

(2013) 05 DEL CK 0220
In the Delhi High Court
Case No : Criminal A. 969 of 2010

Ashwani @ Sonu

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 27-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 211, 212, 213, 214
Evidence Act, 1872 — Section 101, 106
Penal Code, 1860 (IPC) — Section 302, 304B, 498A

Citation : (2013) 137 DRJ 10

Hon'ble Judges : Sunita Gupta, J;Reva Khetrapal, J

Bench : Division Bench

Advocate : N. Hariharan, Mr. Varun Deswal, Mr. Sudeve Panikar, Mr. Vaibhav Sharma and Mr. Anwesh Madhukar, DHCLSC, for the Appellant; Ritu Gauba, APP, for the Respondent

Final Decision : Dismissed

Judgement

Sunita Gupta, J.—The prosecution case emanates from the fact that on 5th February, 2004, information was given to PCR regarding murder on which DD No. 38 was recorded at PP Vijay Vihar. The investigation was initially carried out by Inspector Jaipal Singh (PW-13) who along with Constable Vikram Singh (PW-10) reached the spot, i.e., house No. C-6/77, Sector-5, Rohini, Delhi. In the meantime, Inspector Kishan Kumar also reached the spot where complainant Satish Kapoor, father of the deceased along with his son Sanjay Kapoor met them. The outer door which was a jaliwala darwaza was found locked, hence, its kunda was broken and the dead body of Ms. Sonia was found lying inside the room who was found wearing a green coloured velvet salwar-kamiz and several injuries were observed on her neck. Sh. Satish Kapoor identified the deceased Sonia to be his daughter whose statement was recorded by the Investigating Officer whereupon a Rukka was prepared which was sent through Constable Vikram Singh for registration of the case. The crime team was called at the spot. Photographs were taken. Various exhibits including broken lock and kunda, the

blood stained sheet lying on the double bed, the blood stained quilt and the white coloured Patthar ki Kundi were seized after which the dead body was sent through constable Babu Lal to mortuary where post-mortem on the body was conducted. Thereafter, the dead body was handed over to her parents. During the course of investigation, accused Ashwani @ Sonu was arrested. He made a disclosure statement Ex. PW-2/C and got recovered the key of lock of his house No. C-6/77, Sector-5, Rohini from behind the two wheeler scooter lying near the staircase and polythene bag containing his green coloured shirt from the bushes behind the MCD office having blood stains near the cuff of the shirt. The same were seized vide separate pullandas. The clothes and blood samples of the deceased were also sealed by the doctor at the time of post-mortem of the deceased. Same were deposited in the Malkhana. During the course of investigation, the exhibits were sent to CFSL. After completing investigation, charge sheet was submitted. After hearing arguments on charge, charge for offence u/s 302 Cr.P.C. was framed against the accused to which the accused pleaded not guilty and claimed trial.

2. In order to substantiate its case, the prosecution examined 15 witnesses. All the incriminating evidence was put to the accused while recording his statement u/s 313 Cr.P.C. The case of accused is one of denial simplicitor and he alleged his false implication in the case. He examined DW-1, his father, in support of his defence.

3. After considering the material on record, the learned Additional Sessions Judge vide impugned order dated 16th April, 2010 convicted the accused and vide order dated 12th May, 2010 sentenced him to undergo imprisonment for life and a fine of Rs. 20,000/- in default of payment of fine to undergo simple imprisonment of one year. The impugned judgment has been challenged by filing the present appeal.

4. We have heard Mr. N. Hariharan, learned senior counsel for the appellant, Mr. Anwesh Madhukar, Advocate (DHCLSC) and Ms. Ritu Gauba, learned APP for state. It was submitted by learned counsel for the appellant that as per the prosecution case on 5th February, 2004 at about 19:21 hrs., a call was received by ASI Babulal that murder has taken place at house No. C-6/77, Sector-5, Rohini, Delhi. At 19:36 hrs. PCR reached the spot. The report forwarded by the PCR was that one lady named Sonia, w/o Ashwani, aged about 21 years was found dead in her flat on a cot. Thereafter, Inspector Jaipal Singh along with Constable Vikram reached the spot. After 15-20 minutes of their arrival, the SHO reached the spot. Thereafter, the lock was broken open and the complainant entered the flat. However, much before the arrival of SHO, information was given to PCR regarding lying of a dead body in the house which shows that they had already entered the flat at 19:36 hrs. The accused and the deceased had gone to her parents' house in the evening of 4th February, 2004 as a quarrel had taken place between them. Admittedly, PW-1, PW-2 and wife of PW-1 patched up the matter and sent them home instructing that if any altercation takes place they

