
(2017) 06 CAL CK 0032
In the Calcutta High Court
Case No : 45 of 2015

Bhagirath Sarkar

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 23-06-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 313](#), [Section 174](#), [Section 164](#), [Section 193](#), [Section 159](#)

Citation : (2017) 06 CAL CK 0032

Hon'ble Judges : Rakesh Tiwari, Shivakant Prasad

Bench : DIVISION BENCH

Advocate : Pratik Bhattacharya, Dulal Chandra Sarkar, Saibal Bapuli, Bibaswan Bhattacharya

Final Decision : Dismissed

Judgement

1. The instant appeal is directed against the judgment and order dated 18.12.2014 and 22.12.2014 passed by learned Additional District & Sessions Judge, Fast Track 1st Court, Basirhat, North 24-Parganas convicting the appellant for the offence punishable under section 302 of the Indian Penal Code, 1860 and sentencing him to suffer imprisonment for life and also to pay a fine of Rs. 10,000/- (Rupees Ten Thousand), in default S.I. for six months in S.T. No. 07(7)/2003 corresponding to S.C. No. 31(12)/2001.

2. Factual matrix of the prosecution case is that on 17.02.1997 at about 13:15 hours one Ranjan Kr. Mondal of Village- Balti Paschimpara, P.S.- Swarupnagar called at the P.S. and lodged a written complaint to the effect that on 17.02.1997 at 10:00 hours on receiving an information of death of his wife at Machlandapur Railway Station, he rushed to the house and on reaching there the complainant heard the fact from his son Nityananda Mondal (P.W.-2) that on 16.02.1997 at about 20:00 hours his wife along with children were sleeping after taking night meal and at about 2:00 hours accused Bhagirath of the same village called his

wife to come outside room. Nityananda Mondal, son of the complainant saw the accused to enter into the room asking his mother to come out from the room, who held out threat on his son with dire consequences showing a knife, if he makes any voice.

3. Nityananda Mondal noticed his mother going out of the room out of fear at night and in the next day morning at about 05:00 hours he woke up and found the dead body of his mother lying on the verandah of their house with marks of injury on the neck and the throat. The voice of the accused Bhagirath was very much known to his son Nityananda Mondal (P.W.-2) as he used to visit the house of the complainant in his absence and harassed his wife. On the above complaint, Swarupnagar P.S. case no. 14 of 1997 dated 17.2.1997 under Section 302 IPC was registered against the accused appellant.

4. On completion of investigation, police submitted charge-sheet no. 58 of 1997 dated 18.9.1997 under Section 302 of the Indian Penal Code, 1860.

5. Subsequently, the case was committed by the Sub-Divisional Judicial Magistrate at Basirhat, North 24-Parganas to the Court of Sessions and after taking cognizance as per Section 193 Cr.P.C. learned Sessions Judge transferred the case for trial and disposal by the Additional District & Sessions Judge, Fast Track 1st Court, Basirhat, North 24-Parganas and the charge against the appellant was framed under Section 302 of the IPC, to which he pleaded not guilty and claimed to be tried.

6. To bring home charge against the accused appellant, the prosecution examined as many as 15 witnesses.

7. After closure of prosecution evidence the accused appellant was examined under section 313 of the Code of Criminal Procedure, 1973 pertaining to incriminating evidence against him which he denied as false and pleaded innocence but declined to adduce any evidence in defence. The Learned Trial Court below after hearing both the sides and perusal of the evidence-on-record, held the accused guilty of the offence charged under Section 302 IPC by judgment and order dated 18.12.2014 and 22.12.2014, convicted and sentenced him to suffer imprisonment for life and also to pay a fine of Rs. 10,000/- (Rupees Ten Thousand), in default S.I. for six months and further ordered that the appellant Bhagirath Sarkar shall not be released from jail custody unless he has completed 20 years of imprisonment.

8. The accused appellant assailed the impugned judgment inter alia, on the grounds that the learned Judge by convicting the appellant on the basis of sketchy evidence of only interested witnesses adduced by the prosecution has committed grave prejudice to the appellant

9. Now, the point for consideration is as to whether the impugned judgment is tenable in law and in facts and whether the prosecution has been able to substantiate charge against the accused appellant beyond reasonable doubt.

