

Gurbachan Singh Vs. State

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Court : Delhi

Decided On : Aug-19-2008

Reported in : 154(2008)DLT325

Judge : Vikramajit Sen and; V.K. Shali, JJ.

Acts : [Evidence Act, 1872](#) - Sections 8, 27 and 106; Indian Penal Code (IPC) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 161 and 313

Appeal No. : Crl. Appeal 724/2000

Appellant : Gurbachan Singh

Respondent : State

Advocate for Def. : Sunil Sharma, APP

Advocate for Pet/Ap. : Sumeet Verma, Adv. Amicus Curia

Disposition : Appeal dismissed

Judgement :

V.K. Shali, J.

1. This is an appeal filed by the appellant against the judgment dated 29th September, 2000 and the order of sentence dated 9th October, 2000 passed by Sh. H.S. Sharma, Additional Sessions Judge, Tis Hazari Courts, Delhi convicting

and sentencing the appellant to life imprisonment for an offence under Section 302 of the IPC. The appellant was also sentenced to fine of Rs. 10/- in default and he was directed to further undergo sentence of 5 days of Rigorous Imprisonment in default.

2. Briefly stated, the prosecution case is that the appellant was married to one Smt. Jitender Kaur nearly 10-11 years back from the date of the alleged offence. Smt. Jitender Kaur was alleged to have been strangled by the appellant on the night of 8th and 9th October, 1997 between 11.30 p.m. and 12.00 mid-night at the first floor of House No. E-1/220, First Floor, Madangir where the couple was residing. It was the case of the prosecution that the appellant from the wedlock had two sons aged six years and three and a half years or so. The elder son was being brought up by the father of the appellant at their residence at Palam. The younger one was staying with the appellant himself. The ostensible reason for strangulating the wife was that the appellant was alleged to be an alcoholic because of which there used to be frequent quarrels between the appellant and the deceased. The latter used to object to this habit of the appellant which he had picked up after 4-5 years of the marriage. It was also alleged by the prosecution that on 9th October, 1997 at about 8 or 9 a.m. the appellant dropped his younger son at the house of one Sh. Harbans Singh PW 6 whose son was a class fellow of the appellant's son. It was said by the appellant to Harbans Singh PW-6 that he was taking his wife to the hospital and would come back in the evening and pick up his son. On the next date i.e. 10th October, 1997, the neighbours of the appellant found that bad odour emanating from the flat, whereupon one of the relations of the deceased PW-1 Tara Chand relation of the deceased was also informed who lodged a report vide DD No. 11A at police station Ambedkar Nagar and the investigation revealed that Smt. Jitender Kaur was lying strangled in the room. The room was locked from outside. The lock had to be broken with the help of locksmith PW-10 Sher Mohd. The body of the deceased had started decomposing. While the process of investigation was on, the appellant came to the place of occurrence himself at about 4.00-4.30 p.m. on 10th October, 1997. He was arrested and his search yielded one key of the lock which was found on the door of the room. The accused is also purported to have made the disclosure statement on account of which the piece of cloth with which the deceased was

allegedly strangled was also recovered from the room itself. The police after investigation filed a charge sheet under Section 302 IPC against the appellant whereupon on trial, he was found guilty, convicted and sentenced.

3. The prosecution in support of its case has examined 19 witnesses, namely, PW-1 Sh. Tara Chand, PW-2 Sh. Saroop Singh, father, PW-3 Sh. Jasbir Singh (brother of the deceased), PW-4 Sh. Naresh Kumar, PW-5 Sh. Manjit Singh, PW-6 Sh. Harbans Singh, PW-7 Constable Naresh Kumar, PW-8 Sh. Ashok Kumar, PW-9 Constable Sanjay Malik, PW-10 Sher Mohd., PW-11 Constable Prakash Chand, PW-12 Sh. Sonu Kaushik, PW-13 Constable Afijullah Malik, PW-14 Head Constable Karan Singh, PW-15 SI Bir Singh, PW-16 SI Dhan Singh, PW-17 Dr. S.K. Gupta, (Department of Forensic Medicines and Toxicology), PW-18 SI Asha, PW-19 Inspector Ombir Singh.

