

(2016) 02 DEL CK 0357

In the Delhi High Court

Case No : Crl. A. 79/2016

Ajay

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, Section 32, Section 32(1), Section 65-B
Penal Code, 1860 (IPC) — Section 302, Section 304B, Section 304-B, Section 498A

Citation : (2016) 2 JCC 1099

Hon'ble Judges : Pradeep Nandrajog and Mukta Gupta, JJ.

Bench : Division Bench

Advocate : Ramesh Gupta, Sr. Adv. instructed by Bharat Bhushan Bhatia, Akshay Bhatia and Bharat Sharma, Advocates, for the Appellant; Varun Goswami, APP, for the Respondent

Final Decision : Dismissed

Judgement

Mukta Gupta, J.—1. Ajay @ Sunder Pal though charged for offences punishable under Section 304B IPC and 302 IPC has been convicted for the murder of his wife under Section 302 IPC vide the impugned judgment dated December 14, 2015 and directed to undergo imprisonment for life and to pay a fine of Rs. 25,000/- which if realised a sum of Rs. 20,000/- has to be given as compensation to the legal heirs of deceased Laxmi, vide the order on sentence dated December 17, 2015.

2. Hari Chand received a distress call from Laxmi, his daughter in the intervening night of September 1 and 2, 2011 at around 2.00 AM, a further call by Ajay and then by his brother informing of the death of Laxmi. He along with his wife left the house at about 4.30 AM in the morning for Nangli Sakrawati where they found the dead body of their daughter Laxmi in front of her matrimonial house, a room in the field which was taken by accused persons on contract basis for agriculture. He noticed that two teeth of the lower jaw of his daughter were

broken and blood was oozing out. He made a call to 100 number and Police reached the spot. On the basis of statement Ex.PW-5/A of Hari Chand, FIR No. 299/2011 was registered under Section 498A/304-B IPC at PS Najafgarh and investigation was carried out.

3. Hari Chand stated that he was residing at village Siraspur for the last one year. He had married his daughter Laxmi on May 11, 2011 with Sunder Pal, S/o Bishan. On September 02, 2011 in the night at around 2 O'clock his daughter called on the mobile phone and wanted to talk to her mother. He gave the phone to his wife when his daughter stated to his wife that "Mummy aaj yeh mujhe nahin chodengey". Thereafter the phone got disconnected. Again the phone rang up and this time Ajay @ Sunder Pal abused him. When his wife asked him to make her talk to their daughter Laxmi, Ajay stated that their daughter was lying unconscious. After some time another call came and they were informed that their daughter had died. At about 5.00 AM in the morning they left their village Siraspur to village Nangli Sakrawati where on reaching they found that their daughter had died. His son-in-law used to demand dowry and he suspected that his daughter had been murdered by his son-in-law and his sister.

4. Statement of Kamlesh PW-6, mother of the deceased was also recorded on the same day who stated that in the night at about 12.00 or 1.00 AM, her husband received a telephonic call who handed over the mobile phone to her. She talked to Ajay @ Sunder Pal who handed over the phone to her daughter Laxmi who stated "Mummy jaldi aaja yeh mujhe nahin chodenge", "mein jaa rahin hoon yeh mujhe maar denge" and the phone was disconnected. She heard the noise of falling down of the phone. Thereafter again Ajay @ Sunder Pal called her and told that her daughter had expired. It is stated that prior to the incident Ajay demanded two-wheeler but the demand could not be fulfilled due to their poor economic condition. She also stated about the threats extended by the sister of Ajay.

5. Post-mortem on the body of the deceased was conducted by Dr.Parvinder PW-2 who noted the following injuries:

"1. Lower right central incisor tooth broken (missing) with active bleeding (clotted and free) present with adjoining, bruising and laceration of socket and gum;

2. Upper right lateral incisor, canine and first premolar teeth dislocated with active free bleeding present with adjoining extra vacation of blood present in the gums;

3. Contusion of front upper and lower gums present diffusely (blueish colour)

6. Dr.Parvinder Singh opined the cause of death to be due to asphyxia following ante-mortem smothering and time since death was approximately 11-12 hours. In the further opinion Ex.PW-2/B Dr.Parvinder Singh opined that the injuries mentioned in the post-mortem report were homicidal in nature. The viscera was

preserved and as per the FSL report :

"On chemical & TLC examination, metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides could not be detected in exhibits "1A", "1B", "1C" && "1D".

