

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRIMINAL APPEAL NO.1034/2015

GUDIYA KHATOON Appellant

versus

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.K.GAUBA

R.K. GAUBA, J. (ORAL):

1. With the consent of the learned counsel for the parties, the appeal has been taken up for final hearing.
2. The appellant was put to trial on the charge that on 29th October, 2013 at about 6/6.30 A.M. in Ward No. 19B of Lok Nayak Jai Prakash Hospital (“the hospital”) within the jurisdiction of Police Station I.P. Estate she committed murder of her infant daughter Saalam (hereinafter referred as “the victim child”) by throwing her into a sewer within the compound of the hospital and thereby committed an offence punishable under Section 302 of the Indian Penal Code, 1860 (IPC) and thereafter intentionally gave false information to the police and thereby committed an offence punishable under Section 203 IPC. By judgment dated 20th April, 2015, she was held guilty and convicted, as charged. By order dated 21st April, 2015, she was sentenced to undergo imprisonment for life with fine of Rs.5,000/- for offence under Section 302 IPC and rigorous imprisonment for two years for offence under Section 203 IPC. It was directed by the

trial court that in the event of the amount of fine not being paid, the appellant would undergo further simple imprisonment for three months. Both the substantive sentences were directed to run concurrently and benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was accorded.

3. The appellant is in appeal before this Court assailing the aforementioned judgment and order on sentence.

4. Certain facts are beyond dispute and may be taken note of at the outset. The appellant was married to Sameer (PW-15), a native of District Sitamari, Bihar though living in Delhi for earning his livelihood. The two of them had entered into marriage out of their own choice and volition, after a love affair. Concededly, the appellant had given birth to twin daughters about three months prior to the incident which is the subject matter of the present case. The daughters were named Chaahat and Saalam. It is the latter child named Saalam whose death is in issue before us.

5. It appears that the other child Chaahat had suffered from pneumonia and had to be hospitalised for treatment. The appellant with Chaahat, also accompanied by the victim child, came to the hospital where Chaahat was admitted for treatment as an indoor patient to Ward No. 19B.

6. It appears from the evidence that Ward No. 19B and the adjoining ward called 19A were a part of what was known as Children's Ward. The two wards were connected to each other by a passage and there was a toilet block existing beyond Ward No. 19A at the other end of the premises. The indoor patients admitted even in Ward No. 19B, thus, would use the said toilet block located behind Ward No. 19A and access it through the passage between the two wards 19A and 19B. The scaled site plan (Exhibit PW13/A) prepared in the course of investigation, gives a fair idea of the layout of the premises. It may also be noted here that the long

rectangular hall housing Ward No. 19B had the doctors/nursing station at one end. But, the patients were not required to go via the nursing station to the passage for going to Ward No. 19A as entry/exit door of Ward No. 19B was located immediately after the beds.

7. Evidence shows that there was a CCTV system in operation in the hospital. The cameras would cover all the corridors or passages including the passage from Ward No. 19B up to Ward No. 19A or beyond into the toilet area. The said passage at one end also turned left from where one could go out of the building housing the Children Ward into the open area from where sewer hole (wherein the dead body of the infant child was eventually found) was approachable.

8. The child Chaahat had been brought into the hospital, and admitted, on 26th October, 2013 (Exhibit PW-7/A). The evidence further shows that while the appellant with her two infant children was accommodated inside the ward, her husband PW-15 would sleep at night outside the door of the ward. On the morning of 29th October, 2013, the appellant raised a hue and cry about her second child named Saalam having gone missing. She raised her husband from sleep. Her husband, in turn, informed the Police Control Room (PCR) by making a call on phone No. 100. This information was logged by PCR vide PCR Form (Exhibit PW-16/A and Exhibit PW-9/A) at 07:32:04 hours. The information was passed on by PCR to the police station where it came to be logged vide DD No. 5 (Exhibit PW-18/A) at 7.35 A.M. The matter was entrusted to ASI Om Prakash (PW-22), who reached the Hospital and made inquiries from the appellant. He recorded the appellant's statement (Exhibit PW-22/A) and on that basis, under his endorsement (Exhibit PW-22/B), got the FIR registered for a case of kidnapping under Section 363 IPC.

