
(2015) 09 GUJ CK 0040
In the Gujarat High Court
Case No : Criminal Appeal No. 1029 of 2005

Yasminbegam

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 299, 300, 302, 304

Citation : (2015) 09 GUJ CK 0040

Hon'ble Judges : M.R. Shah, J;K.J. Thaker, J

Bench : Division Bench

Advocate : Samir J. Dave, for the Appellant; H.K. Patel, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

M.R. Shah, J.

1.0. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction dated 04.05.2005 passed by the learned Additional Sessions Judge (7th Fast Track Court), Surat (hereinafter referred to as "learned trial Judge") in Sessions Case No. 96/1997 by which the learned trial Judge has convicted the appellant herein - original accused for the offence punishable under section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and has sentenced her to undergo life imprisonment and fine of Rs. 250/- and in default of payment of fine to undergo further 2 days" SI, the appellant herein - original accused has preferred the present Criminal Appeal.

2.0. That an FIR being I-CR No. 44/1997 was lodged by the original complainant - father of the deceased Basit with Rander Police Station, Surat against the appellant herein - original accused for the offence punishable under section 302 of the IPC. It was alleged that the accused and the deceased Basit were husband and wife residing together. It was further alleged that the deceased Basit was in

habit of taking liquor and therefore, there were frequent quarrels between them. It was further alleged that the father of the accused was residing in Saudi Arabia and therefore, the accused was insisting her husband to go to Saudi Arabia. To that the deceased refused and therefore, there were quarrels between the husband and wife and the accused was insisting for Talaq and was giving threats that if Talaq is not given, he will be done to death. It was further alleged that on 06.02.1997, the day of incident at about 3.00 a.m., the deceased Basit was in drunken condition and at that time the accused tied the deceased with the cot, beaten him by stone on chest and hand, due to which the deceased died in the night of 06.02.1997/early morning on 07.02.1997. Therefore, it was alleged that the appellant herein - original accused has committed the offence punishable under section 302 of the IPC.

2.1. That the aforesaid FIR was investigated by the Investigating Officer PSI Shri Kansara and PI Shri Parghi. The IO collected the evidence against the accused and recorded the statement of the witnesses. The IO also prepared the panchnama of the place of incident; inquest panchnama etc. The IO also collected the P.M. Report, Viscera Report etc. That on conclusion of the investigation and as the IO found that the accused had committed the offence punishable under section 302 of the IPC, the IO filed the charge-sheet against the accused in the Court of learned Chief Judicial Magistrate for the offence punishable under section 302 of the IPC.

That as the case was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate committed the case to the Sessions Court, Surat by whom the appellant herein - original accused came to be tried. That the learned trial Judge framed the charge against the accused at Exh.3 for the offence punishable under section 302 of the IPC. The plea of the accused was recorded at Exh.4 whereby the accused pleaded not guilty and therefore, she came to be tried for the aforesaid offence.

2.2. To prove the case against the accused, the prosecution examined the following witnesses.

Through the aforesaid witnesses, the prosecution also brought on record the following documentary evidences.

2.3. That the prosecution produced the closing pursis at Exh.72. That thereafter further statement of accused was recorded under section 313 of the Code of Criminal Procedure, 1973. The accused denied having committed any offence as alleged. The accused stated in her further statement that the deceased was having illicit relation with one Madhu Kathiyawadi, who was bootlegger and he used to stay there and the Madhu Kathiyawadi was also beating the deceased and at the time of incident she had beaten her husband and after mixing something in the liquor and after the deceased took liquor, he was sent to the house and due to which the deceased died. The defence did not lead any evidence in support of their above defence.

2.4. That thereafter on appreciation of evidence and considering the submissions made on behalf of the prosecution as well as defence, by impugned judgment and order the learned trial Judge has held the appellant herein - original accused guilty for the offence punishable under section 302 of the IPC and sentenced her to undergo life imprisonment with fine of Rs. 250/- and in default to undergo further 2 days" SI.

