

Court No. - 45**Case :-** CRIMINAL APPEAL No. - 1443 of 2008**Appellant :-** Raj Kishore @ Pappu**Respondent :-** State of U.P.**Counsel for Appellant :-** Onkar Nath, Birendra Prasad Maurya**Counsel for Respondent :-** Govt. Advocate**Hon'ble Manoj Misra, J.****Hon'ble Syed Aftab Husain Rizvi, J.**

1. We have heard Sri Amit Tripathi for the appellant; Sri Amit Sinha, learned AGA, for the State and have perused the record.

2. This appeal is against the judgment and order dated 21.02.2008, passed by Sessions Judge, Etah in Sessions Trial No.655 of 2003, arising out of Case Crime No.62 of 2003, police station Bagwala, district Etah, whereby the accused-appellant has been convicted under Section 302 IPC and punished with imprisonment for life and fine of Rs.5,000/- coupled with a default sentence of two years R.I.

INTRODUCTORY FACTS

3. The FIR of the case was lodged by Virendra Singh (PW-1) vide written report (Exb.Ka-1) dated 23.07.2003 scribed by Rahees Ahmad (not examined), which was registered as Case Crime No.62 of 2003 at police station Bagwala, district Etah on 23.07.2003 at 18.20 hrs. The GD entry (Exb.Ka-3) of the written report and the chik FIR (Exb.Ka-2) was prepared by PW-3 at the time and date specified. The allegation in the FIR is to the effect that informant's sister-in-law Anima (the deceased) was married to Narendra. Narendra used to work as a labour in

Delhi whereas his elder brother Raj Kishore @ Pappu (the accused-appellant) used to stay in the village and was addicted to liquor. It is alleged that the appellant used to harass the deceased Anima for money and used to pester her for money sent by her husband. According to the allegations, few days before the incident, Narendra (husband of the deceased) had sent money to Anima. The accused-appellant asked Anima for the money. When Anima refused, she was assaulted. On 23.07.2003 i.e. the date of the incident, the informant (PW-1) and his wife Anita (PW-2) came to know that the accused-appellant was assaulting Anima. On getting information, the informant and his wife Anita, at about 2.00 pm, rushed to Anima's house. There they noticed that the accused-appellant was coming out of the hut on the first floor of the house and running away. When they went up-stairs, they noticed that Anima's body was lying with injury marks on her neck. The FIR was lodged by alleging that the accused-appellant has killed Anima.

4. After registration of the report, inquest was conducted at the spot. After completing the inquest by about 22.00 hrs on 23.07.2003, inquest report (Exb.Ka-5) was prepared by PW-5. The body of the deceased was sealed and dispatched for autopsy. The autopsy was conducted by PW-4 at about 2.30 pm on 24.07.2003. The autopsy report (Exb.Ka-4) notices :

External Examination :

Well built body. Rigor Mortis passed off from upper extremities and present in lower extremities. Face, neck and upper part of chest congested. Abdomen distended (sic) bloated.

(i) Abraded contusion 2 cm x 1.25 cm, right side of neck anteriorly on upper part. Underlying tissues congested.

(ii) Two abraded contusions in a row on left side of neck upper part anteriorly. Each 1.75 cm x 1.25 cm. Underlying tissues congested.

Internal Examination :

Larynx/Bronchi – Congested. Both **cornua** of hyoid bone fractured.

Lungs – Congested.

Abdomen – Stomach full of un-identified food material.

Small Intestine – chyme and gases.

Large Intestine - gases and faecal matter.

Cause of Death - death is due to asphyxia as a result of throttling on account of AMI.

Estimated time of death – about one day before.

5. Investigation was conducted by PW-5 who visited the spot, conducted inquest, prepared papers for autopsy, prepared site plan (Exb.Ka-9) at the behest of PW-2, recorded statement of witnesses and, after carrying out various stages of investigation, submitted charge-sheet (Exb.Ka-10) against the accused-appellant. After taking cognizance on the charge-sheet, the case was committed to the court of session.

