HIGH COURT OF MADHYA PRADESH : PRINCIPAL SEAT AT JABALPUR

(Division Bench : Hon'ble Shri Justice SUJOY PAUL & Hon'ble Shri Justice J.P.GUPTA)

Cr.A. No.2315/2008

Narbada
Vs.
The State of M.P.

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Shri Vishal Danieal, learned counsel for the appellant.

Shri Rahul Mishra, learned G.A for the respondent / State.

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J U D G M E N T

{08th November, 2017 }

Per J.P.Gupta, J :

This appeal has been filed assailing the judgment dated 23/09/2008 passed by the Additional Sessions Judge, Begumganj, District Raisen in Sessions Trial No.1/2003 whereby the appellant has been convicted under sections 376(1) and 302 of the I.P.C. and sentenced him to undergo R.I. for life along with fine of Rs.1000/- and R.I for life along with fine of Rs.1000/-; respectively with default

stipulation as mentioned in the impugned judgment.

2. The brief facts of the case are that on 23/11/2002 near about 5.30 pm in village Singpuri, Police Station Bamhori, District Raisen, deceased Pappi Bai, an unmarried daughter of Hari Singh, was found dead in her house and uncle of the deceased Hari Narayan (PW-4) informed to the police Bamhori about the fact of death of deceased stating that he was in his field and near about 5:30 pm Bablu @ Balkishan informed him that appellant/accused Narbada Prasad entered the house of Hari Singh and closed the door and deceased Pappi Bai was alone in the house. On this information he went to the house and found the deceased lying had already died. However, mother of the deceased Harkoowar Bai, her sister Shakun Bai (PW-5), Shardha Bai, sister-in-law of deceased, brother Inder Singh (PW-2) were present and told him that the appellant/accused along with co-accused Lakhan after getting out of the house fled away and it appeared that appellant/accused Narbada Prasad committed sexual assault on the deceased and on account of that act, she was died or killed by the accused and dead body of the deceased was lying in the house. This information was recorded as Marg No. 10/02 under section 174 of Cr.P.C on 23/11/2002 at about 9.00 pm as Ex.P-7. On 24/11/2002 inquest was conducted and the dead body was sent for medical examination to Dr. Devendra Sharma, Assistant Medical Officer Tehsil Silwani, District Raisen, who expressed his inability to perform post-

mortem of the dead body and referred to Medico Legal Institute Gandhi Medical College, Bhopal. Therefore, the dead body was sent to Gandhi Medical College, Bhopal, where on 25/11/2002 autopsy was conducted by Dr. C.S. Jain, Forensic Expert (PW-7), who opined that the death was taken place on account of strangulation and nature of the death was homicidal and her hymen was torn and virginal slide was taken and on microscopic examination of slide, spermetoja was found and visra was preserved and on toxicological examination, no poisonous substance was found and in this regard, reports Ex.P-11, Ex.P-13 and Ex.P-14 were prepared.

3. After getting report of Medico Legal Expert on 27/11/2002 at 6.30 PM, FIR was registered as Crime No. 90/2002 under section 376, 302 read with section 34 of IPC against the appellant and co-accused Lakhan. During the investigation, it was revealed that Shardha Bai saw the appellant entering into the house and closed the door from inside, in which, deceased was alone and co-accused Lakhan was standing out of the house and when Shakun Bai (PW-5) and Inder Singh (PW-2) returned from the field and entered the house they saw appellant/accused along with co-accused Lakhan running from the house after opening the door situated in southern side of the house and Inder Singh (PW-2) informed to Bablu @ Balkishan to call for Hari Narayan (PW-4). During the investigation on 28/11/2002, appellant/accused Narbada Prasad and co-accused Lakhan were arrested and arrest memos Ex.P-1

and Ex.P-2 were prepared by Investigating Officer R.K Dwivedi (PW-9). Accused persons were medically examined by Dr. Devendra Sharma (PW-3). As per the MLC Ex.P-5 and Ex.P-6, appellant/accused Narbada Prasad and co-accused Lakhan were found to be capable to perform sexual intercourse and no mark of injury was found on their body and slides of semen of accused persons were also prepared and handedover to the police, which were seized vide seizure memo Ex.P-10 by Investigating Officer Vishnu Prasad Verma (PW-6) and the same police officer also seized clothes of the deceased and slides of virginal swab handed over to Medico Legal Institute Bhopal vide seizure memo Ex.P-9.

