HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

D.B. Criminal Appeal No. 202/1992

State Of Rajasthan

----Appellant

Versus

1. Iqbal S/o Shri Abdul Rahman, B/c Musalman Chipa, R/o Falna Station, Falna, Bali.
2. Smt. Bhagwanti W/o Babu Lal, B/c Jain, R/o Khardio Ka Bas, Bali.

----Respondents

For Appellant(s)	:	Mr. B.R. Bishnoi, PP
For Respondent(s)	:	Mr. Sunil Mehta Ms. Shivani Mutha for Mr. S.D. Purohit.

HON'BLE MR. JUSTICE VIJAY BISHNOI

HON'BLE MR. JUSTICE RAJENDRA PRAKASH SONI

Judgment

Reportable

04/08/2023 (Per Hon’ble R.P. Soni, J.)

1. This appeal is directed against the judgment and order dated 09.08.1990 rendered by Additional Sessions Judge, Bali, (District Pali), in Sessions Case No.13/1986 (63/1983) acquitting the respondents-accused for the offence punishable under Section 302 in alternate 302/34 of the Indian Penal Code. Both the accused were charged and tried for allegedly committing murder of Pyari Bai on 13.05.1983 between 11.30 a.m. to 1.30 p.m. suffocating her by stuffing a cloth into her mouth.

2. The facts necessary to be noticed for disposal of present appeal against acquittal, briefly stated, are that on 13.05.1983 at about 2.15 p.m., constable Jeeva Ram (PW-12) of Police Station Bali (District Pali) gave an oral information (ExP-11) to the effect that when he reached Gandhi Chowk at about 2.00 p.m. while patrolling in the town, he saw a crowd there. People in the crowd were saying that an aged woman had been murdered by stuffing a cloth into her mouth. He went to *Khardia Bas,* where*,* a large crowd was gathering outside the house of Babulal Jain which was situated adjacent to municipality building. Wife of Babulal Jain Bhagyawanti was present in the house. Some people were also standing inside the house. In the *Pole* (पोल) of the house, there was a little bit of blood on the floor and a small bucket was also kept in the *chowk* (चौक) of the house, which was half full of water and the colour of which was like red. It led him to guess that the culprit had washed his blood stained hands in that bucket. In a room, Pyari Bai, the mother-in-law of Bhagyawanti had a cloth stuffed into her mouth and was lying dead on a cot. The cloth was full of blood. There was blood on both the shoulders of her blouse as well and blood was also oozing out of her nose and mouth. Two small carpets, lying there, were also found blood stained. 2-3 boxes were lying open in the room.

3. F.I.R. further stated that it appeared that someone has murdered Pyari Bai suffocating her by stuffing a cloth into her mouth. Bhagyawanti, the daughter-in-law (बहू) of the deceased who was present there, told on being asked that the incident took place during the day between 11.30 a.m. to 1.30 p.m. when she

alongwith her children was sleeping on the upper floor of the house. Her husband lives in Bombay. Only Pyari Bai and Bhagyawanti alongwith her children live in the house where the incident took place.

4. In pursuance of the said complaint lodged by constable Jeeva Ram, the investigation was set in motion and the charge-sheet was filed against both the respondents. After the case was committed to the court of Sessions, the charges for the offences punishable under Section 302 in alternate 302/34 of the Indian Penal Code were framed against the respondents to which they did not plead guilty and claimed trial.

5. To bring home guilt of the respondents, prosecution examined as many as 26 witnesses and also got exhibited 28 different documents. Upon being confronted with the allegations set out in the evidence of the prosecution witnesses, both the respondents denied all incriminating circumstances put to them and claimed that they had been falsely implicated and are innocent. The defence propounded by the respondents in the course of trial was of total denial. There were 13 defence witnesses examined by the respondents in support of their defence.

6. We have mulled upon the arguments advanced by both the parties, gone through the impugned order and thoroughly re-appreciated the evidence available on record and also given respectful and thoughtful consideration to the law.