4. The accused was examined under Section 313 of the Cr.P.C. The accused denied his involvement in the commission of the offence although the factum of death of the deceased Smt. Jitender Kaur is not in dispute. The appellant took the plea that on 9th October, 1997 in the morning he had gone to PW-6 Sh. Harbans Singh's house and dropped his son there as he had to go to Haldwani and return on the next day, while as his wife, since deceased Jitender Kaur, was to collect the child from the residence of Sh. Harbans Singh. The appellant in his statement under Section 313 Cr.P.C. has admitted the factum of recovery of key from his possession at the time of his arrest. It is also admitted by him in his statement that one of the legs of the appellant below the knee of the deceased was under a plaster. The appellant did not adduce any evidence in his defence.

5. We have heard the learned Counsel for the appellant as well as the State. We have gone through the records of the case.

6. At the outset, it is stated that both the learned Counsel for the prosecution and defence have admitted that the entire case is based on circumstantial evidence. The learned Counsel for the appellant assailed the finding in the judgment of the learned Additional Sessions Judge, on the ground that the entire chain of circumstances has not been established beyond reasonable doubt so as to leave any room for a hypothesis which is not compatible with the innocence of the

accused. It was in essence urged by him that although there may be a grave suspicion that the appellant may have committed the crime but the suspicion could not take the place of proof which was the sole responsibility of the respondents to establish beyond reasonable doubt. The learned Counsel for the appellant relied upon *State of Haryana v. Jagbir Singh and Anr.* : 2003 CriLJ5054 and *Narendra Singh and Anr. v. State of M.P.* : 2004 CriLJ2842 . The latter authority was specifically relied upon to make a point that although a plea of alibi was taken by the appellant but it was not proved by him yet it was primarily for the prosecution to prove the guilt of the appellant beyond reasonable doubt. The second submission made by the learned Counsel for the appellant is to the effect that no motive has been established by the prosecution for the appellant to kill his wife. It was contended by the appellant that although motive may not be necessarily relevant and established in a case of direct evidence but motive becomes very relevant in a case which is essentially based on the circumstantial evidence and the present case being one based on circumstantial evidence the motive must be established. The third submission made by the learned Counsel for the appellant was that he had disputed the recovery of the key from the appellant. It was contended that the recovery of the key from the appellant was not established inasmuch as the only independent witness to the personal search memo of the appellant was PW-1 Tara Chand who did not support the prosecution case regarding the recovery of the key from the appellant. It was urged that this stood further reinforced by the fact that the recovery of the key is not shown in the personal search memo Ex.PW1/4 of the accused. It was contended that no weight could be attached to the admission made by the appellant in his statement under Section 313 Cr.P.C. regarding the recovery of the key from his pocket. It was stated that the prosecution has to still prove the recovery of the key independently. Reliance was placed on *Shahbuddin v. The State (NCT of Delhi)* 2002 (1) JCC 368.

7. The appellant also disputed the factum of having made the disclosure statement to the Investigating Officer and the consequent alleged recovery of the piece of cloth with which the deceased was alleged to have been strangled. It was also urged by the learned Counsel that assuming though not admitting that the said cloth which was purported to have been recovered by the prosecution in

pursuance to the disclosure statement was inadmissible in evidence on account of the fact that a fact which is already known to the prosecution cannot be said to have been discovered as it constitutes a fact which is already known to the prosecution is in fact rediscovered. Elaborating this argument further it was contended that a Crime Team had visited the place of incident and seen the alleged piece of cloth lying in the room along with number of ruffles where the incident is purported to have been taken place yet they had not mentioned about the said piece of cloth in its report. Therefore, the recovery of the said piece of cloth subsequent thereto in pursuance to the alleged disclosure statement of the appellant is inadmissible in evidence because this fact of cloth being available in the room itself was already known to the prosecution.

8. Per contra, the learned Counsel for the prosecution contended before us that the guilt of the appellant is proved beyond reasonable doubt as the entire chain of circumstantial evidence is completely established without leaving any room for any fact which may be incompatible with his guilt. Thus it was urged that he has been rightly convicted and sentenced by the learned Additional Sessions Judge vide the impugned order. It was contended by the learned Counsel for the State that so far the recovery of the key from the appellant is concerned, no doubt the factum of the same having been recovered from the possession of the appellant is not reflected in the personal search memo but invariably when a person is arrested, an article which is a case property and an article which is not a case property are recovered, from the possession of the accused, they will be reflected in two sets of separate memos. An article which is a case property will be shown only in seizure memo and not in a personal search memo, as has been the case in the present one. It was stated that as the key of the lock which was found on the door of the room from where the body of the deceased was recovered was a case property it was seized vide memo Ex.PW7/1. This was the reason why the recovery of the key does not find the mention in the personal search memo.

