

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

% *Date of decision: August 21, 2014*

+ **CRL.A. 825/2014**

ABDUL KALAM @ ABDUL SALAM @ LALUVA Appellant

Represented by: Mr.Ajay Verma, Ms.Neha
Singh, Advs.

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP with
Insp. Sudhir Kumar, PS Jagat
Puri.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Abdul Kalam is convicted for the offence of murder of his wife Zubeda Khatoon on the strength of testimony of his daughter Roshni and son Shamshad vide the impugned judgment dated March 21, 2014. Vide order dated March 26, 2014 he has been awarded sentence for imprisonment of life with fine of ₹ 5000/- and in default of payment of fine to undergo rigorous imprisonment for 1 year for offence punishable under Section 302 IPC.

2. Abdul Kalam assails the judgment on the ground that the FIR does not disclose that the appellant is an assailant and thus the name of the appellant has been introduced subsequently by tutoring the children who are living in

the guardianship of the parents of the deceased. In the rukka there is no mention of the presence of children at the spot. There is no evidence to show that the appellant absconded after the incident. There are material improvements and inherent inconsistencies in the statements of the prosecution witnesses. The mother of the deceased has stated that the accused and her daughter used to have quarrels as usually happen between husband and wife in every household. Thus, there was no motive or reason for the appellant to kill his own wife. As per the mother of the deceased the relations between the couple were cordial. Even PW-1 the landlord never informed the Police that there used to be any quarrel or dispute between the appellant and the deceased. Roshni and Shamshad are child witnesses and thus no reliance should be placed on their testimonies as they have been tutored. The evidence of the prosecution does not unerringly point out that the appellant has committed the offence of murder of his own wife. Hence, he be acquitted.

3. We have heard learned counsel for the parties and perused the record.

4. Investigation was set into motion on receipt of an information from Police Control Room by HC Satpal Singh PW-6 regarding murder of the wife by her husband. This information was recorded vide DD No.13A Ex.PW-6/A. The information was given from phone No.9891419738 which was sent by Chiranji Lal PW-1 the landlord of house No.190, Gali No.2, Khureji Khas, Delhi. Insp. Rajender Singh PW-18, along with SI Pramod Kumar PW-14, SI Dinesh Kumar PW-12, SI Vijay Kumar, SI Rahul and Constable Samem Khan PW-17 reached the spot. On the spot they found the dead body of a woman lying on a mattress on the ground floor. The dead body was covered by a shawl and blood had oozed out from the head.

Along with these observations DD No.13A was sent to the Police Station as rukka for registration of FIR at 10.30 AM on April 28, 2012. On the same date statements of Roshni PW-4 and Shamshad PW-5, the children of the deceased and the appellant were recorded under Section 161 Cr.P.C. Subsequently, the statements of Roshni and Shamshad were recorded under Section 164 Cr.P.C. by Shri Vishal Gogne learned Metropolitan Magistrate PW-9 on May 03, 2012.

5. The post-mortem was conducted by Dr. Akash Jhanee PW-2 who noted the following injuries on the body of the deceased:

“External examination

- 1. Contusion swelling reddish 7 x 3.5 cm present over the outer half of left side forehead extending down to the left side cheek region ending at the level in front of left ear opening.*
- 2. Incised wound 1.5 x 0.9 x skin deep present over the back of middle half of left wrist region with margins sharp well defined and clean cut.*
- 3. Scratch linear abrasion 0.9 x 0.1 cm lying 0.2 cm bellowing injury No.2.*
- 4. Contusion reddish 3 x 3 cm over front surface of right wrist region.*
- 5. Lacerated wound 7.5 x 2.5 x bond deep present over the left parietal region of the head 6 cm above the top of left ear opening with underlying bone fractured with fractured ends reddish and bruised.*
- 6. Contusion swelling reddish 1 x 0.6 cm present on the right side face 1 cm above and outer to the right angle of mandible.*
- 7. Abrasion contusion reddish 2 x 1 cm present over the lower borer of the right side face lying 3.5 cm from the mid line.*
- 8. Contusion reddish 1.5 x 1 cm under surface of the chin in*

the mid line level.

