

Sheesh Pal Vs. State

Sheesh Pal Vs. State

SooperKanoon Citation : sooperkanoon.com/948977

Court : Delhi

Decided On : Feb-24-2012

Judge : Badar Durrez Ahmed & the Honourable Ms. Justice Veena Birbal

Appeal No. : CRL.A. 1055 of 2010

Appellant : Sheesh Pal

Respondent : State

Judgement :

VEENA BIRBAL, J

1. This appeal is filed against impugned judgment dated 12.07.2010 in Sessions Case No. 41/2010 passed by the learned Addl Sessions Judge-III, North Delhi arising out of FIR No. 286/2002 P.S. Sabzi Mandi by which appellant has been convicted under Section 363/302/201 IPC. The appeal is also directed against the order of sentence dated 12.07.2010 by which he has been sentenced to undergo RI for 5 years and a fine of ` 5,000/-, in default SI for 3 months for the offence under Section 363 of IPC. He is further sentenced to undergo life imprisonment and a fine of ` 50,000/-, in default SI for one year for the offence under Section 302 of IPC. The appellant is further sentenced to undergo RI for 4 years and a fine of ` 5,000/-, in default SI for 3 months for the offence under Section 201 of IPC.

2. The case of the prosecution in brief is that on 25.10.2002, the complainant Rajbir PW-10, made a statement Ex. PW10/A in P.S. Sabzi Mandi alleging therein that he is a rag picker. On 03.10.2002, the appellant, R/o N-272, Old Chandrawal, Majnu ka Tila, had come to his house at 6.15 p.m. and told him that his daughter Laxmi aged 14 years, who had gone to Bara Hindu Rao Hospital along with the wife of appellant had gone missing from there. Thereafter, the complainant PW-10 and his family members had made a search for Laxmi but she could not be traced. The complainant PW-10 had given the description of his daughter Laxmi in the said statement. He had also stated that on 03.10.2002, the appellant Sheesh Pal also lodged missing report of Laxmi i.e., DD No.17A Ex.PW 22/A in P.S. Sabzi Mandi. He has also stated that he has suspicion over appellant having kidnapped Laxmi after enticing her. On the basis of aforesaid statement Ex.PW10/A, SI Parshu Ram PW25 had put his endorsement Ex.PW25/A and got FIR Ex.PW19/A registered under Section 363 IPC against the appellant. During investigation, SI Parshu Ram interrogated the appellant and tried to find the missing girl Laxmi but could not locate her. Due to transfer of SI Parshu Ram PW-25, further investigation was handed over to SI Raman Pratap PW-24. On 10.02.2003, the case file was marked to him. During investigation, he got a „hue and cry?notice pasted and got a wireless message flashed and also got a notice published in the newspaper regarding the factum of Laxmi being missing. The appellant was also interrogated by him but nothing was revealed. He also took the appellant to CFSL, Malviya Nagar and got his polygraph test conducted on 27.03.2003. Thereafter, he obtained the report Ex. PW 24/A and also made a search for the missing girl but could not get any clue. The complainant Rajbir PW-10 had also filed a writ petition being W.P.(Crl) No. 97/2003 in the High Court seeking directions to the Station House Officer P.S. Sabzi Mandi for searching Laxmi and for the arrest of the appellant. By the order of this court dated 07.04.2003, the investigation of this case was transferred to Anti-Kidnapping Cell, Crime Branch, Delhi Police. Thereafter, the investigation was assigned to SI Karan Singh PW29, who also tried to find the missing girl by joining the complainant PW-10 in the investigation and also went to Bombay and Nagpur but the victim could not be traced. Thereafter, SI Karan Singh PW29 was transferred from Anti-Kidnapping Section and the investigation was handed