So far as the motive of the appellant to kill his wife is concerned, it was contended that the motive may not be necessary to be established or proved in each and every case including that of one which is based on circumstantial evidence. In the instant case, it was stated that ostensible motive for the appellant to kill his wife

was that he was an alcoholic and the latter used to object to the consumption of the alcohol and this had caused a serious matrimonial discord and frequent quarrels between the appellant and the deceased. It was stated by PW- 1 Sh. Tara Chand, that almost a year back he had called the deceased to his residence as a fallout of the same. It was only on the assurance of the appellant and his father that the deceased was permitted to go to her matrimonial home by PW-1. The existence of strained relations between the appellant and the deceased was also corroborated by PW-2 and PW-3 who are the father and the brother of the deceased.

With regard to the disclosure statement of the appellant and the consequent recovery of the piece of cloth from the room with which the deceased was strangled, it was urged that the dead body of the deceased was lying in the room where ruffles were scattered all over. Accordingly, even though the Crime Team may have inspected the room yet the piece of cloth with which the appellant is alleged to have strangled his wife, could not have been found unless and until the same was specifically pointed out by the appellant or any other person. This is precisely what had happened that as a consequence of the said disclosure statement Ex.PW1/3, the appellant led the police party to the scene of crime and thereafter, got the said piece of cloth recovered from the room in question among the bunch of ruffles lying there.

Learned counsel for the prosecution also placed reliance on the judgment titled as A.N. Venkatesh and Anr. v. State of Karnataka 2005 SCC (Cri) 1938 in order to contend that the timing of the deceased having expired four days prior to the time of post mortem which was conducted on 12th October, 1997 could not be relied upon as the basis of the exact time of the death of the deceased on account of the fact that the decomposition of the body of the deceased had already set in. Therefore, the timing given by PW-17 Dr. S.K.Gupta with regard to the timing of the death could not be relied upon as the exact time when the death of the deceased is alleged to have taken place. The learned Counsel for the State also contended that there was no evidence at the scene of crime to show that there was any forcible intrusion into the room in question where the deceased was lying and the room was locked from outside and the appellant was found to be in

possession of one of the keys of the said room at the time of his arrest would make any reasonable person to draw an inference to the effect that it was the appellant alone who could have killed his wife. Therefore, there was no infirmity in the judgment and the order of sentence.

9. We have considered the submissions of the respective sides and perused the records. There is no dispute about the fact that the entire case of the prosecution with regard to the death of the deceased is based on circumstantial evidence. The tests which have been laid down by the Supreme Court with regard to the circumstantial evidence must be fully satisfied before the conviction and sentence of the appellant is upheld. Hereinafter, we examine various facts and circumstances so as to see as to whether the guilt of the appellant is proved beyond reasonable doubt so as to uphold his conviction and sentence.

10. In *Padala Veera Reddy v. State of A.P. and Ors.* : AIR 1990 SC79 , it was laid down by the Supreme Court that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

Keeping in view the aforesaid broad parameters which have been laid down by the Supreme Court and reiterated by the subsequent pronouncements including in *Jagbir Singh's case* (supra), we proceed to see as to whether the complete chain

of events in the instant case is satisfied so as to uphold the conviction, sentence of the appellant or whether the submissions which have been made by the learned Counsel for the appellant create a doubt in the mind of the Court so as to give the benefit of the said doubt to the appellant.

