

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

+ **CRL.APPL. No.778/2012**

Reserved on: October 28, 2017

Date of Decision : November 25, 2017

BIRJU KUMAR PASWANAppellant

Through Ms. Saahila Lamba, Advocate
(DHCLSC)

Versus

STATE ... Respondent

Through Ms. Rajni Gupta, APP with
ACP Jagpal Singh and
Inspector Rajeev PS. Inderpuri.

CORAM:

HON'BLE MR. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. The present appeal has been filed by the appellant, Birju Kumar Paswan, challenging the judgement and order dated 29th July, 2011 passed by the Additional Session Judge, Dwarka Courts in Session Case no. 43/11 whereby the appellant was convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC' and the order of sentence dated 29th July, 2011 sentencing the Appellant to imprisonment for life with fine of Rs. 10,000/-.

2. The case of the prosecution is that on the intervening night between 5th April, 2010 and 6th April, 2010 at about 12:05 AM, the appellant brought his wife Neelu (hereinafter referred to as

‘deceased’) to the Ram Manohar Lohia (RML) Hospital, New Delhi. She was declared dead by the doctor who examined her in the hospital. The duty constable at the hospital passed on this information to the Police Station Inderpuri on basis of which DD No.4A was recorded and handed over to ASI Mahaveer Singh (PW-19). ASI Mahaveer Singh reached the hospital and collected MLC of the deceased, he informed the concerned SDM and also telephoned the family members of the deceased. On 7th April, 2010, the brother of the deceased, Shri Anil Kumar Paswan (PW-4) reached Delhi. His statement was recorded before SDM, Delhi Cantt (Ex.PW-1/A). Based on the statement, SDM (Delhi Cantt) (PW-1) issued a direction to SHO, Police Station Inderpuri to register a case and investigate the matter (Ex.PW-1/B) and consequently, FIR No. 50/10 was registered in Police Station Inderpuri on 8th April, 2010 under Section 304B/498A IPC. After receipt of Post Mortem Report (Ex.PW-13/A) on 21st April, 2010, Section 302 IPC was added in the FIR.

3. The appellant was taken into custody on 9th April, 2010. It is the case of the prosecution that on 22nd April, 2010, the appellant made a disclosure statement (Ex.PW-21/A) and got recovered a piece of wire from the roof of his house saying that the same piece of wire was used in committing the strangulation of his wife. The said piece of wire was taken into custody vide Seizure Memo (Ex.PW-21/B). On 16th July, 2010, the wire was shown to Dr. G.A. Sunil Kumar Sharma who had also conducted the Post Mortem of the dead body of the deceased and he opined that the possibility of ligature mark mentioned in the

Post Mortem Report being produced by the wire cannot be ruled out (Ex.PW-13/B).

4. The following charges were framed against the appellant on 20th September, 2010:-

“That on 06.04.2010 death of Neelu (wife of Birju Kumar Paswan) was caused by bodily injury or otherwise than under normal circumstances, within seven years of her marriage and soon before her death, she was subjected to cruelty or harassment by you for, or in connection with, any demand for one Gold chain and Colour T.V. thereby you committed an offence punishable u/s.304B IPC.

In alternative Charge on the aforesaid date, month and year within jurisdiction of P.S. Inderpuri, you intentionally killed your wife namely Neelu and thus, committed an offence punishable u/s.302 IPC within my cognizance.

That on or before 06.04.10 you being the husband of deceased Neelu, subjected her to cruelty for demand of one Gold chain and Colour T.V. thereby committed an offence punishable u/s.498 IPC and within my cognizance.”

5. The prosecution examined the brother of the deceased, Shri Anil Paswan (PW-4), mother of the deceased Smt. Jharokha Devi (PW-3) and the maternal uncle of the deceased, Shri Prabhu Paswan (PW-5) to bring home the charge and offence under Section 304B/498A IPC. The learned Additional Session Judge, however, found both these charges as not proved and discharged the appellant of such charges by way of his impugned order. The State is not in appeal before us and neither do we find any ground to interfere with the said finding.

