**Rakesh Kumar vs.state (Gnctd)**

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**Court** : Delhi

**Decided On :** Jul-26-2018

**Appellant** : Rakesh Kumar

**Respondent** : State (Gnctd)

**Advocate for Def.** : Mr. Kewal Singh Ahuja

**Advocate for Pet/Ap.** : Mr. Harsh Kumar, Mr. Mohit

**Judgement** :

$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A.563 /2018 & Crl. MB7972018 RAKESH KUMAR .....Appellant Through: Mr. Harsh Kumar and Mr Mohit versus Bhandari, Advocates. ....Respondent Through: Mr Kewal Singh Ahuja, APP for the State STATE (GNCTD) CORAM: JUSTICE S. MURALIDHAR JUSTICE VINOD GOEL

JUDGMENT
2607.2018 Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 6th April, 2018 passed by the learned District & Sessions Judge, North East District, Karkardooma Courts, Delhi in SC No.44549/2015 arising out of FIR No.89/2013 registered at Police Station (PS) Khajuri Khas convicting the Appellant for the offence under Section 302 of the Indian Penal Code (IPC) and the order on sentence dated 17th April, 2018 whereby he was sentenced to life imprisonment along with a fine of

Rs.20,000/-; and in default of payment of fine, to undergo simple imprisonment (SI) for two years.

2. At the outset, it requires to be noticed that the Appellant (Accused No.1 - A-1) and his mother Leela (A-2) were charged with having subjected Sunita (wife of A-1/the deceased) to cruelty on account of demand of dowry Crl.A.563/2018 Page 1 of 13 prior to the date of her death on the intervening night of 18th / 19th February, 2013 thereby committing an offence under Sections 498-A read with Section 34 IPC. A-1 was separately charged for having murdered his wife by strangulation at the aforementioned date and time.

3. One of the key witnesses for the prosecution was Smt. Roshni (PW-1) , mother of the deceased. Her initial statement before the Sub Divisional Magistrate (SDM), who conducted the inquest proceedings, was recorded on 18th February 2013 by Mr Rakesh Sharma, SDM (PW-4) and was exhibited as Ex.PW-1/A. In that statement, PW-1 mentioned in response to the specific questions put to her by PW-4 that the deceased and A-1 were married on 27th April, 2008 and that at the time of the marriage, no demand for dowry had been made. However, she stated that after the marriage, the in-laws of the deceased used to subject her to continuous harassment about the poor quality of the articles given to her by her parents at the time of marriage and about the genuineness of such articles. PW-1 specifically named A-2 and her daughter Poonam as harassing the deceased as a result of which she would often return home to her mother. She disclosed how she came to know of the death of her daughter only around at 7 am in the morning of 18th February, 2013 and she suspected A-1, A-2 and Poonam as having murdered the deceased.

4. In the trial Court PW-1 maintained what she had told the SDM as far as the essential particulars are concerned. The improvements that she made in her deposition in the trial Court were not material enough to discredit her testimony. For instance, she mentioned that information regarding death of Crl.A.563/2018 Page 2 of 13 the deceased was conveyed to PW-1 by the father-in-law of the deceased whereas she did not mention this in her statement to the SDM. Further, she deposed that a second call was given by A-1s brother that Sunita Soti ki Soti

Reh Gayi whereas she did not mention this before the SDM. She deposed that after Sunita had given birth to a daughter about four months before the death of the deceased, and that she and the child had been left by the accused at the house of PW-1. She and the child remained there till about a week before the incident, when she was taken back by the accused due to the occasion of marriage of Poonam, sister of A-1, when she returned to her matrimonial home.

5. At this stage it requires to be noticed that the post-mortem of the deceased, performed by Dr. Neha Gupta (PW-5), confirmed that it was a homicidal death. There were reddish blue contusions on the right side of the neck, left side of the neck, two on the left side of the face and one over the left side mastoid process behind the ear. On the neck there was a bruising of soft tissues and muscles of the neck. The cause of death was stated to be asphyxia as a result of ante-mortem throttling. There was no cross- examination of PW-5 at all.

6. With the admitted position being that the deceased died a homicidal death, it became important for the accused to explain the circumstances under which she was found dead inside the house - the other occupants of which were A-1 and A-2. This legal obligation on A-1 arises from Section 106 of the Indian Evidence Act 1872 (IEA), the law in relation to which has been explained by the Supreme Court in the following decisions. Crl.A.563/2018 Page 3 of 13 7. In Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC681 the Supreme Court held that:

"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."

8. In State of Rajasthan v. Kashi Ram (2006) 12 SCC254 it was observed as under:

"17. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory Crl.A.563/2018 Page 4 of 13 or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Re. Naina Mohd. AIR1960 Mad 218."

