
(2016) 03 CAL CK 0151
In the Calcutta High Court
Case No : CRA Nos. 7 and 147 of 2014

Paresh Chandra Mondal and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 106

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

Citation : (2016) 3 AICLR 366 : (2016) 2 CalLT 400 : (2016) CriLJ 3850

Hon'ble Judges : Debasish Kar Gupta and Md. Mumtaz Khan, JJ.

Bench : Division Bench

Advocate : Deep Chain Kabir and Arnab Saha, for the Appellant; Sabyasachi Banerjee and Ranabir Roy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Debasish Kar Gupta, J.—1. These appeals are directed against the impugned order of conviction dated December 19, 2013, of three appellants (two appellants in CRA No. 7 of 2014 and one appellant in CRA No. 147 of 2014) for commission of offence under Section 302/34 of the Indian Penal Code (hereinafter referred to as the I.P.C.) and impugned sentence dated December 20, 2013, to suffer rigorous imprisonment for their life and also to pay fine of Rs. 25,000/- each in default to suffer rigorous imprisonment for a further period of six months each. Two other accused persons, namely, Pashupati Rabidas and Joyanti Rabidas have been acquitted from the charge framed against them.

2. The case of the prosecution in a nutshell is as under:--

"On September 14, 2012 at about 19.00 hours Pashupati Rabidas called Pankaj Singha (the deceased) to the house of Paresh Mondal (the appellant No. 1 in the appeal bearing CRA No. 7 of 2013). Thereafter, the PW 1 (the widow of the deceased and the de facto complainant) came to learn that her aforesaid husband was murdered. After receiving the above information the de facto

complainant went to the house of the appellant No. 1 and found the dead body of her husband at the verandah of the appellant No. 1. She informed it to the police station."

3. The PW 14, Assistant Sub-Inspector of Police, Golapganj Farry, Kaliachak, District-Malda, went to the house of the appellant No. 1 at about 03.00 hours on September 15, 2012 with the PW 8 (Constable No. 52), Golapganj Out Post, under Kaliachak Police Station, District-Malda. He found the dead body of the victim on the corridor of the house of the appellant No. 1. He conducted the surathal examination on the body of the aforesaid deceased person and prepared inquest report dated September 15, 2012. He prepared a rough sketch map of the place of recovery of the aforesaid dead body on the same day. The dead body of the victim was forwarded to the District Hospital Malda through the PW 8 for post mortem examination. The PW 14 seized the following articles from the house of the appellant No. 1 (i) one blood stained bed shit, (ii) mosquito net stained with blood and (iii) one pillow cover also stained with blood.

4. The PW 1 submitted a written complaint on September 15, 2012 at 01.35 hours at the Golapganj Farry and a G.D.E. No. 261 dated September 15, 2012, was made thereof. It was forwarded to the Kaliachak P.S. for initiating a case. The written complaint was scribed by the PW 12. The above written complaint was received in the Kaliachak P.S. on September 15, 2012 at 02.05 hours. General Diary Entry No. 529 dated September 15, 2012 was made in the above police station. Thereafter, the Kaliachak P.S. Case bearing FIR No. 725/12 dated September 15, 2012 was drawn against (1) Pashupati Rabidas, (2) Joyanti Rabidas, (3) Paresh Manda (appellant No. 1 in CRA 7 of 2014), (4) Dilip Mondal (appellant in CRA 147 of 2014) and (5) Jalpana Mondal (appellant No. 2 in CRA 7 of 2014) for commission of offence punishable under Section 302/34 of the I.P.C.

5. PW 11 conducted the post mortem examination over the dead body of the above deceased person and prepared post mortem report No. 1045/12 dated September 15, 2012. According to the opinion of the PW 11, the cause of death of the victim was due to the effect of throttling associated with injuries as stated in the post mortem report and the death was homicidal in nature.

6. PW 14 was entrusted with the investigation of the above case. In spite of conducting raid the accused persons were not traceable. Ultimately Pashupati Rabidas, Joyanti Rabidas and Jalpana Mondal (appellant No. 2 in CRA 7 of 2014) were arrested on September 15, 2012. The appellant No. 1 was arrested on September 20, 2012. The appellant No. 2 surrendered before the Court of learned Chief Judicial Magistrate, Malda, on January 18, 2013.

