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Criminal Appeal No. 5538 of 2016

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| • Dharmendra Nishad | ----- | Appellant |
| | Vs | |
| • State of U.P. | ----- | Respondent |

For Appellant : Smt. Swati Agarwal Srivastava

For Respondent/State : Shri J. K. Upadhyay, Shri Amit
Sinha and Sri Awadhesh Shukla

Hon'ble Pritinker Diwaker, J.
Hon'ble Mrs. Manju Rani Chauhan, J.

Per: Pritinker Diwaker, J

(08.09.2021)

1. This appeal arises out of impugned judgement and order dated 24.09.2016 passed by Special Judge Prevention of Corruption Act, Court No. 2, Gorakhpur in Sessions Trial No. 381 of 2015, convicting the accused-appellant under Section 302 of I.P.C. and sentencing him to undergo imprisonment for life with a fine of Rs. 10,000/-, in default thereof, to undergo three months additional imprisonment.

2. In the present case, name of deceased is Sweta, wife of accused appellant Dharmendra Nishad. Their marriage was solemnized on 08.05.2014 and she died homicidal death on 04.04.2015 at about 08.00 P.M. On the basis of written report Ex.Ka.1, dated 05.04.2015 lodged by father of the deceased Gorakh Nishad (PW-1), F.I.R, Ex. Ka. 3 was registered on the same day under Sections 498A, 304B read with Section 3 of Dowry Prohibition Act against six persons namely Dharmendra Nishad, Khajanchi, Kismati, Ravindra Nishad, Sikandar Nishad and Gunja. Inquest on the dead body was conducted vide Ex. Ka.2 on 05.04.2015 and the body was sent for postmortem, which was conducted on 05.04.2015 vide Ex. Ka.7 by Dr. Akhilesh Singh. As

most of the documents have been admitted by the appellant under Section 294 Cr.P.C., some of the witnesses including the Autopsy Surgeon have not been examined.

3. As per postmortem report, the deceased suffered following burn injuries:

“Abraded contused swelling in and on front of neck of size 8 cm x 2 cm on cutting skin beneath haematoma. On opening trachea deeply congested. Hyoid bone # (fractured).”

4. The cause of death of the deceased has been defined as asphyxia due to ante-mortem injury.

5. While framing charge, the trial Judge has framed charge against the appellant and two acquitted persons, namely Khajanchi Nishad, father of the appellant and Smt. Kismati, mother of the appellant under Sections 498A, 304B read with Section 34 of Dowry Prohibition Act. In addition, charges were also framed against all the accused persons under Sections 302/34 of I.P.C.

6. So as to hold accused persons guilty, prosecution has examined six witnesses, however, no defence witness has been examined. Statement of accused persons were also recorded under Section 313 of Cr.P.C., in which they pleaded their innocence and false implication.

7. By the impugned judgment, the trial Judge has acquitted other co-accused persons of all the offences and the appellant has also been acquitted under Sections 498A, 304-B of IPC read with Section 34 of Dowry Prohibition Act. However, he has been convicted under Section 302 I.P.C. and has been sentenced as mentioned in paragraph no. 1 of the judgement.

8. Learned counsel for the appellant submits:

(i) that all the important prosecution witnesses i.e. Gorakh Nishad (PW-1), father of the deceased, Raj Pati Devi (PW-2), mother of the deceased, Anil Kumar Nishad (PW-3), cousin brother of the deceased, Triloki (PW-4), uncle of the deceased, Radhika (PW-5), cousin sister of the deceased and

Bhola @ Baburam (PW-6), relative of the deceased have not supported the prosecution case and have been declared hostile.

(ii) that even if some of the documents have been admitted by the appellants under Section 294 Cr.P.C, the Court was obliged to examine the important relevant witnesses.

(iii) that the trial court has erred in law in convicting the appellant solely on the basis of Section 106 of Evidence Act. She submits that in the house apart from the appellant, his parents were also residing and there is no evidence on record to show that at the time of occurrence, the appellant was also present in the house. She submits that even accepting the presence of the appellant, on the date of incident, apart from him other inmates were also there and thus it cannot be said that it is the appellant alone, who committed the murder of his wife.

(iv) that it has been further argued that there is no evidence on record to show that the place of occurrence was the bed room of the accused-appellant where he used to sleep along with his wife.

(v) that as per evidence available on record, deceased was having some mental ailment and out of frustration, she appears to have committed suicide but unfortunately, the appellant and his parents have been falsely implicated in the present case.