over to SI Daya Chand PW-35 on 12.08.2004. He also interrogated the appellant but the appellant insisted that he did not know anything about the case. Thereafter, he met the parents of the missing girl at Trans-Yamuna and they had expressed their suspicion that the appellant had killed Laxmi. Then he examined the neighbours of the appellant Sheesh Pal i.e., Mohina PW-2 and Prem Devi PW-1. He also examined Asha PW5, the lady who was living with the appellant as his wife and one acquaintance of the appellant Master Shivraj Singh PW15. During investigation, SI Daya Chand PW-35 came to know that appellant was in the habit of keeping girls/ladies. On further investigation, he also allegedly came to know that appellant Sheesh Pal had earlier killed his wife and a five-month old child. Accordingly, he briefed the higher officers. On 13.02.2005, the investigation was assigned to Inspector Mahesh Kumar Tholia, PW-36. On that day itself, IO PW-36 organized a team comprising of SI Ram Avtar PW30, ASI Rajbir PW18, HC Vijay Pal PW33, Constable Yash Pal PW20, Constable Sat Pal Singh PW32, Constable Devender and Constable Unni Krishnan, SI Daya Chand PW-35 was also associated with the said team. SI Daya Chand PW-35 knew appellant Sheesh Pal as he had earlier interrogated him. On his pointing out, IO had apprehended the appellant. The appellant was arrested vide memo Ex.PW18/B1. His personal search was conducted vide memo Ex.PW18/B and he made an alleged disclosure statement Ex.PW18/C. From there, they had come to the house of the appellant and on the pointing out of the appellant they got recovered one ladder, one two-wheeler scooter having no. DL 7S 7132 and one black tiral weighing about 20 kgs. The aforementioned articles were seized vide memo Ex.PW18/D. IO had also conducted search of the house of the appellant and blank I-cards and rubber stamps of impression of different officials were seized vide memo Ex.PW18/E. Before seizing, necessary formalities about putting them in the pulanda and sealing them with the seal of IO was done. It is alleged that on 14.02.2005, appellant had pointed out the place of occurrence. He had also pointed out the place vide memo Ex.PW35/A at Yamuna river near ISBT, Kashmere Gate where it is alleged that he had thrown the polythene containing pieces of the dead body of Laxmi. After completion of necessary formalities, a report under Section 173 Cr.P.C. was filed before the concerned learned MM, Delhi. The

learned MM committed the case to Sessions Court and thereafter it was assigned to learned Addl Sessions Judge-III, North Delhi wherein charge was framed against the appellant for having committed offence punishable under Section 363/376/302/201 IPC. Appellant pleaded not guilty to the same and claimed trial and thus was tried there.

3. The prosecution in all had examined 37 prosecution witnesses, out of which Prem Devi PW1, Mohina PW2 are the neighbours of appellant, Munni PW3, Rajbir PW10 are the parents of missing girl Laxmi. Sonu PW4 is her brother, Asha PW5 is the wife of appellant with whom it is alleged that he had married in a temple in 2001. The other public witnesses are Suraj Bhan PW9, Raman Kumar PW6, Shivraj Singh PW15. The remaining testimony relates to police and medical evidence.

4. The incriminating evidence was put to the appellant in his statement u/s 313 Cr.P.C. The appellant denied the same. He has stated that he was an innocent person and was falsely implicated in the present case. Laxmi had come to his house with consent of her parents. Whole family of Laxmi used to visit his house quite often. He had further stated that parents of Laxmi had taken loan of Rs. 50,000/- and he used to pressurize Munni PW3 and Rajbir PW10 to return the same. In order to grab his money, they have falsely implicated him in the present case. In defence, he has produced 5 witnesses, namely, Mohd Ilyas DW1, Manohar Lal DW2, Insp. K.S. Rawat DW3, Girish Kumar DW4 and Bishambar Dayal DW5.

5. Relying on the testimony of Sonu PW4, Suraj Bhan PW9, Munni PW3, learned Addl. Sessions Judge held that the appellant had forcibly taken Laxmi from her parents' house. It is further held that from the testimony of PW2, it stands proved that the said witness i.e. Mohina PW2 had heard the cries of a girl coming from the house of appellant in the month of September, 2002. The learned Addl. Sessions Judge also held that the conduct of Asha PW5 also creates doubt as she had left the house of appellant and did not return for more than one year after Laxmi went missing. It was further held that from the evidence of PW15, it stands proved that he had seen the pieces of flesh lying in

a polythene kept on the roof under a 'tirpal' which was recovered from the house of appellant and thus all the circumstances relied upon by the prosecution stand proved against the appellant and accordingly held him guilty under Section 363/302/201 IPC. However, the appellant was acquitted under Section 376 IPC as the same was not proved beyond reasonable doubt.

