
(2017) 03 CAL CK 0002
In the Calcutta High Court
Case No : 360 of 2005

Jahar Misra

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-03-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 161, Section 313 - Examination of witnesses by police - Power to examine the accused
Indian Penal Code, 1860, <a href=1767-120

Citation : (2017) 03 CAL CK 0002

Hon'ble Judges : Aniruddha Bose, Sankar Acharyya

Bench : DIVISION BENCH

Advocate : Mainak Bakshi, Subir Banerjee, ?Jayanta Banerjee,?Pratick Bose

Judgement

1. Decomposed body of a woman was discovered on 24th November, 2001, from a paddy field near Bidhan Chandra Krishi Viswavidyalaya, Regional Research Sub-Station at Raghunathpur, in the district of Purulia. One Bikash Chandra Patra, who was a lecturer with that institute at the material point of time came to learn of the body lying on the field on that day and he had given that information to police. Said Bikash Chandra Patra deposed as P.W.8 at the trial, out of which this appeal arises. Samar Banerjee (P.W.4), Officer in-charge of Raghunathpur Police Station, on receiving such information started U.D.Case No.53/01 dated 24th November 2001 and entrusted Mridul Kanti Saha (P.W.5), subinspector of police with the task of investigation of the case. Subsequently, on 28th November, 2001, One Kashinath Chakraborty (P.W.1) had identified the body to be that of her daughter, Manju. In his written complaint to the police made on 6th December, 2001, he implicated the appellant-accused and his four brothers, Krishna Mishra, Gunadhar Mishra, Subal Mishra, Mohar Mishra and their brother-in-law Amar Tewari in the offence of murder of his daughter. Complaint was also made of physical and mental torture of the victim. On the basis of P.W.1's complaint, formal F.I.R was registered by the P.W.4 and Raghunathpur P.S.Case

No.60 of 2001 under Sections 498A, 302, 201, 120B and 34 of the Indian Penal Code, 1860 was started. This appeal has its origin in that case.

2. P.W.5, on the basis of the said U.D.Case conducted inquest at the location where the dead body was discovered and sent the body, unidentified at that point of time, for post-mortem examination to Sadar Hospital Morgue, Purulia. His inquest report made on the same day, inter-alia, records: " Today the 24-11-2001 around 1.35 p.m having arrived at the paddy field to the western fringe of Bidhan Chandra Agricultural University along with C 15 Dandu (?) Narayan Mondal I am to prepare the inquest report over the decomposed corpse of an unidentified woman. From looking at the corpse it seemed the deceased was about 20 years of age.

From the neck to head of the deceased is missing. Breasts are missing with a lots of maggots visible. Right hand is missing. Right leg downwards of knee is missing. Upwards on knee and upto waist only bones are there but no flesh. Left wrist onwards is missing. There are no flesh on the left ankle and seemed to have been eaten away by maggots. One steel anklet is there. After removing the panty and petticoat of the deceased nothing could be seen in the vagina and rectum. Maggots all over the body of the deceased are seen. There is a kind of hole on the left of the back with maggots in it"

3. Dr. A.K.Josh undertook post-mortem examination but he could not come to a definitive opinion as regards the cause of death of the person on whose body he conducted autopsy. This was mainly because of the decomposed state of the dead body. In his examination-in-chief, which largely corroborates his opinion reflected in the post-mortem report, he stated:-

" On examination I found highly decomposed body with meggot bony skull with 16 nos. of Teeth in the upper socket and 4 nos.of Teeth in lower socket. I found only skull was present. No neck, no breast, no upper extremities, no right leg below knee, only chest and abdomen present, meggots present.

In my opinion cause of death is not clear to me due to highly decomposition of the body and is kept reserve for chemical examination report viceras sent for chemical analysis report. Blood sample preserved and taken by the police. Time of death was approximately 72 hours before P.M.examination"

4. At the time of inquest on 24th November, 2011, the investigating officer had seized from the place the body of the victim was recovered two petticoats, a brown innerwear (panty), a brown and yellow cotton printed sari and also a brown blouse. That seizure list was made Exhibit "6". The prosecution version of the case is that the P.W.1, P.W.2 and the appellant had taken the victim to "Puratan Hospital" at Raghunathpur on 17th November, 2001, as she had fallen ill. The victim, Manju, was married to the appellant Jahar but there is an element of confusion as regards the year in which they got married. Evidence of P.W.1 is that the marriage was solemnised in the year 1996. The husband and wife had troubled relationship and there was an earlier case registered on 20th December,

