
(2014) 04 GUJ CK 0042
In the Gujarat High Court
Case No : Criminal Appeal No. 333 of 2009

Dhulabhai Galapbhai Bariya	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 209, 313
Evidence Act, 1872 — Section 106, 11, 114, 27, 8
Penal Code, 1860 (IPC) — Section 302, 34, 364

Citation : (2014) 04 GUJ CK 0042

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Pratik B. Barot, Advocate for Appellant No. 1, Advocate for the Appellant; Chetna M. Shah, APP for Respondent No. 1, Advocate for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—This Appeal is at the instance of a convict accused of the offence u/s 302 of the Indian Penal Code and is directed against the order of conviction and sentence dated 10th February, 2009 passed by the Additional Sessions Judge, 3rd Fast Tract Court, Panchmahals at Godhra in Sessions Case No. 106/2008. The learned Additional Sessions Judge found the accused-appellant guilty of the offence of murder of his wife and sentenced him to undergo imprisonment for life with fine of Rs. 100/-. In default of payment of fine, further rigorous Imprisonment of one month was imposed.

Case of the Prosecution:

1.1 The deceased namely Beniben was married to the accused. During the wedlock two children were born, a son and a daughter. According to the case of the prosecution, the accused was harbouring doubts that his wife was having an illicit affair with his elder brother. On 21st of March, 2008 the accused and the deceased together left for Village-Malekpur for the purpose of buying few articles

as it was a day of Holi. While returning to village Malekpur the accused is alleged to have inflicted multiple injuries on the body of the deceased with an axe which proved to be fatal. Thus, according to the prosecution the motive behind the commission of crime was the doubt in the mind of the accused that his wife-the deceased had an affair with the brother of the accused.

1.2 It appears from the materials on record that the son of the accused PW. 6 Ranchhodbhai Bariya lodged a First Information Report (Exh. 20) on 21st March, 2008 at 17.15 hours with Lunawada Police Station regarding the incident. In the First Information Report-Exh. 20, the first informant has stated that he was residing with his parents and younger sister, namely, Hansa. He has stated that he was married past five years. He has stated that his father, the accused, was doing the work of chopping wood and for the same he used to travel two kilometers everyday upto the Village-Malekpur. He has further stated that his father, the accused, was harbouring doubts that his wife, the deceased, was having an illicit affair with his elder brother, due to which the accused used to frequently quarrel with his wife at their house. He has further stated that on the date of the incident, his father with an axe in his hand had left for Village-Malekpur to chop wood and had also asked his mother i.e. the deceased to accompany him so that the accused could buy few articles for her as it was a day of Holi. The deceased, on the day of the incident had also accompanied the accused and had left the house at around 11 O'clock for the purpose of buying few articles at Village Malekpur. He has further stated that while at home at around 4 O'clock in the evening he received information that his father had killed his mother with an axe somewhere near Manzara Road situated in the Sim of village Malekpur. The first informant accordingly reached at the place of incident and found that his mother was lying dead in a pool of blood near the wild bushes. He also noticed that there were multiple injuries on her body. He has further stated that thereafter he informed the Police at Malekpur. He stated that as his father was harbouring doubts that his mother was having illicit relations with the elder brother of his father, and for such reason committed murder of his wife.

1.3 On the strength of the complaint Exh. 20, the investigation had commenced. The scene of offence Panchnama Exh. 10 was drawn in the presence of the panch witnesses. The inquest panchnama of the dead body of the deceased-Exh. 6 was drawn in the presence of the panch witnesses. The dead body of the deceased was sent for postmortem examination and the postmortem report Exh. 31 noted that the cause of death was hemorrhagic neurogenic shock due to injuries over the head and face. The blood soiled clothes of the deceased were collected by the Investigating Officer by drawing a Panchnama Exh. 7 in the presence of the panch witnesses and were sent for chemical analysis to the Forensic Science Laboratory. On 22nd March, 2008 the accused appellant was arrested and his arrest Panchnama Exh. 15 was drawn in the presence of the panch witnesses. The clothes worn by the accused at the time of his arrest were collected and sent for chemical analysis to the FSL On the very same day i.e. on 22nd March, 2008,

the accused appellant is alleged to have expressed his willingness to point-out the place where he had concealed the weapon of offence i.e. the axe. Accordingly, the discovery Panchnama of the weapon of offence Exh. 11 was drawn in the presence of the panch witnesses. The weapon of offence was sent for chemical analysis to the FSL The Serological Test report Exh. 42 noted that the weapon of offence-axe was detected with human blood of the blood group "B" matching with the blood group of the deceased. Although the human blood was detected on the shirt of the accused, but the blood group could not be determined. The statements of various witnesses were recorded. Finally, on completion of the investigation, the I.O. filed charge-sheet in the Court of the Judicial Magistrate, First Class, Lunawada.

