

(2007) 12 CAL CK 0020
In the Calcutta High Court
Case No : C.R.A. No. 590 of 2003

Munilal Thakur and Indrajit Show @ Sikka
Vs

APPELLANT

State of West Bengal

RESPONDENT

Date of Decision : 17-12-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 201, 210, 302, 34

Citation : (2008) 3 CHN 1034

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Debasis Roy, Sreyashee Biswas and A. Chakraborty, for the Appellant; Asimes Goswami, Id. P.P. and Kalyan Moitra, for the Respondent

Final Decision : Allowed

Judgement

Girish Chandra Gupta, J.—This appeal is directed against a judgment passed in Sessions Trial No. 72/03 on 10th December, 2003 convicting the appellants under Sections 302/34 and 201/34 of the Indian Penal Code and a further order dated 11th December, 2003 sentencing the appellants to suffer life imprisonment as also to pay a fine of Rs. 10,000/- each, in default to suffer further simple imprisonment for one year for commission of offence punishable u/s 302/34, and further sentencing them to suffer rigorous imprisonment for 7 years as also to pay a fine of Rs. 10,000/- each, in default to suffer rigorous imprisonment for one year for commission of offence u/s 201/34 of the Indian Penal Code. The charges framed against the appellants are as follows:

First- That in the night of 1st/2nd day of January, 2001 on the under constructed roof (2nd floor) of Pannalal Nunia of Bally Durgapur near State Bank of India. Durgapur Branch under P.S. Bally, dist. Howrah in furtherance of your common intention did commit murder by intentionally or knowingly causing the death of Raj Kumar Thakur and thereby committed an offence punishable u/s 302/34 of

the Indian Penal Code, and within my cognizance.

Secondly- That you, in the aforesaid night and at the aforesaid place, in furtherance of your common intention having reason to believe that an offence like murder punishable to death or life imprisonment, committed by you, did cause certain evidence to disappear by way of hiding the dead body of Raj Kumar Thakur under bricks at the under constructed roof (2nd floor) of the house of Pannalal Nunia with an intention of screening yourself from the legal punishment of murder and thereby committed an offence punishable u/s 210/34 of the Indian Penal Code, and within my cognizance.

2. The learned Trial Judge formulated as many as 15 points for determination. Point Nos. 9 and 10 formulated by the learned Trial Judge are as follows:

Did the circumstances clearly denote that the accused persons in furtherance of common intention committed culpable homicide amounting to murder by causing the death of the deceased, Raj Kumar on 1/2-1-01 in the three-storied building of Pannalal Nonia?

Did the accused persons in furtherance of common intention hide the dead body of deceased, Raj Kumar on the stack of bricks situated in the roof of a constructed building of Pannalal Nunia in order to cause disappearance of the evidence of offence of murder on the night of 1/2-1-01?

3. There is no evidence on the record to show as to when did Raj Kumar die. According to the case of the prosecution, appearing from the FIR, Suresh, a minor, aged about 6 years smelt a stench in the 2nd floor of an under construction building, belonging to the complainant Pannalal. Suresh is the son of Pannalal. He reported the matter to his mother Arati. Arati went to the 2nd floor along with Suresh and smelt a stench. She informed the matter to her husband Pannalal. He went upstairs and tried to ascertain the source of stench. Some bricks were lying in the room adjacent to the staircase of the 2nd floor. The stench appeared stronger to him in that room. Upon close scrutiny he noticed legs of a human being in the stack. He immediately informed the matter to the police station and the Panchayat office. Police came and recovered a dead body of an unknown person after removing the bricks. The dead body was found in a sitting position leaning against the wall with bent knees and the neck tied with knots made up of jute thread and a muffler engulfing his neck. The tongue was protruding out with face decomposed.

4. In the FIR it is alleged that someone killed him and had hidden the dead body. The complainant is a resident of an adjacent hut. The complainant (P.W. 1) deposed that there were 12 rooms in the building fully tenanted. But no one complained of any foul smell or any stench. P.W. 5 working in an office situated in the concerned building deposed that he did not get any foul smell before he actually went to the 2nd floor room on 9th January, 2001 after the matter became public.