2.5. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction passed by the learned trial Judge, the appellant herein - original accused has preferred the present Criminal Appeal.

3.0. Shri Samir Dave, learned advocate has appeared on behalf of the appellant herein - original accused and Shri Himanshu K. Patel, learned APP has appeared on behalf of the State/prosecution.

3.1. Shri Samir Dave, learned advocate appearing on behalf of the original accused has vehemently submitted that the learned trial Judge has materially erred in holding the appellant herein - original accused guilty for the offence punishable under section 302 of the IPC for the death of the deceased Basit.

3.2. It is further submitted by Shri Samir Dave, learned advocate appearing on behalf of the original accused that the learned trial Judge while recording the conviction has erred in appreciating the evidence of the complainant, Dr. Mohammed Iqbal Hussain Qureshi and other prosecution witnesses. It is further submitted by Shri Samir Dave, learned advocate appearing on behalf of the original accused that as such there is no admissible evidence much less sufficient evidence to convict the accused for the offence punishable under section 302 of the IPC. It is further submitted by Shri Samir Dave, learned advocate appearing on behalf of the original accused that the learned trial Judge has materially erred in not properly appreciating the fact that the case rests on circumstantial evidence only and that the prosecution has failed to establish and/or prove the complete chain of events. It is submitted that therefore the learned trial Judge has materially erred in convicting the accused when the case rests on circumstantial evidence only. Relying upon the decisions of the Hon"ble Supreme Court in the case of State of Goa Vs. Sanjay Thakran and Another, (2007) 5 JT 146 : (2007) 3 SCALE 740 : (2007) 3 SCC 755 : (2007) 3 SCR 507 ; Madhu Vs. State of Kerala, AIR 2012 SC 664 : (2012) CriLJ 1230 : (2012) 1 Crimes 148 : (2012) 1 JCC 620 : (2012) 1 JT 181 : (2012) 1 SCALE 226 : (2012) 2 SCC 399 : (2012) AIRSCW 782 : (2012) 1 Supreme 342 and in the case of Rumi Bora Dutta Vs. State of Assam, (2013) 6 AD 511 : AIR 2013 SC 2422 : (2013) CriLJ 3260 : (2013) 9 JT 296 : (2013) 7 SCALE 535 : (2013) 7 SCC 417 : (2013) AIRSCW 3517 : (2013) 4 Supreme 488 , Shri Dave, learned advocate appearing on behalf of the original accused has vehemently submitted that as the prosecution has failed to establish and prove beyond doubt the complete chain of events and even the motive and therefore, the learned trial Judge has materially erred in convicting the accused.

3.3. Shri Samir Dave, learned advocate appearing on behalf of the original accused has further submitted that even otherwise the learned trial Judge has erred in accepting the evidence of the relatives of the deceased who all can be said to be interested witnesses. It is further submitted that prosecution has examined several witnesses including father, mother, brother, sister and uncle of the deceased Basit and the learned trial Judge has accepted the evidence of the relatives of the deceased though the accused had no good relations with the relatives of the deceased husband. It is submitted that therefore all the aforesaid witnesses are interested witnesses and therefore, the learned trial Judge has erred in relying upon the evidence of the interested witnesses. It is further submitted by Shri Dave, learned advocate appearing on behalf of the original accused that as per the case of the prosecution and the evidence on record, the accused wanted to go to Saudi Arabia and the deceased husband had not allowed the present appellant - wife to go to Saudi Arabia and the present accused wanted Talaq from her husband which was not accepted by the deceased husband. It is submitted that however it is required to be noted that the accused and her husband got married against the will of the family members of the deceased. It is submitted that therefore looking to the evidence on record, no motive has been proved by the prosecution.

