

(2017) 02 CAL CK 0053
In the Calcutta High Court
Case No : Death Reference No. 03 of 2016

State of West Bengal

APPELLANT

Vs

Lal Chand Mia

RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 433A
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 498A

Citation : (2017) 2 CalLT 64 : (2017) CriLJ 2324

Hon'ble Judges : Nadira Patherya and Debi Prosad Dey, JJ.

Bench : Division Bench

Advocate : Mr. Sudipta Maitra, Mr. Amjad Ali and Mr. Mausam Ali Sarder, Advocates, for the Appellant; Mr. Manjit Singh, Mr. Paban Kumar Gupta, Mr. Rudradipta Nandy and Mr. Pratick Bose, Advocates, for the Plaintiffs/Respondents

Final Decision : Dismissed

Judgement

Debi Prosad Dey, J.—This death reference arises out of the judgment and order of conviction passed by the learned Additional Sessions Judge, Mathabhanga, Cooch Bihar in sessions trial No. 07(05)/2013 (arising out of sessions case No. 420/2012) whereby and where-under the learned Additional Sessions Judge, Mathabhanga, Cooch Bihar convicted Lal Chand Mia alias Abdul Latif for the offence under Section 302 and 498A of the Indian Penal Code and sentenced him to suffer death for the offence under Section 302 and to suffer three years simple imprisonment for the offence under Section 498A of the Indian Penal Code.

2. Lal Chand Mia alias Abdul Latif has also preferred an appeal against the said judgment and order of conviction which has been registered as criminal appeal No. 227 of 2016.

3. The death reference case No. 03 of 2016 is accordingly taken up along with criminal appeal No. 227 of 2016. The appellant was charged under Section 302

and 498A of the Indian Penal Code for causing death of his wife.

4. The parents in law of the deceased and the brother of the appellant also were charged under Section 120B/302 of Indian Penal Code and 498A of Indian Penal Code. Learned Trial Court however acquitted the parents in law and brother in law of the victim. The appellant has been convicted for the offence under Section 302 and 498A of the Indian Penal code and thereby learned trial Court has sentenced the appellant to death for the offence under Section 302 of Indian Penal Code and simple imprisonment for 3 years for the offence under Section 498A of Indian Penal Code.

5. The case of the prosecution as unfolds in the first information report is that Feroja alias Ferbanu Bibi got married with the appellant a year ago from the date of occurrence. Ferbanu Bibi used to reside with the appellant and his parents and brother. The appellant had married one Noor Banu Bibi prior to his marriage with Ferbanu. Noor Banu Bibi had given birth to two sons as a result of her wedlock with the appellant. The appellant divorced Noor Banu Bibi and thereafter the appellant got married with Ferbanu Bibi. Within 2-3 months of the marriage with Ferbanu Bibi, Noor Banu Bibi started visiting the house of the appellant on the plea of visiting her sons. Dispute cropped up between Ferbanu Bibi and the appellant over the issue of visit of Noor Banu Bibi. In the meantime Ferbanu Bibi became pregnant and she was pregnant for 10 months at the time of such occurrence. The foetus also died due to the death of Ferbanu Bibi on 21st day of September, 2010. All the accused assaulted Ferbanu Bibi and the appellant assaulted Ferbanu Bibi with the help of other accused persons. The appellant strangled Ferbanu Bibi with the thick silver chain she was wearing and thereby committed murder of Ferbanu Bibi. The father of Ferbanu Bibi came to know about such incident over a phone call from an anonymous person and rushed to Mathabhanga hospital. The dead body of his daughter with marks of strangulation was found lying in the hospital. Defacto complainant lost his orientation and he was mentally shattered. On gaining his orientation after some time, he had been to Mathabhanga police station to make enquiries and came to know that police did not take any action. The defacto complainant was mentally shattered on account of death of his daughter and he was busy in performing the last rites of his daughter and that is why there was delay in lodging the complaint. On the basis of such written complaint Mathabhanga Police Station case No. 257/2010 dated 9th October, 2010 was started under Section 498A and 302 of Indian Penal code. After completion of investigation, the investigating officer submitted charge sheet against the appellant and 3 others.

6. Trial Court after hearing both sides and considering the materials on record framed charge under Section 302 and 498A of Indian Penal Code against the appellant and 120B/302 of Indian Penal Code against the remaining 3 accused persons, who were ultimately acquitted by learned trial Court. In all the prosecution has examined as many as 18 witnesses. The prosecution has also produced some documentary evidence viz. the formal FIR(exhibit 6), written

complaint(exhibit 4 and 4/1), inquest report conducted by Executive Magistrate(exhibit 3/2), sketch map of the place of occurrence with index(exhibit 7), report of post mortem examination of the victim (exhibit 5) and some other documents.

7. The appellant was examined under Section 313 of the Criminal Procedure Code. The appellant did not adduce any evidence in support of his case. Thereafter learned trial Court convicted the appellant for the offence under Section 302 and 498A of the Indian Penal Code.