7. Hari Chand and Kamlesh deposed in sync with their statements recorded by the SDM. Ashish Mohan PW-11, the SDM Najafgarh who recorded the statement of Hari Chand vide Ex.PW-5/B and Kamlesh vide Ex.PW-6/A also appeared in the witness box and deposed about the proceedings conducted.

8. PW-4 Surrender Kumar, Assistant Nodal Officer IDEA Cellular Phone exhibited the call details vide Ex.PW-4/A along with a certificate under Section 65-B of the Evidence Act as Ex.PW-4/B. The CDRs of the mobile phone of Hari Chand showed as under:

9. Tarif Singh PW-8 in whose farm Ajay @ Sunder Pal used to work stated that he had given mobile phone No. 9718373583 to Rinku who was the cousin of Ajay @ Sunder Pal. Rinku left the job in March 2013. In cross-examination he stated he had employed 7-8 labourers. He was an agriculturist and used to cultivate around 3 acres of land and for that purpose he had employed Arjun, Arun, Vinod, Deepak, Rinku, Vakil @ Lambu, Yadav and Ajay @ Sunder Pal. He used to grow mushrooms from August to March and Ajay @ Sunder Pal was working with him for the last 6-7 years prior to the incident. He had attended the marriage of Ajay in the month of May 2011 being his employer. There were around 40-50 baratis and he had no knowledge whether any car, motor-cycle or other vehicle being given in the dowry. It was a simple marriage with normal gifts like TV, bed, almirah and sofa and no dowry demand was made in his presence. He further stated that mushroom harvesting used to start at about 5.00-6.00 PM and continued till 12.00-1.00 AM in the night. On September 01, 2011 Tarif along with Ajay @ Sunder Pal and other labourers were working in the field till 11.45 PM and thereafter he had gone to his house. After he reached, in 15 minutes he received information from Rinku regarding wife of Ajay becoming unconscious. He reached at the house of Ajay within 10 minutes of receiving the information where he found other labourers, brother and uncle of Ajay and two more residents. Ajay and his brother along with the deceased had started from the fields to the hospital. Tarif and Ajay's maternal uncle accompanied them. When they were on the way Ajay's brother told that wife of Ajay had expired. So they returned to the field instead of taking the wife of Ajay to the hospital. He told Ajay's maternal uncle to inform the father of the deceased. After the death again intimation was given to the father of the deceased. Parents of deceased reached at the house of Ajay at around 6-7 AM. At around 9.00 AM the father and other relatives informed the Police which arrived at 10.00 AM. The SDM of the area also reached and remained on the spot for half an hour.

10. Ajay @ Sunder Pal in his statement under Section 313 Cr.P.C. denied the phone call made to Hari Chand and his wife however admitted the call made by

his elder brother Rajinder to Hari Chand. Thus, though Ajay denied the first call but in answer to question No. 5 admitted that the second call was made by his brother to Hari Chand. He also admitted that Hari Chand spoke to his maternal uncle on the phone where after it was disconnected. The version of Ajay @ Sunder Pal in his statement under Section 313 Cr.P.C. on the phone calls made is :

"Q.2: It is in evidence against you that on 02.09.2011 at about 2:00 am father of deceased PW5 Sh. Hari Chand received a telephonic call from her daughter Laxmi and asked her "Laxmi kya baat hui itni raat ko kaise phone kiya" and deceased Laxmi told her father "Papa baat mat pucho, meri baat jaldi se mummi se kara doo". What have you to say?

Ans. It is incorrect.

Q.3: It is in evidence against you that thereafter Hari Chand handed over his mobile phone to his wife Smt. Kamlesh and deceased Laxmi asked her mother "mummy tum in logo se chup kar aao aaj ye log muzhe nahi chodege" and in the meantime the mobile phone was disconnected. What have you to say?

Ans. It is incorrect.

