

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Hearing & decision: 15th September, 2011

+ **CRL.A No.485/2011**

RIZWAN

..... APPELLANT

Through: Mr. K.B.Andley, Senior Advocate with
Mr. M.Shamikh Advocate.

Versus

STATE

..... RESPONDENT

Through: Mr. Sanjay Lao, APP for the State.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

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| 1. Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Order should be reported in the Digest? | Yes |

JUDGMENT

G.P. MITTAL, J. (ORAL)

1. This case relates to the murder of an infant Roshan who was the son of PW-1 Smt. Madhu Devi, aged about 2-2½ years. The Appellant having been convicted for the offences under Section 302/452/34 IPC by order dated 19.03.2011 was sentenced (by order dt.22.03.2011) to undergo life imprisonment and to pay a fine of ₹20,000/-, in default of payment of fine to undergo simple imprisonment for three years under Section 302/34 IPC. He was further sentenced to undergo rigorous imprisonment for seven years and to pay a fine of ₹5,000/- or in default of payment of fine to undergo simple imprisonment for one year for the offence punishable under Section 452/34 IPC. The Appellant challenged the conviction and order of sentence.
2. Initially DD No.4 (Ex.PW-18/B) was recorded at PS Sultan Puri, 4:25 a.m., to the effect that a quarrel had taken place in Prem Nagar, Gali No.3 near Subhash STD booth at house No.E/2/72A. Subsequently DD No.5 (Ex.PW18/A) was recorded on the statement of PW-1 to the effect that a neighbour had killed her son in block E-2, Prem Nagar III near Subhash STD booth. Initially, PW-16, ASI Krishan Kumar reached the spot at about 6:30 p.m. followed by Inspector Mir Singh (IO) of the case.

The IO proceeded to record the statement (PW-1/A) of Smt.Madhu and made his endorsement Ex.PW-24/A at 11:00 a.m. and sent it to the police station for registration of a case. The facts of the case can be extracted from para 2 and 3 of the impugned judgment as under:

“2. In her statement to the police Smt.Madhu Devi told the police that she was residing at the above stated address and her husband used to work in a plastic factory at Mundka. On 11.06.06 at about 2:45 a.m. his elder son Deepak aged 4 years woke up to have some water. His younger son Roshan(deceased) also woke up with him and asked for some water. Deepak gave water to Roshan and said that he wanted to urinate. On this she told Deepak to open the bolt of the door and urinate near the tap. After some time Deepak came back running and he was frightened. She came outside with Roshan in her lap and saw that in the aangan two persons were standing and one of them was accused Rizwan who was their neighbour and they had a quarrel with him on the point of money transactions. The other person who was with accused Rizwan gagged her mouth and accused Rizwan went inside the room and after some time when he came back, he bolted the door of the room from outside leaving her husband inside the room. Thereafter accused Rizwan snatched her son Roshan from her and started strangulating him and when she tried to save her son, the associate of Rizwan gave her slaps. Thereafter accused Rizwan had put Roshan on the ground and started crushing his neck from his legs. Associate of accused Rizwan lifted Roshan from the ground and then again threw him on the floor and they both ran away from there. Thereafter she started crying and raised alarm and made her husband awake and called the police from the house of her relatives in the neighbourhood.

3. On the statement of Madhu Devi, Insp.Meer Singh made endorsement and got the present case registered. During investigation scaled site plan was got prepared through draftsman. On 11.06.06 ASI Krishan Kumar got postmortem on the body of deceased Roshan conducted and the doctor in the postmortem report opined the cause of death as asphyxia as a result of pressure over neck structure subsequent to throttling. On 12.06.06 complainant made a statement that the other person who was with accused Rizwan in commission of offence on 10.11.06 was Janak Raj @ Lekhi, who is having a grocery shop at D Block, Prem Nagar. She further stated that she had not disclosed the name of accused Janak Raj@ Lekhi earlier as he had threatened her not to disclose his name otherwise he would kill her second son also. She also stated that as she had lodged a complaint against accused Rizwan regarding theft at her house but later on with the intervention of neighbours the matter was settled. She further stated that accused Rizwan and Jank Raj @ Lekhi started threatening her that she had defamed accused Rizwan and they will take revenge for the same and they became enmical towards her. Due to this enmity, accused Rizwan and Janak Raj @ Lekhi committed murder of

her son Roshan. On 15.06.06 accused Rizwan and Janak Raj @ Lekhi were arrested and their disclosure statements were recorded. Place of incident was got photographed. Viscera and blood gauge which were preserved by the doctor during postmortem were sent to FSL, Rohini for analysis. Statements of witnesses were recorded and thereafter challan was filed against accused persons for trial of offences punishable u/s 302/452/34 IPC."