7. After completion of the investigation, the PW 14 submitted charge-sheet bearing No. 762/12 dated November 30, 2012 against the aforesaid five accused persons for commissioning of offence punishable under Section 302/34 of the I.P.C.

8. Charge was framed against the aforesaid five accused persons for

commissioning of offence punishable under Section 302/34 of the I.P.C. on July 11, 2013.

9. The prosecution examined fourteen (14) witnesses. The statements of the accused persons were recorded under Section 313 of Cr.P.C. on December 6, 2013.

10. By virtue of the impugned judgment Pashupati Rabidas and Joyanti Rabidas were acquitted from the charge framed against them. The impugned order of conviction and sentence were passed against the appellants.

11. It is submitted by Mr. Deep Chain Kabir, learned advocate appearing on behalf of the appellants that the impugned judgment and order of conviction and the sentence cannot be sustained in law due to the following reasons:--

"(i) The appellants were not found guilty of commission of offence on the basis of the evidence of eyewitnesses and corroboration of such evidence with the documentary evidence.

(ii) The circumstantial evidence available on record did not prove the commission of alleged offence by the appellants beyond any reasonable doubt. In view of the contradictions of the oral evidence by the prosecution witness as also with the documentary evidence as available on record touching the root of the prosecution case with regard to the time and place of commission of alleged offence by the appellants in view of the evidence adduced by PW 1, PW 2 and PW 9.

(iii) There was contradictions also in the evidence adduced by the prosecution witnesses with regard to the seized articles and the nexus of those seized articles with the commission of the offence by the appellants was not proved beyond reasonable doubt. But all the accused person, namely, Pashupati Rabidas and Joyanti Rabidas, who were last seen together with the deceased namely, Pankaj Singha, were acquitted by virtue of the impugned judgment.

(iv) The prosecution made out a new case in relation to the death of the victim on the basis of the evidence adduced by the prosecution witnesses before the learned trial Judge for the first time in deviation from the prosecution case made out in the FIR and conducting of investigation on the basis thereof which was the basis of convicting the appellants."

12. Mr. Kabir relies upon the decision of *Amba Lal v. Union of India*, reported in , AIR 1961 SC 264 in support of his above submissions.

13. It is submitted by Mr. Sabyasachi Banerjee, learned advocate appearing for the State respondent that the commission of offence by the appellants was proved beyond any reasonable doubt on the basis of the circumstantial evidence. According to Mr. Banerjee, names of the appellants appeared in the letter of complaint of PW 1, amongst other accused persons. From the evidence of two natural witnesses (PW 2 and PW 9) of the locality in which the commission of

offence took place. From their evidence the presence of the appellants at the place of recovery of dead body of the victim (residence of appellant No. 1) proved beyond doubt.

14. According to him, the fact of absconding of the appellants after recovery of dead body of the victim was one of the important circumstantial evidence which had been taken into consideration by the learned trial Judge for finding the appellants" guilty of commission of offence. The learned trial Judge took into consideration the post mortem report dated September 15, 2012 for arriving at a conclusion with regard to the cause of death.

15. Mr. Banerjee drawn our attentions towards question No. 6, 7, 8, 18, 19, 20, 21, 25 and 26 put forward to the appellants at the time of recording their statements under Section 313 of the Cr.P.C.

16. It is further submitted by Mr. Banerjee that apart from the availability of evidence on record (both oral and documentary), the bald denial of the appellants in reply to the aforesaid questions brought the learned trial Judge, irresistible conclusion of commission of offence by the appellants. According to him, due to the discovery of dead body of the victim from the residential house of the appellant No. 1 and the other circumstantial evidence including the oral evidence of PW 1 (the widow of the victim) for calling her husband to go to the above residence and presence of the appellants at that place immediately after the death of the victim as surfaced from the evidence of two natural witnesses (PW 2 and PW 9), the burden of demolition the prosecution case shifted to the appellants under the provisions of Section 106 of the Indian Evidence Act. The appellants failed to discharge the burden. Therefore, according to Mr. Banerjee, there is no infirmity in the impugned judgment, order of conviction and sentence.