6. The learned Additional Session Judge, however, relying upon the statement of Ms. Lalita (PW-7) and Shri Dheeraj Kumar (PW-11), who were the neighbours of the appellant and the deceased as also the statement of Dr. Meeknakshi who had prepared the MLC (Ex.PW-14/A) concluded that the prosecution has been able to prove the presence of the appellant in the company of the deceased immediately before her death. The learned Additional Session Judge further observed that in these circumstances, it was for the appellant to explain the death of his wife, however, in his statement under Section 313 Cr.P.C, the appellant had not rendered any such explanation, including whether the deceased had committed suicide either in his presence or in his absence. Relying on the Post Mortem Report (Exb.PW-13/A), it was concluded that the death of the deceased was not due to natural causes and the recovery of the wire at the instance of the appellant coupled with the statement of Dr. Sunil Kumar Sharma (PW-13) who opined that the death having been caused by the said wire cannot be ruled out clearly led to the guilt of the appellant in having caused death of his wife by strangulation. The learned Additional Session Judge further held that merely because the motive for the crime was not clear or was weak, was not sufficient to acquit the accused when the other circumstances point towards his guilt only.

7. The learned counsel for the appellant has contended that there is no direct evidence to establish connection of the appellant with the offence of murder of the deceased. The case of prosecution being based on circumstantial evidence, complete chain of links connecting

the appellant with the offence of murder of the deceased has not been proved. Mere presence of the appellant in the matrimonial house at the time of the death of the deceased is not sufficient to convict the appellant, particularly when no motive could be established; presence of mother of the appellant is also emerging on record; and the appellant did not abscond after the alleged incident. She further contends that the alleged recovery of wire is extremely weak piece of evidence as the incident had occurred in the intervening night of 6/7th April, 2010, the appellant was arrested at his residence on 9th April, 2010 and the alleged recovery was made only on 22nd April, 2010.

8. It is true that the present case is one of circumstantial evidence. There is no eye witness to the offence. The Court, therefore, has to find if the prosecution has been able to prove its case by forming a complete chain of links connecting the appellant to the offence. In this chain of links, statement of Shri Anil Paswan (PW-4) brother of the deceased and Smt. Jharokha Devi (PW-3) are important as they show that the marriage between the appellant and the deceased was not a happy one. The marriage had taken place on 24th May, 2009 and the death of the deceased was on the night intervening 6/7th April, 2010 i.e. within a period of less than one year. Even during this period, for most part i.e. between Diwali and Holi, the deceased stayed at her parental home away from the appellant. Though the testimonies of PW-3 and PW-4 were not found sufficient to bring home the charge of Section 304B and 498A against the appellant, they do clearly show that the marriage was not a happy one.

9. The Medical Legal Case (MLC) (Ex.PW-14/A) was recorded at 12:05AM on 6th April, 2010. It records that the deceased was brought to the hospital by the appellant. Ms. Lalita (PW-7) states that about 10:00PM on the night of 5th April, 2010 while she was sleeping, she heard some noise coming from outside. When she reached the house of the appellant, she found many persons present there including the appellant. Though she denies having made any statement to the police, this part of her testimony remained unchallenged. The same is also proved from the statement of Smt. Sunita Devi (PW-6) and Shri Dheeraj Kumar (PW-11). From the above, it is evident that the death of the deceased had taken place late at night in her matrimonial home and the appellant was present in the matrimonial home at that time.

10. The Post Mortem Report (Exb. PW-13/A) records the following injuries on the body of the deceased:-

“Ligature mark over upper part of the neck measuring 15cm in length, 0.25cm in width located 6.5cm below chin, 3cm below right ear and 3.5cm below left ear. On deeper dissection of the neck there was slight extravasation of blood under the skin and muscle.”

11. The cause of the death was opined as:-

“Asphyxia cause by the application of ligature around the neck laverage viscera preserved to rule not any poisoning.”

12. Dr. G.A.Sunil Kumar Sharma (PW-13) proved the above report. Though in answer to a question, he states that “ligature mark is

possible in both cases in hanging and strangulation” it is nobody’s case that the deceased had been found hanging. This is important when we further deal with the conduct of the appellant and his failure to offer any explanation on the circumstances of the death of the deceased. In any case, it is proved by the prosecution that the death of the deceased was not due to natural causes.

