

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

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Reserved on: 12th January, 2023

Decided on: 24th January, 2023

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CRL.A. 937/2018

MOHD. ANISH

..... Appellant

Represented by: Mr. S.B. Dandapani, Advocate.

versus

STATE

..... Respondent

Represented by: Mr. Laksh Khanna, APP for State
with Insp. Afaq Ahmed, PS New
Ashok Nagar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. The present appeal has been filed by the appellant challenging the impugned judgment dated 18th April, 2018 passed by the learned Additional Sessions Judge convicting the appellant for offence punishable under Section 302 IPC and the order on sentence dated 1st May, 2018 whereby he has been directed to undergo imprisonment for life with a fine of ₹50,000/- in default whereof to undergo simple imprisonment for six months.

2. A brief background to the passing of the impugned judgment is that pursuant to registration of FIR No. 399/2009 at PS New Ashok Nagar a charge-sheet was filed against the appellant and his parents, namely, Faiz Mohd. and Salma for offences punishable under Section 302/498-A/34 IPC. Pursuant to the trial, vide judgment dated 28th March, 2014 appellant Mohd. Anish was held guilty of the offence punishable under Section 302 IPC for

having committed the murder of his wife/ Manju @ Shahin and Mohd. Anish and his parents, namely, Faiz Mohd. and Salma were convicted for offence punishable under Section 498-A/34 IPC.

3. The convicts preferred appeals before this Court being CRL.A. 534/2014 filed by Faiz Mohd. and Salma challenging their conviction and order on sentence for offence punishable under Section 498-A/ 34 IPC and Mohd. Anish filed CRL.A. 777/2014 challenging his conviction and order on sentence for offences punishable under Section 302 IPC and 498-A/34 IPC.

4. Vide the judgment dated 28th March, 2014 appellant was convicted for the murder of his wife for the reason he was present at home and thus the onus shifted on him under Section 106 of the Indian Evidence Act, to explain under what circumstances she died, however, the PCR official who stated that the appellant was at home was not examined thereby missing out on material evidence. The appeals were thus decided vide the judgment dated 24th September, 2014 whereby Mohd. Anish, Faiz Mohd. and Salma were acquitted for the offence punishable under Section 498-A IPC. However, as regards the conviction of Mohd. Anish for offence of murdering his wife was concerned, the matter was remanded back for further evidence to be led before the Trial Court by examining In-charge of the PCR van which reached at the spot after receiving of the information of a girl being killed. This direction was passed for the reason that in the PCR Form it was recorded that the husband of the deceased was present in the house.

5. Relevant portion of the judgment dated 24th September, 2014 in CRL.A. 777/2014 remanding back the matter is as under:

“2. Our reasons for acquitting Faiz Mohd and Salma and for the remand concerning Mohd.Anish.

3. *Dead body of Manju @ Shahin, who was a Hindu by birth but converted to Islam after contracting marriage with Mohd.Anish admittedly died in her matrimonial house and information regarding the death was received at the Police Control Room on September 22, 2009 at 16:07:03 hours.*
4. *One Pramod had conveyed the information to the Police Control Room which was noted in the PCR Log by L/H.Ct.Nimmo. She wrote on the PCR log that a caller had informed that a Hindu girl had been killed by Muslim.*
5. *Appearing as PW-16, L/Ct.Nimmo has proved only limited part of the PCR form as Ex.PW-16/A. A further writing by her in the PCR log at 16:50:38 hours that the in-charge of the PCR van which had reached the spot had met the husband at the house and had told him that his wife died due to infection on applying 'mehandi' has not been proved.*
6. *On the evidence led, there being no evidence that Mohd.Anish was present in his house when his wife died, and the time of death being late afternoon, the learned Trial Judge has wrongly applied the law that where a husband is present in the house when his wife dies, unless he satisfactorily explained how she died, if the death is homicidal, an adverse inference can be drawn. In the instant case the evidence does not prove that Mohd.Anish was present in the house.*
7. *Unfortunately, the prosecution which had with it a very lethal evidence in the form of a second writing on the PCR log has led no evidence to prove the said writing on the PCR log. The prosecution has not examined the in-charge of the PCR van which had reached the spot and had sent, over the wireless, the information which L/Ct.Nimmo wrote at the second instance in the PCR log. In the second entry of the PCR log it is recorded the husband of the deceased was present in the house.*
8. *As regards the conviction of the three appellants for the offence punishable under Section 498A IPC, the reasoning by the learned Trial Judge is sans any credible evidence.*

