

Ashok Kumar Vs. State

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Court : Delhi

Decided On : Jan-24-2014

Judge : Sanjiv Khanna

Appellant : Ashok Kumar

Respondent : State

Advocate for Def. : Mr. Rajat Katyal

Advocate for Pet/Ap. : Mr. Anil Soni

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRIMINAL APPEAL
No.335/1998 Reserved on:

3. d January, 2014 Date of Decision:

24. h January, 2014 % ASHOK KUMAR Appellant Through: Mr. Anil Soni, Advocate. Versus STATE Through: Respondent Mr. Rajat Katyal, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE G.P. MITTAL SANJIV KHANNA, J: Appellant-Ashok Kumar by the impugned Judgment dated 31st July, 1998 stands convicted under Section 302 of the Indian Penal Code, 1860 (IPC) for the murder of his wife Anita Jain.

2. The undisputed and accepted position is that the appellant got married to Anita Jain on 27th April, 1990 and within 26 days of marriage i.e., on the morning of 23rd May, 1990, she was found dead in the bedroom of her matrimonial house.

3. The aforesaid facts have been established from the testimonies of Kaushalya (PW-1), Mahinder Prasad (PW-8) and Sunil Kumar (PW13), mother, father and brother of the deceased, respectively. We shall be referring to their statements in detail subsequently. At this stage it is sufficient to reproduce question number 11 and the answer given thereof by the appellant in his statement under Section 313 of the Code of Criminal Procedure, 1971:

Q.11 It is further in evidence that on 23.5.90 at about 9.30 a.m. some relatives of yours went to the house of Mahinder Prasad and told him that Anita had died while sleeping. What do you say?. Ans.

4. It is correct.

Learned counsel for the appellant has submitted that the impugned judgment deserves reversal for three reasons. Firstly, the appellant was not present in the house at the time of the occurrence i.e. intervening night between 22nd and 23rd May, 1990. He was present at the shop during the fateful night and had returned to his residence at about 5.00 or 6.00 a.m. and by that time Anita had died. Our attention is drawn to the answer given by the appellant in response to question number 13 in his Section 313 statement. Secondly, it is submitted that this is not a case of homicidal death, but a natural death as the deceased was suffering from Epilepsy. This fact was reluctantly accepted by Mahinder Prasad (PW-8), father of the deceased in his crossexamination. Reliance is placed upon Neurology in Clinical Practice, Volume II, Fourth Edition and Adams and Vectors Principles of Neurology Ninth Edition. Lastly, it is submitted that there is complete absence of motive which combined with ample evidence that the appellant was in love with the deceased contradicts implication of the appellant for the offence. It is stated that the appellant and the deceased got married one year after engagement, and during this time they had interacted and had come to know and love each other.

5. The first and second contentions for the sake of convenience are being dealt with simultaneously as facts are interconnected.
6. In the present case, Rukka (Ex.PW-8/A) was recorded on the statement of Mahinder Prasad (PW-8). PW-8 in his Court deposition has stated that on 23rd May, 1990 at about 9.30 a.m., some relatives of the appellant came to their house and informed him that Anita had expired. He reached matrimonial house of Anita and saw her lying dead. Blood had oozed from her mouth and he observed injury marks on her nose. She had injuries on both sides of her nose and the nose pin was lying on the bed.
7. It was recorded that PW-8 had made inquiries from the deceaseds husband as to what had happened, but the appellant showed ignorance and stated that they had slept in the usual manner and in the morning when he got up he noticed that Anita had died. PW-8 mentioned that he suspected that the appellant had killed his daughter by giving poison as he did not like her. Rukka further records that on physical examination of the dead body, marks of violence/injury were visible on the nose etc. and some poisonous material might have been thrust into the mouth of the deceased. It also records that there were some signs of strangulation as well. The Rukka affirms the injury marks on both sides of the nose and that the nose pin was lying on the bed.
8. Sub Divisional Magistrate, H.C. Gaur, who had appeared as PW-9, was called to the spot. PW-9 deposed that he had reached the spot at 1.10 p.m. and recorded statements of Mahinder Prasad (PW-8), Kaushalya (PW-1) and others. On physical examination it appeared to be a case of murder.
9. The inquest report was proved by H.C. Gaur (PW-9) and was marked Ex.PW9/B. The said report records that there were no marks of violence on the body except on the nose, which had an injury mark of about one and a half inches. It is also recorded that there was another injury of 1/21 on the upper portion of the nose. There was swelling on the nose and the nose pin was found on the bed, alongwith bindi/Kumkum. Pillow cover of one of the pillows was found to be missing. There was secretion from the nostrils. Some blood strained liquid under the nostrils was visible giving the impression that blood had oozed out. It was

specifically recorded that small quantity of secretion had oozed from the nostrils.