4. On 28/11/2002 as per memo Ex.P-16 on the information given by appellant/accused Narbada Prasad, a nylon rope having length of 7.4 inches was seized from his house vide seizure memo Ex.P-17, which was sent for opinion to Medico Legal Institute Gandhi Medical College, Bhopal and Dr. C.S. Jain (PW-7) in his report Ex.P-12 opined that the ligature marks found on the body of the deceased might be caused from the seized rope and thereafter one underwear which was allegedly worn by appellant/accused on the date of incident was seized on which two spots of semen were present was seized vide seizure memo Ex.P-18 and all the seized articles were sent to FSL Sagar by the letter of S.P Raisen dated 20/12/2002 but no report of the examination was produced before the court during the trial.

5. After completion of other formalities of investigation, charge sheet was filed before the JMFC, Silwani, who committed the case to Session court and on transfer, the case was tried by the Additional Session Judge Begamganj, Raisen. The learned Trial court framed charges against the appellant/accused Narbada Prasad for offence punishable under sections 376 (1), 302 of IPC and against co-accused Lakhan under section 376(1)/109 and 302/109 of IPC and the accused persons abjured their guilt and claimed to be tried. Their defence was that they were innocent and falsely implicated only on the ground of suspicion. The deceased committed suicide on account of illicit relationship with son of one Nakedar and they had also produced Shankarlal (DW-1) and Misrilal (DW-2) in support of their version.

6. The learned trial court after trial acquitted co-accused Lakhan from the aforesaid charges and convicted and sentenced the appellant/accused under sections 376 (1), 302 of the IPC and sentenced him as mentioned earlier.

7. The learned trial court has based its finding mainly on the medical reports proved by Dr.C.S. Jain (PW-7) and statement of Investigating Officer, R.K Dwivedi (PW-9), Shakun Bai (PW-5) and Inder Singh (PW-2).

8. This appeal has been filed challenging the aforesaid findings of the conviction and sentence of the appellant/accused on the ground that the findings of the learned trial court are contrary to the facts and law and the appreciation of the evidence has not been done in

right perspective in accordance with the law. The statements of the prosecution witnesses putforth in support of the prosecution evidence have been accepted without considering all facts and circumstances of the case. The testimony of the witnesses are full of material contradictions and omissions and their conduct are also unnatural. No prudent man can believe that they are truthful witnesses and further submitted that the medical evidence available in the present case is not sufficient to hold definitely that the death of the deceased was homicidal. The circumstances also show that it may be a case of suicide and commission of rape with the deceased at the time of the incident is also not proved beyond the reasonable doubt. Mere presence of sperm on the virginal swab of the deceased is not sufficient to legally infer that the appellant/accused committed sexual intercourse with the deceased at the time of incident as no DNA report has been submitted with a view to prove the fact that spermetoja found on the vagina of the deceased was related to the appellant/accused. Other important witnesses Shardha Bai, Kanta Bai, Bablu @ Balkishan and Santosh who allegedly claimed to have seen the appellant/accused running from the house at the time of incident have not been produced in evidence without any reason. The testimonies of Shakun Bai (PW-5) and Inder Singh (PW-2) are also not believable on account of the fact that the door from which it is alleged that the appellant/accused fled away was not visible from the

place where the witnesses were entered in the house and allegedly claimed to have seen the appellant/accused running away at the time of incident.

9. Learned counsel for the appellant/accused contended that the role of the police is also very suspicious and malicious as investigation from the beginning to end was not fair. After getting information about the commission of the cognizable offence from the averment mentioned in the Marg Intimation Ex.P-7 no FIR was registered on the same day and no promptness was shown in getting report from autopsy surgeon before putrefaction of the dead body. Accused persons were taken in custody on the date of the incident without registering the offence against them and their formal arrest was shown after recording of the formal FIR. Even though copy of the FIR was not sent to the concerned Magistrate in compliance with the provision of section 157 of Cr.P.C and the statement of the witnesses have not been recorded without any reason with unusual delay with a view to introduce new facts of the incident and the report of DNA was not produced willfully as it was not in the favour of the prosecution.

