

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

Date of Decision : November 13th, 2017

+ CRL.A. 1283/2015

DILIP @ DEEPAK

..... Appellant

Through: Mr.Vikas Padora & Mr.Dipanshu
Chugh, Advocate.

versus

STATE

..... Respondent

Through: Ms.Aashaa Tiwari, APP along with SI
Jasmer Singh, PS-Jahangir Puri, for
the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S. TEJI, J.

1. The present appeal has been filed by the appellant under Section 374(2) of the Cr.P.C. against the judgment dated 10.08.2015 whereby the appellant has been convicted under Section 498A/304B /302 IPC and against the order on sentence dated 12.08.2015 whereby the appellant has been sentenced to undergo two years rigorous imprisonment along with fine of Rs.10,000/- and in default of payment of fine to further undergo two months imprisonment under Section 498A IPC; to undergo life imprisonment with fine of Rs.20,000/- and in default of payment of fine to further undergo two months imprisonment under Section 302 IPC; and to undergo ten years rigorous imprisonment along with fine of Rs.20,000/- and in

default of payment of fine to further undergo two months imprisonment under Section 304B IPC.

2. Factual matrix, emerging from the record, is that the marriage of the appellant was solemnized with deceased Poonam on 07.07.2011 and thereafter the deceased started residing with the appellant at her matrimonial home. It was alleged that the appellant was cruel towards his wife and used to beat her up. The appellant used to taunt his wife that she had brought insufficient dowry and used to ask her to bring more cash and a car from her father. On 25.12.2011 at about 4.40 a.m., an information was received at the police station regarding a quarrel in the street where the house of the appellant was situated. On the same day, at about 5.10 a.m., another information was received from the hospital to the effect that Poonam who was admitted in an injured condition by her husband had been declared as “brought dead”. SI Brij Bhushan and Ct.Sunil rushed to the spot and found blood lying there. Further investigation of the case was entrusted to Insp. Dharam Pal Singh. Father of the deceased was informed about the incident and he made a statement before the Executive Magistrate to the effect that his deceased daughter used to be frequently harassed on account of bringing insufficient dowry.

3. On the basis of the statement made by the father of the deceased, FIR of the instant case was registered. Postmortem on the dead body of deceased was conducted and as per the opinion of the doctor, death of the deceased was caused due to cranio-cerebral damage consequent upon head injuries which were ante-mortem in

nature and caused by a heavy blunt object. Weapon of offence i.e. wheel paana was recovered from the house of the appellant. After the completion of investigation, charge sheet was filed in the Court.

4. Charge under Sections 498A/304B IPC and an alternate charge under Section 302 IPC was framed against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution had examined 23 witnesses, namely, Om Prakash (PW1), Vishnu Bhagwan (PW2), HC Devender (PW3), Ranbir (PW4), Saroj (PW5), Ct.Basheer (PW6), Ct.Ravi Kant (PW7), Mahendra Prasad Kushwaha (PW8), HC Phool Kumar (PW9), SI Anil Kumar (PW10), Sumit Sahu (PW11), Rohit (PW12), Ct.Ashok (PW13), Insp.Manohar Lal (PW14), SI Anil Kumar (PW15), Ct.Rahul (PW16), HC Jagbir Singh (PW17), Dr.Bhim Singh (PW18), W/Ct. Sunita (PW19), SI Brij Bhushan (PW20), Insp. Jai Prakash Meena (PW21), Dr.Deepak Chugh (PW22) and Insp.Dharam Pal Singh (PW23).

5. After conclusion of prosecution evidence, statement of the appellant under Section 313 Cr.P.C. was recorded in which he denied the case of the prosecution. He claimed that three persons had trespassed into their house and he learnt about the same only when Poonam had fallen upon him. He immediately got up and saw those three persons. He saw his wife bleeding from her head and tried to save himself from those persons. He is alleged to have even kicked those persons and due to a jerk, the TV fell down. Thereafter, he raised a noise and his brother came upstairs and thereafter all the three

persons fled away. Despite opportunity, the appellant did not lead any evidence in his defence.

6. Upon appreciation of evidence and material available on record, the trial court convicted the appellant under Sections 498A/304B/302 IPC and sentenced him for the said offences. Feeling aggrieved by the judgment of conviction and order on sentence, the present appeal has been preferred by the appellant.

