

**HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

**Cr. Appeal No. 04/2003  
c/w Confirmation No. 04/2003**

**Date of decision : August 03, 2007**

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**Lal Babu Rai, 30 years** Vs. **State of J&K**  
**S/o Jaleshwar Rai, R/o Bachhapur,**  
**Tehsil Barasari, Distt. Ballian (U.P.)**  
**Sepoy No.13691803 Y,**  
**14 Guard, C/o 56 APO**  
**at present lodges in Distt. Jail Jammu.**

**State of J&K** Vs. **Lal Babu Rai**

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**Coram:**

**Hon'ble Mr. Justice Virender Singh  
Hon'ble Mr. Justice Mansoor Ahmad Mir**

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For the appellant : Mr. Sakal Bhushan, Advocate.

For the respondent: Mr. B. S. Salathia, Addl. Advocate General.

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| i)  | Whether approved for reporting<br>in Press/Journal/Media | Yes |
| ii) | Whether to be reported in<br>Digest/Journal:             | Yes |
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**Per Virender Singh, J.**

Suspecting his wife of infidelity has become the motive for Appellant, Babu Lal Rai, a Sepoy in Indian Army, (hereinafter to be referred to as ‘Accused’) for allegedly committing the murder of his wife, Smt. Poonam and nine/ten months old son, Ravi Rai, on 03-09-1994 in the vicinity of Seri Pandita (falling within the jurisdiction of Police Station, Kanachak). He was charged for Section 302 RPC and vide impugned judgment dated 10<sup>th</sup>/11<sup>th</sup> of

March, 2003, of learned Sessions Judge, Jammu, stands convicted for the said charge and has been sentenced to imprisonment for life and to pay a fine of Rs.1,000/-, in default thereof to further undergo simple imprisonment of three months. Hence Appeal No.04/2003 by him and Confirmation No.04/2003 by the State.

We intend to dispose of both of them vide this judgment.

PW Rattan Lal son of Amar Nath, is the first informant, who along with PWs Kuldeep Singh and Prem Singh, had apprehended the accused on the spot when he was trying to run towards the road after committing the offence. On inquiry, he disclosed his name and the address, and told the name of his wife and son also.

The case, as set up by the prosecution, in brief, is thus:

PW Rattan Lal was going home after getting medicine from the Hospital and when at about 1 O'clock reached near culvert of Seri Pandita, he heard shrieks from the nearby bushes and he went towards that direction, saw the accused hitting on the head of a lady with a big stone in his hand. The lady was having the child along with her. She was lying on the ground with her face besmeared with blood. Rattan Lal also saw the accused strangulating the child and he succumbed to the injuries. On his noise, aforesaid Kuldeep Singh and Prem Singh also reached there, nabbed the accused and handed over him to Police Post,

Gharota, where statement of PW Rattan Lal was recorded, which was the basis of registration of the formal F.I.R.

The investigation was taken up by PW Shahid Parvez, Sub-Inspector/SHO, Police Station, Kanachak, who after receipt of the copy of Report No.14 DD Entry from Police Post, Gharota, recorded formal FIR, went to the place of occurrence, prepared the rough site plan, seized the dead bodies of the lady and the child and blood stained earth vide separate seizure memos. Blood stained stones were also taken into possession vide seizure memo. Certain pieces of Bangles were also taken into possession and put them in a separate parcel. A separate seizure memo was prepared in this regard. The certain other articles were also seized at the spot. Photographs of the place of occurrence were also got clicked. Autopsy on both the dead bodies was conducted by Dr. B.R. Sharma. Certain articles were also seized during the post-mortem examination, which included the blood of the deceased Poonam Rai. In this regard also, separate seizure memos were prepared. Statements of witnesses were recorded under Section 161 Cr.P.C. and after completion of the investigation, the challan was put in against the accused for Section 302 RPC in terms of Section 173 Cr. P.C. He was, accordingly, charged for the said offence.

In order to substantiate the charge, the prosecution has examined as many as 16 witnesses and the learned trial Court, in brief, has depicted the evidence of all the witnesses, but we do not feel the necessity of reproducing the same once again, as in our view, the prosecution case primarily hinges upon the evidence of three main witnesses, namely, Rattan Lal S/o Amar, Kuldeep Singh S/o Tara Singh and Prem Singh S/o Tori Singh, who were allegedly present near the scene of occurrence. Their evidence is to be appreciated vis-a-vis the medical evidence on record, taking into account the plea taken by the accused under Section 342 Cr. P.C. We shall, however, be discussing the motive part also at the relevant stage.

We, at the very outset, feel the necessity of reproducing the reply tendered by the accused when examined under Section 342 Cr. P.C., after the entire incriminating evidence was put to him. The same, in vernacular (Urdu), when translated into English version, reads thus:

**Question : It has come in the evidence that aforesaid witnesses have made a statement against you to whom (witnesses) you have told that your wife was characterless and she gave a birth to an illicit child and due to this reason, you have murdered both of them. What can you say about this?**

**Answer : It is wrong. The truth is that I had told the witnesses that my wife used to feel herself wrong and, in fact, she had realized her mistakes. She along with her child and him (accused), had come in Shiv Mandhir near the place of occurrence, and in the said Mandhir, she confessed her guilt before the Idol of God and begged pardon there. Then I had pardoned her. But under the influence of her own sin, she used to realize her mistakes internally and before the occurrence also, she tried to commit suicide 2/3 times. On the day of occurrence, when I along with my wife and child, came out of the Mandir and took our lunch together in the ground there. Then, I went to the nearby bushes for urination. When I was in process of passing on the urine, I heard the cries of child and on seeing towards that side, I found that my wife had been pressing the throat of child and while I was in the process of seeing the same, she threw the child on the earth. I got stunned and immediately ran towards the wife. In the meanwhile also, she with her own hands started pressing her own throat and started striking her head with the stone. When I reached near my wife, she fell down after getting unconscious. There was too much noise during that process and she was making much hue and cry to save her, so that she could collect the people to take her and the child to the Hospital. On hearing this noise, the witnesses came on the spot and I narrated the episode to**

**them. They did not believe me and caught hold of me.”**

### **Direct Evidence**

Rattan Lal PW deposed that he had gone to Hospital Bhalwal, as he was not feeling well and when he was coming back from the Hospital, he heard the cries of somebody little before turn of Seri Pandita and went to the site of cry and made a call. Little ahead in the bushes, he saw the accused throwing big stone and by the time he reached there, he saw a lady in an injured condition bleeding profusely from the mouth. He then stated that he also saw a dead child along her side. He enquired from the accused as to who he was; at that time, his (accused) reaction was who was he to enquire from him. But then he told him (Rattan Lal) that the dead bodies are of his wife and son and the son was illicit of his wife, as his wife was of bad character and, therefore, he had killed both of them. Rattan Lal raised noise, which attracted Kuldeep Singh and Prem Singh, PWs, and then all the three caught hold of the accused, took him to Police Post, Gharota, and narrated the entire occurrence to the concerned Police official. This witness also talks of the seizure memos prepared in his presence by the Investigating Officer.

Mr. Bhushan has also drawn our attention to some portion of his cross-examination, where PW Rattan Lal stated that after

hearing the cry, he went towards that side and saw the accused with a stone in his hand, which he threw in his presence. He did not see at what place the accused had hit the stone, but he only saw the deceased's head and mouth bleeding profusely. This witness further stated that the accused had hurled stone only once in his presence and the accused had strangulated the child in his presence. Mr. Bhushan has also taken us through that part of the statement, where this witness had given somewhat contradictory version from his previous statement and he was duly confronted.

PWs Kuldeep Singh and Prem Singh are the other witnesses, who reached the spot after hearing the noise. Both these witnesses have deposed that on 03-09-1994 at about 1.30 in the noon, when they had reached near the turn of Seri Pandita, they heard a noise near the bushes and then saw Rattan Lal coming out and chasing the accused saying to catch hold of him. Consequently, he was caught at the spot and on enquiry he disclosed his name, address and employment in the Army. They further stated that PW Rattan Lal stated that the accused had killed his wife and son and then they went to the spot and saw the two dead bodies lying there and when they enquired from the accused, he disclosed to them that his wife was of bad character and had given the birth to an illicit child and for this reason, he had murdered both of them. These two witnesses had also

accompanied Rattan Lal to Police Post, Gharota. They are also witnesses to the seizure memos prepared at the spot for taking certain other articles into possession by the Investigating Officer.

