



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on: 23rd March, 2023**
Decided on: 26th June, 2023

+ **CRL.A. 1180/2018**
PAWAN KUMAR Appellant
Represented by: Mr. Sumit Chaudhary, Advocate
through VC
Appellant in JC through VC

Versus

STATE NCT OF DELHI Respondent
Represented by: Mr. Laksh Khanna, APP for State
with Insp. Josepha Kujoor, CAW
Cell/SW

+ **CRL.A. 1167/2018**
PRITAM alias SONU Appellant
Represented by: Mr. Kanhaiya Singhal, Mr. Jasmeet
S. Chadha, Mr. Prasanna, Mr. Udit
Bakshi, Mr. Ajay Kumar, Mr. Ujwal
Gahi, Ms Saumya and Mr. Gurjass
Puri, Advocates.
Appellant in person.

Versus

STATE NCT OF DELHI Respondent
Represented by: Mr. Laksh Khanna, APP for State
with Insp. Josepha Kujoor, CAW
Cell/SW

+ **CRL.A. 1166/2018**
SUSHILA alias SUSHIL Appellant
Represented by: Mr. Kanhaiya Singhal, Mr. Jasmeet
S. Chadha, Mr. Prasanna, Mr. Udit
Bakshi, Mr. Ajay Kumar, Mr. Ujwal
Gahi, Ms Saumya and Mr. Gurjass
Puri, Advocates.

Versus

STATE NCT OF DELHI Respondent



Represented by: Mr. Laksh Khanna, APP for State
with Insp. Josepha Kujoor, CAW
Cell/SW.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By these appeals, the appellants challenge the common impugned judgment of the learned Trial Court dated 22nd October, 2018 whereby the appellants were convicted for cruelty and murder of one Jyoti (deceased); and also the order on sentence dated 25th October, 2018 whereby all the three appellants were directed to undergo imprisonment for life along with fine of ₹2 lakhs each in default whereof simple imprisonment for six months for offence punishable under Sections 302/34 of the Indian Penal Code, 1860 ("IPC") and were also directed to undergo simple imprisonment for three years along with fine of ₹1 lakh each in default whereof simple imprisonment for four months of offence punishable under Section 498A/34 IPC. The appellants were acquitted for offence punishable under Section 306/34 IPC and no leave to appeal has been sought by the State challenging the said acquittal.

2. Brief facts of the prosecution case are that the deceased was the wife of appellant Pawan Kumar who married each other on 21st February, 2003. Appellant Sushila and Pritam @ Sonu are the step mother and brother of appellant Pawan Kumar. Out of this wedlock, one daughter 'S' (PW-15) and one son Harsh were born. It was the case of the prosecution that repeated demands of money were made by the appellants from father of deceased Ram Kishan (PW-4). Five days before the incident, appellant



Pawan Kumar and Sushila demanded ₹90,000/- from Ram Kishan and on 12th April, 2010, Ram Kishan (PW-4) was able to give only ₹15,000/- with difficulty. On the morning of 14th April, 2010 at about 6.30 AM, Ram Kishan received a call from Pawan Kumar's *chachi* that the deceased was admitted at Safdarjung Hospital in burnt condition on which he along with his wife Parmeshwari (PW-8) rushed to the hospital where he was informed that the deceased had suffered 92-93% burns after which, Ram Kishan made a call to the police at number 100. On receipt of information, SI Joginder Singh (PW-20) reached Safdarjung Hospital where the deceased was declared unfit for statement. After recording the statement of Ram Kishan, he prepared the *rukka* (Ex.PW-4/A and 20/A) on which FIR No.110/2010 dated 14th April, 2010 under Sections 498A/306 IPC was registered at PS Sarita Vihar (Ex.PW-1/A). At about 12.30 PM the deceased died, and after the post-mortem examination, the body was handed over to Ram Kishan.

3. Dr.Sumit Tellewar conducted the post-mortem examination on the body of the deceased on 15th April, 2010 and vide the report (Ex.PW-19/A) opined:

"Antemortem external injuries

Burnt areas on the body: (Epidermal, dermal, deep) burn present on face, cheek, chest, abdomen, both upper limbs, buttocks, both lower limbs upto ankles and upper back.

*State of burn injuries: (Line of Redness, Erythema, Charring, Granulation tissue, purulent infection) Blackening present **lines** of redness present.*

Approximate percentage of burn injuries: 95%

Other injuries: NIL

Internal Examination

Head: Scalp & Skull: NAD

Brain: Congested

Neck: Naso-Laryngo-Pharynx: NAD



Chest: Lungs: Congested
Trachea & Bronchi: NAD
Heart: NAD
Abdomen: Stomach: empty Mucosal Wall: NAD
Intestines, Liver, Spleen, Kidneys & Pancreas): Congested
Pelvis bladder: Empty Uterus: NAD
Rest of structures inside the body: NAD
Opinion: Death in this case is due to shock due to ante mortem
flame burns.
The time since death is approximately: consistent with hospital
records.
Specimens preserved: Scalp hair for analysis of inflammable
substance.”

