

**(2011) 05 AHC CK 0387**

**Allahabad High Court**

**Case No:** Criminal Jail Appeal No. 7422 of 2007

Mukesh Nut

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision:** May 13, 2011

**Acts Referred:**

- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 302

**Citation:** (2011) 61 ACR 2331 : (2012) 1 Crimes 452 : (2011) 7 RCR(Criminal) 319

**Hon'ble Judges:** F.I. Rebello, C.J; Imtiyaz Murtaza, J

**Bench:** Division Bench

**Final Decision:** Dismissed

### **Judgement**

Imtiyaz Murtaza, J.

The above jail appeal emanates from the judgment and order dated 15.9.2007 rendered by Addl. District and Sessions Judge, Agra in S.T. No 72 of 2006 whereby the Appellant has been convicted u/s 302, I.P.C. and sentenced to imprisonment for life and a fine of Rs 5.000 with default stipulation.

2. The accused is husband who is alleged to have murdered his wife on 26.11.2006 at 2 p.m. in Kiraoli Tahsil district Agra. The F.I.R. of the case was lodged by Rlnku, brother of deceased Sanju.

3. A brief resume of prosecution case is that the complainant and his brothers were dealing in scrap materials in Kiraoli and they had settled at Kiraoli after migrating from Etawah. A week prior to the occurrence, accused Mukesh, his brother-in-law and deceased Sanju, his sister also arrived at Kiraoli from Etawah and started living in a rented room at Kiraoli. It is alleged that Mukesh was addicted to liquor and also used to indulge in gambling and he used to harass and humiliate Sanju on account of the fact that she was unable to bear a child for him even after elapse of 4-5 years of marriage. On the day of occurrence, accused made a telephonic call to the

complainant on Mobile of one Ravi stating that he was far away and that the complainant should go to his house in order to ensure whether everything was going well there. On this telephonic call, the complainant alongwith his brother Manoj went to the house and found the door bolted from outside. When the door was forcibly opened, they found deceased lying supine on the floor and she had been strangulated by a piece of Sari of yellow colour and blood was oozing from her nose. It is further alleged that thereafter a search was made for the accused but he was nowhere traceable. On the basis of written report, a case u/s 302, I.P.C. was registered.

4. The investigation of the case was conducted jointly by S.I. C.B. Singh and S.O. Shyam Singh. The police, after completing investigation, submitted charge-sheet in the Court against the accused. The case was committed to the Court of Sessions and charge u/s 302, I.P.C. was framed against the accused. The accused pleaded his innocence and claimed to be tried.

5. The prosecution in all examined 9 witnesses out of which P.W. 1 is Pankaj Verma Naib Tahsildar, P.W. 2 is complainant Rinku, brother of the deceased. P.W. 3, is Km. Mona, sister of the deceased, P.W. 4 is Manoj brother of deceased, P.W. 5 is Chandrabhusan Singh Investigating Officer, P.W. 6 is Rup Basant Head Constable who registered the case on the basis of written report, P.W. 7 is Dr. Hansraj Singh who conducted autopsy on the dead body, P.W. 8 is Constable Rakesh Kumar who after completion of proceeding of inquest and process of sealing the body, had handed over the body to Constable Ashok Kumar for being escorted for post-mortem, P.W. 9 is Ghan Shyam Singh who was entrusted with the investigation on 15.12.2005.

6. The case of the defence was one of denial attended with the version that he was not present at the time of death of the deceased and he has been falsely nominated in the case. However, no witness was examined by him to vindicate his innocence.

7. The Sessions Judge relying upon the prosecution evidence, rendered verdict of conviction against the Appellant as aforesaid and hence this appeal.

8. As stated supra, since this appeal was preferred from Jail and since the accused was unrepresented, Sri Kameshwar Singh, advocate was appointed by the Court as *amicus curiae*. Sri Kameshwar Singh argued at prolix length. We have also heard Sri D.R. Chaudhary Government advocate who was ably assisted by Sri Avunendra Singh, A.G.A.

