

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 12 of 2011

1. Vinay Kumar, S/o Manrakhan Diksena, aged 26 years,
2. Manrakhan S/o Meghnath Diksena, aged about 65 years,
3. Vinod Kumar S/o Manrakhan Diksena, aged 32 years,
4. Raj Kunwar W/o Manrakhan Diksena

All are R/o Vill. Dhukupkhna, Pali, Katghora, Distt.-Korba, C.G.

---- Appellants

(In Jail)

Versus

- State Of Chhattisgarh, through District Magistrate, Korba, Distt. Korba (CG)

---- Respondent

For appellants No.1, 3 & 4	: Shri Shailendra Dubey, Advocate.
For appellant No.2	: Shri Sameer Singh, Advocate.
For Respondent/State	: Shri Ravindra Agrawal, P.L.

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Inder Singh Uboweja

CAV Judgment

Per Pritinker Diwaker, J

05/04/2016

This appeal arises out of the judgment of conviction and order of sentence dated 27.12.2010 passed by the Sessions Judge, Katghora, Distt. Korba in S.T.No.113/2009 convicting each of the accused/appellants under Section 302/34 of IPC and sentencing them to undergo imprisonment for life and pay a fine of Rs.500/- with default stipulation.

02. In the present case name of the deceased is Santoshi Bai, wife of appellant No.1 Vinay Kumar, their marriage was solemnized some time in May, 2007 and out of the wedlock they have a son. Appellant No.2 Manrakhan is father of appellant No.1 whereas appellant No.3 Vinod Kumar is elder brother of appellant No.1 and appellant No.4 Rajkunwar is wife of appellant No.2 and mother of appellants No.1 & 3. As per the prosecution case, in the night intervening 19/20th July, 2009 the deceased was murdered by the accused persons in her matrimonial house. Merg intimation Ex.P/1 was recorded on 20.7.2009 at 9.45 am at the instance of PW-1 Prahlad, father of the deceased. Inquest on the dead body was prepared vide Ex.P/3. Thereafter, the dead body was sent for postmortem which was conducted by PW-6 Dr. Pradeep Agrawal vide Ex.P/7 who noticed abrasions on neck, right sub-mandibular region, cheek, contusion in left leg, presence of subcutaneous ecchymosis and found that all the injuries were caused by hard and blunt object. In his opinion, the cause of death was asphyxia as a result of throttling and that the death was homicidal in nature. After receiving postmortem report and completing merg enquiry, FIR (Ex.P/8) was registered against the accused/appellant on 21.7.2009 under Sections 304B, 302, 34 of IPC. After investigation, charge sheet was filed against the appellants and accordingly, charges were framed against them under Sections 498A, 302, 34 and alternatively under Section 304B, 34 of IPC.

03. So as to hold the accused/appellants guilty, the prosecution examined as many as 11 witnesses. Statements of the accused persons were also recorded under Section 313 of Cr.P.C. in which they

denied the circumstances appearing against them in the prosecution case, pleaded innocence and false implication. In defence, they examined two witnesses.

04. The trial Court after hearing counsel for the respective parties and considering the material available on record, by the impugned judgment while acquitting the appellants of the charges under Sections 498A, 304B/34 of IPC, convicted and sentenced the appellants as mentioned in para-1 of this judgment.

05. Learned counsel for the appellants submits as under:

(i) that the deceased was a patient of epilepsy and appears to have died of the said disease.

(ii) that either the deceased in the fit of epilepsy had fallen down or during the course of epileptic attack might have pressed her neck which unfortunately resulted in her death.

(iii) that there is evidence on record that appellants No. 2, 3 & 4 were residing separately and the prosecution has utterly failed to prove their involvement in commission of the crime in question based on the evidence adduced by it.

(iv) that at the time of incident, appellant No.1 was not present in the house, at the relevant time *chhatti* ceremony was going on in the house of the appellants and therefore, it is literally impossible for anyone to commit murder of the deceased in presence of number of persons there.

(v) that dead body has not been found inside the room of appellant No.1 and therefore, he cannot be connected with her murder.