7. Argument advanced by the counsel for the appellant was that, as per the statement given by PW22 Dr. Deepak Chugh, the deceased was brought to the hospital by the appellant and his relatives. It was submitted that had the appellant been involved in the crime, it was not expected of him to take his wife to the hospital. It was further submitted that as per the testimony of PW8 Sh. Mahender Prasad Kushwaha, Executive Magistrate, except the father of the deceased, no other person had disclosed about the harassment and cruelty meted out to the deceased. It was further argued that the appellant was a tempo driver and thus did not have the status to maintain a car which was allegedly demanded by him as dowry. It was further submitted that statements of PW4 and PW8 are contradictory to each other, and the theory regarding demand of dowry is baseless. It was argued that the prosecution had failed to establish that there was any demand of dowry by the appellant. It was submitted that the appellant had not committed the murder of his wife. Rather, on the day of the incident, some trespassers attacked his wife which caused the death of the deceased. It was further submitted that

no motive of the alleged offence had been proved on record against the appellant. It was further submitted that the case of the appellant could not be defended properly and as per Article 21 of the Constitution of India, he had every right to be properly defended. In support of this submission, he has relied upon judgments in the case of ***Behram Khursheed v. State of Bombay (1955) 1 SCR 613*** and ***Olga Tellis v. Bombay Municipal Corp. (1985) 3 SCC 545***

He has further referred to a judgment of Allahabad High Court in the case of ***Dr.Nupur Talwar v. State of U.P. and Anr. (Criminal Appeal No.293/2014)*** to press the contention that the appellant cannot be convicted on the basis of Section 106 of the Evidence Act as the prosecution is bound to prove beyond reasonable doubt all the circumstances against the accused to prove the guilt. It was further contended that since the prosecution has failed to establish other circumstances, aid of Section 106 of the Evidence Act cannot be taken to base the conviction of the appellant.

8. Per contra, learned APP for the State argued that the present case is based on circumstantial evidence. The prosecution had brought on record sufficient evidence to link all the circumstances which point towards the guilt of the appellant-that he had committed the murder of his wife. It was further argued that the public witnesses, as well as police officials, and doctors had duly supported the case of the prosecution to the effect that the deceased was subjected to cruelty and harassment on account of demand of dowry and suffering the injury with Paana Ex.P3 recovered at the instance of

the appellant, thus there was no infirmity in the judgment and order on sentence passed by the trial court.

9. We have heard the arguments advanced by both the sides and have gone through the evidence and material available on record, meticulously.

10. PW4-Ranbir is the father of the deceased. He had deposed that Poonam was his second issue. She was married with the accused Deepak @ Dalip as per Hindu rites and ceremonies in July, 2011. He further deposed that two months prior to her death, his daughter Poonam came to her parental house and informed them that her husband accused Deepak @ Dalip used to beat her up and was demanding a car. Thereafter, PW4 had talked with accused Deepak @ Dalip and his parents and told them that he had given a motorcycle, one gold ring and one gold chain at the time of the marriage apart from other articles. PW4 told them that he was not in a position to give them a car as it was beyond his financial capacity. He further deposed that on 25.12.2011 at about 7.00 a.m., mediator Khazan Singh told him that Deepak had murdered Poonam by hitting her with Pana rod. PW4 along with his neighbours reached the house of Deepak where he came to know that his daughter had been killed by accused Deepak @ Dalip. Thereafter, he reached BJRM hospital where he saw the dead body of his daughter. One Executive Magistrate met him in the hospital. Statement (Ex.PW4/A) of PW4 was recorded. He had identified the clothes of his deceased daughter in the Court as Ex.P1.

During cross-examination, PW4 stated that on that day, Khazan Singh came to his house at about 7.00 a.m. and informed him about the occurrence. He had inquired from Khazan Singh as to how he had received the information, to which he stated that he had received a telephonic information. When they reached Jahangirpuri, the Pana-rod was lying in the room smeared with blood. He also stated that he had a talk with his daughter two months prior to her death. In between those two months, his daughter had a talk with her elder sister Saroj who had told informed about the said facts to him. He had informed the police and also the SDM that two months before her death, when his daughter Poonam complained him about the demand of car by the accused, he had a talk with the father of the accused. He denied the suggestion that accused did not treat his daughter with cruelty, and did not harass her. He further denied that his daughter sustained injuries during the theft in the house due to which she died.

