

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

+ **CRIMINAL APPEAL NO. 321/2009**

% **Reserved on: 5th JULY, 2012**
Date of Decision: 17th JULY, 2012

BRIJ KISHORE Appellant
Through Mr. B.S. Chowdhary, Advocate.

Versus

STATE Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL NO. 446/2009

GYAN CHAND Appellant
Through Mr. Manoj Sharma, Mr. Pankaj Yadav
and Mr. Kapil Kaushik, Advocates.

Versus

STATE Respondent
Through Ms. Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J:

Father and son, Brij Kishore and Gyan Chand by the impugned judgment dated 24th January, 2009 have been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short), for the murder of Anita. The deceased Anita was wife of Gyan Chand and daughter-in-law of

Brij Kishore. They have been sentenced to imprisonment for life and fine of Rs. 15,000/- each, to be paid on realization to the children.

2. The case of the prosecution, which has been accepted by the trial court, is that the two appellants had committed the said murder on 22nd February, 2006 at about 2.30 a.m. in room No. 34, Chidyagarh Wali Gali, Plot No. B-1/76, Roshanpura, Najafgarh.

3. There is no dispute that Anita died an unnatural death by strangulation on 22nd February, 2006. The factum of the death stands proved by MLC Ex. PW17/A, written by Dr. Mahesh. The said doctor had examined Anita in the casualty, and had declared her brought dead at 3.30 A.M. on 22nd February, 2006. The MLC Ex. PW-17/A mentions and records that Anita was brought by her sister Pushpa with alleged history of being strangulated with chunni around her neck. PW-16, Dr. Parvinder Singh had conducted post mortem of Anita on 22nd February, 2006. In his report, Ex. PW-16/A and in his statement in court, he had opined that the death had taken place twelve hours back and the cause of death was asphyxiation as a result of ligature strangulation and throttling, which was ante mortem. The injuries

were recent and caused by a soft ligature material. He gave details of the ligature marks in the report Ex. PW16/A and in his testimony. We record that the counsel did not question and challenge the testimony of PW-16 and PW-17 before us.

4. The fact that Gyan Chand and Anita were residing in room No. 34, Chidyagarh Wali Gali, Plot No. B-1/76, Roshanpura, Najafgarh is not disputed before us. The said rooms were taken on rent from PW-6, Kishen Kumar, who has stated that Gyan Chand and his family members were residing in room Nos. 34 and 35. This fact is also proved from several other testimonies, which have been noticed below. The plea of Brij Kishore and Gyan Chand was/is that they were not present in the said rooms in the night intervening 21st and 22nd February, 2006, when Anita was strangled to death and both of them were at the residence of Brij Kishore located at B-213, Sultanpuri, Delhi. In support of their contention they had produced Bhagwati, wife of Brij Kishore, who was examined as DW1.

5. The prosecution relies upon the testimony of PW-1, Sarwan Kumar, brother of the deceased, PW-2, Pushpa, sister of the deceased, and her husband, PW-3, Inderpal who have implicated and blamed the two appellants for the death of Anita.

They also rely on the statement of PW-4, Preeti, daughter of the deceased Anita, aged 10 years.

6. PW-1, Sarwan Kumar has stated that Anita was married to accused Gyan Chand and they used to reside in room No. 34/35 along with the three children Preeti, Sonal and Akash. Sarwan Kumar along with his elder sister Pushpa was also residing in the same building in room No. 15. At about 2.30 A.M. in the night of 21st/22nd February, 2006, their niece Preeti came to their room and complained that her father and grandfather were beating her mother Anita. They rushed to the room of Anita and intervened. Gyan Chand had pressed the neck of Anita and was strangulating her with chunni. Brij Kishore had caught her feet. The accused fled away from the spot. They removed Anita to the hospital, where she was declared brought dead. Police recorded his statement, mark Ex. PW-1/A. He has stated that Gyan Chand was in the habit of consuming liquor and used to suspect that her sister had illicit relations with her nephew Bittoo.

