
(2008) 08 CAL CK 0014
In the Calcutta High Court
Case No : C.R.A. No. 224 of 1989

Nemai Dey

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 22-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) CriLJ 122

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Prabir Kumar Mitra, Satroop Purkaystha and Nasreen Islam, for the Appellant; Tapabrata Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Banerjee, J.—On August 5, 1986 Sikha Rani Dey, wife of Nemai Dey of Burgeria in the district of Midnapore (West) died of poisoning. The Police investigated the case. The Investigating Officer who held inquest of the dead body could not find any external injury on the body of the victim. Dr. Kingsuk Bose held the post-mortem who, however, in his postmortem report mentioned fracture of hyoid bone. According to him, the lungs were also congested, the stomach contained chocolate colour food, liver and kidney were congested. The viscera was sent for forensic examination and upon receipt of the forensic report the doctor opined that death was due to homicidal obstruction of respiratory passage like throttling or strangulation after methyl Parathoin poisoning. After receipt of the post-mortem report the Police suo motu initiated a case and arrested Mr. Nemai Dey, husband of the victim girl and charged him with the offence u/s 302 of the Indian Penal Code. Nimai pleaded not guilty and faced trial. Altogether eleven witnesses were examined on behalf of the prosecution. The defence, however, did not adduce any evidence.

2. PW-1, Kalachand Dey was the brother of the victim. He deposed that the Sikha and Nemai were residing in their marital home along with their only daughter. Nemai was working as a temporary night guard in Shyamchawk School. Sikha died in the night of August 4/5, 1996 Kalachand got the information on the next morning at about 12 noon from a relation. He rushed to the house along with one Madhusudan Jana. He saw froth coming from her nostril. There had been oozing of blood from ears. Her eyes were reddish. Kalachand, however, deposed that he did not notice any mark of injury on her body. He informed the Police, he suspected that Sikha was murdered. He put the intimation in writing. He, however, could not recollect whether he had told the Police that the victim had reported about ill treatment by Nemai, to his mother.

3. PW-2 Swarnalata was the sister of victim. She also rushed to the place of occurrence. She deposed that their marital relationship was cordial. However, one year prior to the incident "it had taken bad turn". Victim made adverse complaint against Nemai about torture and his character. Swarnalata also saw blood oozing from the ears. She saw blood outside her eyes. She, however, could not recollect any further details. She also made a statement to the Police that her sister was subjected to torture. She deposed that Nemai had illicit relationship with Pratima Chowdhury, the matron of the concerned school being PW-6.

4. PW-3, Hrisikesh Dey was a resident of Buragaria. He deposed that Shyamchawk School was about 4/5 miles away from the house of Nemai. Nemai used to attend the duty in the evening and returned on the following morning. He deposed that Nemai was not present in the house on the fateful night. Being attracted by the alarm raised by mother of Nemai he had visited the house. Victim's father was informed by one Gobinda. At the time of inquest no foul play was suspected. He also did not witness any torture by Nemai on Sikha.

5. PW-4 Asit Kumar Dey was also resident of Burageria. He saw Sikha on the floor of the room. Sign of vomiting was there. Nemai started crying and then he became senseless.

6. PW-7 Dr. Kingshuk Bose held postmortem examination as we discussed before.

7. PW-8, Paramananda Roy was the headmaster of Shyamchawk School. He deposed that house of Nemai was at a distance of three kilometers from the school. Sometime he was asked to stay back beyond his duty hours. On that day he attended the school at 10.30 A.M. On reaching there he heard the news. He also heard that Nemai had already left for his house.

8. PW-9 was the Police Officer who held inquest in presence of Nemai. He did not notice any external mark or the injury on the body of the victim. He was informed by the villagers present at the place of occurrence that the victim had committed suicide by taking metacid out of frustration for the absence of her husband.

9. PW-10, was the Investigating Officer. He identified the FIR written by Sadhucharan Chatterjee, another officer. He took up the investigation upon transfer of the earlier officer.

10. PW-11 was the Officer-in-Charge. He subsequently came to the Police Station on being transferred.

11. In reply to the question put to him u/s 313 of the Code of Criminal Procedure the accused stated that he was innocent. His wife died of poison. He was working as a night guard of Shyamchawk School. His duty hours were from dusk to dawn of the following morning.

12. The learned Judge after analysis of the evidence adduced by the prosecution held him guilty of the offence of committing murder of his wife. The learned Judge held that since the autopsy surgeon opined that the death was due to homicidal obstruction of respiratory passage like throttling or strangulation after Methyl Parathoin poison the Court should find out who had committed murder. Learned Judge also held that the suspicion fell upon the husband. He had taken alibi. However, it was to be proved through evidence. The evidence so came out, did not prove the alibi of the accused. According to the learned Judge the motive was clear as the husband had illicit relationship with the PW-6. The learned Judge ultimately held the husband guilty of the offence and sentenced him for life. Hence, this appeal by the appellant.

13. Mr. Prabir Kumar Mitra, learned Counsel appearing for the appellant contended that the relation of the victim never suspected any foul play. They did not lodge any FIR. PW-1 deposed that he made complaint in writing which was never tendered in evidence. The inquest as well as post mortem report were not tendered in evidence. The only person present in the house being the daughter of the victim was not examined. The appellant was on duty. No evidence came out that he had left his work place in the night and had come to the house to commit crime. On a combined reading of the prosecution evidence it was clear that no abnormality was found. The alleged illicit relationship of the appellant with the PW-6 was not proved. Hence, there was no material for which the learned Judge could come to the conclusion that the accused was responsible for the unfortunate incident.