should call them up. No call was received by the in-laws of the accused till 5th February, 2004 simply because everything was fine. The last seen evidence against the accused is only in relation to his being present at the house of his in-laws with the deceased on the evening of 4th February, 2004. There is no evidence on record to even remotely suggest that the accused from his in-law's house had gone to his own house and stayed there over the intervening night. Neither any of the neighbours nor any other public person has been examined who would have seen the appellant at his house had he gone there. According to PW-1, on 5th February, 2004, he reached the spot firstly at 10:00 a.m. and found the house locked from outside. He made telephone calls to Sonia as well as the accused but got no response. He did not take any steps to ascertain that everything was fine. Neither did he call the police nor did he break open the lock rather he simply went back. Then he again returned to the spot at around 5:00 p.m. and at this time, he found the outside iron gate locked but the inside wooden door slightly ajar. This establishes that some person had definitely gone inside the flat between 10:00 a.m. to 5:00 p.m. and committed the murder especially in view of the fact that as per the post-mortem report, time of death comes to 11:00 a.m. on 5th February, 2004. As such last seen theory falls to the ground. It was further submitted that when the alleged shirt of the accused was seized for the first time on 6th February, 2004 only a single blood stain was present near the buttons on the cuff of left sleeve and it was washed. However, it has come in the testimony of PW-1 that blood was present on the cuff of right side of the sleeve and there was also a cut on the chest portion and the cuff portion of right sleeve was not washed. It has further come in the cross-examination of this witness that the lock seized by the police was broken by them. However, on seeing the lock, he admitted that it was not broken but locked. PW-2 brother of the deceased had deposed that key was recovered from the spot, which belies the case of prosecution that key was got recovered by the accused from behind the scooter under the staircase. After seeing the lock, he deposed that it was a new one and having no dents. Further PW-2 deposed that he saw the accused for the first time after the incident at the gate of mortuary while the case of prosecution is that Constable Vikram, Inspector Jaipal Singh and SHO had gone to Yamuna Nagar along with PW-2 and accused was arrested on the pointing out of PW-2. PW-2, however, does not say that he had gone along with them to Yamuna Nagar. Constable Vikram also does not say that he accompanied them to Yamuna Nagar. As per the post mortem, the time of death comes to 11 a.m. on 5th February, 2004. However, in the charge as well as in statement u/s 313 Cr.P.C., it was put to the accused that he murdered his wife at 12:30 in the night on 4th February, 2004. If the death had taken place at about 11:00 a.m. then, the deceased was very much alive at 10:00 a.m. when her father had visited the spot for the first time on 5th February, 2004. Though the father of the deceased was creating ruckus outside, making phone calls but she did not open the door. The natural corollary would be that deceased was sitting inside alive. PCR call was made at 7:21 p.m. that murder has taken place. As such an alternative theory comes into play as admittedly PW-1 is the person who

was lastly present at the spot just immediately before the murder took place. Moreover, had the accused stayed at his house on the intervening night of 4-5th February, 2004 and left in the morning having committed the murder of his wife, the neighbours would have definitely seen him, especially in view of the fact that the flat in question was situated in Janta Flats, Rohini where the houses are huddled together but none of the neighbours were examined. The last seen theory comes into play only where the time gap between point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that the possibility of any person other than the accused being author of the crime becomes impossible. Reliance was placed on *State of Goa Vs. Sanjay Thakran and Another*, ; *Venkatesan Vs. State of Tamil Nadu*, ; *Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh*, . It was further submitted that when the prosecution agency has not exercised due diligence by examining even the immediate neighbours of the accused though they were very much available and who must have naturally noticed him coming in and going out of the house, the accused cannot be burdened with the onus of explaining the circumstances the knowledge of which was equally available if due diligence had been exercised. Reliance was placed on *Vikramjit Singh @ Vicky Vs. State of Punjab*, for contending that a strong suspicion, howsoever grave, cannot take the place of proof. It was submitted that since it was a case based on circumstantial evidence, the chain stands irretrievably broken as such the impugned order deserves to be set aside.

