

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

Date of Decision: 3rd May, 2016

SUNNY @ SONU + **CRL.A. 1102/2011** Appellant

Through: Ms. Manika Tripathy, Advocate

versus

STATE Respondent

Through: Mr. Herein Sharma, APP for State
alongwith Sub Inspector Arvind Kumar,
Police Station Jaitpur, Delhi

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgement dated 02.08.2011 and order on sentence dated 05.08.2011 passed by learned Additional Sessions Judge -3, South East District, New Delhi in Sessions Case No.55/10 arising out of FIR No.57/10 Police Station Jaitpur, Delhi under Section 304 IPC whereby appellant was convicted for offence under S. 304(ii) IPC and was sentenced to undergo rigorous imprisonment for a period of 3 years and fine of Rs 2000; in default to undergo simple imprisonment for a term of 15 days.

2. Police machinery swung into action on 17.03.2010 on receipt of DD No.18-A regarding killing of a child aged about 8/9 months by her father by throttling her neck. On receipt of this DD, Sub Inspector Dara Singh alongwith Head Constable Isha Khan reached the spot i.e. A2/1324, JJ Colony, Madanpur Khadar, New Delhi at second floor where Sonia gave her statement alleging inter alia that her in-laws are residing at the ground floor whereas she alongwith her family members is residing on the second floor. On 16.03.2010 her husband – Sonu came after consuming alcohol and after quarrelling with her slept. He woke up at about 10 am and inquired about his mobile whereupon she informed him that the same is not at the house and he may have left it somewhere else. Then he started beating her. In the meantime, her daughter – Komal aged about 6 months woke up and started weeping. Her husband – Sonu got irritated by saying that “*she weeps too much*”. Thereafter, after pressing her neck threw her on the

floor. When she raised alarm, her neighbours Vijay Chakrobarty, his son Pratap and Jagdish Pradhan came and took Komal to Prabhakar Nursing Home where she was declared brought dead. This statement resulted in registration of an FIR under Section 304 IPC. During the course of investigation, statements of witnesses were recorded; post-mortem of the child was got conducted. The statement of complainant under Section 164 Cr.PC was recorded. After completing investigation, charge-sheet was submitted against the appellant.

3. In order to substantiate its case, prosecution examined 10 witnesses. In his statement under Section 313 Cr.PC, the appellant took the plea that on the fateful day, when he was playing with his child, she fell down and sustained injuries. The death of the child was a result of an accident. He did not prefer to lead any defence evidence. Vide the impugned judgment, the appellant was convicted and sentenced as mentioned hereinbefore. Feeling aggrieved, the appellant has approached this Court by filing the appeal under Section 374 of the Code of Criminal Procedure, 1973.

4. Assailing the correctness and illegality of the judgment, learned counsel for the appellant submits that all the material prosecution witnesses, including the complainant, have not supported the case of prosecution. As regards medical evidence, although in the initial complaint, the complainant has stated that the appellant had throttled the neck of the child, however, the post-mortem report does not support the version of prosecution as according to post-mortem report the death was due to head injuries and smothering. Further, although the Investigating Officer of the case has deposed that the photographs of the spot were taken, however, those photographs were not placed on record. Under the circumstances, it is submitted that the prosecution has failed to bring home the guilt of the appellant beyond reasonable doubt as such the appellant was entitled for benefit of doubt. In any case, since two views are forthcoming as such benefit of doubt has to be given to the appellant and the impugned judgment be set aside and the appellant be acquitted of the offences.

5. Per contra, learned Additional Public Prosecutor for the State submits that the impugned judgment does not suffer from any infirmity. In the initial statement made by the complainant she has levelled allegations of commission of murder of his daughter – Komal by giving her slaps and fist blows and pressing her neck and throwing her on the floor. However, after having lost her child, when she appeared in the witness box, she

took a summersault by taking a plea of accident and exonerating the accused who is none else but her husband. Even the neighbours, to some extent, tried to save the appellant. However, circumstances, establishes the case of prosecution beyond doubt as the factum of beatings given to the complainant by accused finds corroboration from the broken bangles lying at the spot which were seized by the police. Further on hearing cries, the complainant's neighbours gathered and they gave beatings to the accused. Moreover, conduct of the appellant was quite unnatural in not taking the child to hospital if it was an accidental fall. Moreover, if the appellant was not at fault, why he was given beatings by the neighbours. Medical evidence rules out the theory of death by accidental fall.

