

(2019) 08 RAJ CK 0233
In the Rajasthan High Court
Case No : Criminal Appeal No. 1188 Of 2015

Yaseen @ Simiya @ Chimiya

APPELLANT

Vs

State Of Rajasthan

RESPONDENT

Date of Decision : 01-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 313, 374(2)
Indian Penal Code, 1860 — Section 302
Evidence Act, 1872 — Section 106, 118

Citation : (2019) 08 RAJ CK 0233

Hon'ble Judges : Sandeep Mehta, J; Abhay Chaturvedi, J

Bench : Division Bench

Advocate : Ayush Gehlot, Rajesh Panwar, M.S. Soni, N.S. Bhati

Final Decision : Dismissed

Judgement

Abhay Chaturvedi, J

1. The instant criminal appeal under Section 374(2) Cr.P.C. has been preferred by the accused appellant against the judgment and order of conviction dated 27.08.2015 passed by the learned Additional Sessions Judge, Phalodi, District Jodhpur in Sessions Case No.17/2013, whereby, the learned trial Court convicted him for the offence under Section 302 IPC and sentenced him for life imprisonment with a fine of Rs.5,000/- and in default of payment of fine, further to undergo one year's additional imprisonment.

2. Brief facts giving rise to this appeal are that on 25.12.2012, PW-5 Safi Mohd. submitted a written report (Ex.P/9) to SHO, Police Station Phalodi alleging inter alia that his daughter Saripan aged 35 years used to reside at her agricultural field situated at Sarahad Bhakariya along with her husband Yaseen @ Chimiya (the accused-appellant) and her children. On the very day i.e. on 25.12.2012 at about 8:30 am, his maternal grand daughter Maangi @ Mumtaj (PW-10) approached and told him that her father (the accused-appellant) had done away with her mother in the night intervening 24.12.2012 and 25.12.2012 by

strangling her. Thereupon, he rushed to the house of his daughter Saripan and saw that her dead body was lying on the floor of the room and she had been strangled with the aid of odhani (chundari). The accused-appellant, then, ran away after closing the door of the house. Ku. Maangi @ Mumtaj (PW-10) came out of the house through the window of the house and informed him about the incident in detail.

3. On the basis of this report, a formal FIR No.432/12 dated 25.12.2012 was registered at Police Station Phalodi for the offence under Section 302 IPC and the investigation commenced. During the investigation, Photographs (Ex.P/11-20) of the deceased Smt. Saripan were taken. The dead body of the deceased Smt. Saripan was subjected to post mortem examination by PW-7 Dr. Ravindra Parmar who found the cause of death of the deceased to be Asphyxia due to strangulation. During the investigation, following documents were also prepared by the investigating officer:

1. Panchnama Lash Ex.P/1 dt. 25.12.2012
2. Fard Supurdginama Lash Ex.P/2 dt. 25.12.2012
3. Fard Surat haal Lash Ex.P/3 dt. 25.12.2012
4. Site Plan & Site inspection memo Ex.P/4 dt. 25.12.2012
5. Seizure Memo of the clothes of the deceased (Kurta and Salwar) Ex.P/5 dt. 25.12.2012
6. Seizure Memo (odhani/chundari) used to strangle the deceased Ex.P/6 dt. 25.12.2012

The statements of witnesses were recorded by the investigating officer under Section 161 Cr.P.C.. The accused-appellant was arrested on 29.12.2012 vide arrest memo Ex.P/8. Thereafter, after thorough investigation, a charge sheet was filed against the accused-appellant for the offence under Section 302 IPC before the Magistrate concerned.

4. Since, the offence under Section 302 IPC was exclusively triable by Court of Sessions, the case was committed to the learned trial Court.

5. The learned trial Court framed, read over and explained the charges for the offence under Section 302 IPC to the accused-appellant who pleaded not guilty and sought trial. The prosecution examined as many as 14 witnesses and exhibited 21 documents in support of its case. The accused was questioned under Section 313 Cr.P.C. and was confronted with the circumstances appearing against him in prosecution evidence. He denied the same and claimed to be innocent. He further stated in his statement that he was not at the house but was at Jodhpur at the time of the occurrence and had been falsely implicated in this case out of enmity. However, no oral evidence was led in support of defence and only two documents were exhibited.

6. After hearing and appreciating the submissions advanced by the defence and the prosecution and appreciating and evaluating the evidence available on record, the learned trial Court, proceeded to convict and sentenced the appellant as above.