1.4 As the case was exclusively triable by the Sessions Court, the Judicial Magistrate, First Class, Lunawada committed the same to the Court of Sessions u/s 209 of the Criminal Procedure Code.

1.5 The learned Additional Sessions Judge framed charge against the accused-appellant, Exh. 3, and his statement was recorded. The accused appellant pleaded not guilty and claimed to be tried.

1.6 The prosecution adduced the following oral evidence:

1.7 Prosecution also adduced following pieces of documentary evidence:

1.8 After completion of oral as well as documentary evidence of the prosecution, the trial Court recorded the further statement of the accused u/s 313 of the Criminal Procedure Code was recorded. The accused-appellant denied everything that was alleged against him and his defence was that he was falsely implicated in the crime and was innocent.

1.9 On completion of the trial, the learned Additional Sessions Judge found the accused appellant guilty of the offence and sentenced him as stated herein before.

2. Being dissatisfied, the accused has come up with this Appeal.

3. Submissions on behalf of the accused-appellant:

3.1 Mr. Pratik Barot, the learned advocate appearing for the accused-appellant submitted that the Trial Court committed serious error in finding the accused guilty of the offence of murder of his wife. Mr. Barot submitted that the entire case of the prosecution hinges on circumstantial evidence and none of the circumstances relied upon by the Trial Court could be said to be consistent with the hypothesis of the guilt of the accused. According to Mr. Barot, the chain of circumstances relied upon by the Trial Court could not be said to be so complete so as to reach to a definite conclusion that it was none other than the accused who had committed the murder of the deceased.

3.2 Mr. Barot submitted that even assuming for the moment that the deceased had accompanied the accused on the day of the incident there is no evidence to

draw any inference that the accused had been to village Malekpur along with his wife-the deceased. According to Mr. Barot, the Trial Court committed serious error in relying on the oral evidence of the PW. 8 Mahendrabhai Shankarbhai Parmar-Exh. 22 the owner of the flour mill and the PW. 9 Jayeshbhai Motibhai Patel-Exh. 23 the owner of Cloth Shop. Mr. Barot submitted that the panch witnesses of the discovery Panchnama of the weapon of offence failed to support the case of the prosecution and were declared as hostile witnesses. In such circumstances, according to Mr. Barot, no reliance could have been placed by the Trial Court on the circumstance of the discovery of the weapon of offence at the instance of the accused. Mr. Barot submitted that the motive to commit the crime by itself is not sufficient to hold the accused guilty of a serious offence like murder. The motive at best may raise a strong suspicion as regards the complicity of the accused in the crime, but suspicion however strong, cannot take the place of proof. Mr. Barot lastly submitted that the circumstance of last seen together by itself is not sufficient to throw the onus on the accused appellant u/s 106 of the Evidence Act to explain as to what had happened to his wife-the deceased.

3.3 Mr. Barot has placed reliance on the following decisions of the Supreme Court in support of his submissions:

- (i) Niranjan Panja Vs. State of West Bengal,
- (ii) Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan,
- (iii) Rishi Pal Vs. State of Uttarakhand,

3.4 In such circumstances as referred to above, Mr. Barot prays that there being merit in this appeal, the same may be allowed and the order of conviction and sentence be set aside.

4. Submissions on behalf of the State:

4.1 Ms. Chetna M. Shah, the learned Additional Public Prosecutor, appearing for the State, vehemently opposed this appeal and submitted that the Trial Court committed no error not to speak any error of law in finding the accused guilty of the offence of murder of his wife, the deceased. Ms. Shah submitted that all the circumstances emerging from the evidence on record points only towards the guilt of the accused. Ms. Shah submitted that there is evidence of the PW. 6 Ranchhodbhai Bariya Exh. 19, the son of the accused and deceased who is also the original informant that on the day of the incident he was also at Malekpur and had seen the accused i.e. his father and the deceased i.e. his mother together. Ms. Shah submitted that once there is evidence to indicate that the accused and the deceased were together at village Malekpur, then it is for the accused to explain as to what had happened on the way while returning home.

4.2 Ms. Shah submitted that, in cases of the present nature, if strict principles of appreciation of circumstantial evidence are applied, then it would be very difficult for the prosecution to establish the case and, therefore, it is for the accused to

explain as to what had happened to his wife the deceased, more particularly when she was with him all along on the day of the incident.

4.3 Ms. Shah submitted that there is evidence of discovery of weapon i.e. the axe at the instance of the accused which is also a circumstance pointing towards the guilt of the accused. In such circumstances referred to above Ms. Shah prays that there being no merit in this appeal, the same be dismissed and the order of conviction and sentence passed by the Trial Court be confirmed.

