

\$~3

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

+ **CRL.A. 222/2002**

BIJENDER

..... Appellant

Through: Mr. Chetan Lokur, Advocate (Amicus
Curiae) with Mr. Nitish Chaudhary, Advocate

versus

STATE

..... Respondent

Through: Ms. Kusum Dhalla, APP

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

ORDER
08.02.2018

%

Dr. S. Muralidhar, J.:

1. This is an appeal directed against a judgment dated 1st September 2009 passed by the learned Additional Sessions Judge, Delhi in Sessions Case No.15/1999 arising out of FIR No.982/1998 registered at Police Station ('PS') Rajouri Garden convicting the Appellant of the offence under Section 302 IPC for the murder of his wife, Kanta. The appeal also impugns the order on sentence dated 3rd September, 2002 whereby he was sentenced to imprisonment for life with a fine of Rs.2,000/- and, in default of payment of fine, to undergo simple imprisonment for 3 months.

Case of the prosecution

2. At around 10.25 am in the morning of 1st November 1998, information was received in the Police Control Room (PCR) that Kanta, wife of the Appellant aged 27-28 years, had been murdered by her husband at M-407,

Raghubir Nagar. This information was provided by Shakuntala (PW-7), the elder sister of the deceased.

3. Inspector Balraj Singh (PW-26) who was posted as Station House Officer ('SHO') at PS Rajouri Garden received the above information and reached the spot along with his staff. There he found Sub-Inspector (SI) Vijay Singh (PW-25) already present. The dead body of the deceased was found on the first floor of the said house lying on a cot in a pool of blood. There was a visible injury on the right side of the neck.

4. From the spot, three bed sheets, one blood-stained pillow, and one blood-stained *gadda* were lifted from the cot, taken into possession, converted into parcels and sealed. The investigation of the case was entrusted to PW-25.

5. During the course of the investigation, the two children of the Appellant and the deceased, Jyoti (PW-8) and Deepak (PW-9), were examined. Their respective statements under Section 164 Code of Criminal Procedure ('Cr PC') were recorded on 21st November 1998 before the learned Metropolitan Magistrate ('MM').

6. In her statement before the learned MM under Section 164 Cr PC, PW-8 first clarified that she was making the statement of her own free will because she wanted to disclose the complete truth. She stated that on 31st October 1998, she had returned from school at around 11 am. Her father told her that she should not let her mother leave the house. When, in the afternoon, her mother returned from work, she forgot to convey this message to her mother. Subsequently, her uncle, Subhash (PW-5), the brother of the

deceased, came there to pick her mother up but the deceased declined stating that she was feeling unwell. PW-8 recollected her father also staying at home but in a drunken condition. Her mother was washing clothes. Her father then asked PW-8 to go to her aunt's house. She went out of fear because her father used to often beat her mother. When PW-8 returned the next morning at 9:30 a.m. she found her mother sleeping with the bed sheet covering her face. Since it was a Sunday and her mother had forbidden them from waking her up early, PW-8 did not do anything about it, presuming that she was asleep. While PW-8 was heating up some *dal* in the kitchen, her aunt, Shakuntala (PW-7), arrived there and discovered that her mother had been murdered.

7. On the same date, the learned MM also recorded the statement of Deepak (PW-9), son of the Appellant and the deceased, under Section 164 Cr PC. The learned MM took care to ask PW-9 whether he was making the statement of his own free will or whether he was under any pressure from his uncle, Subhash (PW-5), to make such a statement. The child was categorical in answering the said question in the negative and stated that "*Nahi, jo humne dekha hai wahi bolna hai*".

8. PW-9 then proceeded to narrate that it was a Saturday night when he was asleep. When he heard his mother scream, he woke up to notice his father repeatedly switching on and off the lights and repeatedly opening and closing the *almirah*. In the morning, when PW-9 finally woke up, he noticed that the room had been locked from outside. He presumed that his father had gone for work. He also noticed that his mother was still asleep. He then

began watching TV at which time his cousin brother arrived there. He asked his cousin brother to open the latch of the room. Thereafter, he went away to the house of his aunt, Shakuntala. His aunt thereafter arrived there in order to wake his mother up. His aunt then noticed his mother was bleeding from her neck. His aunt then started screaming and it is only then that he realized that his mother had been murdered.

