

(1986) 12 CAL CK 0025
In the Calcutta High Court
Case No : Criminal A. No. 47 of 1984

Dulal Nayek

APPELLANT

Vs

State of W.B.

RESPONDENT

Date of Decision : 19-12-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 342
Evidence Act, 1872 — Section 105
Penal Code, 1860 (IPC) — Section 302, 304, 84

Citation : (1987) CALLT 29

Hon'ble Judges : S.S. Ganguly, J; J.N. Chaudhury, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.S. Ganguly, J.—This is an appeal from the judgment and order of conviction passed by Shri D. Banerjee, Sessions judge, Midnapore u/s 302 I.P.C. in Sessions Trial case No. XVI of April, 1983 sentencing the accused--appellant Dulal Nayek of Village Phulpahari under Police Station--Kotwali to imprisonment for life.

2. On allegation that he had killed his wife, Bari Nayek by hitting her violently on her head twice with the wooden leg of a cot, the appellant stood his trial before the learned Sessions Judge who finding the prosecution case established against him beyond any reasonable doubt and disbelieving his plea of insanity has convicted and sentenced him in the manner stated above. Hence, this appeal.

3. It is urged from the side of the appellant that the prosecution case is false that the witnesses are not reliable and that the learned Judge has convicted the appellant wrongly by relying upon the same. It is also urged that the learned Judge made a mistake by refusing to accept the appellant's plea of insanity.

4. The points which arise for decision in this appeal are (1) if the evidence on record justify the appellant's conviction and (2) if any plea of insanity was established before the learned Sessions Judge.

5. It is not disputed that Bari, the wife of the appellant died a violent death at about 8.00 A.M. on 13/10/81. Information of her death reached the Police Station at 12.30 P.M. (P.W.10) and S.I, Sarbagna the I.O. (P.W.11) who reached the house of Dulal at Phulpahari that very day at about 2.00 P.M. (P.N.4) found the dead body of Bari lying there with two wounds on her head. Post-mortem held on the very following day also revealed two wounds with fractures of both the parietal bones and serious intracranial injuries which according to Dr. B. C. Roy of Sadar Hospital, Midnapore who held the post-mortem examination (P.W.6) were sufficient to cause death and did actually cause death in this case. The injuries, so opined the doctor, were ante mortem and might be caused by hard and blunt substance such as the leg of a cot. It is pretty clear that somebody had caused the death of Bari by hitting her twice on her head with some hard and blunt substance.

6. The learned Sessions Judge as stated above has held that it is the present appellant who had caused the death of his wife by hitting her on her head twice with the wooden leg of a cot. Now, it appears that in coming to his decision in this regard the learned Judge has relied to a great extent on the evidence of two eye-witnesses of the incident--one of whom, i.e., Lakshmi Nayak (P.W.2) is the mother of the appellant himself and the other, i.e., Chhabi Mitra (P.W.3) is none other than a sister of hers apart from being a very close neighbour. Lakshmi (P.W.2) said in her evidence before the learned Judge that it was her. Our son the present appellant who had hit his wife twice on her head with the leg of a cot. She saw him delivering both the blows. Chabbi (P.W.3) on the other hand said in her evidence that hearing the cries of Lakshmi (P.W.2) she had come out of the doors of her house when she saw the present appellant hitting his wife on her head with the leg of a cot. The learned Judge has placed his full reliance upon the evidence of these two witnesses and we cannot blame him either. Ordinarily the near and dear ones of an accused do not come to depose even if they are eye-witnesses and when they do they almost invariably depose in his favour. Here is a case rarest of the rare where a mother and her sister came to depose against their own son and nephew charging him with the most heinous crime imaginable--battering to death a defenseless and an unsuspecting woman without any apparent provocation whatsoever. That is very good reason why the evidence of these two witnesses should have been accepted, for, it is quite clear that poor and unlettered rustic women as they were, they felt that the truth should be told and the guilty punished according to law even though the guilty in this case was none other than their own son or nephew. In this connection it must be added that the defence did not even suggest that the two witnesses had any particular reason for deposing falsely against the present appellant. They being witnesses of truth, therefore, the learned Judge certainly made no mistake by relying on them.

