CASE NO.:
Appeal (crl.) 323 of 2002

PETITIONER:
Kantilal @ K.L. Gordhandas Soni

RESPONDENT:
State of Gujarat

DATE OF JUDGMENT: 11/12/2002

BENCH:
N.SANTOSH HEGDE, J. & B.P. SINGH, J.

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J

The Additional Sessions Judge, Sabarkantha District found the appellant guilty in Sessions Case No. 99 of 1994 for offences punishable under Sections 302, 201, 394 and 449 of the Indian Penal Code and sentenced him to undergo imprisonment for life and imposed a fine of Rs.500 in default of which a further sentence of one year rigorous imprisonment for the offence under Section 302. The Sessions Court further imposed a sentence of two years rigorous imprisonment and a fine of Rs.300 in default of which the appellant was directed to undergo imprisonment for six months for an offence under Section 201. The Court also awarded a sentence of five years rigorous imprisonment and a fine of Rs.300 in default a further sentence of one year rigorous imprisonment for offence under Section 394. For the offence under Section 449 I.P.C. the appellant was awarded a sentence of three years rigorous imprisonment and a fine of Rs.300 in default a further sentence of six months rigorous imprisonment was awarded.

The appellant's appeal before the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 125 of 1997 came to be dismissed by the Division Bench of the said High Court. Hence the appellant is before us in this appeal.

Briefly stated the prosecution case is on 9th of April, 1994 when the milkman who used to supply milk to the deceased Kantaben, went to her house for supplying milk in the morning, he did not get any response when he called for her. Hence, when he peeped inside the kitchen door which was open, he found the deceased lying injured. He immediately informed the relatives and in turn the police were informed who came to the place of incident and removed the body for postmortem which was conducted on 9th of April, 1994, during which procedure PW-1, Dr. Jhinabhai found among other injuries a reddish injury in the front of the throat where a swelling was also noticed. On the examination of the internal injuries corresponding to the injury noticed on the throat, the Doctor found the larynx congested and there was reddish foam inside bronchia. He opined the cause of death of Kanta Ben was due to strangulation. On 10th April, 1994 by which time the son of the deceased had come to Modasa, the son gave a further report to the police that on search of the house of his mother certain gold jewelleries worn by her were found missing and he suspected that the cause of death of his mother was not due to accident as was originally thought of before the postmortem but was murder. PW 28, who conducted the investigation having suspected the appellant on the basis of two cheques of his found

in the house of the deceased, on investigation found that the appellant had financial transactions with the deceased, therefore, he could have been responsible for her death. When he searched for the appellant he could not find him at his usual place of residence or at work, and was able to arrest him only on 11th of May, 1994 about 33 days after the incident on 8th of April, 1994. During the course of his interrogation, based on a statement made by the appellant the investigating agency went to the place of PW 10, a Goldsmith and found out that he, at the instance of the appellant, melted certain gold ornaments into ingots of 60 grams and 35 grams on 9th of April, 1994. On further investigation, it was found that the said ingots were purchased by PW 11, a Jeweller, for Rs.35,000 from the appellant. The investigation also revealed that the appellant had taken a loan of Rs.20,000/- on pledging Kisan Vikas Patras belonging to himself and his wife from Nagrik Bank which amount according to the prosecution was repaid and the Kisan Vikas Patras were redeemed by the appellant at about the same time as he received the money from PW 11. During the course of investigation, it was also revealed that one Natwarlal Shankerlal, PW 21 had seen the appellant in the house of the deceased at about 8 or 8.30 p.m. on 8th April, 1994. The investigating officer, while arresting the appellant on 11th of May, 1994 also noticed that he had certain injuries on him which, on medical examination were found as injuries which could have been caused by the deceased with her nails. It is based on these materials, the prosecution charged the appellant for having caused the death of Kantaben, as stated above.
It is on the basis of the above evidence, the Courts below came to the conclusion that the prosecution has established its case against the appellant and found him guilty of the charges levelled against him and setenced him as stated above.
As could be noticed from the facts narrated hereinabove the case of the prosecution rests on circumstantial evidence. The prosecution has relied upon the following circumstances to prove its case:

a) That the accused was known to the appellant and had financial dealings with the appellant.

b) The accused was in need of money.

c) The accused was last seen in the house of the deceased on 8.4.1994 at about 8 or 8.30 p.m. by PW 21.

d) The accused, even though a person known to the deceased, did not attend either the funeral or called upon the family of the deceased to condole the death and was absconding for nearly 33 days.

e) The accused had got melted certain jewellery with the help of PW 10 into gold ingots on 9.4.1994.

f) The accused had sold two ingots of 60 grams and 35 grams obtained by him from the melting of jewelleries to PW 11 for a sum of Rs.35,000 on 9.4.1994.

g) The accused had taken a loan on hypothecation of Kisan Vikas Patras which were redeemed by repayment of loan on 11.4.1994.

h) The accused had injuries which could have

been inflicted on him by the deceased at the time of attack on her.