4. Investigation in this case was initially carried out by Insp. Josepha (PW-17) and further investigation was carried out by Insp. Dinesh Chander, who passed away during the course of trial. Insp. Dinesh Chander had arrested the appellant Pawan from H.No.548, Chauhan Mohalla, Madanpur Khadar vide memo Ex.PW-6/A and had also recorded his disclosure statement (Ex.PW-6/C). Upon completion of investigation, charge-sheet was filed only against appellant Pawan Kumar. Accordingly, Pawan Kumar was charged for offences punishable under Section 498A IPC and Section 302 IPC and alternatively, for offence punishable under Section 306 IPC. Later on, appellants Sushila and Pritam @ Sonu were also summoned and charged for offences punishable under Section 498A/34 IPC. They were also charged for offence punishable under Section 302/34 IPC and alternatively, for offence punishable under Section 306 IPC.

5. Learned counsel appearing on behalf of appellants Pritam @ Sonu and Sushila assails the impugned judgment on the ground that the prosecution failed to prove its case beyond reasonable doubt against these two appellants and therefore, the impugned judgment and order on sentence



be set aside and the appellants be acquitted. Learned counsel relies upon the following grounds:

- i. Testimony of baby 'S' (PW-15) is shaky and does not inspire confidence and it was pointed out that there are material contradictions and improvements in the testimony of PW-15 viz. her statement under Section 161 Code of Criminal Procedure, 1973 ("Cr.P.C.") and 164 Cr.P.C. which dents the prosecution case at its root. Reliance was placed on the decisions in AIR 2009 SC 152 State represented by Inspector of Police vs. Saravanan & Anr., (2009) 11 SCC 106 State of Rajasthan vs. Rajendra Singh and (2008) 15 SCC 440 State represented by Inspector of Police, Tamil Nadu vs. Sait @ Krishnakumar.
- ii. Possibility of PW-15 being tutored by Ram Kishan (PW-4) cannot be ruled out as it is an admitted position that PW-4 took PW-15 with himself on the very same day of the incident. Further, even the statement of PW-15 recorded by the police (Ex.PW-17/B) was recorded at the house of PW-4, which is evident from the testimony of PW-17. Testimony of PW-15 before the Court was recorded after a considerable gap of six years, during which time, PW-15 continued to reside with PW-4 and therefore, in view of the improvements in the testimony of PW-15, possibility of tutoring cannot be ruled out. In this regard, reliance was placed on the decisions in 2023: DHC:



1962-DB *Hari Om vs. State of NCT of Delhi* and (1998) 7 SCC 177 *Panchhi & Ors. vs. State of U.P.*

- iii. It was pointed out that the statement of PW-15 under Section 164 of Cr.P.C. was not recorded as per the prescribed procedure. It was contended that learned Metropolitan Magistrate (PW-14) failed to put relevant questions to PW-15 to ascertain PW-15's understanding and competence. Reliance was placed on the decision in MANU/DE/3346/2022 *State vs. Rahul.*
- iv. As per the rough site plan (Ex.PW-17/A) and scaled site plan (Ex.PW-16/A), PW-15 witnessed the incident from a height of one meter window and from a distance of about 12-14 feet at night time as to what was happening in the kitchen, which seems improbable.
- v. Allegations with respect to demands of dowry were vague and the financial capacity of PW-4 to pay the dowry was never established by the prosecution. It was submitted that there are material contradictions in the testimony of PW-4 and PW-8 with respect to the allegations of demand of dowry and there is no documentary evidence to corroborate the version of prosecution in this regard. Reliance was placed on a decision in 2007 SCC OnLine Delhi 1921 *Neera Singh vs. State (Govt. of NCT of Delhi) & Ors.*



- vi. It was pointed out that there was no mention of presence of PW-15 at the time of incident in the FIR which was recorded on the statement of PW-4 (Ex.PW-4/A).
- vii. As per the medical treatment opinion (Ex.PW-17/G), it was recorded that “*there is no mention of any smell from the patient in the records*”. Even otherwise, as per the opinion of the doctor in the said opinion, “*nature of burns in LPG leak and kerosene oil drum is thermal burns in both and difficult to distinguish*” and therefore, possibility of deceased being burnt accidentally on account of LPG leakage cannot be ruled out. Even as per the FSL report (Ex.PW-17/I), the articles lifted from the crime scene did not have any residue of kerosene and therefore, the case of the prosecution is without merit.
- viii. The entire case of the prosecution is based on the hypothesis that the relations between the appellant and deceased were strained, however, the same was disproved by the testimony of PW-15, who herself stated that “*my father and my mother used to love each other*”. Thus, it was contended that there was no motive for the appellants to have committed the offence for which reliance was placed on the decision in 2022 SCC OnLine SC 1454 Nandu Singh vs. State of Madhya Pradesh.

