

\$~R-41

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

+ **CRL.A.928/2002**

GOPAL DUTT

..... Petitioner

Through: Mr. Rabindra Singh and Mr. Paras
Aggarwal, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Amit Chadha, APP for State

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

ORDER

26.04.2018

%

Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 10th October 2002 passed by the learned Additional Sessions Judge (ASJ), Karkardooma Courts, Shahdara, Delhi in Sessions Case No.133/1999 arising out of FIR No.552/1997 registered at Police Station ('PS') Gokulpuri, convicting the Appellant for the offence under Section 302 IPC and the order on sentence dated 11th October 2002 sentencing him to imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment for two years.

Original charges

2. At the outset, it should be noted that the Appellant was sent up for trial along with three other co-accused, i.e. his mother Beena Devi, his brother

Madan Mohan, and his sister-in-law Basanti Devi. All four of them were charged with (i) having subjected the Appellant's wife, Kiran @ Kala (hereinafter 'deceased'), to cruelty and harassment for dowry thereby committing an offence punishable under Section 498-A/34 IPC and (ii) on account of Kiran having died an unnatural death on 17th August 1997 in the house of the Appellant, for having committed an offence of dowry death punishable under Section 304-B/34 IPC. The above charges were framed by the trial Court on 12th November 1998.

3. After the prosecution examined thirteen witnesses, the statements of the accused were recorded under Section 313 CrPC on 4th November 2000. All the accused, including the Appellant, denied the incriminating circumstances and claimed innocence. The explanation offered by the Appellant was:

“My wife had returned a day before the incident. I came to know about the death of my wife about 2-3 days of her death. I was in the hospital therefore I do not know how the said incident took place.”

4. The Appellant thereafter examined himself as DW-1 on 27th November 2000. This was basically to mark as exhibits certain letters and envelopes received by him from the deceased which contained her writings.

Framing of the alternate charge

5. While the matter proceeded for arguments thereafter, the learned trial Judge on 27th March 2001 passed the following order:

“After perusing the record, I am of the view that a separate alternative charge u/s 302 IPC should have been framed against

the accused Gopal Dutt. In the interest of justice, it is ordered that the said charge be framed on 4th April 2001.”

6. The order passed by the trial Court on the next date, i.e. 4th April 2001, reads as under:

“An application for exemption for Beena Joshi is moved on the ground that she was operated upon in St. Stephen Hospital for ulcer on 29.3.01. Medical certificate is attached. Heard. Her presence is exempted for today.

Defence Counsel points out that there is no material on record against accused Gopal Dutt for framing charge U/s. 302 IPC.

I see no force in this argument. Charge be framed.

Charge framed, read over and explained to the accused. He pleads not guilty.

Addl. PP and Defence Counsel want time for filing list of witnesses which they want to re-examine/re-cross examine. List of witnesses be filed by 11.4.01.”

PWs cross-examined after alternate charge

7. The further proceedings show that on 23rd April 2001, the accused stated before the trial Court that they wish to re-cross-examine some of the prosecution witnesses. Ultimately, on 29th July 2002, PW-1, i.e. Dr. T.R. Ramteke, the Chief Medical Officer of GTB Hospital, Delhi, where the Appellant was taken for treatment of his injuries on 17th August 1997 at 8.30 pm, was cross-examined in relation to the MLC (Ex.PW-1/A) of the Appellant.

8. On 6th August 2002, three more PWs were present and cross-examined. One of them was Dr. N.K. Aggarwal (PW-2) of GTB Hospital who had performed the post-mortem of the deceased on 19th August 1997 between 2

and 3.15 pm. The two other witnesses who were cross-examined were Kuldeep Singh (PW-7), who was posted as Sub-Divisional Magistrate (SDM), Seelmapur at the relevant time, and Sub-inspector (SI) K.P. Rana (PW-12) who was the first Investigating Officer ('IO') in the case.

9. On 6th August 2002, the learned trial Judge recorded: "P.E. is closed. Case is now fixed for statements of the accused on 16th Aug, 2002."

10. On 16th August 2002, a supplementary statement of the Appellant under Section 313 Cr PC was recorded which reads as under:

"Q.35 In view of fresh evidence lead, do you want to say anything else?

Ans. I am innocent. I have been implicated falsely in this case.

Q.36 Will you lead DE?

Ans. No."

11. Thereafter, the final arguments were heard and the impugned judgment was pronounced.

12. As already noticed, while convicting the Appellant for the offence under Section 302 IPC, the trial Court acquitted all of the accused, including the Appellant for the offences under Section 498-A and 304-B IPC.