6. Learned counsel for the appellant has argued that there is no eye witness to the alleged occurrence. The dead body of the victim has not been found. It is contended that the circumstantial evidence of last seen is also not proved. It is further contended that the evidence of the parents of the victim i.e., PW3 and PW10 is not believable. They are not credible witnesses. Even the evidence of Mohina PW2 is not believable as admittedly she had a property dispute with the appellant and she had enmity with him. Evidence of Shivraj PW15 is also not believable. According to his deposition, he had gone to the house of appellant Sheesh Pal on 1.10.2002 wherein appellant was present and he had allegedly seen flesh pieces wrapped in a polythene lying on the roof of his house whereas as per evidence of Girish Kumar DW 4 appellant was on duty on that day. Further, the evidence of Shiv Raj Singh PW5 of having seen the dead body cut into pieces lying in polythene is not believable. It is also contended that Asha PW5 and neighbour Prem Devi PW1 have also not supported the case of prosecution. It is further contended that evidence on record establishes that the parents of the girl had sent the victim Laxmi to the house of the appellant to look after the appellant's wife Asha PW5 of their own. In this connection, learned defence counsel has referred to W.P.(CrI) No.97/2003. It is contended that the Laxmi had gone missing from Bara Hindu Rao Hospital and appellant had lodged a missing report Ex. PW 22/A on 03.10.2002 and he has been falsely implicated in the present case.

7. Learned APP for the State argued that the present case is based on circumstantial evidence. It is contended that the evidence on record clearly establishes that the appellant had kidnapped Laxmi on 28.09.2002 and she was last seen with him on 30.09.2002 as is evident from the evidence of PW2, PW4 and PW9. It is contended that the appellant had killed his previous wife and child and had also faced trial in this regard. The PWs have also deposed that the

appellant is a man of a bad character. Evidence of Shivraj PW15 clearly establishes that he had gone to the house of appellant on 1.10.2002 and had seen flesh pieces kept in a black coloured polythene which was kept on the roof of the house. It is contended that the appellant has been rightly convicted by the learned ASJ under Section 363/302/201 IPC and no interference by this court is required.

8. We have heard counsel for the parties.

9. The entire case is based on circumstantial evidence. The approach to be adopted and the test to be applied by the court in cases based on circumstantial evidence, was examined by the Supreme Court in Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh; : 1953 Cri.L.J. 129. The court in that case observed:-

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

The above position of law has stood the test of time and has been reiterated in numerous subsequent decisions of the Supreme Court. Reference in this regard is made to the decisions in Sharad Birdhichand Sarda v. State of Maharashtra : 1984 Cri.L.J. 1738 and State of Haryana v. Ved Prakash: 1994 Cri.L.J. 140.

10. The Supreme Court in Md. Mannan @ Abdul Mannan v. State of Bihar; (2011) 5 SCC 317 held as under:-

“In our opinion to bring home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case.”

11. One of the pieces of circumstantial evidence relied against appellant is that he had forcibly taken the victim Laxmi from her parent's house on 28.09.2002 without the consent of her parents. To prove the same the prosecution has relied upon the evidence of Sonu PW4, Munni PW3 and Suraj Bhan PW9 i.e., brother and parents of victim. Sonu PW4 has deposed that on 28th September, 2002, he was present in his house and was unwell. The appellant Shishpal came and took Laxmi by saying that his wife needed some care as she had delivered a child. He has deposed that appellant was known to them as prior to incident he had come to their house once or twice. His parents were not present at that time. He refused to send his sister with him but he insisted to take her. Even Laxmi was not willing to go with him. When appellant took away his sister from his house, some persons from the mohalla were playing cards outside his house. When his parents returned, he informed them that Laxmi had been taken away by the appellant. Then his parents went to the appellant's house but nobody was found there. After few days, the appellant came to their house and told that Laxmi was missing from Hindu Rao Hospital as she did not return after taking medicines. The appellant also stated that he had lodged a missing report at police station of Hindu Rao Hospital. In cross-examination, Sonu, PW4 has

deposed that appellant had taken Laxmi on his motorcycle. He has further stated in cross-examination that appellant used to visit their house occasionally. When the appellant had forcibly taken her sister, about 4-5 persons were playing cards and none of the persons present stopped appellant from taking away Laxmi. He has denied that Laxmi had gone voluntarily with the appellant. He has further stated that he had not come out of the house when the appellant had taken Laxmi. On being further cross-examined, he has deposed that they had gone to Aligarh to locate Laxmi and appellant Shishpal had also gone with them. In Aligarh, they had gone to his friend's „Jija's?house to find out if he had seen Laxmi.

12. The other witness is Munni PW3, Laxmi's mother. She has deposed that the appellant had been visiting her house prior to occurrence as he had enticed her husband for filling up some forms so that he can get some loan. They had also paid him ` 20000/- for disbursement of loan. On 28th September, 2002, the appellant had come to their house and had taken away Laxmi with him by telling her son PW-4 that their mother i.e., Munni PW-3, had received an electric shock. On that pretext, he had taken Laxmi with him. At that time, she and her husband were away for work. When they had returned after finishing their work, their son told them that Laxmi had been taken away by the appellant Shish Pal. She has further deposed that as they did not know the address of the appellant, they had enquired from one person whose name she did not recall and that person had shown the house of appellant from a distance. The appellant had met them and told them that Laxmi had gone with his wife to Hindu Rao Hospital for getting some medicines. At that time his house was locked. The appellant opened the lock of his house and they sat there for sometime. Thereafter, the appellant told them to wait outside and he would bring his wife from the hospital. Thereafter, appellant went away after locking the door. They waited there till 5 in the evening outside the house but appellant did not return. Thereafter, they came back to their house.