7. Our attention was drawn to the site plan of the property marked Exhibit PW-12/A. The said site plan gives location of room Nos. 33 and 34 and also shows the bed where Anita was strangulated. There is another site plan marked Exhibit PW-

20/A, which shows location of both room Nos. 33/34 and 15. Room No. 15 is the place where PW-1, Sarwan Kumar and her sister PW-2, Pushpa were residing. The site plan shows that room Nos. 33 and 34 were located on one end, while room No. 15 was the last room at the other end. However, the two rooms were close enough and it would hardly take 1 to 2 minutes to walk from one room to another.

8. PW2 Pushpa has made an identical statement that in the intervening night of 21st/22nd February, 2006, she was sleeping in her house. At about 2.30 AM, Preeti d/o Anita came and stated that her father and grandfather were beating her mother. She along with her brother Sarwan went to the room of Anita and saw that appellant Gyan Chand was pressing Anita's neck and strangulating her with a chunni. Brij Kishore had caught hold of the two legs of Anita. They intervened and examined Anita. The accused appellants fled from the spot. Anita was taken to the RTRM Hospital, Jaffarpur in a Rickshaw but was declared brought dead.

9. PW3 Inderpal, husband of Pushpa PW2, in his testimony has affirmed that in the intervening night i.e. 21st/22nd February, 2006, at about 2.30 AM, Preeti came and stated that her father

and grandfather were beating her mother Anita. His brother in law, and wife rushed to the room of Anita and they took Anita to the hospital. He remained present with the children in the house. Prior to incident, the accused Gyan Chand and deceased used to quarrel over Bittoo, his nephew. Gyan Chand used to drink alcohol.

10. PW-4, Preeti, the daughter of the deceased aged about 10 years was examined without oath. The order sheet dated 7th March, 2007 records that the Additional Sessions Judge had spoken to Preeti and had put questions to her to ascertain, if she was a competent witness. On being satisfied that she was a mature child and could understand questions to give proper and rational answers, she was permitted to answer questions without oath. Preeti has stated that she did not remember the date but it was night time. Her father and grandfather had given beating to her mother and killed her. She had gone weeping to the residence of her uncle Sarvan to call him. Her uncle had come at the spot. She had remained at the residence of her Mausi. Her Mausi had not reached the spot.

11. Learned counsel for the two appellants have submitted that as per the statement of PW4, PW2 Pushpa did not go to the

room of Anita and only PW1 Sarvan Kumar had gone to the said room. We have examined the said contention and do not think that statement of PW4 Preeti should be read to discredit statement made by PW2 Pushpa. PW-4, Preeti had remained back at the room in which PW1, PW2 and PW3 were residing. As noticed above, room No. 15 and 33/34 were located on the same floor and in the same building. The distance was very small. The relevant and material portion of the statement relates to the factum that she had seen her father and grandfather, i.e. the appellants, giving beating to Anita. She, in the cross-examination, had positively affirmed presence of her grandfather Brij Kishore and had pointed out that the distance between the two rooms was only about 10/20 paces. For a young child of her age, she may not have remembered and recollected the intricate and minute details. Given the trauma and stress of her mother's death at the hands of her father and grandfather, small or minor inconsistency in her statement is natural and normal.

12. Learned counsel for the accused appellants submitted that there are discrepancies in the statements of PWs 1, 2 and 3 and their conduct was not normal. It is submitted that PW1 Sarwan Kumar and PW2 Pushpa have stated that the accused Gyan

Chand was pressing the neck of Anita and strangulating her with chunni and the appellant Brij Kishore had caught hold her feet. When they intervened, they made them, i.e. appellants/accused, flee from there. Thus, their conduct was unnatural, as normally they would not have allowed or forced the appellants to flee. We have examined the said contention and do not find any merit in the same. The statements have been recorded in English and the use of the word “flee” reflects and implies that they had stopped the appellant accused from continuing with the offending acts and told them to move or go away. Their primary concern was to prevent/stop the wrongful act, save Anita, examine her and ensure her well-being. They may not have realized at that time that Anita had died.