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12. We accordingly set aside the impugned decision dated April 05, 2014 to the extent it had held Mohd.Anish, Faiz Mohd. and Salma guilty of the offence punishable under Section 498A IPC.

13. We set aside the impugned decision insofar Mohd.Anish has been convicted for the offence of murdering his wife.

14. We remand the matter for further evidence to be led before the Trial Court on October 27, 2014. But limited to Mohd.Anish being further tried for the offence of murdering his wife. The additional evidence would be to summon and examine the in-charge of the PCR van which reached at the spot after receiving information of a girl being killed. It would concern proof of the second writing on the PCR log.”

6. On the matter being remanded back, the learned Trial Court examined HC Onkar Prasad as PW-22 and on an application filed by the appellant to further cross-examine PW-12 and PW-13, namely, Smt. Gyan Devi and Shri Baburam respectively, the parents of the deceased Manju @ Shahin, they were further cross-examined. After examination of PW-22 and further cross-examination of PW-12 and PW-13 the learned Additional Sessions Judge passed the impugned judgment dated 18th April, 2018 convicting the appellant for offence punishable under Section 302 IPC and the order on sentence dated 1st May, 2018 directing him to undergo life imprisonment, which are in challenge before this Court in the present appeal.

7. Learned counsel for the appellant contends that vide the judgment dated 24th September, 2014 this Court remanded back the matter only for the purpose of adducing evidence as to whether the appellant was present at the house when the PCR officials reached, however PW-22 HC Onkar Prasad does not prove the presence of the appellant at the spot and hence the earlier judgment dated 24th September, 2014 acquitting the appellant for offence

punishable under Section 302 IPC is required to be affirmed. He further states that to prove the offence punishable under Section 302 IPC the burden is on the prosecution to discharge beyond reasonable doubt and from the evidence on record taken in its totality, it cannot be held that the appellant committed the murder of Manju @ Shahin. Further, the appellant examined defence witnesses to show that the relationship between the appellant and his deceased wife were cordial and thus there was no motive to kill her. The version of PW-12 and PW-13, parents of the deceased, is based on exaggeration and falsehood and having been disbelieved, this Court acquitted the appellant, Faiz Mohd. and Salma for offence punishable under Section 498-A/34 IPC. The evidence of the post-mortem Doctor does not show that the death was homicidal; hence an offence under Section 302 IPC is not made out. Appellant in his defence took the specific plea that he was not present at home at the time of alleged incident and examined himself as DW-3, however the Trial Court failed to give any credence to the said testimony. Learned counsel pleads that the impugned judgment dated 1st May, 2018 be thus set aside and the appellant be acquitted of the charge framed for offence punishable under Section 302 IPC.

8. Countering the submissions of learned counsel for the appellant, learned APP for the State submits that in the PCR form itself which was exhibited as PW-16/A, it was noted that the appellant was present at the scene of crime and he took the plea that the deceased died due to reaction after applying *Heena* on her hair. The post-mortem report clearly shows that death was because of asphyxia due to strangulation. The chunni with which strangulation was done was recovered pursuant to the disclosure of the appellant and a subsequent opinion has been rendered by the post-mortem