10. At the outset learned counsel for the appellant has invited our attention to the formal FIR exhibit-6 pointing out that there was delay of about 7 days in forwarding the FIR to the Magistrate as per the endorsement of SDJM Basirhat on 24.02.1997 and referred to the police Regulation 246 regarding dispatch of First Information Report which provides that it shall be sent without delay to the District Magistrate or the Sub-divisional Magistrate through the court officer. Regulation 246, Chapter VI of the PRB lays down the duty of a police officer in connection with the First Information Report.

11. In rebuttal, learned counsel appearing for the State respondent submitted that delay in forwarding the FIR to the Magistrate is not fatal to the prosecution case as the FIR is not ante-timed and ante-dated and there is no allegation of FIR being ante-timed and ante-dated. It is true that the formal FIR bears the endorsement "seen" dated 24.02.1997 as received at the Magistrate court. Endorsement of the S.I. T. Das on the written complaint exhibit-1 clearly shows that the same was received on 17.02.1997 at 13:15 hours and Swarupnagar Police Case No.14 under Section 302 IPC was started against the FIR named accused Bhagirath Sarkar. This fact also finds corroboration by the evidence of the Investigating Officer PW-15, SI Tamal Das who has simultaneously started UD Case No.6/97 dated 17.02.1997.

12. Learned counsel for the State respondent in support of his contention has relied on the observation made in Paragraphs-11, 12, 13 and 14 of the decision in case of Bhajan Singh @ Harbhajan Singh and Ors. vs. State of Haryana reported in AIR 2011 Supreme Court 2552 which are reproduced hereunder for profitable understanding in respect of the delay in sending the copy of FIR to the Magistrate Court. "11. In Shiv Ram & Anr. v. State of U.P., AIR 1998 SC 49, this Court considered the provisions of the Section 157, Cr.P.C., which require that the police officials would send a copy of the FIR to the Illaqa Magistrate forthwith. The court held that if there is a delay in forwarding the copy of the FIR to the Illaqa Magistrate, that circumstance alone would not demolish the other credible evidence on record. It would only show how in such a serious crime, the Investigating Agency was not careful and prompt as it ought to be.

12. In Munshi Prasad & Ors. v. State of Bihar, AIR 2001 SC 3031, this Court considered this issue again and observed:

"While it is true that Section 157 of the Code makes it obligatory on the officer in charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice -- if the court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case."

While deciding the said case, this Court placed reliance upon its earlier

judgments in *Pala Singh & Anr. v. State of Punjab*, AIR 1972 SC 2679; and *State of Karnataka v. Moin Patel & Ors*, AIR, 1996 SC 3041.

13. In *Rajeevan & Anr. v. State of Kerala*, (2003) 3 SCC 355, this Court examined a case where there had been inordinate delay in sending the copy of the FIR to the Illaqa Magistrate and held that un-explained inordinate delay may adversely affect the prosecution case. However, it would depend upon the facts of each case.

14. A similar view was reiterated in *Ramesh Baburao Devaskar & Ors. v. State of Maharashtra*, (2007) 13 SCC 501, wherein there had been a delay of four days in sending the copy of the FIR to the Illaqa Magistrate and no satisfactory explanation could be furnished for such inordinate delay. While deciding the said case, reliance had been placed on earlier judgments in *State of Rajasthan v. Teja Singh & Ors.*, AIR 2001 SC 990; and *Jagdish Murav v. State of U.P. & Ors.*, (2006) 12 SCC 626. [See also *Sarwan Singh & Ors. v. State of Punjab* AIR 1976 SC 2304; *State of U.P. v. Gokaran & Ors.* AIR 1985 SC 131; *Gurdev Singh & Anr. v. State of Punjab* (2003) 7 SCC 258; *State of Punjab v. Karnail Singh* (2003) 11 SCC 271; *State of J & K v. Mohan Singh & Ors.*, AIR 2006 SC 1410; *N.H. Muhammed Afras v. State of Kerala*, (2008) 15 SCC 315; *Sarvesh Narain Shukla v. Daroga Singh & Ors.*, AIR 2008 SC 320; and *Arun Kumar Sharma v. State of Bihar* (2010) 1 SCC 108]."

