

(2014) 01 CAL CK 0058
In the Calcutta High Court
Case No : C.R.A. No. 302/2012

Lakhai Mahali

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 28-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2014) 1 CALLT 656 : (2014) 4 CHN 726 : (2014) 2 Crimes 626

Hon'ble Judges : T. Sen, J;Shib Sadhan Sadhu, J

Bench : Division Bench

Advocate : Moinak Bakshi, Advocate for the Appellant; Manjit Singh, Ld. P.P. and Mr. Pawan Kumar Gupta, Advocate for the Respondent

Judgement

Shib Sadhan Sadhu, J.—In the instant appeal the appellant has challenged the judgment of conviction and order of sentence dated 22.06.2011/23.06.2011 passed by the Ld. Additional Sessions Judge, 2nd Court, Suri, Birbhum in Sessions Trial No. 4(2)2011 arising out of Sessions Case No. 212 of 2010 convicting him u/s 302 Indian Penal Code and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- in default to undergo rigorous imprisonment for 6 months for the offence u/s 302 IPC. Put in a short frame, the prosecution case runs as under:--

The de-facto complainant Sadananda Bhattacharyya of village Chandrapur lodged a written complaint before the O.C. Mohammad Bazar Police Station to the effect that on 20.08.2010 at about 8 A.M. he found the dead body of Fulmoni Mahali, wife of Lakhai Mahali was lying on the veranda of their house sustaining multiple injuries. On 19.08.2010, after returning home from work, Lakhai Mahali demanded money from his wife Fulmoni Mahali but she could not give him money and for that her husband assaulted her. In the following morning her dead body was found lying in the courtyard of their house.

2. On the basis of such written complaint Mohammad Bazar P.S. Case No. 72/10 dated 20.08.2010 u/s 302 IPC was registered. That case was investigated into and on completion of investigation charge sheet was submitted u/s 302 IPC against the present appellant. Thereafter, the case was placed for trial before the Ld. Additional Sessions Judge, 2nd Court, Suri, Birbhum who framed charge u/s. 302 of the Indian Penal Code against the present appellant and after conclusion of the trial, he held the appellant guilty and convicted him as aforesaid.

3. Mr. Moinak Bakshi, Ld. Counsel for the appellant while advancing his argument drew our attention to the following loopholes in the alleged chain of circumstances allegedly pin pointing the guilt of the appellant:--

a) That P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 7 did not at all support the prosecution case and they were declared hostile by the prosecution;

b) P.W. 1 although was not declared hostile by the prosecution but he deposed that he wrote the complaint in P.S., that he signed on a blank paper and that he was not examined by the police and it was his first disclosure in Court;

c) There is no evidence of last seen together;

d) Also there is no evidence of recovery;

e) P.W. 6 Mani Mahali who is the daughter of the appellant and the deceased also did not support the prosecution case and the remaining children have not been examined;

f) No blood or blood stained earth nor the wearing apparels of the deceased were seized or sent for F.S.L. examination and report;

g) The weapon of offence i.e. "Hansua" was not produced in Court nor was identified by any of the P.W. s. including P.W. 1 allegedly in whose presence the same was seized.

He thus emphatically contended that the prosecution has miserably failed to establish the chain of circumstances so as to make it complete and unerringly fixing the appellant with the alleged offence of murder of his deceased wife Fulmoni Mahali. So the conviction cannot be sustained and the appellant is entitled to an order of acquittal by setting aside the impugned judgment and order. He relied on the decisions reported in *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, in support of his contention.