10. In this case, at the time of the incident in the house other persons namely Shardha Bai and mother of the deceased Harkoowar Bai (who has expired) were present and the door of western side was opened for access of anybody, therefore, with certainty it cannot be said that the death of the deceased may not be caused by any other person except the appellant/accused. Thus, appeal

be allowed and appellant/accused be acquitted.

11. Learned G.A opposed the contention of learned counsel for the appellant and prayed that the findings of the learned trial court are based on the legal evidence, which is believable and proved the prosecution case beyond the reasonable doubt. No interference in the findings of the learned trial court is warranted. Hence the appeal be dismissed.

12. Having considering the contentions of learned counsel for the parties and on perusal of the record, for disposal of this appeal, following questions are to be considered:-

(1) Whether at the time of the incident before the death, the deceased was subjected to sexual assault;

(2) Whether the appellant/accused committed sexual assault on the deceased.

(3) Whether the death of the deceased was caused due to strangulation;

(4) Whether the appellant/accused caused the death of the deceased by strangulating her;

13. With regard to the question no.1 and 2 witnesses are the same, hence they are being dealt with simultaneously. Investigation Officer, R.K Dwivedi (PW-9) has stated that on 24/11/2002, he conducted inquest as per Ex.P-4 and at that time on around the neck of the deceased mark of rope was found and the private part was found wet through and no other mark of injury was found. As per the report no broken bangles were found at

the place of incident. The dead body of the deceased was sent to Tehsil Hospital Silwani, where Dr. Devendra Sharma (PW-3) expressed his inability to give correct opinion about the cause of the death and he has stated in his statement that *prima facie* he was unable to give opinion with regard to hanging or strangulation as it was first case of such nature and he was in dilemma and no character of strangulation was found by him, therefore, he referred the case to Medico Legal Institute Bhopal and Dr. C.K. Jain (PW-7) conducted autopsy as a Forensic Expert in Medico Legal Institute, Bhopal. He opined that on around the neck of the deceased, mark of strangulation over the thyroid cartilage, in oblique shape, having width of 0.6 cm was present and opening of the internal side deposition of blood was found situated below the mark and in his opinion, the cause of death was strangulation and the death was homicidal in nature. He also stated that on chemical examination of viscera, there was no presence of poisonous substance and the death had taken place during before 36-76 hours. He further submitted that at the time of conducting autopsy, slide of vaginal fluid was prepared and on microscopic examination spermatozoa was found in the fluid and prepared reports Ex.P-11, Ex.P-14 and the report with regard to conclusive opinion is Ex.P-13.

14. Dr. C.S. Jain, Forensic Expert (PW-7) has not opined in his statement before the court that at the time of the incident, sexual assault was committed with the

deceased. However this opinion has been given in the report Ex.P-13 stating that presence of spermatozoa suggestive of sexual intercourse but the report is not a substantial piece of evidence. Hence the opinion mentioned in the report cannot be considered. In such circumstances, there is no medical evidence with regard to commission of rape with the deceased soon before her death. Dr. C.S. Jain (PW-7) in his cross examination has admitted that he has not expressed any opinion with regard to period of tearing of the hymen. In such circumstances, there is no evidence on record that hymen was ruptured or torn at the time of incident or it was already torn before the date of incident.

15. The learned counsel for the appellant having placed reliance on a judgment of the Apex Court in the case of ***Krishna Kumar Malick Vs. State of Haryana (2011) 7 SCC 130*** ; has contented that merely showing presence of spermatozoa is not sufficient to hold that soon before the death, the deceased was subjected to sexual assault. Apart from it, report of the DNA is must, without the report of DNA, it cannot be said that the alleged sexual intercourse was committed by the accused/appellant. Paragraphs 43 and 44 of the aforesaid judgment are relevant in this regard, which are reproduced as under:-

> 43. With regard to the matching of the semen, we find it from Taylor's Principles and Practice of Medical Jurisprudence 2 Edn. (1965) as under:-
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> "Spermatozoa may retain vitality (or free motion) in the body of a woman

> for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months."