6. Learned counsel appearing for appellant Pawan Kumar adopted the contentions put forth by learned counsel appearing for appellants Pritam @ Sonu and Sushila. In addition thereto, it was contended that PW-15 who is the purported eye-witness and on whose testimony the entire case of the



prosecution rests was taken by PW-4 on 14th April, 2010 itself and her statement by the police was recorded on 19th April, 2010, and therefore, she cannot be held to be a trustworthy witness and cannot be relied upon. It was further contended that Pawan Kumar tried to save his wife/deceased because of which his hands got burnt and not because he burnt the deceased and it was contended that learned Trial Court gave all the benefits in the present case to the prosecution although the benefit of doubt in a criminal trial accrues to the accused/appellant.

7. On the other hand, learned APP appearing on behalf of the State submitted that the prosecution has proved its case beyond reasonable doubt on the basis of ocular/medical and forensic evidence and thus, the learned Trial Court had rightly convicted the appellants and therefore, prayed that the present appeals be dismissed. To support his contention, learned APP relied upon the following facts:

- i. PW-15 is the eye-witness in the present case who categorically stated that a quarrel took place between the deceased and the appellant Pawan. When the deceased was in the kitchen, Pawan pulled the deceased by hand and Sonu and Sushila caught hold of the deceased while Pawan poured kerosene and her aunt threw a burning matchstick on the deceased. The deceased ran towards the bathroom and Pawan followed her and pushed her, during which hands of Pawan got burnt. Thereafter, the deceased was taken to the hospital in a car by Pawan and Sonu. It was contended that conviction can be based solely on the testimony of child witness for which reliance was placed on the



decision in (2001) 9 SCC 129 Suryanarayana vs.State of Karnataka.

- ii. As per the MLC (Mark PW-19/X), the deceased was admitted in the hospital with 95% deep thermal burns. As per the post-mortem report (Ex.PW-19/A), epidermal, dermal and deep burns were present on the face, neck, chest, abdomen, both upper limbs, buttocks, both lower limbs upto ankle and upper back, and it was opined that death was due to shock due to ante-mortem flame burns and the smell of kerosene oil was found present.
- iii. As per the FSL report (Ex.PW-17/1) diesel residue was found on red colour plastic *palta* (Ex.B1), jute *bori* (Ex.B2), handkerchief (Ex.C2) and hair of the deceased (Ex.D).
- iv. Appellant Sushila had taken a defence of *alibi* stating that she was not present at the place of incident and had gone to her father's village at Barotha, Sonipat, Haryana, however, no documentary or ocular evidence to prove the same was brought on record and therefore, an adverse inference must be drawn against her for which reliance was placed on the decision in MANU/SC0115/2022 Pappu Tiwari vs. State of Jharkhand and MANU/SC/1097/2012 Sahabuddin & Anr.vs. State of Assam.
- v. PW-15 specifically deposed with respect to the burn injuries on the hands of the appellant Pawan, however, it was submitted that even if it was believed that the appellant was trying to extinguish the fire the same does not prove his innocence and



in this regard was placed on the decision in 2008 CrI.L.J. 2623 DB Rajinder Kumar vs. State of H.P.

- vi. PW-4 and PW-8 have categorically deposed with respect to demand of dowry by the appellant. Even Surender Singh (PW-9) categorically deposed that PW-4 had collected ₹30,000/- from him for paying ₹60,000/- to appellant Pawan and when PW-4 again demanded money from PW-9, PW-9 refused to give money to him. Pritam Singh (PW-18) was also a witness to a payment of ₹15,000/- by PW-4 to appellant Pawan just before the death of the deceased and it is thus evident that the deceased was tortured on account of dowry.

8. In addition to the above-stated contentions, learned APP further countered the contentions put forth on behalf of the appellants. It was submitted that mere non-mentioning of name of eye-witness in the FIR does not discredit the case of the prosecution and in this regard reliance was placed on the decision in MANU/SC/0471/2003 Chittar Lal vs. State of Rajasthan. It was further countered that although the MLC of the deceased records the deceased to be conscious and oriented, however, it is nowhere mentioned in the MLC that the history was given by the deceased herself and it is improbable that a person who has suffered 95% burns would be in a position to give the history herself. With respect to the improvements made by PW-15 in her testimony, it was pointed out by learned APP that during her cross-examination PW-15 categorically deposed that she had told to the police and the Magistrate that there was quarrel between her mother and the father on the day of incident and that the appellants had burnt her mother in



the hall of the house and also that after the incident, she demanded mobile from her aunt on which her aunt slapped her twice after which she slept. Learned APP also submitted that no question was put to PW-15 during her cross-examination to ascertain whether her view from the window was blocked or not and thus, the defects in the site plan as pointed out by the counsel for the appellant does not find any merit.

