

*** IN THE HIGH COURT OF DELHI AT NEW DELHI
CRIMINAL APPEAL 1201/2011**

Reserved on: 19th September, 2012
% Date of Decision: 26th September, 2012

BAL KISHAN LAMBA Appellant
Through Ms. Anu Narula, Advocate.

versus

STATE Respondent
Through Mr. Sanjay Lao, APP.

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

SANJIV KHANNA, J.

The appellant has been convicted for the murder of his wife Poonam and sentenced to life imprisonment. He has also been directed to pay fine of Rs.2,000/- and in default, to undergo rigorous imprisonment of one year.

2. The prosecution case is that on 12th November, 2006 at about 2.00 P.M., the appellant strangled his wife with a chunni, at their residence WZ-6, Phase-II, Om Vihar, Delhi.

3. As per the charge sheet, Pawan Arora (PW-1), a neighbour, and Master Aman (PW-2), son of the appellant and the deceased, were the eye witnesses. However, Aman (PW-2) did not support the prosecution case. In his examination-in-chief, he professed that he had

gone to his maternal grandmother's place on the day of the incident. On 22nd August, 2007, when PW-2 was examined in the Court, he was about 7 years of age and was studying in Class-II. At the time of occurrence, the appellant would have been around 6-6½ years of age. The learned Additional Public Prosecutor wanted to cross-examine the said witness. However, the learned Additional Sessions Judge observed that it cannot be inferred, from the conduct of the witness, that he was suppressing the truth because the accused-appellant was his father. He further observed that witness appeared to be comfortable and had responded to the questions quite fairly and quickly. However, on the said date, at the request of the Additional Public Prosecutor, recording of further statement of the said witness was deferred because no arrangements were made to play PW-2's videographed statement, made to the police.

4. PW-2 was again examined on 30th September, 2008. At that time, he was about 8 years of age. Photographs and video recording were shown to the said witness and he was confronted. PW-2 admitted that it was his voice and photograph, in the video recording. PW-2, however, refuted that he had stated anything to the police after the incident. PW-2 insisted on not having stated to the police that he had seen his father, i.e. the appellant, tying a Chunni around the neck of his mother and killing her, when she objected to the appellant taking

money out of her purse. It has come on record that, after the death of his mother, PW-2 was staying and residing with his 'Taya' (elder brother of the appellant). It is possible that having lost his mother, PW-2 has tried to protect and save his father. Learned counsel for the appellant argued that the maternal grandparents used to meet PW-2, and therefore, the fact that PW-2 was staying with Taya does not affect the credibility of the said witness. We have our reservations. PW-2 being a very small boy, studying in class-II, may have been tutored and made to believe that he should and could save his father, who was behind the bars and in jail. Stigma and apprehension faced by PW-2 is understandable. PW-2 does not have any siblings. We may also notice that the occurrence in question had taken place on 12th November, 2006 and PW's two statements in the court were recorded after a considerable time had passed. First statement was recorded six months after the incident and second statement was recorded one year and nine months subsequent to the incident. During this period, family members of the appellant had ample time to talk, converse and influence PW-2.

5. Keeping in view the aforesaid facts, including the tender age of PW-2, we are inclined to disregard his statement. His statement will not influence us in examining the statements of other witnesses.

6. Pawan Arora (PW-1) was a neighbour. He was residing opposite

the appellant and Poonam's house. He testified that on 12th November, 2006, at about 2.00 P.M., he was having lunch in his house, when he heard noise and came out. He realised that the source of this noise was the appellant's house. He rushed into the appellant's house where he saw an unconscious Poonam lying on the bed. A Chunni was lying near her. Aman, her son, was sitting in the room adjacent to where Poonam was lying. He also saw the appellant going outside the house. He and Vinod Jagga had chased the appellant. He made a call on 100 number to inform the police. Police eventually came and inspected the site. He was told by the police that Poonam had expired. Police had recorded his statement and on this basis, subsequently, FIR No.106/2006 (Ex.PW- 18/A) at Police Station Uttam Nagar was registered. Chunni (Ex.P-1) was seized and taken into possession.

7. We may notice here that, as per the rukka, (Ex.P-1/A), which is also signed by PW-1, he had heard a loud quarrel occurring in the appellant's house. When he reached the house of the appellant, he found that the appellant was strangulating his wife with green coloured Chunni. On PW-1 entering the house, the appellant untied the Chunni from around his wife's neck and ran away, shouting that he had killed his wife. Vinod Jagga (PW-3), brother of Poonam, had also reached the spot. PW-1 and PW-3 rushed to catch hold of the appellant, but he had escaped. At that time, Aman (PW-2) aged about 5-6 years was

also present there. Thus, as per the rukka (Ex.PW-1/A), Pawan Arora (PW-1) was an eye witness. However, PW-1 has changed his stance in the Court and has averred that he was not an eye witness but had reached the spot immediately after the occurrence whereupon he had seen the unconscious deceased lying there, with a chunni lying nearby and the appellant rushing out of the house. Seeing this, he called the police.