9. *Contusion reddish 5 x 4 cm over front of upper half of right side chest region below outer half of right region.*

10. *Abrasion 0.09 x 0.3 cm reddish over left side front of the neck 4.5 cm below left angle of mandible.*

11. *Abrasion reddish 1.5 x 0.9 cm over right side front of the neck 2.9 cm below the right angle of mandible.*

Internal examination

Scalp showed sub scalp bruising in an underneath the scalp layers. Skull bones showed depressed, commuted fracture in a area 2 x 1.5 cm over left temporal bone of the skull vault with fracture fragments depressed inwards into the cavity. Two fissured fracture lines reddish in colour, radiate from this fracture on to left side parietal bone till the eminence level and then on to the left side occipital bone with fractured and reddish and bruise. Subdural and Subarachnoid haemorrhages were present overlying both sides cerebral hemispheres more on the right side. Multiple petechial haemorrhages were seen intra cerebrally in the white matter of the both sides cerebral and cerebellar hemisphere. Ventricles were full of fluid blood. Skull base showed fracture of the left side middle and posterior cranial fossae.”

6. Dr.Jhaneer opined that the cause of death was Craniocerebral damage consequent to blunt force impact to the head, which was sufficient to cause death in the ordinary course of nature. All injuries were ante-mortem and fresh in duration. All injuries except injury No.2&3 were caused by blunt force impact. Injury No.2&3 were caused by some sharp edge instrument. Subsequent opinion was also taken from Dr. Akash Jhaneer vide Ex.PW-2/B who opined that the injuries mentioned in the post-mortem report and internal brain damage resulting in the death of the deceased was possible by the forceful hitting of the head on the floor of the room. In cross-

examination Dr.Akash Jhanee clarified that injuries found on the person of the deceased were not possible by simple fall on hard surface.

7. The prosecution case primarily rest on the testimony of two children Roshni and master Shamshad.

8. Roshni PW-4 aged 5 years the daughter of Abdul Kalam and the deceased deposed that her mother's name was Zubeda who has since expired. She was killed by her father by strangulating her neck. Roshni deposed that she was sleeping in the night and on hearing the noise she got up and saw that her father held her mother from her hair and threw her on the floor and pressed her neck. He thereafter put a cloth on her and left the house with his jhola. Before leaving his father told her to sleep otherwise he would kill her also. Shamshad and Ruksar were also sleeping with her and they also woke up at the time of incident. She stated that her statement was recorded by the Police as well as by the learned Metropolitan Magistrate. In cross-examination nothing could be elicited from this witness as the deposition was in total conformity with her statements recorded under Section 161 Cr.P.C. on April 28, 2012 and Section 164 Cr.P.C. by the learned Metropolitan Magistrate Ex.PW-4/A. In cross-examination this witness though admitted the suggestion that she had come to Court with her Nani who had got her admitted in the school, however she denied that she was deposing at the instance of her Nani. She volunteered that she was deposing as she knew the facts "*Mujhe pata hai*". She further stated that after her father left with jhola her brother Shamshad went to inform her Nani.

9. Similarly, Shamshad aged 9 years stated that their mother Zubeda had expired. His father used to threaten his mother and she used to say this was