(vi) that at the time of incident, the deceased was carrying pregnancy and therefore, question of committing her murder by her husband does not arise.

(vii) that there was no occasion for the court below to frame charge against the appellant under Section 302 IPC.

(viii) that on the same set of evidence once the appellant has been acquitted for other offences and his parents have been

acquitted for all the offences, question of conviction of appellant does not arise.

(ix) that there was no motive for the appellant to commit murder of his wife and prosecution has completely failed to prove the same.

(x) that in support of her contention, counsel for the appellant has placed reliance on the judgment of **Ch. Razik Ram Vs. Ch. Jaswant Singh Chouhan and Ors.; (1975) 4 SCC 769** and **P. Mani Vs. State of T.N.; (2006) 3 SCC 161**.

9. On the other hand, supporting the impugned judgment, it has been argued by the State counsel:

(i) that the deceased died homicidal death in her bedroom and it was the duty of the appellant to offer plausible, acceptable explanation, which he utterly failed to do and therefore, the court below was justified in convicting him with the aid of Section 106 of Evidence Act.

(ii) that once the appellant has admitted all the relevant documents, he cannot turn back and say that the court below ought to have proved these documents.

(iii) that the appellant had taken calculated risk while accepting the existence and correctness of the documents and having done so, at this stage, he cannot revert back and say that the documents ought to have been proved by the prosecution.

(iv) that prima facie prosecution has successfully discharged its burden in proving the case and thereafter it was for the accused to prove his defence and once the appellant has failed to discharge his burden, the court below was justified in convicting him under Section 302 of I.P.C. The acquittal of the appellant under Sections 498A, 304-B of I.P.C. and Section 3/4 of Dowry Prohibition Act is of no help

to him because his conviction under Section 302 of IPC is on different footing of strong circumstance. Likewise, the acquittal of other two accused persons is also of no help to the appellant because the evidence against those persons is different from that of accused. The deceased died homicidal death in her bed room, the appellant has failed to offer any explanation, therefore, his conviction cannot be faulted with.

(v) that the court below was justified in holding that normally husband and wife used to reside in the same room and therefore, presumption goes against the appellant and he was required to prove otherwise, which he failed to do and, thus his conviction is strictly in accordance with law.

(vi) that the acquittal of the co-accused is of no help to the appellant and he has to stand on his own legs. As per medical jurisprudence, the fracture of hyoid bone is found only in the cases of strangulation and not in the case of suicide.

(vii) that as per post-mortem report, the face of the deceased was congested, which also suggests the cause of death to be strangulation.

(viii) that once the appellant had taken the calculated risk of not cross-examining the witnesses, at the appellate stage, he is estopped to do so.

(ix) that blood was coming from the nose, which is also clear indication of strangulation as defined in the medical jurisprudence.

(x) that as regards the presence of the appellant in the house in question and the presence of other accused persons, it has been argued that the incident occurred inside the bed room of the deceased and that of appellant and no reasonable explanation has been offered by the appellant in 313 Cr.P.C. statement or by adducing any evidence.

(xi) that it is not a case of the accused that some third person has gained entry in the bed room in question and has killed the deceased.

(xii) that in support of his contention, the State counsel has placed reliance upon the following cases:

(I) Trimukh Maroti Kirkan v. State of Maharashtra; (2006) 10 SCC 681.

(II) State of H.P. Vs. Raj Kumar; (2018) 2 SCC 69.

(III) State of Rajasthan Vs. Kashi Ram; (2006) 12 SCC 254.

(IV) Pattu Rajan Vs. State of Tamil Nadu; AIR 2019 SC 1674.

10. We have heard counsel for the parties and perused the record.

11. Gorakh Nishad (PW-1), father of deceased Sweta has not supported the prosecution case and has been declared hostile. Likewise, Raj Pati Devi (PW-2), mother of the deceased, Anil Kumar Nishad (PW-3), cousin brother of the deceased, Triloki (PW-4), uncle of the deceased and Radhika (PW-5), cousin sister of the deceased and Bhola @ Baburam (PW-6), relative of the deceased and husband of PW-5 have also not supported the prosecution case and have been declared hostile.

12. The remaining witnesses, like witnesses of inquest, autopsy surgeon and Investigating Officer have not been examined.

13. The accused persons have admitted some documents under Section 294 Cr.P.C., thus there is no dispute on the part of the appellant to the following documents:

(I) Inquest

(II) Postmortem Report

(III) Site Plan

14. In the site plan, place of occurrence has been shown as bed room and then certain other rooms have also been mentioned.