5. Oral Evidence on record:-

5.1 We propose to first look into the medical evidence on record. The prosecution has examined the PW. 14 Dr. Modi to prove the Postmortem Report-Exh. 31. Dr. Modi in his evidence Exh. 30 has deposed that on 21st March, 2008 he was on duty at the Cottage Hospital, Lunawada as a Medical Officer and while on duty a dead body of a lady was brought for the postmortem examination by the PSI along with the Inquest report. He has deposed that the postmortem examination revealed the following external injuries on the body of the deceased.

About 6 x 5 cm lacerated wound over pubic area above the genital area. Labia major & Vaginal outlet were dangling at pubic region.

- i) 2 x 0.5 cm Lacerated wound at Rt. Temporal area.
- ii) 2 x 1 x 1.5 Incised lacerated wound at Lt. Maxillary region over cheek.
- iii) 1 x 1.5 cm in deep rounded lacerated wound at ant to left ear.
- iv) About 8 x 1 cm with 3 cm in deep incised lacerated wound a Rt Scapular region with muscle tear.
- v) 3 cm depression rounded at Rt. Temporal region.
- vi) Rt. Scapula at part. Side 8 cm Transversely break.
- vii) Over it chick, facial bone at wound site crushed.

He has deposed that the following internal injuries were noted in the Postmortem Report-Exh. 31.

- i) Scalp Tissue teared at Rt. Temporal area with skin about 2 cm.
- ii) Rt. Side temporal bone depressed & # about 4 cm. long.
- iii) Dura matter 1 cm 2 in No. Teared at Rt. Temporal region. Blood clot in between Brain & Dural Brain became pale.

He has deposed that the cause of death was hemorrhagic neurogenic shock due to violent injuries over the head and face.

He has further deposed that the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death and such injuries could have been caused by the muddamal Article axe. In his cross-examination nothing

substantial could be elicited so as to render his evidence doubtful in any manner. From the evidence of the PW. 14 Dr. Modi, two things are established, first that the injuries were caused by a sharp cutting weapon like an axe and injuries were also noticed on the private part of the deceased. A lacerated wound admeasuring 6 x 5 was on the genital area and the injury was such that the labia majora and the vaginal outlet were found in a dangling position. This injury, in our opinion, has some bearing with the motive on the part of the accused to commit the crime. We are saying so because it is the case of the prosecution and well established by the oral evidence of the family members of the accused which includes his son, daughter and his own brother that the accused had doubt in his mind that his wife, the deceased, was having an illicit affair with the brother of the accused.

5.2 We shall now consider the evidence of the PW. 6 Ranchhodbhai Baria-son of the accused and deceased. The PW. 6 in his evidence Exh. 19 has deposed that the accused was his father and the deceased was his mother. He was married and was residing with his parents. He has further deposed that his father, the accused, was doing the work of agriculture and chopping of wood. He has deposed that his father used to go to Village-Malekpur for the purpose of chopping wood. He has deposed that the incident had occurred on the day of Holi. According to him, his father and mother together had gone to village Malekpur on the day of the incident to buy some articles and while returning home, his father, the accused, inflicted injuries on the body of his mother, the deceased, and committed her murder. He has also deposed that his father was nurturing doubts that the deceased was having an illicit affair with the brother of the accused. The PW. 6 has deposed that on the day of the incident, he had left for Malekpur first and while at Malekpur, he had met his parents i.e. the accused and the deceased and as they were to return a little late, he all alone returned to his home. According to the PW. 6, while at home, a Police Constable came and informed him that his father had killed his mother. The PW. 6 thereafter reached at the place of the incident and found that his mother was lying dead having sustained injuries on her private part, back and head. The PW. 6 thereafter went to the police station and lodged a report regarding the incident. In his cross-examination he has deposed that the place, where the dead body of his mother was lying, was a road and many people used to travel through that particular road. He has deposed that the movement of people and the vehicles would be between 6 in the morning and upto 8 in the night. He has deposed that his father, the accused used to go for chopping of the wood as and when someone used to call him for such work He has also deposed that when his father used to go for chopping of wood, he would return at around 6 in the evening and would also get some house hold articles. He has deposed that the mental condition of his father was not good and he used to go to work only if he liked, otherwise used to remain at the house. He has deposed that his sister Hansa was also there at home. He has deposed that he had no personal knowledge about the incident and had not actually witnessed the incident. The contradiction in the

form of an omission was brought in the evidence of the PW. 6 wherein he stated that it was true that in his First Information Report he had not stated that while at Malekpur he had met his parents. He has also deposed that such fact was not stated by him in his complaint as well as the police statement which was recorded. He has also deposed that it was true that his mother, the deceased, had an illicit relation with some other person, but they had no quarrel with anyone in the village regarding the same. He has also deposed that it was true that he had not stated before the police that since his parents were to return a little late he returned home early all alone.