6. I have bestowed my considerable thoughts to respective submissions of learned counsels for the parties and have perused the record.

7. Before coming to the rival submissions of learned counsel for the parties, it will be in the fitness of things to have a glance at the testimony of relevant witnesses.

8. PW1 – Smt Sonia is the complainant. According to her, on the fateful day, she alongwith her husband and child was at home. They were playing with the child. Suddenly, child slipped from their hands and fell down on the floor. She received injuries and became unconsciousness. She shouted. Neighbours gathered there. They gave beatings to her husband who started bleeding from his nose. She became unconscious. Some uncle took the child to hospital where she was declared dead. Since she did not support the case of prosecution, she was cross examined by learned Public Prosecutor. In cross examination, she admitted her thumb impression on Ex.PW1/A at point A.

9. PW-3 Jagdish Pradhan is the neighbour who on hearing noise from the house of Sonu, reached there and found Sonu @ Sunny and his wife Sonia quarrelling with each other and their child was lying on the cot. On coming to know that the child has fallen down he alongwith one more neighbour took the child to Prabhakar Nursing Home where doctor declared her dead. This witness was also cross examined by learned Additional Public Prosecutor for the State wherein he admitted that Vijay Chakrobarty and his son Pratap were also present at house no.A-2/1324.

10. Vijay Chakrobarty (PW4) has also deposed to the same effect that on hearing noise from the house of accused as his wife was crying, he reached there immediately. Child was lying on the floor of the house. He alongwith Jagdish Pradhan took the child to Prabhakar Nursing Home where the child was declared dead. He brought the dead body of the child to the house of accused. After some time police reached at the spot and recorded statement of Sonia.

11. PW-5 – Pratap has totally not supported the case of prosecution by deposing that he was not present on the date of incident and denied in cross examination by learned Additional Public Prosecutor for the State that he had gone to the house of accused on hearing cries of the lady or that he accompanied Jagdish Pradhan and Vijay Chakrobarty to nursing home.

12. PW9 – Dr Praveen Kumar proved the post-mortem report Ex.PW9/A. According to him, postmortem of the deceased baby Komal was conducted who was brought to the hospital with alleged history of assault by throttling and throwing on the floor by father of the deceased. On examination rigor mortis present all over the body, rigor mortis present all over the back and dependent part of the body in supine position except over the placer area, no sign of decomposition seen. Eyes and mouth closed, nails are bluish in colour. Following Ante-mortem injuries were noticed : 1) abrasion of size 1.5 cm x 0.5 cm on the left side of forehead, 2) linear fracture of partial bone of skull bone with fracture line extending from right to left side associated with haematoma, 3) contused abrasion of size 1.2 cm over left masturoid region, 4) bluish contusion of size 5 X 2 cm over the left cheek below eye extending upto State vs. Sunny @ Sonu, roof of nose, 5) contusion of size 5 X 2 cm over tip of nose, 6) curviliner abrasion of size 1 cm X 0.2 cm over tip of nose extending to right ala, 7) curviliner abrasion of size 1.2 cm X 0.25 cm over tip of nose extending to left ala, 8) contusion of size 1.2 X 1 cm over inner aspect of upper lip in the middle line alongwith tearing of frenulam. He further deposed that cause of death in this case is shock due to head injury and smothering.”

13. Sub Inspector Dara Singh (PW10), Investigating Officer of the case, on receiving DD No.18A regarding killing of 8-9 months old female baby by her father, reached the spot where three neighbours – Jagdish Pradhan, Vijay Chakroworty and Pratap were found present; he recorded statement of Sonia Ex.PW1/A, made inquiries

from neighbours; seized broken pieces of bangles vide memo Ex.PW10/B and carried out other investigation.

14. Dr. Shiva Prasad was summoned as a Court witness who was a signatory of the post-mortem report Ex.PW9/A. He clarified the difference between throttling and smothering and deposed that smothering is not possible by fall.