13. She has further deposed that for three days, they kept on visiting the house of the appellant but nobody was found there and the house was found locked. The neighbours of the appellant told them that appellant was a professional

killer and after kidnapping the girls, he used to rape them and thereafter murder them and used to throw their bodies in the river Yamuna after cutting them into pieces. Thereafter, they went to the house of brother of appellant, namely, Om Pal at Village Mohd. Pura rava, Distt. Meerut and asked him to help them in getting Laxmi back from the appellant. Even his brother had told them that appellant had killed about 28 girls and had thrown them in the river and had killed his wife and child also. She has further deposed that since the police did not locate their daughter, they approached the High Court and on the directions of this court, Crime branch investigated the case and appellant was arrested after about three years of the occurrence. She has further deposed that the appellant had been threatening them with dire consequences through his wife Asha, PW5, one Master, namely, Shiv Raj PW-15 and one more.

14. In cross-examination, she denied that she had got registered a case u/s 107/151 Cr.P.C in Police Station Sarai Rohilla against the appellant. She had lodged a report against the appellant and his associates, namely, Master, Anil and one more boy u/s 376 IPC for committing rape upon her. In cross examination, she has further deposed that on 3rd October, 2002 appellant had come to her house and informed that he had traced her daughter and asked her to accompany him. On this, she and her son had gone to his house as her husband was not present at that time. The appellant had left her son at his residence and took her to some unknown place near Chandrawal on his scooter. There he took her in a room where 4/5 minor girls were there. The appellant along with his associates committed rape upon her for the whole night and in the morning, the appellant took her to his house and from there he along with her son were sent to their house. She had lodged a report u/s 376 IPC against the appellant. No such report is placed on the record. In cross-examination, she has further deposed that appellant had taken a sum of Rs.50,000/- from her for arranging a loan of Rs.2 lacs. She had taken a loan of Rs.50,000/- from one Anju in whose house she was working as a sweeper for giving to appellant. In further cross-examination, she has deposed that appellant had killed his wife, two children, one police official. She has admitted having made complaints to the Commissioner, MCD Ex.PW-3/DX and Lt. Governor, Delhi Ex.PW-3.DX-1 against the appellant. In further cross-examination, she has

denied having taken a loan of Rs.50000/- from the appellant. She has admitted that appellant had tried to locate Laxmi and had gone with them to Aligarh. She has further stated in cross-examination that they were handed over to persons of bad character so that they could be killed. She, her husband and son were beaten there and they were kept in a 'Gher' but no report was lodged.

15. There are contradictions in the statements of Sonu, PW-4 and that of his mother Munni, PW-3. The evidence of Sonu, PW-4, also does not stand corroborated with that of his neighbour Suraj Bhan, PW-9. According to Sonu, PW-4, the appellant had taken Laxmi on 28.09.2002 on the pretext that his wife had delivered a child and she needed some care whereas Munni, PW-3 has deposed that appellant had taken Laxmi by telling her son as well as victim Laxmi that their mother i.e PW-3 had received an electric shock. Sonu, PW-4 deposed that when the appellant had come to take Laxmi some persons from the Mohalla were playing cards opposite their house. In cross-examination he has deposed that one of them had objected to his sister being taken away. On being further cross examined, he has deposed that he had raised an alarm but no one came out.

16. The evidence of Sonu, PW-3 that appellant had taken Laxmi forcibly also does not find support from the evidence of his neighbour Suraj Bhan, PW-9 who has deposed that in the year 2002, the appellant had come on a motorcycle and had taken Laxmi with him. He has also deposed that he had seen the appellant visiting the house of Rajbir on one or two occasions. From his evidence, it cannot be said that either Sonu, PW-4 or Laxmi had raised any alarm. Had they raised any alarm the neighbours would have come to their rescue. Nothing has come in the evidence of Suraj Bhan PW-9 for which it can be said that appellant had taken Laxmi forcibly as is alleged by prosecution.

