

(2004) 03 CAL CK 0058
In the Calcutta High Court
Case No : C.R.A. No. 438 of 2001

Shyamkamal Khawas and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 08-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 161, 173, 313

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2004) 2 CHN 321

Hon'ble Judges : Nure Alam Chowdhury, J;Arun Kumar Bhattacharya, J

Bench : Division Bench

Advocate : Sekhar Basu and Jyotirmoy Adhikary, for the Appellant; R.P. Bhattacharya, for the Respondent

Final Decision : Dismissed

Judgement

Arun Kumar Bhattacharya, J.—The hearing stems from an appeal preferred against the order of conviction and sentence passed by the learned Additional Sessions Judge, Purulia in the Sessions Case No. 77/1995 (ST 16/96) on 13.09.2001.

2. A thumbnail sketch of the prosecution case is that on 31.08.1993, Tuesday, at about 8.30 p.m. accused Anadi, Chutan, Jagannath, Buka & Shaktipada came to the residence of the de facto complainant and informed her parents that they would go to Bokaro by a train at 10.00 p.m. for settlement of dispute amongst their brothers in presence of Lakhan & Shakti. She and her mother on good faith allowed her father Phunga to go with them and they accompanied those accused persons and her father upto Sunri Dam where on seeing accused Shyamkamal, Rasraj, Shambhu, Trilochan & 2/3 unknown persons, they became frightened. The accused persons asked them not to be worried as they would bring back Phunga within two days. As Phunga did not return till 12.00 hrs. on 2.9.1993, the de facto complainant and her mother asked for his whereabouts from the

accused persons who gave them to understand that he would come back within a day. On receipt of an information that a dead body was lying in a paddy field by the side of jungle, the de facto complainant had been there and found the dead body of her father followed by her reporting the matter to the P.S. through one Gangadhar Rajak and then lodging a complaint. Hence, all the accused persons were charged under Sections 364/34, 302/34 & 201/34 I.P.C.

3. The defence case, as suggested to PWs. 1 & 5 and as contended by the accused persons during their examination u/s 313 Cr. P. C., is that on the relevant night neither accused Anadi & four others went to the house of de facto complainant and took her father away for Bokaro for settlement of "bhaiyadi" dispute nor she and her mother accompanied them and her father upto Sunri Bundh nor they found four other accused persons viz. Shyamkamal, Trilochan, Shambhu & Rasraj there. The family of the de facto complainant had no "bhaiyadi" dispute with accused Chutan, Buka & Anadi. Accused Jagannath who is a pump operator of Chitmu Pump House, stayed there at night and he was not present at Sunri Dam. The present case has been filed falsely at the instance of Anandamargis of the locality and local people.

4.14 witnesses were examined on behalf of the prosecution, while none was examined on behalf of the defence and after considering the facts, circumstances and materials on record, the learned Court below found all the nine accused persons guilty under sections 302/34 I.P.C. & 364/34 I.P.C., convicted them accordingly on 12.09.2001 and sentenced them to suffer imprisonment for life and R.I. for 10 years each respectively on 13.09.2001.

5. Being aggrieved by and dissatisfied with the said order of conviction and sentence, the convicts have preferred the present appeal.

6. All that now requires to be considered is whether the learned Court below was justified in passing the said order of conviction and sentence.

7. The present case rests on circumstantial evidence -- the circumstance being that the victim was last found together with the accused persons.

8. Before a person can be convicted on the strength of circumstantial evidence, the circumstances in question must be satisfactorily established and the proved circumstances must bring home the offence to the accused beyond all reasonable doubts. If these circumstances can be explained by any reasonable hypothesis, then the accused must have the benefit of the hypothesis Naresh Kumar Vs. State of Maharashtra, When a case rests entirely on circumstantial evidence, such evidence must satisfy the following tests : (1) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established and not "may be established", (2) the circumstance should be of a conclusive nature and definite tendency unerringly pointing towards the guilt of the accused and the facts so established should be consistent not only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty but they

should exclude every possible hypothesis except the one to be proved and (3) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused Sharad Birdhichand Sarda Vs. State of Maharashtra,

9. Out of the above 14 witnesses, PW. 1 (de facto complainant), her mother (PW. 5) & PW. 6 (autopsy surgeon) are vital, others being post occurrence and formal witnesses.