4. Mr. Manjit Singh Ld. Counsel for the State on the other hand wholeheartedly supported the impugned judgment and order of conviction. According to him the loopholes highlighted by his Learned Adversary lose significance in view of the fact that the appellant is the husband of the deceased with whom she was last seen and they slept together and it is for him to explain how his wife died homicidal death but he did not offer any explanation. Further the appellant made disclosure statement in pursuance of which the offending weapon was recovered in presence of witnesses. He submitted yet further that non-production of the

seized "Hansua" in Court does not hit the merit of the prosecution case especially when such seizure went unchallenged and the defence failed to show that any prejudice has been caused to them. Therefore, the appellant has no escape for the crime perpetrated by him and the Ld. Trial Court has rightly convicted him u/s 302 IPC and passed the appropriate sentence which should be maintained. Mr. Singh finally insisted upon dismissal of the appeal.

5. Having regard to the conflicting assertions advanced by the Learned Counsels in the light of the Rulings placed, we find that there is no eye witness or direct evidence to the alleged incident of murder and the entire prosecution case rests on circumstantial evidence.

6. In a plethora of decisions, the Hon''ble Supreme Court has laid down the guidelines for appreciation of evidence in a case of circumstantial evidence. In the case of *Brajendrasingh Vs. State of Madhya Pradesh*, the Hon''ble Supreme Court observed as follows:--

It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The Circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic canon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. It is a settled rule of law that in a case based on circumstantial evidence, the prosecution must establish the chain of events leading to the incident and the facts forming part of that chain should be proved beyond reasonable doubt. They have to be of definite character and cannot be a mere possibility.

7. There can be no dispute that the deceased Fulmoni Mahali had died homicidal death. The question is whether the prosecution has been able to connect the

present appellant with the alleged crime?

8. In the case of Sharad Birdhi Chand Sarda v. State of Maharashtra (Supra) the Hon''ble Supreme Court in a Three Judge Bench decision discussed the law in general relating to suicidal death as also homicidal death and the circumstantial evidence pertaining thereto.

9. In the case of Bodh Raj v. State of Jammu & Kashmir (Supra) the Hon''ble Supreme Court held that the last seen theory comes into play where 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 that possibility of any person other than the accused being the author of crime becomes impossible and also discussed the law in general relating to discovery of fact in pursuance of information given by the accused while in custody.

10. In the case of Pandurang Kalu Paul v. State of Maharashtra (Supra) the Hon''ble Supreme Court also discussed the law relating to discovery of fact as laid down u/s 27 of the Evidence Act, 1872 and held that recovery or even production of object by itself need not necessarily result in discovery of a fact.

11. In the case of Dinesh Borthakur v. State of Assam (Supra) in which the appellant husband was convicted of murder of his wife and adopted daughter by poisoning and strangulation and the Trial Court convicted the appellant on the basis that the reaction of the accused was not natural as he did not exhibit his emotion or sadness despite the fact that a shocking incident had occurred and that the sniffer dog stayed near the accused, the Hon''ble Supreme Court allowed the appeal and held that the circumstantial evidence leading to the guilt of the appellant not having been established by the prosecution, the judgment of the conviction cannot be sustained. It was further observed that no incriminating evidence linking the appellant in regard to administration of poison, pesticide has been brought on record and that a finding of guilt cannot be based on a presumption.

12. In the case of Sattatiya @ Satish Rajanna Kartalla v. State of Maharashtra (Supra) the Hon''ble Supreme Court considered the factors in determining the genuineness of recovery of crime articles and the nature of place from which those were recovered and their relevance u/s 27 of the Evidence Act, 1872 and observed that the credibility of evidence relating to recovery is substantially dented by the fact that even though as per the Chemical Examiner's report the bloodstains found on the shirt, pants and half blade were those of human blood, the same could not be linked with the blood of the deceased and that unfortunately the Ld. Additional Sessions Judge and the High Court overlooked that serious lacuna in the prosecution story and concluded that the presence of human bloodstains on the clothes of the accused and half blade were sufficient to link him with the murder.

