

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

CRA No.38/2011
MP Nos.1/2016, 3/2016, 28/2015, 1/2015, 2/2007
c/w
CONF No.12/2011, MP No.1/2015

Date of order: 08.03.2018

Subash Chander Sharma

v

State of J&K

Coram:

Hon'ble Mr Justice Badar Durrez Ahmed, Chief Justice
Hon'ble Mr Justice Sanjeev Kumar, Judge.

Appearance:

For the Appellant(s) : Present in person.

For the Respondent(s) : Mr Ashish Singh Kotwal, Dy.AG.

i) Whether approved for reporting in
Law journals etc.: Yes

ii) Whether approved for publication
in press: Yes/No

Badar Durrez Ahmed, CJ(Oral)

1. The present appeal and confirmation of the death sentence arise out of the judgment of the Principal Sessions Judge, Jammu in file No. 01/Sessions dated 30.09.2011 and the sentencing order dated 08.10.2011. The said case, in turn, arose out of FIR No. 130/2001, registered at Police Station, Nagrota. By virtue of the impugned judgment, the appellant has been convicted under Section 302/498-A RPC for having murdered his wife Sunita Devi and for having subjected his wife to cruelty. The sentence awarded on 08.10.2011 was that the appellant was to be hanged by neck till death. A fine of Rs. 10,000/- was also imposed. This was for the offence under Section 302 RPC. Insofar as the offence under Section 498-A RPC is concerned, the sentence awarded was one year imprisonment and a fine of Rs. 1,000/-. It may be pointed out at this stage itself that the appellant has been

in custody for over 16 years and six months. The case of the prosecution is that the appellant forcibly drowned his wife in the river Tawi on 09.09.2001.

2. The appellant had informed the police on that date itself that he had gone to river Tawi along with his wife for bathing in the early hours of 09.09.2001. It is the case of the prosecution that he informed the police that he was taking a bath at some distance from his wife when she slipped and drowned. As the police were informed, they started searching for the dead body. Ultimately, the police received information from Police Control Room that one dead body near Gujjar Nagar had been seen. The dead body was evacuated and taken to the mortuary in the hospital. Thereafter, inquest proceedings ensued under Section 174 Cr.P.C. During the inquest proceedings, as per the prosecution, it was revealed that on 09.09.2001, the Police at Sidhra received information through reliable sources that one woman by the name of Sunita Devi, who was the wife of the appellant, residing at House No. 87, Mandir Morh Sarwal, Jammu, had drowned in the river Tawi near Tawi Park. The police party proceeded to the spot and with the help of some civilians conducted search in the river Tawi for the drowned woman till the late hours of 09.09.2001, but no trace could be found. The Station House Officer of Police Station, Nagrota also participated in the search along with other personnel from the said Police Station. The search was resumed the next day early in the morning and at about 09:00 hours the police control room Jammu informed the Police concerned that the death body of one woman Sunita Devi has been traced near Sher-e-Kashmir Bridge in river Tawi, by the Gujjar Nagar Police, who had shifted the dead body to GMC, Jammu. It is further the case of the prosecution that by this time the close relatives of the deceased had also arrived at the scene of occurrence and they expressed doubts as to the cause of death of the deceased and they further suspected foul play on the part of the appellant (her husband) who, as per their statements, had often been harassing her on one pretext or the other. After the conduct of the postmortem examination and upon completion of other legal formalities, the dead body of the deceased was handed

over to her relatives for performance of the last rites. The prosecution case further is that during the course of inquiry the appellant, who was suspected, stated before the investigating officer that on 09.09.2001 he along with his wife (deceased) left their Sarwal residence at about 04:30 hours for Harki Pouri where his wife threw some food to the fish in the river Tawi. They spent about 10 to 15 minutes at Harki Pouri. Thereafter, they left for a temple situated near Circular Road, Jammu. Before going to the temple they went to the river Tawi near Tawi Park for taking a bath. He further revealed that on the way to river Tawi he stopped at a place enroute to answer the call of nature. His wife, however, proceeded ahead. By the time he reached river Tawi, his wife had already entered the river and was taking a bath. He also entered the river and started bathing about 10 to 15 feet away from his wife. It was at this point at about 06.30 hours his wife drowned in the water. He tried to rescue her but could not help her because he did not know swimming and the exact depth of the river Tawi could not be gauged. He came out of the river, picked up the clothes and '*nylon chappals*' of his wife and informed some people who were bathing down stream at a distance of about 100 yards who accompanied him and searched for his wife in the river. While the search was still on, the appellant left the spot to contact the police. It was also stated on the part of the prosecution that instead of going to the nearby Police Post, Panjtirthi, the appellant went to his residence, contacted some people there and accompanied by an Advocate reported to the Police Post, Panjtirthi, from where the police party was deputed to search for the drowned woman at the river Tawi.