14. In support of this contention Mr. Mitra relied on the following decisions:

- (i) 2001 Scc (Cri) 652 : AIR 2001 SC 1512 (Dhanajaya Reddy v. State of Karnataka)
- (ii) Ashish Batham Vs. State of Madhya Pradesh,
- (iii) State of Punjab Vs. Sucha Singh and Others,
- (iv) State of Haryana Vs. Ashok Kumar alias Billu,
- (v) 2004 Scc 1167 (Anil Kumar Singh v. State of Bihar)

(vi) 2005 Scc 1224 : 2005 AIR SCW 893 (Badrilal v. Chandan Singh and Ors.)

(vii) 2005, Scc (Cri) 1468 : AIR 2005 SC 1394 (Anjlus Dungdung v. State of Jharkhand)

(viii) 2006 1 Scc (Cri) 549 (Gayadin v. State of Madhya Pradesh)

(ix) State of Maharashtra Vs. Raju Bhaskar Potphode,

15. Mr. Tapabrata Chakraborty, learned Additional Government Pleader appearing for the prosecution on the other hand contended that the medical evidence conclusively proved that the victim was murdered as the death of the victim was homicidal in nature. He relied on the medical journal to support his contention about the injury found by the doctor. He also contended that the alibi taken by the appellant was not proved. No attempt was made on behalf of the defence to prove such alibi. Since the husband was the only adult member of the family residing in the same house barring the victim it was his responsibility to offer explanation as to how the death had caused. In absence of any evidence laid on behalf of the appellant the circumstantial evidence completed the chain of events which conclusively helped the learned Judge to come to definite conclusion that the appellant was responsible for the crime. In support of his contention he relied on the two Apex Court decisions reported in (i) Syed Ibrahim Vs. State of Andhra Pradesh, and (ii) Trimukh Maroti Kirkan Vs. State of Maharashtra, .

16. It is cardinal principle that alibi is a good defence, at the same time it must be proved by the defence. We are, however, of the opinion that such onus only comes when the prosecution discharges its onus to prove the chain of events without any break of link.

17. On a close analysis of the deposition we find that the villagers and /or neighbours did not complain about any untoward incident happening in the house at any point of time. Nobody made any adverse remark on the relationship of the couple save and except the relatives of the victim. The Police initiated the case suo motu by recording the FIR after about four months after the date of occurrence. It is an admitted fact that came out in evidence that the appellant was working as a night guard in the school. Nobody saw him to come to the house on the fateful night. The incident was reported by the only child of the couple to her grandmother. The child was not examined. Even if we accept the opinion of the Doctor that the death was homicidal in nature it is usual that suspicion would arise which would point out to the husband more so because of the reason that there was an allegation of extra marital relationship the husband had with the matron of the school being PW-6. Such suspicion was not without any basis. However, such suspicion, however grave, cannot be a substitute of proof that would result conviction of the accused. It is significant to note that neither of the witnesses was declared hostile. The villagers did not utter a single word as against the appellant. The school was at least 3 to 5 kilometers away from the place of occurrence. No evidence came out that the appellant had left the school in the night and had come to the house and committed crime. In

absence of any eye witness the circumstantial evidence so came out through prosecution witnesses in our view are not sufficient to hold the appellant guilty of the offence. We fully agree with Mr. Chakraborty when he says that the appellant was obliged to discharge his onus to prove his alibi. We however feel, that stage did not come as prosecution failed to produce sufficient evidence which would shift the onus on the appellant to prove his alibi. In this regard we may refer to two Apex Court decisions being relevant herein. In the case of Ashish Batham (supra) the accused took the plea that on the day of incident he was not present at the place of occurrence and had instead gone to another city along with his sister. The Apex Court held that in absence of any clinching evidence to the contrary Court below was not justified in merely disbelieving such evidence. If we leave aside alibi of the accused for the time being we do not find any clinching evidence, at least to prove the presence of the accused in the house on the fateful night. Had the prosecution being successful to prove his presence the onus would definitely shift on the accused to explain how the incident had occurred. Unfortunately such evidence did not come out in the instant case.

18. In the case of Trimukh Maroti Kirkan v. State of Maharashtra (supra) the Apex Court observed that if an offence took place inside the privacy of a house it would be difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence was insisted upon. The Apex Court observed, "a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape." The Apex Court considering the provisions of Section 106 of the Evidence Act observed that the burden of proof lies on the accused as the accused owes an explanation as to how the death took place. This analogy, in our view, has no application in the instant case in absence of any proof that the accused was in the house when the death had occurred. Admittedly accused was a night guard. The incident occurred in the night when the accused was not supposed to be in the house. Hence, the principle of Section 106 would have no application in the instant case.

19. The appeal thus succeeds and is allowed.

20. The Judgment and order under appeal is set aside. The sentence given by the court below is set aside. Sureties are discharged. The appellant is set at liberty. Let the Lower Court records be sent down with a copy of the foregoing judgment.

Tapas Kumar Giri, J.

21. I agree.