6. The court of session vide order dated 11.02.2004 framed charge of the offence of murder punishable under Section 302 IPC against the appellant. The accused-appellant pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

7. During the course of trial, the prosecution examined as many as six witnesses, their testimony, in brief, is noticed below :

8. **PW-1** – Raj Kishore @ Pappu (Informant). He stated that the deceased Anima was his sister-in-law, younger

sister of his wife and used to reside in the same village in which he resided; whereas, Narendra, her husband, used to work as a labour in Delhi. The accused-appellant, elder brother of Narendra, was a liquor addict and he used to harass Anima for money to cater to his liquor addiction. In respect of the incident, PW-1 stated that about a day or two before the incident, Rs.1,000/- was sent by Narendra to Anima. On the date and time of the incident, PW-1 was in his own house when he was informed by fellow villager, namely, Damodar, that Anima is being assaulted by the accused. On getting the information, PW-1 and his wife Anita (PW-2), at about 2.00 pm, went to her house. They heard Anima crying for help. Those cries were coming from the hut on upper floor of the house. Soon thereafter, they noticed the accused rushing out of the hut located on the upper floor and escaping. When PW-1 went inside the hut, he noticed the body of Anima lying in the hut with injury marks on her neck. PW-1 stated that he got a written report scribed by Rahees Ahmad, which was submitted at the police station. The written report was exhibited as Exb.Ka-1.

During cross-examination, the witness stated that usually money was delivered to the deceased by her husband, when he used to visit. But this time money was sent through a boy Talewar one or two days before the incident. PW-1 stated that his house is about 15-20 paces away from the house of the deceased. In between his house and the house of the deceased, there were two or three houses. He denied the suggestion that the house of PW-1 is about 250 paces away from the house of the deceased. PW-1, however, maintained that information about the incident was received by him from Damodar whose house is next to the house of the deceased. At this stage, the witness was confronted with an omission in the written report with regard to receiving information from Damodar about the deceased being assaulted by the appellant. He was also confronted with an omission in the

written report that he heard cries of Anima. He admitted that he had not mentioned in the report that he heard screams of Anima and stated that by the time he reached there, she was dead. But immediately thereafter, he stated that Anima was asking for help in a low tone. In paragraph 16 of his statement, during cross-examination, the witness stated as follows :

“दामोदर ने खबर दिया तो केवल 5 मिनट में ही मैं पहुँच गया था। मारने वाला पिछवाड़े, को कूद गया था। मेरे शोर मचाते ही वह कूद गया था।”

In paragraph 17 of his statement, the witness stated that there was no blood on the cot where he found the body of the deceased. PW-1 stated that when the I.O. had arrived at the spot, he was there. He stated that he had shown the staircase to the I.O. but had not shown to the I.O. either his or Damodar's house. PW-1 stated that he had also not shown to the I.O. the direction and the place from where he arrived at the spot. The witness, however, denied the suggestion that he has not seen the accused-appellant escaping from the house/room and that he has lodged a false case to get the benefit of the money left by her sister-in-law.

9. **PW-2** – Anita – elder sister of the deceased and wife of PW-1. After disclosing her relationship with the deceased, PW-2 stated that the husband of the deceased, namely, Narendra, used to work in Delhi and used to send money to the deceased; the accused-appellant and her sister's husband, Narendra, used to reside in the same house; that the accused-appellant was addicted to liquor and used to pester the deceased for money to satisfy his liquor addiction; that just two days before the incident, Rs.1,000/- was sent by her husband to the deceased, the accused-appellant came to know about receipt of money by her and, therefore, asked her for money; and that when money was not given to the accused, he assaulted the deceased. In respect of the incident, PW-2 stated that Damodar had given information that the accused-appellant

is beating Anima. On receipt of this information, PW-2 and her husband (PW-1) went to the spot. Anima was crying. She noticed accused-appellant rushing out from the hut located on the upper floor of the house. When PW-2 went there, she noticed Anima lying dead with injury marks on her neck. She stated that the time must have been 2.00 pm. PW-2 stated that her husband and other villagers had also spotted the accused coming out of that hut. PW-2 stated that after the I.O. arrived at the spot he took her statement and prepared site plan as per her instructions.