5. Rebutting the submission of learned counsel for the appellant, learned public prosecutor for the State submitted that as per the statement of PW-1 and PW-2, the deceased and the accused had come to their house and as there were certain disputes between them, after making them understand they were sent back with the instruction to inform on telephone if anything takes place. However, when no such information was received, then the father of the deceased went to her house at 10:00 a.m. The door was found locked. He gave calls to the accused but no response was received. Thereupon, he went back and returned back in the evening at about 5:00 p.m. along with son PW-2. Again the house was found locked. Getting suspicious, he informed the PCR. The police officials broke open the lock and the dead body of Sonia was found on the double bed. It was submitted that there is nothing on record to show that in between when the accused was last seen with the deceased, anybody else had come to the house as such even if there was a gap of 24 hours the last seen theory comes into play. Reliance was placed on *Shyamal Ghosh Vs. State of West Bengal*, ; *Amitava Banerjee @ Amit @ Bappa Banerjee Vs. State of West Bengal*, ; *Ramachami Vs. State*, AIR 2009 SC 712. Moreover, the accused had a motive to do away with the deceased, inasmuch as, he was addicted to alcohol and due to that reason he was not devoting sufficient time on his shop. The deceased used to ask him not to consume alcohol during day time thereupon quarrel ensued. The accused and the deceased went to the house of parents of deceased. Even in their presence, accused quarrelled with the deceased on the ground that she used to inform

everything to her parents. As such there was a motive to commit the crime. Moreover, in cross-examination, suggestion was given to some of the prosecution witnesses that the deceased was having illicit affair with one Ramlal and on 4th February, 2004 he had even seen them in compromising position. If that is so, then that was a strong motive for the accused to commit murder of his wife. The suggestion given to prosecution witnesses binds the accused. Reliance was placed on *Deepak vs. State*, (2012) 3 SCC (Cri.) 1054.

6. It was further submitted that since the incident has taken within the four walls of the matrimonial home, the onus was upon the accused to prove under what circumstances the murder has taken place. Case of accused is one of denial simplicitor. As such, adverse inference is to be drawn against him. Reliance was placed on *Pudhu Raja and Another Vs. State*, rep. by Inspector of Police, . Undue advantage of benefit of doubt is not to be given to the accused on technical considerations. Reference was made to *Nagesh Vs. State*, (2012) 3 SCC (Cri.) 168. The recovery of blood stained shirt and the key stands proved from the testimony of prosecution witnesses. Even if there was an error in charge, no prejudice has been caused to the accused as such same is not fatal. Reliance was placed on *Willie (William) Slaney Vs. The State of Madhya Pradesh*, ; *Rafiq Ahmed @ Rafi Vs. State of U.P.*, ; *Rattiram and Others Vs. State of M.P.*, . It was submitted that the impugned order does not suffer from any infirmity which calls for interference as such appeal is liable to be dismissed.

7. We have given our considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record.

8. There can be no doubt that the present case is one of circumstantial evidence. There is no witness to the commission of crime. Thus, there is a definite requirement of law that a heavy onus lies upon the prosecution to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. Hon"ble Supreme Court and this Court have clearly stated the principles and the factors that would govern judicial determination of such cases.

9. Reference can be made to the case of *Sanatan Naskar and Another Vs. State of West Bengal*, , where the Court held as follows:-

27. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eyewitness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case

may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard.

28. A three-Judge Bench of Hon^{ble} Apex Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, held as under:-

152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant Vs. The State of Madhya Pradesh*, . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail v. State of U.P.*, (1969) 3 SCC 198 and *Ram Gopal Vs. State of Maharashtra*, . It may be useful to extract what Mahajan, J. has laid down in *Hanumant* case (*supra*):

10.... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, , where the observations were made:-

19.... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions. (emphasis in original)

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other

hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

10. In view of the aforesaid principles governing the case based on the circumstantial evidence, let us turn to the case in hand. The incriminating piece of evidence relied upon by prosecution in order to bring home the guilt of accused are:-

i) Motive

ii) Last seen evidence

iii) Recovery of shirt

iv) Recovery of key

v) Scientific evidence and

vi) Absence of any explanation by the accused.

11. Each of the incriminating circumstances set up by the prosecution will be dealt with one by one.

Motive:

12. From the material on record it has been proved that relation between the accused and deceased were not cordial. The accused had been working with his father earlier at Yamuna Nagar, Haryana but then shifted to Delhi. Even in Delhi, he did not commit himself to work although father of deceased got opened for him two shops at various places in Delhi. He was irregular in attending the same and was addicted to drink, even during day time, whereupon there used to be quarrel between the accused and the deceased. He was also upset as his wife used to communicate about his conduct and behavior to her parents whereupon he got annoyed with her. On 4th February, 2004, i.e., one day prior to the occurrence, accused along with the deceased had gone to her parents' house at about 5:00 pm where also quarrel took place between them regarding complaints made by deceased to her parents. The accused was annoyed with her as she used to inform everything to her parents. Although, the matter at that time was patched up due to intervention of parents of deceased who pacified

them but the accused seemed to have sufficient motive to take revenge.

