

Balbir Vs. State of U.P.

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Court : Allahabad

Decided On : Feb-28-1995

Reported in : 1995CriLJ3906

Judge : V.N. Mehrotra and ;S.N. Saxena, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 302; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. A. No. 3423 of 1979

Appellant : Balbir

Respondent : State of U.P.

Advocate for Def. : Dy. G.A.

Advocate for Pet/Ap. : M. Islam, Adv.

Disposition : Appeal allowed

Judgement :

S.N. Saxena, J.

1. This criminal appeal is directed against the judgment and order dated 13-11-1979 of Shri O.N. Asthana, the then learned III Additional Sessions Judge, Mainpuri in Sessions Trial No. 322 of 1979. He convicted appellant Balbir under

Section 302, I.P.C. and sentenced him to undergo life imprisonment for the same.

2. The occurrence, which gave rise to this case, had taken place on 5-4-1979 at 10.00 a.m. in the house of informant Gajju in village Chhabilia within Police Station, Alao of district Mainpuri. The deceased Smt. Lalli was the daughter of informant Gajju and her marriage with the appellant had taken place about three years prior to her murder. Appellant Balbir was a resident of village Sandera within Police Station, Aligarh of district Etah. Smt. Lalli visited the place of her husband four or five times after her marriage, but she was treated in a cruel manner by the appellant who even used to beat her. Informant Gajju, therefore, about two and a half months prior to the murder of Smt. Lalli, had brought her to his house from her Sasural. Appellant Balbir, about a fortnight ago, came to informant's house and wanted to take Smt. Lalli with him to his place, who, however, was not prepared to go there. The informant, therefore, refused the Bida of Smt. Lalli and requested the appellant to live along with him for which he agreed. He, thus, had been happily staying in his Sasural for the last about 15 days prior to this incident. On the fateful day, the informant along with his family members left in the morning for Mangalpur in order to bring fodder. The deceased and the appellant had stayed at the house. At about 10.00 a.m. informant, his wife and son returned home along with the fodder. When they had reached near their house, they saw the appellant running away from the house. The informant tried to stop him, but he managed to escape. On entering the house, they found that Smt. Lalli was lying dead in the house. Her mouth had been gagged with cloth and a rope had been tied around her neck.

3. According to the informant, appellant Balbir had murdered Smt. Lalli, as he had refused her Bida along with him. A number of fellow villagers including Zileadar, Panchhi Bhogi and Saini had seen the appellant coming out of the house of the informant and running away from the village. The informant got drafted F.I.R. of the incident, Ext. Ka-1 by Ram Tirath and left for the police station where he handed over the same to the police at 11.30 a.m. the same day. The distance between the village of the informant and the police station, as disclosed in the formal chick report, was one and a half mile. A case under Section 302, I.P.C. was registered at the police station against the appellant and he was charge sheeted

by the police after the completion of the investigation.

4. The trial of the appellant thereafter took place as usual. His defence consisted of the denial of his guilt. He admitted his marriage with Smt. Lalli, but denied that he used to treat her in a cruel manner. He did not admit that he had started living in his Sasuraal, and stated that he was not there on 5-4-1979 on which date Smt. Lalli was murdered. He denied that the cloth by which the mouth of Smt. Lalli had been gagged was actually his Kurta. He specifically stated in reply to question No. 4 of his statement under Section 313, Cr.P.C. that his Kurta was not there in his Sasuraal.

5. The post-mortem examination on the dead body of Smt, Lalli was performed at 11.00 a.m. on 6-4-1979 by PW 5, Dr. R. K. Jain. He had found the following ante-mortem injuries upon the dead body of Smt. Lalli.

1. Abrasion measuring 0.2 cm. x 0.2 cm. on the right side of chin.

2. A ligature round the neck, just below the thyroid cartilage, the width of which varied from 1 cm. to 1.5 cm.

6. The internal examination revealed congestion of blood in the membranes of neck, larynx, trachea and bronchii. Lungs were also found congested. In his opinion, Smt. Lalli died as a result of strangulation and her death could have taken place in between 6.00 a.m. to 10.00 a.m. on 5-4-1979. He proved the post mortem examination report Ext. Ka-12 and also stated that Smt. Lalli could have died as a result of the ante-mortem injuries on her body. Further, he stated that during the post-mortem examination, he had not found any white substance upon the private part of Smt. Lalli and expressed opinion that it was possible that the same had got removed by her Petticoat and Sari by the time he had performed the post-mortem examination.