9. Having heard the parties at length and perusing the record, the following evidence emerges.

10. 'S' (PW-15) deposed that at the time of incident, she was residing with her father/appellant Pawan Kumar, deceased, appellant Sonu (uncle), aunty Poonam and appellant Sushila (grandmother). She stated that she does not remember when her mother died, but she died six years back and that the incident took place at 11.00 in the night. She stated that her mother/deceased had gone for taking meal from the kitchen and there was quarrel between her mother/deceased and her father/appellant on the day of incident. She further stated that when her mother/deceased was in the kitchen, her father/appellant pulled her mother/deceased by hand and her uncle and grandmother caught hold of the deceased by hand and her father poured kerosene oil on her. Her aunty threw burning matchstick on her and her mother ran towards the bathroom and her father followed her, pushed her in the bathroom and in the said process, hands of her father were also burnt. She stated that she also had younger brother Harsh, who was residing at her *nana-nani's* house in those days. She stated that she was sitting in her bedroom and had seen her mother burning from the window. After the incident, her father and her uncle took her mother/deceased in a car



belonging to one Himanshu who was residing beside their house. She further stated that she asked for mobile phone from her *chachi* so that she could make a call to her *nana* but her aunty did not give the mobile phone to her rather slapped her twice after which she fell asleep. She stated to have narrated the entire incident to the police and after few days her statement was recorded by the Magistrate. She identified all the three appellants and stated that she did not know why the appellants burnt her mother/deceased and also stated that her father and her mother used to love each other. In her cross-examination she stated that she had gone to her *nana's* house early in the morning. She stated that she had told the police and the Magistrate that her mother had gone to bring the meal in the kitchen, also that there was a quarrel between her father and her mother and also that her father had pulled her mother by hand and that her uncle and grandmother caught hold of the deceased's hand while her aunty threw a burning stick on her, also that her mother had ran towards the bathroom where her father followed her, pushed her and in the said process hands of her father were brunt. She further stated that her grandmother and mother used to reside in separate rooms in the house and that the stairs going to the roof of the house of her mother and grandmother were also separate. Their kitchens were also separate. She admitted that the police made inquiry from her at her *nana's* house.

11. Ram Kishan (PW-4) deposed that the deceased was his daughter who got married to the appellant Pawan on 21st February, 2003. He stated that in marriage of the deceased, he gave dowry as per his capability and after marriage, Pawan, his stepmother Sushila and step brother Sonu started demanding dowry. He stated that after four months of marriage, her



daughter was pressurized by the appellants to pay the bill of electricity of ₹40,000/- which was paid by him. After marriage, he used to give ₹1,000/- per week in a month for deceased's expenses because the appellant did not give any money to her. Even at the time of delivery of deceased's daughter and son the hospital bills and the expenses were borne by him. Partition was effected in the family of the appellants, pursuant to which, Pawan was given a *dhaba* at Madanpur Khadar, JJ Colony, which was not in a workable condition and therefore, he gave ₹60,000/- to the appellants Pawan and Sushila, who threatened that the deceased would die of hunger if no help was given to appellant Pawan. Despite all this, the appellants continued to beat his daughter and again demanded a plot of land for which they asked ₹90,000/-. On 12th April, 2010, he gave ₹15,000/- at the office of a property dealer in Sarita Vihar. On 14th April, 2010 at about 6.30 AM, he received a call from the *chachi* of appellant Pawan that the deceased was admitted in burnt condition at Safdarjung Hospital on which he along with his wife and other family members rushed to the hospital where they were informed that the deceased was having 92-93% burns. Thereafter, he made a call to the police at number 100 and his statement (Ex.PW-4/A) was recorded. At about 12.30 PM on the same day itself, the deceased died and her body was sent to the mortuary. He stated that at the time of marriage, one bullet motorcycle and cash of ₹81,000/- was given to appellant Sushila. In his cross-examination he stated that statement of 'S' was not recorded in his presence and that he was sitting in the drawing room on the ground floor while her statement was recorded. He also stated that an agreement to purchase a plot in the name of appellant Pawan was executed on the same



day on which he had paid ₹15,000/- to appellant Pawan for a 48 sq.yards plot at Faridabad.

12. Parmeshwari (PW-8) corroborated the version of her husband Ram Kishan (PW-4). In her cross-examination she stated that the money which was paid for running a hotel to Pawan were arranged by taking ₹30,000/- from relatives and ₹30,000/- were lying in her house and the appellant Pawan came to her house to collect the amount of ₹60,000/-.

13. Surender Singh (PW-9) stated that Ram Kishan was his brother-in-law (*Sala*) and corroborated the version of Ram Kishan. He stated that Ram Kishan collected ₹30,000/- from him to pay ₹60,000/- to Pawan. He stated that on 12th April, 2012, Ram Kishan paid ₹15,000/- to Pawan for purchase of plot. He stated that Ram Kishan had demanded money from him for paying to Pawan and advised Ram Kishan not to pay such amounts to Pawan.