13. Further as per the suggestions given to PW-2 Sanjay Kapoor, PW-13 Inspector Jaipal Singh and PW-14 Inspector Kishan Kumar, accused also suspected character of his wife and as per his version reflected from his disclosure statement he had seen deceased in suspicious circumstances with Ramlal Arora on 4th February, 2004 with whom she, at one point of time, was working. Although the suggestions were denied by the witnesses and according to Inspector Kishan Kumar, he had made inquiries from Rampal who although admitted that Sonia used to work with him at one point of time but denied his relation with her. Be that as it may, the suggestions given by the accused in cross-examination binds him as per Deepak (supra) and if such a plea of appellant is accepted then it furnished even more stronger motive to do away with the deceased.

Last seen:

14. The accused was lastly seen in the company of deceased on 4th February, 2004 at 6:30 p.m. as he along with deceased had gone to her parents' house after their quarrel who settled their disputes, pacified them and sent them back to the house after advising that they should inform them telephonically in case there is any further quarrel between them. The factum of having last seen the accused with the deceased at 6:30 pm on 4th February, 2004 stands duly proved from the testimony of PW-1 Satish Kapoor and PW-2 Sh. Sanjay Kapoor which fact has nowhere been disputed by the accused. Satish Kapoor, PW-1 being father of the deceased undoubtedly was worried about well being of his daughter, therefore, on next day, i.e., 5th February, 2004 he preferred to visit her house and found the gate locked. Two calls were made by him to accused but no response was received. Again in the evening at 5:00 p.m. he came back to the house of his daughter along with his son PW-2 Sanjay Kapoor and found the iron gate locked. However, the inside wooden gate was slightly ajar. He peeped through it and it seemed to him that somebody was sleeping inside whereupon he knocked the door and shouted but finding no response, he became suspicious and made a call at 100 number whereupon police officials reached and broke the lock of the gate and after entering the house, they found one person lying on the double bed whose body was covered with quilt and on removing the quilt, the dead body was identified to be of Sonia. It cannot be lost sight of that accused and deceased were husband and wife and were residing in the house where the dead body was recovered. It has come on record that they had two daughters. Younger daughter was given in adoption by accused at the time of her birth, however, as regards elder daughter, no evidence has come on record as to where she was residing. Fact remains that it is not disputed by the accused that except for him and deceased none else was residing in the dwelling house from where the dead body was recovered. That being so, after they returned from the parents' house of the deceased on 4th February, 2004, at 6:20 p.m., in normal course of events, the accused would have returned to his house. If from the

parents" house of deceased, the accused did not return home till he was arrested by the police then it was a fact within his special knowledge which he was required to explain. But absolutely no explanation has been given by him as to where he was during this entire period. Rather his own conduct is reflective of his guilty mind inasmuch as the house was found locked from outside, key of which was ultimately recovered at his instance from back side of scooter parked under the staircase of the house. Moreover, when he was arrested, his personal search was conducted vide memo Ex. PW 2/B, one chain of golden colour, three rings of golden colour, one pair of ear tops of golden colour were recovered which were presumably of the deceased. Further, it was suggested to PW-13 Inspector Jaipal Singh and PW-14 ACP Krishan Kumar that accused had gone to surrender himself in the police station. Although this suggestion was denied by them but since, such a suggestion was given by the accused in the cross-examination of the witnesses, he is bound by the same and if that is so, then, it is not explained as to how the accused came to know about the murder of his wife and why he himself wanted to surrender in the police station. The failure on the part of accused to furnish any explanation on the aforesaid facts lends support to last seen theory propounded by prosecution. The submission of learned defence counsel that the fact whether the accused returned back to his house or not could have very well been proved by neighbours on investigation being done with due diligence is devoid of any substance because it is common experience that public persons are generally reluctant to join police proceedings. Moreover, experience tells us that in big cities like Delhi where life is otherwise very busy, nobody wants to interfere in the affairs of others. Even otherwise, since it was the matrimonial home of deceased, the neighbours would be least concerned as to whether the accused returned back to the house on the night of 4th February, 2004 or not and if so, at what time and when did he leave the house in the morning of 5th February, 2004. At the cost of repetition, it may be mentioned that these facts were in the special knowledge of the accused which he was required to explain but failed.