7. It appears further that in coming to his conclusion in this regard the learned Judge has also taken into his consideration the other materials on record which are corroborative in nature. Thus there is the evidence of Binode Nayek, (P.W. 5)

the eldest brother of the appellant himself who hastened to the spot hearing the hue and cry raised by his mother (P.W. 2) almost immediately after the incident. He says that at that very time Chhabi (P.W. 3) told him that the present appellant had battered his wife to death. The witness also says that he detained the appellant who seeing him tried to run away. Another brother, Sushil Nayek (P.W. 4) who came back home at about 11.00 A.M. got the same version from his mother Lakshmi (P.W. 2) and he also says that the appellant was trying to run away and was detained by them. This witness (P.W. 4) together with Asoke Das (P.W. 1) who drew up and sent the F.I.R. (ext. 1) to the police station, corroborating S.I. Sarbagna (P.W. 11) also said that in pursuance of a statement made by the appellant and at his pointing out the leg of a cot (ext. 1) was recovered from a bush. This leg of a cot which on chemical examination was found to contain blood stain (ext. 5(2)) was identified by Lakshmi (P.W. 2) as the weapon of offence in this case.

8. The naming of the appellant by the two witnesses as the culprit shortly after the incident, his attempts to run away, recovery of the blood stained leg of the cot identified by one of the eyewitnesses as the weapon of offence from a bush at the instance of the appellant and the results of the post-mortem examination fully corroborate the version of the eye-witnesses. The learned Sessions Judge certainly made no mistake by taking into his consideration, these materials in assessing the evidence of the eyewitnesses and arriving at his conclusions :

The learned Advocate for the appellant urges that Chhabi (P.W. 3) could not have seen the appellant hitting the deceased as by the time she arrived at the spot being attracted by the cries of Lakshmi (P.W. 2) the second blow also must have been delivered. We, do not agree. It appears from Chhabi's evidence that her house is situated only 5/8 cubits away from the house of the appellant and further that whereas her house faces east, that at the appellant faces west. It was perfectly possible, therefore, on her part to come out of her house hearing the cries of Lakshmi (P.W. 2) as the first blow was delivered, to witness the second blow being delivered. This argument, therefore, fails.

It is also urged by the learned Advocate for the appellant that the leg of the cot. (ext. 1) should not have been admitted into evidence in this case without, the statement of the appellant in pursuance of which it was alleged to have been recovered from the bush. We do not find any great merit in this argument also since the statement would have been barred under the provision of Section 26 of the Evidence Act.

The learned Advocate for the appellant points out next that the leg of the cot (ext. 1) was not shown to Dr. Roy (P.W. 6) and that Dr. Roy opines that the injuries on the head of Bari were "sufficient to cause death" and not "sufficient in the ordinary course of nature to cause death". He argues that the combined effect of these omissions robs the opinion of the doctor of all its value and that it should be taken as if the doctor did not give any opinion at all. Citing in this connection *Jiwa Ram Vs. The State*, , and *M. Apparao v. Orissa*, 1983, CrI.L.J.

953 the learned Advocate argues that at worst the appellant could be convicted u/s 304, Part-II of the Indian Penal Code and never u/s 302 of the said Code.

We do not find any great merit in this argument also. It appears from the evidence of S.I. Sarbanga (P.W. 11) that the leg of the cot and a few other seized articles had not come back from the Forensic Science Laboratory Calcutta, on the day the doctor was examined. But we fail to see how does that help the appellant. All that the doctor said was that the injuries on the head which had caused in this case might be caused by hard and blunt substance. Being questioned further he said that both the injuries might be caused by the leg of a cot, which is to be read and appreciated as illustrative and consequential to his earlier answer that they might be caused by hard and blunt substance. In the circumstances stated it becomes immaterial that the actual weapon of offence was not shown to the doctor since it answered the description of "hard and blunt substance".