9. Learned Counsel for the Appellant began his submission arguing that the evidence produced in the case is not adequate and convincing to warrant the conviction. He also challenged the finding recorded by the trial court submitting that the prosecution has miserably failed to prove its case attended with submission that no independent witness was produced or examined in the case. He also argued that the allegation that the deceased was harassed and persecuted for not bearing a

child is wholly false and there is no indicium on record that there was any harassment and in fact there was no lack of cordiality between them. The deceased it is alleged committed suicide herself as she was running in severe depression. The learned Counsel also denied that the accused was an addict. Lastly, he argued that the sentence awarded in the facts and circumstances of the case errs on the side of severity.

10. Per contra, learned A.G.A. has canvassed for the correctness of the view taken by the trial Judge in the backdrop of evidence attended with the submission that sufficient evidence was adduced by the prosecution and the Sessions Judge rightly convicted the Appellant relying on the evidence.

11. In order to appreciate the aforesaid rival contentions of learned Counsel for the parties, we have to independently scrutinize the oral and documentary evidence brought on record by the prosecution.

12. P.W. 1 is Pankaj Verma. Naib Tahsildar and on the day of occurrence, on being instructed by S.D.M. Kiraoli, he arrived at the place of occurrence. According to this witness, entire inquest proceeding was conducted under his active supervision by C.B. Singh S.I. Police and he remained present at the scene till the body was sealed and handed over for post-mortem.

13. P.W. 2 Rinku is the complainant. He deposed that marriage was solemnized about 4-5 years back but no child was born. He also deposed that the accused was working with one Ramesh and was addicted to gambling and liquor. The deceased often took offence to his habit of gambling and drinking upon which he used to beat her. He also deposed that the accused alongwith the deceased had migrated from Etawah to Kiraoli and was living in a rented room there. On 26.11.2005 when he alongwith his brother Manoj was busy at the Godown. Mona, his sister came there to deliver food to them and she informed that the accused had given beating to the deceased. He also deposed that he ignored the information as it had become routine with him to give beating to the deceased. After sometime, he got a call of the accused on the mobile of Ravi who was owner of the Godown whereby the accused asked Ravi to inform him to go to the room as he was far away from Kiraoli. When he and his brother arrived at the room, the same was found locked from outside. When the lock was broken open, he found his sister lying supine on a cot and the blood was oozing from her nose and ear and noose tightened around her neck with a piece of yellow Saree.

14. In cross-examination, the substance what he stated is that the call was received on the mobile phone of Ravi who was the owner of the Godown. He also stated that accused was working with one Ramesh. He also stated that on the day of occurrence, he had not gone to the work and was at home. He also explained that Mona had brought food for them at 7.30 a.m. and at that time she did not complain of any untoward incident. He also explained that at 11 a.m. when Mona again came

to godown with food she was weeping and had told Monoj that the accused was giving beating to the deceased but Monoj did not inform him. He explained that since report was prepared in a haste he did not mention the said fact in the written report. He denied the suggestion that on the day of occurrence, the accused had gone to the place where he worked and that the deceased was killed by some unknown assailants and further that a false report was lodged at the dictate of the police.

15. P.W. 3 is Km. Mona sister of the deceased. She deposed that she had seen accused beating the deceased and she had also seen accused assaulting with a piece of brick. She also stated that her sister cried for help the accused sat on her chest. She also deposed that she had seen the occurrence of beating through crevices of the door and she had also informed her brothers at the godown.

16. In cross-examination, she reiterated the version that on her return after delivering food, she saw accused beating her sister. Thereafter, when her sister cried, the accused sat on her chest. The room was bolted from inside and she saw the occurrence from the crevices of the door. She, however, stated that she did not see accused murdering her sister. She denied that she was giving false version on being primed by her brothers. She also denied the suggestion that she had not seen anything as stated by her.

17. P.W. 4, Monoj substantiated the evidence of P.W. 2 Rinku in all materials aspects.

18. In cross-examination, he reiterated the version of P.W. 2. Nothing incriminating was elicited from his grueling cross-examination. He stated that Mona came with food at about 12 a.m. at the godown and at that time, she had told him about beating being given by the accused to the deceased. He explained that he was missing telling Rinku about what Mona had told him. He also stated that telephone from the accused call came at 2.30 p.m. He also stated that after receiving call, he went to the room which was locked and therefore he returned and did not make any efforts to see whether her sister was inside the room or not. He denied the suggestion that Mona was asked to give evidence on dotted line. He also denied the suggestion that Mukesh accused was not present at station on the day of occurrence.

