

Delhi High Court

Delhi High Court

Dinesh Kumar & Ors. vs State Nct Of Delhi on 14 August, 2014

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on : August 07, 2014 Judgment Pronounced on : August 14, 2014

+ CRL.A. 210/2013

DINESH KUMAR & ORS. Appellants Represented by: Mr.Sanjay Jain, Advocate with Mr.Subhash C.Ahlawat, Advocate

versus

STATE NCT OF DELHI Respondent Represented by: Ms.Aashaa Tiwari, APP

Insp.Jitender Kumar and SI Ajay

Kumar, PS Dabri

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Ms.Gayatri was married to Mukesh on December 10, 2005. Mukesh is the son of Dinesh Kumar and Krishna Devi. On March 16, 2011 Gayatri was brought by Mukesh to Mata Chanan Devi Hospital at 3.25 P.M. Dr.Iftekharul Haque PW-7 working as the Chief Medical Officer of Mata Chanan Devi Hospital examined Gayatri and prepared her MLC Ex.PW- 7/A in which he recorded that Mukesh had brought Gayatri to the casualty and told him that Gayatri became unconscious because she fell at the home following giddiness. He noted that Gayatri was not responding to stimuli and the pulse was not palpable. He further recorded that there were ligature marks on both sides of the neck.

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2. Criminal law was set into motion when the hospital authorities informed P.S. Dabri that a lady named Gayatri wife of Mukesh had been brought to the hospital where she was declared dead. SI Birender PW-10 was handed over copy of the DD for investigation and accompanied by Ct.Navin Kumar PW-6, he went to the hospital and collected Gayatriâs MLC. He seized the dead body and sent it to the mortuary of DDU Hospital for post mortem. Thereafter he went to the house which was the matrimonial home and found a rope tied to the ceiling fan of the room which he seized vide seizure memo Ex.PW-10/A.

3. Since the lady had died within seven years of the marriage and the death was not natural the Sub-Divisional Magistrate Sh.Ashish Mohan PW- 8 was conveyed the information at 10.00 P.M. He was told that no relative of the deceased was present in the hospital. Therefore he went to the hospital on March 17, 2011 where he met Hari Singh PW-5 and Bhanmati PW-1 the parents of Gayatri and recorded Hari Singhâs statement Ex.PW-5/A.

4. Surprisingly, in spite of Hari Singh complaining about dowry harassment and notwithstanding the MLC of Gayatri evidencing either a suicidal or a homicidal death, neither Ashish Mohan PW-8 nor SI Birender PW-10 thought it prudent to get registered an FIR, if not for the offence punishable under Section 302 IPC at least for the offence punishable under Section 498A/304B IPC.

5. Gayatriâs post-mortem was conducted on March 17, 2011 by Dr.Santosh Kumar PW-9 who prepared the post mortem report Ex.PW-9/A on March 17, 2011 recording therein as under:-

EXTERNAL EXAMINATION

CrI.Appeal No. 210/2013 Page 2 of 16 "No any fresh external injuries were present over the body except the ligature mark. Ligature mark present on the upper border of thyroid cartilage in the form of groove, base is dry, hard, leathery, parchment like reddish brown in colour, placed obliquely going towards the posterior aspect of neck. Total circumference of neck is 32.0 cms. Ligature mark size is 26.0 cms x 1.0 cms. The upper border of ligature mark is 6.0 cms below form the base of chin and lower border of ligature mark is 10.0 cms above from the M.sternii. Ligature mark is 3.0 cms below from the right mastoid and 7.0 cms below from the left mastoid. Ligature mark is incomplete and does not encircle the whole neck and absent at the posterior aspect of neck on posterior hair line"

XXXXXX

INTERNAL EXAMINATION

"Neck

Hyoid Bone/Thyroid cartilage/Cricoid cartilage/Tracheal Rings & Mucosa/Any Foreign Body in Trachea: On incision and dissection of neck, no extravasations of blood and clots seen underneath the ligature mark, underlying tissue of neck, muscles and upto the back of trachea. Skin lying under the ligature mark is dry, pale ad glistening. Hyoid bone and all cartilages of neck are intact. Mucosa of tracheal lumen is congested and tracheal lumen contains froth."