10. Subsequently, at 4 p.m. FIR No.210/1990, police station Saraswati Vihar was registered on 23rd May, 1990 setting out and stating the aforesaid facts.

11. V.K. Malhotra, the Investigating Officer, who appeared as PW- 19, has stated that on 23rd May, 1990 he was posted as SHO, at the Saraswati Vihar police station and on receipt of DD No.18 he had reached the matrimonial house of the deceased, who was found dead on the double bed. He recorded statement of Mahinder Prasad, father of the deceased, made endorsement i.e. Rukka Ex.PW-9/A and on this basis the FIR was registered and the case was investigated.

12. There is no doubt that initially Mahinder Prasad (PW-8) and the police including the SDM, H.C. Gaur (PW-9) and V.K. Malhotra (PW19) suspected that this was a case of poisoning with suffocation or smothering, but as per the post mortem report, there was no evidence of poisoning. We cannot be oblivious to the fact that the investigating officer, V.K. Malhotra (PW-19), SDM, H.C. Gaur (PW-9) and the father PW-8 were not eye witnesses to the actual occurrence, but they had reached Anitas bedroom at her matrimonial house in the morning where it was found that she was lying dead on the double bed. There was discharge from the nostrils and injuries on the nose. The inquest report records and mentions the said factual position. This is also recorded and is mentioned in the Rukka and in the FIR. Reference to poisoning at best, therefore, was mere suspicion or doubt. It was the apprehension of the father which got reflected in the inquest report, but this apprehension to our mind will not affect the other evidence, which is lucid and apparent. It points out injuries on the nose as well as bleeding from the nostrils.

13. Post mortem on Anitas dead body was conducted by Dr. L.T. Ramani (PW-7). He has deposed that there was bruising on the tip of the nose of size and a bruise of 1 1 size on the upper and lower lips on the right side. Blood tinged fluid discharge was present in the nostrils. The lips had pouted and the tip of the tongue was protruding out between the teeth. However, the teeth were intact and the gums were normal. Lungs were congested and showed early decomposition changes. Similarly, the heart was flabby due to early decomposition. The internal organs were normal and no typical smell could be identified in the stomach

contents. PW-7 opined that the injury was caused by blunt force application and the death appeared to be due to suffocation. In the cross-examination by the appellant, PW-7 had stated that signs of suffocation were visible on post mortem examination, but he could not definitely tell whether death was on account of suffocation.

14. Learned counsel for the appellant has highlighted this statement made by Dr. L.T Ramani, PW-7 in the cross-examination. In order to appreciate the controversy, we would like to reproduce the entire cross-examination of PW-7, which reads as follows:

Signs of suffocations were visible on postmortam examination but I cannot say whether the death was definitely on account of suffocation. The possibility if sone (some sic) had fits and in that fit if that patient falls facedown on a pillow and if there is block-age of air, it could result into death on account of suffociation.

15. In support of his contention, learned counsel for the appellant has relied upon cross-examination of Mahinder Prasad (PW-8) in which he had stated as under:

My wife has problem of Asthma but she does not suffer from MIRGI. It is wrong to suggest that my daughter used to have fits of epilepsy (MIRGI).

She might be suffering from Asthma. It is wrong to suggest that engagement had once broken down before marriage because my daughter used to have fits of epilepsy. It is wrong that, Again said I do not remember if I had assured that Anita would be given proper treatment for epilepsy. After marriage the accused may have provided medical care to her but I did not.

16. To further press the contention that death due to suffocation was possible if a person had Epilepsy fits, learned counsel for the appellant has relied upon the two medical text-books mentioned in Paragraph 4 above. We are not, however, inclined to accept the contention of the appellant that the deceased was suffering from Epilepsy fits. The prosecution in support of their case had produced Kaushalya (PW-1) and her testimony was recorded on 10th January, 1991. She was also cross-examined but was not questioned and asked whether the