15. The other limb of argument that as per post-mortem report, time of death comes at 11:00 a.m., father of deceased visited her house at 10:00 a.m. and knocked the door then, at that time Sonia must be alive, why did she not respond to the calls, meaning thereby that somebody must have come during the period 11:00 a.m. to 5:00 p.m. and committed her murder is again devoid of merit inasmuch as, as per the post-mortem report, Ex. PW-12/A conducted by Dr. V.K. Jha, it started at 1:00 p.m. and as per the opinion of the doctor, time since death was approximately 26 hours. From this, learned counsel for the appellant wants the Court to believe that the death had taken place at about 11:00 a.m. In *Pattipati Venkaiah Vs. State of Andhra Pradesh*, , it was held by Hon"ble Apex Court that medical science is not yet so perfect as to determine the exact time of death nor can the same be determined in a computerised or mathematical fashion so as to be accurate to the last second. Similar view was taken in subsequent judgments reported as *Dasari Siva Prasad Reddy Vs. The*

Public Prosecutor, High Court of A.P., , Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, , Rakesh and Another Vs. State of Madhya Pradesh, . In view of the same, coupled with the fact that even the doctor in the post-mortem report has given the time since death as "approximately" 26 hrs., it cannot definitely be said that the death had taken place at 11.00 a.m. and not at 10:00 a.m. when the father of the deceased had come to her house. Even otherwise, the door of the house was locked from outside, key of which was ultimately recovered at the instance of accused. This leads to the only irresistible conclusion that it was the accused only, who, after committing the ghastly crime of murdering his wife left the house after locking the same and even when PW-1 Satish Kapoor made two calls to him, he did not respond.

16. Moreover, the accused has failed to explain as to how he came to know about murder of his wife which led him to go to police station to surrender as suggested to PW-13 Inspector Jaipal Singh and PW-14 ACP Kishan Kumar or to find out events concerning his wife as suggested to PW-1 Satish Kapoor. Although these suggestions were denied by the prosecution witnesses, but it clearly reflects that accused was aware of the fact that his wife had been murdered. Moreover, when the door was opened, except the dead body, blood stained clothes and blood stained kundi, nothing was found scattered so as to create a doubt that some unknown person had entered or tried to commit burglary or rob the house in which process the entrant might have murdered the deceased.

17. The judgment in State of Goa Vs. Sanjay Thakran (supra) relied upon by learned counsel for the appellant, does not help him inasmuch as, although it was held that for last seen theory to come into play duration of time gap between the accused person seen in the company of the deceased and the detection of the crime should be so small that possibility of another person being with the deceased should be completely ruled out, it was also held that it cannot be said that in all cases where there is a long time gap between above two points that the evidence of last seen together is to be rejected. Even in such cases the proof of last seen together would be relevant if the prosecution establishes that in the intervening period there was no possibility of any other person meeting or approaching the deceased at the time of incident or before the commission of crime. Venkatesan (supra), however was a case where last seen theory was not relied upon inasmuch as the evidence of the witnesses was not reliable. There was considerable time gap when the witnesses alleged to have seen the appellant together with the deceased and disclosure of dead body. As such, on peculiar circumstances of the case, the last seen theory was not relied upon. On the other hand, in Shyam al Ghosh (supra) relied upon by learned public prosecutor, it was held that where prosecution is relying upon last seen theory it must essentially establish time when accused and deceased were last seen together as well as time of death of deceased. Last seen theory requires a possible link between the time when the deceased was last seen alive and fact of death of deceased coming to light. Reasonable proximity of time between these

two events is a necessary ingredient. Principle is to be applied depending upon facts and circumstances of a given case. Once last seen theory comes into play, onus was on accused to explain as to what happened to deceased after they were together seen alive. In that case also, the accused persons failed to render any reasonable/plausible explanation in this regard.

18. In *Jagroop Singh Vs. State of Punjab*, (2003) 1 SCC (Cri) 1136 also there was a time gap of 24 hours between last seen evidence. It was held that duration is not so long as to defeat or frustrate the prosecution version. The circumstances narrated above leave no trace of doubt that in the instant case deceased was last seen in the company of accused.