Q.4: It is in evidence against you that PW Sh. Hari Chand heard that somebody had snatched the mobile phone from her hand and got switched off and PW 5 Hari Chand also heard the said conversation as he was sitting nearby his wife. What have you to say?

Ans. It is incorrect.

Q.5: It is in evidence against you that after 5-7 minutes thereafter a call was again received on mobile phone of PW-5 Hari Chand and the said call was made by your elder brother Rajinder and he called Hari Chand to the matrimonial house of his daughter. What have you to say?

Ans. It is correct.

Q.7: It is in evidence against you that your maternal uncle also talked with PW-5 Hari Chand and thereafter the phone was disconnected. What have you to say?

Ans. It is correct.

Q.8: It is in evidence against you that after 10-12 minutes a telephonic call was again made by your elder brother Rajinder to PW-5 Hari Chand and thereafter he handed over the said mobile phone to you and you also asked parents of deceased Laxmi to come and said "abhi gadi karke aa jao, agar nahi aaye to mein dekh lunga, agar paise nahi hai to main de dunga, tumhari ladki mar gai hai". What have you to say?

Ans. It is correct that my brother had called the parents of the deceased to inform about the death of deceased Laxmi but it is incorrect that thereafter my brother handed over the said mobile phone to me and I asked parents of

deceased Laxmi to come and said "abhi gadi karke aa jaaoo, agar nahi aaye to mein dekh lunga, agar paise nahi hai to main de dungo, tumhari ladki mar gai hai"

Q.9: It is in evidence against you that after receiving the above mentioned call PW-5 Hari Chand reached your house and he found the dead body of his daughter Laxmi in front of Kothra (room) in the field which was taken by you on the contract basis for agriculture. What have you to say?

Ans. It is correct."

11. Ajay @ Sunder Pal in response to the last question stated that a false case has been foisted on him and his explanation was:

"I was working in the field of Tarif Singh in Nangli Sakrawarti for the last many years with 7-8 more labourers. At the time of incident, there was a season of mushroom crop and all labourers used to work till late night i.e. 12.00 - 1.00 AM. On the day of incident, we left the field at about 11.15 PM and I went to my house where I found my wife in injured and unconscious condition outside the house. I informed my brother and relatives about her condition and on this they came to my house. My brother informed to landlord Tarif Singh about the condition of my wife deceased Laxmi and he also reached at the spot. In the meantime, some of my relative intimated to my in-laws on phone about the condition of my wife. Thereafter immediately I along with my brother, landlord and one more person left for hospital for treatment of my wife on motorcycle. When we were on the way my wife expired and we brought her back to the house. My brother and my maternal uncle made few mobile calls to my in-laws about death of my wife. They intimated that last ceremony may be performed but on repeated request of my maternal uncle and brother they agreed to come to my house, hence, in the morning hours the parents of deceased came to my house and again directed us to perform last rites of deceased. Thereafter, the father of deceased left our house for his house. In the meantime, some relatives of the deceased also reached there and one of them who claim to be a police personal made a call at 100 no. I have never demanded anything from my in-laws or from my wife nor I treated my deceased wife with any cruelty. It is unfortunate incident which shocked me and ruined my married life. It is a false case. I am innocent.

12. Assailing the impugned judgment learned counsel for the appellant contends that the present is a case of blind murder. The appellant was not present when his wife was injured and only on reaching home at night, he found her injured and unconscious outside the house. The onus was on the prosecution to prove that the appellant was present at his house when the incident took place which it failed to discharge. Section 106 of the Evidence Act would have application only when the prosecution has been able to prove that the appellant was present at home. Reliance is placed on the decision reported as 168 (2000) DLT 406 Balbir Singh Vs. State. It is further stated that if there are two views possible than the

one in favour of the accused should be accepted and the accused is entitled to an acquittal in such a case. Referring to question No. 2 in the statement under Section 313 Cr.P.C. noting the statement of Hari Chand PW-5 who deposed that the first call was received at 2.00 AM, it is stated that the call at 12.20 on the intervening night of September 1 and 2, 2011 has not been put to the appellant and thus cannot be used against him. Reliance is placed on , 2008 v. AD (Cr.) (SC) 423 Asraf Ali Vs. State of Assam.