8. It would not be out of place to mention in brief about the evidence adduced by the prosecution in order to appreciate the case of both the parties.

9. Prosecution witness no.1 Janab Ali Mia stated that his daughter got married with the appellant as per Muslim Rites and Customs and for the first 2 months his daughter was living happily at her matrimonial home. The first wife of the appellant was divorced by the appellant. Thereafter the appellant got married with the daughter of prosecution witness no.1. Noor Banu Bibi the first wife of the appellant started visiting the house of the appellant after 2 months of the marriage of Ferbanu Bibi to which Ferbanu Bibi protested. Being aggrieved by such protest Lal Chand Mia used to assault her. On several occasion prosecution witness no.1 requested Lal Chand Mia and his father and mother to restrain Noor Banu Bibi from visiting the house of Ferbanu but they did not pay any heed to his request. In the fateful night, prosecution witness no.1 got information over phone that his daughter became ill and he went to Mathabhanga hospital and found the dead body of his daughter. Prosecution witness no.1 further stated that after some time he filed a written complaint and one Pintu Mia scribed the written complaint as per his dictation and thereafter he had put his left thumb impression on the written complaint.

10. It is therefore, apparent from the evidence of prosecution witness no.1 that PW1 has specifically admitted his left thumb impression on the written complaint and that such written complaint was scribed at his behest by one Pintu Mia. In his cross examination prosecution witness no.1 has admitted that he had conversation with the police in the hospital and at that time he did not state about the incident to the police though prosecution witness no.1 stayed there for about 2 hours. He also did not enter Mathabhanga police station. It has been elicited in the cross examination of prosecution witness no.1 that Lal Chand Mia i.e. the appellant used to reside with his sons aged about 11 and 6 years respectively at the time of his marriage with Ferbanu. Prosecution witness no.1 also did not inform the neighbours of Lal Chand Mia regarding the visit of Noor Banu Bibi in the house of Lal Chand Mia after his marriage with the daughter of prosecution witness no.1. It has further been elicited in the cross examination of prosecution witness no.1 that the accused persons took his daughter to Mathabhanga hospital and the accused persons fled away seeing the relatives of prosecution witness no.1. It has been suggested to prosecution witness no.1 that out of suspicion he had filed such false allegation against Lal Chand Mia and

others.

11. On careful scrutiny of the evidence of prosecution witness No. 1 we find that the factum of dispute between Lal Chand Mia and Ferbanu over the issue of visit of the first wife of Lal Chand Mia is admitted. It is true that prosecution witness no.1 was not present at the time of occurrence and prosecution witness no.1 had lodged the F.I.R. after 18/19 days from the date of death of Ferbanu. The delay has been properly explained by prosecution witness no.1. Admittedly, prosecution witness no.1 is an illiterate person and he gave his left thumb impression on the first information report. A poor villager who is a resident of the border of Bangladesh and India definitely has no courage to enter into the police station so as to enquire as to what steps had been taken by the police. Seeing the police personnel who had conducted inquest over the dead body of the victim, prosecution witness no.1 was satisfied that police would take appropriate steps against the accused. However, on enquiry he came to know after some days that police had not taken any step therefore he lodged the written complaint with the help of prosecution witness No. 9. Admittedly, the source of knowledge of prosecution witness no.1 regarding the illness of his daughter has been admitted by the appellant during his examination under Section 313 of Criminal Procedure Code vide question no.28. It is therefore, apparent from such evidence of prosecution witness no.1 that Ferbanu within 10 months of her marriage in her advanced stage of pregnancy died in her matrimonial home. Secondly, dispute arose between Ferbanu and her husband over the issue of visit of the first wife of the appellant. Thirdly, the appellant and his relatives took Ferbanu to the hospital where she was declared as "brought dead". The accused persons fled away seeing the relatives of the defacto complainant. Prosecution witness no.1 is not a witness of the occurrence and except the aforesaid circumstances, we do not find anything from the evidence of prosecution witness no.1.

12. Prosecution witness No. 2 Amina Bibi is the wife of prosecution witness no.1 and she has fully corroborated the evidence of prosecution witness no.1 in her examination in chief. Admittedly, prosecution witness no.2 also did not state anything to the police but she has corroborated the aforesaid circumstances as has been elicited from the evidence of prosecution witness no.1. It is apparent from the cross examination of prosecution witness no.2 that in the preceding night appellant and his father visited their house at night and prosecution witness no.1 and 2 gave the appellant one new bicycle. This fact further corroborates that the poor father of the victim had acceded to the demand of his son-in-law by making over a new bicycle.

13. Prosecution witness No. 3 Omar Ali Mia has also corroborated that there was dispute between Lal Chand Mia and Ferbanu over the issue of visit of the first wife. Prosecution witness no.3 accompanied prosecution witness no.1 to Mathabhanga hospital and he saw the dead body of Ferbanu. The cross examination of prosecution witness no.3 will be of no help to the defence since

prosecution witness no.1 and 2 have categorically stated that they never informed the police at that time. It has been elicited in the cross examination of prosecution witness no.3 that there was no village salis over the issue of Lal Chand Mia keeping relation with his first wife. On careful consideration of such evidence of prosecution witness no.3 it may be stated that prosecution witness no.3 has also supported and corroborated the fact that a dispute cropped up between Lal Chand Mia and his wife over the issue of visit of his first wife.

