

(2017) 02 CAL CK 0029
In the Calcutta High Court

Case No : Death Reference No. 4 of 2016 In connection with C.R.A. 273 of 2016

The State of West Bengal

APPELLANT

Vs

Lakhikanta Adhikary

RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2017) CriLJ 2450

Hon'ble Judges : Nadira Patherya and Debi Prosad Dey, JJ.

Bench : Division Bench

Advocate : Mr. Kollol Mondal, Mr. Krishan Ray, Ms. Amrita Chel, Advocates, for the Appellant; Mr. Manjit Singh, Mr. Pawan Kumar Gupta Mr. Pratik Bose, Advocates, for the State

Final Decision : Disposed Off

Judgement

Patherya J.—This death reference is directed against the order of conviction and sentence dated 19th February, 2016 and 20th February, 2016 passed by the Additional Sessions Judge, 2nd Court, Arambagh, Hooghly in Sessions Trial No.7(1)/13 arising out of Sessions Case No.106/12 whereby and where under the Trial Court convicted the accused appellant for the offence under Section 302 I.P.C and sentenced him to death. A reference was made by the Trial Court under Section 366 Cr.P.C. and it is only pursuant thereto that the reference has been placed before us for confirmation of the death reference.

2. The accused appellant has also filed an appeal against the order of conviction and sentence which has been registered as CRA 273 of 2016. Both the death reference being Death Reference No.4 of 2016 and Criminal Appeal No.273 of 2016 arise from the common order of conviction and is being disposed of by a common judgment.

3. The case of the prosecution is that one Lakhikanta Adhikary was married to Sulekha Adhikary nine years ago. Although there was a demand, the victim lady

was subjected to both physical and mental torture, so also beatings in her matrimonial home by husband and his family members soon after the marriage.

A few days before the date of incident the accused appellant and his family members threatened to cut the victim lady with chopper.

4. The defacto complainant on 6th August, 2012 was informed that his daughter the victim girl and his grandson had been killed by slicing the throat with sharp weapon. The bodies were found inside the house after the incident and the door was shut. The victim lady was 26 years old and the son was 7 years of age. The mother of the victim lady filed a complaint on the same day with the Officer-in-Charge, Pursura P.S., Hooghly and on basis of such complaint Pursura P.S. Case No.77 of 2012 under Section 498A/302 I.P.C. dated 6th August, 2012 was registered and investigation initiated. Inquest was made under Section 174 Cr.P.C of both the victims. Thereafter, body was sent for postmortem. The accused appellant was arrested on 6th August, 2012 at 16:05 hours. On completion of investigation charge-sheet was submitted against the accused appellant under Section 302 I.P.C.

5. The case was committed to the Court of Sessions and transferred for disposal. Thereafter, the case was transferred to the Court of the Additional Sessions Judge, 2nd Court, Arambagh, Hooghly for trial. Charges were framed and the contents thereof were read over and explained to the accused appellant who pleaded not guilty and claimed to be tried.

6. In all 21 witnesses were examined by the prosecution, and documents exhibited. The accused appellant was examined under Section 313 Cr.P.C. but no D.W. was adduced. Based on oral and documentary evidence the order of conviction and death sentence was passed. Being aggrieved by the said order of conviction and death sentence C.R.A. 273 of 2016 was filed by the accused appellant and Death Reference No.4 of 2016 was filed by the State.

7. Counsel for the accused appellant submits that the F.I.R. was filed against the father-in-law, mother-in-law and the husband of the victim lady under Section 498A and 302 I.P.C. But charge-sheet was filed only against the husband and the parents-in-law were exonerated. The injuries found at the time of inquest does not match with the injuries found at the time of postmortem.

8. P.W.1 and P.W.3 cannot be relied on while P.W.2 has turned hostile. P.W.4 and P.W.15 are the same person and are formal witness. P.W.5 is the neighbour, who is witness to the recovery of the offending weapon. P.W.6 is the father of the accused appellant while P.W.7 is the sister-in-law. P.W.8 and P.W.9 are the helpers of the truck. P.W. 10 is the constable, who is a formal witness. P.W.11 the manager of the roadways does not support the evidence of P.W.8 and P.W.9. P.W.12 did not state of the recovery of the weapon by him or by P.W.5. P.W.13 is the photographer and a formal witness. P.W.14 is the medical officer, who is not very helpful and all that he has said was that he found neck injuries. P.W.16 is the defacto complainant while P.W.17 is Bandana, the sister-in-law of the victim