13. From the evidence on record it is amply clear that mobile phone No. 9873552411 though in the name of Ravinder was being used by Hari Chand and he received four phone calls in the intervening night of September 01 and 02, 2011 from mobile phone No. 9718373583 which though in the name of one Smt. Brahmwati was being used by Rinku who was the cousin of Ajay @ Sunder Pal, however at the time of incident was with Ajay. Further call record of mobile No. 9873552411 used by Hari Chand would reveal that he received the four phone calls from mobile No. 9718373583 at 0.20 hours, 1.02 hours, 1.30 hours and 2.26 hours on September 02, 2011. Though Hari Chand in his deposition stated that the first call was received from his daughter at 2.00 AM but PW-6 Kamlesh clarifies that the call from the daughter was received in the night at about 12.00 or 1.00 AM on her husband's telephone when she spoke to her. Version of Kamlesh is corroborated by the CDR as noted above, the first call being at 0.20 hours of September 02, 2011. The version of both Hari Chand and Kamlesh is consistent that in the said phone call Laxmi hurriedly spoke to her mother, the same being a distress call wherein she stated "Mummy jaldi aaja yey mujhe aaj nahin chodenge". The next call was made by Rajinder brother of Ajay @ Sunder Pal calling them at the matrimonial home of Laxmi informing that their daughter had become unconscious. In the further calls information regarding death of Laxmi was given.

14. Kamlesh PW-6 clearly stated that in the first call she first spoke to Ajay @ Sunder Pal who handed over the phone to his daughter where after the phone was disconnected and she heard the noise of falling down of the mobile phone. As per the suggestion put to this witness, Ajay @ Sunder Pal was working in the mushroom field of Tarif Singh till 11.30 PM where after he returned at home. From the evidence of Tarif Singh PW-8 in whose field the appellant worked and as per Ajay's own statement under Section 313 Cr.P.C. Ajay had left the field latest by 11.30 PM on September 01, 2011. Thus, in any case Ajay @ Sunder Pal reached his house before 12 midnight on September 01, 2011 and the distress call by his wife was made at 0.20 hrs. on September 02, 2011. At 0.20 hours of September 02, 2011 before deceased Laxmi spoke to her parents, Ajay @ Sunder Pal spoke to her mother. Thus it is established that Ajay @ Sunder Pal was at home when the deceased spoke to her parents. The plea of Ajay @ Sunder Pal that on reaching home he found his wife injured and unconscious outside the house is thus unsubstantiated. Since from the evidence on record it is proved beyond reasonable doubt that when Ajay reached his house, deceased was alive, in view of Section 106 of the Evidence Act the onus shifts on him to

explain how Laxmi died.

15. This Court in the decision reported as (2010) 2 SCC 1563 Mukesh Vs. State authored by one of us Pradeep Nandrajog, J. noted the various decisions of the Supreme Court on the issue of onus on the accused under Section 106 of the Indian Evidence Act and held:

"52. Having examined the decisions of the Supreme Court on the point of death of a wife in her matrimonial house, we deem it appropriate to classify the said judicial decisions into undernoted 4 broad categories for the reason we are finding considerable confusion in the minds of the subordinate Judges as to the correct position of law:

I. In the first category fall the decisions where it is proved by the prosecution that the husband was present in the house when the wife suffered a homicidal death and rendered no explanation as to how his wife suffered the homicidal death. See the decisions reported as State of Rajasthan v. Parthu , (2007) 12 SCC 754, Amarsingh Munnasingh Suryavanshi v. State of Maharashtra , AIR 2008 SC 479, Ganeshlal v. State of Maharashtra , (1992) 3 SCC 106, Prabhudayal v. State of Maharashtra , (1993) 3 SCC 573, Dynaneshwar v. State of Maharashtra , (2007) 10 SCC 445, Trimukh Maroti Kirkan v. State of Maharashtra , (2006) 10 SCC 681, Bija v. State of Haryana , (2008) 11 SCC 242 and State of Tamil Nadu v. Rajendran , (1999) 8 SCC 679;

II. In the second category are the decisions where the prosecution could not prove the presence of the husband in the house when the wife suffered a homicidal death but the circumstances were such that it could be reasonably inferred that the husband was in the house and the husband failed to render any satisfactory explanation as to how his wife suffered a homicidal death. The circumstances wherefrom it could be inferred that the husband was in the house would be proof that they lived in the house and used to cohabit there and the death took place in such hours of the night when a husband was expected to be in the house i.e. the hours between night time and early morning. See the decisions reported as State of U.P. v. Dr. Ravindra Prakash Mittal , (1992) 3 SCC 300 and Narendra v. State of Karnataka , (2009) 6 SCC 61.

