

(2015) 06 CAL CK 0047
In the Calcutta High Court
Case No : Death Reference No. 5 of 2014

State of West Bengal

APPELLANT

Vs

Rakesh Singh

RESPONDENT

Date of Decision : 29-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 106, 134
Penal Code, 1860 (IPC) — Section 201, 302, 326

Citation : (2016) 1 CALLT 178 : (2015) CriLJ 3847

Hon'ble Judges : Ashim Kumar Roy, J; Malay Marut Banerjee, J

Bench : Division Bench

Advocate : Siladitya Sanyal and Prasenjit Debnath, for the Appellant; Manjit Singh, Ld. P.P., Rudradipta Nandy and Pawan Kumar Gupta, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Ashim Kumar Roy, J—Both the death reference and the criminal appeal, since are the outcome of a self-same trial, those were taken up for hearing together and are disposed of by this judgment.

In a sessions trial held before the Learned Additional District and Sessions Judge, Fast Track Court, Ghatal, the accused, Rakesh Singh was charged for having committed an offence punishable under Sections 302/201, IPC by intentionally causing death of his two minor daughters and for disappearance of evidence of murder and under Section 326, IPC for causing grievous hurt to his wife. Finally, in the trial, the accused was convicted for all the offences he was charged with but was sentenced to death only for his conviction under Section 302, IPC and without imposing any separate sentence for his conviction under Section 326/201, IPC.

The circumstance that the appellant/convict on the fateful night took away both of his daughters with him from their residence in presence of his wife Sudha

Singh, PW/11 and thereafter none of these two minor girls were found alive and killed and no explanation was forthcoming from the side of the appellant/convict as to what happened to them and how they were killed, although such facts were especially within his knowledge, is the very foundation of the prosecution case against him.

2. In the trial the prosecution to prove its case against the appellant/convict examined as many as 14 witnesses.

The PW/1, Kamalesh Singh was the scribe of the FIR and happens to be the elder brother of the convict. The PW/2, Naren Bera, PW/3, Satinath Chakraborty, PW/5, Biswanath Das were declared hostile. PW/4, Bablu Bera, PW/6, Bhabani Das disown their knowledge anything about the incident. PW/8, Dr. Samar Sinha Das is the doctor, who held postmortem on the dead body of the two deceased. PW/9 Dr. Biswanath Banerjee examined Sudha Singh, the wife of the convict. PW/10, Anil Kumar Kushwaha is a Judicial Officer, who recorded the statement of PW/11, Sudha Singh under Section 164, Cr.P.C.. The PW/11, Sudha Singh is the wife of the convict and mother of the two victims. PW/13, Dr. Kamal Chatterjee is also a doctor, under whose care PW/11, Sudha Singh was admitted at Ghatal Sub-Divisional Hospital. The PW/14 is the Investigating Officer of the case.

3. At the outset, it be noted that both the victims suffered homicidal death was neither challenged nor disputed before us from the side of the convict/appellant. However, during the trial the Autopsy Surgeon, who gave a clear opinion that the cause of death of the victim was due to the effect of injuries found on their persons associated with the drowning and were ante-mortem and homicidal in nature, in his cross-examination was only suggested that was not a fact and actually their deaths were accidental. The Autopsy Surgeon, PW/8 has categorically denied such suggestion of the defence. We find from the cross-examination of the said witness, besides giving such suggestion there was no cross-examination on this point nor anything contradictory to his evidence in chief has been brought out. We on our own very carefully examined the evidence of the said witness and found no reason to doubt his opinion.

4. The learned counsel for the appellant/convict vehemently contended that no reliance can be placed on the evidence of PW/1 Kamalesh Singh, the maker of the FIR, who merely assumed that both of his niece were killed by his brother (appellant/convict) inasmuch as according to his own evidence he has no direct knowledge as to how those two girls were killed. Now, coming to the evidence of PW/11 Sudha Singh, he contended that she is not at all a reliable witness and although on the fateful night after her husband, the appellant/convict took away both of her daughters and came back alone, admittedly, she went to the police station and complained against him for physically assaulting her but she was completely silent to the police about the missing of her two daughters. He further submitted it is quite unusual for her until on the next morning the dead bodies of her two children were discovered, not to disclose anyone about the fact that on the last night both of her daughters were taken away by her husband and