5. P.W. 2 Dr. Swaraj Haider held the post-mortem examination on 11th January, 2001. He deposed that the death took place due to asphyxia. However he did not depose anything as to the probable date of death. The post-mortem report Exhibit "12" goes to show that the examination was conducted on 11th January, 2001 on the body of an unknown male, aged about 26/27 years. P.W. 18 Dr. Swaraj Haider has proved the post-mortem report. The post-mortem report at the top contains a post script which reads as follows:

Unknown since identified as Raj Kumar Thakur vide letter No. nil dated 18th June, 2001 signed by S.I. Bally P.S. dated 18th June, 2001, forwarded by Inspector-in-Charge, Bally P.S., dated 19.6.2001 signed Swaraj Haider 21.6.2001.

6. The letter dated 18th June, 2001 has not been disclosed either. There is no evidence of any common intention. There is no evidence that the deceased was killed in the three-storied building of Pannalal. There is no evidence that the body was subsequently hidden in the stack of bricks.

7. There is no eye-witness in this case. The case is wholly based on circumstantial evidence which would further be illustrated by the following findings recorded by the learned Trial Judge:

In the instant case, the accused persons were found with the victim or "last seen" on 1/2-1-01. The victim-deceased was not found thereafter. His dead body was recovered on 9.1.01. So, the accused persons are bound to explain the details of death of the deceased. Their friendship cannot be a ground of reasonably explained lack of knowledge of death. On the contrary, taking recourse to the good relation/friendship between the deceased and the accused persons, the offence was committed by the accused persons who have not at all advanced any explanation of the death of the deceased. In the aforesaid decision Hon"ble Court has clearly observed that the accused persons could not offer any explanation in their statements recorded u/s 313 Cr.PC. Hon"ble Court has also observed in the said decision that the accused persons and deceased were "last seen" by prosecution witnesses and the death took place on the very date when they were "last seen" together. Therefore, the conclusion of a rational mind is that the accused persons should explain how the victim suffered death. In the instant case also the victim and the accused persons were "last seen" on 1/2-1-01 and this is established by the evidences of P.Ws. 6, 7, 9 and 14. The evidence of the aforesaid witnesses are fully reliable and trustworthy. The accused persons have failed to advance any explanation during their statement u/s 313 of Cr. PC. Their only defence is denial. In view of the decision stated above, I have no hesitation to hold that the accused persons participated in the offence of culpable homicide amounting to murder by causing the death of the deceased.

These points are accordingly disposed of.

8. The learned Trial Judge answered the point Nos. 1 to 10 formulated by him for a decision by holding the appellants guilty merely on the basis of the evidence of the P.Ws. 6,7,9 and 14 who deposed that Raj Kumar was seen in the company of

the appellants in the night of 1st January, 2001. P.W. 6 Pachu Gopal deposed that on 1st January, 2001 he found Munilal, Indrajit and Raj Kumar talking to each other when the P.W. 6 went out for nature's call. In his cross-examination he admitted that he has a bathroom in his house. He further deposed that he uses the bathroom only in the night hours. Therefore the only meaning which can be attributed to his deposition is that he might have seen Munilal and Indrajit talking to Raj Kumar either during the day time or in the evening. P.W. 7 Kallol deposed that on 1st January, 2001 Munilal, Indrajit and Raj Kumar came to his video parlour for hiring a VCR. He did not say as to the time when these three persons went to his shop. P.W. 14 Raju Biswas working with a video shop deposed that on 1st January, 2001 Raj Kumar came to hire a VCR at 10 p.m. He did not depose that Indrajit and Munilal accompanied Raj Kumar. His evidence is suspicious for the simple reason that he deposed in his cross-examination that two days after taking the VCR police came and examined him. We already have noticed that the dead body of the deceased in this case was detected on 9th January, 2001. Therefore the fact that the police came to his shop and examined him could not be relatable to the present case. On the top of that he has given a go-bye to the evidence of P.W. 7 that Raj Kumar, Munilal and Indrajit came to the parlour. Even if we accept the evidence of P.W. 14 that would go to show that Rajkumar alone went to the video parlour. P.W. 9 Sanjay Burma deposed that on 1st January, 2001 at about 10/11 p.m. while he was returning from Chandan Cinema after watching a picture he had seen Indrajit, Munilal and Raj Kumar in front of the house of Indrajit and they were talking about the video cassettes. In his cross-examination he admitted that he did not hear the topic of discussion between those three persons. He could not tell the name of the picture which he had watched in Chandan Cinema.

