
(2016) 10 CHH CK 0044
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 587 of 2004

Smt. Jiteshwari Bai

APPELLANT

Vs

State of Chhattisgarh

RESPONDENT

Date of Decision : 25-10-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2017) 170 AIC 314

Hon'ble Judges : Prashant Kumar Mishra and Anil Kumar Shukla, JJ.

Bench : Division Bench

Advocate : Sachin Singh Rajput, Advocate, for the Appellant; Arvind Dubey, Panel Lawyer, for the Respondent/State

Final Decision : Allowed

Judgement

Prashant Kumar Mishra, J. - Appellant would assail her conviction under section 302 of the Indian Penal Code ("the I.P.C." in short) and sentence of life imprisonment for committing murder of her husband namely; Rohit Kumar (since deceased), a rickshaw puller, in the intervening night of 25/26.6.2003.

2. Case of the prosecution, in brief, is that the deceased Rohit Kumar, son of Ramchandra (P.W.3), was firstly married with Neela Bai and thereafter with Uma Bai, however, marriage with either of these two ladies did not last long because of their bad conduct. Rohit thereafter married the appellant Jiteshwari Bai. Appellant Jiteshwari had illicit relation with the acquitted co-accused Santosh for which there used to be quarrel between the appellant and the deceased. In the intervening night of 25/26.6.2003, Santosh, who was residing nearby, went to the house of the deceased: knocked the door of the room where the appellant and the deceased were sleeping on which Jiteshwari opened the door; and thereafter, Santosh entered the room and bolted the door from inside. When the appellant and Santosh were committing sexual intercourse, the deceased awoke, therefore, the appellant and Santosh committed his murder by strangulating him by means of the silk string worn by the deceased himself. Sunita wife of Santosh

found her husband missing from the house, therefore, she came out of the house at about 3:00 - 4:00 a.m. and called her husband, on which Santosh came out of the house of the appellant and went back to his home. This is said to be witnessed by Bisahin Bai (P.W.6). In the morning, the appellant opened the door and went towards the village pond with her sister-in-law (nanad) Santoshi for attending daily course. On her return, she informed her father-in-law Ramchandra (P.W.3) that Rohit is not awaking on which Ramchandra (P.W.3), Hiralal (P.W.4), brother of the deceased and Sumitra, mother of the deceased, reached the room and saw that Rohit is already dead. He was taken to hospital where he was declared brought dead.

3. On receiving information -from the Doctor, merg was registered and the dead body was sent for post-mortem, which was performed by Dr. R.K. Damle (P.W.7), who submitted the post-mortem report vide Ex. P-7 finding that the death has occurred due to asphyxia as a result of strangulation; viscera preserved for chemical analysis: duration of death within 24 hours; and the injury (sic death) is antemortem in nature.

4. On the basis of post-mortem report, crime was registered and in course of investigation, the accused persons were arrayed on the information of Sunita, wife of Santosh and Bisahin Bai (P.W.6), who informed the Police that Santosh had gone out of the house at about 3:00 -4:00 a.m. and Bisahin Bai (P.W.6) witnessed him coming out of the house of the appellant when the wife of Santosh called him. Santosh also made extra-judicial confession to Mahadev (P.W.2) that he and the appellant have committed the murder of the deceased.

5. After filing of the charge-sheet and at the conclusion of trial, the Trial Judge acquitted the co-accused Santosh for lack of evidence regarding his complicity in committing the crime, however, the appellant has been convicted on the basis of evidence that during the fateful night she and the deceased were sleeping together and in the morning the deceased was found dead, therefore, it is the appellant alone who has committed the murder of the deceased.

6. Shri Sachin Singh Rajput, learned Counsel appearing for the appellant, would argue that the prosecution has failed to establish the inks, therefore, the chain of circumstantial evidence is not complete. He would submit that upon acquittal of Santosh, neither the illicit relationship between the appellant and Santosh is proved nor motive for commission of crime, therefore, only on the basis of appellant's availability in the house on the fateful night she cannot be convicted without there being any corroborative evidence. In support of his contention, Shri Rajput would place reliance upon the decisions of the Supreme Court rendered in *Kanhaiya Lal v. State of Rajasthan*, 2014 (137) AIC 266 (SC)=(2014) 4 SCC 715; *Sharad Birdhichand Sarda v. State of Maharashtra*, AIR 1984 SC 1622; *Nizam and another v. State of Rajasthan*, 2015 (154) AIC 13 (SC)=AIR 2015 SC 3430=2015 (91) ACC 2143 (SC); *Ashok v. State of Maharashtra*, 2015 (150) AIC 207 (SC)=(2015) 4 SCC 393=2015 (89) ACC 939 (SC); and *Babu v. State of Kerala*, (2010) 9 SCC 189.