7. It is admitted case of the prosecution that nobody had seen the actual incident, which happened with the deceased. However,

according to the prosecution, husband of Bhagyawanti lived in Bombay and she lived with her children and aged mother-in-law Pyari Bai at Bali town. About one and a quarter years before the incident, respondent Iqbal started a video parlour in the name and style "*Rubi Coffee House*" adjacent to the house of Bhagyawanti. The roof of the house of Bhagyawanti can be easily accessed from the roof of the coffee house. The municipality building is also near the house of Bhagyawanti. It is further case of the prosecution that after starting the video parlour, respondent Iqbal started impressing Bhagyawanti and used to visit her house often. People of the neighborhood had seen many times both Iqbal and Bhagyawanti talking and laughing outside the house and on the terrace. When Bhagyawanti used to come to watch the film in the video parlour of Iqbal, she was not even charged for the ticket. When the servant of the video parlour used to leave the parlour after night show, Iqbal used to sleep in the coffee house at night. Gradually Iqbal, allegedly had developed illicit relation with co-accused Bhagyawanti and that is why both Iqbal and Bhagyawanti together murdered Pyari Bai. On the date of death of her mother-in-law, people did not see Bhagyawanti even crying or grieving.

8. The complaint was lodged against unknown person since the name of the accused had not been revealed as assailant at that stage. Both the respondents Iqbal and Bhagyawanti, however, came to be arrested on 20.05.1983. Admittedly, there was no direct evidence against the accused. To bring home the guilt of the

accused, the witnesses examined and documents exhibited by the prosecution in relation to the various circumstances are as under:-

1. Illicit relationship and intimacy between both the respondents which formed motive:- Cheeman Lal (PW-8), Jeeva Ram (PW-9), Mohd. Ilias (PW-11), Hakka Ram (PW-16) and Kalu Ram (PW-24) have been examined in relation to this circumstance.

2. Iqbal being entered into the house of Bhagyawanti prior to the incident:- Narotam Das (PW-10), Rustam Khan (PW-15) have been examined in relation to this circumstance.

3. Iqbal being seen leaving the house of Bhagyawanti after the incident:- Suresh Kumar (PW-5) has been examined in this aspect.

4. Immediate conduct and behavior of Bhagyawanti after death of her mother-in-law:- Hakka Ram (PW-16) and Prakash (PW-19) have been produced in relation to this circumstance.

5. Recovery of blood stained cloth (napkin) at the instance of Iqbal:- Kheema Baba (PW-6), Bhopal Ram (PW-7) and Sardar Khan (PW-20) have been examined. Recovery memo of blood stained cloth (ExP-7) and article 2 & 11 have been produced in relation to this circumstance.

6. Recovery of blood stained shirt of Iqbal:- Inda Ram (PW-3), Teja Ram (PW-4) have been examined. Recovery

memo of blood stained shirt (ExP-5) and article 1 have been produced in relation to this circumstance.

7. Recovery of blood stained clothes of Bhagyawanti:- Jodha (PW-6), Bhopalram (PW-7) have been examined. Recovery memo of blood stained clothes of Bhagyawanti (ExP-9) and article 3 & 4 have produced in relation to this circumstance.

8. Recovery of blood mixed water in which hands of culprit were said to be washed:- Badri Narayan Sharma (PW-1), Nirbhay Ram (PW-2) have been examined. Recovery memo (ExP-3) and article 10 have produced in relation to this circumstance.

9. Recovery of blood stained clothes of deceased wearing at the time of death:- Badri Narayan Sharma (PW-1) and Nirbhay Ram (PW-2) have been examined. Recovery memo of blood stained clothes of deceased (ExP-4) and article 5 to 7 have produced in relation to this circumstance.