deceased was suffering from Epilepsy fits. Poonam, sister of the deceased had appeared as PW-3 and her statement was also recorded on 10th January, 1991. She was not cross-examined and questioned that the deceased was suffering from Epilepsy fits. Sunil Kumar, brother of the deceased was examined as PW-13 and again no suggestion was given to him that the deceased had history of Epilepsy fits and was suffering on that account. Similarly, Rajesh, the other brother of the deceased had appeared as PW-15, but no suggestion to that effect was given to him. Statement of PW-13 and PW-15 was recorded in August, 1994 and May, 1995, respectively. Ram Avtar had appeared as PW-16 and deposed that he was related to the appellant and had arranged marriage of the appellant with Anita but no suggestion was given to him about the said illness. Similarly, Neelam (PW-18), younger sister of the deceased was not questioned and asked about Epilepsy fits. Statement-in-chief of Mahinder Prasad (PW-8) was recorded on 25th August, 1992 and completed on 15th October, 1992. Opportunity to cross-examine the said witness was given to the appellant on 15th October, 1992 but PW-8 was not cross-examined; it was specifically recorded Nil. Opp. given.

Thereafter, an application for recall of PW-8 was filed and was allowed, subject to payment of costs of Rs.500/- vide order dated 2nd November, 1996. PW-8, thereafter was cross-examined on 11th February, 1998 and the portion quoted above is from the cross-examination dated 11th February, 1998.

17. In our opinion, the aforesaid statement in the cross-examination is not reliable and does not deserve credence for the following four reasons. Firstly, as noticed above, none of the other family members were cross-examined on the said aspect. Even PW-8 was not cross-examined initially when his statement-in-chief was concluded on 15th October, 1992. Secondly, the appellant has not brought on record any evidence or material to show that the deceased was undergoing treatment for the said ailment. Even in his statement under Section 313, no such plea was taken. On the other hand, the alibi as noted above, was that he was not present at the spot and had returned from the shop at 5 or 6 a.m. on 23rd May, 1990. Thirdly, the appellant did not inform the parents and family members about the deceased till 9.30 a.m. on 23rd May, 1990. He also did not take the deceased to a hospital and remained quiet. Lastly, the contention is not supported by

medical literature, as we have noticed above that there were injury marks on the nose and lips of the deceased. We will like to elaborate on the last reason.

18. Suffocation or smothering is caused by deprivation of oxygen which can be either due to lack of oxygen in the environment or from obstruction of the air passages. Smothering is a form of asphyxia caused by closing external respiratory orifices either by hand or other means or by blocking up cavities of nose and mouth. Homicidal smothering can take place by closing the mouth or nose by hand or cloth or if the face is pressed into a pillow, etc. When obstruction is caused by bed clothing, pillow, cushion etc., it may or may not leave any external signs of violence except signs of asphyxia. When the face is pressed by a pillow, the skin around the nose and mouth may appear to be pale or white due to pressure. Saliva, blood and tissue cells may be found on the pillow and in case orifices are closed by hand, there may be scratches or nail marks or laceration of the soft parts of the face. Lips, gums and tongue may show bruising or laceration and slight bruising may be found in the mouth and nose. Blood may have oozed from the mouth or nose and the tongue may have protruded. Blood stained froth is present in air-passages. Homicidal smothering is difficult to detect and autopsy may reveal asphyxia, but the said evidence should be collated and corroborated by signs of violence or injuries on the face or nose. This is significant and important.

19. In Modis Medical Jurisprudence and Toxicology, 23rd Edition, it has been observed at page 594 as under:

(i) External Appearance The external appearance may be due to the cause producing suffocation, or to asphyxia. (a) Appearance due to the Cause Producing Suffocation: In homicidal smothering, affected by the forcible application of the hand over the mouth and the nostrils, bruises and abrasions are often found on the lips and on the angles of the mouths, and alongside the nostrils. The inner mucosal surface of the lips may be found lacerated from pressure on the teeth. The nose may be flattened, and its septum may be fractured from pressure of the hand, but these signs are, in Modis experience, very rare. There may be bruises and abrasions on the cheeks and the molar regions, or on the lower jaw, if there