1994 under Section 498A of the Indian Penal Code, 1860 against the appellant and seven other persons from his side of family. That case resulted submission of charge sheet but the defence case is that all the accused persons were acquitted by the Court. There is subsequent allegation of lodging of a miscellaneous case for maintenance on 19th September, 2001, but there is no proper evidence about the fate of that case. The matrimonial home of the victim was at Block Danga, Raghunathpur subdivision. But she appears to have had been staying in her parental place for some time, and P.W.2, being Gita Rani Chakraborty - mother of the victim in her evidence stated that it was for the past four or five years the victim was residing with them. Her evidence was recorded on 29th January, 2005. In their depositions, P.W.1 and P.W.2, have narrated what transpired at Raghunathpur on 1st Agrahayan, the last day on which they claim to have had seen their daughter. From the judgement under appeal, we find the date to be first Agrahayan of 1408 B.S., corresponding to 17th November, 2011. P.W.1 in his deposition stated:

"I along with my wife and my Jamai Jahar Misra had taken her to the hospital at Puratan Hospital Raghunathpur. She was treated and my Jamai took my daughter to a Bazar for purchasing medicine. My daughter was taken back to her matrimonial home by her husband"

P.W.2 in her deposition stated:

"We had come to doctor on 1st Agrahan alongwith Monju as she had fallen ill. Manju was staying with us for about 4/5 years. She was treated by the doctor. Jahar also came and asked us to go with him to purchase medicine. My Jamai took my daughter with him. We returned to our house"

5. The prosecution case linking the victim with the appellant when seen last is based on these depositions. It further transpires from the deposition of the P.W.1 that he had made search for his daughter after she was taken to her matrimonial home but could not trace her out. Thereafter, he had contacted his lawyer "Gautam babu" and learnt from him that a dead body was found and was kept in the police station. He could recognise the dead body of his daughter on the basis of her wearing apparels. In his evidence, he has not disclosed the specific dates on which he had started searching for his daughter or contacted his lawyer, but he stated that he had lodged written complaint to the police station on 1st day of Agrahayan. Mr. Mainak Bakshi, learned counsel for the appellant has brought to our notice this part of his deposition and his submission is that the F.I.R., on the basis of which Raghunathpur P.S. Case No. 60/2001 dated 6th December, 2001 was commenced actually was the second complaint, which would have the character of a statement under Section 161 of the Code of Criminal Procedure, 1973. On that ground, he has argued that the written complaint is inadmissible evidence. We shall deal with this argument later in this judgement. So far as the written complaint of 6th December, 2001 is concerned, the body of that complaint has not been made an exhibit. Signature of the maker of the complaint, being the P.W.1 and the signature of P.W.4 the officer in-charge of

Raghunathpur Police Station, as appearing on the body of the complaint however have been marked as Exhibit-1 and Exhibit- 1/1. The P.W.1 in his deposition proved his signature and also deposed of making that complaint. On that basis formal F.I.R was registered on 6th December, 2001 arraigning the appellant and five of his relations as accused persons. From the forwarding report forming part of records of this appeal, it is found that the appellant was taken into custody on 7th December, 2001. Thereafter, charge sheet was submitted and charges were framed against all the accused persons under Sections 498A, Section 302/34 I.P.C read with Section 120B of the 1860 Code. Trial was held by the learned Additional District & Sessions Judge, Fast Track Court (4), Raghunathpur, Purulia. The First Court believed the prosecution story so far as complicity of the accused-appellant in the offence is concerned and found him guilty of offences punishable under Sections 498A and 302 of the 1860 Code. Such conviction was primarily on the basis of circumstantial evidence, as there was no eye-witnesses to the incident. There was also no scientific evidence adduced by the prosecution. The First Court believed that the appellant had accompanied the victim from the hospital. It was opinion of the First Court that the appellant was duty bound to inform the complainant and police about his wife not being traceable. All other accused persons were found not guilty. The appellant-accused was convicted under Section 498A and Section 302 of the 1860 Code and sentenced to suffer imprisonment for life for the charge under Section 302 of the 1860 Code. He was further sentenced to pay Rupees ten thousand as fine. In default of payment thereof, rigorous imprisonment for one year was prescribed. Separate punishment for charge under Section 498A of the Code was not awarded in view of major punishment for imprisonment for life being imposed under the former charge.

6. This judgement and order of conviction and sentence have been assailed by the appellant before us. Mr. Bakshi has argued that the prosecution case suffered from serial discrepancies and conviction was founded on unreliable materials projected as evidence. He sought to impeach the credit of the de facto complainant submitting that the year of marriage was disclosed by him to be 1996, whereas a case under Section 498A of the 1860 Code had been initiated two years earlier, in the year 1994. He wants us to disbelieve the prosecution story that the victim was taken back to her matrimonial home by her husband on the date on which she is alleged to have visited the hospital. He also questions the process of identification of the body. Referring to the evidence of the autopsy surgeon, it has been submitted by him that there is no finding that it was a case of homicidal death. Other shortcomings in prosecution case on which he has laid stress on are delay in filing of F.I.R., which is in addition to his submission that an earlier complaint was suppressed. He has also highlighted the delay of one day in sending the F.I.R to the Magistrate. He has submitted that there was inconsistent description of the articles seized. We have already referred to Exhibit "6", being the seizure list prepared on 24th November, 2011. Another seizure list was made, after identification of the body, on 28th November, 2011, to which