14. Prosecution witness No. 4 Biplab Dutta is a professional photographer who took photograph of a dead body of a female having no personal knowledge about the occurrence.

15. Prosecution witness No. 5 Manik Tamang, constable No. 623 is a witness of the seizure of wearing apparels, viscera and one silver chain of the deceased and he has simply proved his signature on the seizure list vide exhibit 1.

16. Prosecution witness No. 6 Rafiqul Haque is nephew of prosecution witness no.1 and he signed on the inquest report. The signature of prosecution witness No. 6 has been marked exhibit 2 and 3 respectively in both the inquest reports. The evidence of prosecution witness no.6 appears to be formal in nature.

17. Prosecution witness No. 7 Jaheda Bibi is the maternal aunt of the deceased. Prosecution witness No. 7 had been to the Mathabhanga hospital and found the dead body of the victim. She saw froth and blood coming out from the mouth of Ferbanu i.e. the victim who was 10 months pregnant at the time of such incident.

18. Prosecution witness No. 8 Hafijar Rahaman also signed on the inquest report and he has proved his signatures there on vide exhibit 2/1 and 3/1. Prosecution witness No. 8 is also a formal witness though he has stated that at the time of such incident the victim was pregnant and he found froth and blood in the mouth of the deceased.

19. Pintu Mia, prosecution witness no. 9 scribed the first information report at the dictation of prosecution witness no.1 and he has proved the written complaint vide exhibit 4.

20. Prosecution witness No. 9 has further confirmed that prosecution witness no.1 had put his left thumb impression on the written complaint in his presence after being satisfied with the contents thereof. . Prosecution witness No. 10 Dr. Niranjana Das conducted post mortem examination over the dead body being identified by constable No. 1330 Dip Singh Lepcha of Mathabhanga police station. The evidence of prosecution witness no. 10 may be reproduced below for appropriate appreciation.

"non-continuous beaded ligature mark on neck at the level of below hyoid on left side and at the level of hyoid of right side of front neck with faint reddish bruise on back of the neck was found. Bruise was also found on both heel of feet. Petchial haemorrhage on the ligature mark was found. Blueish mark was present on both side of neck below angle of mandible with prominence on left

side. Internally there was intra muscular bleeding on neck tissues. Left side of thyroid cartilage was fractured. Gravid uterus with 36 weeks male foetus was found intact. In my opinion the death was due to asphyxia due to strangulation with thin rope (beaded) associated with throttling. The death of the foetus was due to maternal death. (carbon copy of P.M. report tendered to witness). This is the carbon copy of P.M. report prepared by me and this my original signature with official seal.(carbon copy of P.M. report is marked as Ext.-5).

Cross Examination:-

I did not find nail mark but I found blueish mark on the neck. The hyoid bone of the dead body was not fractured. (volunteers) In case of strangulation the hyoid bone usually does not fracture. Blueish mark on the neck below angle of mandible suggests impression of fingers)."

21. It goes without saying from such evidence of prosecution witness No. 10 that the victim suffered homicidal death and the injuries on the person of the victim were not self-inflicted or a result of any accident. Prosecution witness no. 11 Abhijit Dutta investigated the case and submitted charge sheet. Prosecution witness No. 11 prepared the rough sketch map with index vide exhibit 7 of the entire house of the appellant. He has also proved the formal F.I.R., seizure list, zimmanama etc. Admittedly, prosecution witness No. 11 did not find any eye witness of occurrence. Prosecution witness No. 11 did not send the seized silver chain for FSL examination and he also did not send the viscera of the deceased for chemical examination. The cause of death is apparent from the report of post mortem examination and accordingly there was absolutely no need of sending the viscera of the deceased for FSL examination. Non-examination of the witnesses by the prosecution, in absence of any cogent reason, raises absolutely no doubt in the case of the prosecution.

22. Learned Advocate appearing on behalf of the appellant contended that the FIR was lodged after 18 days from the date of occurrence and the delay in lodging F.I.R. has not been explained by the prosecution so as to remove the doubt of delay in lodging the F.I.R. and accordingly, the entire case of the prosecution ought to be viewed with suspicion only on the sole ground of unexplained delay in lodging the F.I.R.

23. Learned Advocate for the appellant further contended that PW1 and 2 were present at the time of holding the inquest by the police as well as by the Executive Magistrate yet they did not lodge any first information report against the appellant. Second branch of argument on behalf of the appellant is that the opinion of the Doctor is not conclusive to hold that the victim was actually murdered. There is absolutely no opinion of the doctor in the post mortem report to show that the victim was murdered. The doctor has simply stated that the reason for death of the victim appeared to be Asphyxia as a result of strangulation coupled with throttling.