9. The trial court after consideration of the entire evidence on record has acquitted both the accused holding that the circumstantial evidence relied upon by the prosecution does not inspire confidence and is not sufficient to prove the charge against the respondents beyond reasonable doubt. Even the evidence of other witnesses, who had seen the Iqbal prior to and after the alleged incident has also been discarded holding that merely the accused was seen by these witnesses does not mean that he committed murder of Pyari Bai. The trial court further held that

the prosecution has miserably failed to prove the cause of death in as much none of the members of the medical board was examined.

10. In so far as recovery of blood stained cloth (Napkin) is concerned, the learned trial Judge seems to have discarded that piece of evidence holding that recovery of cloth used for stuffing the mouth of the deceased by itself is not sufficient to connect the accused with the alleged murder if the substantive evidence is not reliable and truthful.

11. Mr. B.R. Bishnoi, learned Public Prosecutor took us through the entire evidence and submitted that all the circumstances relied upon by the prosecution are proved beyond reasonable doubt. The trial court did not consider the evidence led by the prosecution in proper perspective and has, consequence thereof, arrived at perverse finding since it was wrongly discarded by the trial court. He submitted that the prosecution has proved the common object and motive beyond reasonable doubt as well as all the recoveries and therefore the learned trial Judge ought not to have brushed aside the entire evidence.

12. He further submitted that other circumstance such as recovery of blood stained clothes of the accused, recovery of cloth (napkin) at the instance of accused, evidence of Narotam Das (PW-10) and Suresh Kumar (PW-5), who had seen Iqbal entering into home of Bhagyawanti prior to incident and coming out of her home after the occurrence, the evidence of witnesses who deposed about the illicit relationship and intimacy between both

the accused which forms the motive, clearly lend assurance to the occurrence and that clearly point to the guilt of the accused.

13. On the other hand, learned counsel for the respondents vehemently submitted that the prosecution has not proved basic links such as last seen, motive and recoveries beyond reasonable doubt and since these links are missing from the chain of circumstances, the respondents cannot be said to have committed alleged offence. He further submitted that the findings recorded by the learned trial Judge and the conclusion arrived at by him in instant case cannot be termed as perverse and no manifest illegality whatsoever has been committed by him in acquitting the accused. It is further argued that it cannot be said that appreciation of the evidence by the trial court is perverse or the conclusion drawn by it could not have been drawn on any view of the evidence; that there is no error, in application of law by the learned trial Judge nor there is any substantive omission on his part to consider the evidence existing on record. He, therefore, submitted that the view taken by the acquitting court is permissible on the evidence on record and, therefore, this Court cannot interfere with the impugned judgment in as much as the order of acquittal has not resulted in miscarriage of justice.

14. Before we consider the submissions advanced by the learned counsel appearing for the parties and the evidence on record it would be relevant to notice the settled position of law to be applied in dealing with the appeal against acquittal.

15. It is well settled that though the appellate court has same powers as the trial Court of appreciating evidence and coming to

its own conclusion on questions of fact, it should not interfere with an acquittal. If the view taken by the trial Court is a reasonably possible view, the appellate court should not disturb an acquittal merely because it thinks that another view is better or more preferable.

16. The consistent and well settled law on the point is that the High Court can interfere with the order of acquittal only when:-

(1) The appreciation of evidence by the trial Court is perverse or the conclusion drawn by it cannot be drawn on any view of the evidence.

(2) Where the application of law is improperly done.

(3) Where there is substantial omission to consider the evidence existing on record.

(4) The view taken by the acquitting Court is impermissible on the evidence on record.

(5) If the order of acquittal is allowed to stand it will result in the miscarriage of justice".

17. We will have, therefore, to apply this test of strong and compelling reasons to interfere with the order of acquittal in the present appeal. In other words we will be applying these principles in the present case to determine whether interference with the order of acquittal impugned in this case is must.

18. In the instant case, we have already narrated the facts and evidence relied upon by the prosecution to bring home the guilt of the accused. We have carefully perused the impugned judgment and re-appreciated the evidence of all the witnesses. We agree with the learned trial Judge that the evidence led by the prosecution is not sufficient to prove all the circumstances beyond

reasonable doubt. We now proceed to record our reasons for arriving at this conclusion.