has been a struggle. Rarely, fracture or dislocation of the cervical vertebrae may occur if the neck has been forcibly wrenched in an attempt at smothering with the hand. No local signs of violence will be found, if a soft cloth or pillow has been used to block the mouth and nostrils. In compression of the chest, external signs of injury may not be present, but the ribs are usually fractured on both the side. In homicidal compression of the chest brought about by the hands or knees of a murderer or by some hard material, bruises and abrasions, symmetrical on both sides, are usually found on the skin together with extravasations of the blood in the subcutaneous tissues. Rarely, along with the ribs the sternum is also fractured. It should, however, be remembered that the traumatic asphyxia produces variable findings. In a fair person, purple suffusion of skin above the point of compression is apparent in severe fixation of the chest by mechanical compression. There may not be any external or internal signs where the pressure is slight or evenly distributed. xxxxxxxx xxxxxxxx xxxxxxxx At page 596 it has been elucidated: (ii) Whether suffocation Homicidal or Accidental was suicidal, Suicidal suffocation is very rare, though a few cases of suicide among prisoners and insane persons have been recorded. They are said to have stuffed their throats with rags, pieces of blankets, and hay. A few cases of women using a common plastic bag to commit suicide by trying them over their head and neck have been reported. Accidental death may be caused in children who cover their head with these bags during play. Where an accused merely stuffed a cloth into the deceased's mouth in order to silence him and not with any idea of killing him, the offence is not murder but one punishable under the Indian Penal Code 1960 s 304. Though death may not have been intended, the law presumes everyone to be responsible for the reasonable and likely consequences of an unlawful act. As a charge of murder may follow, the autopsy surgeon should be aware of the gravity of the situation while removing the gag from the mouth and should make a note as to how the cloth piece is wrapped round the nostrils and mouth, how it is tied and or how far the mouth gag is stuffed inside the mouth. Homicidal suffocation is common, and is usually resorted to in murdering infants and children by forcing mud down their throats, or by smothering them by the hands, clothes, and soft pillows. In adults, it is only possible if the victim is weak and feeble, or is unable to resist, having been previously stupefied by intoxicating or narcotic drugs. Homicidal suffocation by

pressure on the chest is sometimes resorted to in India, but in the case of adults, it is often combined with smothering or throttling, and it is usually an act of more than one person. A form of homicidal suffocation practiced in Northern India is known as Bansdola, although it is not so common now as it used to be formerly. In this form, the victims chest is squeezed so forcibly between two strong wooden planks or bamboos, one being placed across the upper part of the chest and the other across the back of the shoulders, that the respiratory act is interfered with, the muscles are lacerated and the ribs are fractured. If the force applied is very severe, the lungs may be crushed and lacerated. Burying alive used to be resorted to in India as a form of punishment and lepers used to be sometimes buried alive. In the case of infants dying under suspicious circumstances and afterwards exhumed, a question may arise as to whether they had been buried alive. The presence of fine dust in the oesophagus and stomach is a convincing proof of the infant having been buried alive. In a burial after death, fine dust may be found in the upper air-passages, but not in the oesophagus or the stomach. Accidental suffocation is frequent and is produced as described above and by being buried under the sand or the earth while digging deep pits; here the respiratory tract is packed with sand or earth.

20. Viewed from all angles and aspects, we are satisfied and affirm the findings of the trial court that this is a case of homicidal death and not accidental/natural death. We are also satisfied with the finding of the trial court that the appellant was present in the house on the night intervening between 22nd and 23rd May, 1990. It was natural and normal for the appellant to be in the bedroom at night with the deceased. The submission, that he remained at his shop is not believable and has been rightly rejected. There is no evidence, material or even an allegation to show that an intruder or third person had entered to commit the said crime. The appellant was certainly present with his wife Anita in the bedroom. The conduct of the appellant, i.e. failure to take Anita to hospital/doctor and delay in informing Anitas family becomes relevant and can be treated as an implicating factor and circumstance. It would be appropriate here to reproduce observations made by a Division Bench of this Court in Balbir Singh v. State, CrI. Appeal No.992/2004 which stated:

52. It would be most apposite to quote following observations made by Supreme Court in the decision reported as Trimukh Maroti Kirkan v State of Maharashtra (2006) 10 SCC681: 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 Prosecution* 1944 AC315 quoted with approval by Arijit Pasayat, J.

in *State of Punjab v. Karnail Singh* 2003 CriLJ3892). 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. 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 traveling on a railway without ticket. The burden of proving that he had a ticket is on him. 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.

xxxxxxx 54. The legal norm in respect of the application of Section 106 in a given case is contained in the following observations of Supreme Court in Mir Mohammads case (supra):

The section 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.