11. PW5 Saroj is the elder sister of the deceased. She had deposed that deceased Poonam was her younger sister. She further deposed that prior to two months of the death of Poonam, she had gone to her parental house, wherein her younger sister Poonam was also present. When Poonam met this witness, she told her that her husband Deepak @ Dalip used to beat her up and used to compel her to bring money for his expenses, and tortured her for bringing car from her father and also to bring money from her father. On 25.12.2011, on receipt of information regarding death of her sister

Poonam, she had reached the matrimonial house of Poonam where she came to know that Poonam had been murdered by her husband, accused Deepak @ Dalip.

During cross-examination, PW5 stated that her father might have asked accused to keep her sister well and properly. She denied that her sister had not told her on the telephone that accused was demanding car or money. She stated that she was called by her sister on telephone and when she met her, she told her about the demand of car or money made by the accused.

12. PW12 Rohit is the brother of the deceased. PW12 had deposed that Poonam was married with accused Dalip @ Deepak. After the marriage, accused Dalip had started torturing his sister Poonam. He used to hear about the same from Poonam when Poonam used to complain against accused Dalip to his elder sister. He further deposed that on 25.12.2011, his sister Poonam was killed by accused Dalip @ Deepak, as 4-5 days prior to the occurrence, he had gone to meet his sister Poonam at Jahangirpuri and at that time accused Dalip @ Deepak had said to him *“tere pita ne abhi tak gaadi kee maang abhee tak poori nahi kee hai, us se jakar keh dena kee agar gaadi nahi dee to, teri behen ko chod dega”* (your father has not fulfilled the demand of car till now, inform him that if car is not given, his sister would be left). He further deposed that accused abused him due to which he started weeping, at which his sister consoled him. After coming back to his house, he had informed about the same to his father. He stated that since his father was unable to fulfil the said

demand, accused had killed his sister.

13. From the testimony of PW4, father of the deceased, it has been established that prior to two months of the death of the deceased, she had informed PW4 that the appellant used to beat her up, and that he was demanding a car. Testimony of PW4 has duly been corroborated by PW5-Saroj, sister of the deceased. PW5 has categorically stated that when she went to her parental home, she met with the deceased who informed her that the appellant used to beat her up and compel her to bring money from her father, for his expenses. Deceased also told PW5 that the appellant used to torture her for bringing car and money from her father. PW12-Rohit, brother of the deceased also corroborated the testimony of his father (PW4) and sister (PW5). PW12 has specifically stated that when he visited the matrimonial home of his deceased sister, accused told him that his father had not fulfilled the demand of car and if the car was not given, the deceased would be left. Though, the above witnesses were cross-examined at length by the defence, but the defence failed to dent their testimonies that the appellant used to torture and harass his deceased wife Poonam for or in connection with demand of dowry. Thus, the offence under Section 498A IPC is duly proved against him and his conviction and sentence are liable to be upheld.

14. Now, coming to the second part of the offence committed by the appellant. The appellant was charged for offence under Section 304B IPC for committing the dowry death of the deceased, and in alternate, under Section 302 IPC for committing the

murder of the deceased. Having examined the record, we are of the considered view that from the evidence placed on record, the case of commission of murder of the deceased by the appellant is made out, and not that of her dowry death which is discussed as under.

15. The present case is based upon circumstantial evidence and not on direct evidence. There are several circumstances on record which point to the fact that the appellant committed the murder of his wife. The first being, he was alone in the house along with his deceased wife when the incident took place in the dead of the night. Second being, the weapon of offence was recovered from the house of the appellant. Third being, a false plea has been taken by the appellant in his defence, which he has not substantiated or even probalilized.

16. It is alleged against the appellant that on the night of the incident, he was alone in the house with his deceased wife and that he had committed her murder with the use of a wheel paana. On the other hand, defence taken by the appellant is that some trespassers entered their house on the night of the incident, attacked his wife due to which she fell upon him, and he woke up to find his wife bleeding from the head.