6. In his opinion as regards the cause of death he positively opined that death was due to asphyxia from ante mortem ligature hanging.

7. Regretfully, SI Birender PW-10 did not bother to go and collect the post mortem report of Gayatri on March 17, 2011 or a day thereafter. He collected the post mortem report only on May 20, 2011 and then prepared the rukka Ex.PW-10/B at 6.15 P.M. on May 20, 2011 and got registered the FIR Ex.PW-13/A on May 20, 2011 for offences punishable under Section 498A/304B IPC.

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8. Two lack of concern, the first by the learned Sub-Divisional Magistrate and the second by SI Birender are not the only blemish. Another blemish was by SI Birender PW-10 not investigating the case properly to try and ascertain whether apart from Mukesh, his parents Dinesh and Krishna Devi were present in the house when Gayatri was removed to the hospital. It was not known whether it was a case of homicide or suicide. If it was a case of homicide, who all were present in the house would assume relevance.

9. Insp.Praveen Kumar PW-12 took over the investigation on June 07, 2011 and unfortunately even he did not try to ascertain whether Gayatriâs in-laws were present in the house.

10. Mukesh, his parents Dinesh and Krishna Devi were charged for an offence punishable under Section 498A/34 IPC as also for an offence punishable under Section 304B/34 IPC and alternatively for the offence

punishable under Section 302/34 IPC.

11. Smt.Bhanmati PW-1, Gyan Singh PW-4 and Hari Singh PW-5, the mother, brother and father respectively of Gayatri deposed of Gayatri being subjected to dowry harassment after her marriage on December 10, 2005 and that on the day of the incident Gayatri rang up informing that her in- laws were demanding a necklace from her and were beating her. At 4.00 P.M. Mukesh informed that Gayatri had died.

12. The police officers to whom we have referred to above deposed facts as recorded by us while narrating the investigation. The Sub-Divisional Magistrate deposed likewise as above.

13. In spite of the fact that no witness deposed to Dinesh and Krishna Devi being present in the house when Gayatri was either strangled to

Crl.Appeal No. 210/2013 Page 4 of 16 death or committed suicide, the learned Trial Judge has vide impugned decision dated December 10, 2012 convicted Mukesh and his parents for the offence of murder. Two incriminating circumstances have been found established. The first that the parents and brother of Gayatri deposed that in the afternoon Gayatri had informed them over the telephone that her in- laws were beating her demanding a gold necklace. The second is the conduct of Mukesh who told Dr.Iftekharul Haque when he brought Gayatri to the hospital that his wife fell down as she was feeling giddy and then became unconscious, a blatant lie to use the language of the learned Trial Judge. There were ligature marks around the neck of Gayatri.

14. The learned Trial Judge has ignored the fact that neither Dr. Iftekharul Haque noted any other injury mark on Gayatri body when she was brought to the casualty of the hospital except ligature mark around the neck. The post mortem report Ex.PW-9/A also does not record any other injury except the ligature mark on the neck of Gayatri. Thus, the claim of the parents and brother of Gayatri that she rang up her parents and informed that she was being beaten by her in-laws is incorrect. Besides, in his statement Ex.PW-5/A made to the Sub-Divisional Magistrate, what has been said by Hari Singh is that he had received a call at 12.00 Noon demanding a necklace and the threat was that his daughter would be harmed. He never said that his daughter spoke to him. Since the statement is in vernacular, we extract the relevant part in vernacular : â Kal Din 16.03.2011 ko lag bhag 12.00 baje phone aya ki aap apni ladki ko keh do ki haar de do nahi bura ho jayegaâ .

15. There is just no evidence of the presence of Dinesh and Krishna Devi in the house and thus from the conduct of their son who tried to conceal the

Crl.Appeal No. 210/2013 Page 5 of 16 truth from Dr. Itekharul Haque no adverse inference can be drawn against them. Since their presence in the house has been inferred by the learned Judge from the testimony of the parents and brother of Gayatri that at 12.00 Noon Gayatri had rung up complaining that these people would cause harm to her if a gold necklace was not given, a piece of evidence which is highly tainted keeping in view what Hari Singh said at the first instance, the verdict of guilt against Dinesh and Krishna Devi for having committed the murder of Gayatri has to be set aside, and more so for a more weightier reason which we note hereinafter concerning Mukesh, whose conviction for the offence of murder is highly tainted.