Likewise, as per post-mortem report, injuries have been found on the neck of the deceased and her hyoid bone was found fractured.

15. Taking into consideration the above facts, homicidal death of the deceased in her matrimonial house has been duly proved by the prosecution.

16. The next question, which arises for consideration before this Court is as to who would be the culprit of committing offence. There is absolutely no dispute or whisper of evidence that the place of occurrence was not the bed room of the accused-appellant and the deceased. Even a bare perusal of the site plan reflects that the incident occurred in the bed room. The appellant has completely failed to demolish the prosecution case based on the site plan. Likewise, there is no dispute about homicidal death of the deceased. In the evidence, it has also come that at the time of occurrence, the appellant was present in the house and the deceased was taken to hospital by the members of her matrimonial house.

17. In a case where house murder is the issue, heavy burden is on the shoulders of the accused to explain as to under what circumstances the deceased died but here no such explanation has come either in his statement recorded under Section 313 of the Code of Criminal Procedure nor did he take any defence to this effect by adducing any evidence. While dealing with the matter involving the murder committed inside the house, it has been held by the Apex Court in the matter of **Trimukh Maroti Kirkan v. State of Maharashtra; (2006) 10 SCC 681** as under:

"14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* (1944 AC 315) - quoted with approval by Arijit

Pasayat, J in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271). 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 held. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

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

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

18. Further in the matter of **State of Rajasthan v Thakur Singh; (2014) 12 SCC 2011**, it has been held by the Apex Court as under:

"17. In a specific instance in **Trimukh Morati Kirkan v. State of Maharashtra (2006) 10 SCC 681**) this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: (SCC p. 694, para 22)

"22 Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received

injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18. Reliance was placed by this Court on **Ganeshlal v. State of Maharashtra {(1992) 3 SCC 106}** in which case the appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in **Dnyaneshwar v. State of Maharashtra {(2007) 10 SCC 445}** this Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

20. In **Jagdish v. State of MP {(2009) 9 SCC 495}** this Court observed as follows: (SCC 503, para 22)

"22... It bears repetition that the appellant and the deceased family members were the only occupants of the room and it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt."

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts."

19. Now, if the facts of the present case are seen in the light of the afore-quoted judicial pronouncements, picture which emerges is almost identical. The death of the deceased in the present case undisputedly, took place inside the privacy of a house (in the bedroom) where the deceased was along with the appellant. There is no

evidence on record that at the time of occurrence, the appellant was not there.

20. According to the appellant himself, the deceased was hospitalized by her husband and there is no defence by the appellant that some third person has gained entry in the house and committed murder of the deceased.

21. In the case like present one, the assailant has all the opportunity to plan and commit the crime at the time and in the circumstances of his choice and it is extremely difficult for the prosecution to lead evidence to establish the guilt of the accused, if the strict principle of circumstantial evidence is insisted upon.

22. Furthermore, the post-mortem report of the deceased clearly indicates that present is not a case of suicide, but is a case of murder. As per medical jurisprudence, fracture of hyoid bone is often found in the case of strangulation and not in the case of suicide. This apart, face of the deceased was congested and blood was coming from her nose, which also suggests the cause of death to be strangulation as defined in **22nd Edition of Modi's Medical Jurisprudence and Toxicology:**

“Strangulation :

- 1. Mostly homicidal.*
- 2. Face-congested, livid an marked with petechiae.*
- 3. Bleeding from the nose, mouth and ears may be found.*
- 4. Fracture of the larynx, trachea-often found also hyoid bone.”*

23. Yet another important feature of the case is that no explanation has come forward from the accused-appellant in his statement recorded under Section 313 of Cr.P.C. as to how the death of his wife occurred. The appellant was duty bound to explain about the cause of death of the deceased, who died in her bed room.

24. The judgements relied upon by the defence are of no help to the

accused because the facts of the present case are entirely different from those, which have been cited.

25. Thus in view of the aforesaid factual and legal position, this Court is of the considered opinion that the prosecution has collected sufficient evidence to hold the accused/appellant guilty for committing the murder of his wife and that way the Court below has also been justified to arrive at a conclusion slapping conviction on the accused under Section 302 IPC. Accordingly, the judgment impugned calls for no interference in this appeal.

26. Appeal, thus, being devoid of any substance, is liable to be dismissed and it is hereby **dismissed**. Judgment impugned is affirmed. As the appellant Dharmendra Nishad is already in jail, therefore, no further order is required.

Dated:- 08.09.2021

SK/Priya

(Manju Rani Chauhan, J.) (Pritinker Diwaker, J.)