As for the two decision cited, neither has any application to the facts and circumstances of this case. In the first (Jiwa Ram Vs. The State,) the doctor opined that death was due to certain injuries found on the body of the deceased. There was no clear cut opinion that the said injuries were sufficient in the ordinary course of nature to cause death. In the second decision (M. Apparao and Another Vs. State of Orissa,) also the doctor opined that death was due to shock and hemorrhage resulting from the injuries to the vital organs like brain and lungs ; but he did not say that the injuries collectively or individually were sufficient in the ordinary course of nature to cause death. It is under such circumstance that in the second decision the conviction u/s 302 I.P.C. was altered to conviction u/s 304. Part II of the I.P.C. and in the first the conviction u/s 304, Part-II was altered to conviction, u/s 323 of the Penal Code. That is not the case here ; in this case the doctor has clearly and unequivocally opined that the injuries in question were sufficient to cause death. True the words "in the ordinary course of nature" are not there. But that makes hardly any difference since "sufficient to cause death" and "sufficient in the ordinary course of nature to cause death" mean practically one and the same thing, it being impossible to conceive of a situation where "sufficient to cause death". We do not see any reasons, therefore, to alter the conviction in this case to one u/s 304 Part II of the Penal Code as suggested by the learned Advocate for the appellant.

The learned Advocate also points out that the opinion of the doctor was not put to the appellant during the examination u/s 313 Cr.P.C. and he argues that this has vitiated the entire proceeding.

We do not find any great merit in this argument also. Section 313 does not require that each and every piece of evidence should be put to the accused. As observed in Bakhshish Singh Dhaliwal Vs. The State of Punjab, questions are put to an accused u/s 342(now 313) Cr.P.C. to enable him to explain "any circumstances appearing in the evidence against him" which is not quite the same as each and every piece of evidence against him. The doctor's evidence

establishes the truth of the prosecution version that it is the injuries caused by the appellant to his wife which caused her death. The circumstance arising out of this evidence was put to the appellant by question No. 4 which drew the attention of the appellant to the fact that the evidence on record showed that Bari had died as a result of the injuries caused to her by the appellant himself. There was, therefore, sufficient compliance with Section 313 Cr.P.C. in this case.

Besides, even if the medical evidence had been put to the appellant how would he have explained it ? This quest on was specifically put to the learned Advocate for the appellant and he could not make any satisfactory answer to it. Following Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, it must be held, therefore, that no prejudice was caused to the appellant even though, the medical evidence was not specifically brought to his notice during his examination u/s 313 Cr.P.C.

It is also urged by the learned Advocate that had the appellant intended to kill his wife he would have chosen a tangi or some such dangerous weapon to assault her. The fact that he chose a leg of a cot--which will not be chosen as a weapon of offence by any potential killer for killing his victim--shows, so argues the learned Advocate, that killing his wife was far from the mind of the appellant and further that it shows that his intention was merely to beat her up.

We do not find any great merit in this argument too. Intention to kill is not the only intention that makes a culpable homicide a murder. Intention to cause injury- or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be presumed from the act or acts resulting in the injury or injuries. In the present case injuries caused by the appellant were sufficient to cause death and his intention to cause them is to be presumed and the choice of the weapon of offence, therefore becomes immaterial and the choice of the leg of a cot cannot be interpreted to mean that the intention of the appellant was to commit a lesser offence.

We hold agreeing with the learned Sessions Judge, therefore, that the evidence of the eye-witnesses as corroborated by the circumstances arising out of the other materials on record clearly establish, that it is the present appellant who had battered his wife to death by hitting her on her head with the leg of a cot. The injuries -- intentionally caused -- were sufficient in the ordinary course of nature to cause death. The case is therefore fully covered by third clause of Section 300 of the Penal Code.

It is urged lastly that the learned Session Judge should not have rejected the appellant's plea of insanity.

It appears that it was suggested to Lakshmi (P.W.2) during her cross-examination that the appellant used to develop insanity occasionally. She did not accept the suggestion. She admitted saying in her statement u/s 164 Cr.P.C., however, that the appellant had been behaving like a mad man since 15/16 days

before the incident. In his statement u/s 313 Cr.P.C. the appellant took up the plea again and said that at the time of the incident he had been in an unbalanced state of mind and that he did not even know if he had assaulted his wife.