3. After completing the investigation, the challan was filed in the court. The charge under Section 302/498-A RPC was framed against the appellant who claimed trial. As many as 29 prosecution witnesses were cited, of which 25 were examined. The defence also cited and examined 9 witnesses. This was after the accused was examined under Section 342 Cr.P.C. After examining the evidence

on record, the trial court, as mentioned above convicted the appellant under Sections 302/498-A RPC and awarded the sentences mentioned above.

4. The appellant has argued the appeal himself. He was an Advocate by profession when this incident occurred. He submitted that the entire case of the prosecution rests on the question as to whether the death of Sunita Devi was homicidal or accidental. He submitted that insofar as the prosecution is concerned, they have to establish beyond reasonable doubt that the death of Sunita Devi could not have been accidental. It was nobody's case that the death was suicidal. Therefore, the only other alternative would have been that the death was homicidal. He submitted that unless and until this was established by clear evidence, all other circumstances which could be invoked such a motive etc., were irrelevant. According to the appellant, there is enough material on record to establish that the death of Sunita Devi could be accidental and not homicidal. Therefore, the benefit of doubt ought to be given to him. Insofar as the offence under Section 498-A RPC is concerned he submitted that there is no evidence whatsoever of any harassment on his part connected with any demand for any property and therefore, that order of conviction would also have to be set aside.

5. The learned counsel for the respondent/State, however, took us through the entire evidence and the judgment in question. He fully supported the decision of the trial court and was of the view that the death of Sunita Devi was purely homicidal and there was no question of her death being accidental. He also submitted that the motive for the murder was clearly established in as much as it has come in evidence that the appellant used to maltreat his wife and also make demands for property. It is also the case of the prosecution that the appellant did not permit Sunita Devi to visit her parental home and also did not permit her brother to come to the house for the purpose of having a Rakhi tied on his hand by his sister. It is also the case of the prosecution that part of the motive was that the relations were so strained that the appellant did not even permit his wife Sunita

Devi to attend her brother's marriage. Based on the above, the learned counsel for the State submitted that there was a clear motive for committing the murder of Sunita Devi and the circumstances unerringly pointed towards the guilt of the appellant. He submitted that the death penalty had also been rightly awarded because this was one of the rarest of rare cases particularly because the death of Sunita Devi did not mean her death alone, but also of the foetus which she was carrying. It was also submitted that because the appellant was an advocate he had carefully planned the crime without leaving any direct evidence.

6. After having heard the learned counsel for the parties, we are in agreement with the submission made by the appellant that unless and until it is established that the death was homicidal, the rest of the case would not hold any water. The learned counsel for the State submitted that the death was homicidal based on the injuries as recorded in the postmortem examination report exhibited as EXPW-GS. He also submitted that the death was homicidal as the conduct of the accused was not normal. Let us first of all examine the first aspect and that is of the injuries as revealed in the postmortem examination report. The postmortem examination was conducted by PW-Dr Gurmeet Singh. The external and internal injuries found on the body of the deceased were as under:-

- “(i) There was grazed abrasion anterior aspect on right knee 3 X 2 cms.
- (ii) Grazed abrasion anterior aspect on the left knee 3X2 cms.
- (iii) A laceration 1 cm X 0.5 cm long left side forehead just above lateral end of eyebrow .
- (iv) She had washer woman's hands and feet.

Head: She had bruising present under the scalp over left frontal region 5X 4 cms.

Thorax: Her trachea contained sand particles. It also contained blood stained fluid. Rib markings present over pleura.

Lungs: Both lungs congested and edematous”

7. The said witness, Dr Gurmeet Singh, also stated that the uterus of the deceased was enlarged and contained a male foetus 17 cm long. He also opined that the time since death was approximately 30 hours. In his opinion the cause of death in this case was “asphyxia due to drowning”. In the course of cross-examination, he has however, clarified that all the injuries on the body of the victim were superficial and could have been caused due to drowning while floating.