### **Medical Evidence**

Dr. B.R. Sharma conducted the autopsy on the dead body of Smt. Poonam on 08-09-1994. It was identified by the relations of the deceased, who included Vijay Kumar Tiwari, her real brother. Following injuries were noticed on her dead body

- “1. A lacerated wound 6 Cm X 4 Cm over the left temporparietal region of the scalp with underlying committed fracture of left temporal bone.**
- 2. A lacterated wound 4 Cm X 1 Cm over the pinna of left ear with partial amputation of the lobule.**
- 3. A lacterated wound 2 Cm X 2 Cm over the right side face in the maxillary region.**
- 4. A lacterated wound 2 Cm X 1 Cm over the chin.**
- 5. A ligature mark 2 Cm wide transversely paced around the neck just above the thyroid with underlying extravasation of blood.**
- 6. Fifth, Six, Seventh, Eighth, Ninth and Tenth ribs on the right side fractured with underlying laceration of the right lung and the liver”**

Internal examination of the injuries conducted as under:

- “1. Thoracic cavity contains about half liter blood, middle and lower lobes of right lung lacerated under the depressed fractured ribs fifth to tenth.**
- 2. Abdominal cavity contained about 1 liter blood. Upper and outer margin of liver lacerated.**

In the opinion of the doctor, the cause of death was due to asphyxia as a result of strangulation, and other injuries were caused by blunt weapon and were ante-mortem in nature. In his opinion, all the six injuries were sufficient in ordinary course of nature to cause death individually and collectively. The time elapsed between the death and the post-mortem was five days.

Post-mortem conducted on the dead body of child, Ravi Rai, reflected the following injury on his neck only:

**“Irregularly distributed finger marks three in number with crescentic abrasions that is nail marks over the left side of the neck and the front of neck.”**

The cause of death was due to asphyxia as a result of strangulation. The time elapsed was the same about five days.

In his cross-examination, this witness has categorically stated that both strangulation as well as lacerated injuries caused by some blunt weapon on the person of lady, were caused simultaneously in a duration of one to two minutes. He further

stated that strangulation could have been carried out with some soft ligature material like Saree or Dupatta, but not with a rope, as there was no specific imprint over the neck. He, however, stated that it could not be with hands. This witness was very categoric in saying that the injuries Nos.1 and 6 could not be possible by fall, whereas injuries Nos.2 and 3 could be possible by fall. He was again very categoric in his cross-examination that there was only ligature mark on the neck of the deceased and there were no scratches on the legs of the deceased and there were no signs of fingers, thumb impression on the neck. There was no bleeding from the nose, mouth or ears

So far as post-mortem of the child is concerned, this witness stated that there was no specific impression of thumb on the neck of the child and the compression on the neck was with single hand. It was compressed from front and left side.

Dr. K.K. Raina, Scientific Officer, had received seven sealed packets containing certain articles for examination, which included blood stained clay, blood stained stones and other articles like saree, blouse and some under-garments of the lady. All those articles were subjected to Chemical Microscopical and Serological examination for determination of the presence of blood and the origin and group of blood. However, blood group could not be ascertained because of "material disintegrated".

### **Motive**

In order to prove the motive part, prosecution has examined PW Vijay Kumar Tiwari, the real brother of the deceased, who deposed that the accused had got married to his sister in 1991. For some time, he kept her well and then started beating her. Poonam Rai used to tell him about the quarrel saying that he was suspecting her fidelity. This had happened in 1993. Poonam Rai delivered a child in February, 1994 and as she was then turned out of matrimonial home and started staying with him along with the child. On 23<sup>rd</sup> of August, 1994, the accused had taken Poonam and the child back on the pretext that his brother had taken quarter at Jammu. On 05-09-1994, he received information from Police Station, Baraseri, about the murder of his sister along with her son at Jammu and the dead bodies were lying in the mortuary of Jammu Hospital. He along with his uncle, Badri Nath Tiwari, went to Medical College, Jammu, and identified the dead bodies. This witness then talks of the seizure memos prepared after the post-mortem examination.

Mr. Bhushan has pointed out certain infirmities in the cross-examination of the aforesaid witness, which aspect we would deal with at the relevant stage.

SI Shahid Parvez is the Investigating Officer of this case. We do not feel the necessity of touching the investigation

conducted by him, as the same is already alluded to in the preceding paras.

The plea of the accused, as emerges from his statement recorded under Section 342 Cr. P.C., is also depicted in the very beginning of the judgment.

### **Defence**

In defence, the accused has produced his two real brothers, DWs Nand Ji Rai and Shiva Ji Rai. DW Nand Ji Rai was also posted in Army. He stated that after the marriage, the accused was posted at Bhuj, Gujarat. He was also transferred to Bhuj. He then talks of his spending of leave for some time by the accused after the marriage and then he (accused) was transferred to Siachen in the year 1993. Nand Ji Rai was also transferred to Siachen. From there, he had come on leave on 12-08-1994 to his house at Ballia and from there, he went to Nagpur and then from Nagpur to Chandigarh. He then stated that he stayed at Chandigarh at the Transit Camp, where the accused along his wife (since deceased) came to Chandigarh on 27-08-1994 and met him, and on 28-08-1994, he along with the accused and deceased came to Jammu as his mother was residing at Jammu. Besides this his elder brother, Shiva Ji Rai, was also posted at Jammu and was residing in Cantonment, Jammu. He then deposed that from Chandigarh, he along with the accused and his wife (deceased) came on a train

and on the way to Jammu, it was disclosed by her that she had committed a sin, as she was having relations with some other person and had delivered an illicit child. He then stated that the accused, in fact, had loved the child and his behaviour towards his wife and the child was very good, as he had forgiven his wife of her bad act. He then deposed that Poonam told the accused that she could not show her face in the society and wanted to commit suicide. He, thereafter, reached Siachen on 01-09-1994 and there he received the information that his brother (accused) was arrested in this case.

DW Shiva Ji Rai has also deposed somewhat in the same terms in favour of the accused.

After appreciation of the entire evidence, the trial Court has recorded the conviction.

We have heard Mr. Sakal Bhushan, learned counsel for the appellant, and Mr. B.S. Salathia, learned Additional Advocate General, at length. With their assistance, we have gone through the entire evidence on record very minutely. Our attention is also drawn to certain documents from the trial Court record.

Mr. Bhushan, at the very outset, submits that PW Rattan Lal, the first informant, projected as an eye witness to the occurrence or, as a matter of fact, the other two witnesses, namely,

Kuldeep Singh and Prem Singh, were not present at the place of occurrence and that they have been subsequently imported by the prosecution in order to give twist to the real facts to make it a case of culpable homicide. Dwelling upon his arguments, Mr. Bhushan then submits that mode and manner, in which the occurrence has taken place, is not unfolded by Rattan Lal, the so-called star witness, in the Court as it was the basis of the registration of the case and the only evidence, which is brought on record from the substantive statement of this witness, is that he saw the accused throwing a stone only. Beyond this, this witness has not said a word about the manner, in which the occurrence has taken place. From this, the learned counsel wants to develop that, in fact, this witness was not an eye witness to the occurrence and, therefore, whatever is said in the FIR is the brain child of the Investigating Officer, who projected a story suitable to the prosecution.

Mr. Bhushan then submits that throwing of a stone was the only incriminating evidence with the prosecution and even this is not put to the accused while recording his statement under Section 342 Cr. P.C. and this basic lacuna touches the core of the case. This material flaw when appreciated along with the aforesaid weaknesses damages the basic substratum of the case.

According to Mr. Bhushan, the prosecution wants the Court to believe that the accused had also killed his son by

throttling the neck, but there is no evidence to that effect, as nobody has seen him assaulting the child. There is every possibility that Poonam Rai (since deceased) might have throttled the neck of the child before her death. Strengthening his arguments on this aspect, the learned counsel submits that the imprint on the neck of the child, does not indicate as who is the killer and in the absence of link evidence to this effect, the accused cannot be fastened with the murder of child. Even otherwise, incriminating evidence with regard to throttling of the child has also not been put to the accused, while examining him under Section 342 Cr. P.C., and this infirmity has also caused great prejudice to him.

Mr. Bhushan then submits that in order to implicate the accused, the prosecution has projected the evidence of extra-judicial confession suffered by him before aforesaid three main witnesses, namely, Rattan Lal, Kuldeep Singh and Prem Singh, as deposed by them in their substantive statements, but there is omission of factum of extra-judicial confession in the challan submitted by the Investigating Agency against the accused. There is no mention of this material aspect in the FIR also. From this, the learned counsel wants to develop that the evidence of extra-judicial confession has been put forth for the first time when the

aforesaid witnesses appeared in the Court and, therefore, it needs to be discarded.

