

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

RESERVED ON : 07th March, 2012

DECIDED ON : 30th May, 2012

+ **Crl.L.P.95/2012**
Crl.M.A.2300/2012(delay)

STATE Petitioner

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

versus

SUMIT Respondent

Through : None.

+ **Crl.A.1472/2011**

SHER SINGH DAGAR Appellant

Through : Mr.Naresh Kaushik, Mr.S.P.Ahluwalia,
Mr.Karan Singh and Mr.Aditya Sharda,
Advocates.

versus

SUMIT SAUNDAL & ORS. Respondents

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

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

Crl.M.A.2300/2012(delay) in Crl.L.P.95/2012

There is a delay of 44 days in filing the appeal. The delay is condoned for the reasons mentioned in the application.

Application is accordingly allowed.

Crl.L.P.95/2012 & Crl.A.1472/2011

1. The State has preferred the present petition for leave to appeal against the judgment dated 28.09.2011 of learned Additional Sessions Judge in SC No.150/2008 by which the Respondent was acquitted of the charge under Section 302 IPC. Sher Singh Dagar (father of the deceased-Divya) has also preferred appeal under Section 372 Cr.P.C. challenging Respondent's acquittal under Section 302 IPC.

2. The Respondent (Sumit Saundal) was arrested and charged for committing offences punishable under Sections 498-A/302/304-B IPC. The prosecution alleged that the death of Divya, the Respondent's wife occurred otherwise than under normal circumstances within seven years of her marriage. She was subjected to cruelty or harassment by the Respondent for, or in connection with the demand of dowry soon before the death. It further alleged that when the deceased or her parents failed to meet demands for dowry, the Respondent committed her murder by strangulation. The Respondent was charged for committing offences under Sections 498-A/302 IPC or in the alternative for committing the offence under Section 304-B IPC. The accused pleaded not guilty to the charges and claimed that Divya committed suicide by hanging in the matrimonial home, in his absence and he came to know about it on reaching there at 06.00 P.M.

3. The prosecution examined thirty one witnesses to prove its case. In the statement recorded under Section 313 Cr.P.C., the Respondent pleaded false implication. Besides examining himself under Section 315 Cr.P.C. as DW-6, he produced five witnesses in his defence.

4. After appreciating the evidence and after considering the rival contentions of the parties, by the impugned judgment, the Trial Court convicted the Respondent for committing offences punishable under Section 498-A/304-B IPC and acquitted him of the charge under Section 302 IPC.

5. Learned APP for the State has challenged the findings of the Trial Court to the extent the Respondent was acquitted of the charge under Section 302 IPC. The counsel urged that the Trial Court did not appreciate the medical evidence in its proper perspective. PW-22 (Dr.Anil Shandilya) who conducted autopsy on the body of the deceased in the post-mortem report examination (Ex.PW-22/A) observed :

“1. Time since death is approximately about 18 hours prior to post-mortem examination.

2. Cause and mode of death – Final opinion will be given after receipt of blood and visceral chemical analysis report, which has been preserved, sealed and handed over to concerned IO.

3. The post-mortem findings are consistent with pressure over neck/throat by some ligature material.

4. Possibility of strangulation as observed by Executive Magistrate cannot be ruled out at this stage.”

6. He further relied on the testimony of PW-30 (Dr.Komal Singh) who gave subsequent opinion about the cause of death on perusal

of Forensic (FSL) report after considering the viscera/blood report of the deceased which showed absence of any common poison as under :

“Post mortem examination was consistent with the pressure over the neck/throat by someone. The possibility of strangulation cannot be ruled out. Dr.Anil Kumar has left the hospital and his whereabouts are not known to us. As the viscera report was negative for the poison, so nothing more can be added in the cause of death.

The basis of my opinion that the death of the deceased has been caused by strangulation by someone is that :

- (i) There were signs of asphyxia i.e. the pressure over the neck.*
- (ii) There were absence of dry salivary stains at angle of the mouth.*
- (iii) The surface under the ligature mark was not white glistening.*
- (iv) There was no parchmentation, dryness and leathry feeling of the ligature mark.*

The aforesaid findings ruled out the possibility of suicidal hanging and for me it appeared to be the case of garroting resulting in the strangulation and ultimately to death.

7. There was no reason, emphasized the counsel, to discard the medical evidence on flimsy grounds. The Trial Court without any relevant material termed it a case of ‘suicide’. The counsel further urged that the Trial Court omitted to see that the Respondent used to extend threats to kill the victim and on number of occasions had inflicted serious injuries to her. It was not open to the Trial Court to discard extra judicial confession made by the accused voluntarily to her close relative on the spot confessing his mistake. It unmistakably conveyed that the Respondent was the perpetrator of the crime. There was no sign of any depression or

anxiety forcing the deceased to end her life as on the fateful day in the morning itself she had conversed with her mother and desired to visit her in the evening. The unusual post incident conduct of the accused in not reporting the matter to the police and his request to the deceased's mother not to call the police is inconsistent with his innocence. PW-11 Surender Singh (SDM) in the inquest report specifically observed that the cause of death was 'strangulation'. The deceased's parents accused him (the Respondent) for Divya's murder in their statements made to the Executive Magistrate on 26.03.2007. The counsel further contended that the Respondent and the deceased were alone in the house prior to the incident. There was, thus, no possibility of any person other than the Respondent being the author of the crime.

