

**State and Others Vs. Ashok Kumar and Others**

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**Court :** Delhi

**Decided On :** Jan-10-1995

**Reported in :** ILR1995Delhi421

**Judge :** Arun B. Saharya and; M.S.A. Siddiqui, JJ.

**Acts :** Indian Penal Code (IPC) - Sections 34, 201 and 302; Code of Criminal Procedure (CrPC) - Sections 37, 43, 129, 313 and 357(1)

**Appeal No. :** Mur. Ref. No. 2 of 94 with Crl. A No. 213 and 240/1994

**Appellant :** State and Others

**Respondent :** Ashok Kumar and Others

**Advocate for Def. :** S.S. Gandhi, amices Curiae and ; P.S. Sharma, Standing Counsel

**Advocate for Pet/Ap. :** P.S. Sharma,; Rakesh Sehrawat,; Mukesh Kalia and;

**Judgement :**

**M.S.A. Siddiqui, J.**

1. The appellant/accused Ashok Kumar was convicted by the learned Additional Sessions Judge, Delhi under S. 302, IPC and was sentenced to death for the murder of Mahabir Singh (husband of thee appellant/accused Prem Kanwar). The

appellant Prem Kanwar was convicted by the learned Additional Sessions Judge, Delhi under S. 302/34, IPC and was sentenced to life imprisonment together with a fine of Rs. one lac or in default to undergo further rigorous imprisonment for a period of 3-1/2 years. Appellants have appealed against their convictions and sentences. The record is also before us for confirmation of the death sentence. The appeals and death reference are being disposed of by this common judgment.

2. The unfortunate incident, which resulted in the death of Mahabir Singh on the night intervening 29th and 30th December, 1987, was the culmination of the wrong and vicious path of love and lust between the deceased's widow Mst. Prem Kanwar (appellant) and the appellant Ashok Kumar. The prosecution case inter alia is that the appellant Ashok Kumar was promiscuous with the appellant Mst. Prem Kanwar. Both the appellants are residents of the village Assampur, Distt. Sikar (Rajasthan). Even, after the marriage of the appellant Prem Kanwar with the deceased Mahabir Singh, the appellant Ashok Kumar continued visiting the deceased's house. Over powered by adulterous lust and passions, the appellants fixed their minds upon liquidating the deceased.

3. It is the case of the prosecution that on 29th December, 1987 at about 11-20 p.m. the appellants along with the deceased Mahabir Singh and his two children came to Hotel Eagle, Katra Barian, Delhi. Appellant Ashok Kumar hired two rooms in the said Hotel under a pseudo name. He masqueraded himself as Vijay Kumar. Appellant Ashok Kumar occupied the Room No. 33 and the appellant Mst. Prem Kanwar along with her husband (deceased) occupied the room No. 30. The appellants murdered the deceased Mahabir Singh on the night intervening 29th and 30th December, 1987. On 30-12-1987 at about 11 a.m. the appellants left the Hotel Eagle leaving the dead body of the deceased locked in the room No. 30.

4. On 5-1-1988, at about 12-05 a.m. a telephonic information was received from Hotel Eagle at P.S. Haus Qazi to the effect that foul smell was coming out of the said room. On receipt of this information, S.I. Gurbax Singh (P.W. 39) along with Constable Satvir Singh arrived at the Hotel Eagle. The lock of the room No. 30 was broken open in the presence of the Hotel Manager Sunil Kumar (P.W. 12) and his father Hari Om (P.W. 14) S.I. Gurbax Singh found the decomposed dead body

of Mahabir Singh lying on the floor in a pool of blood. He recorded the statement (Ex. P.W. 9/C) of Sunil Kumar (P.W. 12) and made endorsement (Ex. P.W. 39/A) thereon and sent it to the P.S. Hauz Qazi for registration of the case under Ss. 302/201, IPC in consequence of which the case was registered at the said police station vide Ex. P-9/B.

5. S.I. Gurbax Singh (P.W. 39) prepared the inquest report (Ex. P.W. 39/B) and sent the dead body for post mortem examination. He seized the quilt with white cover having blood stains (Ex. P. 14), a tuft of human hair (Ex. P. 12), broken glass bangles, one broken glass (Ex. P. 18), one piece of stone (Red stone) having blood stains (Ex. P. 13), one piece of plastic string having blood stains (Ex. P. 13/A), one pair of goggles (Ex. P.W. 19), canvas shoes (Ex. P. 15/1-2) with brown socks (Ex. P.W. 16/1-2), a blanket (Ex. P. 23) and on Pyjama of the deceased (Ex. P. 17), from the room No. 30 of the said hotel vide seizure memo Ex. P.W. 12/D. He also seized the broken lock and a key along with its ring. He prepared the site plan (Ex. P.W. 29/C). Hotel register (Ex. P-20), Receipt book (Ex. P. 21), the challan form (Ex. P-22) and the notice (Ex. P.W. 27-A) signed by the appellant Ashok Kumar were also seized from the Hotel Manager Sunil Kumar (P.W. 12) vide Seizure Memo (Ex. P.W. 39/D).

6. On 7-1-1988, Dr. L. T. Ramani (P.W. 28) performed the post mortem examination and found rounded punctured hole of 1 c.m. diameter with abrasion around 2 cm x 2 cm area on the left temporal region, 2 cms. in front of triagus of ear. On internal examination, he found blood clots in the scalp over left temporal and right temporal and right occipito-parietal region. There was depressed area of scalp involving left temporal and adjoining left parietal bones over an area of 9 cms. x 7 cms. The depressed portion further showed multiple fragmented fractures driven into cranium. Meninges were intact, brain was lacerated under the depressed fracture and there was generalized subdural haemorrhage. Base of the skull showed fracture of interior cranial fossa and fishered fracture of the orbital plate vide report Ex. P.W. 28-A. Dr. L. T. Ramani (P.W. 28) opined that the deceased's death was caused on account of cranio-cerebral injury. When shown the piece of stone (Ex. P.W. 13) seized from the room No. 30 he stated that the said injury could be caused by that weapon.