06. On the other hand, supporting the impugned judgment it has been argued by the State counsel as under:

(i) that dead body has been found in the veranda adjacent to room of appellant No.1 and thus, burden lies on him to satisfactorily explain as to how the deceased died.

(ii) that the other appellants were not only present at the time of occurrence but were also residing with appellant No.1.

(iii) that number of injuries have been found on the body of the deceased, in particular around her neck which cannot be self-inflicted.

(iv) that in the postmortem report it has been categorically mentioned by the autopsy surgeon that on dissection of neck, presence of subcutaneous ecchymosis was noticed and this is a clear sign of throttling. According to the autopsy surgeon all the injuries were antemortem and that the death was homicidal in nature.

(v) that it is literally impossible for anyone to throttle himself and therefore, it negates the possibility of deceased throttling herself during epileptic fits.

(vi) that PW-1 Prahlad Kumar and PW-4 Smt. Sulochana have duly supported the prosecution case and there is no reason to doubt their veracity.

07. Heard counsel for the respective parties and perused the material on record.

08. PW-1 Prahlad Prasad Jaiswal, father of the deceased, has stated that marriage of the deceased was solemnized with appellant No.1 in 2007. Upon receiving information regarding illness of the deceased when he reached her house, he saw her dead body covered with cloth

lying in the verandah of the house. When the cloth was removed he noticed nail marks on her neck and then suspected her death and lodged merger intimation (Ex.P/1). He is also a witness to inquest Ex.P/3. He has further stated that his daughter/deceased was subjected to cruelty for demand of dowry and about two months earlier was also ousted by the appellants from her matrimonial house. He had admitted that their financial condition is weaker than that of the appellants. In para-9 he has categorically denied the suggestion that his daughter was suffering from epilepsy and had any attack of the same in the past. In para-17 he has further admitted that appellant No.1 was residing separately. He has stated that on the date of incident *chhatti* ceremony was organized in the house of the appellants and their 10-12 relatives were present in the house. As majority of cross-examination of this witness relates to offence under Section 304B and 498A of IPC, for which the appellants have already been acquitted, we are not further dealing with the said evidence.

09. PW-2 Janki Bai Jaiswal, grand-mother of the deceased, has stated that she was informed by the deceased that she was subjected to cruelty by the appellants in connection with demand of motorcycle. She too has denied the suggestion that the deceased was suffering from epilepsy. PW-3 Kamal Kumar Jaiswal, uncle of the deceased, has also denied the suggestion that the deceased was a patient of epilepsy and that she died of that disease. He is also a witness to inquest Ex.P/3. He has stated that on being informed when he reached the house of the deceased, he saw her dead body lying in the verandah with nail marks on her neck and there was swelling in her neck.

10. PW-4 Smt. Sulochana Bai, mother of the deceased, has stated that after seeing the marks of nail on the neck of the deceased she had suspected that her daughter has been murdered by the accused/appellants. On account of this, dispute had cropped up there. Though in para-13 she has admitted that as the deceased was very affectionate to her, on account of her untimely death they got nervous and out of anger lodged the report, but has further denied the suggestion that her daughter was suffering from epilepsy and died due to that disease. PW-5 Dukhiram is a witness to seizure Ex.P/5, he has not supported the prosecution case and has been declared hostile.

11. PW-6 Dr. Pradeep Agrawal conducted postmortem on the body of the deceased along with Dr. CL Ratre vide Ex.P/7 and noticed following symptoms/injuries on the body of the deceased:

“Rigor mortis present on all four limbs, abdomen distended, eyes closed, conjunctiva congested, pupil dilated, cornea hazy. Mouth was partially open, teeth visible, tongue protruded bitten between teeth, face congested, finger nails are bluish, bluishness on back”

Injuries:

(i) 3 abrasions in front of neck 3 cm left lateral to midline at level of hyoid bone to downwards. Each abrasion measures 1 cm x 1 cm x epidermal deep and in close contact with each other,