11. Strained relations between the appellant and the deceased. The case of the prosecution is that the appellant was having strained relations with his wife namely Smt. Jitender Kaur. The reason for having strained relations was given by the prosecution that the appellant was in the habit of taking alcohol to which his wife used to raise objections. This had become a source of constant friction between the two. Further on account of consumption of alcohol, the appellant also used to subject the deceased to physical violence. In order to establish this fact, the testimony of PW-1 Tara Chand who was related to the deceased is important. He has categorically stated that the appellant used to drink alcohol and used to indulge in physical violence against his wife Smt. Jitender Kaur. He has also stated in his statement that on one such occasion, he had brought the deceased to his residence on account of this reason only. Subsequent thereto, the father of the appellant came to the house of PW-1 Tara Chand and took the deceased back. The witness was subjected to cross examine by the appellant where he failed to elicit anything worthwhile which would discredit the testimony of this witness with regard to the factum of the appellant having strained relations with his wife on account of his bad habit of consumption of alcohol. No doubt this witness was declared hostile by the prosecution as he did not support the prosecution case regarding the signing of various documents to begin with. But in cross examination he admitted that he had signed documents like seizure memo, personal search memo, disclosure statement though he again stated that only some of the documents were read over to him. The witness is admittedly of advanced age and therefore cannot be expected to remember the minute details. Some benefit has to be given to the witness on account of his advancing age. The witness has given his age as 72 and at such age a person could be hardly expected to remember the minute details. Further there is also a time lapse between recording his statement and testifying before the Court which also contribute to such a loss of memory. However, the testimony of this witness on core issue regarding strained relations of the appellant and his deceased wife and latter having been brought by PW-1 to

his own residence once and thereafter being taken by the father of the appellant remains unshaken. The testimony of PW-1 Tara Chand is corroborated by PW-2 and PW-3 who are the father and the brother of the deceased. PW-2 Sh. Saroop Singh has stated that the appellant used to drink alcohol and then beat his daughter. He had taken the deceased to his native village also on 3-4 occasions and on some of these occasions, the appellant brought the deceased back to Delhi with the help of his relatives. In the cross examination, he volunteered that on one particular occasion, the appellant beat his wife twice or thrice in his presence only after drinking alcohol. PW-3 Sh. Jasbir Singh brother of the deceased also made the statement on the same lines and he refers to one specific incident when his mother was also present who had taken the deceased to her maternal Uncle's house at Delhi. This seems to be having a reference to the deceased being taken to house of PW-1 Tara Chand which was quite nearby to the residence of the appellant. He has also admitted that a settlement thereafter arrived and the appellant had taken back his wife. This witness was also cross examined by the appellant. However, the testimony of these two witnesses have also remained unassailed on this score. As against this, the appellant has denied that he used to consume alcohol or that he would subject his wife Smt. Jitender Kaur since deceased to any physical assault after consuming alcohol. But the version of the appellant hardly inspires confidence in the light of the testimony of three witnesses namely PW-1, PW-2 and PW-3. Therefore, the factum of the appellant having a strained matrimonial relations with his wife deceased Smt. Jitender Kaur is established beyond any pale of doubt. This is also established that after consuming alcohol he would lose his senses and would indulge in physical violence qua his wife. The deceased was objecting to this habit of the appellant which was the source of constant friction between the two. Obviously, this gave rise to an occasion as well as the motive to the appellant to do away with his wife. It is well reasonable and prudent to draw an inference that the appellant had a definite motive to silence his wife permanently as this was the constant source of friction. This is also an important fact which forms one of the important sequences in the entire chain of events to draw an inference that it was the appellant and no one else who had the motive to kill his wife.

12. Death of the Deceased

It is not in dispute that the appellant was residing only in one room at the address House No. E-1/220, First Floor, Madangir. It is also not disputed by the appellant that on 9th October, 1997 in the morning, he had gone to the residence of PW-6 Sh. Harbans Singh and told him that he is leaving his son with him so that he could play with the son of Sh. Harbans Singh as both of them were studying in the same class. The appellant is alleged to have stated to Sh. Harbans Singh PW-6 that he is taking his wife to the hospital and that he would collect the child in the evening. PW-6 Harbans Singh has stated that the appellant or his wife had not come to collect his child in the evening. On the same day he gave a ring to the father of the appellant who was living in Palam Village and handed over the child to him. It is the case of the appellant that when he came on the next date, he found that his wife has been killed. The appellant also expressed his ignorance about the factum of the room being locked as according to the case of the appellant when he left his house, his wife was there in the room. Let us test the statement of the appellant in the light of the circumstances which have been established. The circumstances which have been established are that the room was lying locked had to be opened with the help of lock-smith PW-10 on 10th October, 1997. The dead body of the deceased had decomposed and bad odour was emanating which lead to the calling of her relation PW 1 Tara Chand by the neighbours and the consequent lodging of FIR. There was no evidence either of the room having been ransacked or there being forced intrusion into the room inasmuch as there was only one window having a grill which was found to be intact and the room was lying locked from outside. If this factual position of the scene of the crime is examined in the light of the statement of the accused to the effect that when he left to drop his son at the house of Sh. Harbans Singh, PW 6 his wife i.e. the deceased was alive. The appellant was the last person to have seen his wife being alive. Therefore, the onus was essentially on the appellant to discharge as in what condition his wife was when he left and what were the reasons which had necessitated for him to leave, what was the reason for him to carry the key of the Lock in his pocket when he specially knew that his wife is at home with her one leg under plaster and the fact that when he will be back his wife will be at home. As against this, the appellant took the keys of the lock with him which was the circumstance which points the needle of suspicion towards him. The appellant has admitted in his