17. Reliance is placed by Mr. Banerjee on the decision of Polamuri Chandra Sekhrarao @ Chinna @ Babji v. State of Andhra Pradesh, reported in , (2012) 7 SCC 706 in support of his above submissions.

18. Having heard the learned Counsels for the respective parties at length as also after considering the materials on record, we find that no eyewitness was available for the prosecution to bring home the charge levelled against the accused persons in the trial. The learned trial Judge took into consideration the circumstantial evidence for adjudication of the question of commission of offence punishable under Sections 302/34 of the I.P.C.

19. With regard to the first contention of the appellants, we find that on September 14, 2012, in the evening at about 7 pm PW 1 (the widow of the deceased person) lodged a written complaint to the effect that one Pashupati Rabidas (accused No. 1) called her husband to come to the house of the appellant No. 1. Her husband went to the above house. According to the letter of complaint, all the accused persons murdered her husband (the victim) by assaulting him physically and ultimately suffocating him by pressing his throat. Subsequently, she went to the house of the appellant No. 1 on receipt of the

information of death of her husband and found the dead body of her husband on the corridor of that house. She was one of the witnesses of the inquest report.

20. According to the inquest report, the primary investigation revealed that the aforesaid Pashupati Rabidas and his wife Joyanti Rabidas (accused Nos. 1 and 2) called the victim over telephone to come to the house of the appellant No. 1. Five accused persons, namely, Pashupati Rabidas, Joyanti Rabidas, Paresh Mondal, Dilip Mondal and Jalpana Mondal assaulted the victim physically and murdered him by suffocating by pressing his throat.

21. According to the evidence on record, Pashupati Rabidas, Joyanti Rabidas (accused Nos. 1 and 2 respectively) and Jalpana Mondal (appellant No. 2 in CRA 7 of 2014) were arrested on September 15, 2012, together from the area of Golapganj Investigating Centre. Subsequently, the appellant No. 1 was arrested on September 20, 2012. The appellant No. 2 surrendered before the Court of learned Chief Judicial Magistrate, Malda, on January 18, 2013.

22. Charge-sheet dated November 30, 2012, was filed against all the aforesaid five accused persons for commissioning of offence under reference. Charge was framed against all of the five accused persons. But from impugned judgment, we find that the learned public prosecutor made his submissions for involvements of the appellants only in commissioning of the offence of killing the victim.

23. We do not find any discussion or observations in the impugned judgment for finding Pashupati Rabidas and Joyanti Rabidas not guilty of commissioning the offence under reference in spite of the contradictions in evidence adduced by the PW 1 with the FIR and inquest report so far as the involvement of the aforesaid Pashupati Rabidas and Joyanti Rabidas in commissioning the offence under reference were concerned.

24. According to the settled proposition of law where a prosecution case depends squarely on the circumstantial evidence, the inference of guilt can be justified in law when all incriminating existence are even to be incompatible with the innocence of the accused. Reference may be made to the decision of Hanumant Govind Narjundkar v. State of Madhya Pradesh, reported in , AIR 1952 SC 343 and the relevant portion of the above decision is quoted below:--

"10.....

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the

act must have been done by the accused....."

25. The above settled proposition of law had been repeated and reiterated time and again by the Hon''ble Supreme Court in the decision of *Matru @ Girish Chandra v. State of U.P.*, reported in , 1971 (2) SCC 75, *Harish Chandra Ladaku Thange v. State of Maharashtra*, reported in 2008 (1) SCC (Cri) 755 and recently in the matter of *Kanaiya Lal v. State of Rajasthan*, reported in , 2014 (4) SCC 715.

