

(2009) 03 CAL CK 0053
In the Calcutta High Court
Case No : C.R.A. No. 813 of 2005

Ashiruddin Sk. @ Paltu Sk.

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 16-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2009) 03 CAL CK 0053

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Md. Sabir Ahamed and Md. Kutubuddin, for the Appellant; Biplab Mitra and Amajit De, for the Respondent

Judgement

Ashim Kumar Roy, J.—In a Sessions Trial the appellant Ashiruddin Sk. @ Paltu Sk. and another Pramila Marjit were convicted under Sections 302/364/201/34 of the Indian Penal Code and sentenced thereunder to suffer imprisonment for life, rigorous imprisonment for 10 years and 2 years respectively with fine and default clause for abducting one Jabir Sk. in order that he might be murdered and for committing murder by intentionally causing death of Jabir Sk. and for causing disappearance of the evidence of murder.

2. Against the aforesaid order of conviction and sentence only the convict Ashiruddin Sk. @ Paltu Sk. preferred this appeal, so far as the other convict Pramila Marjit is concerned, we have been informed by the Learned Counsels of the parties that she has not preferred any appeal questioning the validity of her conviction. In this connection it has also been reported by the criminal section that no appeal has been preferred by the convict Pramila Marjit against her conviction.

3. The background facts of this case are as follows;

On December 10, 1996, P.W. 1 Maniruddin Sk. lodged a FIR with the Khargram

Police Station against unknown persons alleging inter alia that one Jabir Sk., the brother of the complainant was missing since 7 p.m. on December 6, 1996. During the last two days the complainant and others vigorously searched for him and as he could not be traced out on December 9, 2006 the complainant lodged a missing diary at Khargram Police Station and after lodging the missing diary while the complainant was returning from the police station he was informed by one Khudabux that the dead body of his brother has been found lying in Kagajtala pond besides Shanigram.

Following the lodging of the aforesaid First Information Report the police took up the investigation and submitted charge-sheet against the present appellant Ashiruddin Sk. @ Paltu Sk. and one Pramila Marjit for offences punishable under Sections 364/302/201/34 of the Indian Penal Code and for the self-same offence they were charged in the trial before a Court of Sessions.

4. We have heard the Learned Counsel Mr. Sabir Ahamed appearing on behalf of the appellant as well as Mr. Biplab Mitra appearing with Mr. Amajit De for the State. Perused the deposition of the witnesses, the impugned Judgement and other materials on record.

5. This is a case entirely based on circumstantial evidence and it is the settled law in cases depending on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established beyond all reasonable doubts and not only the all facts so established should be conclusive in nature but those facts so established should be consistent only with the hypothesis of the guilt of the accuseds and inconsistent with their innocence.

6. During the trial to establish the charge against the accuseds the prosecution examined as many as 11 witnesses, while defence examined none. Out of the total 11 witnesses the P.W. 1 Maniruddin Sk., who happened to be the elder brother of the deceased is the maker of the First Information Report, while P.W. 2 Ajera Bewa is the wife and 3 Abdul Makim is the uncle of the deceased Jabir Sk. The P.W. 4 Asir Sk. @ Asruddin Sheikh, P.W. 5 Mursalim Sk., P.W. 6 Safiquil Alam, P.W. 8 Abdul Latif, P.W. 9 Nakib Sk. all are the relations of the complainant, except the P.W. 4 and the P.W. 5 who are the local residents, that is the co-villagers of the deceased. P.W. 7 is the Autopsy Surgeon. Both P.W. 10 Dilip Kumar Roy and P.W. 11 Balaji Ghosh are the Investigating Officer of the case. While the P.W. 10 conducted the initial investigation, the P.W. 11 completed the same and submitted charge-sheet.

7. In this case there is no dispute that Jabir Sk. died a homicidal death. However, the prosecution to prove the charge against the accused persons that they have caused the death of Jabir Sk. relied on following circumstances;

(a) In the evening, since when, the deceased Jabir Sk. was missing he was called by the accused Paltu Sk. @ Ashiruddin Sk.

(b) During the search for Jabir Sk. the witnesses found blood marks on the wall of the hut of the accused Pramila Marjit.

(c) Once there was some altercation between the deceased Jabir Sk. and the accused Paltu Sk. @ Ashiruddin Sk. over the issue of extra-marital relationship between the accused Paltu Sk. @ Ashiruddin Sk. and Pramila Marjit.

8. The evidence of P.W. 1 Maniruddin Sk., P.W. 4 Asir Sk., P.W. 5 Mustakin Sk., P.W. 6 Safikul Alam, P.W. 8 Abdul Latif and P.W. 9 Nakib Sk. that they were told by the P.W. 2 Ajera Bewa that before the missing of her husband Jabir Sk., he was called by the two accused persons was not supported by the P.W. 2 in her deposition in Court. Thus, the said evidence of P.W. 1, P.W. 4, P.W. 5, P.W. 6, P.W. 8 and P.W. 9 remain hearsay and are not admissible. So far as P.W. 2 Ajera Bewa is concerned, since according to her own admission in cross-examination she was not examined by the police during investigation, thus her evidence for the first time in Court more than nine years after the alleged incident, does not inspire any confidence in our mind. Moreover, it was only alleged by the P.W. 2 that her husband was called by the accused persons but there is no evidence that following such call her husband accompanied them and thereafter he was never found alive. In any event the evidence of last seen by itself, although in this case the prosecution has failed to prove the same, cannot be of much significant. It may provide a vital link in the chain of circumstances against the accused but unless the time gap is small between the point of time when the deceased was last found alive in the company of the accused and he is found dead the possibility of any person other than the accused being the author of crimes cannot be ruled out. In the instant case, the dead body of the deceased was recovered after three days from the date of his missing. It is the evidence of P.W. 1 Maniruddin Sk., the maker of the FIR that after the blood was found at the house of accused Pramila Marjit he was told by the wife Jabir Sk. that her husband was called by the accused Paltu Sk. about 2/3 days back but nothing was mentioned about the same in the First Information Report, although according to the said witness the FIR was lodged after detection of blood. In our view, this omission is a serious lacuna in the prosecution case and makes the same very doubtful.