3. A report under Section 173 Cr.P.C. was filed by the police. One Janak Raj was also sent up for trial along with Appellant.
4. The Appellant and the co-accused Janak Raj pleaded not guilty to the charge. The prosecution examined 24 witnesses.
5. By impugned order, the Trial Court acquitted Janak Raj holding that there were doubts about his identity. The Appellant was convicted holding that the case was fully established against him.
6. We have heard Mr.K.B.Andley learned senior counsel for the Appellant and Mr.Sanjay Lao learned APP for the State.
7. It is urged by counsel for the Appellant that according to the prosecution the incident took place on 11.06.06 at about 2:45 AM. The first information about the incident was recorded by DD No.4 (Ex.PW-18/B) at 4:25 AM. It is the prosecution's case that there was some discrepancy in the DD (Ex.PW-18/B) about the address where the incident took place and, therefore, a second DD i.e. DD No.5 (Ex.PW-18/A) was recorded in the police station at 06:05 AM.
8. It is contended that PW-1 Madhu, the deceased's mother, who is the solitary witness of the incident did not disclose the name of the assailant either in the first DD (Ex.PW- 18/B) or in her second DD (Ex.-PW-18/A). The first DD entry, it is argued, was regarding a quarrel whereas the second DD was regarding the murder of the child of the complainant aged 2-2½ years. It is submitted that, although the details about the age of the child were given in the second DD, yet, the name of the assailant, especially the Appellant, who was well known to Madhu (PW-1) (as they had a dispute) was not disclosed. It is urged that the cross-examination of PW-1 would reveal that she did not see the assailant and the Appellant with whom she had animosity was falsely implicated in the case to work out a blind murder case. This, argues the learned counsel, is fortified from an unexplained delay of 5-6 hours in recording the FIR.

9. To appreciate the contention raised on behalf of the Appellant it would be appropriate to refer to PW-1's testimony. She deposed that on 10th of a particular month in the year 2006 she went to bed around 11:30 PM. The main light was switched off and only the night lamp was on. At about 2/2:30 AM her son Deepak got up to pass urine. She directed him to relieve himself near the tap. She deposed that the main gate of the house was locked. The door of the room in which they were sleeping was open. Her son Deepak returned and looked scared. When she asked for the reason he did not disclose anything and simply embraced her. Deepak asked for water and she asked him to have it from the pitcher. In the meanwhile her younger son Roshan also got up and also asked for water. Deepak gave him water in the same glass. She came out with Roshan in her lap. As soon as she entered the courtyard she saw two persons, one of whom caught hold of her hand and the other slapped her. When she cried she was gagged. Out of the two persons one was Rizwan (the Appellant), the other person had muffled his face with a handkerchief. Rizwan caught hold of her son Roshan by the neck, pressed it and then threw him on the floor. She started crying, on which the Appellant and his associate fled the spot. While leaving, Rizwan's associate put his foot on her son. She lifted Roshan and found him dead. She deposed that her husband could not come to her rescue as the room in which he was sleeping was bolted (by the accused) from outside. She opened the main gate to call the police. The witness then deposed about an earlier theft incident, committed by Rizwan from her house and the matter having been settled by a memo Ex.PW-1/D through which Rizwan settled the accounts with her. She deposed that in spite of the compromise, Rizwan started threatening her that since he was insulted by her he would avenge it.
10. In cross-examination, she deposed that on the night of the incident it was dark as the lights were off. She gave a version contrary to her examination-in-chief when she deposed that her husband slept in the same room where she had slept with her children. She stated that her husband was not alcoholic and on that day did not go to sleep after taking liquor. She deposed that her son Deepak who had gone to pass urine in the night did not disclose about Rizwan's presence. She deposed that she could not state with certainty if both the persons in the courtyard had muffled their faces. She stated that there was no exchange of arguments so as that she could identify Rizwan by his voice. When a specific question was put to the witness that Rizwan was not present at the time of the incident the witness deposed that she had