7. Turning now to the movements of the appellants. It is the case of the prosecution that on 30-12-1987, the appellants left Delhi for Jaipur and on the same day at about 7 p.m. they stayed in Hotel Sital, Jaipur and left the Hotel on 1-1-1988 at about 1-10 p.m. Thereafter, the appellants went to village Kotputli, Distt. Jaipur (Rajasthan) and stayed in Ram Bhawan Dharamshala from 2-1-1988 to 4-1-1988 vide entries in the register of the said Dharamshala Ex. P.W. 17/A to Ex. P.W. 17/C. The appellant Ashok Kumar stayed in the said Dharamshala under a pseudo name. He masqueraded himself as Om Prakash Sharma s/o Satya Narain Sharma. Hardawari Lal (P.W. 17) the manager of Shri Ram Bhawan Dharamshala, Kotputli, had made entries in the Dharamshala register to show that the appellant had entered the Dharamshala on 2-1-1988 and left it on 4-1-1988. Thereafter, the appellants were located at Ahmedabad on 12-1-1988. According to the prosecution case, on 12-1-1988 the appellant Ashok Kumar was apprehended near the Santoshi Mata Temple, Ahmedabad and the appellant Prem Kanwar was arrested from a house on the showing of the appellant Ashok Kumar. Both the appellants were arrested under S. 41(A) Cr.P.C. Information regarding the appellants' arrest was conveyed to the Delhi Police on wireless. On receipt of the said information, a police party consisting of S.I. Gurbax Singh (P.W. 39), A.S.I. Kartar Singh (P.W. 25), Lady Head Constable Bimla Devi (P.W. 7), Constable Prakash Chand and Constable Attar Singh proceeded to Ahmedabad and brought the appellants to Delhi.

8. On 17-1-1988, S.I. Gurbax Singh (P.W. 39) seized eight glass bangles (Ex. P.W. 1/1-8) from the possession of the appellant Prem Kanwar. A tuft of hairs of the appellant Prem Kanwar was also seized vide seizure memo Ex. P.W. 2/A. S. I. Gurbax Singh (P.W. 39) also seized the pant (Ex. P.W. 25) and the shirt (Ex. P.W. 21) from the appellant Ashok Kumar vide seizure memo (Ex. P.W. 39/H). Specimen of the appellant Ashok Kumar's handwritings (Ex. P. 25/A to Ex. P.W. 30/B) was also obtained and seized vide seizure memo (Ex. P.W. 39/J).

9. On 21-1-1988, Shri Rakesh Garg (P.W. 28) Metropolitan Magistrate, New Delhi, conducted the identification test parade. Appellant Ashok Kumar declined to participate in the identification proceedings. However, the appellant Prem Kanwar was correctly identified by one Dilip vide memo of identification Ex. P.W. 26/B. The

stone piece (Ex. P.W. 13), cloths seized from the dead body and the pant (Ex. P.W. 25) of the appellant Ashok Kumar were sent to forensic expert and the Chemical examiner's report (Ex. P.W. 39/N) discloses that they were found to be stained with human blood of 'B' group which corresponded to the blood group of the deceased. After completion of the investigation the charge sheet was laid.

10. At the trial in the court of sessions, the appellants abjured their guilt. Appellant Prem Kanwar has stated in her examination under S. 313, Cr.P.C. that on 29-12-1987 at about 11 a.m., she accompanied by her husband Mahabir Singh (deceased), two children and the appellant Ashok Kumar came to Hotel Eagle and with the help of guide Bajrangi Lal (P.W. 27) two rooms were got booked in that hotel. She has also admitted that on the fateful night she along with her husband had slept in one of the rooms and the other room had been occupied by the appellant Ashok Kumar. According to her, early in the morning she went out to attend the call of nature in the general lavatory and on her return she found the appellant, Ashok Kumar in that room. At that time, her husband body was covered with a bed sheet. Suspecting some foul play, she removed the bed sheet and noticed blood on his body. On being questioned by her as to why he had inflicted injury to her husband, the appellant Ashok Kumar threatened her with dire consequences if she did not keep quiet. Thereafter the appellant Ashok Kumar administered some drug to her as a result whereof she completely lost balance of her mind. Taking advantage of her perplexed condition, the appellant Ashok Kumar had forced her to accompany him from one place to another. Ultimately, the appellant Ashok Kumar took her to Ahmedabad and there at her request, he left her at the house of her uncle to whom she had narrated the whole incident.

11. The learned Additional Sessions Judge after a protracted trial held that the deceased Mahabir Singh met with homicidal death; that the appellant Ashok Kumar was promiscuous with the appellant Prem Kanwar; that the deceased Mahabir Singh was an obstacle in the smooth and unbridled running of their extra marital affairs and they had clear motive to eliminate the deceased Mahabir Singh; that the appellants had lured the deceased Mahabir Singh and took him to Hotel Eagle, Delhi and eventually succeeded in causing his death in the room No. 30 of the said hotel on the night intervening 29th and 30th December, 1987; that having

accomplished the object of eliminating the deceased, the appellants decamped from the hotel on the next day. He also held that on 29th December, 1987, the appellant Ashok Kumar had booked the room Nos. 30 and 33 of the Hotel Eagle, Delhi and stayed there under an assumed name or a pseudo name. He also felt that this was a case of cold blooded and sordid murder committed for the sake of adulterous lust. That being the case, the learned Judge held that the appellant Ashok Kumar deserved to be awarded the highest sentence laid down under S. 302, IPC. Consequently, he convicted and sentenced the appellant Ashok Kumar to be hanged. He convicted and sentenced the appellant Prem Kanwar to life imprisonment together with a fine of Rs. one lac or in, default of payment of fine to undergo further rigorous imprisonment for three and half years.

