
(2014) 05 DEL CK 0048

In the Delhi High Court

Case No : Crl. A. 320/1998

Anees

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 315

Evidence Act, 1872 — Section 106

Penal Code, 1860 (IPC) — Section 302, 304B, 306

Citation : (2014) 05 DEL CK 0048

Hon'ble Judges : Sanjiv Khanna, J;G.P. Mittal, J

Bench : Division Bench

Advocate : Shahid Azad, Mohd. Aslam and Mr. Shabana Ahmed, Advocate for the Appellant; Rajdipa Behura, APP for State, Advocate for the Respondent

Final Decision : Dismissed

Judgement

G.P. Mittal, J.—Appellant Anees impugns the judgment and the order on sentence dated 28.07.1998 passed in Sessions Case No. 176/1996 arising out of FIR No. 728/1995 whereby he was convicted for the offence punishable u/s 302 of the Indian Penal Code, 1860 (IPC for short) for committing murder of his wife Saira and was sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/-. In default of payment of fine, the appellant was directed to suffer rigorous imprisonment for six months.

2. Facts leading to the registration of FIR No. 728/1995, Police Station Gokal Puri and appellant's trial for the offence punishable u/s 302 IPC can be culled out from para 3 of the impugned judgment as under:-

On 29.12.95 at about 4.45 p.m. wireless operator of Delhi Police informed that P.S. that he had received the information from Lady Ct. Munni Khan that one lady had been stabbed near the factory premises of Veerpal in H. No. 222, Gali No. 3, Old Mustafabad and some officer may be sent at the spot. The information was reduced into writing in the form of DD No. 25-A and copy was given to SI

Mohkam Singh for inquiry. He alongwith his staff and SHO of the P.S. rushed to the spot. The dead body of deceased Mst. Shahida was found lying in the pool of blood in the courtyard of the house. There were deep stab wounds in the abdomen and other parts of the body. Her husband Anis, the accused of the case, was also present at the spot. He was having simple injuries on his left arm. Both of them were sent to the hospital. Doctor examining the deceased Shahida reported that she had been brought dead. Accused Anis was declared fit for statement and was discharged after bandaging. During inquiry, it emerged that accused was fed up from the activities of the deceased as she used to leave the house without his permission and returned (sic return) late in the night and indulged in undesirable activities. Occurrence was also result of the altercation they had on that night about the late coming of the deceased and her refusal to disclose as to where had she gone. During investigation, the IO recorded the statement of the small daughter of the couple who told that she was sleeping and on hearing the shouting and cries, got up and saw her father raining knife blows on the person of her mother. The postmortem of the deceased was conducted and her bloodstained clothes were sent to CFSL. Accused also got the weapon of offence namely the dagger recovered which he alleged to have thrown in the drain of dirty water. Since there was no blood on the knife and it was wiped out, knife was not sent to CFSL. After receiving the reports from the CFSL as to the serological examination and recording the statement of the witnesses and after completing other formalities of the investigation, police filed the Challan against the accused for the offence punishable u/s 302 IPC ...

3. In order to establish its case, the prosecution examined 17 witnesses. The prosecution relied upon direct evidence in the shape of testimony of Shaheena (PW-3), the appellant's and the deceased's daughter who was projected as an eye witness by the prosecution. The prosecution also relied upon circumstantial evidence in the shape of absence of any reasonable explanation by the appellant as to how his wife Ms. Saira suffered fatal injuries in her own house in the appellant's presence in the early hours of 29.12.1995. Motive for commission of the crime was projected as illegal demand of money from relations of the deceased and harassment for not meeting the demands. Evidence was led through Shakeel Ahmed (PW-4) and Rafiq Ahmed (PW-11), brother and father of the deceased respectively that she was even divorced by the appellant. PWs 4 and 11 deposed that they paid a sum of Rs. 50,000/- to the appellant and only then the appellant remarried the deceased and took her along.

4. Shaheena (PW-3) did not support the prosecution case and was declared hostile. The Trial Court opined that Shaheena (PW-3) was between the devil and the deep sea as she did not want to lose her father (the appellant) after having lost her mother in the gruesome incident of 29.12.1995 and thus, her non-supporting the prosecution case was explainable. The alleged recovery of the weapon of offence, i.e. dagger Ex. P-1 was held to be immaterial as the same was not connected to the offence because of absence of any blood thereon. The Trial Court rejected the appellant's explanation that deceased Saira suffered

injuries at the hands of two unknown intruders and in the absence of any plausible explanation as to how the deceased suffered injuries and the appellant being the only person present with her (Shaheena being a small child of five years), held the appellant guilty for Saira's murder and convicted him. The Trial Court rejected the explanation given by the appellant on the ground, inter alia, that the appellant could not have escaped with some superficial injuries while his wife (the deceased) received 14 incised injuries, out of which three were fatal injuries, i.e. injuries No. 10, 11 and 12 which individually and collectively were sufficient to cause death in the ordinary course of nature. In para 25 of the impugned judgment, the Trial Court observed as under:-