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant.

44. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of Crl. A. @S.L.P. (Crl.) No.8021 of 2009 cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences.

16. In the aforesaid circumstances, in this case it is not found to be proved beyond reasonable doubt that the deceased was subjected to sexual assault before her death or near about her death and there is also no evidence to come to a finding that the appellant/accused committed sexual assault with the deceased before or near about her death.

17. With regard to the question no.3 and 4, so far as the nature of the death and the cause of death are concerned, in view of the opinion of the Forensic Expert Dr. C.S. Jain (PW-7) there is no doubt that the death had taken place on account of the strangulation of the deceased and the nature of death was homicidal. However learned counsel for the appellant has placed reliance on the text book of ***Medical Jurisprudence and Toxicology of Modi 25th Edition*** and referred to page 508 and submitted that in view of the marks found on the neck of the body of the deceased, the possibility of suicidal death on account of hanging cannot be ruled out. But opinion of the medical expert by referring a text book at the time of argument cannot be challenged unless it is brought to the notice of medical expert. In this regard the Hon'ble Apex Court in the case of ***State of Madhya Pradesh Vs. Sanjay (AIR 2004 SC 2174)*** has observed that opinions of authors in text books may have persuasive value but cannot always be considered to be authoritatively binding. Such opinions cannot be elevated to or placed on higher pedestal than opinion of expert

examined in Court. The deceased alleged to be strangulated by accused holding accused guilty by trial court only by referring some text books on medical jurisprudence is not proper and further held that it is not satisfactory way of dealing with or disposing of the evidence of an expert examined in the case unless the passages which are sought to be relied to discredit his opinion are put to him and the Apex Court has placed reliance in this regard on the judgment in ***Sunderlal Vs. The State of Madhya Pradesh (AIR 1954 SC 28)*** and ***Bhagwan Das & anr Vs. State of Rajasthan (AIR 1957 SC 589)***

18. In view of aforesaid legal position the opinion of the medical expert cannot be superseded by the opinion of the Court only on the basis of text book referred to as the reasons given for opinion are *prima facie* plausible and also get strength from the scene of incident as there is nothing on record to suggest the fact that in the room in which the dead body of the deceased was found any material of hanging was noticed by anybody and in this regard no cross examination has been made on behalf of the appellant and no suggestion has been given to the witnesses. Hence the finding of the learned trial court with regard to the nature of the death of the deceased and cause of the death are affirmed.

19. Now the main question remains for further consideration is that whether appellant/accused is the person who strangulated the deceased and caused her

death.

20. In this regard, finding of the learned trial court is based mainly on the statement of Shakun Bai (PW-5) and Inder Singh (PW-2) as Chandrash Singh Yadav (PW-1) and Hari Narayan (PW-4) are hearsay witnesses as they reached on the spot later on.

21. Shakun Bai (PW-5) has stated that near about 3 PM, she went to the field along with his sister-in-law Kanti Bai for fetching grass and left his sister Pappi Bai and her mother Harkoowar Bai in the house. Then after about 2 hours, she came back alone to the house and saw co-accused Lakhan standing in front of the door of southern side of her house and after putting bundle of grass in the *tapra* situated towards western side of the house, she entered into the house from western door of the house and saw that appellant/accused Narbada Prasad was coming from the kitchen armed with the rope and went towards the door of southern side of the house and after opening the door, he ran away and co-accused Lakhan also ran away with the appellant/accused. His brother Inder Singh and mother Harkoowar Bai have seen the appellant/accused running away from the spot. Then she went to her kitchen where her sister deceased Pappi Bai was lying without movement and she found her dead. Thereafter, Hari Narayan came on the spot and informed to the police about the incident.