5.3 From the evidence of the PW. 6 it is evident that on the day of the incident, the accused and the deceased both together had left for village Malekpur in the morning. It also appears that the PW. 6 had also gone to Malekpur and while at Malekpur he had met his parents. This is suggestive of the fact that while the accused left in the morning with an axe for chopping of the wood, he had asked his wife, the deceased to accompany him so that he could buy some articles as it was a day of Holi and the presence of the accused along with the deceased at Malekpur is well established by the evidence of the PW. 6. However, the defence has tried to highlight that there is a contradiction in the form of a material omission as the PW. 6 has admitted that he had not stated in his complaint as well as in the police statement that while at Malekpur he had met his parents. Thus, according to the defence such a contradiction in the form of material omission is a relevant fact u/s 11 of the Evidence Act which the trial Court has not overlooked.

5.4 It is no longer *res integra* that it is not the requirement of law that every minute details of the occurrence needs to be recorded in the FIR. The omission of the material facts pertaining to the crime in the FIR is a relevant factor in judging the veracity of the evidence of the maker of the FIR but that by itself is not sufficient to discard the evidence of the said witness. If the evidence of the said witness is otherwise found to be credible, the omission in the FIR is of no consequence. In the present case, we need to keep one aspect in mind that the PW. 6 is the son of the accused and deceased. The son has deposed against his own father and in our opinion he had no reason to make a false statement that he had also gone to Malekpur and while at Malekpur he had met his parents. This fact is further corroborated by the evidence of the PW. 7, Hansaben, the sister of the PW. 6. We shall discuss the evidence of PW. 7 Hansaben a little later. However, from the evidence of the PW. 6 the prosecution has been able to establish that there was motive on the part of the accused to commit the crime and on the day of the incident, the accused and the deceased had left the house together and were also seen by the PW. 6 together at Malekpur.

5.5 The PW. 7 Hansaben Bariya is the daughter of the accused and the deceased. The PW. 7 in her evidence Exh. 21 has deposed that on the day of the incident as it was a Holi, her father, the accused and her mother, the deceased had left together to go to village Malekpur to buy few house-hold articles and his brother,

the PW. 6, had also gone to Malekpur but had returned early. The PW. 7 has deposed that her father the accused, while on his way home from Malekpur, inflicted injuries on the body of her mother with an axe and killed her. According to the PW. 7 she received such information through a Police Constable and thereafter, reached at the place where the dead body of her mother was lying. She has deposed that many other people had gathered at the place of the incident and her mother had sustained multiple injuries on her face, shoulders, etc. She has deposed that her father, the accused, was nurturing doubts on the character of the deceased and due to such doubts, the accused committed the murder of his wife. In her cross-examination, she has deposed that she had no personal knowledge about the incident, but had heard through others that her father had killed her mother. She has also deposed that her father, the accused, was mentally unstable and had not beaten anyone in the village.

5.6 From the evidence of the PW. 7 two things are established, first that the accused and the deceased had left in the morning for village Malekpur to buy house hold articles and secondly, her brother, the PW. 6 had also gone to Malekpur but had returned early all alone. The PW. 7 has also deposed about the doubts which the accused was harbouring in his mind as regards the character of the deceased.

5.7 We shall now look into the evidence of the PW. 8 Mahendrabhai Shankarbhai Parmar, the owner of the flour mill The PW. 8 in his evidence Exh. 22 has deposed that he owned a flour mill at village Malekpur. On the day of the incident he was present at his flour mill and at that point of time the accused had come along with his wife, the deceased, for grinding of the grains. He has further deposed that after the grinding was over, both had left together and at a later point of time he learnt that the accused had killed his wife. He has also deposed that the deceased used to frequently visit his flour mill and that is how he knew the deceased. In his cross-examination, he has stated that there were three flour mills at Malekpur. On the day of Holi, many customers would come at his flour mill and it would be very difficult for him to remember as to who had come and left. He has deposed that as flour was recovered from the place of the incident, the police had come and asked him whether the accused and the deceased had come at his flour mill and on the say of the police he had stated in his statement that the accused and his wife, the deceased, on the day of the incident had visited his flour mill

5.8 From the evidence of the PW. 8, Exh. 22, it is sought to be argued that although the prosecution has tried to establish the presence of the accused at Malekpur by showing that the accused was present at the flour mill of the PW. 8, yet, in the cross-examination the PW. 8 has deposed that it was only at the instance of the police that he had stated that the accused and the deceased had come at his flour mill We are of the view that although the PW. 8 in his cross-examination may have stated so, but on overall appreciation of his evidence it appears that the accused and the deceased had visited the flour mill of the PW. 8

situated at Malekpur. The evidence of the PW. 8 should be read along with the evidence of the PW. 6 as well as PW. 7. There is no doubt that flour was found from the place of the incident. At the same time there is evidence to show that the accused and the deceased were at village Malekpur in the morning.