Recovery of Key:

19. A slight discrepancy has appeared in the prosecution case as to from where the accused was actually arrested, inasmuch as, PW-14 ACP Kishan Kumar has deposed that on the intervening night of 5-6th February, 2004 at about 2:30 a.m. he along with brother of the deceased, namely, Sanjay Kapoor, SI Jaipal and Constable Vikram reached Yamuna Nagar (Haryana) and accused was apprehended on the pointing out of Sanjay Kapoor while coming out of his house. He was brought to Delhi. PW-13 Inspector Jaipal Singh also deposed so. However, this part of their testimony does not find corroboration from PW-2 Sanjay Kapoor and PW-10 Constable Vikram Singh. According to these witnesses, the accused was arrested from mortuary of SGM Hospital. Accused himself has suggested to the prosecution witnesses in cross-examination that he was not apprehended from Yamuna Nagar and he himself surrendered in the police station. He also examined DW-1, his father Sh. Raj Kumar who deposed that police officials of Delhi never came to his house at Yamuna Nagar to arrest his son. Despite this discrepancy as to where the accused was apprehended, the fact remains that it is the consistent case of prosecution that he was arrested at Delhi from Mortuary of Sanjay Gandhi Hospital, Mangolpuri. He made a disclosure statement Ex. PW-2/C and led the police party to the first floor of house No. C-6/77, Sector-5, Rohini, Delhi and took out a key lying behind the scooter near staircase on which TITAN was written. The key was taken into possession vide seizure memo Ex. PW-2/E. Despite cross-examination, nothing material could be elicited to discredit the testimony of either Sanjay Kapoor or police officials. As such recovery of the key of the house at the instance of accused lying behind the scooter near the staircase of the dwelling house stands proved and this is a very strong incriminating piece of evidence against the accused as the house was found locked and it was only after breaking open the lock/kunda that the police officials and the father and brother of the deceased could enter the house where the dead body of Sonia was found lying.

Recovery of shirt:

20. PW-1 Satish Kapoor had deposed that after the incident he saw the accused first time at SGM mortuary. Shirt of green colour stained with blood belonging to

the deceased was got recovered from bushes of MCD office. Blood stain could be seen near the cuffs of the right sleeve of the shirt. PW-2 Sanjay Kapoor, at one stage, deposed that shirt was being worn by the accused at the time of his arrest. However, in this regard, he was cross-examined by learned public prosecutor and in cross-examination he admitted that the accused got the shirt recovered from back side of MCD office from bushes which was having blood stains near cuff of the sleeve of the shirt. The mere fact that in regard to the recovery of the shirt the witness was cross-examined by learned public prosecutor is no ground to discard the testimony as held in *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh*, . Moreover, all the police officials, PW-10 Constable Vikram, PW-13 Jaipal, PW-14 ACP Kishan have deposed in categorical terms that in pursuance to the disclosure statement made by the accused Ex. PW-2/C, he led the police party to a vacant piece of plot at the back of MCD office at Sector-5 near bushes and from there he took out polythene of yellow colour containing a green colour shirt which was stained with blood. The same was taken into possession vide seizure memo Ex. PW 2/D. The fact that the shirt Ex. P-7 belongs to the accused is not even disputed by him inasmuch as it was suggested to PW-14 that the accused did not get the shirt Ex. PW-1 recovered from bushes behind MCD office and that he was wearing the shirt when he was apprehended, the shirt was got removed from his body and planted on him. Meaning thereby that the accused is not disputing that shirt Ex. P-7 belongs to him and it was seized by the police. All the prosecution witnesses have corroborated each other by deposing that the accused got the shirt recovered from the bushes behind the back of MCD office. That being so, slight discrepancy in the testimony of witnesses regarding the places where blood stain was found pales into insignificance.

Scientific evidence:

21. When the police officials reached the spot and entered the house after breaking open the locks/kunda, the dead body of Sonia was found lying on the double bed. The police officials seized the kundi, i.e., white stone, the quilt, bed sheet, lock with iron kunda from the spot vide recovery memos Ex. PW-1/B to Ex. PW-1/E. The dead body was sent to hospital for conducting the post-mortem examination. The post-mortem was conducted by Dr. V.K. Jha, who preserved the clothes of the deceased and blood gauze piece. Same were handed over to the police official. During the course of investigation, the parcels containing bed sheet, quilt, stone kundi having brown stains, shirt having brown stains, brown gauze cloth piece, clothes of the deceased comprising of ladies shirt, salwar, cardigan and chunni were sent to Forensic Science Laboratory, Delhi. The report Ex. PW-14/H was given by Ms. Shashi Bala, Senior Scientific Assistant. As per the report, blood was detected on all the exhibits except salwar. As per the serological report Ex. PW-14/J, the origin of blood was "human" and the blood group was opined to be "AB" group. This report reflects that the blood group of the deceased was "AB" and on the shirt of the accused also human blood of "AB" group was found. This is a very strong piece of evidence connecting the accused

with the crime inasmuch as it was incumbent upon him to prove as to how blood came on his shirt and that too, of the same blood group as that of the deceased but no explanation has been furnished by him.