14. Joginder Singh (PW-20) deposed that on 14th April, 2010, upon receipt of information, he along with Ct.Devender Kumar reached Safdarjung Hospital and found the deceased being treated for burn injuries. The doctor at the hospital had opined the deceased to be unfit for statement. At the hospital he met father of the deceased and recorded his statement (Ex.PW-4/A) and prepared the *rukka* (Ex.PW-20/A). Thereafter, he went to the spot at Chauhan Mohalla, Madanpur Khadar at the house of appellant Pawan where he found the articles in the kitchen scattered, some pulses lying on the floor and some burnt clothes, *rukka* was sent for registration of FIR and further investigation was handed over to SI Josepha. In the meantime, the deceased had expired in the hospital and her body was got



preserved and on the next day i.e. 15th April, 2010 she had sent the body for post-mortem examination.

15. Insp. Josepha (PW-17) deposed that on 14th April, 2010, after registration of FIR, she along with Ct.Virender reached H.No.548 at Chauhan Mohalla, Village Madanpur Khadar where she met SI Joginder. Crime team inspected the spot and photographs were taken. From the spot, she lifted burnt and partially burnt clothes, one gunny bag, one plastic *patla* (Stool), which was seized. She prepared the site plan (Ex.PW-17/A). on 19th April, 2010, she went to the house of Ram Kishan and recorded the statement of Ram Kishan, Parmeshwari Devi, Dinesh, Surrender and 'S'. On





27th April, 2010, statement under Section 164 Cr.P.C. of 'S' was got recorded. Thereafter, the investigation was marked to Insp. Dinesh Chander, who passed away during the trial. In her cross-examination she stated that she had recorded the statement of 'S' in question-answer form and that 'S' used to call her step grandmother as "*bibi*". She admitted that 'S' told her that "*Bibi ghar main nahin thi, Naresh ke ghar gayi thi*". She admitted that there were two sets of living portions in the said house and in one portion, Sonu and his wife along with Sushila were residing and in the other portion Pawan and his family were residing. She also stated that she had found turmeric powder and *chana daal* lying scattered in the kitchen of Pawan and that during inquiry, neighbour have informed her that deceased got burnt while cooking food in the night.

16. In his statement under Section 313 Cr.P.C., appellant Pawan Kumar admitted to have married the deceased on 21st February, 2002. He further admitted that there was distribution of properties and *dhabas* but denied that the *dhaba* was not in working condition or that any amount was demanded or given to him by PW-4. He stated that his step-mother Sushila and step brother Pritam @ Sonu were living separately from him and that they did not demand anything from anyone. He stated that he received injury while extinguishing fire of Jyoti who received injuries while cooking on the gas in the kitchen. He stated that PW-15 was a tutored witness and had deposed falsely.

17. Appellants Pritam @ Sonu and Sushila in their respective statements under Section 313 Cr.P.C. stated that they were living separately from Pawan and the deceased. They stated that both the *dhabas* were in working



condition. They stated that they were innocent and were falsely implicated in the present case. Additionally, appellant Sushila further stated that on the day of incident she had gone to her father's village at Barotha, Sonipat and had received the information about this incident on 14th April, 2010 in the morning on telephone after which she went to Safdarjung Hospital. At the hospital she met deceased Jyoti who told her "*bibi mujhe bacha lo*" and told her that she had received burn injuries accidentally while she was cooking on gas.

18. As noted above, appellant Pawan Kumar and deceased were married on 21st February 2003 and the deceased died an unnatural death on 14th April 2010. Thus, being the unnatural death beyond seven years of marriage, no charge for offence punishable under Section 304-B IPC was framed. However, an alternative charge for offence punishable under Sections 306/34 IPC was framed besides under Sections 302/34 IPC. The appellants have been acquitted for offence punishable under Section 306/34 IPC and there is no leave to appeal sought by the State qua the said acquittal. In view of the fact that the scope of consideration in the present appeals does not relate to offences punishable under Sections 304-B IPC or 306 IPC, the presumption under Sections 113A and 113B of the Indian Evidence Act is not applicable and as regards the offence punishable under Sections 302/34 IPC is concerned, the onus is on the prosecution to prove beyond reasonable doubt that the deceased died a homicidal death and the said offence was committed by the appellants.

19. To prove the homicidal death of the deceased Jyoti, prosecution mainly relies on the testimony of PW-15, the minor daughter of the



deceased and the appellant Pawan Kumar. Undoubtedly, the conviction can be based on the testimony of this child witness who was aged 13 years at the time of deposition on 10th August 2016 and aged 7 years at the time when the deceased died, however, rule of prudence warrants a close scrutiny of the evidence of the child witness. The legal position in regard to the reliance on the testimony of a child witness has been succinctly enunciated by the Division Bench of this Court in the decision reported as (2014) SCC OnLine Del 1952 State Vs. Sujeet Kumar wherein, it was held as under:-

“45. As per the provisions of Section 118 of the Evidence Act, all persons are competent to testify, unless the Court considers that by reason of tender years they are incapable of understanding the questions put to them and of giving rational answers but then it is for the Judge to satisfy himself as regards fulfilment of the requirement of the said provision. Thus, as regards competency of a person to appear as a witness, the legislature has underlined the basic requirement of a person's understanding of the obligation to speak the truth and to give an accurate impression and possession of the mental capacity at the time of the occurrence concerning which he has to testify and to receive an accurate impression of it. This would be more so in case the witness is a child of tender years. An assessment by the court of the competency of a child who is to appear as the witness on these issues is essential. It is also necessary to ascertain as to whether the witness had a memory sufficient to retain an independent recollection of the occurrence; capacity to understanding simple questions about it and the capacity to express his/her memory of the occurrence.

