
(2019) 09 CAL CK 0040
In the Calcutta High Court
Case No : Criminal Appeal (CRA) No. 592 Of 2005

Siddique Sk

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Evidence Act, 1872 — Section 106, 157
Indian Penal Code, 1860 — Section 302, 379, 380
Code Of Criminal Procedure, 1973 — Section 161, 313

Citation : (2019) 09 CAL CK 0040

Hon'ble Judges : Asha Arora, J; Manojit Mandal, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharya, Sonali Das, Sukanya Bhattacharya,
Mirza Firoj Ahmed Begg

Final Decision : Dismissed

Judgement

Manojit Mandal, J

1. The appeal is directed against the judgment and order of conviction and sentence dated 24.06.2005 passed by learned Additional Sessions Judge, 1st Court, Berhampur, Murshidabad in Sessions Trial No. 01 of February 2005 arising out of Sessions Case No. 389 of 2004 convicting the appellant under Section 302 of the Indian Penal Code (hereinafter referred to as "I.P.C") and sentencing him to suffer imprisonment for life and also to pay a fine of Rs.2000/- (Rupees Two Thousand only) in default to suffer simple imprisonment for six months.

2. The gist of the prosecution case as levelled against the appellant is that Bhutto @ Ali Hasan, aged about 8 years and Kaluni, aged about 10 years were the children of PW 10 and PW 11 and 'Bhagna' and 'Bhagni' of PW 1. At the material point of time said Bhutto @ Ali Hasan and Kaluni used to reside with PW 1. On 28.07.2002 at about 8:00 a.m. both Bhutto @ Ali Hasan and Kaluni left with 5 goats for grazing to the Dam of Mauza Kashimpur. Till noon they did not come back. PW 1 searched for them but in vain. On 29.07.2002 at about 5

O'clock in the morning PW 1 received an information that dead body of both the children were found tied with raw jute ropes around the necks in a jute field within village Kashimpur. One of the goats was found lying dead with its neck spotted by raw jute. PW 1 alleged that appellant told one day before the incident i.e. on Saturday that on the next day i.e. on Sunday he would go Kashimpur village to harvest his jute crop and invited both the deceased to go with their goats to his field to feed their goats. PW 1 strongly believed the involvement of the appellant in the murder of the said two children.

3. On the basis of the said petition of complaint, Domkol P.S. Case No. 89 of 2002 dated 29.07.2002 under Section 302/379 of the I.P.C. was registered.

4. Police investigated the case as usual and after completion of investigation submitted charge-sheet against the appellant and others under Sections 302 and 380 of the IPC.

5. Charge under Section 302 of the IPC was framed against the appellant by the learned Trial Court.

6. The prosecution examined 13 witnesses and marked as many as 13 documents as exhibits. On the other hand, the appellant did not adduce any defence witness.

7. In conclusion of trial, the learned Trial Judge by judgment and order dated 24.06.2005 convicted and sentenced the appellant as aforesaid.

8. Mr. P.S. Bhattacharya, learned Senior Advocate appearing for the appellant argued that the impugned judgment and order of conviction and sentence are not sustainable and the appellant has been falsely implicated in this case. It is contended that the impugned judgment is wholly based on surmises and conjectures and is not founded on any positive, cogent and legal reasoning. It is further contended that there are two First Information Reports (hereinafter referred to as F.I.R.s) in the present case. The first complaint was lodged by one Abdus Sadeque on 29.07.2002 (Ext. 13). Suppressing the first complaint, the present FIR was lodged by PW 1 which was treated as Domkal P.S. Case No. 89 of 2002 dated 29.07.2002 under Sections 302/379 of the I.P.C. As such, suppression of the first complaint gives rise to suppression of the actual state of affairs and the appellant has been implicated in this false case. It is further contended that in the first complaint (Exbt.13) lodged by Abdus Sadeque, the appellant has not been named as an accused but in the subsequent complaint he was falsely implicated by PW 1. As such, the subsequent implication of the appellant in the second complaint goes to show that the allegations against the appellant are an afterthought. It is further contended by the learned Senior Lawyer of the appellant that the inquest report was prepared in presence of PW 3 and PW 5 and they signed on the inquest report but they have not stated in the inquest report about the name of the assailant. It is further submitted that the evidence of "Last Seen" is a very weak piece of evidence and cannot be the basis of conviction. So, the appellant has been wrongly convicted and he should be

acquitted from this case. In support of his argument he has relied upon the decisions reported in (2007) 2 C.Cr.Lr. (SC) 669 Sujoy Sen @ Sujoy Kr. Sen v. State of West Bengal and (2016) 1 SCC 550 Nizam and Another v. State of Rajasthan.