An attempt has also been made by Mr. Bhushan to demolish the case of the prosecution with regard to the medical evidence, contending that if one appreciates the post-mortem examination, conducted on the dead body of Smt. Poonam Rai, it cannot be said that it was a case of Asphyxia by ligature. The other injuries on her person could be by a fall. On that basis, the learned counsel submits that the plea taken by the accused, in fact, is nearer to the case set up by the prosecution. He contends that although the accused is not supposed to set up any plea of defence and can demolish the case of the prosecution on account of infirmities crept in, but in the case in hand, the defence plea is very probable and, therefore, it creates doubt in the prosecution story. Mr. Bhushan then submits that the facts, as highlighted by the prosecution, can, no doubt, be termed as a motive for committing the alleged offence, but at the same time, this can also be seen in favour of the accused, who has taken a plea that his wife, after realizing her sin, went to the extent of killing her son and then finishing herself.

Mr. Bhushan then submits that he is not harping upon the theory that the motive is very essential in this case, but once the prosecution has set up a motive, as in this case, it assumes

importance. In this regard, he has taken us though the evidence of PW Vijay Kumar Tiwari, the real brother of the deceased once again and states that it runs contrary to the evidence of DW-1 Nand Ji Rai, whose evidence has not been challenged at least with regard to the leave of the accused. The learned counsel then submits that with regard to the motive, Vijay Kumar Tiwari has developed a new story altogether coming from the mouth of one lady. He took us to the cross-examination of this witness. In the same stress, Mr. Bhushan submits that, may be, the two witnesses are real brothers of the accused, but their evidence cannot not be brushed aside simply on account of their relationship. He contends that the defence set up by the accused is more closer to the theory of suicide, whereas the prosecution is miles apart from the very case set up against the accused and when it is appreciated in its entirety, it speaks volumes of false implication of the accused.

Mr. Bhushan lastly attacks the investigation also saying that it is not fair from the very outset. The learned counsel doubts the arrival of the Investigating Officer at the spot within two/three hours of the occurrence and submits that, in fact, it had not taken place at that time, as alleged by the prosecution. With regard to the recovery effected at the spot, especially the picking up three stones, which were taken to the Executive Magistrate on 11-10-1994 and re-sealed by him for the purposes of sending them to

FSL, the learned counsel submits that chances of tampering with the blood stained stones before they were produced before the Executive Magistrate on 11-10-1994, could not be ruled out.

On the basis of the aforesaid submissions, Mr. Bhushan submits that the case of prosecution is not proved against the accused beyond any shadow of reasonable doubt and, as such, he deserves acquittal.

Mr. Salathia repudiates the submissions of Mr. Bhushan and states that Rattan Lal, PW, or even the other two Prosecution Witnesses, namely, Kuldeep Singh and Prem Singh, had no animosity against the accused and interest in the prosecution. They are most natural witnesses to the occurrence. Even otherwise, the accused has not projected any enmity against the said witnesses.

Mr. Salathia then submits that the accused, in fact, admits his presence at the scene of crime and the plea taken by him of his wife committing suicide, runs contrary to the medical evidence and, therefore, the only conclusion, which can be drawn by this Court is that the accused is the perpetrator of the crime. He, thus, has no escape from his liability. On these grounds, Mr. Salathia prays for confirmation of the conviction and the sentence already recorded by the trial Court.

Before re-scanning the entire case of the prosecution in its right perspective, we would like to observe that the entire controversy now converges to a pertinent situation, as to whether it is a case of culpable homicides or suicide, as the accused has pleaded a specific defence, admitting his presence along with his wife and son (since deceased) at the place of occurrence. He has even gone to the extent of disclosing a particular fact, which was especially within his knowledge.

At the same time, the conduct of the accused also assumes importance in this case, as it is well settled that conduct of the accused must have nexus with the crime committed. In other words, it must form part of the evidence either preceding, during or after commission of the offence.

No doubt, the initial burden is on the prosecution to prove its case beyond any shadow of reasonable doubt, but relevant fact, which is especially within the knowledge of the accused and brought on record, is not to be ignored altogether and once he is unable to strengthen the said fact, the same can be taken against him in addition to the other convincing evidence led by the prosecution.

We are also conscious of the fact that falsity of defence by itself cannot be said to be a ground to believe the prosecution case

as it is, which otherwise is to be tested on its own facts, but in case the prosecution is able to stand firmly on its own legs, then in that eventuality the falsity of defence can very well be commented upon. We are appreciating the case in hand on that rationale.

Much has been said by Mr. Bhushan about the very case set up by the prosecution and in his attempt to demolish it in its entirety, he contended that Rattan Lal, the first informant, or the other two witnesses, namely, Kuldeep Singh and Prem Singh, were not there at the time of occurrence. To say so, he pointed out certain discrepancy, which, according to him, is very material. We, however, are not convinced with the arguments advanced by Mr. Bhushan and comment upon the discrepancies, as highlighted. In our view, the aforesaid three witnesses are most independent witnesses, and were not inclined towards either side. Per chance, PW Rattan Lal happened to be near the place of occurrence when he heard the cries of some one and he intervened. He gives as the true account of what he had seen. The other two witnesses, namely, Kuldeep Singh and Prem Singh, have not been projected as eye-witnesses at all. They reached the spot after hearing the noise of Rattan Lal saying ‘catch hold of the accused’.

We have re-scanned the statement of PW Rattan Lal once again. No doubt, in his initial statement, which is the basis of the registration of the FIR, he stated before the Police that the accused

was having stone in his hand and was in the process of assaulting the lady. He had also stated that the accused had throttled the neck of the child. When he stepped into the witness box, he simply stated that he had seen the accused throwing the stone. He did not talk about the factum of throttling the neck of the child or the fact that he saw the accused giving injuries to the lady. According to Mr. Bhushan, the substantive evidence on the file is that Rattan Lal had seen the accused simply throwing the stone and, therefore, whatever he had stated in his initial statement, giving a photographic version of the occurrence, was a manufactured story suitable to the prosecution. In our considered view, this discrepancy by itself would not dent the case of the prosecution vis-à-vis the basic occurrence. In his cross-examination, a specific question was put to PW Rattan Lal with regard to throttling of the neck of the child, to which he replied that the accused had not throttled the neck in his presence, rather he himself (accused) had disclosed to him that he (accused) had throttled the child. Be that as it may, the very case set up by the prosecution is that, Rattan Lal reached the spot when the accused was in the process of assaulting his wife.

The other factual position before us is that the accused is apprehended at the spot by Rattan Lal with the help of other two persons, namely, Kuldeep Singh and Prem Singh. These three

persons had taken the accused to Police Post, Gharota. The initial DD Entry No.14, which is sent to the Police Station, Kanachak, for the registration of the case, talks about the fact of Kuldeep Singh and Prem Singh accompanying Rattan Lal. The FIR is lodged at 3.30 p.m., i.e., within few hours of the occurrence. All these facts go to show that the aforesaid three persons, in fact, were present at the spot; one seeing the accused in action, may be to some extent, and the other two helped the first one in nabbing the accused. Once the prosecution case is seen from that angle, discrepancies, if any, crept in the statement of Rattan Lal cannot be termed as vital contradictions, so as to dub him as liar or to be taken as a witness introduced subsequently to strengthen the prosecution case. Had the Investigating Officer to manufacture a story of his choice against the accused for certain ulterior motive, which otherwise not pleaded by the accused, either of Kuldeep Singh or Prem Singh could also be shown along with Rattan Lal initially, but the same is not the position. This speaks volumes of the fact that the prosecution case is having no tinge of adulteration in it.

The matter does not rest here. The prosecution case is getting support from extra-judicial confession suffered by the accused immediately after the occurrence before PWs Kuldeep Singh and Prem Singh and admitted his hand in the commission of

murder of his wife and the child. He even made an attempt to run away from the scene of crime. This fact has to be appreciated as conduct of the accused. PW Kuldeep Singh, when stepped into the witness box, stated that on asking the accused told that his wife was of bad character (Budchalan) and his child was also an illicit child (Najaiz Aulad) and for this reason, he had killed both of them. On this aspect, Mr. Bhushan had vehemently contended that extra-judicial confession has been introduced for the first time from the mouth of aforesaid Kuldeep Singh and Prem Singh and the same was not the basis of the challan at all. He then argued that even otherwise, there is discrepancy with regard to the confessing of the guilt by the accused, as Rattan Lal in his substantive statement stated that after the accused had told him that he had killed his wife and the child, he made a noise, which attracted Kuldeep Singh and Prem Singh, whereas PW Kuldeep Singh says that after they heard the noise of Rattan Lal saying ‘catch hold of the accused’, they apprehended him and then on asking, he disclosed to them about the aforesaid fact.