25. It may be stated at the very outset that the defence of the accused though it cannot be used against him for any purpose whatsoever nor can be used for corroboration of the prosecution case, appears to be palpably implausible. According to him, some strangers who were two or three in number, intrudes (sic intruded) in the house and started giving knife blows to him as well as to the deceased. His child who was very small and aged about four or five years has also stated the same thing and was declared hostile. It is not understandable as to how did his wife was inflicted such a large number of knife injuries whereas he had only simple injuries. Secondly, he did not disclose this fact either to the police why inquiry was made from him nor did he lodge any report to this effect. It appears that the defence was taken only for the sake of defence. Knowing it well that its basis was so feeble and weak that nothing can stand on it.

5. The learned counsel for the appellant urges that an accused in a criminal trial is not expected to prove his defence or give an explanation which may prove his case beyond reasonable doubt. He can do so by leading evidence to prove his defence on the test of preponderance of probability only. It is urged that to prove his version the accused/appellant can refer and rely on the evidence produced by the prosecution or can independently lead defence evidence. The learned counsel thus, states that the explanation given by the appellant in his statement u/s 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) that the injuries inflicted on the deceased was the handy work of the two intruders ought to have been accepted by the Trial Court as the appellant could not have done anything more than stating the same.

6. The learned counsel for the appellant criticised the impugned judgment urging that the Trial Court acted on surmises and conjectures while observing that the accused was repentant on his conduct and wanted to revive his wife (the deceased) and therefore, removed her to the hospital in the hope that she might still survive.

7. The learned counsel states that SI Mohkam Singh (PW-17), I.O. of the case, in his cross-examination had stated that he had questioned Shaheena (PW-3) before sending rukka to the Police Station and PW-3 had disclosed that the appellant had murdered his wife Saira. The learned counsel urges that this fact is conspicuously absent in the rukka which falsifies PW-17's testimony and thus,

PW-17 (I.O.) is unworthy of reliance and unbelievable. The learned counsel for the appellant thus, states that since the appellant's defence/explanation cannot be totally rejected, he (the appellant) is entitled to be given benefit of doubt and the Trial Court judgment is liable to be reversed.

8. On the other hand, Ms. Rajdipa Behura, learned Additional Public Prosecutor for the State contends that murder of Saira (the appellant's wife) took place within the four corners of the house in the early hours of 29.12.1995. The appellant was very much present in the house at the time of the offence and thus, these facts having been established by the prosecution, the appellant owed a reasonable explanation u/s 106 of the Evidence Act, 1872 (Evidence Act) to show as to how the deceased suffered fatal injuries. In the absence of any reasonable explanation and on the basis of last seen evidence, the appellant, argues the learned Public Prosecutor, has been rightly held guilty and convicted u/s 302 IPC by the Trial Court.

9. The question for consideration in this case is whether the explanation given by the appellant is acceptable even on the preponderance of probabilities or is merely an eye wash. At this stage, we would like to notice SI Mohkam Singh's (PW-17) testimony showing appellant's reluctance to state as to how the deceased suffered injuries. He deposed:-

On 29.12.95 I was posted at P.S. Gokalpuri. On that day DD No. 25A which is Ex. PW-5/A was entrusted to me for investigation. I along with Ct. Dhan Singh and SHO Rajbir Singh, Ct. Giasuddin and others went to the spot at Gali No. 3, H. No. 220, Old Mustafabad. At the spot, Saira, wife of Anis, was lying in injured condition at the courtyard of the house. Anis present in court, was also present there. He was also having injuries. Both the injured persons had been sent to GTB hospital in a PCR van. We left the Constable Dhan Singh at the spot and we went to GTB Hospital. I collected the MLC of Anis and Saira. On the MLC of Saira, she was declared brought dead. On the MLC of Anis, he was declared fit for making statement and his injuries were kept under observation. I had asked Anis to make his statement, but he was not fit to depose because his wife Saira has died and that he would make the statement sometimes later on the arrival of his relatives. Thereafter, on the basis of DD and circumstances, I prepared tehrir Ex. PW-17/A and sent it through Ct. Giasuddin to the PS for registration of the case ...

