

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

+ **CRL.A.837/2015**

%

Reserved on: December 20, 2017

Date of decision: January 12, 2018

AASHU

... Appellant

Through: Mr. Imran Khan, Advocate.

versus

STATE

... Respondent

Through: Ms.Kusum Dhalla, APP for State
with SI Manoj, P.S. Alipur.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

JUDGEMENT

I.S.Mehta, J.

1. The present appeal is arising from the judgment dated 26th March, 2015 and order on sentence dated 27th April, 2015 passed by the learned Additional Sessions Judge, North Rohini Courts, in Session Case No.271/14 arising from FIR No.255/11 under Section 302 IPC registered at Police Station Alipur, wherein the appellant was sentenced to undergo imprisonment for life and was imposed a fine of Rs.5000/-for offence punishable under Section 302 IPC and in default of payment of fine, to undergo further SI imprisonment for three months.

2.The prosecution set out its case on receiving the DD No.65B (Ex.PW12/A), which was marked to Sub-Inspector Devender (PW27), who

along with Constable Sohan Lal (PW6) reached at the House. No. 9, Aashram Road, Budhpur, and met Sajjan Kumar (PW5), who narrated the incident to them and they found the dead body of one lady named Mamta lying on the floor in between the bed and wall of the room. The iron chain of the pet dog and broken pieces of bangles were found lying there. The dead body of Mamta was taken to Satyavadi Raja Harishchandra Hospital(*'hereinafter referred to as SRHC Hospital'*) for post-mortem, where she was declared brought dead i.e. MLC NO.826/11(Ex 14B/B-13).

3. On receiving the information Sub-Inspector (PW26) Sunil Kumar posted as SHO Police Station along with Constable Vinod (PW13) and Constable Rajender reached to the House No.9, Aashram Road, Budhpur, Delhi, and Inspector Sunil Kumar met the minor children of the deceased namely Kumari Ritika (PW1) and Master Lokesh (PW2). Accordingly, Inspector Sunil Kumar recorded statement of Kumari Ritika (PW1) and got registered the FIR through Sub-Inspector Devender.

4. After registration of FIR, Inspector Sunil Kumar (PW26) called the crime team at the spot who inspected the spot and took photograph of the crime scene. The site plan was prepared at the instance of Kumari Ritika and the relevant exhibits from the spot were seized.

5. The dead body of the deceased Mamta after identification and post-mortem report i.e. Ex.PW14/A was handed over to Sajjan Kumar, husband of the deceased.

6. Subsequently, on 26.07.2011, the Investigating Officer Inspector Sunil Kumar joined investigation along with Constable Vinod Kumar (PW13) and

Constable Rajender along with Sajjan Kumar apprehended accused from Rohini, Delhi at about 3pm on the basis of secret information and on the identification of Sajjan Kumar. The accused was interrogated and was arrested in this case.

7. The accused after the arrest made disclosure statement i.e. Ex. PW5/G-2 and from the possession of the accused one mobile phone of the deceased make Zen company was recovered and thereafter he was examined vide MLC No. 835/11 (Ex.PW17/A).

8. Investigating Officer got scaled site plan through SI Manohar Lal draftsman, and the relevant exhibits were sent to Rohini and subsequently collected FSL on 23.11.2012 i.e. Ex.PX and Ex.PY. The statement of the minor children Kumari Ritika & Master Lokesh were recorded under Section 164 IPC and after completion of investigation the charge sheet was filed by the court of competent jurisdiction.

9. After framing the charge under Section 302 IPC prosecution has led 28 witnesses and accused has led 3 witnesses. After conclusion of arguments, the trial Court convicted the Appellant under Section 302 IPC and sentenced him to undergo imprisonment for life with a fine of Rs.5000/- and in default of payment of fine, to undergo SI for a further period of three months.

10. Aggrieved from the aforesaid judgment dated 26.03.2015 and order on sentence dated 27.04.2015 the Appellant has preferred the present appeal.

11. The learned counsel for the Appellant has submitted that in the present case the Court below wrongly relied upon the statement of minor children of the deceased Mamta i.e. Kumari Ritika PW1 and Master Lokesh PW2. Since both children are minor hence their statement requires independent corroboration.

12. The learned counsel for the Appellant has further submitted that the prosecution has not located the location of the mobile No. 9210651423 of Sajjan Kumar-husband of the deceased to bring out the truth of the incident.