Ruling on the framing of alternate charge

13. One of the first points urged by Mr. Rabindra Singh, learned counsel for the Appellant, is that the learned trial Judge erred in framing the additional charge under Section 302 IPC without there being any fresh evidence to justify it. He further submitted that the evidence in relation to the alternative

charge under Section 302 IPC was not specifically put to the Appellant under Section 313 Cr PC and therefore the conviction of the Appellant for the said offence was bad in law.

14. As far as the above submission is concerned, the detailed narration of facts noted hereinbefore reveals that the alternative charge was specifically framed by the trial Court on 4th April 2001, read over, and explained to the Appellant to which he pleaded not guilty. The trial Court also recorded the plea of the Appellant that he wishes to re-cross-examine some of the PWs. That too was permitted in the subsequent hearings, as noted hereinbefore. Consequently, the Appellant was fully aware of the alternative charge. There was no denial of any opportunity to defend himself against the alternative charge against him under Section 302 IPC.

15. It was then contended by the learned counsel for the Appellant that the first IO, i.e. PW-12, in his cross-examination, admitted that in the course of his investigation, “there was no circumstance for which I thought necessary that case would be made under Section 302 IPC.”

16. What the learned counsel for the Appellant has omitted to mention in making the above submission is the immediate next question and answer recorded in the further cross-examination of PW-12, which took place on 6th August 2002 and which reads as under:

“Q. I put to you that the investigation never proceeded on the line of Sec. 302 IPC for the reason that there was a difference of about 2 days between the age of injuries (second option) and the actual date of incident i.e. 17.8.97?

Ans. It is incorrect.”

17. Further, the Court finds that in the statement of the Appellant recorded under Section 313 CrPC in the very first instance, the following question was put to the Appellant:

“Q.14 It is also in evidence against you that you all accused tortured, humiliated and murdered Smt. Kala @ Kiran, what have you to say?

Ans. It is correct.”

18. Therefore, the trial Judge rightly held that the material before it was sufficient to frame an alternative charge under Section 302 IPC, as was done on 4th April 2001. Further, it is pertinent to note that the said order remained unchallenged. In any event, the Court finds that from the point of view of any prejudice being caused to the Appellant, there was none since he was given a full opportunity to not only recall and cross-examine the PWs of his choice but was also asked on 16th August 2002 whether he wished to lead any further evidence in defence of his innocence. The Appellant having turned down the opportunity to do so, the Court is of the view that there was no prejudice whatsoever caused to the Appellant on account of the alternative charge framed under Section 302 IPC by the trial Court based on the evidence available on the record before it. This plea is, therefore, rejected.

Law relating to circumstantial evidence

19. Before proceeding to examine the merits of the case, it would be appropriate to elaborate on the law relating to evaluation of circumstantial evidence as observed by the Supreme Court in various cases.

20. The law regarding circumstantial evidence is fairly well settled and the duties of the Court in evaluating such evidence have been reiterated on a number of occasions. In *Mahmood v. State of UP (1976) 1 SCC 542*, the Supreme Court observed as under:

“It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the basis therefore must be firmly satisfied -

- (a) that the circumstances from which the inference of guilt is to be drawn, have fully established by unimpeachable evidence beyond a shadow of doubt;
- (b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and
- (c) that the circumstances, taken collectively, are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

21. The Supreme Court, in *Shankarlal Gyarsilal Dixit v. State of Maharashtra (1981) 2 SCC 35*, explained the law thus:

“Since this is a case of circumstantial evidence, it is necessary to find whether the circumstances on which the prosecution relies are established by satisfactory evidence, often described as 'clear and cogent' and secondly, whether the circumstances are of such a nature as to exclude every other hypothesis save the one that the appellant is guilty of the offences of which he is charged. In other words, the circumstances have to be of such a nature as to be consistent with the sole hypothesis that the accused is guilty of the crime imputed to him.”

22. Reference may also be made to *Sudama Pandey v. State of Bihar (2002) 1 SCC 679* wherein the Supreme Court stated:

“It is a settled principle that in the case of circumstantial evidence, the various circumstances should be able to form a chain pointing to the guilt of the accused. In cases where there

is only circumstantial evidence, the Court has to consider the evidence adduced by the prosecution and decide whether the evidence proves particular facts relevant for the purpose of the case and when such facts are proved the question arises whether the facts are capable of giving rise to any inference of the guilt of the accused person or not. An inference of guilt can be drawn only if the proved fact is wholly consistent with the guilt of the accused and certainly he is entitled to the benefit of doubt if the proved fact is consistent with his innocence.”