3.4. It is further submitted by Shri Samir Dave, learned advocate appearing on behalf of the original accused that it is the case of the prosecution that the accused had inflicted stone blows on her deceased husband. It is submitted that the stone was sent for examination to FSL and no blood stains were found on the very stone which was recovered. It is further submitted that inquest panchnama Exh.30 reflects that the dead body was found on the cot and apparently no injuries and blood stains were found on the clothes of the deceased. It is submitted that after removing the clothes of the deceased, injuries were found only and some red fluid was coming out from the mouth of the deceased. It is submitted that there are no any evidence found from the house of the accused of having some scuffle with the deceased husband. It is submitted that all the articles in house were found to be in order.

3.5. It is further submitted by Shri Dave, learned advocate appearing on behalf of the original accused that Anvar Khan - rickshaw driver deposed at Exh.49 that the accused and her deceased husband and one girl had traveled in his rickshaw and all three persons were dropped by him at fountain in the village of the appellant at about 8.30 p.m. It is submitted that at about 3.00 a.m. - next day early morning the accused found that her husband is unconscious and even unable to drink water and therefore, she along with her mother went to the house of her in-laws and informed them about the condition of her deceased husband. It is submitted that no response was received from them and therefore, she went to the house of the uncle of the deceased and the uncle of the deceased came to the house of the accused to see the condition of the deceased and he said that the husband of the accused is no more (expired). It is submitted that therefore the investigation is silent for the period from 08.30 p.m. to 3.00

a.m. It is submitted that this time gap is too long and the chain of circumstantial evidence/events is not complete.

3.6. It is further submitted by Shri Dave, learned advocate appearing on behalf of the original accused that ethanol poison was found in the stomach, liver and kidney of the deceased. It is submitted that cause of death was opined by the doctors that because of the injuries and bleeding, the deceased had died. However, subsequently the viscera was sent to the FSL and as per the report of FSL, heavy ethanol poison was found. It is submitted that subsequently the panel of doctors have opined that death can be caused by the injuries, bleeding and also having intoxicated substance. It is submitted that therefore the possibility cannot be ruled out that the deceased had died because of the intoxicated substance. It is submitted that therefore as such there is no specific opinion given by the doctors for the cause of death.

3.7. It is further submitted by Shri Samir Dave, learned advocate appearing on behalf of the original accused that the learned trial Judge has materially erred in not properly appreciating the fact that the appellant's house is surrounded by other houses in the vicinity of the area. It is submitted that the investigating agency had not recorded or examined any witnesses from the same vicinity. It is submitted that in the Ramzan it was not possible that there was quarrel or fight between the accused and the deceased. It is submitted that if that was so, then there were chances of eye witnesses to the said incident.

3.8. It is further submitted that in the present case section 106 of the Evidence Act has no application at all. It is submitted that as such burden is on the prosecution to prove the case beyond doubt more particularly to complete the chain of events. It is submitted that in the identical fact situation the Hon''ble Supreme Court in the case of P. Mani Vs. State of Tamil Nadu, AIR 2006 SC 1319 : (2006) CriLJ 1629 : (2006) 3 CTC 193 : (2006) 1 DMC 471 : (2006) 2 JT 607 : (2006) 2 SCALE 482 : (2006) 3 SCC 161 : (2006) AIRSCW 1053 : (2006) 2 Supreme 415 has held that section 106 of the Evidence Act have no application.

3.9. It is further submitted by Shri Dave, learned advocate appearing on behalf of the original accused that the learned trial Judge has materially erred in not properly appreciating and/or considering the explanation given by the accused under section 313 of the CrPC more particularly the explanation given by the accused that her husband had illicit relations with one lady Madhu Kathiyawadi who was bootlegger and running a Den and that there are chances that these injuries which were found on the body of the deceased may be because of some fight with persons of said Madhu Kathiyawadi.

Making above submissions and relying upon above decisions and by further submitting that the prosecution has failed to establish and prove the complete and entire chain of events and therefore, the benefit of doubt is required to be given to the present appellant - accused. Therefore, it is requested to allow the present appeal and quash and set aside the impugned judgment and order of

conviction and sentence imposed by the learned trial Judge.