13. The learned counsel for the Appellant has further submitted that the prosecution has failed to prove the motive in the present case. The learned counsel for the Appellant has further submitted that the statement of Kumari Ritika PW1, Master lokesh PW2, and Sajjan Kumar PW5 suffer from material contradiction and their statement does not inspire confidence.

14. The learned counsel for the Appellant has further submitted that there is no finger print on record or any other exhibits to connect the Appellant with the commission of crime and submits that the appeal of the Appellant be allowed and the impugned judgment on sentence be set aside.

15. Per contra, the learned Additional Public Prosecutor has submitted that there is sufficient material evidence on record to connect the present case and the prosecution has proved its case beyond reasonable doubt and further stated that there is no merit in this appeal, and the same be dismissed.

16. The case of the prosecution is that the Appellant who is a habitual visitor at House No.9, Aashram Road, village Budhpur, Delhi visited said house on

23.07.2011 and on 24.07.2011 he stayed back with the wife of PW5 and minor children i.e. Kumari Ritika PW1 and Master Lokesh PW2 on the pretext that he is having stomach problem and makes PW5- husband of the deceased to leave the house in the morning for his duty and thereafter he committed murder of deceased Mamta between 1pm to 4 pm in the aforesaid residential house.

17. The accused in his defence under Section 313 Cr.P.C., has simply denied the allegation and no specific defence was taken. However, his presence at the spot at House No.9, Aashram Road, village Budhpur, Delhi on 24.07.2011 has not been denied in his statement under Section 313 Cr.P.C. The accused further does not deny in his statement under Section 313 Cr.P.C. that Kumari Ritika (PW1), Master Lokesh (PW2) and Sajjan Kumar (PW5) prior to the date of incident are not known to him.

18. The prosecution has relied upon the statement of Sajjan Kumar(PW5) the husband of deceased Mamta and the two minor children i.e. Kumari Ritika (PW1), Master Lokesh (PW2), and Smt. Baleshwari (PW8) to prove its case as well as its corroboration with statement of Sajjan Kumar (PW5), Smt. Baleshwari (PW8).

Position in Law

19. The law relating to circumstantial evidence is well settled in the Apex Court judgment of **Hanumant Govind Nargundkar v. State of Madhya Pradesh**, AIR 1952 SC 343, wherein it was held:-

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which

the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidences so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

Last Seen Evidence

20. The prosecution has relied upon the statement of Sajjan Kumar (PW5). The case of the prosecution is that Sajjan Kumar (PW5) went on duty on 24.07.2011 leaving behind deceased Mamta and two minor children i.e. Kumari Ritika (PW1) and Master Lokesh (PW2) at House No. 9, Aashram Road, village Budhpur, Delhi. It is further the case of the prosecution that the accused remained in the said house along with the deceased, Mamta, and the two minor children.

21. It is further case of the prosecution that when Ritika came out of the bath room, the accused closed the door of the lobby with a bang and after about half an hour he came out very perplexed and in a sweating condition. When minor children i.e. Kumari Ritika (PW1) and Master Lokesh (PW2) inquired about the whereabouts of their mother then accused told them that the mother has gone to the house of Manju aunty.

22. It is further the case of the prosecution that after asking of whereabouts of their mother- the deceased Mamta, the accused told the minor children i.e.

Kumari Ritika (PW1) and Master Lokesh (PW2) that she has gone to the house of Manju aunty and on verifying same they came to know that their mother was not present at the house of Manju aunty, they again inquired about their mother and thereafter accused told their mother has gone to the house of Pinki Tai. It is further case of the prosecution that the accused put on his clothes and picked up his mobile and the mobile of their mother and went out to his house from the back door, on pretext of searching of the deceased Mamta.

Evidence of PW5

23. Sajjan Kumar (PW5) has specifically stated that the accused came to his house i.e. House No. 9, Aashram Road, village Budhpur, Delhi. When he was going on duty on next morning the accused stayed back at the house on pretext that he is having stomach problem. It is further stated that when he came back to his house at about 6 or 7 pm, he found that both children were weeping. On making enquiry, Kumari Ritika (PW1) and Master Lokesh (PW2) narrated the version to their father. On searching for the deceased Mamta at the house, he found towels lying scattered on the bed and pieces of broken bangles lying on the bed. When he lifted up the curtain of the window of the room he found the body of Mamta lying in between the bed and wall of the room. His cousin brother Dinesh (PW9) called the police at 100 Number.