8. Learned counsel for the appellant had submitted that, in view of the contradictions between rukka (Ex.PW-1/A) and PW-1's statement in the Court, PW-1 should be completely disbelieved. It was also submitted that PW-1 was an interested witness, as he was a friend of Vinod Jagga, brother of the deceased Poonam. She had highlighted that there were contradictions in the statement of PW-1, which had been brought out in the cross-examination. Firstly, it was pointed out that in the cross-examination, at one place, PW-1 had stated that he and the appellant were not on visiting terms but, later, he had mentioned that he knew about the appellant purchasing a new house on Power of Attorney. Secondly, he had stated that the appellant's house was constructed 6-7 months prior to the date of incident. At the same time, PW-1 had acknowledged that Poonam and appellant had got married 8-9 years back and he knew them since then. He had also stated that the accused-appellant was owner of the house since before the marriage.

Thirdly, he did not remember the phone number or the person's name from whom he had taken the mobile phone to call the police. Lastly, that the house in question, had only one room, as per the site plan, and not two, as PW-1 had stated. It was accordingly submitted that PW-1 had not visited the site at the time of or immediately after the occurrence and was a planted witness.

9. We have scrupulously examined the contentions, but do not find any merit in the same. As stated above, we are inclined to believe that the testimony of PW-1 on material and relevant aspects, is true and credible. PW-1 has stated that the appellant had constructed the house 6-7 months before the incident. He has also stated that he knew the appellant and the deceased for 8-9 years and that the appellant was the owner of the house before marriage. Construction of the house can be subsequent to purchase of the land/house, as reconstruction can also take place. Presence of PW-1 is proved and established by documentary evidence contemporaneously recorded in the official records i.e. DD Entry No.16A (Ex.PW-8/A) which was recorded at 2.45 P.M. on 12th November, 2006 at Police Station Uttam Nagar. In the said DD Entry, it was recorded that information was received from PCR Van that a person had murdered his wife in house No.WZ-6, Phase II, Om Vihar, Near Laxmi Narain Mandir, Uttam Nagar. Being a neighbour, he is a natural witness. We also reject the contention of

the appellant that PW-1 was an interested witness because he was friendly with the brother of Pooam i.e. Vinod Jagga (PW-3), and, therefore, his statement should be disregarded. PW-1 did know PW-3, deceased-Poonam and the appellant, but there is no ill will or previous enmity between PW-1 and the appellant. Nothing has been brought on record to show that because of personal grudge or ulterior motive, PW-1 would have falsely implicated the appellant. The contention of the learned counsel for the appellant that PW-1 had not visited the house of the appellant because he had stated that there were two rooms, whereas as per the site plan, there was only one room, has to be rejected. The site plan discloses that there was a big room, which was being used as a bed room. There was a part partition wall to segregate the said room from kitchen, in one corner. PW-1, in the examination in chief, has stated that he saw Aman sitting in the room adjacent to the room where Poonam was lying on the bed. This means he was referring to the portion in front of the kitchen. PW-1 has not been specifically cross-examined on the said aspect.

10. Vinod Jagga (PW-3) is the brother of the deceased. He has stated that the deceased had married the appellant about 9 and ½ years back. He disclosed that from the very beginning relations between the deceased and appellant were not good, as the appellant was unemployed and alcoholic. On 12th November, 2006 between 1.30-

2.00 P.M., PW-3 had gone to the residence of his sister. While entering the house, he heard the appellant shouting that he had murdered his wife. PW-1 was already present there. PW-3 and PW-1 tried to catch hold of the appellant, but he ran away. Soon, persons from locality had gathered there. He saw his sister lying dead on the bed and one Chunni lying nearby. PW-1 called the police. Later on the appellant was arrested by the police. PW-3, along with his father and Aman, were called by the SHO, Police Station Uttam Nagar. Aman's statement was videographed. He identified his sister's dead body in the mortuary. In his cross-examination, PW-3 had stated that, on 12th November, 2006, his statement was recorded on two separate occasions. He mentioned that his house was in the same locality, as his sister's, and distance between the two houses is about half kilometre. Appellant and PW-1's houses were also opposite to each other. He knew Pawan Arora (PW-1), a music shop owner, for about 4-5 years. The appellant and Poonam had decided themselves to marry each other and later on their marriages was solemnized by her parents. He admitted that he had not seen the appellant strangulating his sister. When he reached the spot, no one was present from the locality, but when he and PW-1 returned, after chasing the appellant, about 10-20 people from the vicinity had gathered. Pawan Arora (PW-1) and he chased the appellant up to the corner of the gali. PW-3 had stated that the deceased and the appellant

used to have altercations, due to business i.e. on account of the fact that the appellant was not working. In his cross-examination, recorded on 21st April, 2009, he had stated that he knew Pawan Arora for about 10 years. This means, he knew the appellant for about six years, before the date of occurrence. In the cross-examination, he admitted that they were not happy with their marriage. He, further, voluntarily added that the appellant used to harass and beat Poonam and also used to take liquor. He denied the suggestion that the offence was committed by a thief.