19. At the outset, we would like to deal with the first two circumstance namely, illicit relationship between respondents Iqbal and Bhagyawanti plus the motive which according to the prosecution, were the main links in the chain of circumstances.

20. As regard the fact that Iqbal and Bhagyawanti shared an illicit relationship, the first witness examined by the prosecution on the said circumstance is Cheemanlal (PW-8). He deposed that Bhagyawanti has 2-3 children; About 20-25 days prior to the death of deceased, he had seen Iqbal blooming with children of Bhagyawanti; about 7-8 days prior to the incident, Hakkaram a class IV employee in the Municipality, told him that the person, who is operating the video parlour was roaming on the terrace of his building. The roof of house of Bhagyawanti and the roof of house of Iqbal are clearly visible from the roof of Municipality building. The name of person, who was roaming on the roof was not told by Hakkaram. Jeevaram (PW-9) has deposed that he did not see Iqbal and Bhagyawanti talking to each other any time, anywhere.

21. Mohd. Iliyas (PW-11), an employee at the video parlour, has stated that Bhagyawanti came to watch the film 1-2 times in the video parlour of Iqbal; being a neighbour, he did not charge money for ticket from her; Iqbal did not ask Bhagyawanti to watch the film in his parlour for free; Iqbal never visited the house of Bhagyawanti. Hakkaram (PW-16) has deposed that once he saw Iqbal sitting at the house of Bhagyawanti, an old woman

was also sitting with him; children of Bhagyawanti were also sitting near Iqbal. Bhagyawanti was cleaning the dishes at that time; Besides it, he also saw Iqbal roaming on the roof of house of Bhagyawanti. Prakash (PW-14) has not supported the case of the prosecution on this circumstance and deposed that he gave the statement to the police under the pressure of the police. Kaluram (PW-24) has also been declared hostile. He has deposed that he never knew Bhagyawanti and Iqbal and has also stated the fact that he never seen them together somewhere.

22. The evidence produced by the prosecution also reveals that the clothes of the accused Iqbal (Art.-1) and Bhagyawanti (Art.3 and 4) were also recovered by the police under Recovery Memo (ExP-5) and (ExP-9) which were blood stained.

23. An illicit relationship is generally concealed from public gaze and only a few are aware of such a fact. The people generally tend to suppress this fact to protect family honour for fear of societal disapproval. It is nearly impossible for the prosecution to collect direct evidence of an illicit relationship and therefore, it has to be rely upon statements of the witnesses. Illicit relationship is a very advanced stage of intimate relation as against the amity, socialism and talking with each other as a neighbour.

24. On analysis of the evidence, it is proved that the entire evidence available on the record on the said circumstances has only made out a sketchy outline of relationship between Mohd. Iqbal and Bhagyawanti. Nothing is established in respect of the fact of immoral relationship and it can safely be concluded that the evidence so produced is not sufficiently credible to raise inference

of an illicit relationship and we cannot hold that Bhagyawanti was leading an adulterous life with Iqbal.

25. There is no reference of grudge between deceased and Bhagyawanti or Iaqbal on account of their alleged relationship. The prosecution has taken no efforts to find and bring on record the nature of any dispute. The contents of deposition of above witnesses do not make any reference whatsoever to the alleged motive and statements of witnesses completely destroys the motive as alleged by the prosecution. It is against this backdrop, which creates doubt about trustworthy of witnesses. Even otherwise on the basis of contradiction, testimony of said witnesses do not inspire confidence. In our opinion, evidence produced by the prosecution in respect of illicit relationship undoubtedly creates doubt and in any case it cannot be relied upon to accept that both the respondents were having illicit relationship which is said to constitute motive of the alleged occurrence. This being so, in our opinion, the two circumstances namely, illicit relationship and motive cannot be said to have proved beyond reasonable doubt.