7. Learned counsel for the appellant has submitted that the judgment passed by the trial Court is based on surmises and conjunctures. There is no eye witnesses in this case who has seen the accused-appellant strangulating the deceased Smt. Saripan. The trial Court has committed grave error in recording a finding that appellant caused death of his wife by strangulation. It was also urged that learned trial Court has not considered the matter in the right perspective and unjustifiably placed reliance upon the statement of PW-10 Maangi @ Mumtaj who is not a reliable witness. It was submitted that from the perusal of the statement of PW-10 Maangi @ Mumtaj, it is clearly revealed that she is a child witness and in fact, had been tutored to give evidence against the appellant. She admitted in her cross-examination that she was sleeping at the time of the incident and that she had not seen the incident. He further urged that other witnesses PW-2 Allarakh and PW-3 Abdul Majid have not supported the case of the prosecution and have been declared hostile. It was further urged that the prosecution has not been able to prove any motive behind the alleged incident. It was further submitted that no proof has been offered by the prosecution to show that the photographs of the deceased Saripan were genuine. The prosecution has also failed to collect finger prints and foot prints from the place of incident and in absence of such evidence, the finding of conviction recorded by the trial Court is not sustainable and the judgment deserves to be set aside. Learned counsel for the appellant implored the Court that the appellant herein is entitled to be acquitted and the impugned judgment deserves to be set aside. In support of the arguments, the learned counsel for the appellant has placed reliance on the judgment rendered by the Apex Court in the case of Digamber Vaishnav and Ors. Vs. State of Chhattisgarh reported in AIR 2019 SC 1367, wherein, the principles of appreciating evidence of a child witness have been enunciated.

8. Learned Public Prosecutor, on the other hand, vehemently opposed the submissions advanced by learned counsel for the appellant and contended that the impugned judgment passed by the learned trial Court is based on a just and proper appreciation of fact and evidence available on record and thus, there is no ground to interfere with the findings of the trial Court. He further submitted that PW-10 Maangi @ Mumtaj, is of course, a child witness but her statement goes to show that she is a reliable and trustworthy witness. She has narrated before the Court what she had actually seen at the time of the incident. The presence of the witness inside the house at the time of the incident was natural as she was the daughter of the accused-appellant and the deceased. Learned Public Prosecutor implored the Court to dismiss the appeal.

9. We have given our thoughtful consideration to the submissions advanced at Bar; and have gone through the material available on record.

10. A perusal of the evidence adduced by the prosecution goes to show that the deceased Saripan, along with her husband (accused-appellant) and their daughter (PW-10 Maangi @ Mumtaj) used to reside at the house situated in the agricultural field at Sarahad Bhakariya. The prosecution case hinges upon the sole testimony of PW-10 Maangi @ Mumtaj. As per the prosecution case she was present at the time of incident and saw the accused-appellant strangulating her mother with the aid of Odhani (Chundari). She has clearly stated on oath before the trial Court that her father (the accused-appellant) had killed her mother Saripan with the aid of Odhani (Chundari). She has stated after the incident, that her father (accused-appellant) threatened her to go back to sleep otherwise she would also be killed. Thereafter, she fell asleep. She also stated that when she woke up in the morning, she found that the doors of the house were closed from the outside, and therefore, she came out of the house through the window and stated about the incident to her maternal grandfather (PW-5 Safi Mohd.). She further stated that she fell asleep sometime after the death of her mother. She specifically denied that the deceased committed suicide.

11. So far as the plea of the accused-appellant regarding PW-10 Maangi @ Mumtaj was not being an eye witness to the occurrence is concerned, the relevant portion of the statement of PW-10 Maangi @ Mumtaj reads as under:

"यासीन मेरे पिताजी लगते हैं। मेरी माँ का नाम सरिपन है सरिपन मर गई अब सरिपन जिन्दा नहीं है। सरिपन को मेरे पापा ने टुपा देकर मार दिया है दो साल पहले मेरी माता को मेरे पिता ने टुपा देकर मार दिया, जो रात्री के समय मारा था। उस समय मे घर में सो रही थी मैं अकेली सो रही थी मेरी माता सरिपन जो चार पायो के बीच में फर्श पर सो रही थी। मुझे सुबह उठने पर पता चला व देखा कि मेरी माता मरी हुई पड़ी थी गले में चुन्दड़ी का टुपा दिया हुआ था। मैंने मेरी माता सरिपन को मेरे पिता द्वारा टुपा देकर मारते देखा था क्योंकि उस समय मेरे पिता ने कहा कि तुम सो जावो नहीं तो तुम्हें भी मार दूंगा फिर मैं सो गई मुझे नीन्द आ गई। फिर मैंने सुबह उठने के बाद कमरे का दरवाजा बाहर से बन्द होने से कमरे की खिड़की खोलकर बाहर गई और मेरे नाना के घर जाकर उन्हें बात बताई।"