During cross-examination, PW-2 stated that her house is just 15-20 paces away from the house of the deceased. She, however, admitted of not showing her house to the I.O. She stated that her brother-in-law (husband of the deceased) used to send money to the deceased monthly or bi-monthly. In paragraph 6 of her deposition, during cross-examination, she stated as follows :

“Damodar ने खबर दिया तो मैं घर में काम कर रही थी। बच्चों को ऐसे ही छोड़कर मैं चली, 5 मिनट लगा पहुँचने में। मैं पहुँची तो बहुत धीमी आवाज में वह कह रही थी कि बचा ले बचा ले। जब तक मैं ऊपर पहुँची तो गले पर मेरी बहन के निशान थे और वह मर गई थी तथा अभियुक्त पीछे को कूद गया।”

She denied the suggestion that her house is 500 paces away from the house of the deceased. She also denied the suggestion that she arrived at the spot after learning about the death of her sister. She denied the suggestion that there use to be quarrel between the accused and PW-2's husband in respect of the money sent. She also denied the suggestion that she has not seen anyone escaping from the spot.

10. **PW-3** – Suraj Pal Singh. He is the constable of the police station concerned who made the GD entry of the written report and the chik FIR in connection therewith. The chik FIR and GD entry were exhibited as Exb.Ka-2 and Ka-3, respectively. He denied the suggestion that the FIR was ante-timed but admitted that on the date when the

FIR was registered, there was no other cognizable report made at the police station concerned.

11. **PW-4** – Dr. V.V. Verma – autopsy surgeon. He proved the autopsy report and the contents thereof already noticed above. He stated that during internal examination, he had noticed that both cornua of hyoid bone were fractured and in the uterus a 4 cm long foetus was present. The autopsy report was exhibited as Exb.Ka-4. He accepted the possibility of death having occurred at about 2.00 pm on 23.07.2003 as a result of the injuries noticed in the autopsy report.

During cross-examination, he accepted that there could be variation of about six hours either way in his estimate regarding the time of death.

12. **PW-5** – S.I. Narendra Pal Singh – Investigating Officer. He proved various stages of investigation. He stated that he visited the spot, noticed the body of Anima lying on a cot in a hut on the upper floor of the house. He proved the preparation of the inquest report and documents prepared for autopsy. He stated that he inspected the spot in torch and gas light in the presence of the informant as well as his wife Anita and prepared the site plan accordingly, which was marked as Exb.Ka-9. He stated that he recorded the statement of the witnesses and after completing the investigation submitted charge-sheet, which was marked as Exb.Ka-10. He produced the articles worn by the deceased at the time of her death, which were made material exhibits I.e. Exb.Ka-1 to Ka-5.

During cross-examination, PW-5 stated that neither the house of Damodar nor the house of informant was shown by him in the site plan because at the time of inspection he had not noticed them. He also admitted that he had not shown the place from where the witnesses heard the cries of the deceased. PW-5 stated that although he cannot say whether the house of the witnesses was 200 mtrs away from the spot but admitted

that the house of the witnesses examined was in the middle of village Abadi and quite far from the spot. After stating as above, PW-5, to disclose the surroundings, stated as follows :

“To Counsel – मृतक का मकान गांव की आबादी के पूरब में है। मृतक के मकान के पूरब में भूदेव और कुंवरपाल के मकान है। कुंवर पाल का मकान मृतक के मकान के सामने स्थित खरंजा के पूरब में है। कुंवरपाल व भूदेव के मकानों के पूरब में आबादी नहीं है। यह बात भी मैं अपनी याददास्त से ही बात रहा हूँ। मृतक के मकान के पश्चिम-दक्षिण- उत्तर-पूर्व में चारो दिशा में मकानआत है। मृतक के मकान के पश्चिम में लगी हुई खाली जगह नाथू राम की है। वादी ने मुझे यह नहीं बताया था कि मृतक के पति ने उसकी मृत्यु से पूर्व जो एक हजार रुपये भेजे थे वह तालेवर लाया था।”

After stating as above, PW-5 admitted that he did not notice any blood on the cot. He denied the suggestion that he prepared police Parchas while sitting at the police station. He also denied the suggestion that he has submitted a false charge-sheet.