8. On examining, the injuries as recorded in the postmortem examination report, we find that the deceased had grazed abrasions on both the knees of the same dimension. There was also a small laceration of 1 cm X 0.5 cm on the left side of the forehead just above lateral end of the eyebrow. He also indicated bruising under the scalp over the left frontal region of the dimension of 5X4 cms. Her trachea contained sand particles

9. According to the appellant the grazed abrasions on the knees and the laceration on the left side of the forehead could have been caused by the body floating on the water and where the river was shallow the floating body might have hit against the stony bed of the river Tawi. This possibility is confirmed by PW-Dr Gurmeet Singh when he, in his cross-examination, stated that all the injuries on the body of the victim were superficial and could have been caused due to drowning while floating.

10. Insofar as the presence of sand particles in wind pipe are concerned, no definite answer can be given as to whether these were present because of forceful drowning or accidental drowning. In fact, the prosecution has not been able to elicit any information from the said Doctor as to whether the injuries were ante mortem or post-mortem. In other words, all the injuries that are present on the body of the deceased Sunita Devi cannot, with any degree of certainty, be stated to be ante mortem or post-mortem. This being the case, it does not appear that the prosecution has been able to rule out the possibility of the death of Sunita Devi being accidental.

11. Insofar as the conduct of the accused is concerned, the learned counsel for the State submitted that his conduct was not that of a normal husband whose wife had accidentally drowned. First of all, it was submitted that instead of searching for his wife himself and jumping into the water he went and approached PW Mohinder Kumar and PW Vijay Khajuria, who were approximately 100 yards away. However, we find that this circumstance was put to the accused/appellant in his examination under Section 342 Cr.P.C. when he, on the contrary, stated that he tried hard to save her but because of the strong current he could not do so particularly because he do not know how to swim. There is no contrary evidence produced by the prosecution to negate this explanation.

12. Secondly, it was submitted by the learned counsel for the State that the conduct of the appellant was not that of a normal person who had just lost his wife due to drowning as he did not raised any alarm. The appellant explained that the answer given by him in his examination under Section 342 Cr.P.C completely clarifies the position as he himself tried to save his wife up to a point, beyond which he could do nothing as he did not know how to swim. Thereafter, he went to the nearest person PW-Mohinder Kumar, who was 100 yards away down stream. This fact is corroborated by PW Mohinder Kumar that the appellant did approach him and enquire from him as to whether he knew how to swim and then told him that his wife has drowned and if he could help him in searching for her in the river. PW Mohinder Kumar also stated in the course of his deposition that he went into the water which was muddy and the river had differing depths at different places. The depth of the river was greater where the river was narrow and was shallow where the river was wide. However, he could not trace the deceased in the river and he also gave up the search. He stated that the water was upto his navel in some spots and in others it was up to his shoulder.

13. This part of the testimony that PW Mohinder Kumar searched for the deceased at the request made by the appellant has also been corroborated by

another prosecution witness, that is, PW Vijay Khajuria. Therefore, the behavior of the appellant on this aspect cannot be considered to be abnormal.

14. Thirdly, the learned counsel for the State submitted that it was quite abnormal on the part of the appellant that he did not even wait for PW- Mohinder Kumar to return from the river and in straight away proceeding towards his home. But, in order to appreciate the position as it obtained at that point of time it would be necessary to examine the testimony of PW Vijay Khajuria, who categorically stated that PW- Mohinder Kumar, while he was searching for the deceased, stated that the water is dirty and the water is 'more' (zyada) and that she would not be found. On this, PW Vijay Khajuria told the appellant to go home and phone some body. He also stated that during monsoon the level of water is higher and the current is stronger. It is under these circumstances that the appellant immediately went to a friend who was an advocate and then to the police and informed them about the incident and, thereafter, as per the prosecution itself a police party was engaged in the search for the deceased till the late hours of the evening of 09.09.2001. The search was resumed on the next date till they received information about the discovery of a dead body of a woman near Sher-e-Kashmir Bridge, Gujjar Nagar. Therefore, we are of the view that this circumstance of not waiting for PW Mohinder Kumar to return cannot also be regarded as unnatural behavior on the part of the appellant.