thereafter they did not return and he returned alone and their whereabouts were not known. At the same voice, he then argued that no police personnel was examined in support of her such claim that she had been to the police station on the fateful night to lodge complaint against her husband for assaulting her. The learned advocate of the appellant/convict further contended although PW/11 Sudha Singh claimed that she was taken to the hospital at 5 o'clock in the morning but according to PW/12, it was around 12.30 p.m. she was taken to the hospital and there was no explanation as to how a person who sustained such serious injuries was left unattended for such a long time. He submitted it is quite unnatural that when her husband took away her two children around 8 p.m., none of then-neighbours saw them. He further added it is also surprising that after having come to know that two of her daughters were killed, instead of going to the police station she went to the hospital for her own treatment. He further submitted no offending article with which PW/11 was allegedly assaulted was recovered during investigation. Lastly, he contended on the face of the patent contradiction in the evidence of PW/11 and when no motive is attributed against the appellant/convict for killing her two daughters, it would not at all be safe to uphold the order of conviction only on the sole testimony of the PW/11, a highly interested witness. So far as the death sentence is concerned, he submitted that merely because two daughters were killed, the learned trial court awarded extreme penalty against the appellant/convict without addressing it to the principle of law as laid down by the Hon''ble Apex Court in its several decisions.

While addressing this court, the learned counsel for the appellant/convict relied on two decisions of the Hon''ble Supreme Court, one in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622 : (1984) CriLJ 1738 : (1984) 2 SCALE 445 : (1984) 4 SCC 116 : (1985) 1 SCR 88 and another in the case of Murlidhar and Others Vs. State of Rajasthan, AIR 2005 SC 2345 : (2005) CriLJ 2608 : (2005) 5 JT 358 : (2005) 11 SCC 133 : (2005) 1 SCR 175 Supp : (2005) 2 UJ 915 : (2005) AIRSCW 2596 : (2005) 4 Supreme 411 .

5. On the other hand the learned Public Prosecutor although submitted it may not be a case of extreme penalty but the trial court was fully justified in convicting the appellant/convict for murdering his two minor children as also for causing disappearance of evidence of murder and grievous hurt to his wife PW/11. He then contended that there was no legal impediment in concluding the guilt of an accused on the evidence of sole witness. In this regard, he relied on the decision of the Hon''ble Apex Court in the case of Vadivelu Thevar Vs. The State of Madras, AIR 1957 SC 614 : (1957) CriLJ 1000 : (1957) 1 SCR 981 and in the case of State of U.P. Vs. Veer Singh and Others, (2004) CriLJ 3835 : (2004) 5 SCALE 159 : (2004) 10 SCC 117 : (2004) 2 SCR 790 Supp : (2004) AIRSCW 4215 : (2004) 3 Supreme 764 . He contended that there is no reason to doubt the evidence of PW/11 Sudha Singh that on the fateful night the appellant/convict took away both her minor daughters with him and then after about two hours returned home alone and when me PW/11 inquired about her daughters,

she was told they were at the house of one of his friends. He further submitted as the appellant/convict took away both the children with him and thereafter they were never found alive and found killed, it is now for the appellant/convict to explain as to what happened to them after they went with him and how they were killed and for his failure to explain the same, it could very well be inferred that none else but he killed both of them applying the principle of provisions of Section 106 of the Evidence Act. He submitted that this is a case where the circumstance of "last seen theory" is very much applicable and he relied on the decisions of the Hon"ble Apex Court in the case of State of U.P. Vs. Satish, AIR 2005 SC 1000 : (2005) CriLJ 1428 : (2005) 2 CTC 71 : (2005) 2 JT 153 : (2005) 3 SCC 114 : (2005) 2 SCR 1132 : (2005) 1 UJ 367 : (2005) AIRSCW 905 : (2005) 2 Supreme 13 . He further contended where even in a case based on circumstantial evidence the prosecution is able to prove its case beyond all reasonable doubts the absence of motive of the accused is of no consequence. In this regard, he relied on the decision of the Hon"ble Apex Court in the case of Vivek Kalra Vs. State of Rajasthan, (2013) 3 AD 24 : (2013) CriLJ 1524 : (2013) 2 JCC 1152 : (2013) 3 JT 209 : (2013) 2 RCR(Criminal) 190 : (2013) 2 SCALE 515 : (2013) AIRSCW 1155 .