19. P.W. 5 Chandra Bhushan Singh who initially took over the investigation of the case deposed that the case was registered in his presence and thereafter, he left for the place of occurrence where he recorded the statements of the witnesses. He also deposed that a search was made for the accused but he was nowhere traceable. He completed all other formalities and prepared recovery memos etc.

20. In cross-examination he denied the suggestion that the investigation was done carelessly and Mona was introduced as a witness just to prop up the prosecution case.

21. P.W. 6 is Rup Basant Head Constable. He deposed that he registered the case on the basis of written report of Rinku at about 7.30 p.m. on 26.11.2005.

22. P.W. 7 is Dr. Hans Raj Singh who conducted post-mortem on 27.11.2005 and noted following ante-mortem injuries:

- (1) Abrasion 1.5 cm. ♦ 1 cm. on the upper lip.
- (2) Abrasion 1 ♦ 05 cm.
- (3) 0.5 cm. ♦ 0.5 cm. abrasion inside of lower lip.
- (4) Abrasion 0.5 ♦ 0.5 cm. lower lip.
- (5) Abrasion 4 ♦ 1 cm. below stomach side.

23. The Doctor opined that the deceased died due to suffocation and smothering. The Doctor also opined that the injuries could be caused by brick.

24. P.W. 8 is constable Rakesh who stated that the dead body alongwith inquest papers was handed over to constable Ashok Kumar for being carried for post-mortem and after post-mortem the body was handed over to the complainant.

25. P.W. 9 is Ghanshyam Singh who took over investigation on 15.12.2005. He deposed that immediately after taking over the investigation, statements of witnesses were recorded. He also deposed that the accused surrendered in Court on 23.12.2005. He recorded the statement of the accused on 4.1.2006 He deposed that after completing remaining proceeding, he submitted charge-sheet in the Court.

26. In cross-examination, he denied the suggestion that the charge-sheet was submitted in Court without any valid basis.

27. To begin with, the learned Counsel assailed the credibility of the testimony of P.W. 3 Mona on the ground that she was not named in the F.I.R. as eye-witness and she has been subsequently brought in picture to invigorate and lend credibility to the prosecution case. In connection with the above submission, we have delved into the F.I.R. and also the testimonies of the witnesses. There is no gainsaying of the fact that P.W. 3 Mona was not named in the F.I.R. nor has it been mentioned that she was an ocular witness of the occurrence. From a scrutiny of her testimony, we converge to the view that her testimony is credible one and inspires confidence although the fact remains that she is a child witness. We are conscious of the fact that a child witness is a dangerous witness as he/she is pliable and liable to be influenced easily and evidence of such witness has to be acted after careful scrutiny. The learned Sessions Judge has placed credence on her testimony as having an imprest of truth. We have all over again gone through her testimony and it would appear that she had informed P.W. 2 Rinku and P.W. 4 Manoj about assault on the deceased by the Appellant.

28. We would first dwell on the submission whether it would erode the credibility of the prosecution case merely because name of Mona P.W. 3 was not mentioned by the complainant in the F.I.R. In connection with this submission, we would like to advert to a decision of the Apex Court in [Chittar Lal Vs. State of Rajasthan](#), relevant portion of which being germane is excerpted below.

Evidence of the person whose name does not perforce become suspect. There can be no hard and fast rule that the names of all witnesses, more particularly eyewitnesses should be indicated in the F.I.R. As was observed by this Court in [Shri Bhagwan Vs. State of Rajasthan](#), mere non-mention of the name of an eye-witness does not render the prosecution version fragile.

29. In the facts and circumstances of the present case, we are of the view that non-mention of name of Mona P.W. 3 in the first information report would not render the prosecution fragile. The complainant was the real brother of the deceased and the Court can very well visualize the distraught condition of the complainant at the relevant time. In our considered view, if the name of Mona had not been mentioned in the F.I.R. her testimony cannot be thrown above board on this ground alone.