Apparently, the submission advanced by Mr. Bhushan appeared to be somewhat attractive to us, but when appreciated in the light of the statements of aforesaid Kuldeep Singh and Prem Singh, we are not inclined to accept the same. No doubt, there is certainly a discrepancy with regard to the stage of confessing the

guilt by the accused, as stated by Mr. Bhushan, but, in our view, the same is just immaterial and the prosecution case is not to be thrown simply on the ground of some discrepancies in the sequence. What is to be appreciated is that, as to whether a particular fact was there throughout right from the very outset up to the end of investigation or it was introduced subsequently just to seek conviction? We may observe here that on this material aspect, the two main witnesses, namely, Kuldeep Singh and Prem Singh, have not been confronted from their previous statements recorded under Section 161 Cr. P.C. and, therefore, the accused cannot derive any advantage from it. Perhaps this is the legal position. We, however, once again have also gone through the challan where there is a reference to the fact that the accused was having suspicion about infidelity of his wife. He was suspecting that his elder brother, namely, Nand Ji Rai, was carrying on with his wife.

On the basis of what is observed hereinabove, it can be concluded safely that the extra-judicial confession made by the accused, that too within no time of the occurrence, is voluntary, before most independent and unbiased witnesses, and as such, the said piece of evidence, in our firm view, has to be taken into account in favour of the prosecution.

In the light of the aforesaid discussion, it can also be safely said that even if certain incriminating evidence has not been put to the accused, while examining him under Section 342 Cr. P.C., has not caused any prejudice to him, as he was very much aware of the entire case set up by the prosecution against him. He rather has come forward with a specific plea as well.

Lot of efforts have been made by Mr. Bhushan to demolish the case of the prosecution contending that it runs contrary to the medical evidence on record. We have once again very minutely perused the same and find no material flaw, which would help the accused. Dr. B.R. Sharma has categorically stated that both strangulation and lacerated injuries by blunt object were caused simultaneously in a duration of one to two minutes. There are as many as six injuries on the person of deceased Poonam Rai. Injury No.1 is over the left temporparietal region of the scalp. Injury No.2 is again a lacerated wound over the pinna of left ear with partial amputation of the lobule. This shows that lobule, which is tender part of the ear, has been chopped off. Similarly, Injury No.3 is on the right side of the face in the maxillary region. Injury No.4 is on the chin. The aforesaid four injuries are on different parts of the body. Even six ribs (5<sup>th</sup> to 10<sup>th</sup>) have also fractured with underlying laceration of the right lung and the liver. This shows that the lady was badly assaulted by a blunt weapon.

Stone is certainly a blunt weapon. This shows that before Rattan Lal reached the scene of occurrence and saw the stone in the hand of the accused, he was in the process of assaulting, but at the same time, he had already caused certain injuries on the person of the deceased. The injuries, in any case, by any stretch of imagination, cannot be attributable to deceased Poonam herself, believing the defence that she out of anger started hitting her head against the wall and in that process, received these injuries, which are on different sides of the face. Partial amputation of the lobule is indicative of the fact that hard object was hit on this tender part, resulting into amputation. This could be on account of edge of the stone also. Strangulation is also done simultaneously, as stated by the doctor. It appears that the accused strangulated his wife with the help of ligature, which could be one end of the saree worn by the deceased (saree shown in the exhibited photograph) and, thereafter, gave several injuries on her person. All this depicts that he was out to kill her. We do not appreciate the argument Mr. Bhushan that Poonam strangulated herself and then started hitting against the wall. This is just imaginary. We may observe here that we are also not in agreement with the contention of learned counsel to the extent that the post-mortem of Smt. Poonam Rai is more nearer to the defence set up by the accused.

We, at the same time, have perused the post-mortem report of the child, Ravi Rai, also. He was just of the age of nine/ten months at the time of occurrence. Simple pressure on his neck could throttle him. This is what is done in this case. No doubt, the prosecution agency has not made an attempt to be certain with regard to the killer of the child, resorting to any scientific approach, as there were certain imprints on the neck. But, in our view, this fact would not demolish the case of the prosecution in the light of other reliable evidence on record, especially what was stated by the accused himself before the three witnesses. This defect can be attributed to the Investigating Officer as laxity. It is well settled that the prosecution case cannot be thrown on the basis of some defect(s) in the investigation, if it is otherwise proved.

Once on the basis of aforesaid evidence re-appreciated by us, in its right perspective, we are of the view that it is not a case of suicide committed by the wife of the accused by badly hitting herself against the wall, we would not feel hesitant in believing the prosecution story to the effect that the accused, who virtually admitted his presence at the scene, and also stated a fact being especially within his knowledge (theory of suicide), in fact, had killed his wife and the child. We, therefore, repel the arguments advanced by Mr. Bhushan

An endeavour made by Mr. Bhushan in order to create doubt vis-à-vis motive projected by the prosecution and the investigation conducted, especially with regard to the three stones (blood stained) allegedly picked from the place of occurrence and sent for FSL subsequently on 11-10-1994, does not take us to draw any inference against the prosecution. No doubt, in his substantive statement, Vijay Kumar Tiwari, the real brother of the deceased, has not given a clear picture about the stay of his sister (since deceased) in his house after she had some tiff with the accused. He is also not clear about the exact date of birth or even the month of birth of the child (since deceased). He, in his cross-examination, also states that it was not clear to him as to who was that person about whom the accused was doubting that his wife was carrying on and even at one stage, he gave a new version with regard to the motive, as projected by one lady. But this is all immaterial. We, at the same time, have perused the statements of two real brothers of the accused, namely, Nand Ji Rai and Shiva Ji Rai also. DW-1 Nand Ji Rai, being employed in Army and posted with his brother at different station, has given a different story with regard to the leave of the accused and other brother (Shiva Ji Rai) has also made an attempt to save the accused. Even if prosecution is discrepant qua the motive, it would not uproot the case of the prosecution. This all becomes more or less academic in

the light of the other reliable eye version account on record. According to investigation conducted up to the stage of filing of the challan, the accused was suspecting his brother's hand for taking his wife (deceased) off the track. The fact remains that the accused was suspecting his wife's (deceased) disloyalty towards him and that is the motive in his bosom, viz., to commit murder of his wife and the child.

We also do not attach any importance to the flaw pointed out by Mr. Bhushan with regard to the sealing and re-sealing of the blood stained stones, which were ultimately sent to the FSL on 11-10-1994. Three stones, which were marked as Exhibits C, D and E, were initially lifted from the place of occurrence. In a specific question put to Kuldeep Singh in this regard, he stated that 3/4 stones were lying there. He gives the weight of those stones by approximation. The lifted stones were of the weight 2/3 kgs, 15/18 kgs and 500 gms., (Exhibits C, D and E respectively) These stones were initially shown to the doctor to seek opinion and thereafter produced before the Executive Magistrate. He also opened them and re-sealed. No doubt, some ambiguity has crept in with regard to the sealing and re-sealing, but, in our view, this defect is not to be taken that seriously, especially when the prosecution itself is not considering it to be a material

circumstance, as no opinion was given on blood grouping being material found to be disintegrated.

No other material point has been left untouched by us for our consideration.

After churning the entire evidence on record very carefully in its right perspective, the net result now surfaces is that, the prosecution has been able to prove beyond any shadow of reasonable doubt that the accused alone is the perpetrator of the crime, who, on account of suspecting disloyalty of his wife towards him as a partner, and also suspecting his son, of hardly nine/ten months, an illicit one, killed both of them in a planned and gruesome manner. Therefore, his conviction under Section 302 RPC, as already recorded by the learned trial Court, deserves to be upheld. Ordered accordingly.

The net result is that the instant appeal is hereby dismissed being devoid of any merit in it.

Confirmation No.04/2003 is, accordingly, answered.