Against the contention of the learned advocate of the appellant/convict that the PW/11 Sudha Singh is not at all a credible witness, he strenuously contended that not only during chief she claimed to have disclosed the entire incident to the police but also during cross-examination, she stick to her such claim and her such evidence could not be shaken and nothing could have been brought on record that such facts were not disclosed to the police. He further submitted when her evidence that she disclosed the entire incident to the police and when she stick to that, during cross-examination and her such evidence even remotely could not be dispelled, the claim of the learned advocate of the appellant/convict is totally unfounded, illusory and cannot be accepted.

6. We have considered the rival submissions made by the learned counsels, perused the records and the ruling cited on their behalf. Indisputably, the case of the prosecution against the appellant/convict hinges on the evidence of PW/11 Sudha Singh, the mother of the two minor children. According to her on the fateful night it is the appellant/convict, who took away both of them with him but returned home alone and when inquired, she was told that both the daughters were at the residence of one of his friends. We have thoroughly examined her entire evidence. We find her evidence, as above, remained unshaken during her cross-examination at length. We do not find any materials to hold that while reporting to the police about the incident of physical assault by her husband, she did not disclose that both her minor daughters were taken away by the appellant/convict (her husband) and thereafter he returned alone and on the next morning both the daughters were found killed. In this regard, the contention of the learned counsel of the appellant/convict is totally unfounded and against the materials on record. If after police being informed by her about the aforesaid incident, police did not record the same in writing and only picked up the

appellant/convict from his house and brought him to the police station and the PW/11 was left alone at their house, that may be a serious irregularity or lapse on the part of the police, but for that we have no reason to disbelieve the PW/11 Sudha Singh. The defence at no stage neither cross-examined the police personnel examined by the prosecution during the trial on this score, nor any police personnel, who was on duty at the police station at the material point of time, was examined by the defence belie the claim of the prosecution.

Now, coming to the evidence of PW/11 Sudha Singh, we find she categorically disclosed, the incident took place on 12.3.2011 and at night her husband started misbehaving and assaulting her. Thereafter, at around 8 p.m. her husband went away from their house with his two minor daughters on the plea to take a stroll outside. It was a Saturday and at that time she was preparing dinner. At around 11 p.m. her husband came back alone and when she inquired about her daughters, she was told they were at the house of his friend and threatened to kill her, if she asks anything further about them. When she again asked about them, her husband assaulted her with a sharp cutting weapon and caused bleeding injuries on her head and consumed liquor and fell asleep. The PW/11 Sudha Singh further claimed after the discovery of dead bodies of her two daughters, she disclosed the entire incident to the police officer as well as to the Judicial Magistrate and the same was recorded.

We have found that the PW/11 Sudha Singh was cross-examined at length and she reiterated what she stated in chief. On further cross-examination by the defence, she once again repeated the assault meted out to her by her husband and the fact that he took away with him her two daughters and her husband returned alone at around 11 p.m. and when whereabouts of their two daughters was asked, she was told that they had been in the house of one of his friends. The Investigating Officer of the case, PW/14, when was cross-examined, no contradiction was however being taken nor even any attempt was made to contradict the PW/11 Sudha Singh with reference to her making of statement to the police disclosing the fact that her husband took away both of their daughters at 8 p.m. from their residence and then he returned alone and when was asked about the daughters, it was told that they are at his friend's house. Therefore, the evidence of the PW/14 on the question that the appellant/convict with him took away his two daughters from their residence in presence of PW/11 and thereafter both the daughters were found killed, stands proved. The appellant/convict was very much examined under section 313, Cr.P.C. with reference to the above circumstance, brought by the prosecution through the testimony of the PW/11 Sudha Singh and the appellant/convict claimed the same to be false.