The learned Sessions Judge has taken into consideration all the above materials. He pointed out that Lakshmi's admission as to what she said in her statement u/s 164 Cr.P.C. could not be treated as substantive evidence. Observing further that no witness nor any medical officer was examined nor any documentary evidence produced to substantiate the plea of insanity he concluded that the materials on record failed to show that the appellant was of unsound mind at the time of committing the act. He noticed further that the conduct of the appellant and the other surrounding circumstances also showed that, he was aware of the nature of the act on that what he was doing was either wrong, or contrary to law.

We find it very difficult to disagree with the conclusion arrived at, by the learned Judge. Every person is presumed to be sane till the contrary is established. u/s 105 of the Evidence Act read with Section 84, of the Penal Code the burden is on the accused to prove that he committed the act in a moment of insanity and further that his insanity was of such a kind as to make him incapable of knowing the nature of the act or that, he was doing what was either wrong or contrary to law. The accused may discharge the burden by establishing a mere preponderance of probability by producing all the relevant evidence -- oral, documentary or circumstantial before the court. The accused is also entitled to an acquittal if the material on record raise a reasonable doubt as regards the existence of one or more ingredients of the offence including mens rea of the accused ; *Dahya Bhai v. Gujarat* AIR. 1964 S.C. 1958 ; *Partap Vs. The State of Uttar Pradesh*, . In the case at hand the accused, i.e., the present appellant did not produce any evidence whatsoever in support of his plea of insanity -- The materials on record also do not raise any doubt as regards any of the ingredients of the offence. The statement of Lakshmi (P.W.2) u/s 364 Cr.P.C. cannot be treated as substantive evidence for reasons given by the learned Sessions Judge. Insanity also cannot be presumed from only the cruel manner in which the offence was committed.. Absence of an apparent motive is certainly a factor to be considered; In *Re: Vodde Subbigadu*, ; *Ujagar v. State*. AIR 1954 Pcp 4. But it cannot also raise a presumption all by itself since it may not be possible to find out the motive in every case. It is also settled law that the prosecution does not have to establish the motive in a case -- even in a case based entirely on circumstantial evidence -- where the prosecution case is satisfactorily proved by the evidence on record ; *State of Madhya Pradesh Vs. Digvijay Singh*, . In the case at hand, however, there is evidence coming from Lakshmi (P.W.2) that when the appellant used to come back home from work he would start rebuking his wife. There is also evidence coming both from Lakshmi as well as Chhabi (P.W. 2 and 3) that there was a quarrel between the appellant and his wife in the night preceding the day of the incident. There is no reason why this evidence should be disbelieved. The daily quarrel and especially the last one may have provided the course of the sudden violent behaviour. It must be concluded, therefore, that

there is no evidence, no any material on record in support of the appellants plea of insanity and further that the circumstances are not also strong enough to raise such a presumption.

On the other hand there is very good evidence to show that the appellant tried to run away after committing the crime and that he had to be detained by his brothers and a other villagers. This evidence is coming from Sushil and Binode Nayek (P.W. 4 and 5) two brothers of the appellant himself and Tarapada Nayek (P.W. 7) a close neighbour. The appellant has nothing to say against any of these three witnesses. It may be safely held, therefore, that the appellant knew the nature of the act that he had done and further that he also knew that he did what was both wrong and contrary to law. Even granting, therefore, that the appellant was suffering from unsoundness of mind it cannot be said that he was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

The learned Sessions Judge was, therefore, perfectly justified in rejecting the appellant's plea of insanity since it cannot be said that his case was covered by Section 84 of the Penal Code.

The prosecution discharged its burden by establishing that the crime in this case was committed by the appellant. The appellant failed to discharge the burden which lay upon him to show that his case was covered by Section 84 of the Evidence Act. In the circumstances stated the learned Sessions Judge has done quite the right thing by finding the appellant guilty and sentencing him to imprisonment for life u/s 302 of the I.P.C. The present appeal must, therefore, fail.

In the circumstances stated the appeal is hereby dismissed. The judgment and order of conviction and sentence passed by the learned Sessions Judge in Sessions Trial Case No. XVI of April, 1983 are hereby confirmed. The appellant do serve out the sentence passed on him by the learned Sessions Judge and he be informed accordingly.

J.N. Chaudhury, J.

9. I agree.