9. On the other hand, Ms. Sukanya Bhattacharya, learned Advocate appearing on behalf of the State, submitted that the evidence of the prosecution witnesses are cogent, convincing and acceptable. She has further urged that evidence of "Last Seen Together" has been duly proved by the prosecution witness and the appellant has failed to discharge the onus that he parted company with deceased. In support of her argument that she has relied upon the decisions reported in (2003) 1 Supreme Court Cases 534 Sahadevan @ Sagadevan v. State represented by Inspector of Police, Chennai and (1980) 1 Supreme Court Cases 530 Pohalya Motya Valvi v. State of Maharashtra. So the appellant has been rightly convicted.

10. We have heard the learned Counsels for the parties and considered their submission.

11. PW 1 is the defacto complainant in this case. He had stated that deceased Bhutto @ Ali Hasan and Kulsan @ Kalini Khatun are his 'Bhagna' and 'Bhagni' and they used to reside in his house. Both the deceased were engaged to do household works like grazing goats. On 11th Sraban Sunday, 1409 B.S. at about 7:00 a.m. both the deceased left the house taking 5 goats. One day, prior to the date of incident appellant, his co-villagers came to his house. Appellant told him to send his goats to the field as because appellant cultivated jute in his field and he would cut the jute on the date of incident. Accordingly, both the deceased left the house with the goats. Till noon, the deceased did not return to his house and then he came out for searching them. They continued their search but they failed to trace out them. However, on the following morning some of the labourers who went to the jute field informed him that they have found two dead bodies by the side of the jute field. Accordingly, he rushed to the spot and found his said 'Bhagna' and 'Bhagni' lying dead with a gallop of jute string. He has further deposed that he found also one of the goats lying there and also a rope was found. The dead bodies were found strangulation with rope of jute. He searched for appellant. But the appellant was not found in the village. Later, police found out his stolen goats with the possession of others. Thereafter, he went to the police station and lodged written complaint to the police station. This witness was extensively cross-examined by the defence. He stoutly denied the defence suggestion that appellant never came to his house and his suspicion about involvement of appellant is baseless. Therefore, on scrutiny of the evidence of PW 1, I find that PW 1 had taken prompt action immediately after recovery of the dead bodies of his 'Bhagna' and 'Bhagni' and he has fully corroborated his earlier statement made in the written complaint (Exbt. 1). I find nothing to shake the credence of his evidence. There is no reason to believe why he would depose falsely against the appellant. He has clearly stated in his evidence how the

appellant came to his house and what stated to him. I also do not find any justified reason why PW 1 would implicate the appellant falsely letting off the real culprits.

12. PW 4 is Abdul Kaher who has duly corroborated the evidence of PW 1 by saying that on 11th day of Shrabhan, Sunday Kalini and Ali Hasan were murdered. Prior to the date of murder appellant told them that on the following day they would cut the jute and deceased might go to the jute field with their goats for feeding them. On the date of incident he heard that both of them were lying dead on the field and he rushed to the spot and found that raw jute was tied against their respective necks. It appears to him that they were murdered by strangulation. He has further deposed that he found one goat lying dead by the side of the dead bodies. Appellant was not found in the village subsequent to the incident. This witness was also cross-examined by the defence at length. On scrutiny of his evidence, I find nothing to shake the credence of his evidence.

13. PW 6 is Abdul Siddique who has deposed that Kaluni and Bhutto are dead and they used to look after the goats of PW 1. They were murdered about 2/21/2 years ago in the jute field. One day prior to the date of incident appellant told the deceased that he would cut the grown up jutes and told them to go to the field with their goats so that they can feed their goats with jute leaves. He has further deposed that besides himself, PW 4, PW 7 and others were present when appellant was taking with the deceased. He has further deposed that on the following date in the morning he found two deceased with their goats came and stood in front of the house of the appellant. Thereafter, appellant along with both of the deceased and the goats went to the jute field. He has further deposed that till evening, the deceased did not return along with their goats. So, all of them came out for search of them. Appellant was not found in his house. He has further deposed on the next date on Sunday dead bodies of the deceased were detected in the jute field. Their hands were tied with jute rope and also their necks were tied in the same manner. He found one goat lying dead. This witness was also extensively cross-examined by the defence. On scrutiny of his evidence I find nothing to shake the credence of his evidence.