Since according to the PW/11 Sudha Singh, it is proved by the prosecution after the appellant/convict left with his two minor daughters, they were never found alive and killed, the theory of "last seen together" comes into play and in accordance with the provision of Section 106 of the Evidence Act, the burden shift on him to explain as to how and under what circumstances they were killed.

The appellant/convict having failed to offer any explanation as regards to the same and excepting claim the same to be false, such failure is a very strong incriminating circumstance against him. In this regard reliance may be placed in the case of *State of Maharashtra Vs. Suresh*, (1999) 9 JT 513 : (1999) 7 SCALE 386 : (2000) 1 SCC 471 : (1999) 5 SCR 215 Supp : (2000) 1 UJ 326 ; *State of Karnataka Vs. Khaja Hussain*, (1982) 2 SCALE 1073 : (1982) 3 SCC 456 : (1983) 15 UJ 36 ; *State of U.P. Vs. Satish*, AIR 2005 SC 1000 : (2005) CriLJ 1428 : (2005) 2 CTC 71 : (2005) 2 JT 153 : (2005) 3 SCC 114 : (2005) 2 SCR 1132 : (2005) 1 UJ 367 : (2005) AIRSCW 905 : (2005) 2 Supreme 13 . Furthermore, the theory of "last seen together" assumes great importance and pointing towards the guilt of an accused where the time gap between the time when the victim was found alive for the last time in the company of the accused and when the dead bodies were found, is so small that possibility of any other person other than the accused, being the author of the crime, becomes impossible. In this regard, reliance may be placed in the case of *Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh*, AIR 2006 SC 1656 : (2006) 4 JT 16 : (2006) 3 SCALE 452 : (2006) 10 SCC 172 : (2006) AIRSCW 1602 : (2006) 3 Supreme 175 . In the case at hand it is proved that appellant/convict left with his two minor daughters at 8 p.m. and on the next morning on the bank of Silabati river, their dead bodies were found.

The learned counsel of the defence vehemently contended it would be totally unsafe to reach to the conclusion of the guilt of the accused on the sole testimony of the PW/11 Sudha Singh. There is no absolute rule that evidence of sole witness can never be the basis of conviction. No particular number of witnesses is necessary to prove any particular fact and in this regard reference may be made to the provisions of Section 134 of the Evidence Act. It is not the quantity but the quality of the evidence that only counts. In this regard the learned Public Prosecutor very rightly relied on the decision of the Hon'ble Supreme Court in the case of *Vadivelu Thevar Vs. The State of Madras*, AIR 1957 SC 614 : (1957) CriLJ 1000 : (1957) 1 SCR 981 and in the case of *Veer Singh & Ors. v. State of U.P.* (supra). The PW/11 Sudha Singh was cross-examined at length but the defence blatantly failed to contradict her evidence in any manner whatsoever nor her evidence was contradicted with reference to her earlier statement made to the police neither from her cross-examination. The PW/11 Sudha Singh was the mother of the two minor children who were killed. Therefore, there cannot be any valid reason for her to falsely point out any circumstance against an innocent linking him with the murder of her daughters screening the real offender. The defence has not been able during the trial to indicate any reason as to why she shall de- pose falsely against the appellant/convict. The contradictions to which our attention has been drawn by the learned counsel of the appellant/convict are quite minor and so trifling, we are not going to act on the same. The learned counsel for the appellant/convict, for the first time before us, pointed out certain alleged infirmities in the evidence of PW/11 Sudha Singh, but during the trial, she was not cross-examined in this regard.

To sum up the circumstances the prosecution able to prove against the appellant/convict are as follows,

"(a) The appellant/convict used to stay with his wife, PW/11 Sudha Singh and two minor daughters, viz., Radha and Anuradha aged about 3 years and 1 1/2 years respectively.

(b) On 12/3/2011, in the evening the appellant/convict picked a quarrel with the PW/11 and she was assaulted by him.

(c) After some time, the appellant/convict with their two daughters left their residence giving the PW/11 to understand that he was going for walk.

(d) At the same night at around 11 p.m., the appellant/convict returned home alone and none of those two daughters were returned.

(e) When PW/11 asked him about the whereabouts of their two daughters, she was told they are at the house of one of the friends of the appellant/convict and threatened her not to ask anything more.