9. As for the Appellant, he was nowhere to be found. He was ultimately apprehended by PW-25 along with Head Constable Satyawar (PW-19) from a park near B-1, Raghbir Nagar, Delhi on 7th December 1998, i.e. more than a month after the crime had taken place. Pursuant to his arrest and disclosure, the Appellant led the police to the corner of Chameli Park, Raghbir Nagar where under some bricks he had hidden his blood stained shirt and the knife which he had used in the commission of crime. These were then lifted and sealed.

Trial proceedings

10. At the end of the investigation, a charge sheet was filed and by an order dated 5th July 1999, the charge against the Appellant was framed for having committed the murder of his wife in the intervening night of 31st October 1998 and 1st November 1998 at M-407, 1st Floor, Raghbir Nagar within the jurisdiction of P.S. Rajouri Garden, Delhi punishable under Section 302 IPC.

11. The prosecution examined 26 witnesses. In his statement under Section 313 Cr PC, while denying the circumstances put to him, the Appellant claimed that he had been falsely implicated; that he was not in Delhi at the

time of the incident; that he had gone to Garganga to perform the ceremony of his father. He claimed that his children had been tutored and that there is no kitchen or latrine in my house and that he was not present in the house.

12. The Appellant examined Fateh Singh (DW-1) and Amar Nath (DW-2), both of whom claimed to know the Appellant since childhood. They testified to his good character. DW-2 claimed that the Appellant had been arrested in Meerut.

Impugned judgment of the trial Court

13. The trial Court, in the impugned judgment dated 1st September 2001, held in the first place that the medical evidence proved that the death was homicidal. Secondly, the presence of the accused at the place of occurrence at the time of the murder stood proved by the clear and consistent evidence of his son, Deepak (PW-9), and his daughter, Jyoti (PW-8). This coupled with the fact that the Appellant was unable to substantiate his plea of alibi by not leading any evidence in that regard. The evidence of his sister-in-law, Shakuntala (PW-7), about there having been a quarrel between the Appellant and the deceased in the evening of 31st October 1998 between the deceased and the Appellant, further established his presence in the house.

14. The third circumstance held to be proved was locking the room from outside by bolting the latch. This was spoken to by PW-9, Mukesh (PW-6), and Giriraj (PW-13). All of them had gone to the house of the Appellant between 9.00-9:15 a.m. and found the room bolted from outside. It was at the instance of PW-9 that the room was unlocked. This clearly suggested

that the Appellant, after committing the murder, had bolted the latch of the room from outside.

15. The fourth circumstance held proved, according to the trial Court, was the conduct of the Appellant after the commission of the crime. He remained absconding for over a month thereafter. This was a relevant piece of evidence in providing a further link in the chain of circumstances. The fifth and sixth circumstances were recovery of the blood-stained shirt and knife which, according to the trial Court, stood proved. Lastly, the trial Court held that the motive for the commission of the crime stood proved since the depositions of PW-5, PW-7, and PW-11 showed that the Appellant was a habitual drunkard and had a history of quarrelling with and beating his wife.

16. It has come in the evidence of the prosecution that earlier, the deceased and the Appellant lived in Meerut. The family shifted to Delhi where they lived in a rented accommodation. There was an incident of throwing burning oil on the deceased about a year prior to this incident. As a result, the deceased had received burn injuries on the face and both hands. The Appellant had separated from his wife and children for some time. A *panchayat* of the Bhariva Panchayat Sabha of which Laxmi Narain (PW-22) was the President was held on 25th March 1998. The prosecution had been able to prove the *panchayatnama* (compromise deed) executed by the Appellant and the deceased (Ex.PW-22/A) after which they commenced living together at M-407, Raghubir Nagar. Even in the evening on the date of the incident, the Appellant had fought with the deceased had threatened to kill her. PW-7 somehow managed to get the matter sorted out.

17. The trial Court accordingly concluded that the chain of circumstantial evidence was complete and consistent only with the guilt of the accused.

18. With the assistance of learned counsel for the parties, the Court has carefully examined the evidence in the matter afresh.

Death is homicidal

19. In the first place, it requires to be noticed that the death of the deceased was homicidal. The injuries noticed on the deceased by Dr. Sarvesh Tandon (PW-2) were as under:-

“1. Incised penetrating wound 3.5 x 1.8 cm. in size transverse deep, with sharp edges and clean cut margins over right side of neck. Both the angles were acute 6 cms below right ear lobule, starting from 2.8 cm to the right of mid line, direction being from front to back.

2. Abrasion above left nipple transverse slightly curved 7 cms long scratch form fresh heaped up epithelium over left side terminal end. Its medial end started from mid line.