26. It is time tested principle of law that in a case resting squarely on the circumstantial evidence infirmities in between FIR and evidences adduced by the de facto complainant in Court raising grave doubt on the veracity of the prosecution case against the appellants, the evidence of prosecution in regard to the incident could not be accepted in its face value and the same could not be relied upon implicitly for the purpose of finding the conviction of the appellants. Reference may be made to the decision of *Mitter Sen & Ors. v. State of U.P.*, reported in , 1976 (1) SCC 723 and the relevant portion of the above decision is quoted below:--

"5..... The witnesses examined by the prosecution stated that on hearing the noise of the fight, Sajjan Kumar and Laxmi Chand came out of the house with lathis and started assaulting the appellants and their companions, suggesting that the injuries must have been received by appellants Nos. 2 and 3 and Chandra Prakash as a result of lathi blows given by Sajjan Kumar and Laxmi Chand. But when we turn to the first information report which was lodged by Raghubar Dayal, we do not find in it any mention of the names of Sajjan Kumar and Laxmi Chand (sic) came out with lathis and started assaulting the appellants and their companions in exercise of the right of private defence of the person of Raghubar Dayal and Shyam Lal. It is indeed strange that if Sajjan Kumar and Laxmi Chand did in fact come out of the house and start wielding lathis for saving Raghubar Dayal and Shyam Lal from further attack from the appellants and their companions, their names should not have been mentioned in the first information report. The first information report does mention the names of Ram Kishan, Prem Nalwala, Budh Sen, Bhagwan Das and Raj Bahadur, but it makes no mention of Sajjan Kumar and Laxmi Chand. Moreover, there is no explanation offered in the first information report as to how appellants Nos. 2 and 3 and Chandra Prakash came to receive the injuries. The evidence given by the prosecution witnesses in regard to the incident cannot, therefore, be accepted its face value and it cannot be relied upon implicitly for the purpose of founding the conviction of the appellants."

(Emphasis supplied)

27. As discussed hereinabove, we find contradictions in the FIR and the evidence of the de facto complainant, which are of material dimension in nature touching the root of the prosecution case. We also discussed hereinabove the absence of any discussion or observation in the impugned judgment with regard to the

aforesaid contradictions. Therefore, the decision making process of the learned trial Judge in this regard cannot be sustained in law.

28. With regard to the place and time of occurrence of the death of the victim, we find from the evidence of PW 1 (the de facto complainant), PW 2, PW 3, PW 4, PW 5, PW 6 and PW 9, that the dead body of the victim was recovered from the varandah of the residential house of the appellant No. 1. We find from the evidence of PW 10 that the above dead body was recovered from the Baitokkhana of the house of the appellant Nos. 1 and 2. We find no discussion with regard to above contradiction in the oral evidence of the prosecution witnesses in the impugned judgment. The I.O. (PW 14) seized blood stained bed sheet, mosquito net, one blood stained pillow cover from the bedroom of the appellant No. 1. PW 4 was one of the witnesses of the aforesaid seized articles. According to the evidence of PW 11, who had conducted post mortem examination over the dead body of the victim, adduced in course of cross-examination, that there was presence of mud on the different parts of dead body of the victim and according to him such thing could occur if assailant scuffled the victim over a muddy place or after his assassination threw the dead body over a muddy place. Necessary to point out that the forensic laboratory report of the aforesaid seized articles were not produced before the Court. In view of the peculiar facts and circumstances of this case detection of the place of commission of offence in particular i.e. the bedroom or the courtyard/varandah/boitokkhana of the residential house concerned, was essential for the purpose of completing the chain of events so far as the question of commissioning of offence by the appellants was concerned. We find no observations of the learned trial Judge in his impugned judgment in this regard.

29. So far as the time of occurrence of the incident, though there were a few contradictions with regard to the circumstantial evidence of receiving the information of death of the victim by the police, arrival of the police at the place of occurrence, etc., we are of the view that those were of minor in nature taking into consideration the documentary evidence of inquest report, post mortem report, amongst others.

30. According to the learned trial Judge, the prosecution succeeded in proving the facts for arriving at a reasonable inference that the appellants were guilty of commission of offence of murdered the victim on the basis of the evidences available on record in support of the prosecution case but the appellants failed to afford any explanation which might drive the learned trial Judge to draw a different inference.