22. Inder Singh (PW-2) has stated that on the date of incident he was on the field and came back near about

5.30 pm. He resides separately near to the house where incident took place. He heard noises of weeping of her sister Shakun Bai then he came towards southern side of house of the incident and saw the appellant/accused along with co-accused Lakhan coming out of the house from southern door of the house and the appellant/accused was armed with rope. Then he entered into the house where her sister Shakun Bai (PW-5) and mother Harkoowar Bai were weeping and her sister Pappi Bai was lying in the kitchen, she had already died and on her neck marks of rope were present and then he called his uncle Hari Narayan (PW-4).

23. The testimony of Inder Singh (PW-2) is not credible and reliable. According to him, he noticed the incident on hearing the noise of weeping of her sister Shakun Bai (PW-2), who started weeping after seeing the deceased in dead condition. Till then appellant/accused and co-accused Lakhan had fled away as Shakun Bai (PW-2) has stated that when she entered into the house she saw the appellant/accused going towards the southern door coming out from the Kitchen and then the appellant/accused opened the door and fled away. She has also seen co-accused Lakhan, who was standing outside the house and then running away with him. Thereafter she went to the kitchen and found her sister Pappi Bai lying on the floor and then she started crying. In such circumstance, it is doubtful that Inder Singh (PW-2) could have got opportunity to see the appellant/accused

coming out from the house and running away from the spot. Apart from this, statement of Inder Singh (PW-2) is full of material contradictions with the previous statement Ex.D-2 given to the police and with the statement of Shakun Bai (PW-5) and Hari Narayan (PW-4). Inder Singh (PW-2) has not disclosed in his statement Ex.D-2 that he saw the appellant/accused and co-accused Lakhan coming out from the door situated in southern side of the house. He has stated in Ex.D-2 that he saw appellant/accused and co-accused Lakhan running away near the courtyard of Shukhnandan situated towards the south-west of the house while in the court he has claimed that he saw the appellant/accused and co-accused Lakhan coming out from the door situated in the southern side of the house. In the police statement Ex.D-2, it is also not mentioned that the appellant/accused was armed with rope at the time of running from the spot. Shakun Bai (PW-5) has not stated that she saw the co-accused Lakhan in the house and coming out of the house through the door situated in southern side of the house. She has categorically stated that at the time of coming from the field to the house, she saw co-accused Lakhan standing out of the house nearby southern door of the house.

24. Hari Narayan (PW-4) has stated that when he came on the spot, Shakun Bai and Inder Singh told him that the appellant/accused and co-accused Lakhan entered into the house and Shakun Bai saw them running from the room. He has not stated that Inder Singh told him that he

has seen the appellant/accused and co-accused Lakhan coming out from the southern door of the house. This is the reason the name of Inder Singh has not been mentioned as a witness of seeing the accused persons running away from the house in the 'marg' intimation Ex.P-7.

25. In view of the above discussion, the testimony of Inder Singh with regard to seeing the appellant/accused running away from the spot is not believable and is untrustworthy.

26. So far as statement of Shakun Bai (PW-5) is concerned, in her statement there is little exaggeration with regard to seeing the appellant/accused drawing rope over the neck of the deceased and running away with the rope as this statement has not been given to the police as it is not mentioned in her police statement Ex.D-4 but only on the aforesaid account, the testimony of the witness cannot be discarded as completely truthful witness is hardly available. In her testimony, except aforesaid infirmity there is nothing to discard her testimony.

27. On behalf of the learned counsel for the appellant, it is submitted that this witness is close relative and interested witness, hence her testimony cannot be relied upon. But this argument has no substance as the Hon'ble Apex Court in the case of ***Lala Ram Vs. State of Rajasthan (2007) 10 SCC 225*** has observed that there is no proposition in law that relatives are to be treated as

untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard. Hence this contention has no meaning as the facts and circumstances of the present case are also similar. On behalf of the appellant/accused also, no evidence has been led in support of the plea of partiality by the witnesses.

