

(2014) 05 CAL CK 0039
In the Calcutta High Court
Case No : C.R.A. 682 of 2009

Gulai Sk. and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2014) 5 CHN 288

Hon'ble Judges : Tapash Mookherjee, J; Nishita Mhatre, J

Bench : Division Bench

Advocate : Prabir Chatterjee and Mr. Anindya Sunder Chatterjee, Advocate for the Appellant; Saswata Gopal Mukherjee and Mr. Rudradipta Nandy, Advocate for the Respondent

Final Decision : Allowed

Judgement

Tapash Mookherjee, J.—The present appeal is directed against the judgment and order dated 30.01.2009 and 02.02.2009 passed by the learned Additional Sessions Judge, Fast Tract 2nd Court, Kandi, Murshidabad, in Sessions Trial No. 4 of September, 2007, convicting the Appellants of the charges u/s 364/302/201/34 I.P.C. and sentencing the Appellants to suffer R.I. for life and to pay fine of Rs. 10,000.00 (rupees ten thousand only) each, I.D. to suffer S.I. for 6 months more for the offences u/s 302/34 I.P.C. No separate sentence has been passed for the other charges.

2. The facts leading to the original case and subsequently the present appeal, as well, in short, are as follows:-

3. On 05.01.2007 one Ispat Sk. submitted a written complaint before the Bharatpur P.S. in the District Murshidabad and alleged thereby that on 03.01.2007 the present Appellants came to their house, called his father Mantu Sk. out of their house with a view to enjoy liquor together in the bank of the river Quea nearby, and thereafter his father never returned to their house. The

aforesaid defacto complainant and some of his family members searched in the locality for the defacto complainant's father and during such search the Appellants failed to offer any satisfactory explanation for the sudden disappearance of the defacto complainant's father. Subsequently in the morning of 05.01.2007 some wearing apparels and other articles, as well, belonging to the defacto complainant's father was found lying in the bank of the river Quea flowing by the side of their village. It was, therefore, suspected that the Appellants who had taken away Mintu Sk. with them out of the house of Mintu Sk. had committed the murder of Mintu Sk. and tried to cause disappearance of the evidence of murder. Thus, Bharatpur P.S. Case No. 3 of 2007 dated 05.01.2007 u/s 364/34 I.P.C. had been started against the Appellants on the basis of the aforesaid complaint by Ispat Sk. Subsequently the dead body of Mintu Sk. had been recovered from the bank of the river Quea and thereafter Section 302/201 I.P.C. had been added in the case and after completion of investigation charge sheet u/s 364/302/201/34 I.P.C. had been submitted against all the three Appellants namely Gulai Sk. Swapan Das and Bidhan Das.

4. After submission of charge sheet and commitment the case had been transferred to the Court of learned Additional Sessions Judge, Fast Track 2nd Court at Kandi for trial.

5. Considering the materials collected during investigation charges u/s 364/302/201/34 I.P.C. had been framed against all the Appellants. The Appellants denied the charges and claimed trial. Plea of innocence was the only defence case.

6. Prosecution examined 18 witnesses and got some documents and materials admitted in evidence, to prove their allegations against the Appellants.

7. Considering the evidence on record learned Trial Court found all the Appellants guilty of the offences punishable u/s 364/302/201/34 I.P.C. and passed one sentence only for the offence u/s 302/34 I.P.C. Being aggrieved by such judgment and order of conviction and sentence the accused/convicted persons in the Court below filed the present appeal.

8. Learned Advocate for the Appellants argued that the prosecution tried to prove the alleged guilt of the Appellants by circumstantial evidence only, but no such circumstances have been proved beyond all doubts to show the guilt of any of the Appellants and hence learned Court below committed gross error in law by finding the Appellants guilty of the charges framed in the case. On the contrary, learned Advocate for the State/Respondent submitted that the victim was last seen in the company of the Appellants and thereafter the dead body of the victim with marks of the injuries was recovered from the bank of a river in the village and the Appellants failed to offer any explanation, whatsoever, as to what happened after the victim left his house at the call of the Appellants. So, the learned Trial Court had rightly found the Appellants guilty of the offence of the murder of the defacto complainant's father.

9. Admittedly there is no direct evidence of murder and the prosecution's case rests upon circumstantial evidence only. One such circumstantial evidence was the "last seen together" theory and the other circumstance is the alleged discovery of the dead body of the victim on the basis of the statement of the Appellants.

10. The evidence on the point of discovery of the dead body of the victim produced by the prosecution is full of inconsistencies and contradictions.

11. P.W.-18, i.e., the I.O. of the case was the most important witness regarding the alleged discovery of the dead body of the victim. During his examination in chief he stated that after arrest of the Appellants he recorded the statements of the Appellants and went to the bank of the local Quea river and recovered the dead body from a place as shown by the Appellants, but surprisingly during cross examination P.W.-18 stated that the dead body was found floating on posterior condition. The fact being so, there cannot be the "discovery" of the dead body on the basis of the statement of the Appellants. So, Section 27 of the evidence Act has no application in the present case. In fact, learned Trial Court has also held that it is not proved that the dead body of the victim was recovered by the Police on the basis of information provided by the Appellants.

12. As argued by the learned Advocate for the Respondent/State of West Bengal, the prosecution depends mainly on the circumstances that the victim was last seen in the association of the Appellants prior to the death and the defence failed to discharge their onus to explain as to what happened after the victim was found in the company of the Appellants.

13. The defacto complainant Ispat Sk. (P.W.-1) stated that the deceased Mintu Sk. alias Abul Khair was his father and on 03.01.2007 at about 5.30 p.m. his father went out of their house on call by the Appellants and that his father did not return alive thereafter.