11. The disputes and differences between the appellant and his wife, which was alleged motive, is established from Kalandara (Ex.PW-13/C) under Sections 107/151 Code of Criminal Procedure, 1973, which was recorded vide DD Entry Number 27A, dated 18th May, 2006. This Kalandra was disposed of by final order (Ex. PW-25/A) pronounced on 10th November, 2006 by Ms. Rita Bhasin, Special Executive Magistrate. The order records that the appellant had pleaded guilty and was directed to furnish personal bond of Rs 5,000/- under Section 117 Code of Criminal Procedure, 1973 to keep peace for a period of one year. The occurrence in question happened two days after the final order was pronounced, on 10th November, 2006.

12. Learned counsel for the appellant, lastly, submitted that PW-3 had stated that the appellant was arrested at about 4.30 P.M. on the

same day i.e. 12th November, 2006, but as per the police version and arrest memo (Ex.PW-5/A), the appellant was arrested at 8 P.M. on 12th November, 2006. She has also referred to the statement of Constable Basant Kumar (PW-5), who had stated that at about 7.45 P.M., SI Gagan Bhasker and Inspector P.C. Mann and others had met him and others. They were informed by Inspector P.C. Mann that the appellant had committed murder of his wife. They went in search of the appellant and saw the appellant standing at the Om Vihar Bus Stand. The appellant tried to run away from the police but was apprehended. This discrepancy in the statement of PW-3, PW-5 and other police officials is irrelevant and does not affect the substratum of this case. The discrepancy relates to the time of arrest, which in the present case is not of much significance and relevance. It does not dent or put us in doubt about the merits of the deposition made by PW-1 and PW-3, on which we have relied upon. It may be relevant to note here that DD Entry No.16A was recorded at 2.45 P.M. Thereafter, the police party had reached the spot and Rukka was prepared. Crime Team had reached the spot at about 4.30 P.M. FIR was registered at about 5.15 P.M. vide DD Entry No.21A.

13. We have also examined the statement made by the appellant under Section 313, Code of Criminal Procedure, 1973. In the said statement, he has accepted that there were disputes and difference

between him and his wife, which had resulted in the quarrel on 16th May, 2006. He had accepted that he was challaned under Sections 107/151 Code of Criminal Procedure, 1973 and on pleading guilty he was directed to furnish personal bond to maintain peace for one year. We clarify we are relying upon the case, under Section 107/151 Cr.P.C, only for the purpose of holding that there were disputes and differences between the deceased and the appellant and not for any other purpose.

14. We have also examined the statement of Pramod Kumar (DW-1) produced by the appellant. He has stated that the appellant was living with his wife and son, in the same neighbourhood. He had not heard about any quarrel between the appellant and his wife. According to him, the appellant and his wife were on good relations. However, on the date of occurrence, DW-1 was on duty and did not know what had happened. In his cross-examination, he admitted that he had stated that the appellant had good relations with his wife because they were living together and he had seen them going together many times.

15. There is no evidence to show that anyone had made a forced entry or had broken into the house. Thus it is not a case of robbery. The said suggestion was put-forth, by the appellant's counsel, only to PW-3 and not to other witnesses. Even in the statement under Section 313 of the Cr.P.C, the appellant did not point out that there was forced

entry in the house and a burglar may have committed the said murder.

16. Thus, it has been established that, at the time of incident, the appellant was present in the house and immediately after PW-1 and PW-3 reached the house, he ran away from there. Both of them saw Poonam lying dead on the bed and a Chunni lying next to her body. The conduct of the appellant becomes relevant and important. It is apparent that no third person was present in the house. In these circumstances, it was for the appellant to state and explain and what had happened. Section 106 of the Evidence Act, is applicable and states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It would be apposite to mention that Supreme Court in *State of W.B. v. Mir Mohammad Omar* (2000) 8 SCC 382, held:

“37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”

17. In *Trimukh Maroti Kirkan v. State of Maharashtra* (2006) 10 SCC 681, Supreme Court held:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the

accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

18. Statements of PW-1 and PW-3 have been corroborated by the medical evidence in the form of Post Mortem Report (Ex.PW-9/A). Dr. Anil Shandil (PW-9), who had conducted the post mortem, opined that the cause of death is asphyxia from strangulation by mean of ligature which was sufficient to cause death in ordinary course of nature. Inquest report (Ex.PW-23/B) states that there were ligature

marks around the neck of the deceased. No questions were put forth, in the cross-examination of PW-1 and PW-3, to establish and show that this was a case of suicide. The surroundings, as noted by police witnesses, also did not indicate that the deceased had committed suicide. Neither had the accused raised this contention in his statement under Section 313 of the Cr.P.C. If it was a case of suicide the appellant would have naturally rushed to save his wife, instead the appellant ran away from the house. Thus, possibility of deceased committing a suicide is clearly ruled out.

19. In view of the aforesaid discussion, we do not find any merit in the present appeal and the same is dismissed. Conviction and sentence of the appellant are upheld.

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(SANJIV KHANNA)
JUDGE

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(S. P. GARG)
JUDGE

September 26, 2012
NA/kkb