

(2010) 10 CAL CK 0013
In the Calcutta High Court
Case No : C.R.R. No. 3377 of 2005

S.K. Mofizul

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Evidence Act, 1872 — Section 24, 30
Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2010) 10 CAL CK 0013

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : Somenath Banerjee, for the Appellant; Uttiya Roy, for the Respondent

Judgement

Girish Chandra Gupta, J.—This revisional application is directed against an order of acquittal dated 28th September 2005 of the co-accused of charges u/s 302 read with Sections 34 and 120B of the Indian Penal Code passed by the learned Additional Sessions Judge, Fast Track 1st Court, Burdwan in Sessions Case No. 81 of 2005 corresponding to Sessions Trial No. 23 of 2005 (State v. Hasanabanu Begam @ Rekha Begam and Anr.).

2. The facts and circumstances of the case briefly stated are as follows:

On 31st January 2005 a written complaint was lodged with the Officer-in-Charge, Bhatar Police Station, in the district of Burdwan, alleging that Sk. Nurjamal was suspected to have died an unnatural death on 26th January 2005 at his residence while he was supposedly sleeping with his wife and son. Around 1 A.M., in the night, his brothers and neighbours, after having been informed about the death, called at his residence when the aforesaid discovery was made. In the morning of 27th January 2005 the police was informed by Sk. Mofizul, a brother of the victim when they insisted upon a written complaint. Sk. Mofizul came back to the village. He was advised not to proceed with the matter and to go in for funeral of his deceased brother according to the religious rites. The informant and his other brothers were ultimately persuaded in a state of

confusion to bury the dead body. However subsequently they finally decided to bring the matter to the notice of the police. It was alleged in the written complaint that the widow Hasanabanu @ Rekha had been engaged in an illicit relationship with the co-accused Kader Ali. This extra-marital relationship had been protested by the deceased whereupon both the accused persons threatened him of death. The deceased was thus forced to suffer the relationship. The informant entertained the belief that his sister-in-law, the widow of the deceased, in conspiracy with another had killed his brother Nurjamal.

3. The dead body thereafter was exhumed. The case was investigated. Both the accused were arrested and ultimately charge sheeted and tried. The trial culminated in an order of conviction of the widow Hasnabanu @ Rekha but the co-accused Kader was acquitted. It is this acquittal which is under challenge.

4. At the hearing no one appeared for the petitioner. The Court in the circumstances perused the evidence by itself and heard the learned Advocate appearing for the accused/opposite party. Only submission advanced by Mr. Banerjee was that his client was rightly acquitted because he had no role to play in the offence for which the co-accused was convicted and sentenced to suffer imprisonment for life. He ended by submitting that this Court should not interfere with the judgment.

5. The learned Trial Court in passing the order of acquittal has ignored major part of the evidence briefly indicated hereinbelow:

a) P.W.1 the defacto complainant deposed, inter alia, as follows:

As Nurjamal raised protest against such illicit connection of his wife same wife left Nurjamal and went away to Bishnupur with said Kader Ali. Finding clue of them members of father's house of same wife and Kader Ali brought back both said wife and Kader Ali to our village from Bishnupur. Then same wife started living with my elder brother Nurjamal and Kader Ali started living in his house. Houses of both Kader Ali and Nurjamal are situated side by side in the same village.

There is no denial nor any cross-examination as regards this part of the evidence of the P.W.1. Other witnesses have corroborated this part of the deposition of the P.W.1.

b) P.W.3 deposed in that regard as follows:

She went away with Sk. Kader to Bishnupur and stayed there with him for about 3 and 1/2 months. At that time Nurjamal lodged a written complaint with Bhatar P.S. against his wife.

c) The exhibits file contains a written complaint appearing to have been lodged by the deceased on 10th August 2004 with the Officer-in-Charge, Bhatar Police Station alleging that his wife Rekha and the co-accused Kader were involved in an illicit relationship. This document was not taken on record as an exhibit

although the same provides an important link to the chain.

d) In the aforesaid context the evidence of the P.W.1 to the following effect is very important.

In the evening on 26.1.2005 I saw Kader Ali and Nurjamal's wife to hold talk in the house of Nurjamal by gestures.

The learned Trial Court did not consider this piece of evidence in the aforesaid context nor did he consider this piece of evidence in the context of what happened soon after the conversation by signs and he dismissed this piece of evidence by saying that "it is not clear from the said evidence as to on what matter said Kader Ali and Rekha was holding talks by gestures".

e) P.W.12 provided an important link when he deposed that "On the said day at about 12-45/1 A.M. I woke up to urinate and at that time I saw that Kader with bad face (Hantadanta hoye) was going towards his house from the house of Nurjamal. 2/3 minutes after such going away of Kader I heard sound of weeping from Nurjamal's house".