26. So far as next circumstances namely, Iqbal being entering into the house of Bhagyawanti prior to the incident and he being seen leaving the house of Bhagyawanti after the incident is concerned, the prosecution has relied upon the statements of Narottamdas (PW-10), Rustam Khan (PW-15) and Suresh Kumar (PW-5).

27. Narrotamdas (PW-10) has deposed in his statement that he went to watch a movie in the video parlour of Iqbal in the noon

show of the day of occurrence. On that day, he visited the video parlour for the first time. During the show, when he came out to urinate and went into a street, he saw Iqbal going to the house of Babulal.

28. Rustam Khan (PW-15) has deposed that he did not see Iqbal on the day of the incident. He went to see the film on the day of the incident but did not see Iqbal there. Later, when the police came at the video parlour, he saw Iqbal there.

29. Suresh Kumar (PW-5) has deposed that he had gone for some work in the Municipality building,. While returning back, he started to watch a poster which was pasted outside the video parlour. During that time, he saw Iqbal coming out of the house of Babulal. He does not know who lived in the house of Babulal. Thereafter, he went to his house and heard in the evening that an old lady had been killed.

30. An another aspect of the prosecution case is that the shirt worn by Iqbal also get stained with blood when he allegedly committed murder of Pyari Bai and that blood stained shirt was also recovered vide Memo (Ex-15) from the building of the parlour. Interestingly, witness Suresh Kumar (PW-5) does not depose the fact that when he saw Iqbal coming out of the house of Babulal, his shirt was stained with blood. On such a situation, the statement of Suresh Kumar (PW-5) proves to be completely unreliable which wash out the said circumstance. It is, thus, clear that prosecution cannot be said to have established last seen circumstance.

31. On the basis of above evidence, even if it is accepted that the respondent Iqbal was seen entering into and coming out of the house of Bhagyawanti, it is well established law that mere such act of Iqbal is a very weak circumstance and in itself, may not be taken to be sufficient to record conviction of the accused unless the entire chain of circumstance is established. This circumstance has to be linked with some evidence to show that there being last seen together, had any nexus with the homicidal death. Since, it is a very weak type of circumstance therefore, last seen together itself may not always be taken to be sufficient to record the conviction. Therefore, the fact that the respondent Iqbal was last seen entering into the house of Bhagyawanti does not lead to the irresistible inference of the guilt.

32. The next set of circumstances that were relied upon by the prosecution was various recoveries which includes recovery of blood stained shirt of Iqbal, recovery of blood stained clothes of Bhagyawanti, recovery of the blood stained cloth (Napkin) at the instance of Iqbal, recovery of blood mixed water, recovery of blood stained clothes of deceased which she were wearing at the time of her death. The prosecution has produced various witnesses, exhibited different documents and articles to prove the same.

33. The first witness of recovery is Sadar Khan (PW-20). It is deposed by him that the key of the video parlour used to remain with him which was taken by the SHO after the incident but the Police did not recover anything in his presence; he did not know when the parlour was opened by the police for the recovery purpose and he did not see Iqbal there at the time of recovery.

Bhopal Ram (PW-7) has stated that the police had not recovered any cloth (Napkin) from Iqbal in his presence; it is not known to him that where from the police got that cloth; no recovery was made even from Bhagyawanti and he had seen the cloth in the police station only.

34. Inda Ram (PW-3) and Teja Ram (PW-4) are witnesses related to recovery of shirt of accused Iqbal. The deposition of Inda Ram is to the effect that he had seen the recovered shirt at the police station; it is wrong to say that the shirt was taken out of a dry drain of a house next to the scene of incident in his presence. Witness Teja Ram (PW-4) was declared hostile and he stated that it has wrongly been narrated in the recovery memo that Iqbal got the shirt recovered from the open drain of the house next to the place of occurrence.

35. Recovery of blood stained cloth at the instance of Iqbal is (ExP-7) and recovery of blood mixed water in which culprits had allegedly washed their hands is (ExP-3). Both the Motbir to the said memo is Badri Narayan (PW-1) and Nirbhay Ram (PW-2) who have deposed that the police visited the place of occurrence in their presence; the old woman was lying dead; no water or cloth was taken into custody by the police in their presence.