P.W.1 was one of the witnesses. This seizure list was in respect of a steel "torah" or anklet and an amulet. The second seizure list, also prepared by the P.W.5 has been made Exhibit-2/1. No Test Identification parade was made in respect of wearing apparels, on the basis of which the dead body was identified. Mr. Bakshi also points out that there was no evidence of the victim being taken to the hospital at Raghunathpur. In the written complaint, the P.W.1 has referred to outdoor ticket no.29850 dated 17th November, 2001, of Raghunathpur Hospital. The P.W.5, being the investigating officer, however, in his cross-examination by the defence stated that the aforesaid ticket number was not seen by him in the medical register. Mr. Subir Banerjee learned Additional Public Prosecutor has defended the judgement in which the prosecution case against the appellant was sustained. His submission is that there was sufficient evidence, though circumstantial in nature, to find the appellant guilty and the First Court had rightly convicted him and awarded the sentence.

7. The First Information Report on the basis of which case No.60 of 2001 was started is dated 6th December, 2001. The F.I.R was sent to the learned Magistrate on 8th December, 2001. But one day's delay, by itself, is not fatal to the prosecution case in our opinion. Doubt has been raised as to whether the written complaint was made on 6th December, 2001, for the first time or there was an earlier complaint. In his evidence, P.W.1 stated that he had lodged the written complaint with the Police Station on 1st Agrahayan about "four years ago". That would make 17th November, 2001 to be the date of lodging of F.I.R. He also stated that the complaint was written by Madhusudan and the same was read over and explained to him and then he had put his signature. The written complaint records the name of one Paresh Bauri as the scribe thereof. Said Paresh Bauri has not been examined as a prosecution witness. Drawing our attention to the deposition of P.W.1 that the complaint was written by Madhusudan, Mr. Bakshi sought to establish his case that there was an earlier complaint. His alternative submission is that in the event the written complaint dated 6th December, 2001 is treated to be the actual complaint, then also the prosecution case ought to fail because of significant delay in lodging of complaint. On the basis of discrepancy cited by the defence counsel sought to make out a case that there was an earlier complaint, we are unable to accept Mr. Bakshi's argument. The deposition of P.W.1 was recorded on 29th January, 2005, and it is possible that there could be mix up of dates or name of the scribe by the P.W.1. while narrating the sequence of events from the witness box more than three years later. For the same reason, we ignore the reference to Madhusudan as the scribe of the written complaint. The defence counsel also wants us to disbelieve the written complaint because it was dictated by Gautam Babu, lawyer of the P.W.1. This fact emerges from evidence of the P.W.1 in his cross-examination. Assistance of a legal professional in writing a complaint cannot be a fatal flaw in the prosecution case. The U.D.Case was started on the very day the decomposed body was discovered. As regards delay in lodging the complaint, the written complaint records that delay was caused as the

complainant could not ascertain where the incident had occurred. Implication of such delay has to be examined along with other points urged by the learned defence counsel, considering the fact that conviction of appellant is founded on circumstantial evidence.

8. The next question which we shall address is identification of the body. As per evidence of P.W.1, he had identified the deceased on the basis of her wearing apparels. His evidence records:-

"I identified the deceased by identifying her wearing apparels Sari, Saya, Prabal and amulet. Her wearing apparel were not given by me. Witness volunteered that her wearing apparels were given by her Masi"

It has also been pointed out by the defence counsel that the seized articles were never marked or labelled and there was no blood mark or mud or soil on the seized wearing apparels or on the anklet and the amulet. We also find that in the inquest report there was no reference to the amulet or anklet and the first seizure list dated 24th November, 2001 also does not record seizure of these items. The P.W.1 however, in his evidence, specifically referred to the identifying objects and we have reproduced that part of his deposition earlier in this judgement. The impact of improper labelling has been considered by the Supreme Court in the case of *The State of Rajasthan Vs. Daulat Ram* [(1980)3 SCC 303]. The other authority relied upon by the appellant is *Naba Kumar Das Vs. State of W.B.* [(1974) SCC (Cri) 60]. The following passage from the latter judgement has been relied upon by Mr. Bakshi:-

"The Circle Inspector, at the least, did not bring to bear enough care in the discharge of his functions. The churis which were produced before the Court are bronze-based but he wrote brass for bronze. Instead of mentioning in the seizure memo that 4 churis were seized from the appellant's shop, he mentioned that 4 bangles were seized. Both the learned counsel who are familiar with local conditions are agreed that in Bengal a distinction is made between churis and bangles. The explanation of the Circle Inspector that he committed a mistake in describing the articles may or may not be true but the fact that he made a significant error in a material part of the description of the articles seized by him shows that no implicit reliance can be placed on his word. It also seems to us important that the churis, after seizure, were wrapped in a loose sheet of paper and were not kept under seal"

There is another factor on which the appellant wants us to disbelieve that the recovered body was that of the deceased wife of the appellant. Mr. Bakshi points out that family members of the victim did not claim the body of the deceased for performing the last rites. There was also no scientific evidence that the body was that of the wife of the appellant. No viscera was collected for chemical analysis. Moreover, the "Masi" who is meant to have had gifted the sari recovered from the aforesaid location was also not examined by the prosecution.