Absence of any explanation by the accused:-

22. The dead body of Sonia was sent to Mortuary of SGM Hospital. Post-mortem was conducted by Dr. V.K. Jha (PW-12) who found following external and internal injuries on her person:-

1. Pressure abrasion mark present over front and sides of neck, length of which was 10 c.m. x 1 c.m. The skin over it was soft and red and was placed at the level of thyroid cartilage. On the dissection of neck tissue underneath the pressure abrasion mark was having hematoma.
2. Lacerated wound on right side of chin 3 c.m. x 3 c.m. x muscle-deep.
3. Lacerated wound on right side of neck 7 c.m. Below right ear labule below 0.5 x 0.3 c.m. x muscle-deep.
4. Multiple blackish bruising present over front of neck and chest size vary from 1.5 c.m. to 0.3 c.m. to 1 c.m.

He further deposed that on internal examination of said body, he found that:-

There was sub scalp hametoma over front to temporal region subarachnoid and subdural haemorrhage present over front temporal region.

23. The doctor opined that the cause of death is asphyxia consequent to pressure over neck structures by manual strangulation which is sufficient to cause death in the ordinary course of nature. All injuries were anti-mortem in nature inflicted by other party, meaning thereby, that it was a case of homicide. There is no plea of suicide or accidental death on the part of accused. The theory of homicide is compatible with circumstances which stands established on the basis of evidence on record and if it is a case of homicide, then, accused is liable to furnish explanation as to how she died, inasmuch as, it is undisputed case of the parties that deceased died in her matrimonial home where she was living alone with the accused and there was no other family member. A perusal of the statement of accused recorded u/s 313 Cr.P.C. goes to show that he has mostly answered the questions by stating "It is incorrect" or "I do not know".

24. The object of recording the statement of the accused u/s 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair

chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

25. Keeping in view the fact that the offence has taken place in the dwelling house, where the accused was residing with the deceased and prosecution has been able to establish that they were last seen together, then, u/s 106 of the Evidence Act onus shifted upon the accused to show as to how the wife received injuries. Section 101 of the Evidence Act lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is not intended to relieve it of that duty. However, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

26. In *Pudhu Raja (supra)* it is observed that it is obligatory on the part of the accused while being examined u/s 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, in order to decide, as to whether or not, the chain of circumstances is complete. When the attention of the accused is drawn to the circumstances that inculcate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances. Similar view was taken in *Dr. Sunil Clifford Daniel Vs. State of Punjab*, .

27. In this context, observations made by Hon''ble Apex Court in the case of *Trimukh Maroti Kirkan Vs. State of Maharashtra*, and particularly to paragraphs 15, 21 and 22 are reproduced as under:

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial

evidence. The burden would be of comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

xxx xxx xxx

21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of the Hon'ble Supreme Court. [State of Tamil Nadu Vs. Rajendran, : (SCC para 6); State U.P. Vs. Dr. Ravindra Prakash Mittal, (SCC para 39: AIR para 40); State of Maharashtra Vs. Suresh, (SCC para 27); Ganesh Lal Vs. State of Rajasthan, and Gulab Chand Vs. State of Madhya Pradesh, .

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram Vs. State of Himachal Pradesh, it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal Vs. State of Maharashtra, the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement u/s 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State U.P. Vs. Dr. Ravindra Prakash Mittal, the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill treated her and their relations were strained and further the evidence showed that both of them were

in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly Hon"ble Apex Court reversed the judgment of the High Court acquitting the accused and convicted him u/s 302 IPC. In State of Tamil Nadu Vs. Rajendran, the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9 pm and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of crime.

28. Ram Naresh @ Lala vs. State, 2011 IV AD (SC) 534 was also a case where cause of death was asphyxia as a result of compression of neck by ligature. On facts it was found that it was homicidal death. Deceased was living with the accused and it was observed by this Court that it was for the accused to give explanation as to how the body of deceased was found lying on the sofa inside the room, which he failed to furnish and as such keeping in view totality of the circumstances it was held that the circumstances pointing to the guilt of the accused are completely inconsistent with plea of the innocence. The observations made by this Court in Rani Vs. The State of Nct of Delhi, also requires mention. Although that was a case pertaining to section 498A/304B IPC, but the observations are equally applicable to the facts of the present case, inasmuch as, the incident had taken place within the four walls of matrimonial home of the deceased. It was observed as under:-