17. PW18-Dr.Bhim Singh had deposed that on 25.12.2011, he conducted the post-mortem examination on the dead body of Poonam. On examination, he found a lacerated wound 3cm x 1cm x bone deep in the middle of the head; lacerated wound 3cm x 1cm x

bone deep over right parietal region of head and lacerated wound 4cm x 1.5cm x bone deep over right parietal temporal region of head. On an internal examination, he found that the head showed an effusion of blood in the scalp tissues below the injuries with underline depressed fracture upto middle cranial fossa. The brain showed an extensive subdural, sub arachnoid, ventricular blood with contusion below the injuries. As per opinion of the doctor, death was caused due to cranio-cerebral damage consequent upon head injury. All the injuries were opined to be antemortem in nature, fresh in duration and were caused by hard heavy blunt object. It was also opined that the injuries were sufficient to cause death in the ordinary course of nature. Pertinently, time since death was opined as about 12 hours. He proved his report as Ex.PW18/A. Subsequently, he examined the wheel pana Ex.P3 and gave his opinion Ex.PW18/B that the injuries no.1 to 3 mentioned in post-mortem report Ex.PW18/A were possible by the said weapon of offence.

18. From the post-mortem report, it is apparent that the death of the deceased was a homicidal death, and otherwise than in natural circumstances. As per Section 106 of the Indian Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. When it was pleaded by the appellant that trespassers had entered their house on the fateful night and caused head injuries upon his wife which resulted into her death, the onus to prove the said fact was upon the appellant.

19. Apart from taking the plea of causing injuries on the

head of his wife by some thieves, the appellant had not examined any witness, including his brother Vinod, to substantiate his plea. The appellant was given an opportunity to adduce defence evidence but he deliberately chose not to examine any witness in his defence. It has come on record that it was the appellant and his wife who were residing in their house alone. What had happened inside the house on the fateful night can be explained by the appellant alone, as he was the lone survivor after the death of his wife in the room. The appellant was the master of the circumstances which took place within the four walls where the murder of the deceased had taken place, and he was the best person to prove the fact of murder by some third parties, as the said fact was within his special knowledge. There was no evidence of break-in into the appellant's residence, or of any theft. The appellant has not explained as to how is it that his wife was awake, or she woke up when the so called trespassers came in and he kept sleeping; why she did not raise an alarm and wake him up immediately on realising that there had been a trespass in her home in the dead of the night; how come he woke up only after the victim had been fatally hit on the head by the so called trespassers, and she fell on him. The present case is a case based on circumstantial evidence and not on direct evidence which puts a duty upon the appellant to explain the circumstances under which his wife sustained head injury, which was opined to be the cause of her death. Thus, the accused has failed to discharge the onus put upon him by Section 106 of the Evidence Act.

20. The plea taken by the appellant appears to be a cooked-up story. It would be pertinent to mention that PCR officials reached the spot at about 4.40 a.m. but the appellant was not available at the spot. The MLC Ex.PW22/A of the deceased shows that the deceased was taken to the hospital at 5.00 a.m. but was declared “brought dead”, when as per the postmortem report Ex.PW8/A, death of the deceased had taken place at around 12.30 a.m. Equally pertinent it is to note that the appellant had not raised his plea, taken by him in his defence before the doctor.

21. In similar circumstances, the Supreme Court in the case of ***Shambu Nath Mehra v. The State of Ajmer AIR 1956 SC 404*** held that :

“This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he

did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle v. Emperor* A.I.R. 1936 P.C. 169 and *Seneviratne v. R.* [1936] 3 All E.R. 36, 49”

22. Further in the case of *State of West Bengal vs. Mir Mohammad Omar & Ors. etc.* AIR 2000 SC 2988, while discussing section 106 of the Evidence Act, the court observed that:

“The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.”

23. In the case of *Trimukh Maroti Kirkan vs. State of Maharashtra* (2006) 10 SCC 681, scope of Section 106 of the Evidence Act was further discussed and it was observed as under :

“If 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 will be

extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case.”

24. The plea taken by the appellant is that some trespassers/ thieves entered their house on the fateful night and caused injury on the head of his wife which he realised when his wife fell upon him. As discussed above, the said plea appears to be a false one as the appellant has not brought on record any evidence-oral or documentary, to substantiate such a plea which is an additional link in the chain of circumstances. In similar circumstances, the Supreme Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***, AIR 1984 SC 1622 observed that :

“It is well settled that the prosecution, must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a

false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.”

25. Further, in the case of ***Subhash Chand vs. State of Rajasthan (2002) 1 SCC 702*** it was observed as under :

“In Dhananjay Chatterjee's case (supra), the decision of this Court in Sharad Birdhichand Sarda vs. State of Maharashtra, 1984 CriLJ 1738, was relied on. In the later case, it was also held that a false explanation or false plea taken by the accused can be used as an additional link in the chain of circumstantial evidence subject to satisfaction of three essential conditions, namely (i) various links in the chain of evidence led by the prosecution have been satisfactorily proved, (ii) the said circumstance points to the guilt of the accused with reasonable definiteness, and (iii) the circumstance is in proximity to the time and situation.”