46. The evidence of a child witness cannot be rejected per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness it can record conviction based on his testimony. If after careful scrutiny of the testimony of child witness the court comes to the



conclusion that there is impress of truth in it then there is no reason as to why the court should not accept the evidence of child witness.

47. The position of law relating to evidence of child witness was succinctly stated by the Supreme Court in the decision reported as (1997) 5 SCC 341 Dattu Ramrao Sakhare v. State of Maharashtra in the following terms : -

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In 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 demeanor must be like any other competent witness and there is no likelihood of being tutored. 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.”

20. It is thus essential to analyze the testimony of child witness PW-15 as deposed before the Court. She deposed that she was residing with her father Pawan Kumar, mother Jyoti, uncle Sonu, aunty Poonam and grandmother Sushila. She was going to school at that time but did not remember as to in which class, she was studying those days. She also did not remember when her mother died, however, she deposed that her mother died six years back and the alleged incident took place at 11 in the night. At the time of incident, her father, uncle, aunty and grandmother were present in the house. Her mother had gone for taking meal from the kitchen. She did not remember as to what time, her father had come to the house on that day. There was a quarrel between her mother and father on the day of incident, the reason whereof, she did not know. When her mother was in the kitchen, her father pulled her mother by hand, her uncle and grandmother caught hold of her by hand and her father poured kerosene oil over her. Her aunty threw burning match stick on her. Her mother ran towards the bathroom and her father followed her and thereafter, pushed her in the bathroom. In the said process, hands of her father were also burnt. She further deposed that she had one younger brother named Harsh who was not present in the house at the time of incident. He was residing with her Nana Nani's house in those days. She deposed that she was sitting in the bedroom and had seen her mother burning from the window. She also deposed that after the incident, her father and uncle took her mother to hospital in a car belonging to Himanshu, who was residing beside their house and she had no conversation with her mother after the incident. After the incident, she



asked for mobile phone from her Chachi to make a call to her Nana, however, she did not give her phone and rather slapped her twice. Thereafter, she slept. Some lady police official came at her house and made inquiries from her regarding death of her mother. On inquiry, she told the entire incident to the police. After few days of the incident, she was produced in Court by the police for recording her statement, where, a Magistrate recorded her statement and she could identify her signatures.

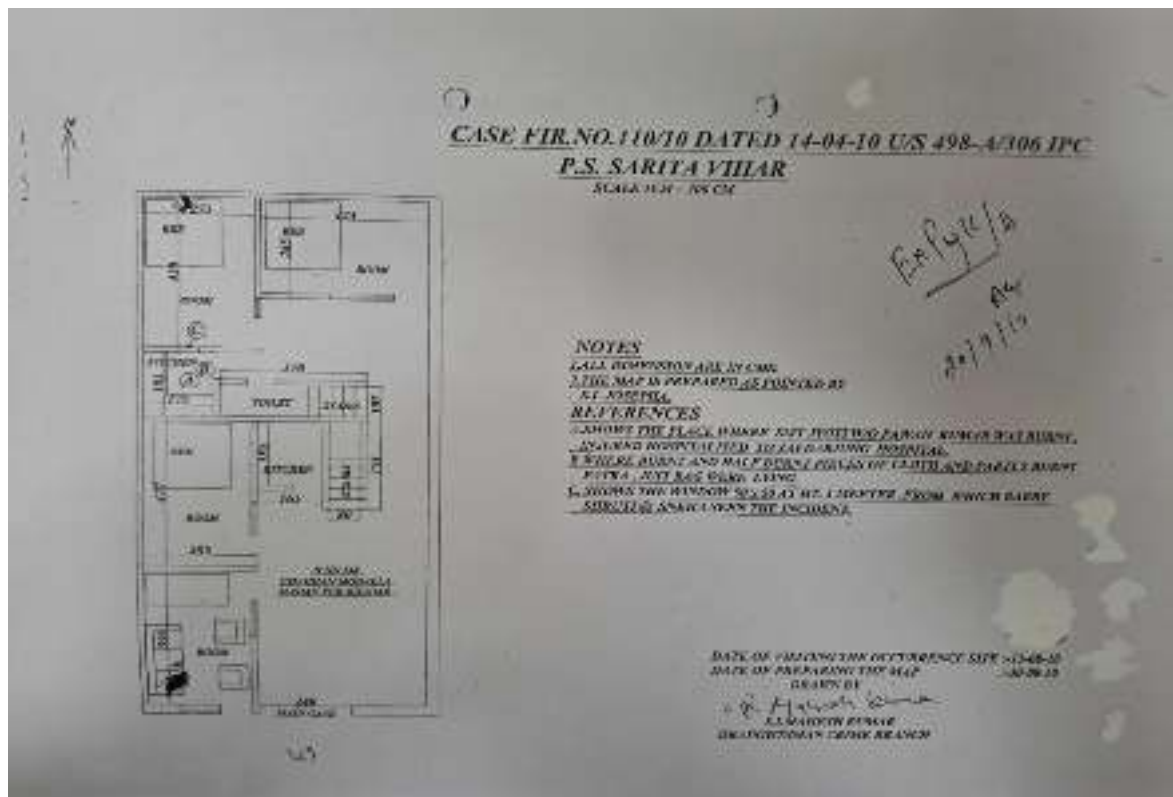
21. In her cross-examination, PW-15 stated that the police did not make the enquiries from her about the incident at her house but at the house of her Nana when she was in the company of Nana, Mause and Mausi. She stated that she left her house at Madanpur Khadar with them in the early morning though she did not know the exact time when she went with them and no police official came at her house in Madanpur Khadar. In cross-examination, she reiterated that her father pulled her mother by hand, her uncle and grandmother caught hold of her hand and her aunty threw a burning stick on her and that they burnt her mother in the hall of the house. In cross-examination, she also stated that the grandmother and the aunty used to reside in separate rooms in the house and that they had separate kitchens and that stairs going to the roof of the house of her mother and her grandmother were also separate. Further, in the kitchen of her grandmother, her aunty used to cook while in the kitchen of her mother, she herself used to cook. It was thus evident that the kitchen of the deceased was separate from that of her step mother-in-law and sister-in-law. PW-15 also admitted that her father and uncle had separate dhabas. She also stated that her father had a bullet motorcycle on which she along with her father and mother used