17. According to the evidence of Munni, PW-3 on coming to know that the appellant had taken away Laxmi forcibly as they did not know the address of the appellant, they had enquired from someone about his address and went to his house. She narrated as to how the appellant treated them and asked them to wait outside his house and disappeared. The aforesaid evidence stands

contradicted by the evidence of her husband Rajbir, i.e. PW-10 who has deposed that when they came to know Laxmi was taken away by the appellant, he along with his wife and 4-5 persons had gone to the office of the appellant and enquired about Laxmi. On this he became violent. The PCR van came and they were taken to P.S. Seelam Pur. They were released after 2-3 hours. From his evidence, it cannot be said that they had gone to the house of the appellant as is deposed by Munni, PW-3. Both are making contradictory statements.

18. The deposition of Munni, PW-3 to the effect that the appellant was a professional killer and that he used to rape the girls and thereafter murdered them and used to throw their bodies in the river Yamuna also does not inspire confidence. They are only bald allegations. No material is placed on record to substantiate the same. Even the necessary details are also not given. Even in complaints Ex.PW3/DX and Ex.PW3/DX1 there are no such allegations. In these circumstances, her deposition in this regard is also not believable.

19. Munni, PW-3 in cross-examination has deposed that on 3rd October, 2002 appellant had come to her house and informed that he had traced Laxmi and asked her to accompany him. Thereupon she along with her son had gone to his house as her husband was not present. The appellant left her son at his residence and took her to an unknown place near Chandrawal on his scooter. There he kept her in a room and with his associates committed rape upon her. In the morning appellant took her to his house and from there she along with her son had gone to their house. Thereafter she lodged a report against him u/s 376 IPC. A court question was put to her to which she had stated that she had lodged a report orally. There is no deposition in examination-in-chief. Even the above statement in cross-examination stands demolished by the evidence of her son Sonu, PW-4 who had deposed that when appellant had visited their house after 3-4 days of taking away of Laxmi, he had told that Laxmi was missing from Hindu Rao Hospital. He has not stated anything in his evidence that appellant had told them that Laxmi had been traced and they should accompany him. He has not deposed anything about having accompanied his mother to the house of the appellant where appellant left her and took her mother somewhere as deposed by his mother. Rather as per his deposition in examination in chief he

alone had gone to the house of appellant after 4-5 days of 28th September, 2002.

20. Sonu, PW-4 has also deposed that on 28th October, 2002, they had gone to Aligarh and the appellant had also accompanied them in the search of Laxmi. Even parents of Laxmi i.e PW-3 and PW-10 have deposed that on 28.10.2002 the appellant accompanied them for tracing their daughter at Aligarh. If the version of Munni, PW-3 is believable, in that event, the family would not have taken the help of the appellant in searching for Laxmi at Aligarh. There is also serious contradiction in the statement of Munni, PW-3 and Sonu, PW-4 about the behaviour of the appellant in Aligarh. According to Munni, PW-3, appellant had handed over them to 'Gundas' at Aligarh who had beaten them. There is no report to the police at Aligarh in this regard. Sonu, PW-10 has not stated anything about these serious allegations or of having received injuries at the hands of 'Gundas'. Shiv Raj Singh, PW-15 had also visited Aligarh with the appellant and family of Laxmi. Nothing is stated by him in this regard.

21. There are serious contradictions in the evidence of the aforesaid witnesses as regards the allegations of kidnapping. No reliance can be placed on their evidence. They are not credit worthy witnesses.

22. Learned counsel for the appellant has invited our attention to a certified copy of WP(Crl.) 97/2003 filed by Raj Bir PW-10 i.e., the father of victim Laxmi , especially para 5 of the writ petition has been referred.

23. We have perused the said para wherein it is stated that on 28th September, 2002 at about 6 pm, petitioner Rajbir i.e., PW-10, his wife Munni, PW-3 returned to their house and came to know that their daughter Laxmi was taken by the appellant. Thereafter, they had gone to the house of appellant to bring back Laxmi. When they reached there, their daughter Laxmi was present there. Appellant Shish Pal and his wife were also there. They enquired as to why he had brought Laxmi to their house. Shish Pal requested him as well as his wife that he would sent back Laxmi as soon as possible and on this assurance, they left their minor daughter Laxmi there.

24. Learned counsel for the State submits that the aforesaid certified copy was not made available to the trial court.

25. However, considering that present is a certified copy and is a part of writ record of this court, we have considered the same. The petition is signed by the petitioner i.e., PW-10 and is also supported by his affidavit. The contents of para 5 of the said writ petition are contrary to the evidence on record of Munni PW3 and Raj Bir PW10. Rather the above para of the writ petition shows that parents of Laxmi had consented to leaving Laxmi at the house of Sheesh Pal.