Presence of the deceased in matrimonial home

23. The deceased was married to the Appellant on 21st January 1997. Although according to the uncle of the deceased, Jagdish Chand Misra (PW-3), there was an issue about the payment of dowry at the time of marriage, since that charge has been held not to be proved by the trial Court, this Court need not to discuss the facts concerning the alleged harassment to which the deceased was subjected to for dowry. The fact remains that the case of the prosecution is that the deceased rejoined her matrimonial home, i.e. rejoined the Appellant, only one day prior to her death on 17th August 1997. It is an admitted case that she was with her parents at least two months prior thereto.

24. The central question in this case, therefore, is whether the deceased and the Appellant were together in his house at the date and time when she died. The answer to this may be gleaned from the response of the Appellant to a query raised in his statement under Section 313 CrPC which reads as: “my wife had returned a day before the incident”. This response is in itself sufficient to conclude that even he does not dispute that at least one day prior to her death he and the deceased were together in his house. In response to Question No.33 when he was asked have you anything else to

say in his statement under Section 313 CrPC, the Appellant replied “we were taking meals in the evening time, then I was taken to the hospital by somebody. I was not in my senses.”

25. The further indication is in the document titled ‘Request for Post Mortem’ (Ex. PW-7/B) which has been exhibited by Kuldeep Singh, SDM (PW-7). He noted in the said document what the accused had told as under:

“Short summary of case

The deceased was discovered dead at the above mentioned address by local police. The husband of deceased is admitted in med-ward G.T.B. for unknown poison. The husband stated before me that he had sex with deceased between 2 pm & 6 pm twice on 16.08.97. He states that after taking dinner at about 10:00 PM on 16.08.97, he fell sick & became unconscious and does not know anything. He states that the deceased did not eat anything on 16.8.97 as she was observing fast. A thorough post-mortem needs to be carried out to find foul play, if any.’

26. There is, therefore, more than adequate evidence to prove that the Appellant was with the deceased shortly prior to her death.

Homicidal death

27. The next circumstance of the deceased having died on account of burns requires to be discussed. The deceased was found in a burnt condition in the house of the Appellant by the police and brought to the GTB Hospital as spoken to by SI K.P. Rana (PW-12). *Inter alia*, they found a plastic can, a half-burnt pant, a broken match box, and sticks. All of these were sealed and placed into separate parcels.

28. The SDM was called in to conduct inquest proceedings. During investigation, it was revealed that the Appellant herein was admitted to the GTB hospital because of his “having consumed some poison.” The SI then proceeded to GTB hospital to record the statement of the Appellant but he was not declared fit to make a statement. He found the Appellant with some injuries on his body. The statement of the uncle of the deceased (PW-3) was recorded by the SDM and a case was registered against the Appellant on that basis.

29. PW-2, who conducted the post-mortem of the deceased, found the burn injuries to be ante-mortem and sufficient to cause death in the ordinary course of nature. He found the deceased 95% burnt. This witness was recalled for cross-examination after the alternate charge was framed. The answer that could be elicited by the Appellant from this witness was, “I cannot say whether the deceased had committed suicide or not. I cannot comment over whether the deceased had committed suicide or not.”

30. There was, therefore, no categorical opinion of the doctor who committed the post-mortem that the death was suicidal. What further contributes to the needle of suspicion being firmly fixed to the Appellant is the presence of vertical scratch marks on his chest, a long horizontal scratch mark in the scapular area, and a small horizontal scratch mark over the inside of the left thigh. There were also multiple scratch marks on the right lateral chest wall. All of this is an indication of there having been a struggle involving the Appellant before the deceased died.

Presence of the Appellant at the time of death

31. The third circumstance is the deceased having died in the house of the Appellant and the Appellant admittedly being the last person with whom she was alive since even according to the Appellant, they had evening meals together and the next morning he found himself in the hospital. What further strengthens the case of the prosecution that the Appellant was present at the time of the death of the deceased are the injuries noted by PW-1 on his person which was proved through the MLC prepared by PW-1.