24. Learned senior Advocate appearing on behalf of the appellant laid stress on

the word "appear" in the post mortem report by contending that the word "appear" cannot be accepted to be the conclusive opinion of the doctor in respect of homicidal death of the victim.

25. Learned Advocate for the appellant thus contended that in absence of any definite opinion from the doctor regarding homicidal death of the victim, learned Court below erroneously convicted the appellant for the offence under Section 302 of Indian Penal Code without having any conclusive opinion about the cause of the death of the victim. Learned Court below ought to have acquitted the appellant only on the ground that the prosecution has miserably failed to prove that the victim was murdered.

26. Learned Advocate for the appellant also drew the attention of the Court about the authenticity of the first information report and pointed out that the first information report was the result of deliberation between the parents of the victim and their relatives and was nothing but guess work on the part of the prosecution in order to rope in the appellant in a false charge of murder that too after 19 days from the actual date of occurrence without any explanation thereof. The edifice of the prosecution case thus becomes doubtful and cannot be relied on.

27. Learned Advocate for the appellant also contended that the left thumb impression of prosecution witness no.1 has not been proved and thus the prosecution has failed to prove the first information report. It is submitted on behalf of the appellant that the neighbouring witnesses, though examined by the investigating officer during investigation, have not been produced and examined at the time of Trial without any explanation and thereby the entire case of the prosecution ought to be viewed with suspicion for non-examination of neighbouring witnesses.

28. No death certificate has been seized or produced by the prosecution though the case of the prosecution is that the doctor examined the victim and gave a certificate to the effect that the victim was "brought dead" to the hospital. The prosecution has miserably failed to produce any document to show any such certificate said to have been given by any doctor and the prosecution has also failed to produce any doctor said to have examined the victim at the hospital.

29. Learned Advocate for the appellant further contended that the Executive Magistrate while holding the inquest over the dead body, found blood and semen in the vagina of the deceased. Secondly, it is apparent from the evidence of PW1 and 2 that the appellant and his father had been to the house of prosecution witness no.1 the proceeding night of such occurrence and one bicycle was given by prosecution witness no.1 to the appellant. All such circumstances lead to the definite conclusion that the relationship between the parties was cordial and there was absolutely no ill feeling amongst the parties to accept the case under Section 498A of the Indian Penal Code.

30. Learned Advocate for the appellant also drew the attention of the Court

regarding non production of the silver chain of the deceased in Court by the prosecution. It is apparent from the materials on record that the silver chain was seized by the police but the silver chain said to be of the deceased, has not been produced in Court. Non production of such silver chain also raises suspicion in the case of the prosecution. Lastly, it has been submitted that other relatives of the appellant though charged under Section 302 IPC were acquitted of such charge. Therefore, the case of the present appellant cannot be separated from the case of the other accused persons and learned Court below was not at all justified in holding the appellant guilty for the charge under Section 302 IPC ignoring the fact that the remaining accused persons have been found not guilty of the self-same charge.

31. Learned Advocate for the appellant also contended that the identification of the room of the appellant by the investigating officer in the sketch map is based on guess work.

32. Learned Advocate for the appellant further contended that the prosecution could not prove the chain of circumstances so as to hold the present appellant guilty for the charge under Section 302 IPC and learned Court below has virtually convicted the appellant on the basis of such statement of the appellant made during his examination under Section 313 Cr.P.C. and thereby came to an erroneous decision. The explanation given by the appellant during his examination under Section 313 Cr.P.C cannot be the basis of conviction. Section 106 of the Indian Evidence Act cannot take place of proof and learned Court below has wrongly interpreted Section 106 of the Indian Evidence Act.

33. Learned senior Advocate appearing on behalf of the appellant further pointed out that the of post mortem report does not justify that the deceased was actually murdered. Failure on the part of the prosecution to prove that the deceased was murdered amounts to failure of the entire case and the case of the prosecution ought to have been rejected by the Court below.

34. Per contra, learned Public Prosecutor Mr. Manjit Singh submitted that delay in lodging FIR has been properly explained by the defacto complainant in the first information report as well as in his evidence. Mr. Singh contended that the defacto complainant is an illiterate villager and resident of a remote village situated at the border of Bangladesh and India. Undoubtedly the defacto complainant was present at the time of holding inquest by police and Executive Magistrate and naturally he was under the impression that the police would take appropriate steps against the accused. The inaction of the police surprised the defacto complainant when he had been to the police station to enquire if any case had been started against the accused or not and thereafter finding no other alternative, with the help of his relatives and with the help of one law clerk of Mathabhanga Court, he filed the F.I.R. against the accused person. Considering the status of the defacto complainant as well as the reasons assigned by the defacto complainant, it may safely be stated that the delay in lodging FIR has been properly and sufficiently explained by the defacto complainant.

35. Mr. Singh contended that unexplained delay in lodging F.I.R. definitely would raise suspicion about the authenticity of the case of the prosecution. Delay in lodging the F.I.R. cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

36. Mr. Singh has relied on the following decisions in support of his contention.

State of H.P. v. Gian Chand(2001)6 SCC 71(para 12) and Dilawar Singh v. State of Delhi 2007 (12) SCC 641(para 9).