15. It is true that PW1, PW3, PW4 and PW5 have not fully supported the case of prosecution, however, it is settled law that merely because a witness is declared as hostile, there is no need to reject his/her evidence in *toto*. The evidence of hostile witness can be relied upon, at least to the extent, it supports the case of prosecution. In ***Sathya Narayanan v. State rep. by Inspector of Police***, (2012) 12 SCC 627, Hon'ble Supreme Court referred to its earlier decision rendered in ***Mrinal Das & Others. v. State of Tripura***, (2011) 9 SCC 479 where while reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, it was held as under:-

“67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.”

The law is now well settled that even if a witness does not wholly support the case of the prosecution his testimony is not to be discarded altogether, and that part of the testimony of the witness can be considered and relied upon as supports the case of

prosecution. It is the consistent view taken by Apex Court and this Court that the fact that the witness has been declared hostile at the instance of public prosecutor and was allowed to be cross-examined furnishes no justification for rejecting en block the evidence of the witness. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof, as held in *State of Gujarat vs. Anirudh Singh and Anr.*, (1997) 6 SCC 514; *Radha Mohan Singh @ Lal Sahib and Ors. Vs. State of U.P.*, (2006) 2 SCC 450; *Mahesh vs. State of Maharashtra*, (2008) 13 SCC 271; *Rajender and Anr. Vs. State of U.P.*, (2009) 13 SCC 480; *Govindapa and Anr. Vs. State of Karnataka*, (2010) 6 SCC 533; *Paramjit Singh @ Pamma vs. State of Uttarakhand*, AIR 2011 SC 200; *Rameshbhai Moohanbhai Koli and Ors. Vs. State of Gujarat*, (2011) 3 SCC (Cri) 102; *Koli Lakhmanbhai Chanabhai Vs. State of Gujarat*, (1999) 8 SCC 624; *Prithi vs. State of Haryana*, (2010) 8 SCC 536; and *Ramesh Harijan Vs. State of Uttar Pradesh*, (2012) 5 SCC 777.

16. Although PW1, PW3, PW4, PW5 and PW6 have not fully supported the case of prosecution but man may tell lie but the circumstances do not, is the cardinal principle of evaluation of evidence. The circumstances in the instant case speak volume as to how the child met the unfortunate death and that too at the hands of her own father. The circumstances available on record prove that:

- (i) Although the complainant – Sonia turned hostile, however, in her initial statement made before the police Ex.PW1/A she has given the details as to how due to the act of the appellant, the child met the unfortunate death. Despite the fact that she turned hostile, she admitted her thumb impression on the complaint Ex.PW1/A at point A which was recorded by Sub Inspector Dara Singh immediately after the incident when he reached the spot. It is pertinent to note that it is not the case of complainant that she had put her thumb impression on a blank piece of paper. Although she denied the contents of Ex.PW1/A, but nowhere explained as to how the same bears her thumb impression. The reasons for her turning hostile is easily understandable that she has already lost her child and in case she deposes against her husband, the inevitable result will be his incarceration in jail and the complainant will not be wanting that her husband should go to jail but the fact remains that her

initial complaint and even her deposition before the Court find corroboration from the circumstantial evidence coming on record.

- (ii) The presence of the appellant at the house when the unfortunate incident took place is undisputed. Even the appellant had admitted that he was present at the house when the incident took place.
- (iii) Sub Inspector Dara Singh found broken pieces of bangles lying at the spot who were seized vide memo Ex. PW10/B. The broken pieces of bangles lend assurance to the averments made in the complaint that when the appellant woke up in the morning and found his mobile missing, he quarrelled with the complainant and in that process her bangles may have broken. Moreover, no explanation is furnished either by the complainant or by the appellant as to how the bangles were broken which were seized by the Investigating Officer of the case.
- (iv) Undisputedly, on hearing cries of PW1, PW3 and PW4 reached the spot. Although according to PW1, PW3, PW4, PW5 Pratap had also reached the spot. Even the investigating Officer of the case found him present at the spot. Although PW5 denied his presence at the house of complainant, the fact remains that at least Pw3 and PW4 had come to the house of the complainant on hearing her cries.
- (v) Beatings were given to the appellant by these neighbours as a result of which blood started oozing from his nose. No explanation is given by the appellant as to why he was given beating by neighbours if he was innocent.
- (vi) The conduct of the appellant is also very unnatural as PW3 and PW4 had taken the child to Prabhakar Nursing Home where the child was declared dead. If it was a case of accidental fall, it would have been natural on the part of the appellant to have taken his child to hospital but that was not done. It is true that behaviour of human beings differ with person to person but having seen the child in unconscious condition it would have been but natural that the appellant being father would have been the first person to take her to hospital. His remaining present at the house and not taking the child to hospital is quite inconsistent with his innocence.