(Emphasis supplied)

"यह कहना सही है कि खाना खाने के बाद मैं, मेरी मम्मी व पापा सभी सो गये थे। सोने का समय मुझे याद नहीं है कितने बजे सोये थे। मैं व मेरी मम्मी एक चारपाई पर साथ-साथ सोये हुवे थे। दूसरी चारपाई पर मेरे पापा सोये हुवे थे। मेरी नीन्द सुबह साढ़े आठ बजे खुली थी। जब मेरी नीन्द खुली तब मैंने देखा था कि मेरी मम्मी मेरे साथ सोई हुई नहीं थी। अलग फर्श पर दो मोचों के बीच सोई हुई थी। मैंने मम्मी को जगाने के लिये आवाजें दी थी लेकिन मम्मी जगी नहीं थी।"

"मेरे पापा ने मेरी मम्मी को टुपा फर्श पर पड़ी हुई को दिया था। यह सही है कि उस समय मैं जागती होती तो जरूर रोती और चिल्लाती"

"मुझे नीन्द मेरी मम्मी को मारने के बाद थोड़ी देर में आई थी। मैं रात को नाना के यहाँ नहीं गई थी। कब्बाडी का धन्धा लोहे का धन्धा होता है। मेरे पापा कब्बाडी का धन्धा फलोदी में करते थे जोधपुर नहीं जाते थे। यह कहना गलत है कि मेरे पिताजी घटना के रोज जोधपुर हो। यह कहना गलत है कि मेरी मम्मी ने स्वयं टुपा खाया हो। यह कहना गलत है कि मुझे नीन्द आई हुई हो और टुपा किसने लगाया हो इसकी जानकारी मुझे नहीं हो।"(Emphasis supplied)

12. A perusal of statement of PW-10 Maangi @ Mumtaj goes to show that on the fateful night, she along with her parents was at the house shown in Site Plan Ex.P/4. The size of the room is 20ft.x10ft. in which two cots, apart from the

other house-hold articles, were lying. She clearly stated that she saw her father (accused-appellant) killing her mother by strangulation with the aid of an Odhani (chundari). Accused-appellant thereafter, threatened her to go to sleep otherwise she would also be killed. She further stated in her cross-examination that she went to sleep sometime after the death of her mother. Her conduct at the time of the incident was natural and compatible with the expected behaviour of a 9 year old child. She could not be expected to have behaved like a fully grown up person. On seeing her father accused-appellant, causing death of her mother and upon being threatened of dire consequences by her own father, the appellant, the child naturally became petrified and there is nothing unnatural if she fell asleep thereafter. The room where the incident was perpetrated is so small that the child even if asleep earlier, would definitely have been woken up because, it can easily be expected that the Saripan must have resisted the attempt made by the appellant to strangle her and the resultant commotion would be sufficient to shake the child out of her slumber. So the argument of the learned counsel for the appellant that at the time of incident she was sleeping and could not have seen the occurrence is not tenable, especially when she has clearly stated in her cross-examination that she went asleep some time after the death of her mother.

13. The testimony of PW-10 Maangi @ Mumtaj was also challenged on the ground of she being under the influence of maternal-grandfather, Shri Safi Mohd. (PW-5). A perusal of her statement reveals that she has admitted that she always abides by the saying of her maternal-grandfather and she does whatever she is told to do by her maternal-grandfather but at the same time, she denied to have given statement falsely upon being tutored by PW-5 Safi Mohd.. Therefore, on a meticulous analysis of her statement, we are of the firm view that she cannot be held to be a tutored witness. No reason whatsoever, has been offered by the appellant as to why the child would depose against and falsely implicate her own father, the accused-appellant for the murder of her mother, the deceased Saripan.

14. The statement of PW-10 Maangi @ Mumtaj gets duly supported by the medical evidence produced by the prosecution. PW-7 Dr. Ravindra Parmar, who conducted the post mortem examination of the deceased Saripan, stated that the cause of death of the deceased was Asphyxia due to the strangulation. He further stated that he found the ligature marks on the neck of the deceased which were caused by a cloth. The post-mortem report (Ex.P/9) was duly proved by this witness.