24. The accused did not suggest to Sajjan Kumar (PW5) that he was not present in the House No. 9, Aashram Road, village Budhpur, Delhi on 23.07.2011 and 24.07.2011. The accused also did not put any suggestions to

the witnesses that the accused visited the aforesaid house on 24.07.2011 between 10 to 6 pm. The accused also did not put any suggestion to the witnesses that some other person could have visited on 24.07.2011.

25. However, Sajjan Kumar (PW5) stated that before his reaching his house at about 6 pm, his minor children i.e. Kumari Ritika (PW1) and Master Lokesh (PW2) were not aware of the death of their mother or where she had gone.

26. The evidence of Sajjan Kumar (PW5) inspires confidence. It stands corroborated by the evidences of the minor children i.e. Kumari Ritika (PW1) and Master Lokesh (PW2).

27. The statement of PW5 does not suffer from any material contradiction or that he wanted to falsely implicate the accused. Moreover, he stood the test of the cross-examination. Consequently, his statement inspires confidence. The version given by him is natural, consistent and trustworthy.

Evidence of the minor children

28. The prosecution has examined Kumari Ritika (PW1) and Master Lokesh (PW2) who are minor children. Kumari Ritika (PW1) was 9 years old at the time of the incident and Master Lokesh (PW2) was 7 years old. Both are students and are living with their parents at House No. 9, Aashram Road, Budhpur, Delhi. The date of the incident happened to be Sunday and they were present in their house with their mother i.e. deceased Mamta and accused (chacha) whom they knew earlier to the date of incident.

Both Kumari Ritika (PW1) and Master Lokesh (PW2) have supported the prosecution version. The contention of the accused that there is improvement and material contradiction in the version of both minor children does not inspire confidence.

29. As regards, the differences in the statement of Kumari Ritika (PW1) under Section 164 Cr.P.C., the timing of taking home work of Master Lokesh (PW2) was mentioned as 10 am but in her cross-examination she deposed the timing of taking home work was 12 noon. This is a minor contradiction. The suggestion to PW1 in this regard which she denied reads thus: -

“It is incorrect to suggest that my chacha left our house before we ate samosa. It is incorrect to suggest that when my father had come to house, I told that I did not know as to where my mother and also told that my chacha had gone in search of her. My mother was not available about three hours before my papa arrived.”
(emphasis supplied)

30. The statement of Kumari Ritika (PW1) and Master Lokesh (PW2) is natural and reliable as both the witnesses were not deposing about a stranger but about a family relation uncle (chacha) whom they knew prior to the incident. They were having good relations with the accused till the date of incident. Their evidence cannot be brushed aside only for the reason that they are minor children. Moreover, on the medical aspects, their version is consistent with that of PW5 and Smt. Baleshwari (PW8).

31. The observation of the Apex Court in Nivrutti Panndurand Kokate &

Ors. v. State of Maharashtra, (2008) 12 SCC 565 is relevant in this context and which is reproduced hereunder:

" 10. 6...The Indian Evidence Act, 1872 (in short "the Evidence Act") does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in Wheeler v. United States (159 US 523). The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon."

There is no reason why the two children would falsely implicate the accused.

Evidence of Smt. Baleshwari PW8

32. The prosecution has examined Smt. Baleashwari (PW8) who is residing in House No.9, Aashram Road, Budhpur, Delhi near to the house of Sajjan Kumar (PW5). She has deposed that the children of the deceased Mamta came to enquire about their mother on 24.07.2011 twice and last at 4:30 pm. Nothing specific came out in the cross-examination. She denied the suggestion that the children did not visit the abovesaid house. There was no suggestion to this witness regarding false implication. The evidence of the

Smt. Baleshwari (PW8) fully supports the evidence of Kumari Ritika (PW1), Master Lokesh (PW2) and Sajjan Kumar (PW5).

The Recovery of the Dead Body

33. Near the body of the deceased, were broken pieces of bangle, an iron chain of the pet dog and one stone. No suggestion was put to Sajjan Kumar (PW5) that the aforesaid articles were not recovered from scene of crime.

Arrest of the Accused & Recovery of Mobile Phone

34. Sajjan Kumar (PW5) in his statement specifically stated that the accused was arrested on 26.07.2011 on his identification and on secret information. Vide search memo Ex. PW5/G1, one make Zen mobile phone of the deceased Mamta was got recovered from the pocket of the pant of the accused on his personal search. He was arrested on 26.07.2011 from Rohini.