3. Abrasion over right cheek 1.3 x 0.8 cms in size 2 cms outside the right eye oval fresh.

4. Abrasion over right side neck 3.5 x 0.4 cms in size just above injury No.1 – fresh.”

20. The opinion on the cause of death was “haemorrhagic shock due to injury to neck structures and blood vessels of right side of neck by a sharp edged weapon”. Injury No.1 was held sufficient to cause death in the ordinary course of nature. All the injuries were ante-mortem. The time of the

post-mortem was 1.00 p.m. on 2nd November 1998 and the estimated time since death was “about 1 ¼ to 1 ½ days”.

Evidence of child witnesses

21. The case of the prosecution was based on circumstantial evidence. It hinged primarily on the evidence of the two children of the Appellant and the deceased, PWs 8 and 9. In particular, the last seen evidence was of PW-9 who was present in the room along with the deceased and the Appellant in the intervening night of 31st October 1998 and 1st November 1998.

22. It was submitted by learned counsel for the Appellant that the statements of PW-8 and PW-9 under Section 164 Cr PC was recorded more than 20 days after the incident during which time, both the children were living with their uncle Subhash (PW-5). According to him, therefore, there was every occasion for both the children to be tutored by their uncle into making a statement against their own father.

23. Before proceeding to analyse the evidence of the two child witnesses, it is necessary to briefly recapitulate the law in that regard. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341*** it was held as follows:

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness

must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

24. In *Ranjeet Kumar Ram v. State of Bihar 2015 (6) SCALE 529*, it was observed:

"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."

25. In *Nivrutti Pandurang Kokate v. The State of Maharashtra (2008) 12 SCC 565*, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

26. In the present case, a careful perusal of both the statements recorded by

the learned MM under Section 164 Cr PC shows that the learned MM took care to ask both the children if they were under any influence or pressure into making the statement. In particular, PW-9 was asked whether he had been asked by his uncle to make a statement in any particular way. As already noticed earlier, PW-9 was categorical that his uncle had not asked him to make a statement in any particular way and that he had to make a statement on the basis of what he had actually seen. Likewise, as regards PW-8, the learned MM took care to ensure that the child knew that she had to speak the truth. The Court is, therefore, not able to accept the plea of the counsel for the Appellant that the statements of the two children under Section 164 Cr PC were not made voluntarily.

27. Both the statements appear to be natural and truthful and without any embellishments. Deepak (PW-9) was around 9 years old at the time of the incident and Jyoti (PW-8) was around 13 years old. The fact that PW-9 did not state that he actually saw his father kill his mother makes his statement most natural. He was asleep and on hearing the screaming of his mother, he woke up. In that drowsy state he noticed his father switching the lights on and off and opening and shutting the *almirah* repeatedly. Therefore, the presence of the Appellant in the room in the intervening night of 31st October 1998 and 1st November 1998 stands proved.

Unproved plea of alibi

28. The plea of the Appellant that he was not in the room at that night but was away at Garganga for performing the last rites of his father remained unsubstantiated. It is trite that when an accused takes the plea of *alibi*, the

burden of proving it is on him. This burden has not been discharged by the Appellant. It has also turned out to be a false plea which provides an additional link in the chain of circumstances. The legal position in this regard was explained by the Supreme Court in *Shaikh Sattar v. State of Maharashtra (2010) 8 SCC 430* as under:

“20. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in the case of *Gurpreet Singh v. State of Haryana, (2002) 8 SCC 18* as follows:

"This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact".

21. But it is also correct that, even though, the plea of alibi of the appellant is not established, it was for the prosecution to prove the case against the appellant. To this extent, the submission of the learned counsel for the appellant was correct. The failure of the plea of alibi would not necessarily lead to the success of the prosecution case which has to be independently proved by the prosecution beyond reasonable doubt.”

29. As rightly pointed out by the trial Court, the circumstance of the room being bolted from outside is an additional pointer to the culpability of the Appellant since he was the only other occupant of the room in that

intervening night. The fact of the room being bolted from outside is spoken to by not only PW-8 but also by Mukesh (PW-6) who arrived there at around 9.00-9:15 a.m. along with Giriraj (PW-13). Both PW-6 and PW-13 worked with the Appellant in making sofa sets. Both of them found PW-9 standing in the room near the window and asking them to open the door of the room that had been bolted from outside. This, coupled with the evidence of PW-7, proves that the room was indeed bolted from outside.

30. The learned counsel for the Appellant submitted that the recovery of the blood-stained shirt and knife was not particularly helpful to the prosecution since the report of the serological unit of the Forensic Sciences Laboratory returned inconclusive results. The bloodstains found both on the knife and the shirt had disintegrated.