5.9 We shall now look into the evidence of the PW. 9 Jayeshbhai Patel who is the owner of a cloth shop in the name of Hari Om Emporium. The PW. 9, in his evidence-Exh. 23, has deposed that he was running a shop in the name of Hari Om Emporium and was in the business of selling cloth. On the day of the incident as it was Holi, many customers were there at his shop and therefore, it was not possible for him to state with certainty whether the accused and the deceased had come at his shop or not. The PW. 9 failed to support the case of the prosecution and was declared as a hostile witness. In his cross examination by the Public Prosecutor he has deposed that it was true that the police might have noted down in his police statement that the accused and the deceased had visited his shop. He has also deposed that a plastic bag was shown to him by the police and on seeing the same he had stated before the police that the bag was of his shop. He has also deposed that the accused used to frequently visit his shop and used to buy clothes on credit. He has deposed that the accused had bought a black pant and an orange coloured shirt on the credit of Rs. 250/-. In his cross-examination by the advocate for the accused he has deposed that on the day of the Holi, due to pressure of work, no bills were issued to the customers, but had maintained the entries regarding the same. He has deposed that the police had not shown him the bill but had only shown the plastic bag. He has also deposed that he had stated before the police that who had visited his shop and what was bought could not be said with certainty. He has also deposed that there were many shops like his shop engaged in the business of selling cloth.

5.10 Although the PW. 9 was declared as a hostile witness, yet from his evidence an important fact has been established that the accused used to frequently visit the shop of the PW. 9 and also used to buy on credit. The PW. 9 has also deposed that a black pant and an orange coloured shirt was bought by the accused on credit of Rs. 250/- and the most incriminating piece of circumstance against the accused is that the black pant and an orange coloured shirt were recovered from the place of the occurrence.

5.11 The prosecution has also examined Dalabhai Bariya as the PW. 10. The PW. 10 is the brother of the accused. The PW. 10 is the person with whom the deceased was having an illicit affair according to the accused. The PW. 10, in his evidence-Exh. 26, has deposed that the incident had occurred on the day of Holi. He has deposed that his brother was harbouring doubts that the deceased was having an illicit affair with him and due to such doubts the accused committed the murder of his wife. He has deposed that the accused was not doing any work properly and due to such reason he used to reprimand the accused. As the PW. 10 used to reprimand the accused with a view to defame him, the accused used to talk regarding the illicit relations of his wife with him.

5.12 Nothing turns around from the evidence of the PW. 10 except the fact that the accused used to harbour doubts regarding the character of his wife-the deceased.

5.13 The PW. 11 Arjunsinh Kalubhai Malivad examined by the prosecution is the brother of the deceased. The PW. 11, in his evidence Exh. 27 has deposed that he was a teacher and the deceased happened to be his sister and the accused was his brother-in-law. He has deposed that on 21/3/2008 as it was a Holi he had gone to his village which was between village Bokannala and Vaghji Bariya. He has deposed that he received a telephone call from one Bharatbhai, the son of his uncle's daughter Chaturiben and had informed him that the accused had killed Beniben, the deceased. He has further deposed that thereafter, he reached Lunawada Dispensary. He has deposed that the accused used to frequently beat and harass his sister as the accused was harbouring doubts that the deceased had illicit relations with the elder brother of the accused.

5.14 Nothing turns around on the evidence of the PW. 12, Bhema Bariya, Exh. 28 and the PW. 13, Exh. 29 as they had learnt through others that the accused had committed the murder of his wife.

5.15 The last witness examined by the prosecution is PW. 15, Ganpatsinh Kesarisinh Vaghela, the Investigating Officer. The PW. 15 in his evidence Exh. 32 has deposed that on 21/3/2008 he was on duty as PSI of the Lunawada Police Station and as it was a day of Holi he was in patrolling. While on patrolling he received an information that a lady had been killed somewhere near the Sim of village Malekpur. Therefore, the PW. 15 left for the Sim of Village Malekpur from Lunawada and on reaching there he found the dead body of a lady lying near a road and the dead body of the lady was identified to be of Beniben-the wife of Dhulabhai Galabhai-the accused. He has deposed that the son of the accused was present at that point of time when he lodged the complaint which was registered as C.R. No. I-35/2008. He has further deposed that thereafter the inquest panchnama of the dead body was drawn in presence of the panch witnesses and the body was sent for the postmortem examination. He has deposed that on 22nd March, 2008, the accused was arrested. The arrest Panchnama of the person of the accused-Exh. 15 was drawn in presence of the panch witnesses. He has deposed that while the accused was in custody he expressed his willingness to point out the place where he had concealed the weapon of offence i.e. the axe and accordingly, the Discovery Panchnama-Exh. 11 u/s 27 of the Evidence Act was drawn in presence of the panch witnesses. He has deposed that the muddamal articles collected in the course of investigation were sent to the Forensic Science Laboratory for chemical analysis. He denied the suggestion in his cross-examination that the signature of the panch witnesses were obtained on prepared Panchnamas and the contents of the panchnama were not noted according to the say of the panch witnesses.

6. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our

determination in this appeal is whether the trial Court committed any error in finding the accused guilty of the offence of murder of his wife.

7. From the overall appreciation of the evidence on record, it is evident that the entire case of the prosecution hinges on circumstantial evidence.

8. The logical process involved in the admission and consideration of circumstantial evidence is explained by Wigmore in paragraph 32 et seq. The test for the admissibility of evidence to prove a circumstantial fact is that "the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural" (paragraph 32, page 421). "Where even the possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact" (Paragraph 34, page 423).

9. Kenny states that "an amount of testimony which is not sufficient to rebut the presumption of innocence entirely (i.e., to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted" (page 388).

10. The principle that criminal Courts should bear in mind is, in the words of C.B. Pollock:

To make a comparison between convicting the innocent man and acquitting the guilty is perfectly unwarranted. There is no comparison between them. Each of them is a great misfortune to the country and discreditable to the administration of justice. The only rule that can be laid down is that in a criminal trial you should exert your utmost vigilance and take care that if the man be innocent he should be acquitted, and if guilty that he should be convicted. (quoted in Donough's Principles of Circumstantial Evidence, 1918, 158).

11. From the above discussion of the law the following propositions emerge as laying down the correct law:

(1) Circumstantial evidence to justify conviction must be consistent with any reasonable or rational hypothesis of guilt of the accused.

(2) When the inference of guilt from the proved incriminating (i.e. circumstantial)

facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him, even if the court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not.

(3) If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not.

(4) If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him. The instant case falls under proposition (2).

12. On overall appreciation of the evidence on record, we are of the opinion that the facts established are consistent only with the hypothesis of the guilt of the accused and the circumstances are of conclusive nature and tendency. The circumstances emerging from the record are fully established forming a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused.

13. The following circumstances form a complete chain establishing the guilt of the accused.

i) The accused was harbouring doubts that his wife, the deceased was having illicit relations with his elder brother, as a result the marital relations were not cordial.

ii) Apart from this, even the son and the daughter of the accused have deposed that their mother, the deceased, had illicit relations in the village although they have not deposed about the illicit relations with the elder brother of the accused. This fact is further corroborated by the evidence of the PW. 11 Arjunsinh Malivad, the brother of the deceased. The PW. 11 has also deposed that the accused used to harass the deceased as he was harbouring doubts as regards the character of the deceased. Thus, a strong motive to commit the crime has been well established by the prosecution.

iii) On the day of the incident i.e. 21st March, 2008 which happened to be the festival of Holi, the accused and the deceased left together in the morning for village Malekpur. This fact is fully established through the evidence of the PW. 6

Ranchhodbhai Bariya-the son of the accused and the deceased and the PW. 7, Hansaben Bariya, the daughter of the accused and the deceased.

iv) It is also established that the PW. 6, Ranchhodbhai Bariya, the son of the accused and the deceased had met his parents at Village Malekpur, but returned home alone as the accused and the deceased were to return a little late. From the evidence of the PW. 6 and the PW. 7, the presence of the accused and the deceased at Village Malekpur is well established.

v) The presence of the accused and the deceased at Malekpur is further well established through the evidence of the PW. 8 Mahendrabhai Parmar, the owner of the flour mill and the PW. 9 Jayeshbhai Patel, the owner of the cloth shop.

vi) It appears that thereafter while returning home, the accused inflicted injuries on his wife the deceased with an axe and committed her murder. The accused was arrested on the next day i.e. on 22nd March, 2008.

14. When the deceased all throughout, on the day of the incident, was in company of the accused and all of a sudden when the wife is found to be dead having sustained injuries all over her body including the private part, then in such circumstances the accused owes an explanation as to what had happened on the day of the incident. Although the accused in his further statement has denied everything, yet the false explanation on his part itself is an additional circumstance going against him. We have noticed that the accused gave his further statement recorded u/s 313 of the Criminal Procedure Code in writing, but a bare perusal of the same would indicate that it was in the nature of written arguments rather than his own explanation as regards the incriminating circumstances which were put to him by the trial Court. We have noticed that the accused in his further statement recorded u/s 313 of the Criminal Procedure Code has denied that the deceased had accompanied him and both had gone together at village Malekpur, whereas the evidence on record suggests otherwise.