4.0. Present Criminal Appeal is opposed by Shri Himanshu K. Patel, learned APP appearing on behalf of the State. It is vehemently submitted that the impugned judgment and order passed by the learned trial Judge holding the appellant herein - original accused guilty for the offence punishable under section 302 of the IPC is on appreciation of evidence on record both oral as well as documentary. It is submitted that finding recorded by the learned trial Judge cannot be said to be perverse and/or contrary to evidence on record. It is submitted that therefore the impugned judgment and order passed by the learned trial Judge is not required to be interfered with.

4.1. It is further submitted by Shri Patel, learned APP that by leading the cogent evidence both oral as well as documentary, the prosecution has been successful in completing the chain of events. It is vehemently submitted that the prosecution has established and proved that the accused was with the deceased at 8.30 p.m., by examining rickshaw driver Anvar Khan, who has been examined at Exh.49. It is submitted that at that time there were no injuries found on the husband of the accused. It is submitted that thereafter till the incident has taken place i.e. 3.00 a.m., the deceased was with the accused alone and the incident has taken place at about 3.00 a.m. in the house of the accused and the deceased. It is submitted that the accused herself in her further statement had specifically admitted that at 3.00 a.m. she went to the house of her in-laws and stated them that her husband is unconscious. It is submitted that therefore the presence of the accused with the deceased at 3.00 a.m. has been established and proved beyond doubt. It is further submitted that it was nobody's case that the deceased was with some other person/s. It is submitted that as the incident had taken place in the house of the deceased and the accused and that too at 3.00 a.m., it was for the accused to explain the injuries on the deceased considering section 106 of the Evidence Act.

4.2. It is submitted by Shri Patel, learned APP that it is true that in the viscera report some ethanol poisonous substance has been found. It is submitted that however the cause of death stated by the doctor is because of the injuries and bleeding. It is submitted that it is required to be appreciated that even according to the defence/accused the deceased was in habit of taking liquor and on that day also he had taken the liquor and therefore, there were all possibility of ethanol in the stomach of the deceased. It is submitted that there is a specific opinion given by the doctors for the cause of death.

4.3. It is further submitted by Shri Patel, learned APP that the motive has been established and proved by the prosecution by examining the family members of the deceased. It is submitted that merely because those witnesses are the family members of the deceased, by that itself is no ground to discard their deposition/evidence on the ground that they are interested witnesses. It is further submitted that therefore the prosecution has been successful in establishing the chain of events leading to only one conclusion that it was the accused who

sustained the injury on the deceased due to which the deceased died.

Making above submissions it is requested to dismiss the present criminal appeal.

5.0. Heard learned advocates appearing on behalf of respective parties at length. We have scanned the entire angles of record and have as such re-appreciated the entire evidence on record, oral as well as documentary.

At the outset it is required to be noted that by impugned judgment and order the learned trial Judge has held the appellant herein - original accused guilty for the offence punishable under section 302 of the IPC for the death of her husband deceased Basit. It is true that the entire case rests on circumstantial evidence and therefore, as held by the Hon"ble Supreme Court in catena of decisions more particularly in the case of Sanjay Thakran and another (Supra), when the case rests on circumstantial evidence, such evidence must satisfy that (1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (2) though circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and the evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

In the very decision in the case of Sanjay Thakran and another (Supra), the Hon"ble Supreme Court has observed that the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found is so small that possibility of any other person being with the deceased could completely be ruled out. It is further observed that the time gap between the accused persons seen in the company of the deceased and the detection of crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstances against the accused. It is further observed that but, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. It is further observed that there can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can

be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. It is further observed that hence, if the prosecution proves that in light of the facts and circumstances, there was no possibility of any person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. It is further observed that for instance, if it can be demonstrated by showing that accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.