There is an unfortunate development under criminal justice system that even in those cases where accused should be examined as a witness by the defence, the accused persons are not examined as a witness. In matrimonial offences, it is the accused and his family members who know what transpired within the family and they should always volunteer themselves as witnesses in the Court so that the Court gets their side of the version by way of evidence and testimony. u/s 106 of Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. When a death takes place within the four walls of matrimonial home, the husband and in laws should come forward and depose as to what was the real cause of death. The criminal practice in India has been on the lines of old track that accused must not speak and he should not be examined as a witness. I do not know why this practice developed but in all matrimonial offences, this practice is shutting the doors of the Court, to the version of the other side, by their advocates.

29. In view of these authoritative pronouncements, it was incumbent upon the accused to give explanation as to how Sonia died but he took up the stand of complete denial of his involvement in the crime and offered no explanation

before the Court. As noticed above, the law required the accused to provide explanation regarding the circumstances appearing against him but he offered complete denial. Strangely when PW 2, PW 13 and PW 14 were cross examined by the defence, suggestion was given to them that deceased was having illicit relation with one Ramlal Arora with whom she was working and with whom he had seen her in suspicious circumstances on 4th February, 2004. If this be the stand of the accused, then there was no occasion for him to deny every material piece of evidence as well as not to give any explanation when he was specifically asked for. As such in the peculiar facts and circumstances of the case, adverse inference is liable to be drawn against him.

30. The circumstances viz. last seen together with Sonia, motive to do away with Sonia, recovery of key of the lock, his blood stained shirt for which no explanation is forthcoming coupled with the medical evidence which proves death to be homicidal and failure on the part of the accused to furnish any explanation pointing towards guilt of the accused are completely inconsistent with the plea of innocence. In view of the above discussion and our appraisal and analysis of the evidence on record, we have no hesitation to hold that the prosecution has successfully established all the circumstances appearing in the evidence against the appellant by clear, cogent and reliable evidence and the chain of the established circumstances is complete and has no gaps whatsoever and the same conclusively establishes that the appellant and appellant alone committed the crime of murdering the deceased on the fateful day in the manner suggested by the prosecution. All the established circumstances are consistent only with the hypothesis that it was the appellant alone who committed the crime and the circumstances are inconsistent with any hypothesis other than his guilt. It is most unfortunate that the husband of the deceased not only failed to perform his duties and obligation as husband to protect and take care of his wife and instead planned the most degrading and cold blooded murder of the innocent wife. On the facts and in the circumstances of the case, this court is of the firm opinion that it is firmly established by the prosecution that accused committed murder of his wife and, therefore, liable to be convicted u/s 302 IPC.

31. However, before parting with the case, we shall take up the submissions raised by the learned counsel for the appellant that although as per the post-mortem report, time of death comes to 11:00 a.m. on 5th February, 2004, however, the charge has been framed that the murder was committed at about 12:30 a.m. (night) on 4th February, 2004 and the same time was put to the accused when his statement u/s 313 Cr.P.C. was recorded.

32. It is no doubt true that during conduct of trial, framing of a charge is an important function of the court, Section 211 to 224 of Chapter-XVII of the Code of Criminal Procedure, 1973 have been devoted by the legislature to the various facets of framing of charge and other related matters thereto. u/s 211, the charge should state the offence with which the accused is charged and should contain the other particulars specified in that section. However, another

significant provision is Section 215 which states that no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. In Rafiq Ahmad (supra) Hon''ble Supreme Court relied upon Willie (supra) where it was held as under:-

Sections 222 to 224 deal with the form of a charge and explain what a charge should contain. Section 225 deals with the effect of errors relating to a charge. Sections 233 to 240 deal with the joinder of charges. Sections 535 and 537 are in the Chapter that deals with irregularities generally and these two sections deal specifically with the charge and make it clear that an omission to frame a charge as well as irregularities, errors and omission in a charge are all irregularities that do not vitiate or invalidate a conviction unless there is prejudice.

33. In the instant case it is not even alleged by the accused that he was in any manner prejudiced by this wrong mention of the time of death of the deceased in the charge or when such a question was put to him u/s 313 Cr.P.C. Under the circumstances, in the absence of any prejudice caused to the accused, the conviction of the appellant on this account does not suffer.

34. In view of the above factual matrix and upon appreciation of evidence, we find that the evidence has been appreciated by the trial court in consonance with the rules and procedure of law. The findings can neither be termed as perverse or improbable. We find no merit in the present appeal and the same is dismissed accordingly.