12. The case of the prosecution solely rests upon circumstantial evidence. The principle relating to appreciation and evaluation of circumstantial evidence are well settled. In the first place, each of the circumstances on which the prosecution relies must be affirmatively established. In the second place, these circumstances considered in their totality must be consistent and consistent only with the guilt of the accused. In the third place; the circumstances must be incompatible with the hypothesis of the innocence of the accused. The cases in which these principles have been enunciated are legends and it is enough to cite the decision of the Apex Court rendered in *Sharad Birdhichand Sarda v. State of Maharashtra*, : 1984 CriLJ1738 . Five golden principal relating to the appreciation of circumstantial evidence which have so aptly been described as the panchshil of circumstantial evidence have been propounded by the Apex Court.

The five principals are :-

(a) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances 'must' or 'should' and not 'may' be established;

(b) 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 explained on any other hypothesis except that the accused is guilty;

(c) The circumstances should be of a conclusive nature and tendency;

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

(e) there must be 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.

13. Learned counsel for the appellants contended that the circumstantial evidence in this case did not measure up to the requisite standard of proof so as to conform to the rigorous requirements justifying a finding of guilt. We may mention here that while considering the question whether the circumstantial evidence is inconsistent with the innocence of the accused the standard to be adopted must be reasonable and not fantastic. As observed by the Apex Court, evidence 'must be qualitative such that on every reasonable hypothesis the conclusion must be that the accused is guilty; not fantastic possibilities not freak inferences but rational deductions which reasonable mind makes from the probative force of fact and circumstances.' (Mohan Lal Pangasa v. State of U.P., : 1974 CriLJ800 , K. M. Shalka v. State of Maharashtra, : [1974]1SCR266 .

14. Bearing in mind the above principles of law enunciated by the Apex Court, we shall scrutinize scrupulously and examine carefully the circumstances appearing in this case against the appellants.

15. Before we deal with the circumstantial evidence led in this case, the first question for our consideration is whether the deceased Mahabir Singh met with homicidal death. It is evident from the evidence of the hotel manager Sunil Kumar (P.W. 12), Hari Om (P.W. 14) Inspector Ram Singh Chauhan (P.W. 18), Ram kumar (P.W. 23), Bajrangi Lal (P.W. 27), and SI Gurbax Singh (P.W. 39) that on 5-1-1988, the decomposed dead body of the deceased Mahabir Singh was found lying in a pool of blood in room No. 30 of the Hotel Eagle, Katra Barian, Frash Khana, Delhi. It has also come in the evidence of Ram Kumar (P.W. 37) that on 8-1-1988 he had identified the deal body of the deceased Mahabir Singh. We have it from the lips of SI Gurbax Singh (P.W. 39) that there was a wound on the left ear

pit of deceased. The evidence of SI Gurbax Singh (P.W. 39) finds ample corroboration from the inquest report (Ex. P.W. 39/B) prepared on the spot.

16. SI Gurbax Singh (P.W. 39) further testified that he had sent the dead body for post mortem examination, Dr. L. T. Ramani (P.W. 28) testified that on 7-1-1988, he conducted the post mortem examination and found a rounded punctured hole of 1 cm diameter with abrasion around 2cm x 2cm area on the left temporal region, 2 cm in front of tragus of ear. Dr. L. T. Ramani (P.W. 28) opined that the deceased's death was caused on account of cranio-cerebral injury post-mortem report (Ex. P.W. 28/A). On these aspects there is no dispute also and hence we do not propose to consider these aspects in detail. The appellants disputed their involvement in the alleged incident. Learned Sessions, Judge has believed the evidence of the said witness, and in our opinion, rightly held that the deceased Mahabir Singh met with homicidal death on the night in question.

17. The next and the most pertinent question that falls for determination is whether the prosecution has been able to prove conclusively that appellants were the authors of the crime; in other words, whether the convictions recorded by the learned trial Court can be sustained or not.

18. To bring home the accusation leveled against the appellants, the prosecution has examined 39 witnesses.

19. The first circumstance against the appellants is their movements and conduct prior to the commission of the alleged offense. The testimony of Praduman Kumar Sharma (P.W. 33) is very important. He deposed that on 27-12-1987 at about 10.30 p.m. the appellant Ashok Sharma accompanied by one lady, two children and one male person, came to his house and expressed his desire to stay in his house. According to this witness, the appellant Ashok Kumar and his companions stayed overnight in his house and left his house next day early in the morning disclosing his next destination.

20. The second circumstances, which incriminates the appellants is that on 29th December, 1987, Ashok Kumar booked two rooms in the Hotel Eagle, Delhi under a pseudo name and stayed over night in room No. 33 of the said hotel and the