28. On behalf of learned counsel for the appellant, it is also contended that from the western door of the house, the door of southern side was not visible as admitted by witness Shakun Bai (PW-5) in her cross examination. Therefore, she was not in a position to see the appellant/accused running from the door of southern side. This submission has no substance as Shakun Bai (PW-5) has categorically stated that when she entered into the house then she saw the appellant/accused coming out from the kitchen and going towards the southern side door of the house. Therefore, there is no question of impossibility to see the appellant/accused going from the house by the witness.

29. Learned counsel for the appellant further submitted that Shakun Bai (PW-5) is also not reliable on account of unusual delay in recording her statement under section 161 of the Cr.P.C by the Investigating Officer. On perusal of the record, it is found that her police statement Ex.D-4 was recorded on 27/11/2002 while she was the star

witness of the incident. But merely on the aforesaid ground statement of the witness cannot be discarded and it is also found that in this regard, no explanation has been sought from the Investigating Officer R.K. Dwivedi (PW-9) during his cross examination. If specific question would have been put to the witness, he could have explained the reason of delay in recording of the statement. Hence only on the ground of delay, it cannot be held that the delay caused was deliberate to give the shape to the incident as per the desire of the prosecution.

30. Learned counsel for the appellant further assailed the credibility of entire prosecution case on the ground that 'Marg' report Ex.P-7 is a carbon copy, so it does not come under the purview of primary document,hence, the same is not admissible and cannot be considered as a part of evidence and in absence of it, the entire case becomes unbelievable. But this contention has no substance, Hon'ble Apex Court in the case of ***Prithi Chand Vs. State of Himachal Pradesh (AIR 1989 SC 702)*** has held that carbon copy made by one uniform process i.e. certificate of doctor given in discharge of his professional duty is admissible in evidence and falls within Explanation 2 of section 62 of Evidence Act. Apart from it, in the present case, no objection has been raised by the prosecution at the time of tendering of the said document in evidence. Hence no objection can be raised about the admissibility of the document in the appeal.

31. Learned counsel for the appellant further submitted

that in the present case, compliance of section 157 of Cr.P.C has also not been made. On perusal of the record, it cannot be said that copy of the FIR has not been sent to the concerned Magistrate as the same finds place in the record and it appears to be received on 29/11/2002 and no specific question has been put up to Investigating Officer R.K. Dwivedi (PW-9) with regard to the delay. In such circumstance, it cannot be said that the delay was caused deliberately in sending the copy of the FIR. Apart from it, in this case, the FIR has been recorded by Investigating Officer R.K. Dwivedi (PW-9) on the basis of result of inquest and 'marg' intimation Ex.P-7 was also recorded on the basis of information given by Hari Narayan (PW-4), who was not an eye witness of the incident. Therefore, in the facts and circumstances of the case, the delay in compliance with the provisions of section 157 of Cr.P.C has no significance on the credibility of the statement of Shakun Bai (PW-5). The Apex Court in the case of ***Munshi Prasad & ors Vs. State of Bihar (2002) 1 SCC 351*** has observed in **para 13 and 16**, which are relevant reproduced as under:-

> 13. In support of the appeal, a further submission has been made pertaining to the First Information Report (FIR). On this score the appellants contended that delayed receipt of the FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that Section 157 of the Code makes it obligatory on the Officer Incharge of the Police Station to send a report of the information received to a Magistrate forthwith, but that does not mean an imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice - if the Court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case. The decision of this Court in Shiv Ram and another v. State of U.P., [1998] 1 SCC 149 lends support to the observation as above.
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> 14. This Court further in State of Karnataka v. Moin Patel and others, AIR (1996) SC 3041 stated

> vis-a-vis the issue of delay in despatch of FIR as below:
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> 16."The matter can be viewed from another angle also. It has already been found by us that the prosecution case is that the FIR was promptly lodged at or about 1.30 AM and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in despatch of the FIR -and for that matter in receipt thereof by the Magistrate - would not make the prosecution case suspect for as has been pointed out by a three Judge Bench of this Court in Pala Singh v. State of Punjab, AIR (1972) SC 2679, the relevant provision contained in Section 157 Cr.P.C. regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under section 159 Cr.P.C. and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however, improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable".