10. According to the evidence of PW. 1, on Tuesday night at about 8/8.30 p.m. accused Anadi, Buka, Chutan, Jagannath & Shaktipada came to their house and called her parents on telling that they would go to Bokaro at 10.00 p.m. by a train for settlement of the previous dispute. She accompanied her parents to Sunri Bundh which is at a distance of about 150/200 cubits from their house where she found on the embankment accused Shyamkamal, Trilochan, Rasraj & Shambhu who told that they would settle the dispute arising out of "bhaiyadi" (agnetic) relation and that after two days her father would be brought back. In cross-examination she stated that there were other unknown persons besides those four accused persons. However, they decided to take her parents with them and lastly they took her father alone. She and her mother returned to their house. On the following morning when PW. 4 came to their house to call her father to go for work, they narrated the incident to him. Similarly, they narrated the incident to PW. 2, PW. 7, PW. 8, PW. 11 & PW. 12. Two days after when her father did not return, she and her mother asked the accused persons regarding the whereabouts of her father and they replied that he would return by tomorrow. On hearing a rumour about murder of a person, she went to the paddy field of Madhai Garai (PW. 10) and found her father lying on his back covered by mud. She came back to her house on weeping, informed her mother and then both of them rushed to the spot. On being informed about the matter through Gangadhar (PW. 8), Police (PW. 13) visited the P.O. and their village when she handed over a written complaint (Ext. 3). The above evidence of PW. 1 is corroborated on material point with her mother (PW. 5) - an eye-witness as also PW. 8 & PW. 11, PW. 2, PW. 3, PW. 4 who are witnesses to the inquest apart from PW. 7, PW. 11 & PW. 12, lifted the dead body of the victim from the paddy field as per instruction of police. Though PW. 2, PW. 3, PW. 4 who, as stated, had been to the house of PW. 1 to call the victim to go with them for work, as also PW. 7 supported the above evidence of PW. 1 about reporting of the incident to them that part of their evidence cannot be taken into consideration due to contradiction for omission on vital point in the absence of any earlier statement u/s 161 Cr. P. C., as is evident from the admission of PW. 3 in cross-examination and evidence of PW. 13 (first I.O.). Similar is the fate of evidence of PW. 5 to that extent. PW. 11 came to learn from PW. 5 about taking away of the victim to Bokaro by accused Anadi, Chutan, Buka & 5/6 others. PW. 6 on holding P.M. Examination (Ext. 2) on 3.9.1993 at about 2.30 p.m. found the dead body of the victim decomposed, foul smell present, skin peeled off totally with greenish

discolouration, scattered matured maggot present, hairs peeled off totally and the following: (1) right side of face probably beaten by wild animals, (2) right ear absent, (3) gross wound over right arm, (4) wound over right thigh, (5) wound over front of chest directive backwards and downwards. In his opinion, cause of death was due to shock and haemorrhage as a result of the above noted injuries which might be ante mortem and homicidal in nature. Generally; after the death of 24 hrs. to 36 hrs. decomposition starts over the dead body, said he.

11. Ordinarily, the fact that accused and deceased were last found together and failure of accused to explain disappearance is a circumstance pointing to murder by accused (AIR 1979 SC 1944.....). In the present case, the accused persons took away the victim at about 8/8.30 p.m. of 31.8.93 representing that they would go to Bokaro for settlement of dispute amongst their brothers and they would bring him back within two days, but on 2.9.93 the victim was found lying dead in a paddy field with five injuries. The evidence adduced by PW. 1, PW. 5, PW. 8 & PW. 11 appears to be satisfactory and there is no reason to disbelieve their testimony. It is true that Section 106 of the Evidence Act cannot be used to shift the onus of proving the offence from the prosecution to the accused, but where there is satisfactory evidence fastening or fixing the liability for the death on the accused, in the absence of any other explanation the only possible inference would be that all the accused participated in the crime. If anyone of them claims contrary u/s 106 the burden of proving that fact would be upon him since that is within his special knowledge. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes it a prima facie case, that the question arises of considering facts of which the burden of proof may be upon the accused [1992(i) Crimes 409 ; AIR 1974 SC 770]. Here, there is no explanation on behalf of the accused persons consistent with their innocence. It was contended by accused Jagannath during his examination u/s 313 Cr. P. C. that he being the pump operator of Chitmu Pump House stayed there at night and he was not present at Sunri Dam. Onus to prove "alibi" is on the accused as it is a matter within his special knowledge Chandrika Prasad Singh and Others Vs. The State of Bihar, and plea of alibi when taken by an accused must be conclusively proved by him State of Haryana Vs. Sher Singh and Others, He must lead evidence to show that he was so far off at the moment of the crime from the place when the offence was committed and that he could not have committed the offence. In the present case, there was no attempt on the part of the said accused to prove the alleged alibi and so it fails. Moreover, plea of alibi disclosed for the first time in a statement u/s 313 Cr.P.C. without being suggested in cross-examination, as has been done in the present case, is fatal for defence [1980 Cri. LJ 1999]. Therefore, absence of any explanation and/or false explanation on behalf of the accused persons can be used as an additional link to the chain of events.