9. In State of Rajasthan v. Thakur Singh (2014) 12 SCC211 the Supreme Court explained the legal position in regard to Section 106 IEA thus:

"16. Way back in Shambhu Nath Mehra v. State of Ajmer 1956 SCR199this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said:

"This [Section 101]. lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the

prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

.....

18. Reliance was placed by this Court on Ganeshlal v. State of Maharashtra (1992) 3 SCC106in which case the appellant was prosecuted for the murder of his wife inside his house. Since Crl.A.563/2018 Page 5 of 13 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."

10. In order to overcome the above burden cast on him in terms of Section 106 of the IEA, A-1 tried to built a defence that the deceased was found dead on the first floor of the house; that he himself was not on the first floor; that it was Pinky, the younger sister of the deceased who was with the deceased on the first floor on the fateful night. The case of the accused, as spoken to by him even in his statement under Section 313 Cr PC was that: ...my sister in law Pinky was sleeping with my wife as some other relatives were also at our house because marriage of my sister Poonam was taken place just before one ISek of the incident. In that night I was sleeping on ground floor along with some other relatives. I have doubt that my sister in law Pinki knew better about the incident as she was sleeping with my wife and my three children in small room at first floor. 11. Further two defence witnesses were examined by A-1. One was Sheela (DW-1), wife of Om Prakash who stated that they had come to attend the marriage ceremony of Poonam. According to her, on 17th February, 2013 Poonam returned to her parental home

for Pagphera and the rituals had gone on till midnight. While DW-1 herself went to sleep on the ground floor, according to her the deceased and her sister Pinki were sleeping on the second floor of the house (which according to the counsel for the accused should be read as first floor of the house). In the cross-examination of Crl.A.563/2018 Page 6 of 13 DW-1, she claimed that she did not know the cause of death of the deceased. An almost parrot like identical statement was iven by the other defence witness i.e. Braham (DW-2), son of Chottu Ram. He too claims not to have known the cause of death of Sunita.

12. The Court finds that the answers given by both by DWs 1 and 2 in their cross-examinations are hollow and expose the lack of their objectivity. It shows that they cannot be trusted, particularly since they say that they did not know the cause of death of the deceased. If indeed they were present in the house, there is no way that they would not have known this.

13. The other attempt at showing that Pinki was present in the house was by putting questions to both PW-1 and Sanjay Kumar (PW-3), the brother of the deceased. As far as PW-1 is concerned, she firmly denied that Pinki was with the deceased. This is what she said: It is wrong to suggest that my daughter Pinki was also there in the house of accused persons on that phera ceremony. 14. As far as PW-3 is concerned, apart from corroborating PW-1 on all the material particulars, he too denied that Pinki was with the deceased on the fateful night. He stated:

"It is wrong to suggest that my sister Pinky was with Sunita in the house of Sunita on the night of the incident of this case or that there used to be bitter relations-between Sunita and Pinky. Vol. Pinky was in our house on that night. 15. Learned counsel for the Appellant sought to show that there were inconsistent statements made by PWs 1 and 3 about the deceased being subjected to harassment prior to her death and especially with regard to the Crl.A.563/2018 Page 7 of 13 demand of dowry.

16. It must be noticed that it is only A-2 who has been convicted for the offence under Section 498-A IPC and not A-1. In fact, A-2 was sentenced for the said offence to the period already undergone by her and understandably, therefore, has not filed any appeal. It is only A-1 who has been convicted for the offence under

Section 302 IPC. Therefore, the evidence led by the prosecution on the aspect of demand of dowry may not be relevant for appreciating the guilt of the Appellant for the offence under Section 302 IPC.

17. However, learned counsel for the Appellant submitted that the prosecution was unable to bring home the guilt of A-1 by proving every link in the chain of circumstances and in particular the motive for commission of the crime. Learned counsel for the Appellant has referred to the decisions in Sharad Birdichand Sarda v. State of Maharashtra AIR 1984 SC1622 Tanviben Pankajkumar Divetia v. State Of Gujarat (1997) 7 SCC156 Harishchandra Ladaku Thange v State of Maharashtra AIR 2007 SC2957and Vithal Eknath Adlinge v. State of Maharashtra AIR 2009 SC2067 18. The law relating to circumstantial evidence, as explained in the above decisions, is fairly well-settled. The conditions precedent that must be fully established to bring home the conviction of an accused, on the basis of circumstantial evidence have been explained as under: (1) the circumstances from which the conclusion of guilt is to be Crl.A.563/2018 Page 8 of 13 drawn should be fully established. The circumstances concerned `must' or `should' and not `may be' established; (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency; (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. 19.1 Learned counsel for the Appellant also referred to the decision in Dhal Singh Dewangan v. State of Chhattisgarh 2016 (9) SCALE142where by a 2:1 decision, the Supreme Court gave the accused in that case the benefit of doubt by holding that all the links in the chain of circumstances were not shown to have been proved by the prosecution. 19.2 In the above case, there were as many as six murders i.e. the wife and five daughters of the Appellant. The room in which the dead bodies were found was locked from the inside and the accused was also found in an unconscious condition. The circumstances that weighed with the trial Court and the High Court in convicting the Appellant were as under: 24. We now consider the