16. The reason obviously is the categoric finding in the post mortem report of the deceased that the death was the result of asphyxia caused by ligature hanging. The learned Trial Judge has totally overlooked the post mortem report. Death was not homicidal.

17. Independent of the opinion in the report, we have noted, in paragraph 5 above, the external and the internal injuries on the neck in the form of ligature mark externally seen and internally detected.

18. A ligature mark is the result of abrasion or compression of the skin by a strangulation device, which usually has a rough surface. The mark is usually visible as a pale furrow soon after death and after a lapse of time it turns into a brownish hue as the furrow dries. In cases where the surface of the ligature is very smooth, the abrasive effect is minimal and the mark is visible as a pale strip of skin or furrow for sometime after death. If a large amount of material is used, the ligature mark may be the impression of the folds of the cloth, or in some circumstances there may be no mark at all.

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19. In cases where the cause of death is compression of the neck, ligature mark may be found in two circumstances: (a) death by hanging, and (b) death by ligature strangulation.

20. It is a well-accepted fact that the ligature mark of hanging and strangulation are not found at same level.

21. Thus, it would be apposite to understand and differentiate between the ligature patterns along with other external and internal injuries which result from each of the above two situations. A reading of Modi's Medical Jurisprudence and Toxicology, 23rd ed. 2005 and Burkhard Made, (ed.), Wiley Blackwell, Handbook of Forensic Medicine, 1st ed.rep.2014 would bring out that hanging entails the suspension of the body by a ligature around the neck, wherein the constricting force on the neck which causes death happens to be the weight of the body. The loop of a running knot tightens during suspension and produces a ligature mark which is horizontal but moving upward towards the chin and in almost every case, above the thyroid cartilage.

22. In cases of complete hanging i.e. suspension of the body with no contact with the ground petechiae (red/purple spots on the skin) is not present. However in cases of incomplete hanging i.e. where the body is suspended but has some form of contact to the ground petechiae may found on the eye, face, behind the ears and in the oral mucosa.

23. In suicidal hanging, the ligature mark usually runs above the thyroid cartilage. In most cases, it lies between the chin and the larynx. If the noose slips upwards during the hanging, there may be several parallel marks and broad abrasions, which run upwards. The blood draining from the head and

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24. Where a ligature is bound twice or more around the neck, overlapping folds of skin may be caught between the individual loops, known as skin ridges. Skin blisters filled with fluid in the interior and the periphery of the ligature, and dried saliva tracks in the mouth may also be found. When the ligature passes above the larynx, the hyoid bone is pushed obliquely backwards together with the base of the tongue resting against the posterior wall of the pharynx, which leads to obstruction of air. The tongue is thereby protruded forward.

25. In addition to the aforementioned external injuries, hanging also entails certain internal injuries. Haemorrhages are mostly to be found on the clavicles, more rarely on the manubrium sterni. However, haemorrhages around the laryngeal and hyoid fractures are scarce and almost non-existent. Only in extreme incidences of trauma, as in falls from a height with the noose around the neck, ruptures of the fasciae and the neck muscles may be observed.

26. In deaths because of ligature strangulation, petechiae are usually present. It is generally more intense than in other forms of strangulations because of the strength applied by the arms in tightening the ligature. Just like the ligature mark produced in death by hanging, the ligature mark is caused by the abrasion of the ligature on the skin. In the majority of cases, the ligature furrow runs horizontally round the neck on its front and sides. If the ligature is a wide band of cloth with a smooth surface, the lesion of the stratum corneum may be so

minimal that no mark is discernible. Non- intense ligature strangulations may simply leave a reddish hyperaemia on

Crl.Appeal No. 210/2013 Page 8 of 16 the skin of the neck. However, in cases of intense strangulation the larynx and hyoid bone might suffer a fracture. Occasionally, a fine white foam may adhere to the laryngeal, tracheal and bronchial walls, which may be streaked with blood The foam accumulates from bronchial secretion and tidal air during dyspnoea.