37. Mr. Singh further contended that the post mortem report conclusively proved that the death was homicidal in nature.

38. Mr. Singh has stressed on the post mortem report (exhibit 5) wherefrom it transpires that the victim aged about 20 years was of average built weighing 52 Kgs died of Asphyxia. The doctor opined that death appears to be due to asphyxia due to strangulation with thin rope(beaded) associated with throttling. Death of the foetus was due to maternal death.

39. Mr. Singh further pointed out that the doctor found blueish mark on the neck and the hyoid bone of the dead body was found fractured. The doctor has further stated in cross examination that blueish mark on the neck below angle of mandible suggests impression of fingers.

40. Learned Public Prosecutor candidly contended that the post mortem report clearly suggested homicidal death of the victim. Doctor also found bruise on both heel of feet. That goes to show that the feeble bodied victim could not resist the strangulation and she helplessly rubbed her heels at the time of breathing her last.

41. Mr. Singh contended that mere non-mention of the word homicidal in the post mortem report is not at all sufficient to hold that the death was not homicidal. The Public Prosecutor has also drawn the attention of the Court that there was no eye witness of such occurrence and the entire case of the prosecution rests upon circumstantial evidence. The doctor PW20 has simply stated that a thin rope (beaded) has been used for causing such strangulation/throttling. The witnesses have tried to establish that the silver chain of the victim was used as weapon of such murder. The evidence of the doctor has corroborated such assumption of the prosecution witnesses in respect of the weapon of murder. Since the silver chain has not been produced in the Court and

the same was also not produced before the doctor in order to ascertain that such throttling/strangulation may be caused by such silver chain, we are not in a position to accept the case of the prosecution that the strangulation was effected by such silver chain of the victim. Naturally non-production of such silver chain does not raise any doubt in the mind of the Court about the cause of death.

42. Mr. Singh has rightly pointed out that the post mortem report has clearly established that the victim was murdered. Page 451 and 452 of Modi on jurisprudence and toxicology has been relied on. "Strangulation" is defined as compression of the neck by force other than hanging. Ligature strangulation is a violent form of death, which results from constricting the neck by means of a ligature or by any other means without suspending the body. Throttling has been described as manual strangulation meaning thereby compressing with hand. The doctor found marks of finger on the neck of the deceased and as a result of such strangulation/throttling the death of the victim was caused by asphyxia. Therefore, Mr. Singh contended that there is/ was absolutely no doubt that the victim was murdered. By no stretch of imagination, it can be said that such strangulation/throttling was self-inflicted by the deceased.

43. Mr. Singh contended that non-examination of the witnesses, who were examined during investigation by the Investigating Officer, has not cast any doubt in the case of the prosecution. It is within the exclusive domain of the prosecuting agency to examine the witnesses, who are necessary for proving the case of the prosecution. Mere non-examination of any witness will not cast any doubt in the case of the prosecution. Since the case is based on circumstantial evidence, the prosecution thought it fit not to examine the witnesses and such witnesses were also not named in the charge sheet. Had it been a fact that such witnesses would have told something new and beneficial to the case of the defence, the accused had the liberty to examine such witnesses as defence witnesses. Learned Advocate for the appellant also could not show as to how and in what manner such witnesses were vital to the case of the prosecution or that as to how such non-examination of witnesses, who were examined during investigation, were vital to the case of the prosecution.

44. Lastly, Mr. Singh contended that the case of the present appellant and that of the other accused, who have been acquitted by the trial Court, is altogether different and should be viewed differently. The present appellant was charged under Section 302 and 498A of Indian Penal Code. The parents in law and the brother of the appellant were charged under Section 120 B of the Indian Penal Code read with Section 302 of Indian Penal Code.

45. Learned Trial Court did not find any evidence of criminal conspiracy against the remaining accused and accordingly was justified in acquitting the remaining accused persons for the offence under Section 120B/302 of Indian Penal Code. Learned trial Court also did not find any ingredients of offence under Section 498A of Indian Penal Code in respect of the other accused persons and that is why they have been acquitted. The case of the prosecution reveals that on the

fateful night the victim was in the exclusive custody of the appellant and it was the appellant who took the victim to the hospital on the plea of illness, where the victim was declared "brought dead" by the doctor. Therefore, the appellant is duty bound to explain as to how and in what manner the victim was murdered while she was in custody of the appellant. Learned trial Court did not find any role of other accused persons in the entire scenario of the prosecution case as unfolded by the evidence of the witnesses and therefore was justified in acquitting the other accused persons.

46. Mr. Singh learned Public Prosecutor contended that learned Trial Court was justified in singling out the appellant as the author of such crime and the person who inflicted torture upon the victim.

47. Learned Advocate for the appellant has referred the following decisions in support of his contention.

(i) 2012(4) SCC 379(Jai Prakash Singh v. State of Bihar and Anr.etc.) wherein the apex Court has emphasized the need for prompt lodging of F.I.R. this resulted in cancellation of the anticipatory bail granted.