32. In view of the aforesaid legal position, in the present case also as discussed earlier, the delay in sending the copy of the FIR to the Magistrate has no significant effect. Hence the contention of the learned counsel for the appellant is not beneficial for defence.

33. Learned counsel for the appellant further submitted that the investigation was not fair and in the case of heinous crime, Investigating officer has caused delay at every stage of the investigation and looking to the tainted investigation, no reliance can be placed on the prosecution case. Undoubtedly, in this case some lapses or delay in investigation *prima facie* appear as FIR has been recorded after completion of the inquest report while it ought to have been written at the same moment as averments of Marg intimation disclose the fact regarding commission of cognizable offence and statement of witnesses have not been recorded immediately and unusual delay has been caused while the accused persons were taken into custody on the same

day as stated by Inder Singh (PW-2) but their formal arrest has been shown after 5 days and DNA report has not been collected or submitted before the court. But merely on the ground of some lapse and negligence in the investigation, the evidence adduced before the court cannot be thrown out and it is duty of the court to scrutinize the evidence considering the lapse and negligence, and examine whether the said evidence is reliable or not or whether lapse affects the object of finding out the truth. In this regard, the Hon'ble Apex Court in the case of ***Hema Vs. State through Inspector of Police, Madras (2013) 10 SCC 192*** has made following observation in para 18, which is reproduced as under:-

> "18. It is clear that merely because of some defect in the investigation, lapse on the part of the I.O., it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the Court to scrutinize the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth."

34. In the light of the above principle, we have already considered the lapses and its effect on the statement of Shakun Bai (PW-5) and on the ground of the aforesaid lapse, and negligence of Investigating Officer, credibility of Shakun Bai (PW-5) cannot be impeached.

35. In this case, the prosecution has also placed reliance on the circumstance of seizure of Nylon rope on the instance of the appellant/accused and the learned trial court has also accepted the aforesaid circumstance to be established by the prosecution and also considered for

conviction of appellant/accused. But the circumstance of seizure of nylon rope on the instance of appellant/accused is not found to be proved beyond the reasonable doubt. In this regard, the statement of Investigating Officer R.K. Dwivedi (PW-9) is not credible and reliable. He has stated that on 28/11/2002, he arrested the appellant/accused and on the information given by him (Memo Ex.P-16), nylon rope was seized from the place shown by the appellant/accused near village Nulla under the tree of 'Kohe' hidden by keeping the stone and seizure memo Ex.P-18 was prepared before the witnesses but the witnesses of Ex.P-16 and Ex.P-18 have not been produced before the trial court and no explanation in this regard has been given. Inder Singh (PW-2), brother of deceased has categorically stated that on the date of incident on 23/11/2002 appellant/accused was taken into custody by the police in connection with the incident. Therefore, showing the arrest of appellant/accused on 28/11/2002 is false and in this regard statement of Investigating Officer is not reliable. The seized rope has not been produced before the court for identification by the relevant witnesses as Inder Singh (PW-2) has stated that the rope which was carried by the appellant/accused was taken by him from the place of the incident then it could have been identified by Shakun Bai (PW-5). Hence the seizure of nylon rope on the instance of appellant/accused cannot be said to be proved beyond the reasonable doubt as in this regard, statement of

Investigating Officer is not credible.

36. In the aforesaid circumstance, the opinion given by Forensic Expert Dr.C.S. Jain (PW-7) that by using the seized nylon rope, act of strangulation may be caused, cannot be considered to be a circumstance against the appellant to connect him with the crime.

37. Learned counsel for the appellant also submitted that in this case, the prosecution has not produced Shardha Bai as a witness while she was an important witness like Shakun Bai (PW-5) and other witnesses of the locality who might have seen the appellant/accused running from the place of the incident and only close relatives and interested witnesses have been produced. This conduct of the prosecution creates reasonable doubt on the credibility of the prosecution story. It is correct that in this case during the investigation, statement of Sharadha Bai was also recorded and she also disclosed to police that she saw the appellant/accused running from the place of incident but from the statement of other witnesses it appears that she had also reached the spot after Shakun Bai (PW-5) and Sharadha Bai saw the appellant/accused running in the street after coming out from the house. She is also close relative of the deceased being sister-in-law of Inder Singh (PW-2), therefore, it cannot be said that she might be more reliable in comparison of Shakun Bai (PW-5) and Inder Singh (PW-2) and she has been left because she could not support the prosecution version. Hence non-examination of her cannot impeach the

credibility of the prosecution.