13. Learned counsel for the appellants submitted that there are other contradictions in the statement of PWs1, 2 and 3 which are material and relevant. It was stated that PW1 had deposed that Preeti had come but had not mentioned about presence of any other person, whereas PW2, Pushpa had stated that two ladies were present with Preeti but she did not remember their names and the ladies had knocked at the door of their room. The aforesaid statements were made in cross-examination of

PW2. PW1 in the cross examination was not specifically asked the question, whether Preeti was alone or some other women were present when the door was knocked. Similarly, PW3 was not asked any question on this aspect.

14. The contention that no public witnesses, who had collected at the spot were examined by the prosecution, does not affect the prosecution case. It does not dent or obscure the statements of PW-1, 2, 3 and 4. Ramwati, resident of room No. 33 was cited as a witness and her purported statement under Section 161 Cr.P.C. was placed on record. However, she was not traceable and the said position is stated and is recorded in the order dated 7th February, 2008.

15. Learned counsel for the appellants has submitted that PW-16, Dr. Parvinder Singh, Forensic Medicine, RTRM Hospital had stated that the 'chunni' used for strangulating Anita was blue in colour, whereas in fact the 'chunni' was green or firoji in colour. Dr. Parvinder Singh had conducted post mortem of Anita on 22nd February, 2006 and his statement was recorded in the Court on 15th September, 2007. He has stated that on 1st March, 2006 he had received one white packet duly sealed with the seal of APS and on opening, he found one bed sheet, chunni and shawl.

The colours were indicated and stated. Wrong description of the colour of the chunni, to our mind, does not materially affect the credibility of the statement made by Dr. Parvinder Singh. This is not destructive and does not create doubt about the testimony of the other witnesses. The chunni Ex PW-1/B was identified by the PW-15, SI Sandeep Kumar and PW-20 Inspector Mahender Singh. It was seized and sealed on 22nd February, 2006, itself vide seizure Memo Ex.PW15/A. PW-20 identified the chunni, bed sheet and shawl as Exh. P1 to P3. The said witnesses were not questioned/cross examined about the colour of the chunni. Chunni is also visible in the photograph taken by PW 8, Bhram Dutt marked as Ex.Pw8/19. It is bluish green in colour.

16. PW-16, Dr. Parvinder Singh, in his evidence has given the full details of the ligature mark, the sizes and the external and internal injuries which were found on the body of Anita and had caused her death. He had come to the conclusion that the death was due to asphyxia as a result of ligature strangulation and throttling which was ante-mortem. Nothing to contradict or doubt the said statement has been pointed out to us. PW-17, Dr. Mahesh, had examined Anita and had written the MLC marked Ex. PW-17/A. He had stated that Anita was brought by

her relatives with alleged history of strangulation with chunni around her neck. He examined her and found that she had been brought dead. In the cross examination, he has stated that blood stains were present in her nasal alae.

17. However, we find merit in the contention of the appellants that evidence of PW-18, Pinki, who is also sister of Anita is not reliable. She had in her statement claimed that she was residing in the same room with her brother Sarwan Kumar and had gone to the room of Anita in the night intervening 21st/22nd February, 2006. She had also stated that the two appellants were apprehended by Sarwan Kumar at the spot. Her name was not mentioned by PW-1, Sarwan Kumar, PW-2 Pushpa, PW-3 Inderpal or by PW-4, Preeti. We completely disregard and we discount her statement. The same is not being taken into consideration.

18. Another contention raised by the appellants was that evidence of DW-1, Bhagwati, wife of Brij Kishore has been ignored. In her statement, DW-1, Bhagwati had stated that at about 6.30 A.M. either on 21st or 22nd February, 2006, 10-12 police officials came to her house and had asked for Gyan Chand and Brij Kishore, who were required to come to police

station for 2-3 minutes. Gyan Chand had come to their house at Sultanpuri, a day before at about 8-9 p.m. He wanted money from Brij Kishore for making his house. Brij Kishore had told him that he did not have any money but he could give money in the morning after withdrawing from the bank. Gyan Chand had stayed back at Sultanpuri and had spent night with them. Both of them had been falsely implicated. Gyan Chand, a mason/contractor had collected Rs.1.5 lacs and required another Rs.50,000/- for building his house. Reference was also made to the statements under Section 313 of Cr.P.C. made by both Gyan Chand and Brij Kishore.