13. It emerges from the trend of the observations made in the cited decisions that the Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159 Cr.P.C, if so required. Section 159 Cr.P.C empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself or through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and if necessary to give appropriate direction. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown.

14. Having respectfully considered the observation of the Hon'ble Apex Court in the cited decision and considering the evidence of I.O. (P.W.-15), we do not find any suggestion given to the Investigating Officer as to why there was delay in forwarding the FIR to the nearest Magistrate. No such submission was also raised before the learned trial court so as to doubt the FIR and to brand it as embellished one.

15. In second fold argument learned counsel for the accused appellant invites our attention to the contradictions in the evidence of PW-I, the husband of the deceased as to where and how he received the information regarding the death of his wife. Though he stated in his examination-in-chief and in later part of

cross-examination that he was informed by one Kajal about the death of his wife at Maslandapur railway station itself but said Kajal was not produced before the Court below as witness nor her statement under Section 161 of the Code of Criminal Procedure was ever recorded by the I.O. The purpose for which PW-1 had been to Sayestanagar has also not been stated in the FIR and no such statement made under Section 161 Cr.P.C. But PW-6 has stated in his examination-in-chief that he himself accompanied PW-I to in Sayestanagar and the same was for negotiation of a marriage which according to the defense casts a reasonable shadow on the prosecution story which is a weak part of the chain of circumstances.

16. It is further pointed out that admittedly there was a long standing illicit relationship between the deceased and the accused and PW-I was not happy with the said fact. Admittedly, a village salish was also held though the relationship continued. So, the PW-I being the husband of the deceased might have the motive to murder his wife and to implicate the accused appellant to achieve his kinky intention.

17. Learned counsel for the appellant has pointed out that the witness Kajal and Bisakha in whose house the de-facto complainant stayed on the fateful night have not been examined by the prosecution who according to the defense are material witnesses.

18. We find from the evidence of PW-1 himself in his cross-examination that when he was at Maslandapur railway station along with Govinda, Kajal had simply told him that an incident happened in his house but details of incident was not disclosed to him by Kajal. In our view non-examination of Kajal is not fatal to the prosecution case inasmuch as the statement made on oath by PW-1 in his cross-examination attains the probative value as his statement stood the test of cross-examination by defense and we do not find material contradiction taken in his statement that he was not in the house of Bisakha on that fateful night. Gobinda Mondal, PW-6 has corroborated the fact that Ranjan Mondal his uncle, Kajal his own third sister and Bisakha his eldest sister who lives in her inlaws house at Sayestanagar and the deceased happened to be his aunt. Nityananda Mondal, PW-2 is the second son of his uncle Ranjan Mondal. On the date of death of Saraswati he was away from his house and stayed along with his uncle Ranjan Mondal, P.W.-1 in the house of said sister Bisakha. The deceased Saraswati and Nityananda stayed at their house at Balti village. On 17th morning he alongwith the husband of Bisakha and his uncle Ranjan went to Maslandapur for marriage negotiation of his other sister where Kajal reported that Saraswati Mondal was murdered in the last night. On hearing, they came to the house at Balti village by bus and found the dead body of his aunt lying on "verandah" and blood oozing from her mouth with black mark of a strangulation around her throat. He found that the police had arrived there who interrogated him how the incident of murder occurred and he narrated the incident to the police what he had heard from Nityananda Mondal, PW-2. In cross-examination he stated in clear crystal

term that he met his uncle Ranjan at the house of Bisakha at Sayestanagar. He himself, his uncle Ranjan, his brother-in-law Dukhiram Sarkar (bhognipati) and Monoranjana Sarkar (husband of Bisakha) went to Tangra by auto-rickshaw. They started from Sayestanagar in the morning of 8:30 a.m. for Tangra and they arrived at Maslandapur at about 10/10:15 a.m. Immediately, after getting down from auto rickshaw they met Kajal being accompanied by Chitta Mondal where they were reported about the death news of Saraswati. On hearing the death news his bhognipatis went to their house but he himself with uncle Ranjan, Kajal and Chitta came back to the house by bus at about 12:30/1 p.m.