15. When an accused is examined u/s 313, Criminal Procedure Code, it is done "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him", and not because a prima facie case has been made out against him. It would, therefore, be fallacious to contend that unless the circumstantial evidence itself makes out a prima facie case against him, he cannot be asked to explain the incriminating circumstances. He can be questioned at any stage of the trial and whether a prima facie case is made out against him or not is seen after his examination. The answers that he gives to the questions are to be taken into consideration along with the prosecution evidence and then it is to be decided whether a prima facie case is made out against him and a charge is to be framed. His failure or refusal to explain the adverse circumstances thus comes in logical sequence before the decision whether a prima facie case is made out against him or not.

16. We are of the opinion that Ms. Shah, the learned Additional Public Prosecutor, is quite justified in submitting that when the accused and the deceased being

husband and wife had left in the morning for Village Malekpur and all throughout the day were together and abruptly if the dead body of the wife is recovered on a road with multiple injuries all over the body, then it is for the accused to explain what had happened to his wife. Ms. Shah is right in submitting that such facts would be within the personal knowledge of the accused and the silence on the part of the accused itself is an incriminating circumstances. Ms. Shah is further justified in submitting that in the cases of the present nature if strict principle of appreciation of circumstantial evidence is insisted upon then it would be very difficult for the prosecution to establish the case against the accused.

17. Cases are frequently coming before the Courts where the husbands, due to strained marital relations and doubt as regards the character, have gone to the extent of killing the wife. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. Unlike the present case, no member of the family, even if he is a witness of the crime, would come forward to de pose against another family member.

18. In this context, we may quote with profit the decision of the Supreme Court in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra, . In the said case, the Supreme Court observed that a Judge does not preside over a criminal trial merely to see that no innocent man is punished but also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character, which is almost impossible to be led, or at any rate, extremely difficult to be led. The duty on the prosecution is to lead such evidence, which it is capable of leading, having regard to the facts and circumstances of the case.

19. The question of burden of proof, where some facts are within the personal knowledge of the accused, was examined by the Supreme Court in the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., . In the State of West Bengal (supra), the assailants forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of the fear of the accused, and took him away at about 2.30 in the night. The next day in the morning, his mangled body was found lying in the hospital. The trial Court convicted the accused u/s 364, read with Section 34 of the Indian Penal Code, and sentenced them to ten years rigorous imprisonment. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for the charge of murder. The accused failed to give any explanation as to what had happened to Mahesh after he was abducted by them. The learned Sessions Judge, after referring to the law of circumstantial evidence observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt.

20. The Supreme Court took note of the provisions of Section 106 of the Evidence Act, and laid down the following principle in paragraphs 31 to 34 of the reports.

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody.

21. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show, like in the present case, that shortly before the commission of the crime they were seen together or the offence took 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.

22. In *Nika Ram v. State of Himachal Pradesh* (supra), it was observed that the fact that the accused alone was with his wife in the house when she was

murdered there with "khokhri" 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.

23. The prosecution has also placed reliance on the circumstance of the discovery of the weapon of offence i.e. the axe at the instance of the accused. Although the panch witnesses failed to support the case of the prosecution and were declared as hostile witnesses, yet the I.O. in his evidence has deposed that the accused had expressed his willingness to point-out the place where he had concealed the weapon of offence and accordingly had led the police party and the panch witnesses to the place from where the axe was discovered. We are of the opinion, having regard to the nature of the evidence on record that the Investigating Officer has not deposed in clear terms the exact statement made by the accused which led to the discovery of the fact, viz. the weapon of offence. Therefore, the discovery of the weapon of offence may not be strictly in accordance with the provisions of Sec. 27 of the Evidence Act, but at the same time, we are of the view that the fact that the accused had led the police party and had pointed-out the place from where the weapon of offence was discovered would be a relevant fact U/s. 8 of the Evidence Act as conduct of the accused. This circumstance of the conduct could also be considered as one of the incriminating circumstances in the chain of other circumstances.

24. In this context, we may quote with profit the observations made by the Supreme Court in A.N. Venkatesh and Another Vs. State of Karnataka, .

By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct u/s 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand Vs. State (Delhi Administration), . Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible u/s 27 of the Evidence Act, still it is relevant u/s 8.

25. We shall now deal with the decision of the Supreme Court on which strong reliance has been placed by Mr. Barot in support of his submissions.