7. Per contra, Shri Arvind Dubey, learned Panel Lawyer, appearing for the State, would argue that the present being a case of house murder, it is difficult to find any direct evidence, therefore, the burden lies on the appellant to explain the facts within her special knowledge in respect of death of her husband when they alone were together in the house on the fateful night. Shri Dubey placed reliance on the judgment of the Supreme Court rendered in *State of Rajasthan v. Thakur Singh*, 2014 (140) AIC 52 (SC)=(2014) 12 SCC 211=2014 (86) ACC 685 (SC), together with the earlier judgments of the Supreme Court referred therein.

8. The present is a case where the prosecution had filed the charge-sheet against two persons namely; the appellant Jiteshwari Bai and her alleged paramour, the acquitted co-accused Santosh. The story common to both the accused persons is that they had illicit relation and on the fateful night Santosh entered the house of the appellant and was performing sexual intercourse, on which the deceased awoke and thereafter both of them murdered the deceased by strangulating him with the help of silk string. The evidence exclusive to the co-accused Santosh was that when he was missing from the house, his wife Sunita came out of the house and called his name on which Santosh came out of the house of the appellant and this was witnessed by Bisahin Bai (P.W.6) and further that he had made extra-judicial confession before Mahadev (P.W.2).

9. Sunita was cited in the charge-sheet as a witness for the prosecution, however, her name was not included in the trial programme, therefore, she has not been examined. Since Bisahin Bai (P.W.6) turned hostile and the other witnesses not supporting the case of prosecution insofar as the story of illicit relationship is concerned, not only Santosh has been acquitted but the whole gamut of evidence in respect of motive for commission of crime, which was common to both the accused persons remained disproved. Thus, on the basis of state of evidence on record, the prosecution is left without proving any motive for commission of crime.

10. The remaining evidence against the appellant is of her availability in the house on the fateful night in the room, wherein she and her husband had slept together.

11. While T.S. Verma (P.W.1) is the Patwari, therefore, he has not thrown any light on this aspect of the matter. Mahadev (P.W.2) before whom Santosh has made extra-judicial confession has turned hostile and has not supported the case of prosecution even during cross-examination. Ramchandra (P.W.3) is the father of the deceased and, thus, he happens to be the father-in-law of the appellant. According to this witness, he came back to the house at about 10.00 p.m. and knocked the door of the room where deceased Rohit and appellant Jiteshwari were sleeping, but it was bolted from inside. He has stated that relationship between the appellant and the deceased was cordial. In the morning of 26.6.2003, this witness had gone to the village pond and when he came back the appellant was already in the house. This witness has not raised any suspicion on the appellant that she may be involved in committing murder of the deceased,

on the contrary he would again say in para 6 of his statement that the deceased and the appellant had never quarreled in his presence.

12. Hiralal (P.W.4) is the brother of the deceased. He also speaks about Rohit and Jiteshwari being available in the room. When he awoke at about 6.00 a.m., the inmates of the house were crying, however, this witness went to the village pond and on returning back, he became aware that Rohit has died. He has demonstrated ignorance as to how Rohit has died; neither has raised suspicion on the appellant.

13. Bharatlal (P.W.5) is the relative of the deceased. He resides in the same house. He also speaks about Rohit and Jiteshwari going to the room after dinner. He knew about the death of Rohit at about 6.00 a.m. in the morning. This witness has not raised any suspicion on the appellant. As against Ramchandra (P.W.3), who has deposed that Rohit and Jiteshwari went inside the room at about 10.00 p.m., this witness states that Rohit came back to house at about 12"0 clock in the night and they enjoyed the dinner for about half an hour and thereafter Rohit retired to sleep in his room. This witness also speaks that there was no quarrel between the appellant and the deceased.

14. Dr. R.K. Damle (P.W.7), who performed the post-mortem on the body of the deceased, stated that there was ligature mark over the neck of the deceased measuring length of 26 cm whereas the silk string was measuring 57 cm. He found cyanosis over the lips and the nails of the deceased. He has found the oesophagus and trachea to be healthy and admits that cyanosis over lips and nails occurs in case of poisoning, however, in the FSL report (Ex. P/14), the deceased was not found to be poisoned. He admits that the ligature marks were found above the trachea which is usually found in the case of suicide.

15. More importantly, Dr. R.K. Damle (P.W.7) has mentioned in the postmortem report that the death is ante-mortem to mean the injuries are ante-mortem, however, he has not reported that the death was homicidal in nature. Though in the evidence, he has explained that strangulation is always homicidal.

16. Bisnu Sahu (P.W.8) was also a witness of extra-judicial confession made by acquitted co-accused Santosh, however, he has also turned hostile and not supported the case of the prosecution.