19. We do find minor contradiction in the statement of PW-6 with that of PW-1 in regard to the information received by them at Maslandapur railway station but that would not be fatal to the prosecution case because PW-1 who happened to be the husband of the deceased Saraswati may not have received information by Kajal about the death of Saraswati whereas she might have informed PW-6 Gobindo about the actual incident of death of the deceased. So such contradiction in the statement of P.W.-1 about simply having received the information of a trouble in his house and the non-disclosure of the purpose for which he had been to the house of Bisakha are not material contradiction in our considered opinion, as the prosecution case narrated by the witnesses are in general agreement finding corroboration with each other and such minor contradiction do not go to the root of the prosecution to shake it. Nonexamination of said Kajal, Bisakha, said brother-in-laws of PW-6 namely Dukhiram Sarkar and Monoranjana Sarkar is also not fatal for the prosecution.

20. Learned counsel for the appellant adverted our attention to the evidence of Nityananda Mondal, P.W.-2 by submitting that his statement about taking away of his mother deceased by the accused on the point of knife is not only unusual but also very suspicious and submitted that the evidence of autopsy surgeon in his cross-examination suggested a case of hanging contending that symptom mentioned in the inquest report exhibit-2 as to sign on the neck of the dead body is symptom of hanging but at the same time he has confronted the eye-witness and the de-facto complainant P.W.-1 on the score that it was he who committed the murder of the deceased as he was unhappy with the deceased due to her illicit relationship with the accused appellant for long time. It was also suggested to PW-1 that due to loose character of his wife he had quarreled with his wife and for such reason he murdered his wife by strangulating her. Such suggestion has been elicited to the PW-1 during cross-examination is for taking a defensive plea by the accused appellant. PW-1 has proved and corroborated the FIR which was scribed by Govinda Mondal, PW-6. PW-1 on the fateful night was in the house of Bisakha at Sayestanagar and at about 10 a.m. he was present at Maslandapur railway station where he was informed by his niece Kajal to go to his house as a trouble occurred in his house. On hearing the information he came back to his house and found dead body of his wife lying on the "verandah" and her mouth covered by a saree and after removing saree from her mouth he found a mark of strangulation around her throat. He asked his son Nityananda, P.W.-2 as to how

his wife died and his son told him that he himself and others were sleeping inside the room and at night about 02:00 hours Bhagirath Sarkar came there through the door of the room as the door was in broken condition and he called his wife. After hearing his voice his son woke up and recognized Bhagirath. It was then moonlit night. P.W.-2 narrated that Bhagirath held out threat to him by showing knife and his mother went out of room under fear, then he went to sleep but in the morning he saw the dead body of his mother lying on the "verandah" with blood mark on her face.

21. Nityananda Mondal, PW-2 the son of de-facto complainant is a star witness and an eye witness to the occurrence to the extent that on 16.02.1997 in the night at about 8 p.m. he himself, mother, sister and brother went to sleep after taking dinner and at about 02:00 hours on 17.02.1997 Bhagirath Sarkar came to the house and called his mother by knocking at the door. His mother refused to come out responding to the call of Bhagirath. Then Bhagirath entered into the room where they were sleeping. On hearing the voice of Bhagirath he woke up from sleep when Bhagirath showed a sharp knife pointing to him and threatened him not to shout otherwise he would kill him. Thereafter, Bhagirath came out from the said room alongwith his mother. So he went to sleep and in the following day morning he found his mother lying on "verandah" with blood coming out from her mouth and a black mark of strangulation around the throat. He cried and shouted then the para people came to his house. After his father returned home, he narrated the incident to him. P.W.-2 has proved the photo snaps of his mother marked as Material exhibit -I and exhibit-I/1. He stood the test of cross-examination and his ocular testimony was not shaken by the defense because we hardly find any contradictory statement impeaching his oral testimony. This witness also made a statement under Section 164 of the Cr.P.C before the judicial Magistrate, Basirhat and the statement has been proved as exhibit 4/3 by Golam Nabi, PW-7 Judicial Magistrate, 1st Additional Court, Basirhat who was then posted on 24.02.1997.

22. We find at the foot of the said statement of PW-2 that a certificate was given by the Judicial Magistrate explaining to the witness the contents written in the verbatim of the witness which was made voluntarily by him and the statement so explained and admitted by PW-2 to be correct. Thus, the statement under Section 164 finds corroboration by its maker Nintyananda Mondal PW-2 as required under Section 157 of Evidence Act.