13. In the case of Joydeb Patra & Ors. v. State of West Bengal where the allegation was that the appellant husband and in-laws committed murder of wife/

deceased by administering poison in her food but the Inquest Report prepared on date of death of deceased stated that though the relatives of deceased stated that she has taken poison, no froth was seen on nostril and mouth of deceased and the post mortem report prepared by Autopsy Surgeon does not state the cause of death of deceased and no poison could be detected in viscera of the deceased, the Hon''ble Supreme Court held that as the prosecution failed to establish beyond reasonable doubt that poison was administered to the deceased and that the deceased died due to poisoning, the very foundation of the case of prosecution stood demolished and the Courts below could not have held appellants guilty just because they have not been able to explain under what circumstances the deceased died and accordingly the conviction of the appellants was held to be improper and was set aside.

14. In the case of *Raj Kumar Singh @ Raju @ Batya v. State of Rajasthan* (Supra) the Hon''ble Supreme Court discussed the scope and purpose of the examination of the accused person u/s 313 of the Criminal Procedure Code, 1973 and observed that the purpose of such examination is to meet the requirement of the principles of natural justice i.e. *audi alteram partem*. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the Court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the Court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination u/s 313 Cr.P.C., cannot be used against him and have to be excluded from consideration.

15. On a sum total of the aforesaid decisions, it is clear that in a case where the prosecution was not able to produce any eye-witness it was the duty of the prosecution to prove that the evidence so came up at the trial makes a complete chain of circumstance which would raise the pointer to the accused and the accused only. It would also suggest that no one else could be involved in such incident. If the test is positive, the conviction is a matter of course.

16. Let us now consider the case in hand. From the unimpeachable evidence of P.W. 6 who is none but the daughter of the appellant and the deceased it becomes unmistakably established that the couple was last seen together for sleeping. That is to say that they closeted together in the same bedroom during the fateful night. There was no contradictory evidence on this score. Hence, it could be safely concluded that the prosecution was able to prove that the accused and the victim were last seen together. Therefore, it is within the special knowledge of the accused and it was obligatory for him to offer explanation as to how the homicidal death had been caused. But no trouble was taken by the accused to dispel the doubt in the mind of the Court. Even he offered no explanation during his examination u/s 313 Cr.P.C. and he simply pleaded his

innocence. The defence contended before us that had the accused killed his wife their children who were sleeping in the adjacent room must have seen the incident. But P.W. 6 has not stated so. On the contrary, she has stated that she had awakened her father in the morning on that very date. Further contention of the defence was that no motive for killing his wife by the accused came out in evidence. We are not at all impressed. There might be hundred and one reasons for causing the crime. In this context, it is interesting to note that it was revealed by the defence from the cross-examination of P.W. 5 Sukumar Mahali that there was illicit relation between Fulmoni and Chakai Lohar and that there was dispute between Lakhai and Fulmoni about such illicit relation. Therefore, it is the defence who threw us some light as to what had happened between the couple which resulted in such unfortunate incident. Be that as it may the law is well-settled on the point that when there is abundant evidence to show that the accused and the accused alone would have committed the murder the absence of proof of motive does not vitiate the prosecution case, (vide 2003 SCC. (Cri.) 144 : 2003 SCC (Cri.) 412).

17. The couple went to bed in their room for sleeping. They were inside the room. In the following morning the dead body of the victim wife was found lying on the veranda sustaining several sharp cut injuries. The opinion of the Doctor P.W. 11 indicates that the death was caused due to the effect of those injuries which are ante-mortem and homicidal in nature. The defence did not make any cross-examination to the Doctor on his opinion so as to rule out the factum of homicidal death of the deceased or to any other cause of death. The accused did not offer any explanation. We are of the view that the chain is complete. The Ld. Trial Court rightly held the accused guilty of the offence. We have no hesitation to hold that there is hardly any scope for interference on that score.

18. The appeal fails and, is, hereby dismissed.

19. Let a copy of this judgment be also sent along with the Lower Court Records to the Ld. Trial Court. Urgent certified photostat copy will be given to the parties if applied for.

T. Sen, J.

I agree.