12. It is the evidence of PW. 1 that after two days when her father did not return to house, she and her mother asked all the nine accused persons regarding whereabouts of her father and they told that her father would return by

tomorrow which is more or less buttressed by PW. 5 who deposed that on Wednesday (subsequently corrected as Thursday in cross-examination) when her husband did not return they found Anadi, Chutan & Buka at their village, that both of them went to the house of Shyamkamal, Trilochan, Rasraj, Shaktipada and others one after another to enquire about her husband and they reported that he would return by tomorrow, and there is no denial of it in their cross-examination. As per evidence of PW. 8, on their return to village, on 2.9.93 when PW. 1 and PW. 5 asked accused Anadi regarding the whereabouts of the victim the latter stated that he would return tomorrow. He is silent as to wherefrom he came to learn about it. Nevertheless, there is, of course, absence of earlier statement of PW. 5 u/s 161 Cr. P. C., as is evinced from the evidence of PW. 13, that on Thursday she had been to the house of Anadi, Chutan & Buka and enquired about her husband. As a matter of law, statement of police are meant to be brief, and omission amounts to contradiction when it is in respect of a vital point *Surender Kumar Aggarwal Vs. Satyapal Varshneya*, but omission to minor details cannot be utilised as contradiction *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, . So, the said omission being in respect of minor details does not appear to be a contradiction. If a witness is sought to be contradicted u/s 145 of the Evidence Act with reference to his previous statement, his attention must be drawn to that statement. Here, the said procedure having not been followed in respect of the balance statement of PW. 5 her evidence remains unshaken to that extent. The above very evidence strengthens the prosecution story of involvement of the accused persons with the crime and leads to show that knowing fully well that the victim would never return, they falsely represented about return of the victim by tomorrow only for allaying the situation, since presence of matured maggot on the decomposed dead body of the victim leads to suggest that the murder took place on that very night i.e. 31.8.93.

13. Mr. Sekhar Basu, learned Counsel for the appellants, on referring to the evidence of PW. 6 who could not comment as to how the injuries were caused and whether injury No. 5 alone may sufficiently cause death of a human being and opined that injuries 1 to 4 are not sufficient to cause death of a man and cause of death might be ante-mortem and homicidal in nature and the evidence of PW. 10 that his adjoining lands are covered with jungle and there are hillocks in and around his land advanced argument contending that when the autopsy surgeon is not sure about the cause of death i.e. homicidal or not, it gives rise to a reasonable suspicion as to whether human hands could at all be attributed to such death in view of the fact that the right side of face was probably beaten by wild animals, as was found by the autopsy surgeon, and as such conviction based on suspicion should not be sustained. It is the specific case and evidence of the prosecution that the accused persons along with 2/3 unknown persons took away the victim on that night at about 8/8.30 p.m., and so the possibility of attack by wild animal and causing the said injury No. 1 i.e. biting of the right side of the face during his lifetime is ruled out. P. M Examination was held after about 2 1/2

days. The dead body was decomposed with presence of matured maggot and skin & hairs peeled off totally. Though PW. 6 opined that injury Nos. 1 to 4 are not sufficient to cause death of a man and he could not comment as to whether injury No. 5 alone i.e. would over front of chest directive backwards and downwards may sufficiently cause death of a human being. It is to be borne in mind that the injuries found should be read as a whole and not in piecemeal and thus it would not be proper to adopt the process of etymological dissection and after taking words or sentence out of their context to proceed to construe it. Cause of death, as opined by PW. 6, was due to shock and haemorrhage as a result of the above noted injuries which might be ante-mortem and homicidal in nature i.e. death was the result of the cumulative effect of those injuries. It may be noted that the attack was not an ordinary one but a consistent and determined attack. So the above contention of Mr. Basu cannot at all be sustained.