8. Learned counsel for the complainant/victim argued on similar lines and heavily relied on the opinion of Dr.Komal Singh, whereby it was clearly mentioned that the death was due to 'strangulation'.

9. We have considered the submissions of the learned APP and learned counsel for the complainant/victim and have considered the Trial Court records. Undisputably, Divya's death took place on 25.03.2007 at about 05.00 or 06.00 P.M. in the matrimonial home within seven years of her marriage with the Respondent otherwise than under normal circumstances. The Respondent was arrested and prosecuted for committing the offences under Section 498-A/302 IPC or under Section 304-B IPC (in the alternative). By the impugned judgment, he was held guilty for committing offences under Sections 498-A/304-B IPC only. Since the Respondent's conviction under Section 498-A/304-B IPC is not under challenge before us, we shall confine our decision to the plea

whether the prosecution was able to prove beyond reasonable doubt that the death was due to homicide without discussing the merits of conviction to avoid prejudice to either of the parties.

10. Admittedly, there is no eye witness of the occurrence and the prosecution case rests on the circumstantial evidence only. The initial version reported to the police was that it was a case of suicide. PW-6 (Shakuntla), with her nephew reached the spot on getting telephonic call from the Respondent but did not lodge any report with the police. She informed her husband regarding the occurrence. PW-1 (Sher Singh Dagar), also did not intimate the police. The police arrived on the spot on receipt of information at 07.30 P.M. recorded by Daily Diary (DD) entry No.31-A dated 25.03.2007 (Ex.PW-7/DA) at police station Dwarka. The informant from B-502, Hind Co-operative Group Housing Society, Sector 5, Dwarka had reported that his 'sister' had committed suicide. The investigation was assigned to ASI Ramesh Chand who with Constable Ashok Kumar reached the spot. They found the lifeless body of a woman on the bed. One double bed-sheet was also found on the bed. PW-14 (ASI Ramesh Chand) deposed that deceased's husband had informed him that Divya committed suicide using the bed-sheet (Ex.PW-12/A). PW-8 (SI Yogeshwar Singh) from the Crime Team in the report (Ex.PW-8/A) directed him to seize the bed-sheet as it could be a material used for hanging. Photographer PW-13 (HC Parvir Singh) took six photographs from different angles (Ex.PW-13/1 to Ex.PW-13/6) and photograph Ex.PW-8/DA depicted one cane chair at point 'A'. PW-11 (Surender Singh, Executive Magistrate, Palam) reached the spot and after inspecting the body prepared the death report (Ex.PW-11/A) and sent it to DDU

Hospital with a request to preserve it. Apparently, on 25.03.2007, the deceased's parents did not lodge any FIR against the accused for committing Divya's murder. The Executive Magistrate did not record their statements that day. The prosecution witnesses did not offer any explanation for not registering the case under Section 302 IPC on day of occurrence i.e. on 25.03.2007. PW-1 and PW-6 made their statements to the Executive Magistrate the next day and PW-11 directed the SHO by an endorsement Ex.PW-11/F to take action in accordance with law.

11. The delay in registering the case under Section 302 IPC on 26.03.2007 has remained unexplained.

12. PW-11 Surender Singh (SDM) did not depose in the examination-in-chief about any observation regarding the death by strangulation or the basis of any such observation. He also did not depose if the deceased's parents had suspected the death due to 'strangulation'. It is unclear how and on what basis he (Executive Magistrate) observed the possibility of death by strangulation in his report. The victim had not sustained any external visible injuries (except ligature mark on the neck) on her person. There were no marks of violence on the body of the accused. There was no indication that the clothes which the accused was wearing at the time were in torn condition or the articles in the room were lying scattered to give an impression that the deceased had offered any resistance or struggled to save herself. The scene of incident was not found tampered with. The police did not examine any neighbours to ascertain if they had heard any commotion, noise or cries of the deceased. The conduct of the accused was reasonable as soon after the occurrence, he informed the deceased's mother on phone about the incident. He did

not attempt to disturb the scene to cause any evidence of the commission of offence to disappear or to flee from the spot.

13. The post-mortem of the body was conducted on 26.03.2007. PW-22 (Dr.Anil Shandilya) proved post-mortem report examination (Ex.PW-22/A) in which he did not give any definite opinion about the cause and mode of death and opted to wait for receipt of blood and visceral chemical analysis report. PW-22 was not sure if the death was due to strangulation. As per the FSL report Ex.PW-28/A no common poison could be detected in the viscera/blood of the deceased. During the investigation and also during the trial, the bed-sheet or position of the knot was not shown to him to ascertain if the ligature on the deceased's neck could be produced with it.