- (vii) The medical evidence totally demolishes the case of the appellant that it was a case of accidental fall. As stated above, as per post-mortem report, there were several ante mortem injuries and the cause of death was opined to be shock due to head injuries and smothering.

17. The post-mortem report Ex.PW9/A recorded alleged history of assault and throttling on the floor, however, the final opinion was that death was as a result of shock due to head injuries and smothering as such in order to seek clarification, Dr. Shiv Prasad who counter-signed the post-mortem report was summoned as a court witness and he explained the meaning of smothering and throttling by stating that 'smothering' is suffocating a person by obstructing the mouth and nose with hand or any other object whereas 'throttling' is suffocating a person by putting pressure on neck. Much emphasis was laid by learned counsel for the appellant that complainant in her initial statement Ex.PW1/A made to the police had stated about throttling, however, medical evidence is to the contrary. This submission is devoid of any merits as the complainant – Sonia seems to be an illiterate woman as even her statement bears her thumb impression. Moreover, the incident took place at the spur of moment wherein baby was picked up by accused, beaten and pressed by neck. That being so, it will not be possible for her to distinguish whether in that moment, the neck was pressed or mouth or nose was pressed and, therefore, mere mentioning of throttling in the alleged history does not belie the prosecution case as the head injury is duly corroborated due to throwing of child on the floor. Moreover, the plea of accidental death due to fall of child on the floor, is belied by medical evidence. Dr. Shiva Prasad in his cross examination by counsel for the appellant ruled out the possibility of smothering by mere fall of a person by stating that if some heavy object including any person falls on top of a person, there is possibility of smothering and same is applicable even for a small child of six months. Injuries numbers 4 to 8 are unlikely to be caused by fall from height. He further stated pursuant to the cross examination by learned Additional Public Prosecutor for the State that the injuries do not suggest any natural cause of death. It is not the case of the appellant that when the child had fallen on the floor any heavy object or any person fell on her resulting in smothering. Moreover, there is absolutely no explanation as to how the child sustained injury numbers 4 to 8 as reflected in the post-mortem report.

18. The circumstantial evidence, which find substantial corroboration from the medical evidence and also to some extent from the ocular testimony of the prosecution witnesses was meticulously examined by learned Additional Sessions Judge for arriving at a conclusion that prosecution had succeeded in establishing its case beyond reasonable doubt. However, keeping in view the fact that the incident had happened at a spur of moment and was the result of trivial quarrel between husband and wife and on being irritated, the appellant picked up the child; gave her beatings and pressed her neck and thrown on the floor which resulted in her death coupled with the fact that the appellant did not try to abscond despite beaten by neighbours and arrival of police reflects that there was no intention on the part of the appellant to kill the deceased baby, but the circumstances did suggest that he had the requisite knowledge, therefore, he was convicted for offence under Section 304(ii) IPC. The findings do not call for any interference.

19. As regards sentence of the appellant, keeping in view the peculiar facts and circumstances of the case, the Trial Court has already taken a lenient view by awarding sentence of three years which does not call for any further interference.

20. The net result is that the appeal is dismissed.

21. The sentence of the appellant was suspended vide order dated 05.09.2011 and he was ordered to be released on bail. The appellant is directed to surrender before the concerned Trial Court on or before 13.05.2016, failing which learned Trial Court to take necessary steps to get the appellant arrested to serve the remainder part of his sentence.

The appeal stands disposed of accordingly.

Trial Court record be sent back forthwith along with a copy of this judgment.

(SUNITA GUPTA)
JUDGE

May 03, 2016/rd