26. Even if the aforesaid document is ignored, the evidence of PWs, as discussed above, of the appellant having kidnapped Laxmi is not creditworthy, as such, no reliance could be placed on it. Rather the evidence on record shows that appellant was known to the family of Laxmi. He had also been visiting their house for loan for them. It has also come in the evidence of Munni, PW-3, Sonu, PW-4 and Rajbir, PW-10 that appellant had accompanied them on 28.10.2002 for searching Laxmi at Aligarh.

27. As regards the allegations that Laxmi was last seen with the appellant on 30.09.2002, the prosecution has relied upon the evidence of Mohina, PW-2 and Asha, PW-5. Mohina, PW-2 is the neighbour of the appellant while Asha, PW-5 was living with the appellant at the relevant time as his wife.

28. Mohina, PW-2 has deposed that she knows the appellant as at the relevant time he was residing in her neighbourhood and was working in MCD. His conduct and character was not good. She has deposed that he used to bring new ladies to his house. In the year 2002, he had brought one girl namely, Laxmi, to his house. She has further deposed that in the month of September, 2002 at about 10/10.30 pm, she heard the cries of a girl coming out of the house of appellant. Thereafter, that girl was not seen. At that time, Asha PW-5 was living with him as his wife. In the morning, she asked Asha PW-5 as to what had happened at night but she kept mum. After about 7/8 months, when appellant started beating her, Asha PW-5 came to her and told that appellant had killed Laxmi and had thrown her body in the Yamuna river after cutting it into pieces. Asha PW-5 had also shown marks of injury to her. She has identified the

photograph of Laxmi Ex.PW2/A in court.

In cross examination, she has stated that there was a dispute between her and the appellant on a plot of land and appellant had forcibly occupied some portion of their plot no.N-71A/272, Purana Chandrawal, Majnu Ka Tilla, Delhi. Appellant had also constructed a door adjacent to her door forcibly and in respect of that dispute, the matter went to court. On further cross-examination, she has deposed that she did not lodge any complaint regarding her hearing shrieks of Laxmi in the month of September, 2002.

From the evidence of the aforesaid witness, it is clear that she was having a dispute with the appellant over a plot of land as well as the appellant having constructed a door adjacent to her door forcibly and the matter went up to the court. The above shows that she had an animosity towards the appellant. Further, as per the case of the prosecution, date of disappearance of Laxmi is 3rd October, 2002. As per the prosecution case, the statement of Mohina PW-2 u/s 161 Cr.P.C wherein she has levelled the allegations against the appellant, was recorded only on 5th January, 2005. There is no explanation as to why her statement was recorded after a gap of more than two years. In these circumstances, her testimony of having heard cries of Laxmi does not inspire confidence.

29. The other witness is Asha, PW-5. She has deposed that the appellant is her husband. She was married with appellant in a temple in the year 2001. Prior to her marriage with appellant, she was already married and has three children from previous marriage. Her first husband was not keeping her properly and used to beat her after taking liquor. She had left him and came to Delhi where initially she lived in her sister's house where appellant had met her. Appellant had told that his first wife had expired as such she got married him. Asha, PW-5 has further deposed that when she had stayed in the house of appellant, Munni, PW-3 i.e. mother of Laxmi was already there and appellant told her that she was his sister-in-law and usually visits him. After her marriage, Munni, PW-3 and her family members used to visit their house. She further deposed that Munni PW-3 used to tell her to leave the house of appellant as she wanted to live with him.

She gave birth to a female child in September, 2002 at Hindu Rao Hospital. Munni PW-3 had left Laxmi after 10/15 days of her delivery at her house. Appellant took her and Laxmi to the Hindu Rao Hospital as she was having problem with the stitches. Laxmi was a tall girl. From hospital, she went missing and a report was lodged. They had made a search for her but she could not be located. She has further deposed that after that incident, she went to her parents house and remained there for more than about one year. Her daughter from her earlier marriage had also come to stay with her when she was living with the appellant.

As noted above, the above witness did not support the case of prosecution and was cross examined by learned APP and was confronted with her statement Ex.PW5/A made to the police. She did not own up to having made any such statement to the police wherein it is alleged that on 30th September, 2002 Laxmi was present in her house and at about 8 pm, she had gone to watch TV in the adjacent room and the appellant had come at 9.30 pm and at about 10.30 pm, she had heard the cries of Laxmi but she could not get up as she was under the influence of medicine. Thereafter, she did not see Laxmi.

Despite being cross-examined and confronted with the statement made to the police Ex.PW5/A, nothing relevant has come out which could be of any help to the prosecution.