19. The trial court, has rightly discredited and disbelieved the statement of DW-1, Bhagwati in view of the clear and categorical evidence on record about the presence of Gyan Chand and Brij Kishore at the site of the crime and the fact that both of them were present at B-1/76, Najafgarh. The statement of DW1, Bhagwati that Gyan Chand had come to the house of Brij Kishore at Sultanpuri and had spent night between 21st and 22nd February, 2006 for collection of money for constructing the house is clearly not believable. DW-1 has stated that Gyan Chand had already collected Rs.1.5 lacs but required another

Rs.50,000/- to build his house. She had not stated that Rs.1.5 lacs had already been spent and the construction was in progress. Rs.1.5 lacs is the substantial amount of money. If this money was available with Gyan Chand, he could have utilized the same, before asking for any money from his father, Brij Kishore. Brij Kishore in his statement under Section 313 of Cr.P.C. had stated that on 21st February, 2006 at about 5 A.M. in the morning, his son had come to their house at Sultanpuri to discuss finance/ money for making a house. He stayed back. At about 6.30 A.M., next day, police officials came and he and his son Gyan Chand were forcibly taken to police station Najafgarh. Gyan Chand had also made a similar statement regarding visit to the house of his father at Sultanpuri on 21st February, 2006 at 5 A.M. He remained there and at 5 A.M. on the next day, i.e., 22nd February, 2006, police came and he along with the father was forcefully dragged to the police station. Only thereafter, he came to know that his wife was killed. He has stated that he had collected Rs.1.40 lacs to construct a room. The plea of the appellants is not acceptable. Evidence of PW1 to 4 is to the contrary, reliable and credible. Their statements have been discussed above.

20. In the present case, it is noticeable that the deceased Anita was taken and brought to the hospital as per the MLC at 3.30 A.M. She was declared brought dead. DD No. 7A, Ex.11/B was recorded by the police on the basis of report made by the duty Constable at the hospital at 3.50 a.m. Thereafter, DD No. 9, Ex. PW-11/C was recorded. Statement of Sarwan Kumar, PW-1/A was recorded and rukka was sent to the police station at 7.10 a.m. FIR was registered. Before that, the police had started investigation at 4 a.m. after receiving the said DD entries. The stand/stance of PW1 Sarwan Kumar from the beginning is the same and he had implicated the appellants. His presence and the presence of PW2, 3 and 4 at the spot or the place of crime has not been challenged and questioned.

21. Learned counsel for the appellants submitted that there is dispute about how and when the appellants were arrested as, DW-1 had stated that they were arrested at 6.30 A.M. on 22nd February, 2006 from the house of Brij Kishore at Sultanpuri. As per the prosecution version, the appellants were arrested from ISBT bus stop, Kashmiri Gate after 3 P.M. on 22nd February, 2006. PW-15, SI Sandeep Sharma has stated that they went in search of the accused persons and subsequently apprehended

them at GL 23 bus stop, ISBT, Kashmiri Gate. Personal search was conducted and personal search memos PW-5/A and B were drawn. PW-20, Inspector Mahender Singh has made a similar statement. The said contention of the appellants does not further or support their contention that the case against them is fabricated. The statements of witnesses PW-1 to 4 are credible and clearly show and establish that the two appellants had killed/ murdered Anita.

22. In view of the aforesaid facts, we do not find any merit in the present appeals and the same are dismissed. The conviction and sentence are upheld. In default of payment of fine, the appellants will undergo simple imprisonment of six months.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(S.P. GARG)
JUDGE

JULY 17th, 2012
VKR