circumstances which have weighed with the Courts below:-

"a]. The appellant was the only male member residing with his mother, wife and five daughters. Crl.A.563/2018 Page 9 of 13 b]. The house in question which opened in a gali was bolted from inside on the fateful night. c]. The appellant was found lying unconscious in a room where there were five dead bodies with another dead body in the adjoining room. d]. A knife, which could possibly have caused injuries to the deceased, was lying next to his left hand. e]. His clothes - lungi to be precise, were found to be having blood stains with blood of human origin. f]. He had offered no explanation how the incident had occurred and as such a presumption could be drawn against him under Section 106 of the Evidence Act. 19.3 After discussing the law relating to circumstantial evidence, the Supreme Court in Dhal Singh Dewangan v. State of Chhattisgarh (supra) noticed that the prosecution ought to have placed on record the material indicating as to what made the accused unconscious and what was the probable period that he may have been in that state, and noted: ..what made him unconscious, what was the probable period of such unconsciousness and whether the appellant was falsely projecting it. However, nothing was placed on record. Neither any doctor who had examined him was called as witness, nor any case papers of such examination were made available. In the absence of such material, which the prosecution was obliged but failed to place on record, his explanation cannot be termed as false. The explanation that he knew nothing as he was unconscious cannot be called, absence of explanation or false explanation. So the last item in the list of circumstances cannot be taken as a factor against the appellant. 19.4 The further factor that weighed with the Supreme Court in giving the accused the benefit of doubt was that the clothes of the accused were not seized immediately at the place of occurrence. While the arrest memo Crl.A.563/2018 Page 10 of 13 mentioned his clothes to be full pant and shirt, it again mentioned nothing found on the person of the accused except clothes worn by him. What was sent for examination was a lungi. It was not clear how the lungi was seized if the Appellant was wearing full pant and shirt.

20. Every case obviously turns on its own facts. The Court is of the view that the decision in Dhal Singh Dewangan v. State of Chhattisgarh (supra) is therefore of

no assistance to the present Appellant because the facts here are different. It is nobodys case that the room on the first floor in which the deceased was found was locked from inside. The Appellant here is not shown to have himself suffered any injury or that he was unconscious. He was very much in the house. With the basic fact that the deceased suffered a homicidal death inside the house being established, the other occupants of which were her husband and mother-in-law, the burden certainly shifted to the Appellant to explain the circumstances, which were exclusively within his knowledge, under which the death of the deceased was caused. It is not even the case of the Appellant that there was any stranger inside the house to commit the murder of the deceased. The desperate attempt to show that it was the deceaseds own younger sister Pinki who may have committed the crime, hopelessly failed for the reasons already explained.

21. With regard to the motive for the crime, as noticed by the trial Court, and as is evident from the unshaken testimonies of PWs 1 and 3, in the four years prior to her death and after her marriage, the deceased was subjected to harassment. Even keeping aside the harassment for the purposes of dowry aside, it is clear that the deceased was being even otherwise harassed in Crl.A.563/2018 Page 11 of 13 numerous ways. Every time she fell ill, she was sent back to her parental house. Both witnesses have spoken about the accused persons leaving the deceased at her parental home after beating her and A-1 declaring that he would not keep the deceased in her matrimonial house . Even after the birth of their child, when the child was only 15 days old, A-1 took the deceased to her parental home and left her there. She was compelled to go to her matrimonial home only because of the marriage of Poonam, the sister of A

Therefore, it cannot be said that the prosecution has not proved the motive for the murder at the hands of A-1.

22. The circumstances that have clearly been established by the prosecution are that the deceased was in an unhappy marriage; she was subjected to beatings and harassment in the four years prior to her death and was not being looked after well by A-1 at her matrimonial home; that the deceased was found dead on the first floor of her matrimonial home in which A-1 and his mother resided; that the

possibility of anyone else being involved in the murder of the deceased was ruled out; the Appellant did not have any satisfactory explanation to discharge the burden that fell upon him under Section 106 of the IEA about the circumstances under which the deceased was found murdered in her matrimonial home and that the death of the deceased was homicidal.

23. Consequently, this Court concurs with the trial Court that the chain of circumstantial evidence is complete and points unerringly to the guilt of the Appellant and no one else for the murder of the deceased. Crl.A.563/2018 Page 12 of 13 24. For all of the aforementioned reasons, the Court finds no reason to interfere with the impugned judgment and the consequent order on sentence of the trial Court. The appeal and the application are dismissed, but in the circumstances, with no orders as to costs.

25. The trial Court record be returned along with a certified copy of this judgment. JULY26 2018 rd S. MURALIDHAR, J.

VINOD GOEL J.