14. PW 7 is Motiur Rahaman who has deposed that Bhutto and Kaluni were murdered about 21/2 years ago. On 10th Shrabhan, Saturday in the evening, the appellant told the deceased that he would cut the grown jute stick on the following day i.e. on Sunday and asked them to visit the jute field with their goats so that they can feed their goats with jute leaves. When appellant was taking as such to the deceased, then PW 4 and PW 7 were present. He has further deposed that on the following morning he found that appellant was going towards the jute field followed by the deceased with their goats. He has further deposed that they also saw that appellant was gesturing them to come to the jute field from a little distance. By the end of the day deceased did not come back. They came out for their search but they found none of them including the appellant. In course of search they found the deceased lying dead in the jute

field and hands and necks of both the deceased were tied with rope. Police came at the spot after the incident and held inquest over the dead bodies of the deceased. This witness has proved his signature in the seizure list. This witness was cross-examined by the defence at length. This witness has stoutly denied the defence suggestion that appellant did not state the deceased to go to the jute fields with their goats for feeding them and that he had enmity with the appellant.

15. PW 9 is the sister of the PW 1. She has deposed that deceased Bhutto and Kaluni used to reside with them. About 21/2 years ago both of them were murdered. On the relevant date, appellant came to their house and told his 'Bhagna' and 'Bhagni' that on the next day he would cut his grown up jute stick and asked them to go to his jute field with the goats for feeding them with jute leaves. This talk was held on Saturday afternoon. She had further deposed that on the next day i.e. on Sunday in the morning both her 'Bhagna' and 'Bhagni' were sleeping with her. Then appellant came and hinted his presence by clapping his hands and also announced that he was going to his jute field. She has further deposed that she woke up both of them and asked them to go to the field of the appellant with the goats. Appellant went to the jute field followed by them with the 5 goats. When the children did not come back, she came of the house and began to search for them but she failed to trace out them. She has further deposed that on the morning of Monday, she heard that bodies were found in the jute field and accordingly she went there and identified the dead bodies to be her 'Bhagna' and 'Bhagni'. One goat was found lying dead by their side. She found that the hands and necks of both of them were tied with rope. This witness was subjected to extensive cross-examination. On a scrutiny of the evidence of the PW 9, I find nothing to shake credence of her evidence. Considering the evidence of PW 4, PW6, PW 7 and PW 9 it is apparent that they have duly corroborated each other.

16. PW 2 is Moslam Ali who is the scribe of the written complaint. He has proved the written complaint (Exbt. 1) into evidence.

17. PW 3 is Md. Abdul Basir who has deposed that Ali Hasan and Kaluni were murdered and he was present at the time of holding inquest on the dead bodies of the deceased. He has proved his signatures on the inquest reports (Exbt. 2 and Exbt. 3) into evidence.

18. PW 5 Mafikul Islam is another witness of the inquest. He has proved his signatures on both the inquest reports (Exbt. 2/1 and Exbt. 3/1) into evidence.

19. PW 8 is the witness of seizure. PW 10 and PW 11 are the parents of the deceased. PW 10 and PW 11 have stated that Ali and Kaluni were their son and daughter and they were murdered.

20. PW 12 is doctor Hriday Kumar Mandal of New General Hospital, Berhampur. He has deposed that he conducted post examination over the dead bodies of Ali Hasan and Kulsan Khatun. On examination he found the following injures on the

person of Ali Hasan:-

- i. Multiple ligature mark around the neck.
- ii. Jute plant found around the neck.

He opined that cause of death of Ali Hasan was homicidal and ante mortem in nature. He has proved Post Mortem Examination Report of Ali Hasan (Exbt. 5) into evidence.

He has further deposed that on examination of Kulsan Khatun, he found the following injuries:-

- i. Multiple ligature marks around the neck.

He opined that cause of death was due to strangulation which was ante mortem and homicidal in nature. The said doctor has proved the Post Mortem Examination Report of Kulsan Khatun (Exbt. 6) into evidence.

21. On consideration of the above evidence of the prosecution witnesses, I find that this is a case entirely based on circumstantial evidence. It is no longer resintegra that to establish a case against an accused on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn should be fully established and the facts so established on the circumstances relied upon by the prosecution must always be consistent only with the hypothesis of the guilt of the accused and not with his innocence.