32. In his further examination on recall on 29th July 2002 after the alternative charge was framed, PW-1 stated that he noticed the following injuries on the person of the Appellant:

- “1. two scalds 3 cm x 1.5 cm and 1.5 cm x 1 cm right forearm above wrist on lateral side;
2. two superficial redish marks appeared of burn on right forearm below scalds near wrist size each 1.5 cm long ¼ wide;
3. long scratch mark on posterial aspect of right forearm above 6 inch long;
4. superficial radish burn mark, medical side of right wrist – 2 cm in diameter;
5. multipal (5 in no.) scratch arks (parreal each other abrasion each other) right lateral chest wall below axilla;
6. triangular burn mark left lateral abdominal wallbelow costal margine size 2.5 x 1 cm;
7. vertical scratch mark (leniar) left lower chest wall 3 cm long.
8. small abrasion back of left elbow – 1 cm x .5 cm
9. long horizontal scratch mark left scapular area about 5 cm long (leniar)
10. two small abrasion right scapular area; size 1.5 cm diameter each

11. small horizontal leniar scratch mark over left thigh lateral side; 1.5 cm long”

33. Although he notes that “all injuries/burns appear one day old however opinion of forensic experts be obtained regarding age of injuries/burns”, in the cross-examination of this witness on behalf of the Appellant and the other accused, this witness also stated as under:

“It is correct that my opinion about the duration of injuries being one day old cannot be a definite one. Vol. – There can be a variation of 12-24 hours. It is wrong to suggest that apart from the burn injuries, the other injuries are not possible because of the fall on a hard surface.”

34. The burn injuries on the forearms of the Appellant have been unable to be explained by him. The weak plea put forth by him about having consumed some poison was unable to be proved through medical or forensic evidence. The above injuries on the Appellant, unexplained by him, are a very strong indication of his presence in the house at the time that the deceased was burnt.

Applicability of Section 106 IEA

35. Learned counsel for the Appellant was unable to persuade the Court about the non-applicability of Section 106 Indian Evidence Act (‘IEA’) in these circumstances. It is pertinent to recapitulate the law in this regard as laid down by the Supreme Court. In ***Shambhu Nath Mehra v. State of Ajmer AIR 1956 SC 404***, the Supreme Court explained that Section 106 IEA was not intended to shift the burden of proof (in respect of a crime) onto 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-eminent 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.”

36. 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.”

37. 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 cause 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.”

38. Thus, the legal position in this regard is very well settled. Where the unnatural death has happened within the confines of any house, the occupants of which are the deceased and her spouse, there has to be some convincing explanation offered by the spouse, in this case the Appellant, for the unnatural death. He has none to offer. This is, therefore, another strong circumstance in the chain of circumstances which unerringly points to the guilt of the Appellant and no one else in the murder of his wife.

Absence of established motive irrelevant

39. It was repeatedly argued that an important link in the chain of circumstances was the motive and since in this case the Appellant and his wife were not shown to be having any quarrel prior to her death, the absence of proof of motive could weaken the case of the prosecution. However, the Court is unable to accept this argument. The correct legal position was explained by the Supreme Court in *Arjun Mallik v. State of Bihar 1994 Supp (2) SCC 372* in the following words:

“...mere absence of proof of motive for commission of a crime cannot be a ground to presume the innocence of an accused if the involvement of the accused is otherwise established. But it has to be remembered that in incidents in which the only evidence available is circumstantial evidence then in that event the motive does assume importance if it is established from the evidence on record that the accused had a strong motive and also an opportunity to commit the crime and the established

circumstances along with the explanation of the accused, if any, exclude the reasonable possibility of anybody else being the perpetrator of the crime then the chain of evidence may be considered to show that within all human probability the crime must have been committed by the accused.”

40. In the present case, the deceased admittedly returned to her matrimonial home only on the evening previous to the date of incident. The other circumstances in the chain have been comprehensively proved by the prosecution. While motive is a significant link in the chain of circumstances, there are instances where the motive is known only to the Appellant and no one else. What transpired in the evening of 17th August 1997 was entirely within the Appellant’s knowledge. By opting to keep silent, and not offering any alternative explanation, the Appellant ran the risk of bearing the burden of the guilt of the death of the deceased. In a case like the present one where the other circumstances are conclusively proved against him, the Appellant cannot escape conviction only because the prosecution has not been able to prove the motive for the commission of the crime.

Conclusion

41. For all of the aforementioned reasons, the Court concurs with the Trial Court that the prosecution has been able to prove the circumstances which unerringly point to the guilt of the Appellant and no one else for the offence of murdering his wife punishable under Section 302 IPC. The order on sentence also does not call for interference. The appeal is accordingly dismissed. The bail bonds and surety bonds of the Appellant are cancelled.

42. The Appellant shall surrender to the jail authorities before 1st May 2018

failing which he will immediately be taken into custody by the IO who is present in Court.

43. The trial Court record be returned forthwith with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 26, 2018

sr, nd, nk