26. In Rishi Pal (Supra) the Supreme Court in the facts of that case acquitted the accused-appellant of the offence of murder, as in the opinion of the Supreme Court, the evidence as regards the deceased being last seen together with the accused was not found to be satisfactory. Mr. Barot has placed reliance on this decision for the simple reason that in the said case also the accused accompanied by the deceased had gone in a car borrowed by the accused. One of the witnesses deposed that the accused and the deceased together had visited

his farm and had left together. However, the accused returned alone with soiled clothes. The Supreme Court took the view that the evidence would create suspicion, but suspicion however strong may not take the place of proof. We have gone through the entire decision of the Supreme Court and more particularly, the evidence which was taken into consideration by the Court. It appears that it was a case where the dead body of the victim was not found. The Supreme Court took the view that in the absence of the corpus delicti, the prosecution owes a duty to prove that the case was one of homicidal death. The court took the view that before seeking to prove that the accused was the perpetrator of the murder it must be established that homicidal death had been caused. The Court further observed that ordinarily the recovery of the dead body of the victim or a vital part of it bearing marks of violence was sufficient proof of homicidal death of the victim. In the facts of the case the Supreme Court took the view that if the prosecution had been able to successfully provide cogent and satisfactory proof of the victim having met of homicidal death, the absence of corpus delicti would not be by itself a fatal to a charge of murder. The failure of the prosecution to adduce such evidence would, however, result in failure of the most essential requirement in a case involving a charge of murder. The Supreme Court further observed that there was no evidence either direct or circumstantial about the deceased having met a homicidal death. In such circumstances the Supreme Court observed that the charge of murder leveled against the appellant rested on a rare tenuous ground of the deceased and the accused having been last seen together. Ultimately, the Supreme Court did not find even the circumstance of last seen together reliable so as to consider the same as one of the incriminating circumstances against the accused. We have also noticed that the Supreme Court was not satisfied with the evidence as regards the motive on the part of the accused in committing the crime. The Court observed after appreciating the evidence on record, that absence of strong motive in the case was something that could not be lightly brushed aside.

27. Thus, this decision relied upon by Mr. Barot hardly helps the accused-appellant in any manner. To a certain extent the facts may be identical but ultimately as discussed above in the said case, the corpus delicti was not found and, therefore, the prosecution was not able to prove that the death of the deceased was homicidal. Prosecution also failed to prove the motive and the theory of last seen together was also not found to be reliable. In the present case the corpus delicti was very much found and it has been well established that the deceased had sustained injuries over her private part, head and a face. The cause of death assigned by the Doctor in the Postmortem report is also shock due to grievous injuries on the head and the face. The motive in the present case is also well established. The accused was doubting the character of his wife, the deceased, as he had an impression in his mind that his wife was having illicit affair with the elder brother of the accused. In the present case the motive is also well established. It is also well established that the accused and the deceased had left together in the morning and were together at village Malekpur

and thereafter all of a sudden in the evening the dead body of the deceased was recovered. In our opinion this decision is of no avail to the accused-appellant.

28. In *Raj Kumar Singh (Supra)*, the Supreme Court has explained the principles of appreciation of circumstantial evidence. The Court observed that in a case of circumstantial evidence the judgment remained essentially inferential. The Supreme Court observed that the inference would be drawn from the established fact as circumstances lead to particular inferences. The court has to draw an inference with respect to whether the chain of circumstances is complete and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime in question. The Court further observed that suspicion however grave it cannot take the place of proof and that there was a large difference between something that "may be proved" and "will be proved". There cannot be any dispute with regard to the proposition of law explained by the Supreme Court, but such principles were applied by the Supreme Court in the peculiar facts of that case. The most important aspect of the said case is that the discovery of the body of the deceased was grossly suspected owing to the fact that it was neither natural to defecate on the roof of a house nor to go to the roof of vacant building in the wee hours of the morning. The recovery was also not believed by the Court. The medical evidence was also not in consonance with the case of the prosecution. Thus, this decision is also of no avail to the appellant.

29. In *Niranjan Panja (Supra)*, the Supreme Court explained the relevance of motive in cases of circumstantial evidence and the circumstance of the last seen together. In the facts of that case, the Supreme Court was of the view that the prosecution failed to establish any strong motive on the part of the appellant to commit the crime. So far as the circumstance of last seen together was concerned in the facts of that case, the Supreme Court reached to the conclusion that the same was not incriminating in any manner as the prosecution could not fix the time of death and there was no evidence led to that effect. According to the Supreme Court, where the prosecution depends upon the theory of last seen together it is always necessary that the prosecution should establish the time of death, which the prosecution had failed to do in that case. Thus, this decision is also of no avail to the accused-appellant as it was rendered in the facts of that case. In the present case, as stated above, the prosecution has been able to establish the strong motive and there is no question of fixing the time of death for the theory of last seen together because it is well established that in the morning of 21st March, 2008 the deceased and the accused had left their house together for village Malekpur and in the evening the dead body of the deceased was recovered. In the overall view of the matter, we are of the opinion that the trial Court committed no error in finding the accused guilty of the offence of murder of his wife. Resultantly, this appeal fails and is hereby dismissed. The order of conviction and sentence passed by the trial court are hereby affirmed.