13. **PW-6** - Constable Satyendra Singh. He is the constable of the police station concerned who was handed over the body for autopsy. He proved that sealed body was handed over to the Doctor for autopsy. He also stated that the body was brought by Jugaad (a vehicle) and as the said vehicle had a breakdown therefore there was delay in the post-mortem. He stated that till the body was in his custody, no person was allowed to touch it and it was kept sealed.

STATEMENT OF THE ACCUSED UNDER SECTION 313 CrPC

14. The incriminating circumstances appearing in the prosecution evidence were put to the appellant for recording his statement under Section 313 CrPC. The appellant denied the incriminating circumstances appearing in the prosecution evidence and claimed that the deceased used to reside separate and not in his house; that he was not present in the house at the time of

the occurrence; he was irrigating his field; and that he has been falsely implicated.

TRIAL COURT FINDINGS

15. The trial court found that the prosecution was successful in establishing motive; that the accused was seen rushing out of the hut wherein, immediately thereafter, the body of the deceased was noticed lying on a cot with injury marks on the neck; that the autopsy report confirmed that the deceased was strangled on or about the time the deceased was noticed exiting the hut, the chain of circumstance stood complete indicating beyond reasonable doubt that it was the accused-appellant and none other who committed the murder and as the explanation tendered by the appellant was found inadequate and false, he is liable to be convicted.

SUBMISSIONS ON BEHALF OF THE APPELLANT

16. Learned counsel for the appellant submitted that the prosecution evidence fails to establish that information about the deceased being assaulted by the accused was provided to PW-1 and PW-2 by Damodar, inasmuch as, Damodar has not been examined as a witness. Further, the I.O. was not shown the house of Damodar as being next to the house of deceased therefore, on what basis PW-1 and PW-2 arrived at the spot has not been proved beyond doubt. Hence, the very foundation of the prosecution case is rendered doubtful. PW-1 and PW-2 in their deposition though stated that their house is about 15-20 paces away from the spot but, in the site plan, there are other persons house adjoining the house of the deceased. In addition to above, the statement of the I.O. indicates that the house of PW-1 and PW-2 was quite far from the house of the deceased, inasmuch as, according to him, the house of the deceased was in one corner of the village, whereas the house of PW-1 and PW-2 was in the middle of village Abadi. Therefore, possibility of PW-1 and PW-2 arriving at the spot immediately after getting

information about the deceased being assaulted by the accused appears remote. It was also argued that though PW-1 and PW-2 initially stated that they saw the accused-appellant exiting the hut and escaping from the house by using the staircase, as was disclosed in the site plan, but during cross-examination they stated that the accused escaped by jumping over the back wall. This is at complete variance from the initial statement of PW-1 and PW-2 made during the course of investigation. In these circumstances no reliance can be placed on their deposition. It has been submitted that it appears to be a case where the deceased was killed in her own house; no one witnessed the incident; that as the incident was of day-time, no one was present in the house; that the FIR was lodged, after deliberation or guess work, with delay of over four hours even though the police station was only five kilometres away. As there is no cogent and reliable evidence in respect of the presence of the appellant within the house at the relevant time, the conviction of the accused-appellant is not sustainable and is liable to be set aside.

SUBMISSIONS ON BEHALF OF THE STATE

17. Per contra, learned AGA, appearing for the State, submitted that both PW-1 and PW-2 have succeeded in proving the motive for the crime; that although the accused-appellant stated that he had a separate residence but he has not disclosed specifically as to where else he resided; that the appellant was noticed exiting the hut where, immediately after appellant's exit, the deceased was found dead by PW-1 and PW-2, with injury marks on her neck and the autopsy confirmed that she could have died due to those injuries at the time when the appellant was seen exiting the hut therefore, the chain of circumstances is complete and in absence of cogent explanation from the appellant, the trial court was justified

in convicting the accused-appellant and sentencing him as above.