appellant Mst. Prem Kanwar along with her deceased husband stayed in room No. 30. Guide Bajrangi Lal (P.W. 27) testified that on 29-12-1987 at about 11 or 11.30 p.m. the appellants along with the deceased Mahabir Singh and his two children met him near Bharat Hotel. According to this witness, the appellant Ashok Kumar masqueraded himself as Vijay Kumar. It is evident that the appellant Ashok Kumar himself must have invented this name. Bajrangi Lal (P.W. 27) testified that the appellant Ashok Kumar told him that he wanted to book a room in a hotel having three beds. His evidence further shows that he proposed that he could arrange one room having a double bed and the other a single bed a brought them to the Hotel Eagle, Katra Barian, Delhi and got the rooms Nos. 30 and 33 booked in the said hotel. It is also evident from the evidence of Bajrangi Lal (P.W. 27) that the appellant Ashok Kumar had paid Rs. 200/- as advance which he deposited with the hotel manager Sunil Kumar (P.W. 12) and issued receipt (Ex. P.W. 12/B); that the appellant Ashok Kumar had signed the notice (Ex. P.W. 27-A) as Vijay Kumar and that the appellant Ashok Kumar had also signed the hotel register (Ex. P.W. 12/A) as Vijay Kumar. His testimony also finds ample corroboration from the testimony of the hotel manager Sunil Kumar (P.W. 12) and the documentary evidence mentioned above. In addition to this, there is the evidence of Shri T. R. Mehra (P.W. 30), Sr. Scientific Officer, Documents-cum-Asstt. Chemical Examiner, Govt. of India to the effect that on comparison of the writings and signatures of the appellant Ashok Kumar on the aforesaid documents, he come to the conclusion that the hand writing in the specimen writings and the notice (Ex. P.W. 27/A) and the hotel register (Ex. P.W. 12/A) is of the appellant Ashok Kumar. Learned Sessions Judge has believed the evidence of the said witness and we are not inclined to take a different view. Thus, the evidence of the said witness clearly proves that on 29-12-1987 at about 11 p.m. the appellants along with the deceased Mahabir Singh and his two children came at the Hotel Eagle and the appellant Ashok Kumar booked rooms Nos. 30 and 33 under a pseudo name of Vijay kumar. It is evident that the appellant Ashok Kumar himself had invented this name to conceal his identity. It is also evident from the evidence of SI Jai Bhagwan (P.W. 21) that he had verified the address given by the appellant Ashok Kumar and recorded in the register of the Hotel Eagle (Ex. P.W. 12/A) and the same was found to be false. It follows that the appellant Ashok Kumar had

deliberately given false address to the hotel manager. This spells put his guilty conscience. It appears that the appellants Ashok Kumar was interested in keeping his identity concealed as he had a nefarious design in his mind. He seems to have felt that the precautions, which he had taken in mentioning a pseudo name on the paper would be sufficient for screening himself from the offence.

21. It is pertinent to note here that the appellant Mst. Prem Kanwar has admitted in her examination under Section 313 Cr.P.C. that on 29-12-1987 at about 11 p.m. she accompanied by her husband Mahabir Singh, her two children and the appellant Ashok Kumar came to the Hotel Eagle and with the help of guide Bajrangi Lal (P.W. 27) two rooms were got booked in that hotel. She has also admitted that on the fateful night she along with her husband had slept in one of the rooms and the other room had been occupied by the appellant Ashok Kumar. She has further added that on the next morning she found her husband lying injured in that room.

22. The third circumstances against the appellants is that on the night in question, the deceased Mahabir Singh was last seen alive in the company of the appellants. It is evident from the evidence of the hotel manager Sunil Kumar (P.W. 12), Waiter Ram Kumar (P.W. 23) and the Guide Bajrangi Lal (P.W. 27) that on 29-12-1987 at about 11 O' clock, the appellants along with the deceased Mahabir Singh came at the Hotel Eagle and stayed there. It is also evident from the evidence of Sunil Kumar (P.W. 12), Hari Om (P.W. 14), Inspector Ram Singh Chauhan (P.W. 18), Ram Kumar (P.W. 23), and SI Gurbax Singh (P.W. 39) that on 5-1-1988, the dead body of the deceased Mahabir Singh was recovered from the room No. 30 of the said hotel.

23. The fourth circumstances against the appellants is their disappearance from the hotel soon after the death of the deceased Mahabir Singh. At the outset, we may mention here that we are aware that absconding by itself is not conclusive of either guilt or guilty conscience, (Rahman v. State of U.P. AIR 1972 SC 110 : 1972 Cri LJ 23, and that the conduct which destroys the presumption of innocence of an accused person can alone be considered against him. (Anant Chintam Lagu v. State of Bombay, 0043/1959 : 1960 CriLJ682 . As demonstrated earlier, on 29-12-

87 at about 11 p.m. the appellants along with the deceased Mahabir Singh and his two children came at the Hotel Eagle and the appellant Ashok Kumar booked the rooms Nos. 30 and 33 and stayed in the hotel under a pseudo name. We have from the lips of the hotel waiter Ram Kumar (P.W. 23) that on 30-12-1987 at about 9 a.m. he had served the tea to the appellants. Hotel Manager Sunil Kumar (P.W. 12) deposed that after occupying the rooms Nos. 30 and 33 the appellants had returned locks of these rooms to him through the waiter Govinda on the ground that they will put up their own locks in the rooms. Sunil Kumar (P.W. 12) further testified that on 30-12-1987, at about 11 a.m. he had seen the appellants with two children leaving the hotel and thereafter they were not seen in the hotel. Nothing has been elicited in the cross-examination of the said witnesses to shake their testimony on the said facts. Both the witnesses have been believed by the learned Sessions Judge and we see no reason to differ with the learned Judge on this count. Thus the evidence of Ram Kumar (P.W. 23) and Sunil Kumar (P.W. 12) clearly proves that on 30-12-1987, the appellants had absconded from hotel around 11 a.m. In her examination under Section 313 Cr.P.C. the appellant Mst. Prem Kumar has stated that on the next morning, he found her husband (deceased) lying injured in the room and at that time the appellant Ashok Kumar was also there. According to her, on being questioned as to why he had inflicted injury to her husband, the appellant Ashok Kumar had threatened her with dire consequences if she did not keep quiet. She further added that the appellant Ashok Kumar had administered some drug to her as a result whereof she completely lost balance of her mind and that the appellant Ashok Kumar had coerced her to accompany him from place to place. It seems that soon after the death of Mahabir Singh the appellants decided to abscond from the scene of occurrence. In these circumstances, the appellants' disappearance from the Hotel Eagle after the death of the deceased assumes significance and the said conduct of the appellants smacks of their guilty conscience.