23. We do not find force in such argument advanced by learned counsel for the appellant bearing in mind the ocular testimony of P.W.-2 who has identified the accused appellant by his voice as the person who held out threat with dire consequences showing a knife warning him not to shout.

24. It is also submitted that the evidence of the Investigating Officer is not creditworthy and all other witnesses cited by the I.O. in the charge-sheet are either interested or related witnesses and challenged the investigation in regard to inquest over the dead body of the deceased.

25. It would appear from the inquest report exhibit-2(3) that it was held by S.I. Tamal Das, I.O. P.W.-15 on 17.02.1997 at 02:45 hours in connection with Swarupnagar Police UD Case No.6/96 dated 17.02.1997 and Swarupnagar Police Case No.14 dated 17.02.1997 under Section 302 IPC. Therefore, it is clear that the inquest was held after specific police case was registered by the I.O. who visited the spot and held inquest under the provision of Section 174 Cr.P.C. It was prima facie revealed during inquest that Bhagirath Sarkar use to visit the house of female deceased Saraswati Mondal in absence of her husband and used to disturb Saraswati Mondal on her way and also held out threat. However, to ascertain the actual cause of death and to ascertain if she had been raped prior to her death, the dead body was sent for autopsy to Sub-divisional Hospital, Basirhat under dead body challan carried by C/2642 Brindaban Mondal. This constable is a witness to the inquest report though not examined but in our view that would not be fatal to the prosecution case as it would be seen from the postmortem report exhibit-5 proved by the autopsy surgeon Dr. Chandrasekhar Roy, PW-12 that said constable had carried the dead body of Saraswati Mondal wife of the de-facto complainant Ranjan Kumar Mondal to Basirhat S.D. Hospital on 17.02.1997 which was dispatched at 15:45 hours and the postmortem was performed on 18.02.1997 between 4 p.m. and 5 p.m. and according to the doctor the death of the deceased was due to hemorrhagic shock, trauma, ante-mortem and homicidal in nature. The doctor found fracture of right shoulder joint, fracture of ribs 2nd & 3rd right side, ecchymosis on the right side of the neck, right and left lung pale, heart pale and empty, liver, spleen and kidney pale.

26. According to Smt. Fulmala Bachhar, PW-3 when woke up from her sleep during dawn her husband told her to call Mana then she had been to tube-well to take water where she heard hue and cry of the sons and daughters of Ranjan from the direction of the house. On hearing hue and cry she herself, along with her husband and others rushed to the house of Ranjan where she found the children of Ranjan crying and Saraswati lying on "verandah" with blood coming out from her mouth. On seeing her condition she lost her sense at the spot. This witness testified the fact of seeing the dead body of Saraswati lying on the verandah. Her husband Biswanath Bachhar, PW-4 stated that he had been to the house of Mana to call him to go out for selling fish and at that time he found the body of Saraswati lying on verandah. Then he told his wife, why Saraswati was lying in such a condition during winter then he went inside the latrine for nature call. On hearing the voice of children of Ranjan he came out from the room after coming from the latrine but he has no personal knowledge about the GD having been lodged with the police station and even not having seen the dead body of Saraswati. Therefore, evidence of PW-4, is of no help to the prosecution case.

27. Debasis Dey, PW-5 had taken the photo snaps of the deceased which were marked as Mat exhibits-I & I/1. He is a photographer and owns a studio in the name and style of "Aparna Studio".

28. Tushar Kanti Sarkar, PW-8 had seen the dead body of wife Ranjan lying in the

verandah with the blood oozing from her mouth but he did not know the cause of death. Whereas Smt. Arati Soren, PW-10 was declared hostile by the prosecution.

29. Ananda Mohan Sarkar, PW-11 did not know the cause of death of Saraswati but he knew that there was illicit relation between Bhagirath and Saraswati. He deposed that two years before her death he had protested against Bhagirath for his coming to the house of Ranjan. He also stated that accused attempted to commit rape on her and over that incident police case was registered but the matter was earlier settled on compromise at the intervention of the police. Subrata Chatterjee, PW-13 S.I. of police posted at Swarupnagar Police Station on 17.06.1997 has simply submitted the charge sheet under Section 302 of IPC.