It is on the basis of the above circumstances that the appellant was found guilty of having murdered the deceased Kantaben. We have heard learned counsel for the parties and have given our anxious consideration to the facts of the case. If actually the circumstances narrated hereinabove have been established beyond any reasonable doubt, there could be no difficulty in concurring with the finding of the Courts below. However, we find that some of the links in the chain of circumstances have not been established by the prosecution either in accordance with law or beyond reasonable doubt, because of which, in our opinion, serious doubts arise as to the correctness of the prosecution case which will be discussed by us hereinbelow.

In regard to the circumstance that the appellant was known to the deceased and had financial transactions, we have no doubt the prosecution has established this fact, therefore, we proceed on the basis that this circumstance stands proved. So also, the second circumstance noted above that the accused was in need of the money and he had given two cheques which obviously were not encashed by the deceased, therefore, to that extent that the appellant had a motive, also could be accepted. The third circumstance noted hereinabove, in our opinion, has not been established by the prosecution. This is based on the evidence of PW 21, the neighbour Natwarlal Shankarlal. There is no doubt that this witness resides very close to the house of the deceased and it is also possible that on 8.4.1994 around 8 or 8.30 p.m. he might have been present in his house but we have serious doubt whether this witness had actually seen the appellant in the house of the deceased. It is an admitted fact that at that point of time there was no light in the house of the deceased. In such circumstances, this witness has not given any reason how he could identify the appellant in spite of the fact that there was no light. That apart, the most doubtful part of PW 21's evidence is that he did not speak about this factum of his having seen the appellant in the house of the deceased on 8.4.1994 night to anybody for nearly 39 days till after he decided to speak to the investigating agency. No explanation whatsoever has been brought on record to explain this extraordinary conduct of this witness. This witness was known to the deceased and he was staying in the close proximity of the house of the deceased; after the incident on 8th of April, 1994 police were regularly visiting the house of the deceased; all the relatives of the deceased had come to Modasa including her son and definitely if this witness is speaking the truth he would have known the importance of the fact noticed by him on 8th of April, 1994. Still he did not speak about this to anybody till 17th of May, 1994 by which time the appellant was arrested. To us, the evidence of this witness seems to be artificial. Of course, merely because the evidence of a witness is recorded by the police under Section 161 Cr.P.C. belatedly, by itself, does not make the evidence unacceptable provided there is some logical or acceptable explanation for the same. In the instant case, there is no such explanation. Therefore, contrary to the findings of the Courts below, we are unable to accept the evidence of this witness. Hence this circumstance cannot be relied upon.

The next circumstance, as to the default of the accused, in not attending the funeral or of his abscondance, even if held to be proved by the evidence of prosecution; by itself, will not implicate the appellant, however the cumulative effect of this circumstance along with the motive will be discussed by us hereinafter.

The next circumstance pertains to the accused having taken certain jewellery and having melted the same with the help of PW 10. This circumstance, in our opinion, is a very important link in the prosecution case. If established, it would go a long way in strengthening the links in the chain of circumstances relied upon by the prosecution. In support of this circumstance, the prosecution had produced PW 10, Bipinchandra Ambalal Soni. But, this witness has not supported the prosecution case in regard to the fact of the accused having taken some gold ornaments to him and having melted the same into gold ingots. Therefore, this important link in the chain of circumstances is not established by the prosecution

The next circumstance relied upon by the prosecution is again an important circumstance which pertains to the accused having sold two ingots of 60 grams and 35 grams each to PW 11, Parasmal Himamal Soni, for which, according to the prosecution, the accused received a sum of Rs.35,000 from PW 11. This witness, PW 11, has also not supported the prosecution case; nor have the Panch witnesses Vijaykumar Navnitlal Shah and Purankumar Chamanlal Purani, who were examined to establish the fact that the appellant had voluntarily shown the shop of PW 11, supported the prosecution case. But the Courts below relied upon certain documents seized from the premises of PW 11 to establish the fact that there were entries in those documents to show that PW 11 had made those entries which pertain to the purchase of two ingots of gold from the appellant and PW 11 having paid him Rs.35,000 for the same. It is true, this witness PW 11, Parasmal Himamal Soni, though did not support the prosecution on the sale and purchase of ingots from the appellant, did speak about the entries in the documents seized by the police. The Courts below have chosen to rely upon this evidence to come to the conclusion that this part of the prosecution case is acceptable and held that the appellant had in fact sold certain gold ingots to PW 11 and received Rs.35,000. We think it is not safe to rely upon this part of the prosecution evidence. While considering the evidence of the prosecution in this regard, we must first notice the fact that the prosecution has failed to prove that the appellant took the gold ornaments belonging to the deceased to PW 10 and got them melted into two ingots of 60 grams and 35 grams. In the absence of that part of the prosecution case being proved what is left is the documentary evidence of certain ingots having been purchased by PW 11 and the said witness paying Rs.35,000 to the appellant. Here, apart from the fact, PW 11 has denied having made this purchase, the Panch witnesses who are the witnesses to the statement of the appellant for having shown them the shop of PW 11 have not supported the prosecution case. The sole reliance, hence, has to be placed on the documents seized from the shop of PW 11 and the contents of the said documents. From the evidence produced by the investigating agency in the form of evidence of PW-11, it is seen that there is entry to show that on 9th of April, 1994 one Kantibhai G.K. Lal sold two gold ingots to PW 11 and received Rs.35,000 for the same. But then we must notice this is not an entry made by PW-11 himself. It is an entry made by one Soni Kanti Bai, who has not been examined by the prosecution. Further, this part of PW-11's evidence will have to be evaluated in the background of the fact that this witness had earlier denied that the appellant had sold the gold to him, if so, there is no explanation as to how this entry came to be made. The most damaging part of this part of the prosecution case is that this fact of the appellant having sold the gold ingots and receiving Rs.35,000 from PW 11 is not put to the accused in his Section 313 Cr.P.C. examination. The questions put to this witness in