17. The question to be considered is -

Whether in view of the provisions contained under section 106 of the Evidence Act, the appellant's conviction can be sustained only on the evidence that she alone was available in the house, and has not explained the circumstances about the death of her husband, even without any corroborative evidence or any other adverse circumstances against her, for committing the murder of her husband ?

18. In Sharad Birdhichand Sarda (supra) the Supreme Court has underlined the conditions, which must be fulfilled for convicting an accused on the basis of circumstantial evidence and held in para-152 as under:

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ? must or should" and not ?may be" established. There is not only a grammatical but a legal distinction between ?may be proved" and ?must be or should be proved" as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793=AIR 1973 SC 2622, where the following observations were made :

?certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ?may be" and must be" is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent 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.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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."

19. In Sujit Biswas v. State of Assam, AIR 2013 SC 3817=2013 (127) AIC 25 (SC)=2013 (82) ACC 467 (SC) the Supreme Court has held that suspicion, however, strong cannot take place of proof. Para 6 is quoted below :

"6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the Court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the

touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar and another v. State of M.P., AIR 1952 SC 343 State through CBI v. Mahender Singh Dahiya, 2011 (105) AIC 251 (SC)=AIR 2011 SC 1017=2011 (74) ACC 914 (SC), and Ramesh Harijan v. State of U.P.), 2012 (115) AIC 41 (SC)=AIR 2012 SC 1979=2012 (78) ACC 153 (SC)).

20. Yet again in Kanhaiya Lal (supra), the Supreme Court has held thus in para 15 :

"15. The theory of last seen--the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan."

21. Strong reliance has been placed by the State Counsel upon the decision rendered by the Supreme Court in Thakur Singh (supra). In the said case, the accused had committed murder of his wife by locking his wife and daughter inside the room and bolting it from inside. All three remained in the room throughout the day and the accused did not yield to the persuasion of the relatives to open the door. Later in the evening, the relatives removed the roof tiles (kelu) from above the house and discovered that the accused had killed his wife. The door of the house was broken open and the accused was caught and tied by his brothers and relatives. Although the Supreme Court referred to its earlier decisions in the matter of Shambhu Nath Mehra v. State of Ajmer, AIR 1956 SC 404 Trimukh Maroti Kirkan v. State of Maharashtra, 2006 (47) AIC 47 (SC)=(2006) 10 SCC 681; Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106; State of W.B. v. Mir Mohammad Omar and others, (2000) 8 SCC 382; and Gian Chand and others v. State of Haryana, (2013) 14 SCC 420 to hold that the facts relating to the cause of death of the accused's wife being known only to the accused yet he chose not to disclose them or to explain them, the principles laid down in section 106 is clearly applicable, therefore, a very strong presumption arises that the accused had killed his wife, however, in the case at hand, the basic case of the prosecution is not that the appellant alone had killed the deceased and both were together in the room throughout the night. Instead, the allegation is that the appellant and the acquitted co-accused Santosh has illicit relation and they together killed the deceased, however, one of the accused

having been acquitted, it did not remain the case of the prosecution that since the appellant alone was in the house, it is for her to explain the special fact within her knowledge about the death of the deceased.

22. In Babu (supra), the Supreme Court has held that in a case of circumstantial evidence, the onus is on the prosecution to prove that chain is complete. In such case, the burden on the prosecution is always greater and the absence of motive weighs in favour of the accused.

23. As earlier discussed, with the acquitted of Santosh and the basic story of the prosecution having been belied by the Trial Judge, there is total lack of evidence concerning the appellant's motive to commit the crime. Moreover, the witnesses have not stated that the relationship between the appellant and the deceased was strained or that they had ever quarrelled on any particular reason.

24. Of course, a suspicion arises and it points towards the appellant that she should explain the death of her husband, however, that alone may not be sufficient to convict a person for committing murder.

25. In a case of circumstantial evidence, something more than mere suspicion is needed to convict a person. The law requires establishment of proof of case of the prosecution to exclusion of all other hypothesis pointing towards the innocence of the appellant. The ingredients of such hypothesis is in the nature of availability of motive, strained relationship between the parties and other corroborative evidence, however, none of such hypothesis against the appellant is available.

26. In the considered opinion of this Court, the Trial Judge has wrongly convicted the appellant for committing murder of the deceased. It is a case where there is absolute lack of cogent and reliable evidence to send the appellant behind the bar for commission of the murder of her husband.

27. As a sequel, the appeal is allowed. Conviction and sentence imposed on the appellant under section 302 of the I.P.C. are hereby set aside and she is acquitted of the said charge. The appellant is on bail. Surety and personal bonds earlier furnished at the time of suspension of sentence shall remain operative for a period of six months in view of the provisions of section 437-A of the Cr. P.C. The appellant shall appear before the higher Court as and when directed.