31. According to the provisions of Section 106 of the Indian Evidence Act, when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. The above provision was interpreted by the Hon''ble Supreme Court in the matter of Sucha Singh v. State of Punjab, reported in , 2001 (4) SCC 375. According to the observations made in the above decision, pre-condition of shifting the burden of finding explanation to the accused persons

that the prosecution has been succeeded in proving the facts for which a reasonable inference can be drawn in favour of commissioning of offence by the appellants. The relevant portion of the above decision is quoted below:--

"19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

32. As discussed hereinabove, there were infirmities in the decision making process of the learned trial Judge in removing the contradictions in between the oral evidence and documentary evidence discussed hereinabove. That apart, the burden of acquiring explanation might have been attached to any one or more appellants when the ownership of the house where the dead body of the victim had been recovered was ascertained.

33. According to the written complaint of the PW 1, the dead body of her husband was recovered on the corridor of the house of the appellant No. 1. The appellant No. 2 (in CRA 7 of 2014) was the wife of the appellant No. 1. According to the PW 2, appellant Nos. 1 and 2 used to reside in two separate houses. According to the evidence of PW 3, the victim was asked to come to the house of three appellants. According to the evidence of PW 6, the appellant No. 1 in possession of the residential house in question. According to the evidence of PW 9, a natural witness, residing at the area of commissioning of the offence, the house in question was in possession of the appellant No. 1. According to the natural witness, who was the resident of the village where the appellant No. 1 had been residing, the dead body of the victim was recovered in the house of appellant Nos. 1 and 2. Therefore, in absence of ascertaining the ownership of the house of commissioning of offence the burden of finding explanation should not have been shifted to all the appellants to dislodge the prosecution case.

34. With regard to the contention of absconding of the appellants from the place of recovery of the dead body of the victim on the date of occurrence of the incident of his death, it was decided by the Hon'ble Supreme Court in the matter of Sk. Yusuf v. State of West Bengal, reported in , (2011) 11 SCC 754, that in a case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. According to the above decision, it is quite possible that he may be running away merely on being suspected out of fear of police arrest and harassment. The relevant portion of the above decision is quoted below:--

"31. Both the courts below have considered the circumstance of abscondence of the appellant as a circumstance on the basis of which an adverse inference could

be drawn against him. It is a settled legal proposition that in a case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely on being suspected, out of fear of police arrest and harassment. (Vide *Matru v. State of U.P.*, *Paramjeet Singh v. State of Uttarakhand* and *Dara Singh v. Republic of India*.) Thus, in view of the law referred to hereinabove, mere abscondence of the appellant cannot taken as a circumstance which gives rise to draw an adverse inference against him."

35. After considering the evidences on record, we are of the opinion that the observations made by the Hon"ble Supreme Court in the above decision is applicable in the instant case. That apart, appellant No. 2 (in CRA 7 of 2014), amongst other accused persons, was arrested from the area near Golapganj

36. Investigating Centre on September 15, 2012, appellant No. 1 was arrested on September 20, 2012, and the appellant No. 2 surrendered before the Court of learned Chief Judicial Magistrate, Malda, on January 18, 2013.

37. In view of the above, the decision making process of the learned trial Judge in convicting the appellants for commissioning of the offence under reference taking into consideration the fact of abscondence of the appellants as one of the consideration in the facts and circumstances discussed hereinabove cannot be sustained in law.

38. In the decision of *Polamuri Chandra Sekhrrao @ Chinna @ Babji v. State of Andhra Pradesh* (supra), the Apex Court arrived at a conclusion that the accused person was under obligation to offer explanation in support of his innocence due to discovery of the dead body of the victim from the courtyard of his house taking into consideration the provisions of Section 106 of the Indian Evidence Act. But in view of the distinguishable facts and circumstances of the instant case and in particularly the reasonable doubt with regard to the ownership and possession of the residential house in question, the above decision has no manner of application in this case.

39. In view of the discussions and observations made hereinabove, the impugned judgment, order of conviction and sentence are quashed and set aside.

40. These appeals are, thus, allowed. The appellants are directed to be set free expeditiously unless required in any other criminal case.

41. Let this judgment together with the Lower Court's records be sent back to the learned Court below expeditiously.

42. Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J.—I agree.