14. Mr. Basu on referring to the cross-examination of PW. 5 next contended that had there been any alleged ill-intention, PW. 5 would not have been requested to accompany them to Bokaro. The short answer is that it may be an eye-wash only for getting a negative reply since she could not be expected to leave house keeping her daughter PW. 1 alone.

15. Mr. Basu adversely criticized the unusual conduct of PW. 8 who despite his knowledge of the incident from PW. 1 & PW. 5 did not disclose it either at the Pundag O.P. or to I.O. at the time of recording his statement u/s 161 Cr.P.C. It is the evidence of PW. 8 that when he had been to the field of PW. 10 at about 12.00 hrs. there were a number of persons including their villagers. He was behind PW. 1 & PW. 5 on way to the said paddy field and he had no discussion with PW. 1 & PW. 5. On seeing the dead body he went to Pundag O.P. for reporting about the incident as per advice of the persons present. The above evidence shows that he went to Pundag O.P. only for reporting about the unnatural death of the victim which may be clear from the evidence of PW. 13, and so, non-reporting about the entire incident on his part to Pundag O. P. will not give rise to any suspicion. There was no attempt on the part of defence to contradict PW. 8 with reference to his earlier statement u/s 161 Cr. P. C. on vital point.

16. On referring to the evidence of PW. 3, PW. 7, PW. 8 & PW. 13 Mr. Basu further argued that time of arrival of I.O. (PW. 13) at the P.O. is inconsistent with some of the PWs, thereby leading to a reasonable suspicion regarding trustworthiness of the prosecution story. He also contended that instead of going to the spot first, I.O. visited the village and being accompanied by PW. 8 went there which was beyond the normal conduct of an I.O. All the relevant witnesses viz. PW. 1, PW. 4, PW. 7 & PW. 8 stated that the police came to the village at the sunset time. PW. 3 alone deposed regarding visit of police at about 1.30 p.m. which is belied by PW. 8 who reached Pundag O. P. at about 3/ 3.30 p.m. for the purpose of reporting about the death of the victim followed by his return, and so the said

evidence of PW. 3 may be ignored. PW. 13 on receipt of information over R.T. message from Pundag I.C. made a G.D. entry dated 2.9.1993, rushed to the village Chitmu at about 19.20 hrs. contacted PW. 8 and had a talk with him about the matter of information which he received over R.T. message from Pundag I.C., received the F.I.R. at about 19.15 hrs., visited the P.O. being accompanied by PW. 8 and started investigation, as it stands on over all consideration of his evidence. Since he did not have a direct contact with PW. 8 who gave information about unnatural death to Pundag O.P., no sinister motive can be imputed to his first visiting the village and contacting PW. 8 in above circumstances, as prudence would suggest a different course. That he received the F.I.R. at 19.15 hrs. tallies with the endorsement on the F.I.R. itself. PW. 1 deposed that the written complaint was made over to police at their village which is supported by the testimony by PW. 8 who scribed the F.I.R, sitting at the house of PW. 5 in presence of police, and also PW. 5. So the evidence of PW. 13 at one place of his cross-examination that he reached village Chitmu at 20.25 hrs. from the paddy field and prior to reaching the village he was engaged in the investigation in the paddy field which is self-contradictory appears to be a mistaken one inasmuch as it is a specific evidence that he first visited Chitmu village at 19.00 hrs., contacted PW. 8, had a talk with him and started investigation after receipt of F.I.R. Apart from this, there are 2/3 other minor discrepancies which cannot undo the effect of evidence otherwise sufficient on record. The witnesses are deposing after a lapse of about 6 1/2 years. Powers of observation, memory and recapitulation differs from man to man and memory is apt to be blurred in the passage of time, and so the said discrepancies being not vital may be ignored, as minor contradictions which are inevitable when the story of a crime is narrated are not material when there is general agreement and consistency in regard to the substratum of the prosecution case State of Uttar Pradesh Vs. Ram Sagar Yadav and Others, , Jagdish Vs. State of Madhya Pradesh, , State of Punjab Vs. Wassan Singh and Others, .