30. Pabitra Mukherjee, PW-14 ASI of the said police station had accompanied S.I. Tamal Das, SI Partha Sikdar and Constable Brindabon Mondal to Balti, Paschimpara, P.S. Swarupnagar at 2:45 p.m. in connection with the said case and pointed out that S.I. Tamal Das held inquest over the dead body of Saraswati Mondal in his presence. This fact is also corroborated by I.O. that he started UD case as well as specific police case and reached at P.O. at 2:45 p.m. and held inquest over the dead body and prepared inquest report exhibit-2/3 and sent the dead body to the hospital for postmortem examination along with the original inquest report. He prepared the sketch map index of the P.O as exhibit-7 and recorded the statement of available witnesses. The dead body was sent to Basirhat hospital for postmortem examination through Constable Brindabon Mondal, C/2642 by C.C exhibit-8 and also proved the road challan exhibit-9. I.O. seized the wearing apparels of the deceased as produced by Constable Brindabon Mondal and ASI, Asutosh Chakroborty under a seizure list exhibit-10. I.O. was confronted with the fact that whether he had seized any chadar, muffler or tupi by the side of the dead body as narrated by Nityananda while he made such statement to the Magistrate. The I.O. pointed out that in his statement there is no such mention but he has admitted that it would appear from the formal FIR exhibit-6 that the learned S.D.J.M signed on the formal FIR on 24.02.1997. He was aware of provision under Section 157 of Cr.P.C regarding sending of FIR within 24 hours to the nearest Magistrate. Admittedly, no magisterial enquiry was held under Section 164 Cr.P.C for holding inquest of the dead body. While holding inquest on the dead body he did not find any scratches, abrasion, bruises on different parts of the body of deceased specially on the back, buttocks as well as upper and lower extremities as a result of struggle and resistance. I.O. was suggested during cross-examination that surathal was held at police station by obtaining signatures of the witnesses on the blank paper, which suggestion has been denied by the I.O. He admitted having not examined Chitta Sarkar and Kajal daughter of elder brother of the complainant who allegedly had given information about the death of his wife at Maslandapur station.

31. We have critically examined the evidence of the prosecution witnesses. Though there may be minor defect in the investigation on the part of the Investigating Officer but such defect as suggested by defence does not take

away the prosecution case.

32. Learned counsel appearing for the State respondent has referred to decision in case of Surajit Sarkar vs. State of West Bengal in AIR 2013 (2) SCC 146 wherein in paragraph 53 it has been observed thus: "53. In Visveswaran all that this Court observed was that: "In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need necessarily lead to rejection of the case of prosecution when it is otherwise proved." Similarly, in Muniappan this Court held: "The law on this issue is well settled that the defect in the investigation itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omission lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would" eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to what such lapses affected the object of finding out the truth." Finally in Sheo Shankar Singh it was held as follows: "Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case."

33. Therefore having regard to the principle laid therein and considering the totality of the evidence we are unable to accept the submission that there is serious defect of the omission on the part of the Investigating Officer.

34. Lastly, it is submitted by the learned counsel for the appellant that the present case rests upon circumstantial evidence but the prosecution has failed to complete the chain of circumstances and the findings of the Learned Trial Judge are based upon conjectures and surmises which cannot take place of legal proof in view of settled proposition of law because none has seen the accused appellant having committed the crime of murder of Saraswati Mondal, the deceased.

35. Per contra, learned counsel appearing for the State respondent relied on a decision in Bodh Raj @ Bodha and Ors. Vs. State of Jammu and Kashmir reported in AIR 2002 SC 3164 and submitted that time gap between the accused and deceased seen last alive and the deceased found dead if small gap, the last seen theory comes into play. It has been observed that it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.

36. Now, we are required to appraise the evidence as adduced by the

prosecution witnesses to consider the applicability of the last seen theory and to see the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small or that possibility of any person other than the accused being the author of crime becomes impossible.