27. We reproduce an extract from a research paper by Dr.Dean Hawley, Director of Autopsy Services, Indiana University of Medicine wherein he discusses the injuries, which result from ligature strangulation:- "The injuries that may occur include patterned contusions and abrasions caused by fingernails, finger touch pads, ligatures, or clothing. These injuries are then prone to change over time, with the healing process. Injuries not at all apparent on the day of death may actually become visible by the next day, as the skin begins to dry and become more transparent.

In addition to the blunt force injuries of the neck, strangulation produces evidence of asphyxiation, recognized as pinpoint hemorrhages in the skin, conjunctiva of the eyes, and deep internal organs."

28. The comparison between the ligature marks resulting from hanging and strangulation has been lucidly discussed in Sadikhusen G.Momin, et. al, Pattern of Ligature Mark in Cases of Compressed Neck in Rajkot Region: A Prospective Study, J. Indian Acad Forensic Med. Jan-Mar 2012, Vol.34, No.1 as under:

"A running noose can tighten at the time of suspension and may then produce a mark which takes a horizontal turn but it is likely to be above the thyroid cartilage. Ligature mark depends on the nature and position of the ligature used, and the time of suspension of body after death. If the ligature is soft, and the ligature removed immediately after death, there may be no mark. Again, the intervention of a thick and long beard or clothes on the neck leads to the formation of a slight mark.

Crl.Appeal No. 210/2013 Page 9 of 16 Sometimes, the pattern of the ligature material is impressed on the skin and a characteristic diagonal mark of the strands found when the rope is used. The wide band of cloth when used as a ligature on the bare skin may cause a narrow ligature mark, due to tension lines in the stretched cloth. The mark is a groove or furrow the base is pale, hard leathery and parchment like and margins are red and congested. Ecchymoses and slight abrasions in the groove are rare, but may be found in some cases for instance in judicial hanging.

Usually only one mark is found. Multiple marks may be present due to multiple turns around the neck or upward displacement after application due to fall. The mark is usually situated above thyroid cartilage between larynx and the chin and is directed obliquely, upwards following the line of mandible and interrupted at the back or may show an irregular impression of a knot, reaching the mastoid processes behind the ears towards the point of suspension.

The mark may be found on or below the thyroid cartilage, especially in case of partial hanging. It may be circular if a ligature is first placed at the nape of neck and then its two ends are brought horizontally forwards and crossed, and carried upwards to the point of suspension from behind the angle of the lower jaw on each side. The mark will be circular and oblique if a ligature is passed round the neck more than once. Near the position of the knot, it is like an inverted "V".In strangulation, ligature may be applied as one turn around the neck or even less, as homicide have been perpetrated by assailant pulling U shaped ligature against the front and sides of neck, while standing at the back."

29. The aforementioned research paper referred to a study conducted by the Department of Forensic Medicine, P.D.U. Medical College and Hospital, Rajkot where a number of cases of death by hanging and ligature strangulation were examined. It was observed as under: "In all cases of hanging underlying soft

tissues of neck were pale, white and glistening, ligature mark was incompletely

Crl.Appeal No. 210/2013 Page 10 of 16 encircling the neck in 72 cases (80%) and obliquely present around the neck all 90 cases (100%) of hanging. In all cases of ligature strangulation underlying soft tissues showed extravasation of blood."

30. At this stage, a word also needs to be spoken about death by smothering. Smothering is a form of asphyxia by blockage of external respiratory orifices, or blockage of cavities of nose or mouth. Homicidal smothering is extremely difficult to detect. Autopsy may reveal asphyxia, but there may not be any corroborative medical evidence to establish foul play.

31. Having noted as above, keeping in view the external and the internal injuries noted in the post mortem report, it is apparent that the ligature mark is the only external injury present on the body. There is no other injury anywhere on the body to evidence any sort of struggle or possible resistance by the deceased. The ligature mark is present on the upper border of thyroid cartilage as it is in almost all cases of hanging. The mark is 3 and 7 centimetres below the right and left mastoid i.e. the projections behind each ear respectively. The position of the above indicates that the ligature mark is horizontal but makes a \hat{a} \hat{V} \hat{a} . The said pattern of ligature mark bears considerable similarity to the ligature marks present in bodies where the cause of death was hanging. In almost all cases of hanging, the ligature mark was present right above the thyroid cartilage. Thus, the ligature pattern resembles the ligature marks found in cases of death by hanging. Relevant would it be to note that no extravasation of blood was found under the ligature mark. As earlier noted, all cases of ligature strangulation showed extravasation of blood in the underlying tissues.