**( Mansoor Ahmad Mir ) ( Virender Singh )**  
**Judge                              Judge**  
**Jammu**  
**August 03, 2007.**  
**\*T. Arora, PS\***

**HIGH COURT OF JAMMU AND KASHMIR AT JAMMU**

**Cr. Appeal No. 04/2003  
c/w Confirmation No. 04/2003**

**Date of decision : August 03, 2007**

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**Lal Babu Rai, 30 years** Vs. **State of J&K**  
**S/o Jaleshwar Rai, R/o Bachhapur,**  
**Tehsil Barasari, Distt. Ballian (U.P.)**  
**Sepoy No.13691803 Y,**  
**14 Guard, C/o 56 APO**  
**at present lodges in Distt. Jail Jammu.**

**State of J&K** Vs. **Lal Babu Rai**

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**Coram:**

**Hon'ble Mr. Justice Virender Singh  
Hon'ble Mr. Justice Mansoor Ahmad Mir**

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For the appellant : Mr. Sakal Bhushan, Advocate.

For the respondent: Mr. B. S. Salathia, Addl. Advocate General.

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| i)  | Whether approved for reporting<br>in Press/Journal/Media | Yes |
| ii) | Whether to be reported in<br>Digest/Journal:             | Yes |
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**Per Virender Singh, J.**

Suspecting his wife of infidelity has become the motive for Appellant, Babu Lal Rai, a Sepoy in Indian Army, (hereinafter to be referred to as ‘Accused’) for allegedly committing the murder of his wife, Smt. Poonam and nine/ten months old son, Ravi Rai, on 03-09-1994 in the vicinity of Seri Pandita (falling within the jurisdiction of Police Station, Kanachak). He was charged for Section 302 RPC and vide impugned judgment dated 10<sup>th</sup>/11<sup>th</sup> of

March, 2003, of learned Sessions Judge, Jammu, stands convicted for the said charge and has been sentenced to imprisonment for life and to pay a fine of Rs.1,000/-, in default thereof to further undergo simple imprisonment of three months. Hence Appeal No.04/2003 by him and Confirmation No.04/2003 by the State.

We intend to dispose of both of them vide this judgment.

PW Rattan Lal son of Amar Nath, is the first informant, who along with PWs Kuldeep Singh and Prem Singh, had apprehended the accused on the spot when he was trying to run towards the road after committing the offence. On inquiry, he disclosed his name and the address, and told the name of his wife and son also.

The case, as set up by the prosecution, in brief, is thus:

PW Rattan Lal was going home after getting medicine from the Hospital and when at about 1 O'clock reached near culvert of Seri Pandita, he heard shrieks from the nearby bushes and he went towards that direction, saw the accused hitting on the head of a lady with a big stone in his hand. The lady was having the child along with her. She was lying on the ground with her face besmeared with blood. Rattan Lal also saw the accused strangulating the child and he succumbed to the injuries. On his noise, aforesaid Kuldeep Singh and Prem Singh also reached there, nabbed the accused and handed over him to Police Post,

Gharota, where statement of PW Rattan Lal was recorded, which was the basis of registration of the formal F.I.R.

The investigation was taken up by PW Shahid Parvez, Sub-Inspector/SHO, Police Station, Kanachak, who after receipt of the copy of Report No.14 DD Entry from Police Post, Gharota, recorded formal FIR, went to the place of occurrence, prepared the rough site plan, seized the dead bodies of the lady and the child and blood stained earth vide separate seizure memos. Blood stained stones were also taken into possession vide seizure memo. Certain pieces of Bangles were also taken into possession and put them in a separate parcel. A separate seizure memo was prepared in this regard. The certain other articles were also seized at the spot. Photographs of the place of occurrence were also got clicked. Autopsy on both the dead bodies was conducted by Dr. B.R. Sharma. Certain articles were also seized during the post-mortem examination, which included the blood of the deceased Poonam Rai. In this regard also, separate seizure memos were prepared. Statements of witnesses were recorded under Section 161 Cr.P.C. and after completion of the investigation, the challan was put in against the accused for Section 302 RPC in terms of Section 173 Cr. P.C. He was, accordingly, charged for the said offence.

In order to substantiate the charge, the prosecution has examined as many as 16 witnesses and the learned trial Court, in brief, has depicted the evidence of all the witnesses, but we do not feel the necessity of reproducing the same once again, as in our view, the prosecution case primarily hinges upon the evidence of three main witnesses, namely, Rattan Lal S/o Amar, Kuldeep Singh S/o Tara Singh and Prem Singh S/o Tori Singh, who were allegedly present near the scene of occurrence. Their evidence is to be appreciated vis-a-vis the medical evidence on record, taking into account the plea taken by the accused under Section 342 Cr. P.C. We shall, however, be discussing the motive part also at the relevant stage.

We, at the very outset, feel the necessity of reproducing the reply tendered by the accused when examined under Section 342 Cr. P.C., after the entire incriminating evidence was put to him. The same, in vernacular (Urdu), when translated into English version, reads thus:

**Question : It has come in the evidence that aforesaid witnesses have made a statement against you to whom (witnesses) you have told that your wife was characterless and she gave a birth to an illicit child and due to this reason, you have murdered both of them. What can you say about this?**

**Answer : It is wrong. The truth is that I had told the witnesses that my wife used to feel herself wrong and, in fact, she had realized her mistakes. She along with her child and him (accused), had come in Shiv Mandhir near the place of occurrence, and in the said Mandhir, she confessed her guilt before the Idol of God and begged pardon there. Then I had pardoned her. But under the influence of her own sin, she used to realize her mistakes internally and before the occurrence also, she tried to commit suicide 2/3 times. On the day of occurrence, when I along with my wife and child, came out of the Mandir and took our lunch together in the ground there. Then, I went to the nearby bushes for urination. When I was in process of passing on the urine, I heard the cries of child and on seeing towards that side, I found that my wife had been pressing the throat of child and while I was in the process of seeing the same, she threw the child on the earth. I got stunned and immediately ran towards the wife. In the meanwhile also, she with her own hands started pressing her own throat and started striking her head with the stone. When I reached near my wife, she fell down after getting unconscious. There was too much noise during that process and she was making much hue and cry to save her, so that she could collect the people to take her and the child to the Hospital. On hearing this noise, the witnesses came on the spot and I narrated the episode to**

**them. They did not believe me and caught hold of me.”**

### **Direct Evidence**

Rattan Lal PW deposed that he had gone to Hospital Bhalwal, as he was not feeling well and when he was coming back from the Hospital, he heard the cries of somebody little before turn of Seri Pandita and went to the site of cry and made a call. Little ahead in the bushes, he saw the accused throwing big stone and by the time he reached there, he saw a lady in an injured condition bleeding profusely from the mouth. He then stated that he also saw a dead child along her side. He enquired from the accused as to who he was; at that time, his (accused) reaction was who was he to enquire from him. But then he told him (Rattan Lal) that the dead bodies are of his wife and son and the son was illicit of his wife, as his wife was of bad character and, therefore, he had killed both of them. Rattan Lal raised noise, which attracted Kuldeep Singh and Prem Singh, PWs, and then all the three caught hold of the accused, took him to Police Post, Gharota, and narrated the entire occurrence to the concerned Police official. This witness also talks of the seizure memos prepared in his presence by the Investigating Officer.

Mr. Bhushan has also drawn our attention to some portion of his cross-examination, where PW Rattan Lal stated that after

hearing the cry, he went towards that side and saw the accused with a stone in his hand, which he threw in his presence. He did not see at what place the accused had hit the stone, but he only saw the deceased's head and mouth bleeding profusely. This witness further stated that the accused had hurled stone only once in his presence and the accused had strangulated the child in his presence. Mr. Bhushan has also taken us through that part of the statement, where this witness had given somewhat contradictory version from his previous statement and he was duly confronted.

PWs Kuldeep Singh and Prem Singh are the other witnesses, who reached the spot after hearing the noise. Both these witnesses have deposed that on 03-09-1994 at about 1.30 in the noon, when they had reached near the turn of Seri Pandita, they heard a noise near the bushes and then saw Rattan Lal coming out and chasing the accused saying to catch hold of him. Consequently, he was caught at the spot and on enquiry he disclosed his name, address and employment in the Army. They further stated that PW Rattan Lal stated that the accused had killed his wife and son and then they went to the spot and saw the two dead bodies lying there and when they enquired from the accused, he disclosed to them that his wife was of bad character and had given the birth to an illicit child and for this reason, he had murdered both of them. These two witnesses had also

accompanied Rattan Lal to Police Post, Gharota. They are also witnesses to the seizure memos prepared at the spot for taking certain other articles into possession by the Investigating Officer.