37. In this case we find a positive evidence from the ocular testimony of PW-2 the son of the deceased Saraswati who has narrated having seen the accused coming to their house, knocking the door, calling his mother in the dead hours of night and due to knock on the door he woke up and could recognize the accused from his voice, and the accused having held out threat with dire consequence warning him not to shout, his mother going out from the house with the accused out of fear and finding his mother lying dead on the verandah of the house with bleeding injury on her mouth just on the next day morning at dawn.

38. Thus evidence of PW-2 stood the test of cross-examination and his testimony goes uncontroverted and is trustworthy in so far the theory of last seen together of accused with the deceased applies and comes to play in the instant case.

39. The case was instantly registered with the police station giving rise to investigation which resulted in the submission of charge-sheet is also a pointer to the fact that there was a narrow gap between time when the deceased was seen together with the accused alive and the time when the deceased was found lying with injuries on the verandah by her own son just on the next day morning at dawn.

40. It would be pertinent to take note of the findings of guilt of the accused appellant recorded by the trial court who has clearly made observation as under: "Although defence tried to make out a story that accused did not enter in the room of the deceased (Saraswati) and called her to come out from the room and further tried to make out a story that PW-1 the husband committed murder to Saraswati as Saraswati had illicit relation with the accused.

P.W.-2 the son of Saraswati saw her mother to come out from the room with the accused when Saraswati were sleeping with her son and daughter in her room and go outside the room with the accused. So Saraswati was last seen together with the accused and the prosecution seriously established that the accused entered into the room of Saraswati and forced her come out from the room with him on the day of incident and the accused did not give any explanation about the cause of death of Saraswati. He always kept himself mum at the time of examination under section 313 of Cr.P.C The accused also did not give any explanation in his defence about this. In another recent judgment reported in (2014) C Cr LR (SC) 126 the Hon'ble Judges of Apex Court was also held "THE ACCUSED HAS A DUTY TO FURNISH AN EXPLANATION IN HIS STATEMENT UNDER SECTION 313, Cr.P.C REGARDING ANY INCRIMINATING MATERIAL THAT HAS BEEN PRODUCED AGAINST HIM. IF THE ACCUSED HAS BEEN GIVEN THE FREEDOM TO REMAIN SILENT DURING THE INVESTIGATION AS WELL AS

BEFORE THE COURT, THEN THE ACCUSED MAY CHOOSE TO MAINTAIN SILENCE OR EVEN REMAIN IN COMPLETE DENIAL WHEN HIS STATEMENT UNDER SECTION 313, Cr.P.C IS BEING RECORDED. HOWEVER, IN SUCH AN EVENT, THE COURT WOULD BE ENTITLED TO DRAW AN INFERENCE, INCLUDING SUCH ADVERSE INFERENCE AGAINST THE ACCUSED AS MAY BE PERMISSIBLE IN ACCORDANCE WITH LAW"

Here in this particular case the victim (Saraswati) and accused Bhagirath Sarkar were found to come out from the room of Saraswati in the verandah and dead body of Saraswati was found in verandah by PW-2. The accused Bhagirath Sarkar did not offer any explanation when and how he parted the company of the victim. As such the accused Bhagirath Sarkar failed to discharge his burden cast upon him by Section 106 Evidence Act."

41. Thus, learned court was absolutely right in arriving at a decision that there was close proximity of time between the accused and the appellant being seen together at 2 a.m. on 17.02.1997 and the recovery of the dead body in the morning at 5 a.m. on 17.02.1997. It was necessary for the accused to have offered reasonable explanation as to what had happened to the deceased Saraswati with whom he had come out from the room in the previous night.

42. Bearing in mind the principle laid down in decision reported in 2002 (2) SCC (Cri) Page 413 that so far as the circumstance proved by the prosecution is concerned in the absence of any reasonable explanation on the part of the accused, there is only conclusion to be arrived at is that it was the accused alone who had abducted the deceased Saraswati and had killed her in absence of her husband.

43. Giving an anxious consideration to the facts and circumstances of the case discussed in the forgoing paragraphs and having gone through the judgment impugned we do not find any ground in this appeal to interfere into the impugned judgment. In the result, the appeal is dismissed.

44. Let a copy of this judgment along with the lower court records be sent down to the learned Court below for information and doing the needful.

45. Urgent certified photocopy of this Judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.