to visit her Nana's house every week to meet Harsh. She clarified that every Saturday was a half day of her school, so, they used to go to their Nana's house on every Saturday and all three of them stayed on Saturdays and Sundays every week. She also clarified that there was an alimrah and that her mother used to sit on the ground where a gas stove was kept and she used to cook by sitting on the ground. Above the gas stove in the kitchen, there was an almirah where the spices used to be kept. This witness in the cross-examination also admitted that there was a cooler in her bedroom which was installed at the window. This part of the cross-examination and that she used to sleep with mother and father in the said bedroom and there was another room in the house wherein, belongings like *sandook* and other luggage etc. used to be kept, is essential to be considered, for the reason, the learned counsels for the appellants have taken this Court through the site plan and the photographs. The scaled site plan Ex.PW-16/A in this regard is as under:



न्यायमेव जयते



22. Though the scaled site plan Ex.PW-16/A shows a window at point 'C', however, no such window is visible in the photographs. However, a perusal of the photographs would also reveal that they have not been taken from the angle so as to see the connection between the kitchen and the bedroom where PW-15 was sleeping. Further, presence of the spices on the floor of the kitchen also do not rule out that the deceased had not gone to take food from the kitchen. As a matter of fact, burnt pieces of clothes and spices lying scattered show that the incident took place in the kitchen. Further, next to the gas stove which was of LPG, on a plate, chapattis are seen lying below which a newspaper is also seen, which is also in a burnt condition. It would be thus relevant to reproduce the photographs (Ex.PW-10/2 & PW-10/3) as under:



सत्यमेव जयते

Signature Not Verified

Digitally Signed
By: JUSTICE MUKTA
GUPTA

CRLA. Nos. 1180/2018, 1167/2018 & 1166/2018

Signature Not Verified

Digitally Signed
By: POONAM RAMBA

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23. Learned counsels for the appellants also sought to discredit the testimony of this child witness on the ground that her statement was recorded once she was in the custody of her maternal grandfather, the complainant in the FIR and thus, the witness was tutored. The statement of PW-15 was recorded by the learned Metropolitan Magistrate vide Ex.PW-14/B under Section 164 CrPC on being satisfied that the witness was voluntarily speaking. Before the learned Magistrate vide Ex.PW-14/B, PW-15 stated that her father used to work in a hotel. She was studying in 1st standard. Earlier, she was studying in UKG and her father used to fight with the mother daily and used to beat her because her mother used to make phone calls as her father did not come home. She stated that on that date, her father, uncle, grandmother and aunty were at home. All four of them



burnt her mother with kerosene oil. She was at home. Her mother was burnt at night. She had a younger brother named Harsh. She asked her mother as to who did all this on which her mother did not say anything. Thereafter, her father took her mother to the hospital in the car of Himanshu who used to stay near their house. Her mother was taken to her Mama's house. She cried and her sister Chanchal also cried. She did not know as to why all four of them burnt her mother. Undoubtedly, this version under Section 164 CrPC is not a detailed one as is made in the deposition, however, the allegations in sum and substance in the statement under Section 164 CrPC is same as deposed to by the child witness in her deposition before the Court. Though, the father of the deceased had leveled allegations for demand for dowry and harassment, however, from the deposition of this witness, it is clear that the relation between the families was cordial, for the reason, every weekend, the witness along with her parents used to go and stay at her Nana's house to live with the younger brother. Further, though in her statement under Section 164 CrPC, the reason for quarrel between her father and mother was due to the father coming late at home, however, this fact has not been stated by this witness in her deposition before the Court. Rather, she stated that she did not know why her mother was burnt by accused persons and her father and mother used to love each other. Apparently, there did not appear to be any constant conflict or quarrel between the appellant Pawan Kumar and his wife.