7. The prosecution, besides other evidence of formal nature, relied upon the testimonies of PW 1, Ziledar and PW 2, Gajju, the informant. Neither of them had witnessed the commission of the crime. The prosecution, with the help of their testimonies, tried to establish that the accused was seen by them running away

from the house of the informant and on entering the house they found Smt. Lalli lying dead as already mentioned above. Their testimonies were attacked on various grounds on behalf of the accused.

8. PW 4, S. I. Raj Kumar Misra had investigated the case. He was present at the police station when the F.I.R. was handed over to the police. He proved the formal chick report Ext. Ka-2 and the registration of the case in the general diary, Ext. Ka-3. He interrogated the informant and Clerk Constable Mahabir Singh at the police station and reached the place of occurrence the same day. The dead body of Smt. Lalli was found lying upon a cot in a room. There was no source of light and, therefore, he had got the cot along with the dead body brought outside the room. He found that the mouth of the dead body had been gagged with the help of a Kurta of Malmal and rope was there around her neck due to which there was mark around the neck. There were blood stains upon the Kurta. He appointed Panchas, examined the dead body and prepared the inquest report Ext. Ka-5. He then sent the dead body for post-mortem examination. Thereafter, he inspected the place of occurrence and prepared the site plan Ext. Ka-10. P.W 1, Ziledar was interrogated by him on 26-5-1979. He arrested accused Balbir on 17-5-1979 in his village in district Etah. In his cross-examination, he stated that during the examination of the dead body of Smt. Lalli, he had found white substance upon her private part and also that sexual intercourse had taken place with her.

9. Head Constable Mahabir Singh, No. 56, was examined as a Court witness. He stated about the despatch of the special report of the incident from the police station.

10. Shri S. R. Singh, the then District Magistrate, Mainpuri, was examined as CW-2. He stated that he had perused the special report of this occurrence on 8-4-1979.

11. The accused did not examine any witness in defence.

12. The learned District and Sessions Judge after considering the evidence on record found that the prosecution had been able to establish the guilt of the accused beyond reasonable doubt, and, therefore, convicted and sentenced him

as mentioned above. Feeling aggrieved, the accused preferred this appeal.

13. For the appellant, it was vehemently argued that the prosecution had miserably failed to establish that the appellant had been residing in the house of his father-in-law in village Also, district Mainpuri; that the evidence which could have been produced by the prosecution to establish the aforesaid very important fact, was not even collected by the Investigating Officer during the investigation; that the relations between the appellant and his wife and in-laws had been strained; that she in all probability had been raped by some one in the morning of the fateful day after her parents and brother had left the house for collecting fodder from the fields and that due to strained relations, the informant had falsely involved the appellant in this case.

14. Learned A.G.A., however, contended that the learned lower Court had rightly relied upon the testimonies of PW 1, Ziledar and PW 2, Gajju; that he had rightly convicted and sentenced the appellant and that the appeal, therefore, was liable to be dismissed.

15. For the appellant, it was also contended that the prosecution had not been able to explain the act of sexual intercourse with the deceased; that the learned lower Court also was faced with the aforesaid difficulty and that the learned lower Court, therefore, had based its finding of guilt upon surmises and conjectures for which there was no evidence worth the name on the record. Learned counsel for the appellant specifically referred to one of the paragraphs at page 62 of the paper-book (page 13 of the judgment of the learned lower Court) and argued that a wrong inference, not supported by any evidence was drawn by it about the guilt of the appellant. It would be proper to reproduce the aforesaid paragraph, particularly because paragraph numbers have not been put in the impugned judgment.