9. There is, therefore, slender evidence, if at all, to show that Raj Kumar was seen with Munilal and Indrajit at 10/11 p.m. on 1st January, 2001. Sole source of this evidence is the P.W. 9. We already have indicated that P.Ws. 6 and 7 did not disclose the time as to when did they find the deceased in the company of Munilal and Indrajit. The evidence of P.W. 14 goes to show that Raj Kumar alone went to hire a VCR. Therefore, the learned Trial Judge grossly misunderstood the evidence of the P.Ws. 6, 7, 9 and 14. Even assuming that the deceased was seen in the company of Munilal and Indrajit at 10/11 p.m. on 1st January, 2001 that by itself would not be enough to hold that Munilal and Indrajit murdered Raj Kumar. This is precisely what the learned Trial Judge did. In the absence of any evidence to establish that Raj Kumar was killed immediately or shortly after 10/11 p.m. of 1st January, 2001, there can be no basis to hold that Munilal and Indrajit committed the murder. Reference in this regard can be made to a judgment in the case of Hatti Singh v. State of Haryana reported in 2007(2) E Cr. N 558, wherein their Lordship expressed the following views:

In Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, , this Court noticed:

The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration.

In State of U.P. Vs. Satish, , this Court observed:

The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. 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 the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of P.W. 2.

See also Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir,

There cannot be any doubt that conviction can be based on circumstantial evidence, but therefore the prosecution must establish that the chain of circumstances only consistently point to the guilt of the accused and is inconsistent with his innocence. Circumstances, as is well known, from which an inference of guilt is sought to be drawn are required to be cogently and firmly established. They have to be taken into consideration cumulatively. They must be able to conclude that within all human probability the accused committed the crime. See *Geejaganda Somaiah v. State of Karnataka* AIR 2007 SCW 1681.

Reliance has been placed by the learned Counsel for the State on a decision of this Court in *Kashi Ram* (supra), wherein it was held that the incriminating circumstances must form a complete chain and must be consistent with no other hypothesis except the guilt of the accused.

10. In the absence of any evidence as to the time and date of the death of the deceased even by approximation the possibility of anyone other than the accused being the author of the crime cannot be ruled out. This possibility becomes all the more important when P.W. 18 the brother of the deceased Raj Kumar admitted in his cross-examination that there was friendship between Raj Kumar and Munilal. The identification of the deceased is claimed to have been made on 13th January, 2001. If the deceased had died shortly after 10/11 p.m. of 1st January, 2001 it is difficult to believe that identification was possible on 13th January, 2001. The photographs exhibited in this case exposed on 9th January, 2001 go to suggest that identification on that day was possible. The post-mortem report dated 11th January, 2001 goes to show that the body was decomposed. If we accept the evidence that the body could be identified on 13th January, 2001 it

is difficult to believe that the deceased died on 1st January, 2001 or in the early hours of 2nd January, 2001. The entire thing becomes, all the more suspicious by the absence of the letter dated 18th June, 2001 by which name of the deceased was supplied to the Autopsy Surgeon (P.W. 22).

11. The learned Trial Judge grossly erred in shifting the onus, in the facts of this case, of explaining as to how did the victim come to his death.

12. Surprisingly the learned Trial Judge was persuaded to hold as follows:

"Exht. 7" it appears that Karan Singh also stated before the Id. Magistrate that about 12 night on 1/2-1-01 he came out for nature's call and found Munilal in front of the saloon. He heard sound of removal of bricks, and he also found Indrajit there. So, the evidence of prosecution witnesses find corroboration with the statement of P.W. 20 who recorded the statement of witnesses u/s 164 of Cr.PC marked Exbts. "6" and "7" respectively.

13. Exhibit "7" was tendered through the learned Judicial Magistrate who had recorded the statement of Karan Singh u/s 164 Cr.PC. Karan Singh himself did not come to the box. Therefore the statement made by him could not have been treated as a substantive piece of evidence.