24. The fifth circumstance against the appellants is their subsequent conduct and movements which were extremely strange and unnatural. It has come in the evidence of Shiv Prasad Yadav (P.W. 29), manager of the Hotel Sital, Jaipur City, that on 30-12-1987, both the appellants had come to the said hotel and stayed in room No. 136 till 1-1-1988. His evidence further shows that the appellant Ashok

kumar had himself made the entries in the hotel register (Ex. P.W. 22/B). On this point, his testimony has been left unchallenged by the appellants. There is not even a whisper of a suggestion in the cross examination of this witness that on 30-12-1987 neither the appellants had stayed in hotel nor the appellant Ashok Kumar had made any entry in the hotel register (Ex. P.W. 22/B). Thus the unchallenged testimony of Shiv Prasad Yadav (P.W. 29) clearly proves that on 30-12-1987 at about 7 p.m. the appellants occupied the room No. 136 of the Hotel Sital Jaipur City and stayed there till 1-1-1988. Shri Prasad Yadav (P.W. 29) further testified that on 1-1-1988, the appellants had checked out at about 1.10 p.m. Evidently, the appellant Mst. Prem Kanwar was hand in glove with the appellant Ashok Kumar. She would not agree to go and stay with the appellant Ashok kumar unless she was in terms of illicit intimacy with him. The subsequent conduct of the appellants is also a definite pointer to their culpability, totally inconsistent with their innocence. It is a painful circumstance in connection with the foul wrong which clearly shows that the appellant Ashok Kumar was promiscuous with the appellant Prem Kanwar. And it aggravates the wickedness of the appellants conduct that after committing the murder of the deceased Mahabir Singh, they were moving like husband and wife.

25. The prosecution has examined Hardawari Lal (P.W. 17) to prove that on 2-1-1988 the appellants along with two children had checked in Shri Ram Bhavan Dharamshala, Kotputli (Rajasthan) and stayed in room No. 24 till 4-1-1988, and that the appellant Ashok Kumar had stayed in the said Dharamshala under a pseudo name vide entries made in the Dharamshala register (Ex. P.W. 17/A). Hardawari Lal (P.W. 17) is the manager of Shri Ram Bhavan Dharamshala of Kotputli (Rajasthan). He deposed that on 2-1-1988, one male person, along with one female and two children had stayed in room No. 24 of the said Dharamshala and the male person had disclosed his name as Om Prakash s/o Satya Narainji, Caste Sharma, r/o Dabla, Distt. Sikar (Rajasthan) vide entries in the register (Ex. P.W. 17/A), but he failed to identify the appellants in the dock. He has been declared hostile by the prosecution and he has emphatically denied the suggestion that the appellants had stayed in the said Dharamshala from 2-1-1988 to 4-1-1988. Consequently, his testimony does not help the prosecution case.

26. The sixth circumstance against the appellant is their arrest by the Ahmedabad police on 12-1-1988. Head constable Raj William Chavan (P.W. 32) deposed that on 12-1-1988, he was posted in Police Station Sahibad, Ahmedabad (Gujarat). According to this witness, on 12-1-1988, he was deputed by the charge officer to investigate the report received from a traffic constable about arrest of a person involved in a murder case of Delhi. On receipt of this information, he accompanied by two police constable proceeded to the Santoshi Mata Temple, Sahibad. He testified that the appellant Ashok Kumar was apprehended near the said temple. He further testified that the appellant Ashok Kumar was interrogated about the appellant Prem Kanwar and on his showing the appellant Prem Kanwar was arrested from a house which was at a distance less than 1/2 k.m. from the said temple. The appellant Mst. Prem Kanwar, in her examination under Section 313 Cr.P.C. has admitted her arrest by the Ahmedabad police on 12-1-1988. Head Constable Raj William Chavan (P.W. 32) further testified that after arresting the appellants, he flashed a wireless message (Ex. P.W. 32/D) to the Delhi Police about their arrest. He also added that on receipt of the said wireless message Delhi Police came to Ahmedabad and thereafter the appellants were handed over to them. On the point, his testimony finds ample corroboration from the evidence of SI Gurbax Singh (P.W. 39), who had brought the appellants to Delhi.

27. The Seventh circumstances against the appellant Ashok Kumar is the recovery of the blood stained pant from his possession. It is evident from the evidence of the Investigating Officer SI Gurbax Singh (P.W. 39) that the pant (Ex. P.W. 25) was seized from the appellant's possession vide seizure memo (Ex. P.W. 30/H). His evidence further shows that the same pant was sent to the CFSL for Chemical examination. It has come in the evidence of Dr. L. T. Ramani (P.W. 28) and the SI Gurbax Singh (P.W. 39) that sample of the deceased's blood was taken and the same was also seized by the SI Gurbax Singh (P.W. 39) vide seizure memo (Ex. P.W. 10/A). Evidence of SI Gurbax Singh (P.W. 39) further shows that the sample of the deceased's blood was also sent to the CFSL for Chemical examination. The Chemical examination and the Serologist found the pant (Ex. P.W. 25) of the appellant Ashok Kumar to be stained with human blood of 'B' group which corresponded to the blood group of the deceased Mahabir Singh vide reports Ex. P.W. 39/N and Ex. P.W. 39/Q. Report of the Serologist (Ex. P.W. 39/N) further

shows that blood stains of 'B' group were also found on the piece of stone (Ex. P.W. 13), which is the weapon of the alleged offense.

28. The eighth circumstance against the appellants is that they had ample opportunity to carry out the design of liquidating the deceased Mahabir Singh. The circumstances discussed above clearly indicate that the ill-starred Mahabir Singh was lured to death by the appellants. The object, therefore in bringing him to Delhi and getting him stayed in room No. 30 of the Hotel Eagle was to provide them with an opportunity of carrying out their plan of liquidating him.