(f) Since, the PW/11 again asked him about the whereabouts of her two daughters, she was physically assaulted.

(g) On the next morning the dead bodies of her two children were found lying near the bank of river Silaboti.

(h) The PW/8, Dr. Samar Sinha Das held post-mortem on both the dead bodies and according to him, in both the cases the death was homicidal in nature due to the ante mortem injuries found in their person associated with drowning.

(i) The appellant/convict left with his two daughters on the previous evening and on the next morning their dead bodies were found on the bank of river Silaboti."

Now, taking together all the aforesaid circumstances which were independently proved beyond all reasonable doubt by the prosecution during trial, we find the chain of circumstance is complete and the same leads to one and only one inevitable conclusion with the accused is guilty of the offence and it is none else other man he who killed his two minor daughters. Therefore, we do not find any valid reason to interfere with the order of his conviction under Section 302, IPC for killing of his two minor daughters and the trial court was fully justified.

Since it has also been proved by the prosecution after killing his two minor daughters, the dead bodies were thrown in the river, we find the case against the appellant/convict that he caused to disappear the evidence of murder has been proved and therefore he was rightly convicted under Section 201, IPC.

Now, coming to the question of validity of conviction of the appellant/convict under Section 326, IPC, we find PW/12 Anup Chakraborty, a neighbor of the appellant/convict removed her to Ghatal Sub-Divisional Hospital where she was admitted for her treatment. According to the PW/12, he was told by the victim PW/11 that her husband inflicted those injuries on her. The PW/12 was cross-

examined by the defence but nothing could be brought out from his deposition to discredit him, on the contrary the witness disclosed to have seen the injuries on her person. The PW/9 Dr. Biswanath Banerjee, was the doctor who examined the PW/11 at the emergency and admitted her in the hospital. The emergency outdoor ticket and other medical documents were exhibited during the trial and marked as Ext.-7, Ext.-8, Ext.-9, Ext.-10 and Ext.-10/1. In his examination-in-chief the PW/9 claimed to have found polytrauma with head injury and several other injuries on the person of the victim PW/11 and according to him, some of those injuries were grievous in nature. He claimed that PW/11 disclosed to him that injuries were inflicted on her by her husband, the appellant/convict. However, in his cross-examination PW/9 admitted there is no mention in the injury report whether injuries were grievous or simple. PW/9 further stated there was no note in the injury report that she herself disclosed that she was assaulted by her husband. We, however, do not incline to accept the same to be a serious infirmity in the prosecution case, since the doctor in his substantive evidence during the trial and with reference to the injury report disclosed some of the injuries were grievous in nature and it was disclosed to him by the PW/11 the victim that injuries were inflicted on her by her husband, the appellant/convict. On careful examination of the injury report and other medical documents we find that everywhere it was noted that she was assaulted by her husband and was conscious. Accordingly, the conviction of the appellant/convict under Section 326, IPC does not deserve to be interfered with.

For the reasons stated above, the conviction of the appellant/convict under Sections 302/326/201, IPC is sustained.

This brings us to the question of sentence. We find the learned trial Judge, while awarding extreme penalty to the appellant/convict referred several judicial pronouncements of the Apex Court, where the convict was sentenced to death. The trial Judge is of the opinion in the light of those judgments referred by him it can safely be held that it is the bounden duty of the court to treat the offence as rarest of rare cases when murder is multiple in number, diabolic, barbaric and the victims are innocent children. The mother of the victim reposed full confidence on the appellant/convict and allowed him to take both of his children for the purpose of walking. Although the trial court examined the case in the light of the aggravating circumstances but never mitigating circumstances were taken into consideration. The trial court has not recorded anywhere that there is no chance of the appellant/convict being reformed or he constituted a threat to the society.

In our opinion this is not a fit case for awarding death sentence. Accordingly, the order of sentence of death is commuted to imprisonment for life. So far as the conviction of the appellant/convict under Sections 326/201, IPC, we do not propose to impose any separate sentences.

In the result, this appeal stands partly allowed with the modification of sentence as aforesaid.

Office is directed to send down the LCR together with the copy of the judgment to the court below at once.

Urgent xerox certified copy of this order be given to parties, if applied for, as early as possible.