5.1. In the case of Trimukh Maroti Kirkan Vs. State of Maharashtra, (2007) CLT 471 Supp : (2007) CriLJ 20 : (2006) 2 DMC 757 : (2006) 9 JT 50 : (2006) 10 SCALE 190 : (2006) 10 SCC 681 : (2006) 8 SCR 156 Supp : (2006) 148 STC 638 , the Hon''ble Supreme Court while considering the burden of proof in a case rest on circumstantial evidence has observed and held that if an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it would be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon by the Courts. It is further observed that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. It is observed that a Judge also presides to see that a guilty man does not escape. It is further observed that 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. It is observed that 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. It is further observed that one has to keep in mind section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the aforesaid decision in paras 14, 15, 16, 21, 22, the Hon''ble Supreme Court has observed and held as under:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* - quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*). 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. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."

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 a 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.

16. A somewhat similar question was examined by this Court in connection with Section 167 and 178-A of the Sea Customs Act in *Collector of Customs, Madras & Ors. v. D. Bhoomall* and it will be apt to reproduce paras 30 to 32 of the reports which are as under : (SCC pp.553-54)

"30. It cannot be disputed that in proceedings for imposing penalties under Clause (8) of Section 167 to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it -""all exactness is a fake". El Dorado of absolute proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered - to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp. 63 at

p.65 "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the persons concerned in it. On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in "Law of Evidence", (12th Edn. Article 320, page 291), the "presumption of innocence is, no doubt, presumption juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice."

(Emphasis supplied)

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 this Court. [See State of Tamil Nadu Vs. Rajendran, AIR 1999 SC 3535 : (1999) CriLJ 4552 : (1999) 3 Crimes 179 : (1999) 7 JT 348 : (1999) 6 SCALE 145 : (1999) 8 SCC 679 : (1999) 3 SCR 89 Supp : (1999) AIRSCW 3536 : (1999) 8 Supreme 505 ; State U.P. Vs. Dr. Ravindra Prakash Mittal, AIR 1992 SC 2045 : (1992) CriLJ 3693 : (1992) 2 Crimes 664 : (1992) 3 JT 114 : (1992) 1 SCALE 937 : (1992) 3 SCC 300 : (1992) 2 SCR 815 ; State of Maharashtra Vs. Suresh, (1999) 9 JT 513 : (1999) 7 SCALE 386 : (2000) 1 SCC 471 : (1999) 5 SCR 215 Supp : (2000) 1 UJ 326 ; Ganesh Lal Vs. State of Rajasthan, (2002) CriLJ 967 : (2001) 9 JT 383 : (2001) 7 SCALE 551 : (2002) 1 SCC 731 : (2001) AIRSCW 5251 : (2001) 8 Supreme 317 and Gulab Chand Vs. State of Madhya Pradesh, AIR 1995 SC 1598 : (1995) 2 Crimes 188 : (1995) 5 JT 373 : (1995) 2

SCALE 623 : (1995) 3 SCC 574 : (1995) 3 SCR 27 : (1995) 2 UJ 201].

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*, AIR 1972 SC 2077 : (1972) CriLJ 1317 : (1972) 2 SCC 80 : (1972) SCC(Cri) 635 : (1973) 1 SCR 428 : (1972) 4 UJ 932 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. In *Ganeshlal Vs. State of Maharashtra*, (1992) CriLJ 1545 : (1992) 2 Crimes 161 : (1993) 1 DMC 326 : (1992) 2 JT 592 : (1992) 1 SCALE 811 : (1992) 3 SCC 106 : (1992) 2 SCR 502 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 under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation were 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*, AIR 1992 SC 2045 : (1992) CriLJ 3693 : (1992) 2 Crimes 664 : (1992) 3 JT 114 : (1992) 1 SCALE 937 : (1992) 3 SCC 300 : (1992) 2 SCR 815 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 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 this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of Tamil Nadu Vs. Rajendran*, AIR 1999 SC 3535 : (1999) CriLJ 4552 : (1999) 3 Crimes 179 : (1999) 7 JT 348 : (1999) 6 SCALE 145 : (1999) 8 SCC 679 : (1999) 3 SCR 89 Supp : (1999) AIRSCW 3536 : (1999) 8 Supreme 505 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 9.00 p.m. 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 the crime."