14. Sufiar Rahaman (P.W.-6) was a brother of the deceased Mintu Sk. and he stated that he found his brother Mintu Sk. going with the Appellants on the relevant date after which the dead body of his brother was recovered. The victim's wife, i.e., Habibunnesha Bibi (P.W.-7) stated that on the relevant date at about 5/5.30 p.m. the Appellants came to their house to meet her husband and thereafter her husband went away with the Appellants and at the time of the dinner when her husband did not return home she asked her son to search for her husband and subsequently the dead body of her husband was recovered.

15. Samsul Alam (P.W.-8) was a neighbour of the deceased. He stated that the victim was found proceeding towards the bank of the nearby river Quea in the company of the Appellants and subsequently the wearing apparels and the dead body of the deceased were found in the bank of the river Quea.

16. Some minor contradictions are there between the statements of the witnesses on the aforesaid subject. But the contradictions pointed out by the

learned Advocate for the Appellants were so minor that they should be ignored.

17. Khudu Khan (P.W.-9) in his evidence-in-chief stated that one evening he found the deceased proceeding towards Uttarpara in the company of the Appellants. The fact was not challenged by the defence during his cross examination. Similarly, one Akai Khan (P.W.-10) in his examination in chief stated that the deceased Mintu Sk. was his co-villagers and one day when he was working in the field he found the deceased Mintu Sk. going somewhere with the Appellants. Defence declined to cross examine him also. So, from the evidence on record discussed above it is found that it has been firmly established in the case that the deceased was found alive for the last time in the company of the Appellants.

18. Learned Advocate for the Appellants emphatically argued that to rely upon the "last seen together" theory, there should have a close proximity of time when the deceased is found with the accused for the last time and when the dead body of the victim is recovered. But in the present case there is no such proximity of time. Learned Advocate for the Appellants cited the decisions reported in (2005) 3 SCC 114 State of Uttar Pradesh V. Satish and the decision reported in Mohd. Azad @ Samin Vs. State of West Bengal, . In both those cases it has been clearly held that the last seen theory is attracted only when the time gap between when the deceased is "last seen" with the accused and the recovery of the dead body, is so short that the possibility of any third party's interference can be conclusively eliminated.

19. In the present case, the time of death of the victim was very important, but it has not been proved by the prosecution by any medical evidence or otherwise. According to the version of the witnesses the deceased was seen with the Appellants for the last time in the evening of 03.01.2007 and the dead body of the deceased was recovered on 05.01.2007 in the evening. So, there was a long time gap between the point of time when the deceased was found with the Appellants and subsequent recovery of the dead body. In the circumstances interference of a third party between the time gap cannot be ruled out. So, in view of the decisions cited by the learned Advocate for the Appellants and mentioned above the theory of "last seen together" cannot be blindly applied in the present case as has been done by the learned Trial Court.

20. Motive is irrelevant in a case where the case is proved by direct and ocular evidence. But proof of motive is very important where a case is sought to be proved by circumstantial evidence. The decision reported in Sakharam Vs. State of Madhya Pradesh, cited by the learned Advocate for the Appellants is relied on the point.

21. In the present case, there is no evidence whatsoever on the question of motive of the Appellants behind the alleged murder. The I.O. of the case (P.W.-18) clearly expressed that he made no attempt to ascertain motive, if any, behind the murder. The finding of the learned Trial Court in the judgment on the

point is that there may be "motiveless crimes" and the question of motive is of little importance when there is reliable evidence to prove the offence. Such a view does not find support in law. As pointed out earlier, proof of motive is very important in a case based on circumstantial evidence like the present one. But the point has been totally ignored during the investigation and a wrong interpretation of law on the point has been recorded by the learned Trial Court.

22. In a case of murder cause of the death has to be conclusively proved. In the present case, the autopsy surgeon in the P.M. Report opined that the death of the victim was due to drowning and there is a possibility of the drowning being Homicidal. His opinion on the point of such possibility was some nailmarks and small abrasions found on the dead body. Fracture of hyoid bone or any other bone in the neck is not there and the nailmarks found on the neck of the dead body and the abrasions found are not so serious to suggest a forceful drowning. In fact, the Doctor performing the P.M. Examination (P.W.-13) was not also sure about the cause of death and his opinion on the point is "Homicidal has a possibility." In view of such opinion and the basis thereof it cannot be conclusively held that the death of the victim was Homicidal.

23. So, from the foregoing discussion it is clear that the prosecution has failed to prove any chain of circumstances to prove the charge of murder against the Appellants.

24. In the F.I.R. itself, it is stated that the Appellants invited the deceased for consuming liquor together on the bank of the river nearby and that on the basis of such invitation the deceased himself went out with the Appellants. The fact being so, the charge of abduction finds no basis to stand upon. There is no evidence also on record to show that the Appellants had floated the dead body of the victim or that the Appellants or any of them caused any material evidence to disappear. So, the charge u/s 201 I.P.C. does fail also.

25. To conclude, the prosecution failed to prove any of the charges framed against the Appellants. Learned Trial Court was, therefore, wrong in law to find the Appellants guilty of the charges u/s 364/302/201/34 I.P.C. and to convict the Appellants to the aforesaid charges.

26. So, the appeal is allowed. The judgment and order of conviction and sentence passed on 30.01.2009 and 02.02.2009 by the learned Additional Sessions Judge, Fast Track, 2nd Court, Kandi, Murshidabad, in Sessions Trial No. 4 of September, 2007, are hereby set aside.

27. The Appellants be set at liberty at once if they are not liable to be detained in connection with any other case.

28. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Advocates for the parties upon compliance of all formalities.