9. These are no doubt flaws in investigation but we do not think these flaws can

negate the evidence of P.W.1 of having identified his deceased daughter, or the fact of identification itself. No such suggestion was given to the P.W.1 in course of his cross-examination. The defence otherwise has not set up any contrary story. The fact that the family members of the deceased did not claim the body may reflect unusual behaviour on their part but for that reason alone we cannot infer that the body recovered was not that of Manju, wife of the appellant. So far as the two authorities cited on behalf of the appellant are concerned, we do not think in the factual context of this case, the principles enunciated therein are applicable. The shortcomings in the seizure list or in description of the seized articles relate to identification of the victim. In our opinion the P.W.1's evidence is sufficient to lead to a finding that the body of the victim was properly identified. Thus, these discrepancies by themselves cannot have any material impact in negating the prosecution case.

10. Conviction of the appellant is primarily based on evidence of P.W.1 and P.W.2. that on 1st Agrayan the appellant had taken the victim with him after her visit to the said hospital. But, barring evidence of these two prosecution witnesses, there is no other witness narrating or corroborating these statements. There is no corroboration from any other witness about presence of the appellant at the hospital or the appellant leaving with the victim to purchase medicine. We further find that there was no evidence that the victim had been taken to Raghunathpur Puratan Hospital on that date. We have already referred to the evidence of the Investigating Officer in that regard. In his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has denied being at that spot and he has referred that part of the prosecution story to be concocted. There is no evidence from any independent witness that P.W.1 and P.W.2 were searching for their missing daughter between 17th November and 24th November, 2001. This factor, coupled with the fact that the complaint was lodged seven days after the P.W.1 had identified the body to be that of his daughter on 28th November 2001, as it appears from Exhibit- 2/1, raise serious doubt on prosecution case. So far as, charge under Section 302 of the 1860 Code is concerned, we do not find links in the chain of circumstances to be intact to sustain finding of guilt and conviction of the appellant. There is no supporting evidence to the depositions of P.W.1 and P.W.2 that the victim had left with the appellant on 17th November 2001. The visit to the "Puratan Hospital" has not been proved through any independent witness. The prosecution has failed to prove such visit on the basis of registers maintained at the hospital. There is no independent witness to corroborate the stand of the P.Ws 1 and 2 that between 17th and 24th November 2001 they were searching for their daughter. Even after identification of the victim's body, there was seven days' delay in making the complaint. The explanation in the complaint that delay was because of delayed identification of location where the incident had taken place is unreliable. These gaps break the chain of circumstances based on which appellant was found guilty. The obligation or duty on the part of the appellant to report missing of his wife cannot be inferred, as evidence is inadequate to establish the appellant had taken the

victim with him to the matrimonial home on 17th November 2001.

11. We accordingly set aside the judgement and order of sentence so far as conviction of the appellant under Section 302 is concerned. The appellant is acquitted of the charge under Section 302 of the 1860 Code. We, however, sustain conviction of the appellant under Section 498A of the 1860 Code as we are satisfied that the prosecution has made out a case for his conviction under this provision. There is sufficient materials in the depositions of the P.W.1 and P.W.6 (Tapati Chakraborty)- who is the younger sister of the victim-to sustain the prosecution case on this count. We award three years rigorous imprisonment to the appellant for having committed the offence under Section 498A of 1860 Code, since the learned First Court was not inclined to award any punishment on this count. He is further directed to pay fine of rupees one thousand. In default thereof, he is further directed to undergo rigorous imprisonment for six months. We have already discussed the reasons given in the judgement under appeal for not awarding sentence under the aforesaid provision. We are informed by the learned counsel for the appellant as also the State that the appellant is in custody since 27th November, 2001. As he has served out more the sentence of imprisonment being imposed by us, and the period of detention undergone by him covers the period for which he would have had to suffer rigorous imprisonment in the event he would have had defaulted in payment of fine, we direct that no fine ought to be realised from the appellant. The appellant is directed to be set free forthwith, if his detention is not necessary in any other case. The appeal is allowed in part, in the above terms.

12. Let a copy of this judgement along with the lower Court records be sent down to the learned Court below immediately.

13. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.