statement under Section 313 Cr.P.C. the recovery of keys from his pocket though the learned Counsel for the appellant had disputed the recovery of the same on the ground that the recovery of the same does not find mention in the personal search memo. The admission made by the accused in his statement recovery of the keys from him is a fact which certainly lends credence to the recovery as stated by PW-1 Tara Chand from the appellant. Reliance is placed in this regard on Mohan Singh v. Prem Singh and Anr. AIR 2002 SC 3582.

There is something unnatural on the part of the appellant to carry the keys with him when he knew that his wife is having one of the feet plastered she would not be able to move and consequently it was reasonable to infer that she would be available at home. This fact accordingly also forms a part of the chain which goes against him. PW-6 Sh. Harbans Singh has testified that the appellant told him that he is taking his wife to the hospital and he would collect his son in the evening while as in the statement under Section 313 Cr.P.C. he takes the plea that he had gone to Haldwani for the night and returned on the next day. The fact that one of the leg of the deceased below the knee was under plaster, yet she was able to walk was also a fact specially within his knowledge and, therefore, he ought to have established it. On the contrary, the appellant has taken a false and frivolous plea before PW-6 Harbans Singh that his wife would come to collect the child by not disclosing the factum of his wife being immobilized. From the above facts it is fully established that the appellant is the person who saw his wife last as being alive and after which she was found dead. The appellant was carrying a key of the house while as he knew that his wife will be available at home especially in the light of the fact that one of her leg was under plaster. The appellant took a false plea that he had gone to Haldwani. No clothes are carried by him even for a change. All these facts have also been proved beyond any reasonable doubt which make an prudent and reasonable person to draw an inference that it was the appellant who had committed this offence of murder.

13. Plea of Alibi

Further, the appellant took a plea of alibi but did not even care to enter into the witness box or even produce any defence witness to prove the same. No doubt

the learned Counsel has relied upon a judgment of the Supreme Court in Narendra Singh's case (supra). There is no dispute about the fact that despite the plea of alibi on being raised even if it is not proved the burden of proof remains on the prosecution. Further if any, doubt arises the benefit of the said doubt is to be given to the accused. However, the facts of that case are totally different and merely because the appellant has raised the plea of alibi yet not proved or we are not saying that this in itself is sufficient to establish the guilt of the appellant. What we are stating is that after this plea of alibi is raised and not proved it is certainly one of the circumstance which is taken along with other host of circumstances clearly make any reasonable person to draw an inference that it is the appellant who has killed his wife.

14. Conduct of the Accused

a) The human conduct is unpredictable. The Supreme Court in case titled Padala Veera Reddy v. State of A.P. and Ors. : AIR 1990 SC79 has also observed that in a given fact situation a particular accused person may act in a manner in which a normal person would not act but nevertheless it will be pertinent here to mention that under Section 8 of the [Evidence Act, 1872](#) both the previous as well as the subsequent conduct of accused would be not only relevant but admissible also. It is established from the testimony of PW-1 Tara Chand, PW-2 Saroop Singh and PW-3 Jasbir Singh that appellant had started taking alcohol after 4-5 years of the marriage and that on account of his frequent consumption of alcohol, he was ill treating his wife deceased/Smt. Jitender Kaur which resulted in strained matrimonial relations between the appellant and the deceased. PW-1Tara Chand although has been declared hostile but has been very categorical in his statement to the effect that almost a year prior to the incident, there was quarrel between the appellant and the deceased Smt. Jitender Kaur who happened to be his sister's daughter's daughter because of the former's habit of consuming alcohol. As a consequence of this, he being the only relation available in Delhi had got the deceased Smt. Jitender Kaur to his residence in Masjid Moth which is hardly at a distance of 2-3 km. PW-1Tara Chand has also testified to the effect that after the deceased came to his residence, she was permitted to go to her husband's place only when her father-in-law and the appellant had made entreaties to him and had