### **Medical Evidence**

Dr. B.R. Sharma conducted the autopsy on the dead body of Smt. Poonam on 08-09-1994. It was identified by the relations of the deceased, who included Vijay Kumar Tiwari, her real brother. Following injuries were noticed on her dead body

- “1. A lacerated wound 6 Cm X 4 Cm over the left temporparietal region of the scalp with underlying committed fracture of left temporal bone.**
- 2. A lacterated wound 4 Cm X 1 Cm over the pinna of left ear with partial amputation of the lobule.**
- 3. A lacterated wound 2 Cm X 2 Cm over the right side face in the maxillary region.**
- 4. A lacterated wound 2 Cm X 1 Cm over the chin.**
- 5. A ligature mark 2 Cm wide transversely paced around the neck just above the thyroid with underlying extravasation of blood.**
- 6. Fifth, Six, Seventh, Eighth, Ninth and Tenth ribs on the right side fractured with underlying laceration of the right lung and the liver”**

Internal examination of the injuries conducted as under:

- “1. Thoracic cavity contains about half liter blood, middle and lower lobes of right lung lacerated under the depressed fractured ribs fifth to tenth.**
- 2. Abdominal cavity contained about 1 liter blood. Upper and outer margin of liver lacerated.**

In the opinion of the doctor, the cause of death was due to asphyxia as a result of strangulation, and other injuries were caused by blunt weapon and were ante-mortem in nature. In his opinion, all the six injuries were sufficient in ordinary course of nature to cause death individually and collectively. The time elapsed between the death and the post-mortem was five days.

Post-mortem conducted on the dead body of child, Ravi Rai, reflected the following injury on his neck only:

**“Irregularly distributed finger marks three in number with crescentic abrasions that is nail marks over the left side of the neck and the front of neck.”**

The cause of death was due to asphyxia as a result of strangulation. The time elapsed was the same about five days.

In his cross-examination, this witness has categorically stated that both strangulation as well as lacerated injuries caused by some blunt weapon on the person of lady, were caused simultaneously in a duration of one to two minutes. He further

stated that strangulation could have been carried out with some soft ligature material like Saree or Dupatta, but not with a rope, as there was no specific imprint over the neck. He, however, stated that it could not be with hands. This witness was very categoric in saying that the injuries Nos.1 and 6 could not be possible by fall, whereas injuries Nos.2 and 3 could be possible by fall. He was again very categoric in his cross-examination that there was only ligature mark on the neck of the deceased and there were no scratches on the legs of the deceased and there were no signs of fingers, thumb impression on the neck. There was no bleeding from the nose, mouth or ears

So far as post-mortem of the child is concerned, this witness stated that there was no specific impression of thumb on the neck of the child and the compression on the neck was with single hand. It was compressed from front and left side.

Dr. K.K. Raina, Scientific Officer, had received seven sealed packets containing certain articles for examination, which included blood stained clay, blood stained stones and other articles like saree, blouse and some under-garments of the lady. All those articles were subjected to Chemical Microscopical and Serological examination for determination of the presence of blood and the origin and group of blood. However, blood group could not be ascertained because of "material disintegrated".

### **Motive**

In order to prove the motive part, prosecution has examined PW Vijay Kumar Tiwari, the real brother of the deceased, who deposed that the accused had got married to his sister in 1991. For some time, he kept her well and then started beating her. Poonam Rai used to tell him about the quarrel saying that he was suspecting her fidelity. This had happened in 1993. Poonam Rai delivered a child in February, 1994 and as she was then turned out of matrimonial home and started staying with him along with the child. On 23<sup>rd</sup> of August, 1994, the accused had taken Poonam and the child back on the pretext that his brother had taken quarter at Jammu. On 05-09-1994, he received information from Police Station, Baraseri, about the murder of his sister along with her son at Jammu and the dead bodies were lying in the mortuary of Jammu Hospital. He along with his uncle, Badri Nath Tiwari, went to Medical College, Jammu, and identified the dead bodies. This witness then talks of the seizure memos prepared after the post-mortem examination.

Mr. Bhushan has pointed out certain infirmities in the cross-examination of the aforesaid witness, which aspect we would deal with at the relevant stage.

SI Shahid Parvez is the Investigating Officer of this case. We do not feel the necessity of touching the investigation

conducted by him, as the same is already alluded to in the preceding paras.

The plea of the accused, as emerges from his statement recorded under Section 342 Cr. P.C., is also depicted in the very beginning of the judgment.

### **Defence**

In defence, the accused has produced his two real brothers, DWs Nand Ji Rai and Shiva Ji Rai. DW Nand Ji Rai was also posted in Army. He stated that after the marriage, the accused was posted at Bhuj, Gujarat. He was also transferred to Bhuj. He then talks of his spending of leave for some time by the accused after the marriage and then he (accused) was transferred to Siachen in the year 1993. Nand Ji Rai was also transferred to Siachen. From there, he had come on leave on 12-08-1994 to his house at Ballia and from there, he went to Nagpur and then from Nagpur to Chandigarh. He then stated that he stayed at Chandigarh at the Transit Camp, where the accused along his wife (since deceased) came to Chandigarh on 27-08-1994 and met him, and on 28-08-1994, he along with the accused and deceased came to Jammu as his mother was residing at Jammu. Besides this his elder brother, Shiva Ji Rai, was also posted at Jammu and was residing in Cantonment, Jammu. He then deposed that from Chandigarh, he along with the accused and his wife (deceased) came on a train

and on the way to Jammu, it was disclosed by her that she had committed a sin, as she was having relations with some other person and had delivered an illicit child. He then stated that the accused, in fact, had loved the child and his behaviour towards his wife and the child was very good, as he had forgiven his wife of her bad act. He then deposed that Poonam told the accused that she could not show her face in the society and wanted to commit suicide. He, thereafter, reached Siachen on 01-09-1994 and there he received the information that his brother (accused) was arrested in this case.

DW Shiva Ji Rai has also deposed somewhat in the same terms in favour of the accused.

After appreciation of the entire evidence, the trial Court has recorded the conviction.

We have heard Mr. Sakal Bhushan, learned counsel for the appellant, and Mr. B.S. Salathia, learned Additional Advocate General, at length. With their assistance, we have gone through the entire evidence on record very minutely. Our attention is also drawn to certain documents from the trial Court record.

Mr. Bhushan, at the very outset, submits that PW Rattan Lal, the first informant, projected as an eye witness to the occurrence or, as a matter of fact, the other two witnesses, namely,

Kuldeep Singh and Prem Singh, were not present at the place of occurrence and that they have been subsequently imported by the prosecution in order to give twist to the real facts to make it a case of culpable homicide. Dwelling upon his arguments, Mr. Bhushan then submits that mode and manner, in which the occurrence has taken place, is not unfolded by Rattan Lal, the so-called star witness, in the Court as it was the basis of the registration of the case and the only evidence, which is brought on record from the substantive statement of this witness, is that he saw the accused throwing a stone only. Beyond this, this witness has not said a word about the manner, in which the occurrence has taken place. From this, the learned counsel wants to develop that, in fact, this witness was not an eye witness to the occurrence and, therefore, whatever is said in the FIR is the brain child of the Investigating Officer, who projected a story suitable to the prosecution.

Mr. Bhushan then submits that throwing of a stone was the only incriminating evidence with the prosecution and even this is not put to the accused while recording his statement under Section 342 Cr. P.C. and this basic lacuna touches the core of the case. This material flaw when appreciated along with the aforesaid weaknesses damages the basic substratum of the case.

According to Mr. Bhushan, the prosecution wants the Court to believe that the accused had also killed his son by

throttling the neck, but there is no evidence to that effect, as nobody has seen him assaulting the child. There is every possibility that Poonam Rai (since deceased) might have throttled the neck of the child before her death. Strengthening his arguments on this aspect, the learned counsel submits that the imprint on the neck of the child, does not indicate as who is the killer and in the absence of link evidence to this effect, the accused cannot be fastened with the murder of child. Even otherwise, incriminating evidence with regard to throttling of the child has also not been put to the accused, while examining him under Section 342 Cr. P.C., and this infirmity has also caused great prejudice to him.

Mr. Bhushan then submits that in order to implicate the accused, the prosecution has projected the evidence of extra-judicial confession suffered by him before aforesaid three main witnesses, namely, Rattan Lal, Kuldeep Singh and Prem Singh, as deposed by them in their substantive statements, but there is omission of factum of extra-judicial confession in the challan submitted by the Investigating Agency against the accused. There is no mention of this material aspect in the FIR also. From this, the learned counsel wants to develop that the evidence of extra-judicial confession has been put forth for the first time when the

aforesaid witnesses appeared in the Court and, therefore, it needs to be discarded.