doctor opining that the ligature injury was possible by the said Chunni. Though in his statement under Section 313 Cr.P.C. as also while appearing as DW-3 the appellant took the plea that he was not present at home and being the next day after *Eid* he had gone to his friends and relatives, however he has taken contradictory stands as also he has not proved his plea of alibi, the onus of which was on the appellant and hence an adverse inference is required to be drawn against the appellant in terms of the decision of the Hon'ble Supreme Court reported as (2012) 13 SCC 213 Sahabuddin & Ors. Vs. State of Assam. Learned APP for the State submits that the conduct of the appellant in absconding from the place of incident after the Police arrived is an additional chain in the link of circumstantial evidence. He further contends that the lack of proof of motive cannot be fatal to the prosecution case, as held by the Hon'ble Supreme Court in the decision reported as AIR 1997 SC 1808 Nathuni Yadav & Ors. Vs. State of Bihar & Ors.

9. From the evidence on record the four relevant witnesses of the prosecution are Dr. Vinay Kumar Singh/ PW-4 who conducted the post-mortem, Gyan Devi and Baburam (PW-12 and PW-13 the parents of the deceased) and Onkar Prasad/PW-22 the PCR official.

10. Dr. Vinay Kumar Singh (PW-4) deposed that he conducted the postmortem on the body of the deceased Manju @ Shaheen and tendered his postmortem report (Ex. PW-4/A). He opined:

“External injuries :

1. Ligature mark, of 17.5 x 1 - 2.5 cm in size, present over middle part and right side of neck, 6 cm below right ear, 6 cm below chin and 6.5 CRL.M.A. below left ear, firm, interrupted over front with 3 x 1 cm mark 3.5 cm abovemiddle of left collar

bone, 1cm away from midline on dissection subcutaneous tissue was pale.

2. Multiple abrasions, 1 x 1 cm, 3 x .3 cm and .3 x .3 cm present over back of right hand, knuckle of index finger, middle finger, 8.5 and 8 cm below tip and 9 cm below tip of little finger.

On internal examination, in head and neck, neck structure was intact, brain was edematus and cerebral vessels were engorged. In chest, in lungs petechial haemorrhage present over fissural aspect of lungs. Both lungs were congested. In abdomen, in stomach 250 ml of brownish material with pungent smell, walls were congested, small intestine, liver, spleen, kidneys were congested.”

On examination of the weapon i.e. chunni, he opined that the injury No.1 could be caused by the said weapon or some similar weapon. Further, on receipt of the chemical analysis report, he gave his opinion as to the cause of death which was asphyxia due to ligature strangulation. In his cross-examination, he stated that injury No.1 was possible only by ligature and not by falling on any edged object. Further, he stated that about 1/3rd circumference of the neck of the deceased, the ligature mark was interrupted and not visible. He stated that the ligature marks on the dead body were horizontally placed.”

11. Gyan Devi (PW-12), who was the mother of the deceased deposed that about 2-2½ years ago, the appellant Anish took away her daughter/deceased, then aged about 17 years. To save their reputation, the family did not lodge any complaint with the police and in the year 2009, in the month of June, the appellant performed *Nikah* with her daughter/deceased. After about 10-15 days of *Nikah*, deceased met her on the way when she was going to Subzi Mandi and told her that the in-laws were harassing the deceased while saying “*tere maa baap ne kuch nahi diya hai aur hamein jevar chahiye*”. Thereafter, about 4 days after meeting her daughter/deceased, appellant

Anish met her on the way to market and asked her to give ₹2,00,000/- to him, otherwise they will keep harassing her daughter/deceased. Appellant further told her that if she cannot give ₹2,00,000/-, she should transfer her house in his name. After some time, the deceased made a call to her and told her that her in-laws were harassing her, treating her cruelly and beating her on account of non-fulfillment of demand of dowry. PW-12 further stated that the last telephone call from the deceased was received by her about 2-3 days prior to the festival of *Eid* and that the present incident took place after 2-4 days of *Eid*. She further stated that on 22nd September, 2009, somebody informed her at her house that her daughter/deceased was killed, on which she and her husband went to the matrimonial house of deceased where neither the appellant Anish nor any of his family members was found but her daughter/deceased was found lying dead on the cot in the hall on the ground floor. Thereafter, she and her husband came back and her husband made a call to the police. She identified the dead body of her daughter (Ex. PW-12/A). In her cross-examination, she stated that she did not have any knowledge about any love affair between her daughter/deceased and the appellant Md. Anish until she ran away from her house. She stated that neither any one from her family attended the *Nikah* ceremony nor visited the house of the appellant and that no conversation took place between her and the appellants. She further stated that a baby was born to her daughter/deceased after one year when she ran from the house and that she visited her daughter at the hospital and told her daughter not to visit her house.