this regard are as follows;
Q: The witness Parasmal Himatlal at Exhibit 33 has stated that he had made bill in the name of Kantibhai G.K. Lal for making gold ingot vide bill No.7 of his bill book of 1994, what do you have to say?

A: I do not know.

Q: This witness has further stated that he has produced the gold ingot, muddamal article No.1 before police, what do you have to say?
A: I do not know. (Emphasis supplied).

A perusal of the questions put to this witness as to the facts incriminating him and as extracted hereinabove, according to us does not reflect any incriminating evidence as to the appellant having sold any gold ingots to PW-11. The first question extracted hereinabove in this regard shows that parasmal Himatlal at Exhibit 33 had made a bill in the name of Kantibhai G.K. Lal for making gold ingot and the appellant was called upon to answer that question which he rightly says that he does not know. The factum of PW 11 had made an entry in his book in the name of one Kantibhai G.K. Lal cannot be a circumstance incriminating the appellant unless there was a connecting evidence to show that this appellant had sold the gold ingots to PW 11 which part of the prosecution case has not been proved. Therefore, it is futile, in our opinion, for the prosecution to rely upon some entry made by one Soni Kanti Bai who has not been examined and in the background of the fact that PW 11 himself had denied the fact of the appellant selling gold to him. Therefore, in our opinion, the fact of there being an entry in Exhibit 33 in regard to some gold ingot cannot be a circumstance incriminating the appellant.

The next question put to the witness is that PW 11 has stated that he has produced the gold ingot before the police. What you have to say? We do not think this circumstance is also an incriminating circumstance against the appellant in the absence of there being acceptable evidence that the ingots given by PW 11 to the police are the ingots given to PW 11 by the appellant. In the absence of this link evidence, this circumstance also cannot be construed as circumstance incriminating the appellant.
From the above questions put to the appellant in his examination under Section 313 Cr.P.C., it is seen that the prosecution has not established the fact that the appellant had sold the gold to PW 11.
The next circumstance relied upon by the prosecution is in regard to the loan taken by the appellant by hypothecating the Kisan Vikas Patra and that repaid that loan on 14th of April, 1994, assuming that the same has been established, that would not in any manner implicate the accused with the murder of the deceased Kantaben in the absence of any material to show that repayment was made from out of the proceeds of the articles robbed by the appellant from the deceased Kantaben. Appellant had his own printing business and it is for the prosecution to establish that the one and only source to repay the money was from out of the stolen property of deceased Kantaben, which not having been done, even this circumstance cannot be of any assistance to the prosecution.
The factum that the accused had certain minor injuries and that he was not available to the investigating agency from

10th of April, 1994 to 11th May, 1994 would not also be a circumstance which would implicate the accused with the murder of Kantaben.

From the discussion of the circumstances relied upon by the courts below, we have noticed the prosecution has failed to establish : (a) that PW 21 had seen the appellant in the house of the deceased on 8.4.1994; (b) that the appellant had got certain gold ornaments melted with the help of PW 10 on 9th April, 1994; and (c) that the appellant had sold two ingots of 60 grams and 35 grams each to PW 11 for a consideration of Rs.35,000.

In view of the fact that the prosecution has failed to prove these links in the chain of circumstances, in our opinion, the rest of the circumstances do not form a complete chain as to draw an irresistible inference that the circumstances established by the prosecution establish that it is the accused and the accused alone who could have committed the murder of deceased Kantaben. In our opinion, those circumstances proved by the prosecution can only throw a doubt as to the involvement of the appellant in the murder of Kantaben which is not sufficient to base a conviction.

On the above basis, we are of the opinion, that the Courts below were in error in coming to the conclusion that the prosecution has established its charges against the appellant by the circumstantial evidence relied upon by it. Hence, the appellant is entitled to succeed in this appeal.

Accordingly, the judgment and conviction of the courts below are set aside. The appeal is allowed. The appellant, who is in custody, shall be released forthwith, if not required in any other case.