(ii) 2004 (10) SCC 141 (State of Punjab v. Daljit Singh and Ors.) wherein the prosecution failed to explain the delay in lodging F.I.R and sending the same to Magistrate and accordingly the Apex Court did not interfere with the order of acquittal of the accused. Besides delay in lodging F.I.R, the Apex Court also did not rely on the evidences of other witnesses.

(iii) 2015(2) C.Cr. Lr. (SC) 342 (Daulat Ram @ Daulti v. State of Haryana) Wherein the prosecution failed to prove the circumstances as well as the motive of the appellant in commission of such crime. In view of the fact that other accused with similar role had been acquitted from the charge of murder, the apex Court acquitted the appellant from the charge of murder. In short, motive plays a pivotal role in a case based on circumstantial evidence.

(iv) 1993 Cr.LJ 2597 (Uttam Satta and another v. State of Punjab) relying on the extra judicial confession of the appellant, which was retracted at the time of examination of the appellant under Section 313 Cr.P.C., the High Court convicted the appellant. The apex Court set aside the said conviction since the entire case of the prosecution was based on extra judicial confession of the appellant which was subsequently retracted by the appellant.

(v) AIR 1963 SC 1094(Pyare Lal Bhargava v. State of Rajasthan) While upholding the conviction and sentence for the offence under Section 379 of Indian Penal Code, the apex Court considered the legality of the confession made by the accused during trial. The apex Court interpreted the word "appears" in Section 24 of the Indian Evidence Act and came to the conclusion that the word "appears"(in Section 24 of the Indian Evidence Act) should be read as "seems". As per Apex Court the word "appears" imports a lesser degree of probability than prove.

48. Such interpretation of Section 24 of the Indian Evidence Act has no bearing with the word "appear" of the post mortem report. Doctor opined that cause of death appeared to be asphyxia as a result of throttling and strangulation by a thin rope. Cause of death has been conclusively and definitely pointed out by the doctor. The doctor did not see the occurrence and as such the doctor incorporated the word "appear" before giving the final opinion. Therefore, the decision under reference will be in no way applicable in the given facts and circumstances of this case.

(vi) AIR 1976 SC 2423 (Ilam Singh and Ors. v. State of U.P.)

49. In a dispute between two groups, the prosecution failed to establish that the convicts were aggressors. The injury sustained by the convicts were not matching with the description given in the first information report. Considering the facts and circumstances of the case, the Apex Court acquitted the appellants.

(vii) AIR 1983 SC 66 (Mayur Panabhai Shah v. State of Gujarat) While remanding the case under Section 376 of Indian Penal Code to the High Court, the Apex Court has observed that the evidence of the doctor has got to be appreciated like the evidence of any other witness. The High Court dismissed the appeal at the time of admission and that is why the matter was remanded to the High Court by the apex Court.

(viii) 1979 SCC (Cri) 1 (Ganesh Bhavan Patel and Anr. v. State of Maharashtra)

50. Additional sessions Judge acquitted the appellants on the ground of inordinate delay in registration of first information report and further delay in recording the statements of material witnesses. The High Court reversed the order of learned Additional Sessions Judge and convicted the appellant. The Apex Court ultimately acquitted the appellants restoring the judgment of the Additional Sessions Judge considering that there was serious infirmities in the evidence of eye witnesses as well as there was inordinate delay in registration of first information report and further delay in recording the statements of material witnesses. The facts of the case under reference are not similar to the present case.

(ix) 1975 SCC (Cri) 601 (Balaka Singh and others v. The State of Punjab).

51. Nine persons were charged for the offence under Section 302 of Indian Penal Code. The names of four persons were not mentioned in the inquest report and they were acquitted but the remaining 5 persons were convicted. The prosecuting defacto complainant was found to be inimical to the accused. Considering the entire facts and circumstances of the case, the Apex Court held that the case of remaining 5 accused persons cannot be severed from the case of other acquitted accused and accordingly acquitted the appellants.

52. Admittedly, delay in lodging F.I.R. raises doubt about the authenticity of the case of the prosecution. Unexplained delay undoubtedly is fatal to the case of the prosecution. But if the delay is properly explained and the same is being

accepted by the Court as reasonable, in that event delay in lodging F.I.R. is not fatal to the case of the prosecution. At the risk of repetition, it may be stated that the defacto complainant being a hapless, illiterate villager could not even understand the importance of setting the law in motion by lodging first information report. After some time, when he recovered from the pain and grief due to death of his daughter, he went to the police station and came to know that no complaint was lodged against the perpetrator of such crime. Thereafter the defacto complainant, the illiterate villager, set the law in motion with the help of a law clerk.