14. It is all the more surprising that the learned Trial Judge came to the following conclusion:

P.W. 23 S.I. Amal Kanti Das held investigation of Bally P.S. Case No. 8/01 dt. 9.1.01. He recorded the statements of Umesh Thakur u/s 161 of Cr.PC. He has stated that the witnesses stated before him that the victim, Raj Kumar joined in a saloon at Hapta Bazar. Thereafter, loss was sustained by Munilal. There was friendship between Indrajit, Munilal and Rajkumar. Indrajit used to visit Raj Kumar's house to see video. There was illicit relationship between Rajkumar and wife of Indrajit. Hence, Indrajit and Munilal murdered Rajkumar and they tied his neck and concealed his dead body in the stack of bricks in the roof of building of Pannalal Nonia. The witnesses Umesh Thakur examined as P.W. 17 has been declared hostile. Although motive behind the murder has not been proved by prosecution beyond all reasonable doubt motive is not so important in the instant case in view of decision of Hon'ble High Court, Calcutta (D.B.) reported in Crime 87 (Part. 11) 342 and also in view of the fact that the prosecution witnesses saw the accused persons with the deceased for the last time on 1.1.01. They hired VCR. They are found talking with each other in the evening and also on the night. Therefore, it is the duty of the accused persons to explain as to how the death of Rajkumar took place. Therefore, provision contained in Section 106 of Evidence Act is surely applicable.

15. A statement made u/s 161 Cr.PC by any witness has no evidentiary value and can only be used for the purpose of contradicting the witness who made the statement. In the present case the learned Trial Judge referred to an alleged statement allegedly made by Umesh Thakur u/s 161 Cr.PC to the S.I. Amal Kanti

Das (P.W. 23). It is significant that Umesh himself, when he came to give evidence, did not support the alleged statement allegedly made by him u/s 161.

16. We are sorry to say that it did not occur to the learned Trial Judge that no attempt was made by the prosecution to call the employer of the deceased or the co-employees of the deceased who could have provided important pieces of evidence as to when was the deceased last seen. P.W. 23 deposed that the deceased was working in a saloon at Hafta Bazar. Therefore P.W. 23 had the requisite clue but he did not pursue the same. The following finding of the learned Trial Judge is perverse being based on no evidence whatsoever:

Circumstances reveal that offence was committed under the garb of friendship. It is crystal clear that the accused persons committed the offence in a pre-calculated manner. The ingredients of mens rea the criminal intention strongly prevailed their mind. In other words, commission of offence is a result of pre-motivated and well planned machination. The accused persons after commission of murder successfully caused disappearance of evidence of offence by hiding the dead body in the stack of bricks and in the building of de facto complainant Pannalal Nunia. Due to their machination of hiding the dead body, there was delay for eight days for detection of the dead body.

17. Mr. Roy, learned Advocate appearing in support of the appeal submitted that there has been gross miscarriage of justice.

18. Mr. Goswami, learned Public Prosecutor appearing for the State did not dispute that the case of the prosecution is weak.

19. For the reasons indicated above the judgment and order under challenge is set aside. The appeal is allowed. We set aside the judgment and order of conviction and sentence imposed upon the appellants by the Id. Trial Court and acquit the appellants. The appellants are on bail. They are discharged of their liability under the bail bonds furnished by them.

20. We have been highly perturbed to see the slipshod manner in which the present case was handled. The learned Trial Judge has not lived up to the expectations of this Court for reasons already disclosed. The manner of appreciating the evidence and conducting the examination u/s 313 Cr. PC leave much to be desired. Let a copy of this judgment be forwarded to the learned Trial Judge Shri M.K. Chowdhury. He is reminded of the following wholesome advice rendered by Edmund Burke:

All persons possessing a position of power ought to be strongly and awfully impressed with an idea that they act in trust and are to account for their conduct in that trust to the one great Master, Author and Founder of the Society.

21. Lower Court Records with a copy of this judgment be transmitted forthwith to the learned Trial Court for information and necessary action.

22. Urgent xerox certified copy of this judgment, be delivered to the learned

Advocates for the parties, if applied for on compliance of all formalities. The learned Registrar General is to carry out the order at once.

Kishore Kumar Prasad, J.

I agree.