(ii) abrasion in center of neck in front over thyroid cartilage 1 cm x 0.5 cm x epidermal deep and vertically placed,

(iii) two abrasions in right sub-mandibular region 0.5 cm x 0.5 cm x skin deep, blood clot present,

(iv) abrasion on left cheek 1 cm x 0.3 cm x epidermal deep transversely placed,

(v) contusion in front of left leg 4 cm x 3 cm situated in upper third of left leg, skin bluish colour

Dead body wearing black blouse, orange check saree, black petticoat, maroon underwear. Two yellow metallic bangle in right wrist, one yellow metallic bangle and one yellow glass bangle in left wrist and one glass bangle in left wrist is broken. Bindiya in forehead, yellow metallic ring in left finger (ring finger), white metallic ring in right middle finger, fully (nose-pin) in left ala of nose, rubber band in hair are present. Black thread and tabeez and two pin present in neck along with it a metallic locket with hexagonal 18 moti silver colour present in neck and around neck. Locket and moti are without thread, probably broken mangalsutra. Black thread, locket and 18 moti are sealed, labelled and handed over to the police constable.

On dissection of abrasion on neck, subcutaneous ecchymosis was found present.

Injuries No. (i) to (iii) were caused by hard and blunt object and were antemortem in nature.

In his opinion, the cause of death was asphyxia as a result of throttling and that the death was homicidal in nature.

In para-13 he has stated that the injuries pointed out by him on left leg of the deceased could not have occurred by rubbing but it can be caused if a person writhes in pain or hits against a hard object. He has admitted that a patient of epilepsy can feel difficulty in breathing and he makes repeated twisting movements of hands and legs and in that process, may also suffer injuries. He has further stated that thyroid cartilage was healthy and hyoid bone was intact. He has also stated that all the symptoms, except the marks on the neck, noticed by him on the body of the deceased are common in epilepsy. In para-24 he has clarified that the opinion given by him in the postmortem report regarding death of the deceased due to throttling is mainly on the basis of four marks found on her neck. In the last line of his cross-examination he has stated that the symptoms found on the body of the deceased leading to her death could occur during severe fits of epilepsy.

12. PW-7 Janakram, Kotwar, has turned hostile. PW-9 Chandrama Singh Rajput, Station House Officer, P.S. Bango, did initial part of investigation including registration of merger intimation and FIR. PW-10 Arun Kumar Xalxo, Executive Magistrate, prepared the inquest Ex.P/3, spot map Ex.P/4 and made application Ex.P/9 for sending the dead body for postmortem. He has stated that at the time of inquest relatives of the deceased were also present and whatever they stated, the same was recorded. While preparing inquest, he noticed that the deceased was wearing a gold leaf-like locket and an amulet (*tabeez*) and there were mild abrasions on her neck. He has further stated that at the time of preparation of inquest, on being enquired he came to know that

appellant No.1 was residing with his wife/deceased whereas the others were residing separately. PW-11 Shyam Sidar did the investigation.

13. DW-1 Shyam Sidar has stated that he was residing near the house of the accused persons and that appellant No.1 Vinay along with his wife/deceased and child was residing separately. He has stated that *chhatti* ceremony was there in the house of appellant No.3 Vinod and number of persons had gathered there. He has further stated that the deceased was suffering from epilepsy and he had treated her through sorcery. DW-2 Ganeshram is an Ayurvedic Doctor. He has stated that he had treated the deceased for her weakness and epilepsy.

14. Close scrutiny of the evidence makes it clear that the deceased died under unnatural circumstances in the night intervening 19/20th July, 2009 while residing in the house of appellant No.1, with whom she was married just two years back. As per evidence on record (PW-1 and PW-10), accused/appellants No. 2 to 4 were residing separately, the prosecution has utterly failed to prove their involvement in commission of the offence by adducing any cogent and clinching evidence against them. It appears that they were arrayed as accused in the crime in question because the prosecution witnesses alleged demand of dowry by them, however, they have been acquitted of that charge by the trial Court for want of sufficient evidence to substantiate the same. Thus, in view of the nature and quality of evidence adduced by the prosecution it would be hazardous to hold them guilty under Section 302/34 of IPC and in our considered view they deserve to be acquitted of the said charge by extending them benefit of doubt.