15. The fourth aspect with regard to the conduct of the appellant which was sought to be highlighted by the learned counsel for the State was that he was carrying a polythene bag containing the garments of the deceased and ladies chappals belonging to the deceased when he met PW Mohinder Kumar. According to the learned counsel for the State, it appeared that the appellant was more concerned about the garments and the chappals than about saving his wife. First of all, this argument cannot be raised at all because no specific incriminating question in this regard was put to the appellant/accused. Secondly, it is quite possible that as the deceased was bathing and had left her clothes on the bank of

the river and the appellant picked them up along with chappals so that when her body was found or she was alive she could be immediately draped in the clothes. This is a clear possibility and cannot be ruled out.

16. Therefore, on examining the postmortem examination report and the injuries indicated therein and the conduct of the appellant, it cannot be said with certainty that the death of Sunita Devi was homicidal. As such, the possibility of the death being accidental cannot be ruled out. In such circumstances, all other evidence recedes into the background. Unless and until the death of Sunita Devi is established beyond reasonable doubt to be homicidal, no conviction can be based on any other piece of circumstantial evidence which does not tend to support the conclusion theory of homicide. Therefore, the benefit will have to go to the appellant insofar as the offence under Section 302 RPC is concerned. It is obvious that the question of who killed Sunita Devi would only arise if it can be established that she was in fact killed by some one.

17. Insofar as offence under Section 498-A RPC is concerned, Explanation (b) has been pressed into service to attempt to establish cruelty on the part of the appellant towards his deceased wife Sunita Devi. But, we find that there is no evidence whatsoever apart from the testimonies of Sunita Devi's brother PW Kulbushan Sharma who, also in his testimony, clearly indicates that while the appellant and his wife were residing at Rani Talab for about 7 years from the date of their marriage there was no untoward incident and the appellant had never misbehaved with the deceased and no demand was ever made. He also stated that when the appellant and his wife moved to their Sarwal residence he had heard from the landlady that the relations between the appellant and his wife were not cordial. However, the so called land-lady has not been produced as a witness nor had he stated as in his statement under Section 161 Cr.P.C. He also submitted that the reason for his suspicion and his belief that the appellant had committed the murder of Sunita Devi was the factum of non attendance of his marriage by the appellant and his wife.

18. PW Kailash Rani, the mother of the deceased also stated to the effect that if they (meaning the appellant and his wife) had attended Kulbushan's wedding that would have been enough for them. In other words, the grouse against the appellant was inter alia the non attendance of the wedding of PW Kulbushan Sharma. The other two witnesses on whom the prosecution relied upon were the minor daughters of the deceased and the appellant. One daughter, PW Nidhi Sharma was 10 years old at the time of the testimony on 01.09.2004 and which implies that she was about 7 years on the date of the occurrence. The other daughter PW Upasana Devi was about 9 years old at the time of her deposition which implies that she was approximately 6 years old on the date of occurrence. Both these daughters, after the date of alleged occurrence were residing with their 'mama' (maternal uncle) (PW Kulbushan Sharma). PW Nidhi Sharma, the older of the two daughters, stated what the prosecution version was. In other words, that the father never allowed their mother to go to her parental house and that once the 'mama' had come for having the rakhi tied, but her mother was not allowed to tie the rakhi on his hand and he was thrashed. She also stated that once her mother was taken to the forest and left there alone. Of course, no date or year of the raksh bandhan or the date or year of the alleged incident of having been left alone in the forest were indicated. The younger daughter, that is, PW-Upasana Devi also made similar statements that the parents used to quarrel and 'once' her father had inflicted blows on the abdomen of her mother. Again, no date or year has been given. The raksha bandhan incident has also been narrated by her. In cross-examination, however, she had stated that the parents used to love the children and they used to go to the Tawi Par often.

19. On going through the testimonies of these child witnesses, we get the impression that they were tutored by their 'mama' PW-Kulbushan Sharma and, therefore, we cannot place much credence on their testimonies. As a result, even insofar as offence under Section 498-A RPC is concerned, the prosecution has not

been able to establish the same beyond reasonable doubt. Once again the benefit has to go to the accused.

20. Consequently, after giving benefit of doubt to the accused on both counts, the appellant/accused is acquitted of the charges. The impugned judgment and the order on sentence are set aside. The confirmation reference is also disposed of. The appellant is present in Court and has been produced in custody. He is at liberty to leave the Court and is free to go home.

21. The concerned jail shall return all the belongings of the appellant to him within a day.

(Sanjeev Kumar)
Judge

(Badar Durrez Ahmed)
Chief Justice

Jammu
08.03.2018
Vijay