assured him not only about the good conduct of the appellant but also about the factum that he would give up his habit of consuming alcohol. The testimony of PW-1 Tara Chand has not been demolished on this core issue of the strained matrimonial relations between the appellant and the deceased on account of the frequent consumption of the alcohol by the former and the fact that only a year prior to the incident the deceased had been brought by him from the matrimonial home. Merely on account of fact that PW-1 Tara Chand has been declared hostile does not mean testimony of this witness cannot be relied upon. There is absolutely no justification for PW-1 Sh. Tara Chand to testify falsely against the appellant. No doubt he is related with the deceased distantly but he has hardly any personal axe to grind against the appellant so as to falsely testify against him complaining about his bad habits and ill-treating his wife. Therefore, these facts clearly established that the appellant was alcoholic which was the bone of contention between him and the deceased. This fact is also corroborated from the testimony of PW-2 Saroop Singh and PW-3 Jasbir Singh who were respectively the father and the brother of the deceased. Their testimony also has gone unshaken in the cross-examination. The aforesaid facts clearly are part of transaction which show the conduct of the appellant regarding his behaviour pattern qua the deceased.

b) The conduct of the appellant before the alleged time of incident is also unnatural inasmuch as the case of the appellant is that he had left his wife alive on 9th October, 1997 as he wanted to go to Haldwani. It was for this purpose that he had left his son aged around 3 to 4 years at the residence of PW-6 Harbans Singh so that his son can play with the son of Sh. Harbans Singh who were classmates. It has also been stated by PW-6 Harbans Singh that the appellant had told him that his wife would come to his house in the evening to pick up the child. The appellant in the first instance had admitted his statement that one of the legs of his wife below the knee was under a plaster. It is not the case of the appellant that despite the leg of the deceased being under a plaster, she was in a position to walk so that she could have gone and collected her son. The appellant also did not give any such suggestion to either PW 6 Harbans Singh or to any other witness including the Investigating Officer that his wife was in a position to walk despite one of her legs being immobilized. Therefore, this concealment of material fact show that he was trying to hide something. This is an important piece of conduct of

the appellant. As has been stated herein above the conduct of the appellant taking a false plea of alibi or even carrying a key of the lock when he knew that his wife was going to be at home, when he comes back are also relevant factors which are not only unnatural conduct but also, would make any reasonable, prudent person to draw an inference against the appellant. Even after the incident when he was arrested on 10th October, 1997 he made a statement to that effect that he was ignorant about the death of his wife Smt. Jitender Kaur. There is nothing on record to show that the appellant had any sense of loss or dejection which any normal person would have under such circumstances. The appellant had an association with the deceased for more than a decade. The most natural and probable conduct of a person who would lose his wife would be one of sorrow, dejection, sense of loss etc. but evidence has come on record but this was conspicuous by its absence. This was totally unnatural conduct on the part of the appellant and is also a circumstance which militates against the appellant. This also shows that the motive of the appellant was to silence her because she was raising objection to the consumption of frequent alcohol by the appellant.

c) One of the arguments which was advanced by the learned Counsel for the appellant was to the effect that the prosecution has not examined the son of the appellant who was 3 to 4 years old as a witness. It was the son of the appellant, who was the best witness to tell the truth as to what happened after the appellant had left the house on 8th or 9th October, 1997. Neither his statement under Section 161 Cr.P.C. has been recorded by the police nor has he been produced as a witness before the trial Court. Therefore, an adverse inference should be drawn against the prosecution on account of not having produced a witness who was within their power.