- collapsed on the dead body of her son and, therefore, could not state about Rizwan's presence.
11. It is important to note that in her examination-in-chief PW-1 deposed that her husband could not come out (at the time of the incident or even thereafter) as his room was bolted from outside by the assailants. In cross-examination she changed her version and deposed that her husband slept in the same room in which she was sleeping with her kids. The conduct of the husband (PW-4) in not getting up on hearing commotion and not lodging report with the police is quite strange.
 12. From the deposition of Smt.Madhu Devi (PW-1) it is clear that she was sure of the Appellants identity as he was Madhu's neighbour and there was also a previous incident of theft being committed by the Appellant at complainant's house, the dispute was settled a few days before this incident. It is intriguing that neither in the DD (Ex.-PW-18/B) recorded at 4:25 a.m. nor in DD (Ex.-PW-18/A) recorded at 6:05 AM, the name of the Appellant was mentioned. Sometime sketchy information is given to the police merely to enable it to reach the spot and take further action. That is not the case here. DD No.5 (Ex.PW-18/A) mentioned some details i.e., that the complainant's son aged 2-2½ years was killed. As a natural human conduct the complainant would have mentioned the assailant's name if she was really aware of it.
 13. According to PW-16 ASI Krishan Kumar, on receipt of the DD he could not reach the spot because of confusion about the house number. However, when he received the subsequent DD (No.5) through Constable Ratti Bhan he immediately reached the spot. In cross-examination ASI Krishan Kumar disclosed the time he reached the complainant's house, as 6:20 AM. He stated having met the complainant Madhu Devi and her husband, yet he preferred not to record their statement. He deposed to remaining at the spot for two hours. Inspector Mohd. Iqbal, SHO of the police station and the crime team also reached the spot in his presence at 7:20/7:30 AM. It is not inexplicable why the complainant's statement was not recorded either by ASI Krishan Kumar or by the SHO of the police station though commission of a serious offence such as murder had been brought to their notice. PW-16 went on to add that the additional SHO Inspector Mir Singh reached the spot in his presence at 8:30 a.m. He was the IO of the case and recorded the complainant's statement. Rukka Ex.PW-24/A was recorded on the statement of Ex.PW1/A of the complainant. It mentioned the time of sending the rukka, to the police station (for registration of the case) as 11:00 a.m. Thus it can be presumed that the statement of the complainant Madhu

Devi might have been recorded at 10:45 AM. The prosecution is under an obligation to explain the delay from 6:20 AM when ASI Krishan Kumar reached the spot followed by the SHO, at least Inspector Mir Singh who was assigned the investigation ought to have given some explanation as to why he did not record the statement of the complainant immediately at 8:30 AM. But no explanation whatsoever has been given either by the complainant or by the IO for this delay in recording the complainant's statement on the basis of which the FIR was ultimately recorded.

14. In *Meharaj Singh v. State of U.P.* (1994) 5 SCC 188 while emphasizing the importance of recording a prompt FIR the Supreme Court observed as under:

“FIR in a criminal case and particularly in murder case is a vital and valuable piece of evidence for the purpose of appreciating evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses if any. Delay in lodging FIR often result in embellishment, which is a creature of an afterthought. On the account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version of exaggerated story.”

15. In *Jhulia Kali v.State of Tamil Nadu* (1972) 3 SCC 393 the Supreme Court observed as under:

“...first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused.”

16. Similarly in a recent case in *Kishan Singh v.Gurpal Singh* (2010) 8 SCC 775 the Supreme Court held that *“Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case there is some delay in recording the FIR, the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained.”*

17. Turning to the facts of the case we may say that no explanation has been given by the prosecution for the delay of approximately five hours in recording the FIR. This delay assumes importance in view of the fact that the complainant had animosity against the Appellant and his name did not find mention in DDs Ex.PW 18/A and PW-18/B.

Though the prosecution tried to project the earlier incident between the complainant and the accused as a motive to commit the offence, yet it has to be kept in mind that animosity is a double edged weapon which cuts either way. There is every likelihood that the complainant might have suspected the Appellant (who was inimical towards her) as perpetrator of the ghastly crime which is why there were deliberations and delay in the FIR. We have no manner of doubt that the Appellant's identity was not established and he was falsely implicated only on suspicion after due deliberation.

18. The Trial Court fell into error in not giving adequate attention to this important aspect of the prosecution case. The impugned order, therefore, cannot be sustained and the appeal has to succeed.
19. In view of above discussion the impugned order is set aside. The Appellant's personal bond and the surety bond are cancelled and he is ordered to be set at liberty, if not required in any other case.
20. The Appeal is allowed in the above terms.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

SEPTEMBER 15, 2011
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