The learned Trial Court got rid of this important piece of evidence by observing that "such evidence since does not find place in the F.I.R. of the case and is not corroborated by any other P.Ws. we also cannot rely upon the said evidence of the P.W.12." P.W.12 was not the F.I.R. maker nor is it anybody's case that he was consulted before lodging the F.I.R. In the dead of night it must have been a fortuitous circumstances, if at all, that the P.W.12 woke up from the bed to respond to nature's call and saw the co-accused Kader coming out from the house of the victim hurriedly. No one was supposed to have been watching the activities of Kader in the night. Therefore to insist upon corroboration of this fact and refusal to include this fact as a link in the chain is unrealistic to say the least.

f) P.W.4 in his evidence deposed as follows:

On 27.1.2005 men of Rekha and Kader created pressure upon us and buried the dead body of Nurjamal.

P.W.12 in that regard deposed as follows:

On the following day some villagers of Rekha's father and some of our villagers buried the dead body of Nurjamal.

There is no challenge to this evidence.

g) The learned Trial Court in convicting the accused Rekha relied on her confessional statement deposed to by the P.Ws.1 to 4. The learned Trial Court, as a matter of fact, expressed his views as follows:

However, as admittedly at the time of death of Nurjamal only Nurjamal and his wife Rekha and one son and nobody else were in the house of Nurjamal and said wife namely, Rekha has confessed before P.Ws.1 & 4 that she killed Nurjamal with napkin and also with fists and blows and evidence of doctor B.N. Kahali (PW

11) shows that the death of Nurjamal was due to the effect of injuries antemortem and homicidal in nature and injury No. 1 might have been caused by an impact with an object (hard blunt) or blow and there was also an attempt of strangulation by ligature, considering the said evidence of doctor and Rekha's confessional statements and other circumstantial evidence, this court cannot but decide that accused Rekha committed homicidal death of Nurjamal. Although evidence of P.Ws.1 & 4 shows that being pressed Rekha confessed that she killed Nurjamal. Section 24 of the Evidence Act since provides that if confession is caused by inducement, threat or promise by a person in authority, such confession cannot be relied upon and in the instant case P.Ws. 1 & 4 are not such persons in authority, we are to rely upon confession made by accused Rekha before said P.Ws.1 & 4.

6. The evidence of P.W.4 as regards the confession is follows:

Being pressed by us same wife replied that as they were involved in illicit connection and Nurjamal saw the same she and Kader Ali by giving napkin in his neck and by assaulting him with fists and blows killed him.

7. The learned Trial Judge also ignored the important fact that the postmortem report (exhibit "7") shows as many as eight injuries including a ligature mark. The evidence of the P.W.11 the autopsy surgeon in that regard is as follows:

This is the said postmortem examination report in original prepared and signed by me (Marked Exhibit.7). Death in my opinion was due to the effect injuries ante mortem and homicidal in nature. There was also an attempt of strangulation by ligature. To ... ligature means a material which is used for causing strangulation like rope, cloth etc. Injury No. 1 as is mentioned in the P.E. examination report might have been caused by an impact with an object (hard blunt) or ... For cumulative effect of all injuries mentioned in the P.M. examination report the death was caused.

8. The learned Trial Court for undisclosed reasons relied only on a part of the evidence for the purpose of convicting the accused Rekha. He also missed the fact that in law the confession would also apply to the co-accused Kader. Reference in this regard may be made to Section 30 of the Evidence Act which provides as follows:

Consideration of proved confession affecting person making it and other jointly under trial for same offence.- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

9. Reference may also be made to illustration (a) appended to the aforesaid section.

A and B are jointly tried for the murder of C. It is proved that A said "B and I

murdered C". The Court may consider the effect of this confession as against B.

10. For the aforesaid reasons I am of the considered opinion that the order of acquittal without considering the evidence indicated above cannot be sustained. The impugned order has occasioned serious miscarriage of justice. The order of acquittal of the co-accused Kader Ali of the charges u/s 302 read with Sections 34 and 120B IPC passed by the learned Trial Court on 27th September 2005 is therefore set aside. The accused Kader should be taken into custody forthwith and retried in accordance with law without being influenced by any of the observations which may have been made herein. It is clarified that release of the accused of Kader on Bail after he is taken into custody shall be in the discretion of the learned Trial Court.

11. Let the lower Court Records along with a copy of this judgment be sent down forthwith.

12. Urgent xerox certified copy of this judgment, be delivered to the learned Counsel of the parties, if applied for, upon compliance of all formalities.