ANALYSIS

18. Having noticed the rival submissions as also the entire evidence on the record, before proceeding to evaluate the evidence we may observe that this is a case based on circumstantial evidence. In a case based on circumstantial evidence, when conviction can be sustained, the law is settled. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

19. In the instant case, the incriminating circumstances on which the prosecution placed reliance were as follows : the appellant was a liquor addict; he used to pester/harass his sister-in-law (wife of his brother) for money; the appellant's brother used to reside in Delhi in connection with his work and used to send money to his wife; two days before the incident, the deceased's husband had sent money to his wife; the appellant had been pestering the deceased for the money and in connection therewith he assaulted the deceased; that on 23.07.2003, at about 2.00 pm, PW-1 and PW-2 were informed by Damodar that the deceased was being assaulted by the appellant; on receipt of this information, PW-1 and PW-2 arrived at the spot to notice the appellant escaping from the hut; when they entered the hut on the upper floor of the house, PW-

1 and PW-2 found the deceased lying dead on a cot with injuries on her neck.

20. In so far as the motive is concerned, the best person who could have given evidence of having sent money to the deceased was her husband Narendra. The husband of the deceased has neither been interrogated nor examined by the prosecution to ascertain whether any money was sent by him to the deceased in connection with which she was allegedly harassed/assaulted by the appellant. No doubt, it is not necessary for the prosecution to examine all the witnesses interrogated but the Investigating Agency did not even interrogate Narendra to confirm whether any money was dispatched by him to his wife. We did not find any statement of the I.O. (PW-5) with regard to recording the statement of deceased's husband in connection with sending money to the deceased. Interestingly, in the evidence of PW-1 it has come that Talewar had delivered money to the deceased. But, even the statement of Talewar was not recorded. In these circumstances, we are of the view that it is not proved beyond reasonable doubt whether money was sent to the deceased by her husband two or three days before the incident. Further, except PW-1 and PW-2, no other person has been examined to disclose whether the appellant was a liquor addict. In these circumstances, the motive for the crime has not been established beyond reasonable doubt.

21. We are conscious of the law that in a case based on ocular account, motive may not have a crucial role to play but in a case based on circumstantial evidence, motive assumes importance and may form part of the chain of circumstances. However, even if the prosecution was not successful in establishing the motive for the crime beyond reasonable doubt, we would have to examine whether the prosecution was successful in proving beyond doubt that the accused-appellant was noticed rushing out of the hut wherein, immediately after his exit, the deceased was

found dead by PW-1 and PW-2. If the prosecution succeeds in establishing this circumstance beyond reasonable doubt, the onus would shift on the accused appellant to explain his presence there at that time, in absence whereof, an adverse inference in respect of his guilt might be drawn.

22. To prove the above-mentioned circumstance, the prosecution has relied on the testimony of PW-1 and PW-2. Consequently, we would have to evaluate the testimony of PW-1 and PW-2.

23. In assessing the value of the evidence of an eye witness there are two principal considerations : (a) whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence; and (b) whether there is anything inherently improbable or unreliable in their evidence.

24. In the instant case, PW-1 and PW-2 were not residents of the house/hut where the incident occurred. They claim to have arrived at the spot on receipt of information from Damodar. Thus, their presence is not natural. To prove that Damodar provided them information neither Damodar has been produced as witness nor location of Damodar's house enabling him to get information and pass it on to PW-1 and PW-2 is disclosed in the site plan. Rather, the prosecution has suppressed vital information with regard to the distance of the house of the two witnesses from the house of the deceased. Interestingly, the site plan does not indicate the presence of house of PW-1 and PW-2 in the vicinity. There are, however, several houses shown in the site plan neighbouring the house of the deceased but the house of the two witnesses as also of Damodar is conspicuous by its absence. The two witnesses were cross examined on this aspect and suggestion was given to them that their house is located at a distance of about 250 paces from the house of the deceased. The two witnesses might have denied this