In view of the above evidence, the circumstances of having been last seen Laxmi with the appellant on 30.09.2002 and thereafter the cries being heard by Mohini PW-2 and Asha PW-5 are not established.

30. The other circumstantial evidence relied upon by the prosecution is that on 1st October, 2002, the dead body of Laxmi cut into pieces and kept in a polythene which was seen lying on the roof of the house of the appellant under the 'tirpal' by Asha, PW-5 and Shivraj Singh, PW-15. Asha, PW-5 did not support the prosecution case in this regard when she was confronted with her alleged statement Ex.PW 5/A u/s 161 Cr.P.C. where it was so recorded. She did not own the said statement and denied having made any such statement to the police and denied having seen the dead body of Laxmi cut into pieces lying in a

polythene on the 'tirpal'.

31. Shiv Raj Singh, PW-15 has deposed that on 1st October, 2002 he had gone to the house of appellant at about 7/8 am at Chandrawal for taking money as the appellant had got one jacket stitched from him. At that time, Asha, PW-5 was present in the house. Appellant had gone to the latrine which was situated outside the house. Then, Asha, PW-5 told him that Laxmi was missing from the house since last night. She also told him that she had heard the screams of Laxmi last night. Asha had also told him that something was kept on the roof of the house. He used the stair case and found a black polythene and he could feel some pieces of flesh by touching the polythene. In the meanwhile, the appellant had come back and threatened him and Asha not to disclose anything to anyone otherwise he would kill them. Thereafter, he came back to his house.

He was also treated hostile by the learned APP and was cross-examined at length. On being cross-examined, he has stated that the appellant did not allow him to use the ladder as he had stated there was an electric current in it. However, he suspected foul play and he used the ladder and saw the dead body of Laxmi which was cut into pieces in the black polythene in between the bricks under the 'tirpal' and the same was seen by Asha, PW-5 also.

It may be noticed that the said witness has made different statements at different stages. In examination-in-chief, he did not say having seen the cut pieces of body lying in a polythene. After treating him hostile and on being cross-examined by learned APP, he has stated having seen the body of Laxmi cut into pieces in a black polythene lying on the roof. On being cross-examined by Ld.counsel for appellant he has stated that he cannot say as to how many polythenes were there on the roof. He has also stated that he did not tell anyone of having seen the body in pieces and straightaway went to his factory. It is unimaginable that a person having seen the dead body cut into pieces will not inform anyone. He has further stated in cross examination that he had also accompanied the appellant to Aligarh in search of the "deceased" Laxmi after 1.10.2002 and 4-5 persons had also accompanied them. It may be seen that as per the prosecution, they had gone in search of Laxmi to Aligarh on 28.10.2002.

It is not believable that a person having seen the dead body, as has been deposed by the aforesaid witness, would thereafter accompany the appellant and others for search of a dead person. As per investigation, he has made the statement to the police making allegations against appellant for the first time after a gap of two and half years of the alleged incident. Further, it is not the case of the prosecution that Shiv Raj Singh, PW-15 had seen Laxmi prior to incident. Under these circumstances, the evidence of Shiv Raj Singh, PW-10 does not inspire confidence. Further, Asha PW-5 has also not supported his version.

He has also deposed that appellant had killed his previous wife Sheela and child. In this regard, learned counsel for the appellant has pointed out that appellant was acquitted in the said case. Nothing contrary is pointed out by the learned APP appearing for the State.

The other evidence relied upon by the prosecution is the „tirpal’ Ex.P1 which was seized by the IO PW-36 from the roof of house of appellant. As per CFSL report Ex. PW 24/A blood was detected on it. However, no blood group could be detected. Further, there is nothing to show that blood detected was that of Laxmi. No DNA test was done to substantiate that it was the blood of Laxmi. Prosecution has failed to prove even the aforesaid circumstantial evidence against the appellant.

32. Even evidence of SI Dayachand, PW-35, ASI Rajbir Singh PW-18 and IO PW-36 about pointing out memo Ex.PW 35/A at the instance of appellant is not convincing. Nothing is recorded pursuant thereto. There is no evidence that the victim is dead. As per prosecution case, her dead body is not found. There is no believable positive evidence on record that anyone had seen her dead body.