III. In the third category would be proof of a very strong motive for the husband to murder his wife and proof of there being a reasonable probability of the husband being in the house and having an opportunity to commit the murder. In the decision reported as Udaipal Singh v. State of U.P. , (1972) 4 SCC 142 the deceased wife died in her matrimonial home in a room where she and her husband used to reside together. The accused- husband had a very strong motive to murder the deceased which was evident from the letter written by him to his mistress, which letter clearly brought out the feeling of disgust which the accused had towards the deceased. The accused had the opportunity to commit the murder of the deceased as there was evidence to show the presence of the accused in the village where the house in which the deceased died was situated

at the time of the death of the deceased. Noting the facts that the accused had a strong enough motive and an opportunity to murder the deceased, noting that there was no evidence that the appellant was seen in his house by anybody, the Supreme Court convicted the accused.

IV. In the fourth category are the decisions where the wife died in her matrimonial house but there was no evidence to show presence of the husband in the house at the time of the death of the wife and the time when the crime was committed was not of the kind contemplated by the decisions in category II and was of a kind when husbands are expected to be on their job and there was either no proof of motive or very weak motive being proved as in the decision reported as *Khatri Hemraj Amulakh v. State of Gujarat* , AIR 1972 SC 922 and *State of Punjab v. Hari Kishan* , 1997 SCC Cri. 1211."

16. As noted above it has been proved by the prosecution that Ajay was present when Laxmi was alive and soon thereafter she was found murdered by smothering. Having not explained how Laxmi died an adverse inference is required to be drawn under Section 106 of the Evidence Act against Ajay.

17. Statement of Laxmi made to her mother soon before the incident, i.e. "Mammi Jaldi aaja yeh mujhe nahi chodenge, main ja rahin hoon yeh mujhe maar denge", is required to be treated as a dying declaration and is admissible under Section 32 of the Evidence Act as the same explains the circumstances resulting in the death of the deceased. The issue whether the statement made before the death occurs, if it explains the circumstances of the transaction which results in death, is relevant and admissible came up for consideration before the Privy Council in the decision reported as , AIR 1939 Privy Council 47 *Pakala Narayana Swami Vs. Emperor* and it was held:

"The first question with which their Lordships propose to deal is whether the statement of the widow that on 20th March the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive payment of his dues was admissible under Section 32(1), Evidence Act, 1872. That Section provides:

Statements written or verbal of relevant facts made by a person who is dead... are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question.

A variety of questions has been mooted in the Indian Courts as to the effect of this Section. It has been suggested that the statement must be made after the

transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae." Circumstances must have some proximate relation to the actual occurrence: though, as for instance, in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose. It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that the cause of (the declarant's) death comes into question." In the present case the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on 21st March or 22nd March: and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted."

18. Reliance of learned counsel for the appellant on the decision reported as *Asraf Ali* (supra) is misconceived. In the present case though Hari Chand stated that his daughter called up in the night at about 2.00 AM however his wife deposed that Laxmi called up at about 12.00 or 1.00 AM which is further corroborated by the telephone call records. Minor variation of time is bound to occur when somebody is woken up in the midst of night. Failure to state the exact time by Hari Chand and thus incorrect time of call being put to Ajay in the statement under Section 313 Cr.PC has caused no prejudice to Ajay for the reason statement of Smt. Kamlesh Ex.PW-6/A and the phone call records have been duly put to Ajay in his statement under Section 313 Cr.P.C. Learned counsel for the appellant has not been able to demonstrate any prejudice caused.

19. In view of the aforesaid discussion the impugned judgment of conviction and order on sentence are upheld. Appeal is dismissed.

20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

21. TCR be returned.