It was stated in Milan Singh v. State Crl. Appeal No.892/2011 as follows:

11. Even if we ignore/exclude the witnesss version that he had seen the accused strangulating the deceased, the fact remains that the accused was seen in the house soon before the death of the victim and during this short span none else was there to commit the crime. In Babu S/o Raveendran vs.Babu s/o Bahuleyan and Anr.(2003) 7 SCC37Supreme Court observed:

The second important circumstantial evidence the accused is that the accused and the deceased were last seen together. To put it tersely both of them slept together by retiring to the room that night. Last seen together in legal parlance ordinarily refers to the last seen together in the street, at a public place, or at any place frequented by the public. But here, the last seen together is much more than that. The last seen together here is sleeping together inside the bolted room. It is in the evidence of PW-3 and PW-6 that they had dined together and the accused and the deceased were closeted in a room at about 8:30 P.M. is undisputed and it is for the accused alone to explain as to what happened and how his wife died and that too on account of strangulation.

12. The gap between point of time when the accused and deceased were last seen alive and the deceased was found dead is so small that possibility of any person other than the accused being author of the crime becomes impossible.

21. It is difficult for us to accept that the appellant-husband, who was sleeping on the same bed, would not be aware and remained unconcerned if his wife Anita had suffered an Epilepsy fit. It has also come on record as per the appellant, that he and the deceased had remained engaged for almost a year. In case the deceased was a patient and suffering from Epilepsy fits, as the appellant wants us to believe, he would have led some evidence to show and prove the said medical condition. Further, he would have certainly cross-examined the relatives of Anita on the said aspect right from the beginning. The first two contentions are accordingly rejected.

22. On the question of motive, the Rukka (Ex.PW-8/A) records that the appellant did not like the deceased, Anita. Anita had objected to the appellants liquor consumption and his habit of coming late. Anita, as per the Rukka, had informed that the appellant used to lavishly spend money on his friends. Kaushalya (PW-1), the mother was declared hostile and was cross-examined by the Additional Public Prosecutor. It was deposed that Anita had told her that the appellant used to beat her whenever Anita asked the appellant not to drink. She had stated that Anita told her that the appellant told Anita that he did not like her. Poonam (PW-3), sister of the deceased has stated that Anita was not happy and she suspected that the appellant was having an affair. The Appellant used to quarrel with Anita and beat her. Sunil Kumar (PW-13), brother of the deceased, however, did not support the prosecution case and had stated that he never saw the appellant drunk. His cross-examination was conducted on 18th March, 1996. Similar statement was made by Neelam (PW-18) in her testimony recorded on 19th March, 1996. However, she has stated that the neighbours had informed her that the appellant used to drink and that he was intimate with some other woman. PW-18, however, was cross-examined on the question that the deceased was suffering from Asthma to which she responded by saying that Anita did have a problem of Asthma occasionally and sometimes she even took treatment.

23. Failure to conclusively establish motive does not entitle the appellant a benefit of doubt. Motive in some cases is difficult to decipher and conclusively proven, as it is personal to the accused and may remain only within his knowledge. Absence and failure to conclusively establish motive, even in cases of circumstantial

evidence can lead to conviction. The mandate is that the chain should be complete and there should be enough material to conclusively hold that the accused had committed the said offence and possibility of a third party involvement stands fully ruled out. We have referred to the said evidence and material. In the case at hand, there is no possibility or probability of a third party involvement.

24. Mahinder Prasad (PW-8) in his examination-in-chief had stated that his daughter had objected to the appellant taking liquor and coming late. He had also stated that engagement between her daughter and appellant was re-settled by intervention of his relatives. This statement in examination-in-chief remained unquestioned and unchallenged. In the present case, homicidal death had taken place within one month of the marriage. The death, as noticed above, was in the privacy of the bedroom where the husband who in the present case is the appellant and the deceased i.e. the wife, were alone present. There were marks and injuries on the nose and lips of the deceased. These remain unexplained. Unnatural death was due to suffocation or rather smothering. The appellant belatedly informed the family members of the deceased at 9.30 a.m. The appellant did not take immediate steps to take the deceased to the hospital or doctor. Third party involvement is ruled out.

25. In view of the aforesaid discussions we affirm the findings of the trial court. We do not find any merit in this appeal and the same is dismissed. Conviction of the appellant under Section 302 IPC and sentence are upheld. The appellant was released on suspension of sentence vide order dated 17th February, 2003. He shall now surrender within 30 days to undergo the sentence. In case of failure to surrender, appropriate steps for his arrest as per law will be taken by the trial court. Trial court record will be sent back. (SANJIV KHANNA) JUDGE (G.P. MITTAL) JUDGE JANUARY24h, 2014 NA

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