26. Another circumstance in the present case is that the weapon of offence was recovered from the spot itself. PW4-Ranbir Singh has categorically stated that when he visited the spot, he had seen the rod paana lying in the room and the same was smeared with blood. PW18-Dr.Bhim Singh has stated that on 13.01.2012, he received an application from Insp. J.P. Meena along with one sealed

pullanda. On opening the pullanda, he found one iron rod (wheel pana) Ex.P3. PW18 also mentioned the description of the weapon in his report by preparing its sketch. He examined the said weapon and gave his report Ex.PW18/B stating that injuries no.1 to 3 mentioned in the post-mortem report Ex.PW18/A were possible by the said weapon of offence. There was no cross-examination of PW18 by the defence to the effect that the wheel pana Ex.P3 was not used in the commission of the crime. As per the postmortem report Ex.PW18/A, injuries sustained by the deceased on her head were caused by a hard heavy blunt object and the said fact has been duly substantiated by report Ex.PW18/B of PW18 to the effect that the injuries mentioned in postmortem report were possible by the wheel pana Ex.P3.

27. Another circumstance which links the appellant to the chain of events is that the first Daily Diary entry was recorded by the police at about 4.40 a.m. regarding taking place of a quarrel near the house of the appellant and then the deceased Poonam was brought to the hospital at about 5.00 a.m. wherein she was declared “brought dead”. Even at that stage, the appellant did not claim, or raise an alarm in the neighbourhood, that his wife had been injured by unknown trespassers. The postmortem on the dead body of the deceased was conducted at 12.30 p.m. on 25.12.2011, and the time since death was opined to be about 12 hours. From the opinion expressed by the doctor, the death of the deceased could have taken place about 12 hours back, meaning thereby around 12 midnight. On the other hand, plea of the appellant is that the trespassers entered

their house around 4.30 a.m. and they caused injuries to the deceased. The time since death of the deceased mentioned in the postmortem report Ex.PW18/A further falsifies the plea of the appellant that the death of the deceased had taken place in the manner and at the time explained by him. Therefore, the judgment relied upon by the appellant in case of **Dr.Nupur Talwar** (supra) is of no help to him inasmuch, as, prosecution has successfully established the complete chain of events, i.e. the appellant was the master of circumstances on the night of the incident; weapon of offence was recovered at the instance of the appellant, and, a false plea of defence was taken by the appellant

28. So far as the contention of the appellant that he was not given any due and proper opportunity to defend himself is concerned, the same is without any basis. Perusal of the testimony of prosecution witnesses shows that they were cross-examined at length from the side of the defence. Also, an amicus curiae was appointed by the trial court to give a fair and reasonable opportunity of defence to the appellant. After the conducting of entire the trial, examination of prosecution witnesses, recording of statement of the appellant under Section 313 Cr.P.C. and delivering the judgment of conviction and order on sentence, the appellant, at this stage, cannot be allowed to raise an entirely new and unsubstantiated plea that he was not given a fair opportunity of defence during the trial. Even otherwise, the same is not borne out from the record.

29. In view of the above mentioned facts and circumstances,

this Court is of the considered opinion that the appellant has failed to make out any ground in support of the present appeal. Rather the prosecution has successfully established all the circumstances which lead to the only conclusion that the deceased was murdered by the appellant himself and none else. The entire chain of events have been duly proved, and the prosecution has successfully established its case against the appellant. Therefore, conviction of the appellant under Section 302 IPC is liable to be upheld.

30. So far as the conviction of the appellant under Section 304B is concerned, we are of the view that since he has been convicted under Section 302 IPC, he cannot be punished for commission of dowry death as the parameters to hold a person guilty for both these offences are altogether different. Consequently, the conviction and sentence of the appellant under Section 304B IPC is hereby set aside.

31. As discussed above, the judgment of conviction of the appellant under Section 498A and 302 IPC and the sentence awarded to him are accordingly upheld.

32. With the above modification in the conviction of the appellant, the appeal is disposed of.

P.S. TEJI, J

VIPIN SANGHI, J

NOVEMBER 13, 2017/dd