9. According to the FIR thus registered at the instance of the appellant, she had got up in the morning and required to go to the washroom. She

claimed that she had approached the washroom, but was in need of assistance for taking care of the child (named Saalam), who was crying. She has stated in the FIR that she had met a lady in a blue saree who, on her request, agreed to take care of the child while she went into the toilet. It was her version that when she came out of the toilet after some time she found the lady in the blue saree and the child missing. The evidence clearly shows that efforts were made to trace out the child, but to no avail. Thus, a case for kidnapping was registered and taken up for probe.

10. It is established through evidence, which is beyond reproach, that on account of some complaint of blockage in the sewage system, the PWD staff posted in the Hospital was requested to look into the issue. Pursuant to this, Sewerman Manoj (PW-5) assisted by his colleague Jai Pal (PW-6) went to check on the sewer where they found the dead body of the missing child in the sewer hole behind the toilet block of Ward No. 19A. The discovery of the dead body around 2.30 P.M. on 29th October, 2013 in the said circumstances was reported to the police. The matter was thus further inquired into by Inspector Ram Singh (PW-24) assisted by other police officials.

11. During the course of investigation, the dead body was identified to be that of the missing child named Saalam by the appellant and her husband PW-15. The Investigating Officer called in a private photographer Chiranji Lal Sharma (PW-14), the result of whose efforts has been brought in as evidence in the form of photographs (Exhibit PW-14/A1 to A7). These photographs clearly show and confirm that the dead body of the child identified as Saalam was found in the sewer hole behind the toilet block of Ward No. 19A in the afternoon of 29th October, 2013.

12. After the requisite formal inquest proceedings, the dead body was sent for post-mortem examination, which was conducted by Dr. Ashish Bhute, Sr. Resident of Department of Forensic Medicine, Maulana Azad

Medical College (PW-3) on 30th October, 2013. The autopsy doctor (PW-3) proved the post-mortem examination report (Exhibit PW-3/A) at the trial. What is noticeable in this report is that no external injuries were found present. In absence of any such signs or symptoms on the dead body, it is clear that the death of the child was not by strangulation or throttling or smothering. The autopsy doctor reserved his final opinion in the report (Exhibit PW-3/A). He had preserved the viscera and intended to await the result thereof. The viscera was eventually sent to Forensic Science Laboratory (FSL). The FSL report (Exhibit PW-24/C) dated 28th January, 2014 shows that chemical, microscopic and TLC examination had indicated negative tests for metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides. The autopsy doctor gave his final opinion (mark 'A') stating that to his knowledge and belief death had occurred as a result of suffocation in sewage line and aspiration of sewage matter.

13. The victim child was hardly three months old. In absence of any other theory being propounded, we accept the opinion of the autopsy doctor with regard to the cause of death. Apparently, the child had been dumped in the sewer hole by someone intentionally. The prime question, however, is as to who had done it and did the appellant dump and throw her own daughter in the sewage system where she died.

14. The investigating agency concluded, primarily on the basis of evidence of Sheetal Kumari (PW-1) and Kapoor Singh (PW-2), the staff nurse and the security guard respectively of Ward No. 19B that it was the appellant who had taken the child out of the ward in the early morning of 29th October, 2013 and had returned empty handed to the ward. The investigating agency relied on the evidence of Rehana (PW-4), Sameer (PW-15) and Rajesh Prasad (PW-23) to bring home the allegations that the appellant was finding it difficult to bring up the two children for several

reasons, including financial difficulties faced at that time. From this, motive for putting one of the two children to death is attributed. While Sameer (PW-15) is the husband, Rehana (PW-4) is described as *bhabhi* (sister-in-law) of the appellant. Rajesh Prasad (PW-23), on the other hand, was the person for whom Sameer (PW-15) was working and with whom PW-15 is stated to have shared his domestic difficulties. Noticeably, none of these witnesses (PW-4, PW-15 and PW23) support the theory of motive.

15. The appellant when confronted with evidence adduced at the trial reiterated in her statement under Section 313 Cr.P.C. that the child had been taken away from her hands by a lady in a blue saree outside the toilet block and thus she was innocent and had been falsely implicated.