29. The ninth circumstance against the appellants is that they had motive to commit the murder of the deceased Mahabir Singh. It may be remarked here that it is not always easy to prove the motive of the crime. Often the motive is locked up in the heart of the offender. However, in the instant case, the appellants suspicious movements and strange conduct after the alleged occurrence clearly indicate that the appellant Ashok Kumar was promiscuous with the appellant Mst. Prem Kanwar and this gives us the clue to find out the motive, which prompted them to commit this ghastly deed. The appellants object evidently was to remove the obstacle in the smooth and unbridled running of their clandestine relationship. It obviously was not possible, while the deceased Mahabir Singh was alive. The appellants therefore, must have resorted to the extreme step of getting rid of the deceased Mahabir Singh with a view to remove the thorn from their wrong and vicious path of love and lust.

30. The tenth circumstance against the appellant Ashok Kumar is that he has offered no Explanationn about the incriminating circumstances proved against him. It is pertinent to note here that when an accused is examined under Section 313 of the Criminal Procedure Code it is done for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and not because a prime facie case has been made out against him. The answers that he gives to the questions are to be taken into consideration along with the prosecution evidence and then it is to be decided whether the prosecution has succeeded in bringing home the guilt to the accused. The law is that the accused is only asked to explain the adverse circumstances he is not required to prove his innocence. In

the present case, the appellant Ashok Kumar has offered no Explanation in his examination under Section 313 Cr.P.C. about the incriminating circumstances proved against him. Learned counsel for the appellant Ashok Kumar has submitted that an accused is not bound to give any Explanation at all, that relying upon the law (that circumstantial evidence must be consistent only with the guilt of the accused and must not be consistent with any other rational Explanation indicating innocence of the accused) he may not open his mouth because of the evidence being consistent with the guilt of somebody else, that the fact that he does not open his mouth cannot be used against him and that it is the duty of the Court to invent possible Explanation. These submissions, in our opinion, tend to an unwarranted extreme.

31. The law is that circumstantial evidence must be inconsistent with every rational hypothesis of innocence of the accused. It is not required to be inconsistent with every imaginable or conceivable hypothesis of innocence. Were it so, no conviction would at all be possible on circumstantial evidence. It is always possible to imagine facts consistent with the innocence of the accused. Even in a case where there is direct evidence against the accused, it is possible to imagine that the evidence adduced by the prosecution is false and in the case of circumstantial evidence. The scope for this imagination is even greater because not only can the witnesses who depose about the circumstantial facts be imagined to be false but also it can be imagined that some body else committed the offense and fabricated the circumstantial evidence against the accused.

32. In this connection we may usefully excerpt the following observations of Kenny, he states that :-

'The rule of criminal law that the prosecution must make out its case is not, of course, confined to cases of bigamy; for in all criminal charges the prisoner is entitled to plead not guilty and, if he wishes, to offer no evidence, but to submit merely that the evidence of the prosecution is not sufficient. However, in certain special circumstances to be described below the judge may direct the jury that the prosecution have done enough to make it possible (although not obligatory) for them to convict unless the prisoner offers, even by unworn statement, some

Explanationn. If he remains silent and leave this hostile testimony unexplained, his silence can be regarded as sufficient to justify his conviction .....'

(Quoted from Kenny's Outlines of Criminal Law - 19th Edition page 458.)

On page 464 he includes the accused's false statement and his silence among the principal forms of circumstantial evidence. In Mangal Singh's case AIR 1937 Lah 127 : 38 Cri LJ 472, it was held that the want of Explanationn of a very suspicious circumstances is itself circumstantial evidence. It has also been held by the Apex Court in Mohan Lal v. State of U.P., : 1974 CriLJ800 that falsity of the accused's plea is itself a circumstances and the same can be taken into consideration if there are other completing materials bringing home the guilt to the accused.

33. From the above discussion of the law, it emerges that if the inference of guilt from the proved facts is as much a natural or probable hypothesis as any other, the onus of offering an Explanationn for the incriminating facts lies upon the accused. If he does not offer any Explanationn, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him. In the present case, the appellant Ashok Kumar has not offered any Explanationn consistent with innocence regarding the incriminating facts proved against him and that by itself is a circumstantial fact against him.

The last circumstances against the appellant Mst. Prem Kanwar is the falsity of the plea put forward by her in the course of her statement recorded under Section 313 Cr.P.C. We are well aware of the fact that a false defense is no substitute of proof, which the prosecution has to establish. It has been pointed by the Apex Court in Shankarlal v. State of Maharashtra, : 1981 CriLJ325 . Even so, that decision itself had indicated that such false plea could be considered as an additional circumstances, if other circumstances point unfailingly to the guilt of the accused. (See also Mohanlal v. State of U.P., : 1974 CriLJ800 .

34. It is pertinent to note here that the appellant Mst. Prem Kanwar has stated in her examination under Section 313 Cr.P.C. that :-