12. Baburam (PW-13) corroborated the version of his wife Gyan Devi (PW-12). However, he stated that no demand of dowry was made to him by

the appellant. He stated to have identified the dead body of her daughter (Ex. PW-13/A). Further, he stated to have accompanied the I.O. alongwith his team when a secret information was received by the I.O. about the appellant Anish. Appellant Anish was arrested in his presence and his disclosure statement (Ex. PW-13/E) was also recorded in his presence. He stated that the appellant Anish led the police team to the place where murder of the deceased was committed and that at the instance of the appellant Anish, one chunni by which the deceased was strangled was recovered at the instance of the appellant Anish. He stated that after about 8-10 days, he was again asked to join the investigation when an information about the father of the appellant Anish was received. He alongwith the police team went towards Kali Bari Mandir where the father of appellant Anish was seen coming from the side of metro and on his identification of the father of the appellant FaizMohd. @ Chaandi, he was arrested vide arrest memo (Ex. PW-13/H) and his disclosure statement (Ex. PW-13/J) was recorded. He further stated that about 1-1½ month prior to the death of his daughter, he met his daughter/deceased coming from the side of Noida in a cycle-rickshaw and on meeting her, she had tears in her eyes and told him that the appellants were demanding ₹2,00,000/- and jewellery as dowry, to which, he replied that he will do something after which his daughter/deceased left. Thereafter, he did not meet his daughter/deceased. Thereafter, APP sought permission to cross-examine the witness with respect to certain facts which was allowed, and in his cross-examination, he stated that the appellant Anish stopped him on his way and asked to transfer his house in the name of the appellant and that the appellant also extended threats to him. Further, he stated that he came to know about the love affair between her daughter/deceased and Anish when

his daughter left his house. He stated that his daughter got married without his consent and that he never tried to talk to his daughter after she left his house. He stated that he never made any complaint to police regarding demand of dowry.

13. HC Onkar Prasad (PW-22) stated that on 22nd September, 2009 at about 4:35 PM, he received a call from the control room that “*masjid ke pass waligali, New Ashok Nagar, ladki ko sasuralwalon ne maar diyahai*”. On reaching the spot at C-II, A-200, New Ashok Nagar, Ground Floor, he found several persons gathered there and the girl was lying dead on a cot with her face/body covered up. The husband of the deceased namely Anish was also present at the spot who told him that the deceased had died owing to spread of infection after applying *Mehandi*. In the meantime, local police arrived at the spot and the body of the girl was shifted.

14. Testimonies of the PW-12 and PW-13, parents of the deceased, though disbelieved by this Court qua the dowry demand, however, it is relevant to prove that the deceased was married to the appellant and was residing with him in the matrimonial home.

15. As noted above, Dr. Vinay Kumar Singh has proved that the injury No.1 i.e. ligature mark was possible by the Chunni recovered from some similar weapon. He also opined the cause of death as asphyxia due to ligature strangulation and all injuries were ante-mortem in nature and of recent duration. The injuries on the deceased besides the injury No.1 which include multiple abrasions present over the back of right hand, knuckle of index finger, middle finger below the tip and little finger are signs of struggle and the death is due to strangulation. In cross-examination of Dr. Vinay Kumar Singh, learned counsel for the accused took the plea that the

injury to the deceased could be possible by falling on edged object, which he denied and clarified that it was only a ligature. In cross-examination he further pointed out that the ligature mark on the dead body was horizontal and that in cases of hanging the ligature mark on the dead body are upward and oblique. He clarified that in case of burking, the ligature marks may occur obliquely, however two persons are required for the same one for pulling and the other to hold/ pin down the body. He also denied the suggestion that in case of ligature strangulation by Chunni, the ligature mark should be present all around the neck. This evidence of Dr. Vinay Kumar Singh proves beyond reasonable doubt that the death of the deceased was homicidal in nature caused due to strangulation with the Chunni.