13. Section 106 of the Indian Evidence Act, 1872 puts the burden of proving any fact which is especially within the knowledge of any person, upon such person. In the case of **State of Rajasthan Vs Kashi Ram (2006) 12 SCC 254**, Supreme Court, after referring at various judgements, summarized law on use of Section 106 of the Evidence Act in criminal trial as under:-

“23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is

always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., [Re AIR 1960 Madras 218]”.

14. In the case of **State of Rajasthan Vs Parthu (2007) 12 SCC 754** Supreme Court again reiterated that:-

“14. In the absence of sufficient or cogent explanations in that behalf the court would be entitled to consider the same as the circumstances against the accused. [(See Raj Kumar Prasad Tamarkar v. State of Bihar) 2007(10) SCC 433]

15. This Court in a large number of decisions in a case of this nature had also applied the principles of Section 106 of the Evidence Act. [(See State of Rajasthan v. Kashi Ram [(2006) 12 SCC 254 : (2007) 1 SCC (Cri) 688 : (2006) 11 Scale 440] and State of Punjab v. Karnail Singh) (2003) 11 SCC 271”]

15. In the case of **Trimukh Maroti Kirkan Vs State of Maharashtra (2006) 10 SCC 681** Supreme Court held that:-

“21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of T.N. v. Rajendran (SCC para 6); State of U.P. v. Dr. Ravindra Prakash Mittal (SCC para 39; AIR para 40); State of Maharashtra v. Suresh (SCC para

27); *Ganesh Lal v. State of Rajasthan* (SCC para 15) and *Gulab Chand v. State of M.P.* (SCC para 4).]

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

16. Applying the above law to the facts of the present case, as found above, there was matrimonial discord between the deceased and the appellant; the death of the deceased happened at late hours of the night in her matrimonial home; the death was not on account of natural causes; the Appellant was present in the matrimonial home at the time of death, it was incumbent upon the appellant to have rendered a sufficient and cogent explanation regarding the cause of death of the deceased. In his statement recorded under Section 313 C.r.P.C, he offers no such explanation and therefore, we find that the prosecution has been able to prove all links in the chain of circumstances that lead to the finding of guilt of the appellant to have caused death of the deceased by strangulating her.

17. The contention of the counsel of the appellant that motive has not been proved by the prosecution, in view of our above finding, would not be of much relevance. It is no longer *res integra* that mere absence or lack of proof of motive does not lead to inference that the accused is innocent. In any case, as held by us above, there was

evidence of disharmony in the marriage of the appellant and the deceased which has been proved by the prosecution.

18. The submission of the learned counsel for the appellant with respect to the recovery of the wire equally cannot come to the aid of the appellant. HC Maha Singh (PW-21) has deposed about the disclosure statement made by the appellant (Ex.PW-21/C) as also the recovery of the wire from the roof of his House/Jhuggi. In his cross examination, he stated that though the IO had requested some public persons, including ladies, to join the investigation but none agreed. Inspector Jagpal Singh (PW-24) is the Investigating Officer. He also stated about the recovery of the wire at the instance of the appellant. In his cross examination, a suggestion was put to him that the piece of wire (Ex.PW-24/P1) is not the same wire with which the death of the deceased was caused. He denied the said suggestion. Another suggestion was put to him that the deceased hanged herself with the help of a different piece of wire. This was also denied by him. The testimony of PW-21 and PW-24 regarding the disclosure statement on the recovery of the wire at the instance of the appellant could not be shaken in the cross examination. It is also of some significance that the Post Mortem Report gives the dimension of the injury found on the neck of the deceased as measuring 15cm in length and 0.25cm in width. Dr. G.A.Sunil Kumar Sharma (PW-13) has given an opinion as to the possibility of said injury being caused by the wire so recovered. The recovery of the wire at the instance of the appellant is therefore an important circumstance against the appellant.

19. In view of the discussion aforesaid, this Court finds no error in the impugned judgement convicting the appellant Birju Kumar Paswan for offence punishable under Section 302 IPC or the order of sentence.

20. The appeal is accordingly dismissed.

21. Copy of the order be sent to Tihar Jail for updating of records and intimation to the appellant. Trial Court Record be sent back.

NAVIN CHAWLA, J

MUKTA GUPTA, J

NOVEMBER 25, 2017

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