38. So far other persons of the locality are concerned, during the investigation, presence of other person at the moment of the incident have not been established. Therefore, non production of other witnesses in evidence cannot be considered as an unfairness of the prosecution and on this basis, the statement of Shakun Bai (PW-5) cannot be held to be unreliable. In view of the aforesaid discussion, it is found to be proved that the appellant/accused was seen by Shakun Bai (PW-5) coming out from the kitchen and then running away from the southern door of the house and that time deceased Pappi Bai was found lying in dead condition.

39. Now the question is that whether the aforesaid circumstance is sufficient to hold that the appellant/accused is the only person who could have caused death of the deceased and by no stretch of imagination it cannot be said that the aforesaid act cannot be done by any other person as the case is based only on the circumstantial evidence. With regard to appreciation of circumstantial evidence, the Apex court has laid down certain principles in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116**, which are reproduced here as under :-

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned ‘must’ or ‘should’ and not

‘may be’ established;

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

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

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

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

40. Learned counsel for the appellant submitted that from the evidence of Shakun Bai (PW-5) and Inder Singh (PW-2), it is established that at the time of incident, Harkoowar Bai, mother of deceased and Shardha Bai, sister-in-law were present and the father of the deceased Hari Singh has not come in the picture of the affairs of

death of the deceased. There is no cogent evidence with regard to him that at what point of time, he went from the home to another village and when returned to the house. Shakun Bai (PW-5) had stated that her father had went to Village Saikhedha situated about 5-7 Km far. While in the police statement Ex.D-4 it is stated that on the date of the incident father, went to village Udaipura and in the statement of the court she had admitted that distance of village Udaipura is near about 30 to 40 Km. This contrary statement creates suspicion about non-availability of father Hari Singh. In other words, presence of father Hari Singh in the house cannot be ruled out and the western door was open. In such circumstance, it cannot be said that no other person except the appellant could have caused death of the deceased as other persons could have entered into the house and caused death of the deceased and other occupant of the house could have also caused death of the deceased. Hence, it cannot be said that presence of appellant/accused on the spot establishes the fact that no other person except the appellant/accused could have caused death of the deceased. The motive of the appellant to enter in the house may be different but his presence at the time of incident cannot be considered only for the purpose of causing death of the deceased. Hence in this case, considering all probabilities, it cannot be held that the conduct of the accused unerringly points towards the guilt of the accused.

41. Hence, in this case, considering the circumstance established by the prosecution and various possibilities and probabilities with all certainty it cannot be held that the circumstances show the act of the accused unerringly pointing out the guilt of the accused as the circumstance established in the case is not of conclusive nature, which can be considered to exclude other possible hypothesis except that the appellant/accused is the only preparator of the incident. In the present case, it cannot be said that the prosecution has established the chain of the evidence so completely 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 and not by anybody else. In view of the discussion, it is crystal clear that in this case another view is also plausible and involvement of other persons in place of the appellant/accused cannot be completely ruled out. Thus, the prosecution has failed to establish it's case beyond the reasonable doubt against the appellant/accused.

42. In the aforesaid circumstance, it cannot be held that the prosecution has succeeded to prove the fact that the appellant/accused committed death of the deceased by strangulation. Thus, it is held that the prosecution has failed to prove the charges against the appellant beyond the reasonable doubt. Hence this appeal is allowed and the findings of the trial court with regard to conviction and sentence of the appellant under section 376(1) and

302 of the IPC are set aside.

As the appellant is in jail, if he is not required in any other case, he be released forthwith.

A copy of this order be sent to the concerned trial court and jail authorities for necessary action.

(Sujoy Paul) (J.P Gupta)
Judge Judge

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