16. On reaching the spot at 16:50:38 hours, the PCR officials in the PCR Form Ex.PW-16/A noted that *‘Shahin, wife of Anish, aged 21 years, R/o C-2/200 New Ashok Nagar – Do sal pahle love marriage ki thi, uska Pati Bata Raha Hai Ki Mehendi Lagane Ki Vajah Se Infection Ho Gaya. Ladki Ke Pariwar Vale Kah Rahe Hai Ki Damad Ne Ladki ko Mara Hai. SHO and the Staff Mauka Par, 22.09.2009 18.03.27, Dead Body Kapde Me Dhaki Thi, Bahari Chot Ke Bare Me Confirm Nahi’.*

17. To prove the contents of this PCR call HC Onkar Prasad was examined as PW-22. As noted above in his testimony, he clearly stated that when he reached the spot, he found several public persons gathered. The girl apparently was dead lying on a cot with her face/ body covered. The husband of the said girl, namely, Anish was also present at the spot and he told the witness that his wife was a Hindu and she has died owing to the spread of infection after applying Mehendi. He also stated that he made

entry in the call book maintained at the said PCR regarding the receipt of the said call and the facts and circumstances found at the ground.

18. Further the prosecution has also proved the recovery of Chunni at the instance of the appellant and the opinion of the post mortem doctor, that the ligature was possible by the said Chunni.

19. In view of this clinching evidence that the wife of the appellant, who was the deceased, died a homicidal death by asphyxia due to strangulation by a Chunni when the appellant was present at home, thus under Section 106 of the Indian Evidence Act, the onus shifts on him to explain as to how she died. In the decision reported as (2006) 10 SCC 681 Trimukh Maroti Kirkan vs. State of Maharashtra, the Hon'ble Supreme Court held:

*“14. 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. (See *Stirland v. Director of Public Prosecutions* [1944 AC 315 : (1944) 2 All ER 13 (HL)] — quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* [(2003) 11 SCC 271 : 2004 SCC (Cri) 135] .) 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. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this*

section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

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21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] (SCC para 6); State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] (SCC para 39 : AIR para 40); State of Maharashtra v. Suresh [(2000) 1 SCC 471 : 2000 SCC (Cri) 263] (SCC para 27); Ganesh Lal v. State of Rajasthan [(2002) 1 SCC 731 : 2002 SCC (Cri) 247] (SCC para 15) and Gulab Chand v. State of M.P. [(1995) 3 SCC 574 : 1995 SCC (Cri) 552] (SCC para 4).”

20. Instead of explaining the special facts within his knowledge, the appellant took the plea that he was not at home being the day next to *Eid* and had gone to meet his friends and relatives. Though appellant examined two defence witnesses i.e. DW-1 and DW-2 from the neighbourhood besides him, who only stated that there was no quarrel between the appellant and his wife, however, no evidence of any friend or relative to whom the appellant had gone to meet on the said day was led. Further, there is contradiction in the statement of the appellant under Section 313 Cr.P.C. and evidence of the appellant as DW-3 as to when he received the information about the death of the deceased. We also find no merit in the contention of the learned counsel for the appellant that since the appellant has already been acquitted for the charge of offence punishable under Section 302 IPC the only evidence now that can be read is of PW-22/Onkar Prasad and no other evidence can be looked into.

21. Consequently, the appeal is dismissed.

22. Copy of the judgment be uploaded on the website and be sent to the Superintendent Jail for updation of record and intimation to the appellant.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

JANUARY 24, 2023/ga