53. The Hon"ble Apex Court in State of H.P. v. Gian Chand reported in (2001) 6 SCC 71, has held as follows:

Para 12 "Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

54. The Hon"ble Apex Court in Dilawar Singh v. State of Delhi reported in 2007(12) SCC 641 has held that,

Para ? 9 - In criminal trial one of the cardinal principles for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always views the allegations with suspicion and looks for asatisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

55. The delay has been properly explained by prosecution witness No. 1 and we do not find any laches on the part of the prosecution. We do hold that delay in lodging F.I.R. appears to be natural and the same has been properly explained by the prosecution.

56. Secondly, the scope and object of the inquest report has been elaborately discussed recently in the case of Radha Mohan Singh v. State of U.P. (2006)2 SCC 450 as follows:

"It is limited in scope and is confined to ascertainment of apparent cause of death-it is concerned with discovering whether in a given case the death was

accidental, suicidal or homicidal or caused by animal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted ? Details of overt acts need not be recorded in inquest report ? question regarding details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted or who were the witness of the assault is foreign to the ambit and scope of the proceedings under Section 174- No requirement in law to mention details of FIR names of the accused or the names of eyewitnesses or the gist of their statements in inquest report, nor is the said report required to be signed by any eyewitness."

The purpose of inquest report is to ascertain the apparent cause of death.

57. Therefore, it would not be prudent enough to search out any reason of such death in the inquest report except the apparent cause of death.

58. In the context of the given facts and circumstances of this case we may enumerate the circumstances proved by the prosecution from the evidences adduced by the prosecution.

(i) Ferbanu i.e. the victim was married to the appellant 11 months before the date of incident.

(ii) The victim was the second wife of the appellant.

(iii) The appellant divorced his first wife Noor Banu Bibi and thereafter got married with the victim. The first wife of the appellant Noor Banu Bibi, despite being divorced, used to visit the house of the appellant on the plea of visiting her sons.

(iv) Dispute cropped up between the appellant and the victim over the issue of visiting Noor Banu Bibi.

(v) The victim was pregnant for 9/10 months at the time of such incident.

(vi) The Post Mortem report clearly establishes that the victim was murdered due to strangulation/throttling.

(vii) The foetus of the victim died as a result of the death of victim.

(viii) The appellant took the victim to hospital and the doctor declared the victim brought dead.

(ix) The occurrence took place in the matrimonial home of the victim.

(x) The sketch map reveals that the victim and the appellant used to stay in a room.

(xi) The victim was in the custody of the appellant on the fateful night and the appellant could not explain during his examination under Section 313 Cr.P.C as to how the victim was murdered.

59. Dispute over the visit of the first wife of the appellant may safely be accepted

as the motive of commission of such murder of the victim. All these circumstances clearly lead to the irresistible conclusion that the victim was murdered in her matrimonial home while she was staying with the appellant in a particular room in her matrimonial home. Nothing has been stated by the appellant during his examination under Section 313 Cr.P.C in order to justify that the victim was murdered by anybody else or under any given circumstances.

60. That having not been done, it is well settled principle of law that the appellant is duty bound to explain the circumstances so as to remove the confusion as to who is the author of such crime, failing which, it would be just and fair to accept that the appellant is the author of such crime. Let us now look into the explanation given by the appellant during his examination under Section 313 Cr.P.C. While replying to question No. 35 the appellant has stated that Ferbanu was 10 months pregnant at the time of such incident. While answering question No. 46 the appellant has categorically stated that on the fateful night it was raining and suddenly he heard groaning of his wife and found her seriously ill. The appellant then arranged vehicle and took his wife to Mathabhanga Sub-Divisional Hospital and the doctor of that hospital declared his wife dead. He thereafter pleaded innocence. Therefore, the appellant has admitted that he was with his wife on the fated night and thereafter he took his wife to the Mathabhanga Sub-Divisional Hospital where his wife was declared dead. There is no need of examination of such doctor, who declared his wife dead since such fact has been admitted by the appellant. Secondly, the appellant is therefore duty bound to explain as to under what circumstance his wife was murdered while his wife was in his custody.

61. Acceptance of a new bi-cycle after 10 months of marriage and just before the murder of Ferbanu Bibi, does not justify cordial relationship between the parties.

62. Inquest report simply reveals apparent cause of death. The Executive Magistrate found semen and blood in the vagina of the deceased. Admittedly, Ferbanu Bibi was pregnant for 10 months on the date of occurrence. To have sex with ten months pregnant lady amounts to cruelty. It needs no proof that there was no consent on the part of such pregnant lady to have sex with her husband. The case of cordial relationship between the parties accordingly fails.

63. The circumstance, proved by the prosecution, conclusively proves that Ferbanu Bibi was murdered. It is therefore incumbent upon the appellant to offer explanation as to how and in what manner his wife was murdered.

64. It is not always possible for the prosecution to prove all the circumstances. Moreso, when such circumstance is within the special knowledge of the accused. Section 106 of the Indian Evidence Act, then comes into play to relieve the prosecution from proving such circumstance, which cannot be proved by adducing evidence. The accused is duty bound to offer explanation of such circumstance. If the accused offers false explanation or no explanation of such circumstance, the accused will be deemed to be the author of such crime.