33. Learned counsel for the appellant has pointed out that there is also a delay of two and half years in recording the statements of prosecution witnesses under section 161 Cr.P.C. It is contended that the same is fatal to the case of prosecution. It may be noticed that FIR Ex.PW-19/A u/s 363 IPC was registered on 25th October, 2002. Thereafter, there had been no progress in the investigation. There is no explanation why statements of PWs were not recorded

earlier. WP(C) No. 97/2003 was filed by Laxmi's father in this court wherein investigation was transferred to Anti Kidnapping Section, Crime Branch on 7.4.2003. Even thereafter, statements of PWs were recorded after a long time in February, 2005. The delay is fatal to the case of the prosecution. It creates doubt in the prosecution case. Reference in this regard is made to Ganesh Bhavan Patel and anr vs State of Maharashtra (1978) 4 SCC 371, wherein the Supreme Court held:-

“15. As noted by the Trial Court, one unusual feature which projects its shadow on the evidence of P.Ws., Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 Cr.P.C. were recorded on the following day. Welji (P.W. 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case.

47. All the infirmities and flaws pointed out by the trial Court assumed importance, when considered in the light of the all-pervading circumstance that there was inordinate delay in recording Ravji's statement (on the basis of which the "F.I.R." was registered) and further delay in recording the statements of Welji, Pramila and Kuvarbai. This circumstance, looming large in the background, inevitably leads to the conclusion, that the prosecution story was conceived and constructed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion.”

Further, in *Jagjit Singh @ Jagga Vs State of Punjab (2005)3SCC689*, wherein also there was delay in recording the statement of an eye witness by the investigating officer and no explanation was forthcoming as to why the statement was recorded after 3 days despite the fact that doctor had given the fitness certificate. The Supreme Court held as under:-

“30. This has to be viewed in the light of the fact that her statement was recorded by the Investigating Officer for the first time three days after the occurrence, and her statement was recorded by the Judicial Magistrate six days after the occurrence. The courts below have taken the view that delay in examining her has caused no prejudice to the defence. Counsel for the appellant, submitted that this period was utilized by the prosecution for tutoring the witness, and therefore the delay of three days in her examination under Section

161 Cr. P.C. is significant. No explanation is forthcoming as to why she was not examined for three days when the Investigating Office knew that a statement of her's had been recorded by the doctor on 30th August, 1996. The Trial Court took the view that since she was under a shock she was not in a position to make a statement and, therefore, her statement was recorded later. This is clearly erroneous because the case of the prosecution is that she regained consciousness on 30th August, 1996 and, thereafter, she was fully conscious. The evidence of Dr. Bhupinder Singh, PW-7 who gave a certificate of her fitness to make a statement is also to the same effect. The reasoning of the Trial Court that the victim, PW-6, was under a great shock and was not in a position to make the statement, cannot be sustained. Neither the Trial Court nor the High Court cared to closely examine the evidence on record to find out whether there was any evidence on record to prove that the appellant was known to PW-6 or that PW-6 had any reason to know his name so as to be able to identify him by name. The explanation furnished by PW-6 five years after the occurrence, that she knew the appellant because he happened to be the son of Amar Singh at whose tune well her grandparents resided, is unacceptable particularly, in view of the fact that there is no evidence to establish that she had ever earlier seen the appellant and in none of the three statements made by her earlier the name

of Amar Singh is mentioned. The delay in examining her in the course of investigation also creates a serious doubt in the absence of any explanation for her late examination after three days, when admittedly she was the sole eye witness who was also injured in the course of the occurrence. We are, therefore, of the view that though she may have witnessed the occurrence, she did not know the appellant by name as she had no opportunity of knowing or seeing him earlier, and that she has involved the appellant at the instance of her father, who was the person who suggested the involvement of the appellant when her statement Ex.PW-6/A was being recorded.”

Learned APP for the State has also relied upon the polygraph test of the appellant wherein the report Ex.PW 24/A is as under:-

“Analysis and evaluation of the polygrams reveal deceptive response. According to the test and analysis, the following statements of Shishpal are perhaps incorrect. That,

(i) His wife Smt.Asha had sent Laxmi to bring medicine from chemist's shop in Hindu Rao Hospital, and

(ii) He has not kidnapped Laxmi alongwith someone.”

There is nothing on record to show that appellant had consented for the said test. Further, without any material evidence on record, the said report is also of no help to the prosecution.

34. Considering the totality of the evidence on record, the prosecution has failed to establish the circumstantial evidence alleged against the appellant. The appellant has already been acquitted by the learned trial court for the offence punishable u/s 376 IPC. We are of the view that in the facts and circumstances of the case, the appellant deserves to be given the benefit of doubt in respect of the other offences also. Giving the benefit of doubt, he is acquitted of charges in respect of other offences also.

The appeal is accordingly allowed. The impugned judgment and order on the point of sentence are set aside. The appellant is in custody. He is directed to be

released forthwith if not required in any other case.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com