'I and my husband along with my children had come to Delhi. Co-accused Ashok accompanied by husband. We stayed in a Hotel. Our room was separate where my husband, myself and my children stayed, Co-accused Ashok stayed separately in another room. On the fateful night I slept along with my children in our room. My husband also slept in that very room. While I was asleep, my husband might have gone out. I re-collect that he came back drunk. At that time I was almost half asleep. My husband slept on a bed. Early in the morning I notice that there was no water in our bedroom. I went out to attend the call of nature in the general bathroom of the Hotel. I took bath there also. When I returned to my room I found co-accused Ashok also in the room. There was a bed sheet on my husband. I suspected something and when I removed the sheet, I noticed blood on the body of my husband. I inquired from Ashok as to why he had done so and injured my husband. Co-accused Ashok threatened me to keep quiet or he shall kill me and my children also and ran away. I was perplexed. He further threatened me to accompany him along with the children or he shall finish us all. In these circumstances I was much confounded and was not in a position to understand the situation. For fear of the lives of my children as well as my own life. I was compelled to go with him under his threats. Later he gave me some pills because of which I became some what semi conscious and in that position co-accused Ashok took me and my children to various places. He repeatedly gave me pills to keep my senses down. I ultimately insisted that I be left at the house of my uncle Shri Jaideep Singh because I wanted to be way from co-accused Ashok for saving my own and my children' lives. Throughout I remained under the fear of death of my children and of myself at the hands of the co-accused Ashok. I narrated everything to my uncle Jaideep Singh at Ahmedabad, who took me to the police station at Ahmedabad. I narrated whatever had happened to the police at Ahmedabad as well as to the Delhi Police. Even in Jail at Delhi, co-accused Ashok has been giving me threats constantly and when I come from Tihar Jail to District Court, there also whenever he gets a chance he threatens me and states that he would kill me and my children if I narrated the truth.'

35. It is well settled that where the inculpatory part of statement of the accused is distinct and severable from the exculpatory part and if the Court find the exculpatory part to be inherently improbable, the other part of the statement which

implicates the accused and which the Court sees no reason to disbelieve, could be accepted, (*Jethamal v. Asstt. Collector of Customs Bombay*, : 1974 CriLJ621 . It is pertinent to note here that sub-section (4) of Section 313 Cr.P.C. permits that the answers given by the accused in response to his examination under Section 313 Cr.P.C. can be taken into consideration. (*State of Maharashtra v. R. B. Choudhary*, : 1968 CriLJ95 . The Apex Court in the case of *Hate Singh v. State of Madhya Bharat* 1953 Cri LJ 1933 : : AIR 1953 SC468 held that an answer given by an accused under Section 313 Cr.P.C. examination can be used for proving his guilt as much as the evidence given by a prosecution witness.

36. On reading Mst. Prem Kanwar's statement as a whole, it appears that she was really trying to throw the main blame on the appellant Ashok Kumar, though she admitted that she had seen her deceased husband lying injured in room No. 30. She more or less tried to make out that she was an unwilling spectator of the crime committed by the appellant Ashok Kumar. It has come in the evidence of Ram Kumar Waiter (P.W. 23) that on 30-12-1987 at about 9 a.m. he had served the tea to the appellant. It is also evident from the evidence of the hotel manager Sunil Kumar (P.W. 12) that on 30-12-1987 at about 11 a.m. he had seen the appellants along with two children leaving the hotel. Nothing has been elicited in cross examination of the said witnesses to show that the appellant Mst. Prem Kanwar had exhibited any uneasy symptoms before leaving the Hotel Eagle on 30-12-1987. On the contrary, circumstances proved in the case clearly indicate that after the alleged occurrences the appellant Mst. Prem Kanwar was found moving with the appellant Ashok Kumar who was not her husband.

37. It is worth mentioning here that the appellant Mst. Prem Kanwar has stated her examination under Section 313 Cr.P.C. that on the next morning she had seen her husband lying injured in the room. She wants us to believe that when she questioned the appellant Ashok Kumar as to why he had inflicted injury to her husband, he threatened her with dire consequences. Had it been so, one would have expected her to raise an alarm and come out of the room shouting for help and at least show some concern. But she did nothing. On the contrary, as deposed by the waiter Ram Kumar (P.W. 23) she took tea with the appellant Ashok Kumar at about 9 a.m. and, thereafter, she left the hotel with the appellant

Ashok Kumar at about 11 a.m. Surely, this was not the normal conduct of the wife who did not even care to complain to any one about the murder of her husband or show any emotion. It is evident from the evidence of Shri Prasad Yadav (P.W. 29) that on 30-12-1987 at about 7 p.m. she along with the appellant Ashok Kumar checked in Hotel Sital, Jaipur and stayed there till 1-1-1988. Thus the entire conduct of the appellant Mst. Prem Kanwar from the time the deceased was killed up to the time she was arrested by the Ahmedabad police is inconsistent with the fact that she was under the influence of some intoxicating drug or threat to her life. Thus, the subsequent conduct of the appellant Mst. Prem Kanwar is a definite pointer to her culpability, totally inconsistent with her innocence. Viewing the aforesaid circumstances, we are of the opinion that the plea taken by the appellant Mst. Prem Kanwar that she did not participate in commission of the alleged occurrence is too big a pill to be swallowed. This strange conduct of the appellant Mst. Prem Kanwar is also a factor which can be used for cementing the prosecution case.

38. Thus, the aforesaid unrealistic and false plea put forth by the appellant Mst. Prem Kanwar is itself an additional circumstance lending support to the other impelling circumstances unflinchingly pointing out the guilt of the appellant.

39. Summing up, therefore, we find and hold that the totality of the above circumstances unerringly, unflinchingly and unshakably proves that the appellants were the perpetrators of this heinous crime of murder and none else and that they have been rightly convicted by learned Additional Sessions Judge.

40. This brings us to the point of sentence. Learned counsel for the appellant Ashok Kumar has strenuously urged that the present case is not fit for awarding extreme penalty of death to the appellant. He brought to our notice a number of decisions of the Apex Court where their Lordships have expressed themselves in favor of a sentencing policy of life term as against death penalty. In *Ediga Anamma v. State of A.P.* : 1974 CriLJ683 , the Apex Court pointed to the retreat of death penalty as part of punitive strategy in many countries of the world. Learned counsel further submitted that where the murderer is too young and too old or the haunting horror of being hanged has been hovering over his head for a few years

or the condemned prisoner is the sole bread winner of the whole family, the lesser sentences of the imprisonment should be the judicial choice. He brought to our notice the social and personal circumstances in the present case relevant to the above approach. He submits that the appellant is in prime of his youth and his whole family will be ruined if he were to be extinguished from earthly existence. It must, however, be pointed out that the learned standing counsel for the State referred some of the more important of these grounds and went to the extent of even stating that the appellant's survival would be a menace to the society.