suggestion and claimed that their house is 15-20 paces away from the house of the deceased but, interestingly, the I.O. who made spot inspection and prepared site plan (Exb.Ka-9) at the behest of PW-1 and PW-2 did not disclose the house of either the informant or of the witness Damodar in the site plan. Further, the I.O. (PW-5) stated that though he cannot disclose the exact distance between the house of the informant and the house of the deceased but it is correct that the house of the two witnesses is located in the middle of village Abadi and is at a distance from the spot. He clarified the above statement by stating that the house of the informant is in the middle of village Abadi whereas the house of the deceased is in the eastern corner of the village. Once this is the position, the possibility of the witnesses having arrived at the spot immediately on getting the information that the deceased was being assaulted appears remote. More so, because the autopsy report does not disclose presence of injuries over the body except around the neck. Had there been injury marks all over the body the possibility of the victim raising an alarm and inviting attention of neighbours would have been there. Since only two abraded contusions have been found around her neck, the probability of her murder going unnoticed is quite high. Consequently, the possibility of her neighbours noticing her cries and informing others appears remote. Further, both PW-1 and PW-2 have admitted during their cross-examination that the culprit had escaped by jumping over the back wall of the house. If that was so, the site plan prepared at the behest of PW-1 and PW-2 was at complete variance with their statement inasmuch as it discloses the accused escaping from the front of the house by using the same staircase which the witnesses used to go to the upper floor of the house to notice the deceased lying dead on a cot in the hut. These circumstances seriously dent the credibility of the statement of PW-1 and PW-2 that they noticed the

accused exiting the hut wherein, immediately after his exit, the deceased was found dead there.

25. Now, we shall examine whether, on account of joint living, a presumption could be drawn against the appellant. In this regard we notice that appellant was the Jeth of the deceased. According to PW-2 the appellant resided in the same house. The appellant in his statement under Section 313 CrPC has denied joint living. But, during cross-examination of PW-2, no specific suggestion was put to PW-2 that the appellant resided elsewhere at some other place. Therefore, assuming that the appellant and the deceased resided in different rooms of the same house, we would have to examine whether there could be a presumption drawn against him with the aid of section 106 of the Evidence Act even though the appellant denied his presence in the house at that time.

26. In **Shivaji Chintappa Patil Vs. state of Maharashtra, (2021) 5 SCC 626**, it was observed that *"Section 106 of the evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. It was observed that Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It was further observed that only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused"*.

27. In the instant case, the appellant has denied his presence in the house at the relevant time. The deposition of PW-1 and PW-2, who allegedly saw him exiting the hut, have not been found trustworthy by us. Other than that, there is no cogent evidence about the presence of the appellant in the house at the relevant time. Moreover, it is a case of day-time occurrence. Ordinarily, during day-time men-folk

are out in connection with their daily chores. The appellant has claimed that he was not present in the house but was watering his fields. Thus, in absence of cogent evidence that the appellant was in the house/hut at the relevant time, provisions of Section 106 of the Evidence Act can not be pressed into service to put onus on the accused to explain as to under what circumstances, the deceased suffered ante-mortem injuries.

28. In addition to above, we notice that the police station where the report was lodged is at a short distance of five kilometres from the spot. The FIR though is within 4 and ½ hours of the alleged occurrence but that time is sufficient to deliberate and implicate a person on the basis of suspicion. In ordinary circumstances, this delay was not much but here we are dealing with a case based on circumstantial evidence where, firstly, the incriminating circumstances have not been proved beyond reasonable doubt and, secondly, the person who provided information to PW-1 and PW-2, namely, Damodar, about deceased being assaulted by the accused appellant has not been examined. The sum total of our analysis is that the prosecution evidence does not inspire our confidence and the possibility of involvement of some one else in the crime is not ruled out.

29. In view of the analysis and discussion above, we are of the view that the prosecution has failed to prove the charge against the appellant beyond the pale of doubt therefore, this is a fit case where the accused-appellant is entitled to the benefit of doubt. Consequently, the appeal is **allowed**. The judgment and order of the trial court convicting and sentencing the appellant is set aside. The accused-appellant is acquitted of the charge for which he has been tried and convicted. It is reported that the appellant is in jail. He shall be set at liberty forthwith, unless warranted in any other case subject to compliance

of provisions of Section 437-A CrPC to the satisfaction of the trial court.

30. Let a copy of this order be forwarded to the court below along with the record for information and compliance.

Order Date :- 18.7.2022.

Rks.