Considering the aforesaid law laid down by the Hon''ble Supreme Court, the case on hand is required to be considered.

5.2. From the evidence on record it cannot be disputed that the death of the deceased was homicidal death. From the deposition of Dr. Mohammed Iqbal Hussain Qureshi (PW-13), who was examined at Exh.38 as well as from the P.M. Report produced at Exh.43, following injuries were found on the dead body.

The cause of death mentioned in the P.M. Report and even as per the Doctor was "shock and hemorrhage due to multiple injuries over the body." The Doctor also observed that the final opinion will be given after chemical analysis report comes. The viscera was sent for chemical analysis for detecting alcohol or any other poison. It is true that in the report of the Viscera, ethanol poison was found, however that might be because of the fact that the deceased was in habit of taking liquor and prior to the incident, he had taken liquor. However, it is required to be noted that there is no opinion that the death has taken place because of the poisonous substance. Under the circumstances and on appreciation of entire evidence on record, we confirm the finding recorded by the learned trial Judge that the death of the deceased was homicidal death.

5.3. On appreciation of entire evidence on record it emerges that the deceased was seen with the accused at about 8.30 p.m. and the same is established by the deposition of rickshaw driver Anvar Khan (PW-15), who is examined at Exh.49. Thereafter, the deceased was with the accused/in the company of the accused in their residence, till the time of incident i.e. at about 3.00 a.m. The aforesaid is established by the witnesses examined and even the same is not denied by the accused. On the contrary in the further statement she has categorically stated that at 3.00 a.m., she went to her in-laws house and stated that Basit (deceased) is unconscious. It is nobody's case and more particularly even case on behalf of the defence that after 8.30 p.m. till 3.00 a.m. the accused and deceased were not together in their residence. It is also required to be noted that the incident has taken place in the house of the accused and deceased and that too at about 3.00 a.m. in the morning. Therefore, it was for the accused thereafter to explain the injury on the deceased. In view of the above clinching evidence and having proved that both, the deceased and the accused, were together at 8.30 p.m. and thereafter also, upto 3 a.m. i.e. till the time of incident and the dead body was found in the house of the accused and the deceased where they alone were residing and that too it happened at 3.00 a.m. in the morning and nothing has come out from the evidence that the deceased was having any injury at 8.30 p.m. when the rickshaw driver dropped at fountain in the village of the accused, we are of the opinion that prosecution has been successful in completing the chain of events which led to the conclusion that it was the accused alone who caused the injury on the deceased due to which

deceased subsequently died.

5.4. Even prosecution has been able to prove the motive by examining the witnesses. It has come on record that the deceased was in habit of taking liquor. It has also come on record that the accused wanted to go to Saudi Arabia which was not accepted by the deceased and for that accused wanted divorce. Even in the further statement of the accused, she stated that the deceased used to take liquor and used to have illicit relation with one lady Madhu Kathiyawadi, a bootlegger. Thus, even the relations between the accused and the deceased were not that much cordial and it can be said that they were having strained relations. The aforesaid is required to be considered along with the finding recorded hereinabove.

5.5. In the further statement the accused in her defence had come out with a case that the deceased was taking liquor and was staying with a bootlegger Madhu Kathiyawadi and she (Madhu) used to beat the deceased and therefore, the said Madhu and her men might have beaten the deceased on that day and therefore, the deceased might have sustained the injuries. However, for the aforesaid, no evidence has been led by the defence. The defence/the accused has miserably failed to establish and prove the above. It is true that it is not incumbent upon the accused to prove the above. But when it was a specific case on behalf of the accused explaining the injuries on the deceased and the dead body was found from the residence of the accused and the deceased, thereafter the burden lies upon the accused to substantiate the same. It is also equally true that by the aforesaid alone the accused cannot be held guilty, however the aforesaid is required to be considered alongwith the finding recorded hereinabove and the surrounding circumstances and while appreciating the entire evidence on record. Thus, the accused in her further statement under section 313 of the CrPC offered an explanation which is untrue and/or not substantiated. Therefore, as held by the Hon"ble Supreme Court in the case of Trimukh Maroti Kirkan (Supra), the aforesaid can be treated as an additional link in the chain of circumstances against the accused to make it complete.