9. The next circumstances that blood marks were found at the residence of accused Pramila Marjit is also very suspicious. We have found from the evidence of P.W. 1, Maniruddin Sk. such blood marks were detected by him while he was returning after lodging of the missing diary from the police station but such an important fact was surprisingly not found place in the First Information Report lodged thereafter. The absence of the said fact in the First Information Report certainly shatters credibility of the prosecution case. Moreover no bloodstained earth was seized by the police and on such view of the matter, we are not inclined to consider the same against the accuseds. It would not be out of place to mention that the P.W. 4 who happened to be the uncle of the deceased Jabir Sk. claimed that he heard from Kinu Sk., the son of deceased Jabir Sk. that

before the Jabir Sk. was found missing he was called from his residence by Paltu Sk. is equally not admissible in evidence, when the son of the deceased was not examined during the course of trial by the prosecution.

10. We have also noticed a serious infirmity in the prosecution case. While P.W. 2 Ajera Bewa and P.W. 3 Abdul Makim, according to their own admissions, were not examined by the police during investigation, according to the investigation of this case P.W. 10 Balaji Ghosh, the witnesses viz. P.W. 5 Murselim Sk., P.W. 6 Safikul Alam, P.W. 8 Abdul Latif and P.W. 9 Nakib Sk. were examined nearly seven and half months after the alleged incident. This nonexamination of the vital witnesses as well as unusual and inordinate delay of examination of some witnesses, although they were very much available just immediately after the occurrence makes their evidence not at all reliable.

11. For the reasons stated above, we are of the clear opinion that the prosecution has miserably failed to prove its case against the accused persons and established their guilt. Thus, the impugned order of conviction and sentence is liable to be set aside.

12. Last but not the least, in this case a very vital question arises for our decision and that deserves a decision from our end. The question so arises for decision is that when in an appeal preferred by one accused, he is found to be not guilty for want of evidence and the prosecution case as a whole fails, whether any other co-accused, who has not preferred any appeal against his conviction arising out of the self-same judgement is entitled to enure to the benefits of such order of acquittal, if so, then when and under what circumstances. It is an admitted position in this case the co-accused Pramila Marjit has not preferred any appeal against her conviction arising out of the self-same judgement.

13. It may be recorded that the Learned Counsel appearing on behalf of the State Mr. Biplab Mitra in his usual fairness vehemently urged before this Court that the benefit of acquittal of the appellant Ashiruddin Sk. @ Paltu Sk. ought to be extended to the other convict Pramila Marjit, although she has not preferred any appeal questioning the validity of her conviction. Mr. Mitra in support of his contention relied on the following decisions;

(i) Dandu Lakshmi Reddy Vs. State of A.P., . (ii) Akhil Ali Jehangir Ali Sayyed Vs. State of Maharashtra, . (iii) Harbans Singh Vs. State of Uttar Pradesh and Others, and (iv) Raja Ram and Others Vs. State of M.P., .

14. Be that as it may it is no longer *res integra* that a High Court while exercising its appellate power u/s 386 of the Code of Criminal Procedure, although, the jurisdiction is a limited one still High Court can exercise its revisional jurisdiction and/or inherent jurisdiction not only when there is a formal application but also *suo motu*. Inherent power of the High Court can be exercised both in relation to substantive as well as the procedural matter. Of course such power has to be exercised in very exceptional cases, but certainly to be exercised, *ex debito justitiae*, to do real and substantial justice for which alone it exists. The inherent

power and jurisdiction of the High Court can always be used for dealing with an extraordinary situation in the larger interest of administration of justice and for preventing manifest injustice being done. In this connection it would be more profitable to refer to the decision of the Hon''ble Apex Court in the case of Popular Muthiah Vs. State represented by Inspector of Police, . We have considered the case laws referred by Mr. Mitra and it appears in all those cases the Apex Court extended the benefit of an acquittal to the other non-appealing convicts.

15. Now, having regards to the evidence on records in this case in hand, it is beyond all doubts that the prosecution case against both the accuseds and the evidence led by the prosecution against them are so interdependent and inextricably integrated, that there is no scope for distinguishing the case of the appellant from that of the non-appealing accused. Both of them are similarly situated so far as the prosecution case against them is concerned. We are of the further opinion the prosecution has not been able to make out any case against the nonappealing accused Pramila Marjit and no conviction of her is at all possible on the face of the evidence on records. According to us this is a fit case where the benefit of acquittal of one of the co-accused ought to be extended to the non-appealing accused Pramila Marjit to prevent the miscarriage of justice. There is no valid reason to deny the benefit of the order of acquittal of the appellant Ashiruddin Sk. @ Paltu Sk. to the non-appealing accused Pramila Marjit.

16. In the result while allowing the appeal of the appellant Ashiruddin Sk. @ Paltu Sk. by setting aside the impugned order of conviction and sentence passed against him and acquitting him from the case, we also set aside the order of conviction and sentence so far as the non-appealing accused Pramila Marjit is concerned. She also stands acquitted from the case.

17. This appeal stands allowed and order of conviction and sentence is set aside both in respect to the appellant Ashiruddin Sk. @ Paltu Sk. as well as the non-appealing accused Pramila Marjit. Both of them who are in jail shall forthwith be released from the custody if not wanted in connection with any other case.

Let the Lower Court Records be sent down to the Court below at once.