15. We are of the view that no adverse inference can be drawn against the prosecution on account of the son having not been examined as a witness. Learned Counsel for the appellant is assuming and as if the appellant's son was the witness to the gruesome commission of crime. According to the post mortem, which took place on 12th October, 1997 at about 11.15 a.m., the death of the deceased has taken place four days prior to the date of the incident. Learned Counsel for the respondent has cited an authority to the effect that the body of the

deceased had started decomposing, the exact time of death given by the doctor who conducted the post mortem examination could not be taken to be as a correct one. This proposition of law is not disputed by the learned Counsel for the appellant but the fact of the matter remains that the prosecution case is also to the effect that the death of the deceased Smt. Jitender Kaur had taken place between the night of 8th - 9th October, 1997. The appellant's case is also to the effect that on 9th October, 1997, he left his home in the morning for going to attend some work outside Delhi. If that be so, it can safely be presumed that at the time when the appellant left his residence, his wife was alive, while as, this fact is not supported from the Forensic record which is to the effect that death of the deceased was four days prior to the date of conducting the post mortem. Therefore, the death had taken place sometime either on 8th October, 1997 in the evening or early hours of 9th October, 1997. The report of the postmortem to the effect that the deceased had died four days earlier and the fact that decomposition of the body had set in clearly makes a prudent man to draw an inference that at the time when the appellant left on 9.10.97 along with his son, the wife was not alive. So far as the son of the appellant is concerned, he was at the time of incident only of tender years that is of 3 to 4 years. It is totally a surmise or conjecture that the appellant would commit the offence while as the son was awake. In our view as the son was of tender years and there was no evidence that he had seen the incident therefore, the non-production of the son can by no stretch of imagination be construed to be fatal to the case of the prosecution. We feel that non-examination of the child by the prosecution would not make us draw an adverse inference against the prosecution. He could have been produced as a defence witness by the accused if his testimony could have assisted the accused.

16. Recovery of the cloth piece as a consequence of disclosure

a) PW-15 SI Bir Singh after the arrest of the appellant recorded his disclosure statement. The said disclosure statement has been duly proved as Ex.PW1/3 which is also signed by PW-1 Tara Chand. In pursuance of this disclosure statement, the appellant has taken the Investigating Officer to the place of incident and shown them the place where the piece of cloth Ex.PW1/7 was recovered. The said piece of cloth was having a mark of MT 30 and was lying amongst or under

the ruffles which were scattered all around in the room while the dead body was found lying. Therefore, this was also established beyond any shadow of doubt that the appellant was in knowledge of the place as well as the factum of having kept a piece of cloth Ex.PW1/7, in the said room, where the dead body of his wife was lying. The prosecution has proved photos of the deceased after the incident which shows that the body of the deceased lay with the ruffles all over in the room. PW-17 Dr. S.K.Gupta who conducted the post mortem has also opined that the death of the deceased was by strangulation. In addition to this there is a ligature mark on the neck of the deceased. There is absolutely no reason not to rely on the factum of disclosure statement having been made by the appellant and thereafter getting the police party to a place where he had hidden the said piece of cloth. The fact of knowledge of the place where the piece of cloth bearing MT 30 is hidden, is also a factor or circumstance which goes against the appellant. We are not impressed with the submissions of the learned Counsel for the appellant to the effect that the said fact of the cloth lying amongst the ruffles in the room in question was already known to the police as a Crime Team of the police had visited the place of incident. We feel that by no stretch of imagination, the crime team could have noticed the offending piece of cloth with which the deceased was strangled lying on the spot as it was clearly established that so far as the dead body was concerned, the same was lying in the room and was surrounded with number of ruffles and it was difficult for anyone to pick up a particular piece of cloth and then to say that this was the piece of cloth with which the lady was strangled unless and until the same was shown by the accused. Therefore, we feel that the plea of the appellant that the factum of cloths being known to the police in the room itself is untenable because there were number of ruffles lying in the room and it was only at the instance of the appellant that the offending one was recovered. In State of H.P. v. Jeet Singh : 1999 CriLJ2025 , it was held that there is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if the recovery of the article was made from any place which is open and accessible to others. In our case also the place namely the room might have been accessible to crime team or any other person but no one could have taken out a piece of cloth with which the deceased was strangled unless and until it was known to a person because the room was full of ruffles. The submission of the learned