10. PW-17's testimony that the appellant refused to make the statement as to the incident and on the other hand, his disclosure that he would make the statement later on, on arrival of his relatives speaks volume that the appellant wanted to invent some story by gaining time. Had two intruders actually caused injuries on the person of deceased Saira as has been subsequently propounded by the appellant, he would have immediately informed the police about the same so that the culprits are immediately caught and brought to book. PW-17's testimony that the appellant wanted to make the statement later on only on arrival of his relatives was not challenged by the appellant in PW-17's cross-

examination. At this stage, it would be appropriate to advert to the explanation given by the appellant in reply to question No. 12 in his statement u/s 313 Cr.P.C. which is extracted as under:-

Q.12 Have you anything else to say?

Ans. I along with my wife, deceased, and my daughter Saina was sleeping in my house. Two persons caused injuries to my wife. I tried to save her but I was also hurt by those persons. I do not know as to why those strangers caused injuries to my wife. I am innocent. After causing the injuries those persons fled away from there.

11. The explanation that two persons had caused injuries on the person of deceased Saira was admittedly not put to PW-17 in his cross-examination. Had there been any truth in the explanation propounded by the appellant, he would not have been content to simply state that the injuries were caused by two persons, he would have given the detailed description (as far as possible) of the assailants as also the motive as to why the deceased alone was targeted particularly, when robbery was not the motive of the injuries alleged to have been inflicted by the two unknown intruders. Intrusion into the house by unknown third persons would have resulted in tell tail and revelatory evidence. There is no indication or suggestion relating to the said evidence.

12. We are conscious of the fact that burden is always on the prosecution to prove its case beyond reasonable doubt. Section 106 of the Evidence Act does not relieve the prosecution of proving essential facts and it is only when those facts are proved and further facts are/could only be in the knowledge of the accused, that the accused is expected to give an explanation. At this stage, it would be appropriate to extract Section 106 of the Evidence Act with the illustrations appended thereto as under:-

106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations:-

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

13. In Santosh Kumar Singh Vs. State thr. CBI, , referring to Trimukh Maroti Kirkan Vs. State of Maharashtra, , the Supreme Court 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. 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.

14. In a case dealing with the recovery of gold with foreign markings in *Shah Guman Mal Vs. State of Andhra Pradesh*, , the Supreme Court observed that the broad effect of the application of the basic principles underlying Section 106 of the Evidence Act would be that the onus is discharged if the prosecution adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved.

15. Recently, in *Prithipal Singh etc. Vs. State of Punjab and Another etc.*, , relying on *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, , the Supreme Court reiterated that Section 106 of the Evidence Act was not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt but the Section would apply only to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding existence of certain other facts and the accused by virtue of his special knowledge regarding such facts fails to offer any explanation which might derive the Court to draw a different inference. Paras 53 and 79 of the report in *Prithipal Singh* are extracted hereunder:-

53. In *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also *Shambu Nath Mehra Vs. The State of Ajmer*, , *Sucha Singh Vs. State of Punjab*, and *Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police*, .)

x x x x x x

79. Both the courts below have found that the appellant-accused had abducted Shri Jaswant Singh Khalra. In such a situation, only the accused person could explain as to what happened to Shri Khalra, and if he had died, in what manner and under what circumstances he had died and why his corpus delicti could not be recovered. All the appellant-accused failed to explain any inculpatory circumstance even in their respective statements u/s 313 CrPC. Such a conduct also provides for an additional link in the chain of circumstances. The fact as to what had happened to the victim after his abduction by the accused persons, has been within the special knowledge of the accused persons, therefore, they could have given some explanation. In such a fact situation, the courts below have rightly drawn the presumption that the appellants were responsible for his abduction, illegal detention and murder.

16. We do agree that the burden of furnishing explanation u/s 106 of the Evidence Act on an accused is not as heavy as is on the prosecution to establish the guilt of the accused. The onus can easily be discharged by an accused by proving his version on mere preponderance of probabilities. In *Salim Zia Vs. State of Uttar Pradesh*, , the Supreme Court held as under:-

9. This takes us to the consideration of the other crucial question viz. whether the appellant was protected by the right of private defence of person or property. It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. (See *Partap Vs. The State of Uttar Pradesh*, and *Munshi Ram and Others Vs. Delhi Administration*, .) In the instant case, however, the appellant has not discharged that burden either by adducing any defence evidence or by eliciting from the prosecution witnesses the existence of facts and circumstances satisfying the requisite test of preponderance of probabilities entitling him to exercise the right of private defence either of person or of property.

17. Similar view was taken by the Supreme Court in *T.N. Lakshmaiah Vs. State of Karnataka*, ; *Krishnan Vs. State of Tamil Nadu*, and *Jeffrey J. Diermeier and Another Vs. State of West Bengal and Another*, .