'It appears that Smt. Lalli got up in the morning and she prepared bed-tea for her young husband Balbir, who was lying in the bed. She gave to her husband and she also took tea. Her husband Balbir look Lalli in his cot and after some affection committed rape upon her. Thereafter, the male instinct of the accused Balbir forced Balbir to tell Smt. Lalli that she should accompany him and to live with him

at parental house in district Etah. As Smt. Lalli declined to give consent to go with him and gave some terse reply, the accused Balbir got enraged and gagged her neck by his hands. Her mouth opened. The guilt was obviously to the mind of the accused Balbir. The accused Balbir put the nearby lying Kurta in the mouth of Smt. Lalli and tied a rope round the neck of Smt. Lalli in order to conceal his wrongful criminal act. Later being aware of the arrival of his father-in-law he rushed away from the house.'

16. After carefully considering the aforesaid submissions and going through the record of the case, we are of opinion that the prosecution had not been able to establish the guilt of the accused beyond reasonable doubt and the contention of the appellant that he had been falsely implicated could not lightly be brushed aside. Motive always was a double edged weapon. In this case, however, it supported more the contention of the appellant than that of the prosecution and it appeared improbable that a husband, who allegedly had been living for the last about 15 days in the house of his father-in-law in another village in district Mainpuri where his wife also was living, would prefer to commit murder of his wife after enjoying sex with her in the morning of 5-4-1979. On the other hand, the informant after finding his daughter dead, had got ample opportunity to implicate the appellant falsely for the murder, as the actual culprit was some unknown person. It may be mentioned here that the Investigating Officer had not tried at all to collect the clothes etc. of the appellant from the house of the informant in support of the prosecution version that he had been living in the house of the informant. Informant Gajju stated in para 16 of his statement in cross-examination that appellant Balbir had got two or three Kurtas of terricot, which were of different colours having printed designs upon them, that he had got one printed shirt also and that the kurta, which was found in the mouth of the dead body of his daughter, had been put on by Balbir four or five times. The aforesaid Kurta and shirt should have been taken into possession by the Investigating Officer in order to prove that the appellant Balbir actually had been residing in the house of the informant.

17. PW 1, Ziledar in para 1 of his statement stated that there was nothing in the hand of the appellant when he had seen him running away from the house of the informant on the date of this occurrence. This statement, if believed, would show

that the appellant had left his belongings including the clothes in the house of the informant. According to the own showing of the prosecution thus the material evidence was there in the house of the informant to prove that the appellant had been residing there from some time prior to this occurrence. The prosecution did not give any explanation as to why the aforesaid very important evidence was not collected by the Investigating Officer. This is a case of circumstantial evidence and very important link in the chain of the circumstances, thus, was omitted by the Investigating Officer.

18. The informant Gajju, PW 2, was a highly interested witness, but on this ground alone his testimony could not be disbelieved although it required very close scrutiny. The only other evidence on the record was the statement of PW 1, Ziledar, which was attacked mainly on the ground that he had been interrogated after 51 days of the occurrence although he was a resident of the same village, namely, Alao, and the prosecution had not been able to give any reason whatsoever as to why the Investigating Officer had interrogated him after such inordinate delay. The Investigating Officer was in a position to interrogate him on the very day of the occurrence i.e. 5-4-1979. In the absence of any explanation of inordinate delay, the testimony of PW 1 Ziledar also required a very strict scrutiny.

19. It was also important to mention that the alleged Kurta of Malmal of the appellant found in the mouth of the dead body was not subjected to the test identification which under the circumstances was essential. No reasons again was given by the prosecution as to why the identification proceedings of the Kurta were not got conducted by the I.O. A very important piece of corroborative evidence, thus, was not brought on the record and another important chain in the circumstances of the case, thus, was not there on the record.

20. PW 1, Ziledar, in his examination-in-chief stated that after the running away of Balbir he had come to know in the village that Lalli had been murdered. This part of his statement reads as follows:-

'Balbir ke bhaag janey ke baad mainey gaon mey jana ki Lalli ko maar dala.'