As observed hereinabove when the deceased and the accused got down from the rickshaw at about 8.30 p.m. and thereafter they went to their village/residence, no injuries were there on the deceased. That thereafter i.e. after 8.30 p.m., the deceased and the accused were together in their house and the dead body was found with fatal injuries at about 3 a.m. from the house of the deceased and the accused and both of them were in exclusive possession of the house.

5.6. Now, so far as the contention on behalf of the accused that if the quarrel would have taken place at 3 a.m., which was the day of Ramzan, some neighbors might have heard the quarrel. However, it is required to be noted that as such police recorded statement of neighbour, however, he had turned hostile. It is required to be noted that looking to the manner in which the offence has been committed and the deceased was beaten when his hands were tied with the cot, there are all possibilities that there might not be any voice of quarrel. In any

case by not examining the neighbour and/or the neighbors not coming forward, the prosecution case shall not fail if there are other surrounding circumstances which led to the conclusion that it was the accused alone who had committed the offence.

Considering the entire evidence on record, we are of the opinion that the prosecution has been successful in establishing, proving and/or completing the chain of events which led to the conclusion that it was accused alone and alone had committed the offence and had killed her husband.

6.0. Now, that takes us to the question as to what offence the accused has committed i.e. either the offence punishable under section 302 of the IPC or any other offence?

From the entire evidence on record and the surrounding circumstances which led the accused to commit the offence and/or cause injury on the deceased which ultimately proved to be fatal, we are of the opinion that it cannot be said that the case would fall under section 299 or 300 of the IPC.

6.1. In the scheme of the IPC culpable homicide is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice versa. Speaking generally, "culpable homicide" sans "special characteristics of murder is culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognize three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

6.2. The academic distinction between "murder" and "culpable homicide not amounting to murder" has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Clause (b) of section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health

or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to section 300.

6.3. Clause(b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause(b) of Section 299 and clause(3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury..." sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the internal bodily injury or injuries sufficient to cause death in the ordinary course of nature.

6.4. The ingredients which are required are that there should be no motive. We are of the opinion that the culpable homicide is there, but it would fall within the provisions of section 304 Part-I and not part-II of IPC, as submitted by the learned advocate for the appellant. The factual scenario and the manner of assault, in our considered view, the appropriate conviction shall be under section 304 Part-I of IPC, and to that extent, the appeal requires to be partly allowed.

6.5. In the facts and circumstances of the case, we are of the opinion that the accused can be said to have committed the offence under section 304 Part I of the IPC and benefit of doubt can be given to the accused for the offence punishable under section 302 of IPC. Therefore, to that extent the conviction is

to be altered and the impugned judgment and order passed by the learned trial Judge is required to be modified to the aforesaid extent.

7.0. In view of the above and for the reasons stated above, the impugned judgment and order dated 04.05.2005 passed by the learned Additional Sessions Judge (7th Fast Track Court), Surat in Sessions Case No. 96/1997 is hereby altered to offence punishable under section 304 Part I of the IPC and the original accused is held guilty for the offence punishable under section 304 Part I of the IPC and to that extent the impugned judgment and order passed by the learned trial Judge is hereby modified. The accused is sentenced to undergo 7 years" RI with a fine of Rs. 250 and in default to undergo further 2 days" SI. It is reported that the accused is on bail and therefore, on her conviction for the offence punishable under section 304 Part I of the IPC, her bail bond shall stand canceled. Time to surrender to the accused is hereby granted upto 01.11.2015. Appeal stands partly allowed to the aforesaid extent and is disposed of accordingly.