31. Even if the circumstance of recovery of the blood-stained knife and shirt are kept aside, the Appellant had still not been able to explain his absence for over a month after the commission of the crime. He has led no evidence to show where he was during this time and in particular his plea that he was away in Garganga performing the last rites of his father could not possibly explain his absence for over a month. Incidentally, even that has not been proved by him. This is, therefore, a further circumstance that works against the Appellant.

Section 106 Evidence Act

32. Added to this is the burden placed on the Appellant as a result of Section 106 Indian Evidence Act ('IEA'). The Appellant was the only other

occupant apart from his son, PW-8 (who was asleep in the room) in the house in which his wife and children normally resided. On the intervening night of 31st October 1998 and 1st November 1998, when there was no one else in the house and the Appellant was last seen with his wife, who was found the next morning murdered with the door of the room latched from outside, it is for the Appellant to explain under what circumstance his wife could have been found dead in the room. These were facts exclusively within his knowledge and his failure to do so would result in an adverse opinion being drawn against him.

33. In *Shambhu Nath Mehra v. State of Ajmer AIR 1956 SC 404* the Supreme Court explained that Section 106 of the Evidence Act was not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is difficult for the prosecution to prove that fact. It was held:

"This Section 101 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."

34. In *Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681* the wife was injured in the dwelling home where the husband ordinarily resided. The Court held:

"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."

35. Similarly, in *Dnyaneshwar v. State of Maharashtra (2007) 10 SCC 445* the Supreme Court observed:

"It has not been disputed before us that the deceased was murdered in her matrimonial home. It is not the case of the appellant that the offence was committed by somebody else. It is also not his case that there was a possibility of an outsider to commit the said offence. One of the circumstances which is relevant is that when the couple was last seen in a premises to which an outsider may not have any access. It is for the husband to explain the ground for unnatural death of his wife."

Not culpable homicide

36. It was then urged by learned counsel for the Appellant that even if the Appellant is disbelieved about his absence from the scene of crime, it was perhaps a crime committed in the heat of the moment as a result of a sudden quarrel. He referred to the disclosure statement where the Appellant referred to the fact that he was constantly being taunted by his wife. According to the learned counsel for the Appellant, there was no pre-meditation for the crime because the quarrel that took place, as spoken to by PW-7, in the evening of 31st October 1998 was an immediate provocation for the Appellant to kill his

wife. He accordingly submitted that the offence should be held to be one punishable under Section 304 Part-I IPC and not Section 302 IPC.

37. The Court is unable to accept the above submission. The overwhelming evidence shows that the Appellant in fact planned to eliminate his wife in the intervening night of 31st October 1998 and 1st November 1998. The consistent statement of the daughter, Jyoti (PW-8), under Section 164 Cr PC as well in the Court is that the Appellant had asked her to go away to the house of her aunt, Shakuntala (PW-7). Clearly, the Appellant saw PW-8 as coming in the way of his plans. He was aware that his younger child would be fast asleep so as to not come in the way of his plan of murdering his wife that night. The quarrel between the Appellant and the wife on the evening of 31st October 1998 was one more in the history of violent behaviour displayed by the Appellant towards his wife. As recently as in March 1998, after a violent incident of throwing hot oil on his wife, there had been a settlement reached between the Appellant and his wife before a *panchayat*, the President of which was PW-22.

38. Added to this is the fact that many of the witnesses have spoken to the fact that the Appellant would often come home drunk and behave in a violent manner towards his wife. Even PW-8 disclosed about the fear she would experience when her father came in that kind of mood as he would often beat her mother. Therefore, the crime did not take place as a result of any sudden provocation as sought to be made out but as a result of several years of violent behaviour of the Appellant towards his wife.

39. Consequently, the Court is unable to accept the submission that the

crime is not of murder but of culpable homicide not amounting to murder which should be punished under Section 304 Part-I IPC.

Conclusion

40. Viewed from any angle, the Court is satisfied that the trial Court committed no error in concluding that the prosecution had proved, beyond reasonable doubt, every link in the chain of circumstances and that the only possible conclusion is that it was the Appellant, and no one else, who committed the murder of his wife.

41. Consequently, the appeal is dismissed. The bail bonds and surety bonds furnished by the Appellant stand cancelled. He is directed to be taken into custody forthwith to serve out the remainder of his sentence.

S. MURALIDHAR, J.

I.S. MEHTA, J.

FEBRUARY 08, 2018

'anb'