22. PW 4, PW 6 and PW 7 found the appellant talking to the deceased just one day before the date of incident in the house of PW 1 and PW 9, where both the deceased used to stay. They also found that the appellant came to the house of PW 1 and PW 9 on the next day morning and both the deceased followed him towards jute field. So, both the deceased were last seen together with the appellant. PW 4, PW 6, PW 7 and PW 9 were cross-examined at length and in full but nothing was brought out from their cross-examination to doubt their credibility. The learned Counsel for the appellant has not been able to point out any contradiction in the testimony of those witnesses, on whose evidence the prosecution case rests. The defence has also not come out with any explanation what happened after going to the field in between the appellant and both the deceased in the said jute field.

23. The evidence of PW 4, PW 6 and PW 7 including their cross-examination reveals that they found that the hands and necks of both deceased were tied with jute rope. The medical officer (PW 12) found that jute plant found around the neck. He has further opined that cause of death of both the deceased was homicidal and ante mortem in nature. Thus, I find that medical evidence has corroborated the ocular evidence i.e. the statements of PW 4, PW 6, PW 7 and PW 9.

24. I have already decided in my forgoing paragraphs that both the deceased and the appellant were last seen alive on 11th day of Shrabān, Sunday, 1409

B.S. The provision of Section 106 of the Evidence Act itself is unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden but if he fails to offer an explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 of the Evidence Act does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. This principle has been succinctly stated in *Naina Mahamad, In Re* reported in AIR 1960 Madras 218. A similar view was also taken in *Sahadev v. State* reported in (2003) 1 SCC 534 and in *State of Rajasthan v. Kashi Ram* reported in (2007) 1 SCC (Cri) 688.

25. In *Sahadev v. State* (Supra) the prosecution established that the deceased was seen in the company of the appellants from the morning of 05.05.1985 till at least 5 p.m. on that day when he was brought to his house and thereafter his dead body was found in the morning of 06.03.1985. In the background of these facts the Hon'ble Court observed:

"Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 Code of Criminal Procedure they have not taken any specific stand whatsoever".

Since, in the instant case, the appellant Siddique Sk. failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

26. The evidence of PW 1 including the cross-examination reveals that PW 1 searched for the appellant vigorously but he was not found in the village. It is also the evidence of PW 4 and PW 6 that appellant was not found in the village subsequent to the incident. The evidence of the I.O. (PW 13) reveals that the appellant was arrested on 19.09.2002 from Benikhali under P.S. Basirhat, in the district of North 24-Parganas. From the above evidence of the prosecution witnesses, it is clear that the appellant was not traceable in the village immediately after the occurrence when the PW 1, PW 4 and PW 6 were searching for him in the village in connection with this occurrence. The appellant was

arrested on 19.09.2002 from the district of North 24-Parganas. The appellant did not explain how he disappeared from the village and was not seen in the village from the day of occurrence and how and in what connection he had been away from his residence at the village. The evidence regarding absconding is adequate and satisfactory, lends further credence to the prosecution case.

27. Learned Lawyer for the appellant urged that delay in recording the case has not been explained. So the defence version may be treated as true. In this regard, the evidence of PW 1 discloses that till noon his 'Bhagna' and 'Bhagni' did not return back to the house and then he came out for searching them and they continued their search till the recovery of their dead bodies. On getting information about recovery of the dead bodies, he rushed to the spot and found his 'Bhagna' and 'Bhagni' lying dead. Thereafter, he lodged the written complaint at the police station. On scrutiny of the evidence of PW 1, I find that his evidence is clear, cogent and believable and his conduct was normal. From the written complaint (Exbt. 1) it transpires that Officer in Charge, Domkal Police Station received the written complaint on 29.07.2002 on 10:45 hours. From the formal FIR (Exhibit 7) it transpires that place of occurrence is 10 km away from the Domkal Police Station. Therefore, having considered the evidence of PW 1 and the exhibited documents, I hold that ejahar was lodged promptly at the earliest opportunity when there was no chance of concoction and embellishment.

28. Learned lawyer appearing for the appellant also urged that PW 1 had stated some facts in evidence which he had not stated in the written complaint. The written complaint need not disclose all the facts in details. The fact is that both the deceased did not return home at noon and PW 1 started searching out and failed to search them out and subsequently dead bodies were found lying dead at the jute field and the appellate asked them to go to Nashimpur jute field for grazing the goats and this fact has been stated by PW 1 in his written complaint and in his subsequent deposition before the Court and his evidence is duly corroborated PW 4, PW 6, PW 7 and PW 9. So, the submission of the learned lawyer for the appellant cannot be accepted.