36. It sounds very unnatural and also improbable that a person would leave the bucket of blood stained water lying openly in the house and do not pour that water down the drain from the scene of offence with a view to preserve it**.**

37. On the basis of above evidence produced by the prosecution, it is proved that testimonies of recovery witnesses do not inspire

confidence. It is against this backdrop, all the recoveries undoubtedly, create doubt about their genuineness and the contents thereof. In any case it cannot be relied upon to accept that all the recoveries were made in the presence of witnesses and in the manner as stated by the prosecution.

38. We find absolutely no fault with the findings recorded by the trial court in respect of all the recoveries and therefore hold that the recoveries of the articles have not been proved by the prosecution beyond reasonable doubt.

39. The law is well settled that recovery of articles cannot take place of substantive proof against the accused. If the evidence in the nature of recovery does not appear wholly satisfactory, the recoveries at the instance of the accused cannot carry prosecution case any further. In other words the recovery of blood stained shirt of Iqbal, recovery of blood stained cloth (Napkin) from Iqbal, recovery of blood stained clothes of Bhagyawanti, recovery of blood stained clothes of deceased and recovery of blood mixed water in a bucket itself could not sufficient to connect the accused with the murder of Pyari Bai by invoking Section 114 of the Indian Evidence Act.

40. In our opinion, merely because some blood stains on the clothes of the accused match with the blood group of the deceased, could also not help the prosecution to connect the accused with the murder of Pyari Bai in the absence of other substantive proof against them. No inference of guilt can be drawn against the respondents from the fact that the blood stains of the

blood group of the deceased were found on the clothes of the respondents.

41. The main links in the chain of circumstances are missing and, therefore, in our opinion, recoveries alone could not be sufficient to connect the accused with the murder of Pyari Bai.

42. We would now like to consider the last circumstance relied upon by the prosecution that is postmortem report. The prosecution wanted to establish that Pyari Bai died on account of homicidal violence but miserably failed to establish the said fact. It is unfortunate that the prosecution failed in its duty by not examining the doctor who prepared the P.M.R. and marking the PMR as exhibit by the doctor. We are at a loss to find as to why the prosecution did not examine the doctor, who conducted autopsy and issued postmortem report. Though sub-Section (4) of Section 293 of Criminal Procedure Code contemplates that the documents issued by the Government Scientific Expert enumerated under sub-Section (4) need not be examined and the documents can be marked but it does not contemplate production of postmortem reports without examining the doctor.

43. Section 294 of the Criminal Procedure Code though states that where any document is filed before any court by the prosecution it can be marked if the other side has no objection in its marking but contents can be proved only by producing its scribe. In the instant case, the PMR (ExP-22) has been exhibited by Investigating Officer Amarudeen (PW-22) which is of no use for the prosecution and contents of PMR as well as cause of death cannot be considered proved.

44. In this view of the matter, there is no evidence on record to show that Pyari Bai died on account of homicidal violence. In the absence of any medical evidence, we are unable to hold that the prosecution has proved its case under Section 302 of the Indian Penal Code. We, therefore hold that prosecution has miserably failed to establish the charge of murder against the respondents.

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

46. In the present case, it cannot be said that all the links in the chain are complete. Every links in the chain of circumstance relied upon by the prosecution has some or other infirmity and lacuna. Therefore, such evidence cannot be relied upon to base conviction.

47. In our opinion, the findings recorded and conclusion arrived at by the trial court are not found to be perverse. There is no strong and compelling reason to interfere with the order of acquittal made on proper appreciation of the evidence on record.

In such state of affairs, we hereby confirm the finding recorded by the trial court.

48. Resultantly, we dismiss the appeal against acquittal. The bail bonds, if any, executed under Section 390 of the Criminal Procedure Code stands canceled.

(RAJENDRA PRAKASH SONI),J **(VIJAY BISHNOI),J**

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