his habit. He stated that he did not remember the date, month or year but it happened many days ago. It was night time, he along with his mother, father and sisters Roshni and Ruksar came to their house after taking dinner from the house of their Nani. Nargis did not come as she used to stay at the house of their Nani. After coming back he and his sisters went to sleep on the mat of the floor. At about midnight on hearing the noise of opening of the gate he woke up and saw that his father was putting sheet on his mother. He thereafter picked up clothes and jewellery and put the same in a bag and left the house. Before leaving the house he threatened them not to tell anything to anyone failing which he would kill them. They then quietly slept. Next morning at about 8.00 AM their sister Nargis came and woke them up. They found that their mother was not responding. They went to the house of their Nani and called her. Their Nani then called their mama, mausi. Police came to their house and took the body of their mother. Even in cross-examination of this witness nothing could be elicited because his deposition was in conformity with the statements recorded under Section 161 Cr.P.C. on April 28, 2012 itself and Section 164 Cr.P.C. on May 03, 2012 vide Ex.PW-5/A. However, the suggestion given to Shamshad in the cross-examination was that he was deposing falsely at the instance of his Nani, which he denied.

10. The presence of the children at the house and the appellant absconding from the house after the incident has also been proved by Chiranji Lal PW-1 who made the PCR call. He was the owner of the premises where Abdul Kalam with his family was residing as a tenant on the ground floor. Chiranji Lal deposed that on April 28, 2012 he left for work at 8.00 AM. He received a phone call from his house at 10.00 AM that Abdul

Kalam had murdered his wife and has fled away. He came back and saw Zubeda lying dead and children present in the room but Abdul Kalam was missing. He informed the Police at 100 number.

11. The version of the children is further corroborated by the PCR information Ex.PW-10/A a contemporaneous document sent to the Police on April 28, 2012 at 9.05 AM which informed that in Gali No.2, Khureji Khas, House No.190, Ambedkar Chopal Wali Gali “*Ik Admi Ne Apni Wife Ka Murder Kar Diya Hai*”. The PCR officers on reaching the spot have noted that the call was found to be correct and Mohd. Masoom aged 45 years has informed that his sister Zubeda wife of Abdul Kalam @ Laluva age 35 years who was living in the house on rent of landlord Chiranji Lal that “*Behen Ke Sar Mein Chot Marne Se Dead Hai Hai Pati Mauke Se Farar Hai*”. So the contention of the appellant that there was no eyewitness and he has been falsely implicated is incorrect.

12. The version of these witnesses is further corroborated by the post-mortem report which opines injury on the head and as per the subsequent opinion of the doctor Ex.PW-2/B the injury on the head was possible by the forceful hitting of the head on the floor of the room.

13. It is well settled that conviction can be based on the testimony of child witnesses if the same is found to be reliable and only as a rule of prudence corroboration is sought. The position of law relating to evidence of child witness was dealt by the Supreme Court in the decision reported as (1997) 5 SCC 341 *Dattu Ramrao Sakhare Vs. State of Maharashtra* wherein it was held:

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In

other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

14. The explanation of Abdul Kalam in his statement under Section 313 Cr.PC is that he is innocent and has been falsely implicated at the instance of Najbul Nisha, his mother-in-law as she borrowed ₹20,000/- from him and has not returned the same. Thus, due to money dispute, she tutored Chiranjilal, Roshni and Shamshad. The deceased was the wife of Abdul Kalam, who died at night in the tenanted room and Abdul Kalam would have been naturally present there. He has rendered no explanation contrary to what has

been deposed by his children as to how the death of his wife occurred. After the prosecution has discharged its initial onus, the burden shifted to Abdul Kalam under Section 106 of the Indian Evidence Act to explain the circumstances of the death of his wife at night especially when no plea has been taken by him as to where he had gone at night.

15. The prosecution in the present case through the evidence of Roshni and Shamshad which is duly corroborated by contemporaneous documents and post-mortem report coupled with the fact that Abdul Kalam who was present at the house at night absconded thereafter and could be arrested only on May 07, 2012 is sufficient to uphold the conviction of the appellant as held by the learned Trial Court. Consequently, upholding the judgment of conviction and order on sentence the present appeal is dismissed. The appellant will suffer the remaining sentence.

16. T.C.R. be returned.

17. Two copies of the judgment be sent to the Superintendent Central Jail Tihar one for his record and the other to be handed over to the appellant.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 21, 2014
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