30. The next attack of the learned Counsel is again on the testimony of P.W. 3 Mona. In this limb of argument, the learned Counsel argued that it had come in the deposition of P.W. 3 Mona that on her return from Godown, she saw through crevices of the door that the Appellant while sitting on the chest of the deceased was assaulting her. He further argued that if it was so, there was no occasion for the witness to have informed P.W. 2 when she had gone to Godown to deliver meal to him, about beating being given by the Appellant to the deceased. In connection with this submission, we have all over again scrutinized the evidence. It is categorically stated by P.W. 4 in his deposition that when Mona returned after giving food, she again came to the Godown and informed about the incident. The testimony as noted above, furnishes answer to the arguments of the learned Counsel for the Appellant. By this reckoning, we are of the view that the submission on this count is not loaded with any substance.

31. It is significant to mention here that the manner of assault as narrated by P.W. 3 Mona finds full corroboration from the post-mortem report. The salient aspects of her deposition may be recalled here. P.W. 3 has stated that her sister was killed by Mukesh and she had seen him assaulting her sister. She also stated that she was assaulted by brick and she was also strangulated and that when her sister cried for help, the Appellant sat on her chest. In this connection, we may also advert to the testimony of P.W. 7 Dr. Hansraj Singh who had conducted autopsy. The doctor aforesaid clearly opined that injury Nos. 1,2, 3 and 4 may be caused by brick attack and if brick is sharp-edged, then injury No. 5 may be caused. The cause of death of the deceased was opined to be suffocation and smothering.

32. We may also advert to another important circumstance of the case. According to the testimony of P.W. 3, Mona, only deceased and Appellant were inside the room/house when the deceased was assaulted by the Appellant. It is borne out from the record that the room was found bolted from outside. We may now advert to the deposition of P.W. 2 Rinku. He deposed that he had received a call from Appellant on the mobile of Ravi, owner of the Godown in which Appellant asked Rinku to go to the house and take welfare as he was away from Kiraoli. When P.W. 2 and his brother arrived at the room, it was found bolted from outside. When the lock was broken, his sister was found lying supine on a cot and blood was oozing from her nose and ears and a noose of yellow saree was found tied around her neck. The evidence of P.W. 2 has been substantiated by evidence of P.W. 4.

33. It is a settled principle of law that where an offence is committed in the privacy of a house, the initial burden to establish the case would undoubtedly lie on the shoulder of the prosecution but the nature and amount of the 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 comparatively of a lighter character. In this connection attention is drawn to Section 106 of the Evidence Act which envisages that 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 premises that the burden to establish its case lies entirely upon the prosecution and there is no duty at all of the accused to offer an explanation.

34. In connection with the above, we feel called to refer to the decision of the Apex Court in *Trimukh Marothi Kirkan* (2007) 1 SCC (Crl) 80 : 2006 (3) ACR 3150 (SC) and para 14 of the said decision being relevant is quoted below:

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 AC 315 quoted with approval by Arijit Pasayat, J., in *State of Punjab Vs. Karnail Singh*, 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 travelling on a railway without ticket. The burden of proving that he had a ticket is on him.

35. Reverting to the case in hand, there remains no manner of doubt that the prosecution has succeeded in leading evidence in order to show that shortly before the commission of crime, the Appellant and deceased were seen together and Appellant had not offered any explanation as to how his wife received injuries nor offered any explanation to elucidate on the cause of death. In our considered view, it constitutes a strong circumstance which evinces that the Appellant was responsible for commission of the crime.

36. For the foregoing discussions, we are of the firm opinion that the Sessions Judge rightly placed credence on the testimony of P.W. 3 Mona and recorded verdict of conviction. We find no infirmity in the finding and in our considered view, the view taken by the learned Sessions Judge should be affirmed. It is accordingly affirmed.

37. In the above conspectus, the appeal fails and is dismissed. The Appellant is incarcerated in jail. He shall serve out the sentence awarded by the trial court as affirmed by us.