65. This proposition of law has been accepted by the Hon''ble Supreme Court in the following decisions:-

- (i) 2007 (10) SCC 445 (Dnyaneshwar v. State of Maharashtra)
- (ii) AIR 2009 (SC) 1881 (Narendra v. State of Karnataka)
- (iii) 2014 Criminal Law Journal 4047 (State of Rajasthan v. Thakur Singh)
- (iv) AIR 2006 (SCW) 5300 (Trimukh Maroti Kirkan v. State of Maharashtra)
- (iv) 2000 SCC (Cri) 1516 (State of West Bengal v. Mir Mohammad Omar)

66. The Hon''ble Supreme Court in a latest decision reported in AIR 2016 (SC) (Cri) 717 (Chaman and Anr. v. State of Uttarakhand) has also accepted the self - same proposition of law. The victim was in the custody of the appellant. Post mortem report confirmed that the victim was murdered. The appellant could not offer any explanation as to how the victim was murdered. The Apex Court upheld the conviction of the appellant relying on Section 106 of the Indian Evidence Act.

67. In the context of the given facts and circumstances of this case, we find that the appellant also could not explain as to how Ferbanu was murdered though, admittedly, Ferbanu was in his custody till her murder. Therefore, learned trial Court was justified in holding the appellant guilty for the offence under Section 302 of Indian Penal Code.

68. Motive cannot be translated into evidence. Motive has to be ascertained from the attending circumstances. The prosecution successfully proved that dispute cropped up between the appellant and the deceased over the issue of visit of the first wife of the appellant and the said dispute may safely be accepted as motive of the appellant to do away with Ferbanu. Therefore, we also find motive of the appellant in the commission of such crime.

69. In the absence of any explanation, relying on the decisions referred to herein above and with the help of Section 106 of the Indian Evidence Act it may safely be concluded that the appellant/Lal Chand Mia is the author of such crime and he has rightly been convicted by the trial Court for the offence under Section 302 of Indian Penal Code. Appellant also did not spare the hapless parents of Ferbanu and he also accepted one new bicycle just before committing such offence. On that ground learned trial Court was also justified in convicting the appellant for the offence under Section 498A of the Indian Penal Code.

70. Unfortunately, the foetus of Ferbanu also died due to murder of Ferbanu by the appellant. The appellant has thus committed double murder. Being charged with the gravity of the offence, the trial Court has sentenced the appellant to death for the offence under Section 302 of Indian Penal Code.

71. The extreme penalty of death need not be inflicted except in rarest of rare cases. Before awarding the penalty of death, the circumstance of the offender are also required to be taken into consideration along with the circumstance of

the crime for the reason that life imprisonment is the rule and death sentence is the exception. The penalty of death sentence is warranted only in a case where the Court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstance of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. Undoubtedly, the case of the prosecution is based on circumstantial evidence.

72. Secondly, there is absolutely no history of previous conviction of the appellant. Death of a house wife is not rarest of rare case in the context of present day situation of our society. Ferbanu Bibi was pregnant for 10 months when she was murdered. The appellant has thus committed double murder.

73. There is absolutely no material before us to hold that the appellant would be menace to the society and the appellant deserves death penalty.

74. Having considered the facts and circumstances of this case, we are of considered view that learned trial Court was not at all justified in awarding death penalty to the appellant for the offence punishable under Section 302 of the Indian Penal Code. We thus commute the death sentence to life imprisonment and direct that the appellant shall suffer rigorous imprisonment for life for the offence under Section 302 of Indian Penal Code besides maintaining the fine amount awarded by the learned Trial Court.

75. In view of amendment of the Criminal Procedure Code and incorporation of Section 433A the state authorities may release a convict after 14 years despite being directed to suffer life imprisonment.

76. Though the present case is not one of "rarest of rare" to merit the death penalty, the question crops up as to if the penalty of life imprisonment with the rider under Section 433A of Code of Criminal Procedure is commensurate to the appellant's crime. In view of Section 433A of Code of Criminal Procedure the appellant may be released from imprisonment after 14 years. The formalization of a special category of sentence has been considered by the Apex Court in the decision reported in (2008)13 SCC 767 (Swamy Shraddananda v. State of Karnataka). The Hon'ble Supreme Court has directed not to release the appellant from prison till the rest of his life.

77. Relying on the aforesaid decision we thus direct that the appellant shall suffer imprisonment for life and he shall not be released from prison till completion of his actual imprisonment for 20 years. We do maintain the sentence for the offence under Section 302 of Indian Penal Code in respect of the fine amount awarded by learned Trial Court.

78. The death reference is thus answered in terms of the above direction.

79. We do also affirm the sentence for the offence under Section 498A of Indian

Penal Code against the appellant.

80. The criminal appeal is accordingly dismissed.

Let a copy of this judgment be forwarded to the trial Court along with the lower court record for information and for taking appropriate steps.

Urgent certified Photostat copy of the judgment be given to the parties, if applied for, upon compliance of all the formalities, as per usual terms and conditions.

Nadira Patherya, J.—I agree.