21. The aforesaid statement of PW 1, Ziledar, suggested that he in all probability, had come to know from some one in the village that Smt. Lalli had been murdered by Balbir. His house was situate on the extreme eastern end of the village. He stated that he was going towards his field when he had seen Balbir running away. He on his own showing thus was a chance witness and after carefully considering the circumstances of the case, his testimony did not appear to be worthy of credence. He claimed to have recognised the Kurta of Malmal of the appellant even before it was taken out of the mouth of Smt. Lalli vide para 4 of his statement. Only a part of the Kurta was out of the mouth of the dead body, but Ziledar, PW 1 even then claimed to have identified the same as that of Balbir. His testimony suggested that he was prepared to support the prosecution story up to any extent. The appellat belonged to a village in district Etah while the informant was the fellow villager of Ziledar, PW 1, and, therefore, it was probable that he had stated in favour of the prosecution. In order to make his testimony believable, he wrongly stated in para 11 of his statement that he was interrogated by the Investigating Officer after four or five days of the occurrence while according to the Investigating Officer, he had interrogated him after 51 days of the incident. Under the circumstances, therefore, we are of opinion that the learned lower Court wrongly placed reliance upon the testimony of Ziledar, PW 1.

22. A very important circumstance in this case is the commission of sexual intercourse with the deceased. If the sex act was performed by the appellant, it appeared improbable that he immediately or soon thereafter, strangulated her. According to the prosecution, he had been living for the last about 15 days, in the house of his father-in-law. There is no explanation as to why he waited for 15 days for committing the murder of his wife. Had he decided to kill her, the same could have been done by him much earlier and certainly not soon after having enjoyed sex' with her. This state of affairs supported the contention of the appellant that she, in all probability, had been ravished by some unknown person, who, in order to remove the evidence against him, committed her murder by strangulating her. Learned lower Court also appeared to have faced the difficulty in relying upon the eye-witness account and that is why recourse was taken to surmises and conjectures that after the commission of the sexual intercourse, the accused probably had asked his wife to accompany him to his house, who, however, was

not prepared for the same and, therefore, he committed her murder. It has also been observed by the learned lower Court that the deceased probably had in the morning served bed tea to the appellant and had also herself taken the same. The observation probably had become necessary, as Dr. R. K. Jain, PW 5, had found about two ounces of some liquid of tea colour in the stomach of the dead body. This inference also, however, is based on surmises and conjectures only for which there was no justification.

23. An attempt was made to argue that there was no medical evidence to support the commission of sex act with the deceased and, therefore, the omission to explain the same did not prejudice the eye-witness account. The contention, however, appeared to be devoid of merits. Dr. R. K. Jain, PW 5 had performed the post-mortem examination on the next day and by then there was every possibility of the removal of the white substance upon the private part of the deceased by her clothers. His statement, therefore, was of no help for the prosecution. As against it, the inquest report, which was prepared immediately after the examination of the dead body the same day clearly showed that some white substance was there upon the private part of the deceased and there were no good reasons to disbelieve this part of the prosecution evidence which, as observed above, supported the probability of commission of rape upon Smt. Lalli. Absence of injuries on the dead body was not material, as she was a married woman and nothing could be said as to whether there were more than one person who had overpowered her when she was ravished in the house of her father.

24. From the above discussion, we are of opinion that the possibility of the murder of Smt. Lalli by some unknown person or persons, who had first criminally assaulted her, was very much there and it outweighed the probability of her murder by the appellant after having enjoyed sex with her in the morning of 5-4-1979. The statement of the informant Gajju alone, therefore, could not safely be relied upon to prove the guilt of the accused. The chain of the circumstances, as already discussed above, was not complete due to which also verdict of guilt could not safely be returned against the accused. The inferences drawn by the learned lower Court about the manner in which the occurrence had taken place were not based upon any evidence. The accused should have been given the benefit of

doubt by the learned lower Court and the appeal, therefore, was liable to be allowed.

25. The appeal is allowed, the conviction and sentence of the appellant are set aside and he is acquitted of the charge levelled against him. He is on bail and need not surrender. His bail bonds are cancelled and sureties discharged.

26. The material Exhibits 1 to 11 shall, after the expiry of the period of appeal, be destroyed. No material exhibit shall be sent to the appellate Court unless specifically called for.

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