16. The learned trial court, on the basis of evidence led, summarised her conclusions in (paragraph 55 of) the impugned judgment as under:-

“(i) Accused Gudia Khatoon had given birth to twin daughters three months prior to the incident.

(ii) She and her husband did not have the requisite financial capacity to bring up both the daughters.

(iii) Accused Gudia Khatoon used to remain irritated and upset as she did not have the ability to look after both of them.

(iv) In the intervening night of 28/29.10.2013, she slept inside the Children’s Ward in LNJP Hospital with her twin daughters.

(v) Her husband Sameer @ Phaikan (PW15) was sleeping outside the ward.

(vi) At about 6.30 AM on 29.10.2013, she was seen going towards the sewer located behind the wards with her deceased daughter Saalam.

(vii) The toilets were attached with the wards and there were no toilets outside the ward.

(viii) No lady in blue saree was seen at 6.30 AM outside the ward or entering or leaving the hospital by either PW2/Kapoor Singh/Security Guard or in the CCTV footages.

(ix) Accused Gudia Khatoon was seen returning

back without her daughter Saalam.

(x) She woke her husband only after the false incident of alleged kidnapping and did not hand over the child to him.

(xi) She was neither upset nor teary eyed after the alleged kidnapping.

(xii) Recovery of body of deceased Saalam from the sewer located behind the wards towards which she was seen last going with her infant child.

(xiii) No explanation having been offered by accused Gudia Khatoon in her statement u/s 313 Cr.P.C. regarding her conduct of not waking up her husband earlier and for going out side the ward towards the sewer line with her deceased infant Salaam.”

17. On reappraisal of the evidence, however, we find that the trial court has fallen in grave error by accepting the prime allegations in the prosecution case and reaching several of the above-noted conclusions. There is no evidence confirming that the appellant or her husband were facing any financial difficulties or that the appellant used to remain irritated or upset as she was not capable of looking after two children. The evidence about she having been seen going towards the sewage system behind the wards around 6.30 A.M. on 29th October, 2013 with the victim child, as we shall presently see, is not very convincing. The conclusions reached by the investigating agency on the basis of CCTV footage about the theory of a lady in blue saree having taken away the victim child from the hands of the appellant being falsely set up by the appellant, or about she (appellant) herself having gone out of the ward area, are not supported by any material. As is clear from the following passage extracted from the statement of Inspector Ram Singh (PW-24), it is just his word that the CCTV system would not corroborate the allegations of the appellant about the role of a third person (lady in blue saree) in the Hospital:-

“.....In the hospital, we checked the CCTV footages. There is only one way which leads to the Children Ward and the CCTV footage pertaining to the said way was thoroughly checked and no such suspected lady as described by the accused Gudia Khatoon was found. Other CCTV footages near the exit and entrances of the remaining wards in the hospital were also checked including the exit and entry of the hospital but no such lady as described by the accused was found.”

18. Admittedly, the CCTV footage was not collected as evidence for the appellant to be confronted with it or to prove negatively that no lady in blue saree could have had a role in the episode as was being claimed by her. Significantly, Ram Singh (PW-24) did not state that CCTV footage would show that the appellant had gone outside the Children's Ward. PW-24 on the said relevant aspect remained palpitatingly silent.

19. It is pertinent to refer to the evidence of PW-1 and PW-2 at this stage. Before we take note of what they had to say in the court, we must record exception to the manner in which their statements were recorded in the trial court. As a part of their examination-in-chief, their respective statements under Section 161 Cr.P.C. (vide Exhibit PW-1/A and Exhibit PW-2/A respectively) were exhibited. This is not permissible and contrary to law.

20. Be that as it may, Sheetal Kumari, the Staff Nurse (PW-1), who is stated to have informed the Investigating Officer vide her statement under Section 161 Cr.P.C. (Exhibit PW-1/A) on 31st October, 2013 that she had seen the appellant going out with the victim child and returning without the baby to the ward, would not say so when examined in the court. Her evidence shows that she was the nurse on duty during the night. The Ward No. 19B at that time had around 30 patients, some of whom were in critical state inasmuch as one child was even suffering from dengue fever. The

nurse (PW-1) would depose about the appellant having been inside the ward as attendant mother of the child admitted for treatment and she having kept the other child (the victim) with her over night and her husband having stayed outside the ward. She would not testify or confirm that when the ward door was opened by her in the morning around 6.30 A.M., the appellant had taken the child out of the Children's Ward to return empty handed after some time. She has not so stated.