14. After receipt of viscera, the investigating officer did not seek the opinion of Dr.Anil Shandilya regarding the cause and mode of death. On 11.11.2007, an application was moved by Inspector, Anti Homicidal Section, Crime Branch to PW-30 (Dr.Komal Singh) to seek final opinion regarding the cause of death. It is a mystery why the IO opted to seek final opinion from Dr.Komal Singh who had not even conducted the post-mortem on the body despite availability of Dr.Anil (he appeared before the Court as PW-22 on 18.03.2010). Dr.Komal Singh in the report Ex.PW-30/A gave opinion that it was a case of garrotting resulting in the strangulation and ultimately to death. It is settled view that when there is difference of opinion between two experts, the opinion of the medical officer who performed post-mortem examination should be preferred. Curiously, at the time of examination of PW-22 (Dr.Anil Shandilya), the prosecution did not seek his subsequent opinion about the cause of death.

The circumstances in which the investigating officer obtained the subsequent opinion from PW-30 (Dr.Komal Singh), casts serious doubt about its authenticity. Medical evidence is basically opinionative. It can be considered to lend corroboration to the direct evidence. Even PW-30 was not definite about her opinion. In the cross examination, the witness was asked the question :

“Q. Is it correct that a definite opinion regarding cause of death cannot be given without seeing the dead body?

A. I would have been in a better position if I had examined the body personally.”

The use of the words “appears to be” also suggested that death might not be homicidal in nature and in the absence of any other evidence or circumstance to indicate that it was a case of murder or homicidal death, the conviction of the accused under Section 302 would not be proper. The Trial Court gave detailed reasons to arrive at the conclusion that it was not a case of death by strangulation.

15. The prosecution did not produce any evidence that the accused had ever threatened to ‘kill’ his wife. No complaint in this regard was ever lodged by the deceased or her parents with the police any time. The evidence or record does not show if any life threatening injuries were ever inflicted by the accused. It also did not prove the call-details to corroborate PW-5’s version regarding her conversation with the deceased that day. The Trial Court had considered the allegations of demand of dowry and beatings to the deceased on account of non-fulfilment of dowry demands.

16. The Trial Court disbelieved the extra judicial confession allegedly made by the Respondent before a relative. We do not deviate from it. An extra judicial confession can be relied on if the evidence about it comes from the mouth of a witness who appears to be unbiased, not even remotely inimical to the accused and the words spoken to by him are clear, unambiguous and convey in clear terms that the accused was the perpetrator of the crime. In the present case, name of the relative to whom confession was made by the Respondent was never revealed. There is nothing to show that the Respondent had any reasons to confide in him. The findings of the Trial Court on the circumstance are relevant to note :

“26. Ld. Prosecutor also submitted that the accused had made an extra judicial confession about the crime in front of PW6 and therefore, he is liable to be convicted u/s.302 IPC. In this regard, he referred to following portion contained in examination in chief of PW6 :

“My husband asked me to give a ring to the police. The moment I told that I will give a ring to the police, accused Sumit fell down on my feet and asked me not to call police. After sometime, my husband came there alongwith relatives. One of our relatives in a fit of anger slapped the accused and asked the accused as to why he had killed Divya and the accused told that he has committed a mistake.”

27. Apparently, even as per the aforesaid deposition of PW6, accused has not made any confession to her. At the most, he is stated to have admitted his guilt to a relative of PW6, who had slapped the accused and asked him why he had killed Divya. However, the name and particulars of that relative have nowhere been mentioned. He has not been examined as a witness by the prosecution. The exact words allegedly uttered by the accused have not come on record. Therefore, it is very difficult to hold that the accused has made any extra judicial confession. For basing a conviction, an extra judicial confession, it must be shown that the confession was made voluntarily and in a fit state of mind.

The words of its maker should unambiguously convey that he and only he has committed the crime. The extra judicial confession can be accepted only if it passes the test of credibility, which is not the case here. The accused having been slapped indicates application of force upon him to extract the alleged confession.”

17. It is well established in law that the Appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the Appellate Court may be the more probable one. In the case of ‘*State of Uttar Pradesh vs. Nandu Vishwakarma*’, (2009) 14 SCC 501, Supreme Court observed as under :

“23. It is a settled principle of law that when on the basis of the evidence on record two views could be taken- one in favour of the accused and the other against the accused- the one favouring the accused should always be accepted. This Court in ‘Chandrappa vs. State of Karnataka’, SCC 432 observed as follows :

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

- (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
- (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
- (3) Various expressions, such as, ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of*

language’ to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

- (4) *An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
- (5) *It two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court”.*

18. The prosecution failed to produce any cogent, reliable and clinching evidence to prove beyond doubt that the accused had ‘murdered’ the victim by ‘strangulation’ and it was a case of culpable homicide.

19. In the light of above discussion, we find no merit in the petition filed for leave to appeal and also in the appeal filed by the victim under Section 372 Cr.P.C and both are dismissed.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MAY 30, 2012/tr