An attempt has also been made by Mr. Bhushan to demolish the case of the prosecution with regard to the medical evidence, contending that if one appreciates the post-mortem examination, conducted on the dead body of Smt. Poonam Rai, it cannot be said that it was a case of Asphyxia by ligature. The other injuries on her person could be by a fall. On that basis, the learned counsel submits that the plea taken by the accused, in fact, is nearer to the case set up by the prosecution. He contends that although the accused is not supposed to set up any plea of defence and can demolish the case of the prosecution on account of infirmities crept in, but in the case in hand, the defence plea is very probable and, therefore, it creates doubt in the prosecution story. Mr. Bhushan then submits that the facts, as highlighted by the prosecution, can, no doubt, be termed as a motive for committing the alleged offence, but at the same time, this can also be seen in favour of the accused, who has taken a plea that his wife, after realizing her sin, went to the extent of killing her son and then finishing herself.

Mr. Bhushan then submits that he is not harping upon the theory that the motive is very essential in this case, but once the prosecution has set up a motive, as in this case, it assumes

importance. In this regard, he has taken us though the evidence of PW Vijay Kumar Tiwari, the real brother of the deceased once again and states that it runs contrary to the evidence of DW-1 Nand Ji Rai, whose evidence has not been challenged at least with regard to the leave of the accused. The learned counsel then submits that with regard to the motive, Vijay Kumar Tiwari has developed a new story altogether coming from the mouth of one lady. He took us to the cross-examination of this witness. In the same stress, Mr. Bhushan submits that, may be, the two witnesses are real brothers of the accused, but their evidence cannot not be brushed aside simply on account of their relationship. He contends that the defence set up by the accused is more closer to the theory of suicide, whereas the prosecution is miles apart from the very case set up against the accused and when it is appreciated in its entirety, it speaks volumes of false implication of the accused.

Mr. Bhushan lastly attacks the investigation also saying that it is not fair from the very outset. The learned counsel doubts the arrival of the Investigating Officer at the spot within two/three hours of the occurrence and submits that, in fact, it had not taken place at that time, as alleged by the prosecution. With regard to the recovery effected at the spot, especially the picking up three stones, which were taken to the Executive Magistrate on 11-10-1994 and re-sealed by him for the purposes of sending them to

FSL, the learned counsel submits that chances of tampering with the blood stained stones before they were produced before the Executive Magistrate on 11-10-1994, could not be ruled out.

On the basis of the aforesaid submissions, Mr. Bhushan submits that the case of prosecution is not proved against the accused beyond any shadow of reasonable doubt and, as such, he deserves acquittal.

Mr. Salathia repudiates the submissions of Mr. Bhushan and states that Rattan Lal, PW, or even the other two Prosecution Witnesses, namely, Kuldeep Singh and Prem Singh, had no animosity against the accused and interest in the prosecution. They are most natural witnesses to the occurrence. Even otherwise, the accused has not projected any enmity against the said witnesses.

Mr. Salathia then submits that the accused, in fact, admits his presence at the scene of crime and the plea taken by him of his wife committing suicide, runs contrary to the medical evidence and, therefore, the only conclusion, which can be drawn by this Court is that the accused is the perpetrator of the crime. He, thus, has no escape from his liability. On these grounds, Mr. Salathia prays for confirmation of the conviction and the sentence already recorded by the trial Court.

Before re-scanning the entire case of the prosecution in its right perspective, we would like to observe that the entire controversy now converges to a pertinent situation, as to whether it is a case of culpable homicides or suicide, as the accused has pleaded a specific defence, admitting his presence along with his wife and son (since deceased) at the place of occurrence. He has even gone to the extent of disclosing a particular fact, which was especially within his knowledge.

At the same time, the conduct of the accused also assumes importance in this case, as it is well settled that conduct of the accused must have nexus with the crime committed. In other words, it must form part of the evidence either preceding, during or after commission of the offence.

No doubt, the initial burden is on the prosecution to prove its case beyond any shadow of reasonable doubt, but relevant fact, which is especially within the knowledge of the accused and brought on record, is not to be ignored altogether and once he is unable to strengthen the said fact, the same can be taken against him in addition to the other convincing evidence led by the prosecution.

We are also conscious of the fact that falsity of defence by itself cannot be said to be a ground to believe the prosecution case

as it is, which otherwise is to be tested on its own facts, but in case the prosecution is able to stand firmly on its own legs, then in that eventuality the falsity of defence can very well be commented upon. We are appreciating the case in hand on that rationale.

Much has been said by Mr. Bhushan about the very case set up by the prosecution and in his attempt to demolish it in its entirety, he contended that Rattan Lal, the first informant, or the other two witnesses, namely, Kuldeep Singh and Prem Singh, were not there at the time of occurrence. To say so, he pointed out certain discrepancy, which, according to him, is very material. We, however, are not convinced with the arguments advanced by Mr. Bhushan and comment upon the discrepancies, as highlighted. In our view, the aforesaid three witnesses are most independent witnesses, and were not inclined towards either side. Per chance, PW Rattan Lal happened to be near the place of occurrence when he heard the cries of some one and he intervened. He gives as the true account of what he had seen. The other two witnesses, namely, Kuldeep Singh and Prem Singh, have not been projected as eye-witnesses at all. They reached the spot after hearing the noise of Rattan Lal saying ‘catch hold of the accused’.

We have re-scanned the statement of PW Rattan Lal once again. No doubt, in his initial statement, which is the basis of the registration of the FIR, he stated before the Police that the accused

was having stone in his hand and was in the process of assaulting the lady. He had also stated that the accused had throttled the neck of the child. When he stepped into the witness box, he simply stated that he had seen the accused throwing the stone. He did not talk about the factum of throttling the neck of the child or the fact that he saw the accused giving injuries to the lady. According to Mr. Bhushan, the substantive evidence on the file is that Rattan Lal had seen the accused simply throwing the stone and, therefore, whatever he had stated in his initial statement, giving a photographic version of the occurrence, was a manufactured story suitable to the prosecution. In our considered view, this discrepancy by itself would not dent the case of the prosecution vis-à-vis the basic occurrence. In his cross-examination, a specific question was put to PW Rattan Lal with regard to throttling of the neck of the child, to which he replied that the accused had not throttled the neck in his presence, rather he himself (accused) had disclosed to him that he (accused) had throttled the child. Be that as it may, the very case set up by the prosecution is that, Rattan Lal reached the spot when the accused was in the process of assaulting his wife.

The other factual position before us is that the accused is apprehended at the spot by Rattan Lal with the help of other two persons, namely, Kuldeep Singh and Prem Singh. These three

persons had taken the accused to Police Post, Gharota. The initial DD Entry No.14, which is sent to the Police Station, Kanachak, for the registration of the case, talks about the fact of Kuldeep Singh and Prem Singh accompanying Rattan Lal. The FIR is lodged at 3.30 p.m., i.e., within few hours of the occurrence. All these facts go to show that the aforesaid three persons, in fact, were present at the spot; one seeing the accused in action, may be to some extent, and the other two helped the first one in nabbing the accused. Once the prosecution case is seen from that angle, discrepancies, if any, crept in the statement of Rattan Lal cannot be termed as vital contradictions, so as to dub him as liar or to be taken as a witness introduced subsequently to strengthen the prosecution case. Had the Investigating Officer to manufacture a story of his choice against the accused for certain ulterior motive, which otherwise not pleaded by the accused, either of Kuldeep Singh or Prem Singh could also be shown along with Rattan Lal initially, but the same is not the position. This speaks volumes of the fact that the prosecution case is having no tinge of adulteration in it.

The matter does not rest here. The prosecution case is getting support from extra-judicial confession suffered by the accused immediately after the occurrence before PWs Kuldeep Singh and Prem Singh and admitted his hand in the commission of

murder of his wife and the child. He even made an attempt to run away from the scene of crime. This fact has to be appreciated as conduct of the accused. PW Kuldeep Singh, when stepped into the witness box, stated that on asking the accused told that his wife was of bad character (Budchalan) and his child was also an illicit child (Najaiz Aulad) and for this reason, he had killed both of them. On this aspect, Mr. Bhushan had vehemently contended that extra-judicial confession has been introduced for the first time from the mouth of aforesaid Kuldeep Singh and Prem Singh and the same was not the basis of the challan at all. He then argued that even otherwise, there is discrepancy with regard to the confessing of the guilt by the accused, as Rattan Lal in his substantive statement stated that after the accused had told him that he had killed his wife and the child, he made a noise, which attracted Kuldeep Singh and Prem Singh, whereas PW Kuldeep Singh says that after they heard the noise of Rattan Lal saying ‘catch hold of the accused’, they apprehended him and then on asking, he disclosed to them about the aforesaid fact.