The accused did not put any suggestion to Sajjan Kumar (PW5) that from his personal search no such mobile phone belonging to deceased Mamta was got recovered from the pocket of his pant on 26.07.2011 on search by I.O. Sunil Kumar (PW26). Consequently, the recovery of the mobile phone of deceased Mamta stands proved and further proved that he was arrested on 26.07.2011 at Rohini.

Medical Evidence

35. The post-mortem of the dead body of the deceased Mamta was conducted by Dr. Bhim Sen (PW14). The post-mortem report PW14/A shows that there were seven external injuries on the deceased body.

The cause of death was asphyxia consequent upon ante-mortem smothering and manual strangulation by hands.

All the injuries were ante mortem in nature and fresh in duration. He further deposed that injuries no. 1, 2 and 3 could be caused by force impact and injuries no. 4,5,6 and 7 could be caused by manual pressure by hands and fingers. It was opined that the death of Mamta was due to asphyxia consequent upon ante-mortem smothering and manual strangulation by hands and time since death was about 20 hours. The deceased Mamta was examined by Dr. Naveen vide PW14/B13 who declared her dead. It is a case of homicidal death. The accused has not cross-examined this witness.

Conduct of Accused

36. It is in the statement of Kumari Ritika (PW1) and Master Lokesh (PW2) that the accused left the House No. 9, Aashram Road, Budhpur, Delhi on the pretext that he will search their mother on 24.07.2011. However, after the incident he did not return on the said date. It was their father who came ultimately at 6 pm. The accused absconded from the aforesaid house till he was arrested by police. Thus, the subsequent conduct of the accused goes against him.

37. In the instant case, both parties are known to each other, it is because of this reason the accused under the pretext of stomach ache remained in the said house along with the deceased Mamta and two minor children in absence of his husband. The circumstantial evidence coming on the record indicates that it was perhaps a desire of lust on the part of the accused which resulted into death of the deceased Mamta. However, in the circumstantial

evidence it is very difficult to prove the motive beyond reasonable doubt, as the motive lies in the heart of the accused. The following observation of the Apex Court in **Vivek Kalra v. State of Rajasthan, (2014) 12 SCC 439**, is relevant:-

“9.....The general good behaviour of the appellant and the fact that he had no bad habit have no nexus with the offence alleged against the appellant and not relevant when other circumstances have established beyond reasonable doubt that it is the appellant alone who has committed the murder of the deceased.”

38. The prosecution has been able to prove their case through Kumari Ritika (PW1), Master Lokesh (PW2), Sajjan Kumar (PW5) and Smt. Baleshwari (PW8). On 24.07.2011 Sajjan Kumar (PW5) left House No.9, Aashram Road, Budhpur, Delhi in the morning leaving behind deceased Mamta along with two minor children i.e. Kumari Ritika (PW1) and Master Lokesh (PW2) with the accused.

The prosecution also been able to prove that the accused remained in the said house along with two minor children on the aforesaid date till the offence was committed between 1:30 pm to 4 pm.

Moreover, the mobile phone of the deceased was recovered from the pocket of the pant of the accused during the personal search conducted at the time of his arrest on 26.07.2011.

There is no evidence or circumstance emerging on the record that between the time that PW5 left the House No.9, Aashram Road, Budhpur,

Delhi in the morning of 24.07.2011 and till he returned at 6 pm any adult person other than the accused visited who could have committed the murder of the deceased.

The post-mortem report Ex.PW14/B3 shows that the death of the deceased Mamta was homicidal.

The conduct of the accused in misleading the two children and making them search for their mother, and the fact that he did not return till his arrest, only indicates:

That he was the only adult person who was present at House No. 9 Aashram Road, Budhpur, Delhi, who could be able to commit the murder of the deceased Mamta, as shown in site plan i.e. Ex.PW26/B and scaled site plan i.e. Ex.PW22/A.

Aforesaid discussion only indicates the guilt of the accused and no other person in the commission of offence.

The DW1 Smt. Mahendri Devi, DW2 Sh. Dharambir, and DW3 Smt. Susheela Devi have been examined but were of no help to the accused as nothing substantive emerged from their evidence.

39. Consequently, the submissions of the learned counsel for the Appellant are rejected.

40. We find no legal infirmity in the impugned judgment dated 26.03.2015 and order on sentence dated 27.04.2015 passed by the learned Additional Session Judge and the same are affirmed.

41. The appeal is dismissed and all the pending applications (if any) are disposed of.

42. LCR file be sent back forthwith along with a copy of this judgment. No order as to costs.

I.S.MEHTA, J.

S.MURALIDHAR, J.

JANUARY 12, 2018