29. Learned lawyer for the appellant urged that there are two FIRs in the present case. First complaint was lodged by one Abdus Sadeque on 29.07.2002 (Exbt. 13). Suppressing the said first complaint, the present First Information Report was lodged by one Abdul Rasid (PW 1) which was treated as Domkal Police Station Case No. 89 of 2002 dated 29.07.2002 under Section 302/379 of the IPC. As such, suppression of the first complaint gives rise to suppression of the actual state of affairs and the appellant has been implicated in this false case. In support of his argument he drew the attention of the Exbt. 13, written information submitted to the police station by one Abdus Sadeque. I fail to accept such contention of the learned Senior Advocate appearing for the appellant as because the said written information has not been treated as an FIR in the present case and the maker of the said information i.e. Abdus Sadeque has not been examined in this case. That apart, there is nothing in the Exhibit 13

that prior to submitting this written information, the informant consulted with the maternal uncle of the deceased i.e. PW 1. Now turning to the question of evidentiary value of FIR it appears that in view of the decision of the Hon'ble Apex Court in the case of Apren Joseph v. State of Kerala reported in AIR 1973 SC 1 the principle object of FIR is to set the Criminal Law in motion from the point of view of the information and to obtain information about on alleged crime. It is not a substantive piece of evidence and it can be used only for the purpose of corroboration under Section 157 of the Evidence Act against the maker only. In this case maker of Exhibit 13 has not been examined.

a) It was also held in another decision reported in 1999 Criminal Law Journal 1248 that FIR cannot be used to contradict or discredit the evidence of other witness found prima facie reliable.

b) Therefore, examining the question in the light of the aforesaid principles of law it can be held that the purpose of the FIR in the instant case has been duly satisfied in accordance with law. So, the submission as made by the learned Advocate appearing for the appellant cannot be accepted.

30. Learned Senior Counsel for the appellant further urged the inquest reports were prepared in presence of PW 3 and PW 5 but the name of the appellant was not mentioned. So, a reasonable doubt may arise as to the evidence of the prosecution witnesses. The inquest report is used to determine the apparent cause of death and the physical character, position of the body and other features connected with the body and it is not required to mention the name of the assailant in such report. The Court should consider the trauma suffered by the PW 3 and PW 5 and they might not be in a state to mention the name of the assailant at the time of holding inquest. For that reason the statement of the witnesses on oath cannot be disbelieved. Therefore, I hold that the submission as made by the learned Counsel for the appellant in this regard is not acceptable.

31. Learned Advocate appearing for the appellant further urged that the evidences appearing in the examination in chief of the prosecution witness No. 6 and 7 totally contradict their respective statements made before the I.O. (PW 13) under Section 161 of the Cr.P.C. So, these contradictory evidences do not bear any legal right. I fail to accept such submission made by the learned lawyer appearing for the appellant as because I have already decided in my foregoing paragraphs that the evidence of the PW 6 and PW 7 found reliable and creditworthy. Support can be gathered from the judgment of State of U.P. v. Krishna Master reported in AIR 2010 SC 3071 wherein it has been observed that evidence tendered before the Court cannot be rejected on the basis of statement made by the witness before police under Section 161 of the Cr.P.C. when witness was never confronted with his statement recorded under Section 161 of Cr.P.C as in this case no suggestion was thrown to the PW 6 that they have not stated the facts deposed in evidence before the police.

32. The decision reported in (2007) 2 C.Cr.LR (SC) 669 Sujoy Sen @ Sujoy Kr.

Sen v. State of West Bengal is of no assistance to the appellant as because a vital link in the chain of circumstances was missing in that case.

33. The another decision reported in (2016) 1 Supreme Court Cases 550 Nizam and Another v. State of Rajasthan also is of no assistance to the appellant as because there was a long time gap between last seen and recovery of dead body in that case.

34. For the reasons stated above, I am of the opinion the trial Court was fully justified in coming to the conclusion as to the guilt of the appellant and, accordingly, the order of conviction and sentence does not deserve any interference. In the result, the appeal fails and stand dismissed.

35. The Lower Court Record along with copy of this judgment be sent to the learned Trial Court below at once for information and taking necessary action.

36. Urgent Photostat certified copy of the order, if applied for, be given to the parties on priority basis on their usual undertaking.

I agree.