15. As regards conviction of appellant No.1 Vinay Kumar, husband of the deceased, it is clear from the evidence on record that the deceased was residing with this appellant under the same roof and her dead body with injuries on her neck was found in the verandah adjacent to their bedroom. In a case like this when 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 is extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence is insisted upon. In such cases, 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 can not 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 the accused to offer any explanation.

16. In the case in hand, though appellant No.1 has tried to explain the said circumstance by making statement under Section 313 of Cr.P.C. that on the date of incident he along with his child and guests was there in the house of his brother where *chhatti* ceremony was going on. It is well settled principle of law that onus to prove alibi is on the

accused as it is a matter within his special knowledge, when such plea is taken by the accused, it must be conclusively proved by him. Accused pleading alibi must lead evidence to show that at the relevant time he was so far off from the place of occurrence that he could not have committed the offence. Once the appellant has taken such a plea in his defence, he was required to prove the same either by putting suggestion to the prosecution witness or examining the defence witnesses on the said point. However, it has not been done, which in turn points towards his guilt.

17. The main defence of the appellants is that death of the deceased was the result of epileptic fits and not throttling. Though as per medical evidence, the symptoms/injuries noticed on the body of the deceased could be caused due to epileptic attack because during that process a patient of epilepsy can feel difficulty in breathing and makes repeated twisting movements of hands and legs, but at the same time the doctor has also noticed certain marks on the neck of the deceased and after considering the nature and extent of all the injuries, in particular presence of subcutaneous ecchymosis on dissection of abrasion on neck, opined that the cause of death was asphyxia as a result of throttling and that the death was homicidal in nature.

As per Modi's Medical Jurisprudence, one of the symptoms in a case of death due to throttling or strangulation is presence of subcutaneous ecchymosis. Further, in such a case, usually there are scratches, abrasions, fingernail marks and bruises on the face, neck and other parts of the body. In the case in hand also, the autopsy surgeon has noticed presence of subcutaneous ecchymosis on dissection of

abrasion on the neck of the deceased. Though various suggestion have been put to the autopsy surgeon in his cross-examination, most of them have been accepted by him, but if his statement is read as a whole, it appears that without correctly following the suggestions he answered the same. However, no question whatsoever has been put to this witness by the defence as to under what circumstances there could be presence of subcutaneous ecchymosis and whether it was due to pressing of her own neck during epileptic attack. Moreover, it is a settled position of law that mere opinion of the doctor or his Court statement cannot be treated as conclusive piece of evidence especially when the postmortem report speaks otherwise. This apart, once such a defence has been taken by the accused/appellants, they ought to have proved the same not only by adducing cogent and reliable oral evidence but also by medical evidence of a conclusive nature that death of the deceased was the outcome of throttling herself during the course of epileptic attack. Further it is a matter of common sense that no one can commit suicide by throttling himself and that is what has been said in Modi's Medical Jurisprudence that it is not possible for anyone to continue a firm grasp of the throat after unconsciousness supervenes, hence throttling by the fingers cannot possibly be suicidal.

18. Thus, considering the plea of alibi taken by appellant No.1 turning out to be false in the facts and circumstances of the case together with the medical evidence disclosing cause of death as asphyxia as a result of throttling and the death being homicidal in nature, it can safely be held that it is appellant No.1 who throttled the deceased to death.

19. In the result, the appeal is allowed in part. While acquitting appellants No. 2, 3 & 4 of the charge under Section 302/34 of IPC, appellant No.1 is held guilty under Section 302 of IPC. The impugned judgment stands modified to the above extent. As appellants No. 2 to 4 are on bail, they need not surrender. Appellant No. 1 is already in jail, therefore, no order regarding his surrender etc. is required.

Sd/

(Pritinker Diwaker)

Judge

Sd/

(I.S. Uboweja)

Judge

Khan