Counsel for the appellant that although the learned trial Court had noted the recovery of the piece of cloth with which the deceased was alleged to have been strangled but yet it was not taken as a circumstance against the appellant for proof of his guilt and rightly so because it is a fact which was already in the knowledge of the appellant and therefore, could not be rediscovered so as to make it admissible under Section 27 of the Evidence Act. We do not agree with this submission of the learned Counsel for two reasons, firstly the recovery of a piece of cloth was not rediscovered because even though the crime team had visited but they could not notice the cloth as there were ruffles lying around the body, secondly the non-mention by the learned Trial Judge about this circumstance seems to be only on account of inadvertent mistake and not because of the reasons stated by the learned Counsel. We are of the view that the appellant had voluntarily made a disclosure statement and it was within the knowledge of the appellant the place where the piece of cloth was kept by him with which the strangulation is purported to have been carried. The appellant led the police party where the piece of cloth was got recovered. These are also the factors which point towards the guilt of the appellant.

17. Thus from the aforesaid evidence beyond reasonable doubt the following facts are established:

- a) The appellant and the deceased were living together along with one of their sons who was of tender years of 3 years in one room tenement in Madangir.
- b) The appellant was an alcoholic because of which there were frequent quarrels between the appellant and his deceased wife Smt. Jitender Kaur.
- c) On account of the alcoholism of appellant, there was matrimonial discord. The deceased wife had been taken on number of occasions by her father PW-2 to the native Village and once by PW-1 from her matrimonial home.
- d) The father of the appellant had gone to the residence of PW-1 Tara Chand along with accused and made entreaties and assured him of his good conduct where upon the deceased was permitted to accompany the appellant back to his matrimonial home.

e) The factum of the deceased objecting to the consumption of alcohol by the appellant was motive for the appellant to silence her voice permanently because it was a constant source of conflict between the two.

f) The body of the deceased was recovered from the one room tenement where the deceased was left on 9th October, 1997 by the appellant who had allegedly left his son with PW-6 Harbans Singh on the pretext that he was going out of station or he was taking his wife for medical treatment while as this was only a concocting facts.

g) The appellant had taken a false plea of alibi that he had gone to Haldwani and had returned on the next day. He had not carried any briefcase so as to even carry a single set of clothes for a change. Further the fact of going to Haldwani was a fact which was specifically within the knowledge of the appellant. The onus was on them in terms of Section 106 of Evidence Act to establish the same.

h) The room where the body of the deceased was recovered did not bear any sign of forced intrusion in the house as the grill on the only window was intact and the door was locked from outside.

i) The appellant was the last person to see his wife being alive when he is purported to have left the house.

j) One leg of the wife of the appellant below knee was under plaster yet she was able to walk was a fact that specially within the knowledge of appellant which fact has not been proved by discharging onus under Section 106 of the Evidence Act.

k) Since the wife of the appellant was alive when he left there was no justification for him to carry the key with him.

All these facts clearly which have established beyond any shadow of doubt that if taken cumulatively, will establish that any reasonable prudent man would draw an irresistible conclusion that it was the appellant and appellant alone who had committed this ghastly murder of his wife by strangulation and thereafter locked the room. There is not even a single circumstance which in our view is incompatible with the innocence of the accused, a benefit of which can be given to

the appellant.

As a matter of fact, the Hon'ble Supreme Court in a case titled as State of Rajasthan v. Kashi Ram (2006) 12 SCC 254 has dealt with a case of circumstantial evidence where the facts of the case were almost similar to the facts of the present case. In the said case, the following factors were established as a part of the chain of circumstance which led to the conviction of the accused in the said case:

1. Relation between the husband and wife were not cordial even after the seven years of marriage.
2. They were blessed with 2 daughters.
3. Deceased came to her maternal house due to frequent quarrels with her husband.
4. The main door of the house was locked at the time of the occurrence of the event.
5. The post mortem reports claims that the death of the deceased was caused due to the asphyxia.
6. The waist chord was found from the possession of the respondent.
7. They were last seen on Tuesday evening on February 3, 1998.
8. Keys of the locks put on the two doors were recovered from the possession of the respondent on February 18, 1998.
9. The trial court came to the conclusion that the only inferences that can be drawn from the proved facts and circumstances was the respondent after committing the murder of his wife and his two daughters locked the house and disappeared from the scene.

18. In view of the aforesaid discussion, the appeal of the appellant is dismissed. A copy of the judgment be sent to the Jail Superintendent so that it is made available to the convict undergoing the sentence.

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