15. PW-5 Safi Mohd., father of the deceased and PW-6 Askar Ali, brother of the deceased have also supported the statement of PW-10 Maangi @ Mumtaj as they clearly stated that PW-10 Maangi @ Mumtaj came to the house of Safi Mohd. and told them that the accused-appellant had caused death of her mother. Thereupon, they rushed to the house of Saripan and saw that her dead body was lying on the floor and an Odhani (chundari) was tied around the neck in the shape of a ligature. PW-5 Shri Safi Mohd. informed the police and submitted a

written report (Ex.P/9). PW-9 Ahmad Khan also supported the statement of PW-10 Maangi @ Mumtaj and stated that he also went to the house of the deceased after seeing that PW-5 Safi Mohd. was going to the house of the deceased where he saw the deceased was lying on the floor and further stated that PW-10 Maangi @ Mumtaj revealed that the accused-appellant had caused death of her mother Saripan by strangulating her in the preceding night.

16. As such, the statement of PW-10 is corroborated by the medical evidence and statement of PW-5 Safi Mohd., PW-6 Askar Ali and PW-9 Ahmad Khan as well.

17. The Apex Court in the case of Digamber Vaishnav and Ors. Vs. State of Chhattisgarh (supra) has observed with regard to the testimony of the child witness at para No.21, 22 and 23 as under:

21. The case of the prosecution is mainly dependent on the testimony of Chandni, the child witness, who was examined as PW-8. Section 118 of the Evidence Act governs competence of the persons to testify which also includes a child witness. Evidence of the child witness and its credibility could depend upon the facts and circumstances of each case. There is no Rule of practice that in every case the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand but as a prudence, the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that witness must be a reliable one.

22. This Court has consistently held that evidence of a child witness must be evaluated carefully as the child may be swayed by what others tell him and he is an easy prey to tutoring. Therefore, the evidence of a child witness must find adequate corroboration before it can be relied upon. It is more a Rule of practical wisdom than law.

23. In Alagupandi alias Alagupandian v. State of Tamil Nadu, MANU/SC/0531/2012 : (2012) 10 SCC 451, this Court has emphasized the need to accept the testimony of a child with caution after substantial corroboration before acting upon it. It was held that :

36. It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no Rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a Rule of

prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable."

18. While keeping in view the principles laid down in the case of Digamber Vaishnav (*supra*) and examining the facts of the case at hand, we find that the testimony of PW-10 Maangi @ Mumtaj is trustworthy and reliable and the same can be accepted for convicting the accused-appellant. The statement of PW-10 Maangi @ Mumtaj does not show anything which could persuade the Court to hold that she could not understand the circumstances or that she had been tutored by anyone. Now-a-days, with the development of social environment, a child of 9 years of age has sufficient understanding so as to be a competent witness of a sterling worth.

19. The judgment rendered in the case of Digamber Vaishnav (*supra*) is not beneficial in any manner to the case of the appellant.

20. Apart from that, admittedly, the accused-appellant, the deceased Saripan and PW-10 Maangi @ Mumtaj were living at the house mentioned in Site Plan, Ex.P/4. On the fateful night, all the three persons were indisputably in the house. It was within the special knowledge of the accused-appellant as to what had happened inside the house which led to the death of his wife, the deceased, by strangulation. Therefore, as per Section 106 of the Indian Evidence Act, the burden of proof would shift on to the accused-appellant to explain the circumstances in which his wife died by strangulation within the close precincts of their room in the night time. The accused-appellant has stated in his statement under Section 313 Cr.P.C. that at the time of the incident he was not at the house, but was at Jodhpur. So, it was the duty of the accused-appellant to prove his defence by adducing proper evidence but he has not led any evidence to prove that he was not at his house at the time of the incident but was at Jodhpur. Hence, there is nothing on record which can be treated to be a logical / acceptable explanation of the accused-appellant. Hence, the net result is that the accused-appellant has not explained the circumstances in which, his wife died in the matrimonial home, and therefore, the presumption of guilt of accused-appellant as per Section 106 of the Evidence Act has to be raised in this case.

21. In these circumstances, we are of the firm opinion that the prosecution has proved its case against the accused-appellant beyond reasonable doubt that he caused death of his wife Smt. Saripan by strangulating her in his own house. As such, other arguments advanced by the counsel for the appellant need not be discussed.

22. In view of the above, we find no reason whatsoever to interfere with the findings of the trial court while convicting the accused - appellant for the offences under Section 302 IPC vide impugned judgment dated 27.08.2015. Therefore, we are of the view that there is no force in the appeal. Consequently, the same is

dismissed. The impugned judgment dated 27.08.2015 passed by the learned Additional Sessions Judge Phalodi, District Jodhpur is upheld.

23. The record of the trial court be sent back forthwith.