21. Kapoor Singh (PW-2), the security guard on night duty outside the ward, however, deposed that at about 6.15 A.M. after the ward door was opened by the night duty nurse, he had seen the appellant going out with the child into the area where Hospital garbage was dumped and the sewage line was located. He stated that the washroom was inside the ward and that the appellant had returned 15/20 minutes after exiting from the ward area. He also stated that he had not seen any lady in a blue saree as described by the appellant. This version of PW-2 has been believed by the trial court for concluding that it was the appellant, who had taken out the victim child into the area where the sewage line was located. We, however, find it difficult to accept the testimony of Kapoor Singh (PW-2) for several reasons.

22. The facts and circumstances as have been brought out through the evidence of the police officials (who were involved in the investigation) clearly show that the dead body having been discovered in the afternoon on 29th October, 2013, the police was trying to locate the lady in a blue saree to whom kidnapping had been attributed by the appellant in the FIR registered earlier in the morning. The evidence shows that for locating or identifying the said lady, the Investigating Officer had checked out the CCTV footage of the Hospital. The CCTV footage covered all passages, corridors, nooks and corners but its scrutiny drew a blank. It did not implicate the appellant or contradict her version that she had gone to the

toilet and had not left the Children's Ward. In these circumstances, when the police was clueless, the first persons to be questioned, or interrogated, would be the medical or nursing staff connected to the ward or in the adjoining areas and, above all, the security personnel. Curiously, Ram Singh (PW-24)'s deposition does not mention any interrogation of the security guard prior to 31st October, 2013. It is on that day, two days after the occurrence, that the statement of Kapoor Singh (PW-2), the night duty security guard was recorded. It is in that statement that he would claim that it was the appellant, who had taken out the child, not to the washroom area beyond Ward No. 19A, but instead outside the premises towards the area where the sewage line was located (and where the dead body was later found). It is difficult to believe this story, coming two days after the dead body had been discovered and reject the appellant's version, for the simple reason the same CCTV footage as had shown negatively and ruled out the role of any lady in blue saree would have positively shown, if that were a fact, the role of the appellant carrying the child in question outside the covered area into the open space from where one would have to approach the sewage line. This was the most compelling and crucial evidence. The CCTV footage, for reasons not explained, was not collected. An adverse inference against the version of the prosecution thus will have to be raised. For all we know, the CCTC footage could also have proven negatively the role attributed to the appellant. No reason is also forthcoming, why Kapoor Singh (PW-2) thought it appropriate to come out and make his statement challenging the appellant's version after two days. It is apparent that PW-2 must have been questioned and asked on his lapse, he being the security guard on duty.

23. In the above facts and circumstances, we cannot uphold the finding recorded by the trial court that it stands established and proved that the appellant had taken out the victim child from the ward area in the direction

of sewage system. The reference to the conduct of the appellant in not shedding any tears or not being visibly upset after the victim child had gone missing, to us, cannot be decisive. The evidence rather shows that the appellant was upset, which is the reason why she had immediately raised her husband from sleep and it was at her instance that the matter was reported to the police by a call to the PCR. Initially her conduct and behaviour did not arouse suspicion. The opinion of the Staff Nurse (PW-1) that the appellant need not have handed over the child to a stranger or could have woken up her husband for taking care of the child while she went to the washroom area can at best be called hindsight.

24. For the foregoing reasons, we find a number of gaps in the circumstances that have been proved. The fact that the child went missing in the early morning hours and the dead body was found in the sewer pit later in the afternoon are the only two circumstances which have been conclusively proved. From these facts, it is difficult to say that the circumstances unerringly point towards the guilt of the appellant. The hypothesis of her innocence cannot be ruled out.

25. In the result, the appeal is allowed. The impugned judgment and order on sentence are set aside. The appellant is acquitted. She will be released from custody forthwith unless required to be detained in any other case in accordance with law.

(R.K.GAUBA)
JUDGE

(SANJIV KHANNA)
JUDGE

NOVEMBER 30, 2015
VKR