17. On drawing Court's attention, to the evidence of PW. 1, PW. 3 & PW. 4 Mr. Basu next argued that prior enmity between some PWs. and the accused persons was much active and the said enmity combined with political rivalry between the two rivals prompted them to initiate the instant case being piloted by PW. 8, but the learned Court below failed to assess the veracity of the prosecution story and accepted whole untruth as truth thereby arriving at a most unjudicious conclusion resulting in miscarriage of justice. It is the evidence of PW. 1 that her father had a quarrel with Anadi, Chutan & Buka about six months before the occurrence. "Bhaiyadi" quarrel arose between Anadi & his brothers and her father, as their cow entered into the house of Anadi, and while her father was alive the rajaks of their village did not participate in any social function at their house and there was no talking term of Anadi & others with her father prior to that night when they came to call her father. The evidence of PW. 4 who is a supporter of "Amra Bangali Party", reveals that he and others are accused persons in a case brought by accused Trilochan over an incident of 22.4.1993 at

the house of Trilochan and the accused persons are supporters of C.P.I.(M). The victim, as stated by PW. 7, was a supporter of "Jharkhand Party". Now, enmity between the accused and the victim is a double-edged weapon since it may provide incentive for the crime and it may also provide reasons for falsely implicating the accused. However, to a suggestion put to PW. 5 in cross-examination that being influenced by the Anandmargis of their locality she has filed the case falsely which has been categorically denied by her. No material has been placed on behalf of the defence in this regard. Merely accused there were five rival political parties in the village, in the absence of any cogent evidence it does not necessarily follow that the present case was the outcome of some rival political party. On the next morning of the incident the matter regarding taking away of the victim by those accused was reported to some PWs, and after recovery of the deadbody complaint was lodged without delay. PW. 8 who scribed the F.I.R. under the instruction of PW. 1 frankly stated about pendency of a criminal case against him for throwing bomb upon one Kista Majhi, but the case cannot be said to have any nexus with the present one. Similarly, the incident of gherao of the house of accused Trilochan by some miscreants of village, as deposed by PW. 3, has no connection with the instant case. It has nowhere been suggested that either PW. 1 or PW. 5 has or had any personal grudge against any accused. Even if, assuming arguendo, they had strained relation, this is no ground for discarding their testimony Babu and Others Vs. State of Uttar Pradesh, especially when it is also buttressed by two other witnesses, viz. PW. 8 & PW. 11. No animus of those PWs. 8 & PW. 11 against the accused having been made out, it improbabilises the hypothesis of their false implication. Even in a murder case, conviction may be based on the testimony of a single reliable witness Shrishail Nageshi Pare Vs. State of Maharashtra, Corroboration as a rule of prudence requires material fact which in the case on hand exists. Witnesses have to be weighed and not counted since quality matters more than quantity in human affairs.

18. As regards motive, absence of motive does not disprove the prosecution case if the prosecution succeeds in proving the same Bahal Singh Vs. The State of Haryana, . The presence of motive is relevant u/s 8 of the Evidence Act as it goes to show the mens rea of a crime and it is a circumstantial evidence against the accused (1970 Cr. LJ 1081). The prosecution is not to prove motive for it is known only to accused State of Haryana Vs. Sher Singh and Others, . Proof of motive satisfies the judicial mind about likelihood of the authorship but its absence only demands deeper search and cannot undo effect of evidence. In the case on hand, "bhaiyadi" quarrel between accused Anadi & his brothers and the victim arose about six months back over the issue of entering of the cow of the victim into the house of accused Anadi, and there was no talking term even between accused Anadi & others and the victim prior to the fateful night, and so the said strained relation might have prompted the accused persons to eliminate him from the world.

19. In the premises, in the light of the above discussion, there appears to be no

material to interfere with the findings of the learned Court below.

20. Before the record is parted with, it is necessary to point out that where the prosecution case is that the person abducted has been murdered by the abductor, there can be no scope for a charge u/s 364 I.P.C., and the abductor should be charged with murder pure and simple Upendra Nath Ghose Vs. Emperor, . As such, the conviction and sentence u/s 364/34 I.P.C. deserves to be set aside.

21. Accordingly, while the conviction and sentence u/s 302/34 I.P.C. passed by the learned Court below against the accused persons is hereby confirmed, the judgment stands modified to the extent that the conviction and sentence u/s 364/34 I.P.C. of the accused persons be set aside. The accused persons stand acquitted of the charge u/s 364/34 I.P.C.

22. The appeal accordingly fails and is dismissed.

23. Let a copy of this judgment along with the L.C.R. be sent down at once to the learned Court below.

Nure Alam Chowdhury, J.

24. I agree.