Apparently, the submission advanced by Mr. Bhushan appeared to be somewhat attractive to us, but when appreciated in the light of the statements of aforesaid Kuldeep Singh and Prem Singh, we are not inclined to accept the same. No doubt, there is certainly a discrepancy with regard to the stage of confessing the

guilt by the accused, as stated by Mr. Bhushan, but, in our view, the same is just immaterial and the prosecution case is not to be thrown simply on the ground of some discrepancies in the sequence. What is to be appreciated is that, as to whether a particular fact was there throughout right from the very outset up to the end of investigation or it was introduced subsequently just to seek conviction? We may observe here that on this material aspect, the two main witnesses, namely, Kuldeep Singh and Prem Singh, have not been confronted from their previous statements recorded under Section 161 Cr. P.C. and, therefore, the accused cannot derive any advantage from it. Perhaps this is the legal position. We, however, once again have also gone through the challan where there is a reference to the fact that the accused was having suspicion about infidelity of his wife. He was suspecting that his elder brother, namely, Nand Ji Rai, was carrying on with his wife.

On the basis of what is observed hereinabove, it can be concluded safely that the extra-judicial confession made by the accused, that too within no time of the occurrence, is voluntary, before most independent and unbiased witnesses, and as such, the said piece of evidence, in our firm view, has to be taken into account in favour of the prosecution.

In the light of the aforesaid discussion, it can also be safely said that even if certain incriminating evidence has not been put to the accused, while examining him under Section 342 Cr. P.C., has not caused any prejudice to him, as he was very much aware of the entire case set up by the prosecution against him. He rather has come forward with a specific plea as well.

Lot of efforts have been made by Mr. Bhushan to demolish the case of the prosecution contending that it runs contrary to the medical evidence on record. We have once again very minutely perused the same and find no material flaw, which would help the accused. Dr. B.R. Sharma has categorically stated that both strangulation and lacerated injuries by blunt object were caused simultaneously in a duration of one to two minutes. There are as many as six injuries on the person of deceased Poonam Rai. Injury No.1 is over the left temporparietal region of the scalp. Injury No.2 is again a lacerated wound over the pinna of left ear with partial amputation of the lobule. This shows that lobule, which is tender part of the ear, has been chopped off. Similarly, Injury No.3 is on the right side of the face in the maxillary region. Injury No.4 is on the chin. The aforesaid four injuries are on different parts of the body. Even six ribs (5<sup>th</sup> to 10<sup>th</sup>) have also fractured with underlying laceration of the right lung and the liver. This shows that the lady was badly assaulted by a blunt weapon.

Stone is certainly a blunt weapon. This shows that before Rattan Lal reached the scene of occurrence and saw the stone in the hand of the accused, he was in the process of assaulting, but at the same time, he had already caused certain injuries on the person of the deceased. The injuries, in any case, by any stretch of imagination, cannot be attributable to deceased Poonam herself, believing the defence that she out of anger started hitting her head against the wall and in that process, received these injuries, which are on different sides of the face. Partial amputation of the lobule is indicative of the fact that hard object was hit on this tender part, resulting into amputation. This could be on account of edge of the stone also. Strangulation is also done simultaneously, as stated by the doctor. It appears that the accused strangulated his wife with the help of ligature, which could be one end of the saree worn by the deceased (saree shown in the exhibited photograph) and, thereafter, gave several injuries on her person. All this depicts that he was out to kill her. We do not appreciate the argument Mr. Bhushan that Poonam strangulated herself and then started hitting against the wall. This is just imaginary. We may observe here that we are also not in agreement with the contention of learned counsel to the extent that the post-mortem of Smt. Poonam Rai is more nearer to the defence set up by the accused.

We, at the same time, have perused the post-mortem report of the child, Ravi Rai, also. He was just of the age of nine/ten months at the time of occurrence. Simple pressure on his neck could throttle him. This is what is done in this case. No doubt, the prosecution agency has not made an attempt to be certain with regard to the killer of the child, resorting to any scientific approach, as there were certain imprints on the neck. But, in our view, this fact would not demolish the case of the prosecution in the light of other reliable evidence on record, especially what was stated by the accused himself before the three witnesses. This defect can be attributed to the Investigating Officer as laxity. It is well settled that the prosecution case cannot be thrown on the basis of some defect(s) in the investigation, if it is otherwise proved.

Once on the basis of aforesaid evidence re-appreciated by us, in its right perspective, we are of the view that it is not a case of suicide committed by the wife of the accused by badly hitting herself against the wall, we would not feel hesitant in believing the prosecution story to the effect that the accused, who virtually admitted his presence at the scene, and also stated a fact being especially within his knowledge (theory of suicide), in fact, had killed his wife and the child. We, therefore, repel the arguments advanced by Mr. Bhushan

An endeavour made by Mr. Bhushan in order to create doubt vis-à-vis motive projected by the prosecution and the investigation conducted, especially with regard to the three stones (blood stained) allegedly picked from the place of occurrence and sent for FSL subsequently on 11-10-1994, does not take us to draw any inference against the prosecution. No doubt, in his substantive statement, Vijay Kumar Tiwari, the real brother of the deceased, has not given a clear picture about the stay of his sister (since deceased) in his house after she had some tiff with the accused. He is also not clear about the exact date of birth or even the month of birth of the child (since deceased). He, in his cross-examination, also states that it was not clear to him as to who was that person about whom the accused was doubting that his wife was carrying on and even at one stage, he gave a new version with regard to the motive, as projected by one lady. But this is all immaterial. We, at the same time, have perused the statements of two real brothers of the accused, namely, Nand Ji Rai and Shiva Ji Rai also. DW-1 Nand Ji Rai, being employed in Army and posted with his brother at different station, has given a different story with regard to the leave of the accused and other brother (Shiva Ji Rai) has also made an attempt to save the accused. Even if prosecution is discrepant qua the motive, it would not uproot the case of the prosecution. This all becomes more or less academic in

the light of the other reliable eye version account on record. According to investigation conducted up to the stage of filing of the challan, the accused was suspecting his brother's hand for taking his wife (deceased) off the track. The fact remains that the accused was suspecting his wife's (deceased) disloyalty towards him and that is the motive in his bosom, viz., to commit murder of his wife and the child.

We also do not attach any importance to the flaw pointed out by Mr. Bhushan with regard to the sealing and re-sealing of the blood stained stones, which were ultimately sent to the FSL on 11-10-1994. Three stones, which were marked as Exhibits C, D and E, were initially lifted from the place of occurrence. In a specific question put to Kuldeep Singh in this regard, he stated that 3/4 stones were lying there. He gives the weight of those stones by approximation. The lifted stones were of the weight 2/3 kgs, 15/18 kgs and 500 gms., (Exhibits C, D and E respectively) These stones were initially shown to the doctor to seek opinion and thereafter produced before the Executive Magistrate. He also opened them and re-sealed. No doubt, some ambiguity has crept in with regard to the sealing and re-sealing, but, in our view, this defect is not to be taken that seriously, especially when the prosecution itself is not considering it to be a material

circumstance, as no opinion was given on blood grouping being material found to be disintegrated.

No other material point has been left untouched by us for our consideration.

After churning the entire evidence on record very carefully in its right perspective, the net result now surfaces is that, the prosecution has been able to prove beyond any shadow of reasonable doubt that the accused alone is the perpetrator of the crime, who, on account of suspecting disloyalty of his wife towards him as a partner, and also suspecting his son, of hardly nine/ten months, an illicit one, killed both of them in a planned and gruesome manner. Therefore, his conviction under Section 302 RPC, as already recorded by the learned trial Court, deserves to be upheld. Ordered accordingly.

The net result is that the instant appeal is hereby dismissed being devoid of any merit in it.

Confirmation No.04/2003 is, accordingly, answered.

**( Mansoor Ahmad Mir ) ( Virender Singh )**  
**Judge                              Judge**  
**Jammu**  
**August 03, 2007.**  
**\*T. Arora, PS\***