18. As stated earlier, it is proved by overwhelming evidence and is not even disputed by the appellant that deceased Saira was inflicted injuries inside the matrimonial home (of the appellant and the deceased). Initially, the appellant was completely silent as to how his deceased wife suffered injuries. He told the IO that he would make a statement later on only when his relations would arrive. As we have pointed out earlier, in cross-examination of the IO and even in his statement u/s 313 Cr.P.C., the appellant has not given the details of the

intruders. From the appellant's conduct in not disclosing to the IO as to how his deceased wife suffered fatal injuries, there was a lurking doubt even at that very time that it was only the appellant who was responsible for causing the injuries unless something material was really brought out by the appellant. Nothing prevented the appellant to have disclosed about the incident immediately when the police reached the spot that the injuries were inflicted on his deceased wife by two unknown intruders. There was no indication or giveaway to show the presence of third parties who intentionally targeted the deceased. All these facts taken together, i.e. nondisclosure of the information about the incident to the police, not giving the details of the two intruders even in his statement u/s 313 Cr.P.C. etc. would really show that the explanation given by the appellant was false which would become an additional link in the chain of circumstantial evidence in view of Mannu Sao Vs. State of Bihar, .

19. In Munna Kumar Upadhyaya @ Munna Upadhyaya Vs. The State of Andhra Pradesh Through Public Prosecutor, Hyderabad, Andhra Pradesh, , it was reiterated that if the accused gave incorrect or false answers during the course of his statement u/s 313 Cr.P.C., the Court can draw an adverse inference against him. In para 76 of the report, the Supreme Court observed as under:-

76. If the accused gave incorrect or false answers during the course of his statement u/s 313 Cr.P.C., the court can draw an adverse inference against him. In the present case, we are of the considered opinion that the accused has not only failed to explain his conduct, in the manner in which every person of normal prudence would be expected to explain but had even given incorrect and false answers. In the present case, the Court not only draws an adverse inference, but such conduct of the accused would also tilt the case in favour of the prosecution.

20. We are conscious of the fact that Shaheena (PW-3) the appellant's daughter has not supported the prosecution version that the appellant was the perpetrator of the crime. She, in fact, came out with the story which is in line with the explanation given by the appellant in his examination u/s 313 Cr.P.C. But at the same time, as stated above, no such explanation was given by the appellant to the IO when he reached the spot immediately on getting information of the incident. No such question was even put to the IO when he entered the witness box as PW-17. The appellant did not choose himself to enter the witness box u/s 315 Cr.P.C. and subject himself for cross-examination in order to explain the peculiar circumstances in which his wife was murdered within his small house. What is more intriguing is why the intruders would keep their hands off in inflicting injuries on the appellant's person who as per his own showing tried to save his wife when she was being inflicted injuries by the two intruders. Therefore, we totally reject the so-called explanation given for the first time by the appellant in his examination u/s 313 Cr.P.C. The fact that the deceased's murder was committed within the four corners of the small house in the appellant's presence and the fact that the appellant even failed to disclose to the I.O. as to how his deceased wife suffered injuries and the giving of a false

explanation unerringly point to the guilt of the appellant. It is firmly and clearly established that it was the appellant and the appellant alone who was the perpetrator of the crime.

21. It is true that SI Mohkam Singh (PW-17) had admitted in his cross-examination that the appellant's daughter had disclosed even before sending the rukka to the Police Station that the appellant had committed the gruesome act and that this fact not been mentioned in the rukka does not in any way belies the prosecution version. Perhaps the I.O. thought that it would be inappropriate to record the statement of a child aged about five years for the purpose of registration of an FIR against her father and to first independently investigate and come to more solid evidence. It may also be mentioned that during the investigation of this case, an application was moved by the appellant's father for getting the statement of Shaheena (PW-3) recorded u/s 164 Cr.P.C. which was not recorded by the learned Metropolitan Magistrate as the child was found to be tutored. It seems that the I.O. preferred not to be criticised for getting the case registered on the basis of statement of a child of tender age. And so he did not record Shaheena's (PW-3) statement in the rukka.

22. We are conscious of the fact that Shaheena (PW-3) has not supported the prosecution version that her father, the appellant had caused injuries on the person of her deceased mother. The same, however, is of no consequence as the child was of tender years and as observed by the Trial Court was tutored by the appellant's father. The appellant, however, cannot make any advantage if PW-3 did not support the prosecution version.

23. We are not going to attach much importance to the alleged harassment and the demand of dowry by the appellant because of the contradictions and the discrepancies in the statements of PWs 4 and 11. Otherwise also, this is not a case u/s 306/304B IPC and thus, the alleged harassment was of no consequence and could at best have provided some motive for commission of the crime.

24. In view of the foregoing discussion, we are of the view that the appeal is devoid of any merit; the same is accordingly dismissed. The judgment and order on sentence passed by the Trial Court are affirmed.

25. The appeal stands disposed of in above terms.