41. In *Ediga Anamma* : 1974 CriLJ683 , the Apex Court while noticing the social and personal circumstances possessing an extenuating impact, has equally highlighted that in this country under the present conditions deterrence through death penalty may not be a time barred punishment in some frightful areas of barbarous murder. Their Lordships further observed that the brutal features of the crime and the hapless and helpless state of the victim steel the heart of the law to impose the sterner sentence.

42. There are however certain basic principles which the Apex Court has laid down in *Bachan Singh v. State of Punjab* : 1980 CriLJ636 . The Apex Court has given certain guidelines for awarding death sentences and has also indicated certain mitigating circumstances which are to be taken into account. Some of them read as under :-

'1) That the offence was committed under the influence of extreme mental or emotional disturbance.

2) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society.

(3) The probability that the accused can be reformed and rehabilitated.'

43. Their Lordships also indicated certain aggravating circumstances and some of them read as under :

'Aggravating circumstances :-

A Court may, however, in the following cases impose the penalty of death in its discretion;

a) if the murder has been committed after previous planning and involves extreme brutality; or

b) if the murder involved exceptional depravity; or

c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

i) while such member or public servant was on duty; or

ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of this duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

d) if the murder is of a person who had acted the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.'

44. Learned trial Court has referred to some of these aggravating circumstances in awarding the death penalty to the appellant Ashok Kumar. The question is whether the appellant's case comes under the category of rarest of rare cases for awarding the death sentence.

45. On the face of the circumstances indicated above, it was apparent that this was a treacherous murder of an innocent person by the appellants, the circumstances of which were so heartless and heinous. As demonstrated earlier, the appellant Ashok Kumar was promiscuous with the appellant Mst. Prem Kanwar and the appellants had strong motive to liquidate the deceased Mahabir Singh. Before a man can deliberately debauch the wife of the friend who confides in her he must have become utterly abandoned to every principle of virtue and be lost to every sentiment of manly honour.

46. In the instant case, the circumstances indicated above do suggest that the appellant Ashok Kumar had not only invaded the marital rights of the deceased Mahabir Singh but he had made the appellant Mst. Prem Kanwar the prostitute of a base libertine's lust. The circumstances further go to show that the deceased Mahabir Singh had been lured to death by the appellant Ashok Kumar. Keeping in view the time and place chosen by the appellant Ashok Kumar to liquidate the deceased, it can safely be inferred that this was a murder by stealth. It was to be a secret assassination. It was not their purpose to have an open combat. On the contrary, the appellants were to approach their victim unawares, and silently give the fatal blow. Ultimately, the fatal blow was given, and the deceased passed without struggle or a motion, from the repose of the sleep to the repose of death. This bloody drama exhibited suddenly excited, ungovernable rage. The actors in it were not surprised by any lion like temptation spraining upon their virtue and overpowering it before resistance could bring. Nor did they do the deed to glut savage vengeance, or satiated long settled and deadly hate. It was a treacherous, cold blooded, premeditated and concerted murder.

47. For the forgoing reasons, we are of the considered view that the appellant's case comes under the category of rarest of rare cases for awarding the death sentence. We, therefore, confirm the death sentence awarded to the appellant Ashok Kumar by the learned trial Court.

48. As regards the sentence of the appellant. Mst. Prem Kanwar, learned counsel relying upon the authority of Palaniappa Gounder v. State of T.N., : 1977 CriLJ992 , contended that imposition of sentence of fine of Rs. one lac on the appellant was wholly unjustified in the circumstances, of the case. Learned Additional Sessions Judge imposed in the instant case a fine of Rs. one lac on the ground that 'the accused with planning and calculations moved from city to city taking un-due advantage of freedom of movement and the State had to incur heavy expenses for their arrest and investigations. The accused must bear this burden as a punishment .....

49. There can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine. It has been held in the case of Palaniappa Gounder :

1977 CriLJ997 (supra) that 'the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy fine of sentence.' Their Lordships have further observed that before imposing the sentence of fine, particularly a heavy fine, along with the sentences of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circumstances of the case; and the fine must not be excessive, having regard to all the circumstances of the case like motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine. The primary object to imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realized, which can happen only when the fine is not unduly excessive having regard to all the circumstances of the case including the means of the offender. No doubt, the Courts have powers under Section 357(1)(c) Cr.P.C. to award compensation to compensate the heirs and dependents of the deceased for the loss resulting from the death. In the instant case, the learned Judge had imposed sentence of fine to defray the expenses incurred in the prosecution.

50. In the instant case, there is nothing on record to show that the appellant Mst. Prem Kanwar has made or is likely to have made any pecuniary gain by committing the alleged offence. Learned trial Judge did not even attempt to consider whether the appellant Mst. Prem Kanwar has means to pay such a heavy fine imposed on her. In the circumstances, we do not think there was any justification to have imposed a sentence of fine Rs. one lac over and above the sentence of life imprisonment. Hence we set aside that part of the sentence and affirm only the sentence of life imprisonment awarded to the appellant Mst. Prem Kanwar. If the fine amount has been paid it will be refunded to the appellant Mst. Prem Kanwar. Except to the limited extent of modification in the sentence her appeal will stand dismissed, and the death reference is answered accordingly.

51. In conclusion we would like to place on record our appreciation for the valuable service rendered by Mr. Gandhi Advocate, who appeared as amicus Curiae in unravelling the intricacies of this case. He has devoted considerable industry to the task. He has argued matter with his usual fairness and ability and has left

nothing unsaid.

52. Order accordingly.

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