24. From the photographs of the kitchen, it is evident that there is no kerosene stove. There is one electric heater lying on the slab and below the slab, is a stove run by LPG gas cylinder. Though smell of kerosene was



present as per the post mortem report, however, the FSL report Ex.PW-17/I could not detect residue of kerosene/diesel/petrol in Exhibits A1, C1, C3, C4, C5, C6, C7 and C8 i.e. the burnt clothes of the deceased and the clothes of the appellants which were burnt and having black deposits. Further, though PW-15 claimed that her mother was burnt in the hall, however, from the photographs, no burn residues or any effect thereof, is evident in the hall and the entire incident appears to have taken place in the L-shaped kitchen itself which admeasures 182 cms. with the L-shape slab around, measuring approximately one feet at both the sides. Thus, at best an area of 3 feet x 3 feet was available in the kitchen and it was not possible for five people to be present inside the kitchen, with three of them catching hold and one lighting the fire without the others catching fire. From the site plan and the photographs enclosed, it is apparent that the quarrel took place between the husband and wife when no other family member was present and apparently, for the reason, that the husband used to come late as stated by PW-15, whereafter, the deceased died due to burn injuries.

25. In a similar situation, the Division Bench of this Court in the decision reported as 1993 (27) DRJ (DB) 621 Jaspal Singh & Ors. Vs. The State (Delhi Administration) noting the fact that the incident took place in the kitchen and the kitchen was very small measuring 4 ft. x 3 ft. with shelves on two sides and the door of the kitchen opening inside the kitchen could hardly accommodate two persons at a time, out of which, one was the deceased, held that the same created a reasonable doubt on the prosecution case besides the infirmities and inconsistencies in the dying declaration.



26. In view of the discussion aforesaid, this Court is of the considered view that the appellants Pritam @ Sonu and Sushila @ Sushil are entitled to benefit of doubt as their presence at the spot even though deposed by PW-15, is not fortified by scene of occurrence as evident from scaled site plan and the photographs.

27. As regards appellant Pawan Kumar is concerned, his presence at the spot is established as in the process, his hands also got burnt. Though the case of the prosecution based on the testimony of PW-15 is that while the appellant Pawan Kumar pushed the deceased in the bathroom, his hands got burnt, appellant Pawan Kumar in his explanation under Section 313 CrPC in response to question No. 37, stated that in fact, he received injury while extinguishing fire of Jyoti as she received injuries while cooking on gas stove in the kitchen. However, this explanation does not appear to be plausible, for the reason, from the photographs of the kitchen, it is evident that the food had already been cooked and was not in the process of being cooked.

28. Contention of learned counsel for the appellant that it is for the prosecution to prove that the death was homicidal in nature and not suicidal, deserves to be rejected, for the reason, the death of the deceased took place at night in the house when both the appellant and deceased were together, thus what transpired at the time of incident being within the special knowledge of the appellant, the onus shifts on the appellant under Section 106 of the Indian Evidence Act to explain how the deceased died. The explanation rendered by the appellant in his statement under Section 313 CrPC as noted above, is not fortified from the scene of occurrence. The



Hon'ble Supreme Court in the decision reported as (2006) 10 SCC 681

Trimukh Maroti Kirkan Vs. State of Maharashtra held as under:

*“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.

XXX XXX XXX

22. *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. In Nika Ram v. State of H.P. [(1972) 2 SCC 80 : 1972 SCC (Cri) 635 : AIR 1972 SC 2077] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with “khukhri” and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [(1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : AIR 1992 SC 2045] the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that*



time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of T.N. v. Rajendran [(1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.”

29. In view of the discussion aforesaid, this Court finds no error in the impugned judgment convicting the appellant Pawan Kumar for offence punishable under Section 302 IPC and the sentence awarded. However, the impugned judgment of conviction and order on sentence against the appellants Pritam @ Sonu and Sushila @ Sushil are set aside. Consequently, Crl.A. Nos. 1167/2018 & 1166/2018 are disposed of, whereas, Crl.A. No. 1180/2018 is dismissed. Appellants Pritam @ Sonu and Sushila @ Sushil who in custody are directed to be released forthwith by Superintendent Tihar Jail, if not required in any other case.



30. Copy of the judgment be uploaded on the website of this Court as also be sent to the Superintendent Jail for intimation to the appellants, updation of records and necessary compliance.

(MUKTA GUPTA)
JUDGE

(POONAM A. BAMBA)
JUDGE

JUNE 26, 2023/‘vn’