32. Thus, even otherwise there enough material to conclude that the

Crl.Appeal No. 210/2013 Page 11 of 16 deceased was not strangled to death. The death is by hanging. There is no possibility of the deceased being forcefully hanged because if it was so she would have resisted and there would be other injuries on the body.

33. The death being suicidal, the trial court committed a serious error in convicting the appellants for offence under Section 302 IPC. This brings us to the question whether the appellants can be convicted for offences punishable under Sections 304B and 498A IPC. A perusal of the record shows that the appellants were charged for offences punishable under Sections 302/304B/498A/34 IPC. They have been acquitted for offences punishable under Section 304B and 498A IPC and no leave to appeal petition has been filed by the State against the impugned judgment nor has any appeal been filed by the complainant against acquittal of the appellants for the aforesaid offences.

34. In the decision reported as (2001) 2 SCC 577 Shamnsaheb M. Multtani Vs. State of Karnataka a three judge bench noted that where main ingredients of two cognate offences are common the one punishable with lesser sentence can be said to be minor offence. Noting that the ingredients of Section 304B IPC were different from those of Section 302 IPC, the former could not be regarded as minor offence of the latter, it was held -

"25. We have now to examine whether, on the evidence now on record the appellant can be convicted under Section 304-B IPC without the same being included as a count in the charge framed. Section 304-B has been brought on the statute book on 9-11-1986 as a package along with Section 113-B of the Evidence Act. Section 304-B(1) IPC reads thus:

\hat{a} 304-B. Dowry death.- (1) Where the death of a

woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown

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cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called dowry death, and such husband or relative shall be deemed to have caused her death.â

26. In the Explanation to the Section it is said that the word dowry shall be understood as defined in the Dowry Prohibition Act, 1961.

27. The postulates needed to establish the said offence are: (1) Death of a wife should have occurred otherwise than under normal circumstances within seven years of her marriage; (2) soon before her death she should have been subjected to cruelty or harassment by the accused in connection with any demand for dowry. Now reading section 113B of the Evidence Act, as a part of the said offence, the position is this: If the prosecution succeeds in showing that soon before her death she was subjected by him to cruelty or harassment for or in connection with any demand for dowry and that her death had occurred (within seven years of her marriage) otherwise than under normal circumstances "the court shall presume that such person had caused dowry death".

28. Under Section 4 of the Evidence Act "whenever it is directed by this Act that the Court shall presume the fact it shall regard such fact as proved, unless and until it is disproved". So the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the court. However it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross- examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both.

29. At this stage, we may note the difference in the legal position between the said offence and section 306 IPC which was merely an offence of abetment of suicide earlier. The

Crl.Appeal No. 210/2013 Page 13 of 16 section remained in the statute book without any practical use till 1983. But by the introduction of Section 113A in the Evidence Act the said offence under Section 306 IPC has acquired wider dimensions and has become a serious marriage- related offence. Section 113A of the Evidence Act says that under certain conditions, almost similar to the conditions for dowry death the court may presume having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no compulsion on the court to act on the presumption the accused can persuade the court against drawing a presumption adverse to him.

30. But the peculiar situation in respect of an offence under Section 304B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts on to him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave

miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious

Crl.Appeal No. 210/2013 Page 14 of 16 punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304- B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible

Crl.Appeal No. 210/2013 Page 15 of 16 for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption."

35. Thus Sections 304B or 498A IPC not being minor offences of Section 302 IPC, in the absence of an appeal by the complainant or the State, it is beyond the jurisdiction of this Court to convert the conviction for offence punishable under Section 302 IPC to one under Section 304B or 498A IPC.

36. As the conviction the appellants for offence punishable under Sections 302/34 IPC is illegal, they are acquitted of the said charge.

37. The appeal is disposed of.

38. The appellants, who are in custody, be released forthwith, if not required in any other case. Copy of the judgment be sent to Superintendent, Tihar Jail for necessary action.

39. TCR be returned.

(PRADEEP NANDRAJOG)

JUDGE

(MUKTA GUPTA)

JUDGE

AUGUST 14, 2014

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