lady with whom the accused appellant had an extramarital affair. P.W.18 is the Sabhapati. P.W.19 is the postmortem doctor. P.W.20 is the I.O. There is no eyewitness in the instant case and the case is based on circumstantial evidence. It is the case of the prosecution that the appellant killed his wife and son in the night of 5th August, 2012/ 6th August, 2012. P.Ws.6, 8, 9 and 11 have proved the time of incident to be between 10 and 11 p.m. the offending weapon has been recovered under Section 27 as will appear from the evidence of P.W.5 and P.W.12. Motive for committing the offence by the accused appellant is also very clear from the evidence of P.W.17 (Bandana). P.Ws.6, 8, 9 and 11 has not supported the case of the prosecution. In fact, P.W.11 has demolished the prosecution's case as regards time. P.W.11 is a prosecution witness who has not been declared hostile and he has in his evidence stated that the appellant went to Calcutta and returned next day from Calcutta. As regards the recovery of the offending weapon under Section 27, there are different versions given by P.Ws.5, 12 and 20. Whatever be the motive, this alone cannot prove the commission of the offence. According to P.W.11 the accused left for Calcutta at 9.30 p.m. on 5th August, 2012 and returned the next day, i.e., on 6th August, 2012 at about 10/10.30 a.m. None of the prosecution witnesses has said that at night both the victims were at home in the custody of the appellant. P.Ws.3 and 7 has stated that the body was found at 9 a.m. As motive cannot prove the commission of offence and different versions given with regard to recovery so also the absence of the accused appellant from the P.O. on the night of 5th August, 2012 and 6th August, 2012 calls for setting aside the order of conviction and sentence dated 19th February, 2016 and 20th February, 2016. Reliance is placed on (2011) 13 SCC 706 and (2015) 4 SCC 467.

9. Counsel for the State submits that the case is not based on eyewitness evidence, but on circumstantial evidence. The circumstance being:-

- (i) The victims are the wife and son of the accused appellant and none can doubt this relation.
- (ii) The incident took place in the matrimonial home.
- (iii) Although the other members of the family lived in separate mess but without a doubt they lived in one premise.
- (iv) There is also nothing to show that the accused appellant did not reside in the said premise.
- (v) P.W.6 found the accused appellant in the house on the fated night at 11-11:30 p.m.
- (vi) P.W.8 has also said that the appellant went to his house.
- (vii) P.W.9 has also stated that the appellant gave him country liquor to drink and after consuming some himself went to his house.
- (viii) The victims were found dead in the morning.

(ix) The appellant returned home at 10/10:30 a.m. on 6th August, 2012.

(x) On his return he informed P.W.11 that his wife had been bitten by snake.

10. P.W.6 is the father of the accused appellant and he is a truthful witness when he said that the accused appellant "went out by my side". This has been elicited by the defence in cross-examination and there is no reason to disbelieve him. P.W.8 is the Khalasi who says that the loaded truck was standing at Pursura More and at about 10-10.30 p.m. accused appellant went to his house and returned after 40 minutes to the truck. P.W.9 another Khalasi has also stated that at 10.30 p.m. the accused appellant had gone to his home. P.Ws.6, 8 and 9 have all said about the accused appellant coming to his house while P.W.6 has stated of the presence of the accused appellant in the house at about 11- 11.30 p.m. P.W.8 has stated that he went to his house at about 10-10.30 p.m. P.W.9 has also stated that the accused appellant went to his house at about 10.30 p.m. after consuming country liquor. P.W.11 the manager has stated that on 5th August, 2012 he reached Pursura More at about 9.15 to 9.20 p.m. and after 20 minutes he handed the challan to the accused appellant for carrying potato to Calcutta by truck. Thereafter till the following day P.W.11 did not know the whereabouts of the accused appellant. On the following day, i.e., 6th August, 2012 the accused appellant returned from Calcutta and on his return he informed P.W.11 that his wife had been bitten by a snake. On 10th August, 2012 recovery was made without any objection and P.W.5 and P.W.12 have submitted in this regard. The 161 statements were taken on 6th August, 2012 and 10th August, 2012. At the time of examination under Section 313 Cr.P.C. no alibi has been taken by the accused appellant. Therefore, his presence in the house cannot be ruled out. The accused appellant was arrested on 6th August, 2012 at 16.05 hours at Champadanga and it is only thereafter the statement under Section 27 was made and the offending article recovered.

11. Motive is apparent from the evidence of P.W.17, the sister-in-law and it is because of such motive that the offence was committed by the accused appellant. As the circumstance has been linked, the order of conviction and sentence be upheld and appeal be dismissed.

12. Having considered the submissions of the parties this case is undoubtedly based on circumstantial evidence with no eye-witness. The appellant was driving a truck on the fated day and P.W.8 and P.W.9 were the helpers on that truck. P.W.11 is the manager who loaded the truck with potatoes on 05.08.12 and came to Pursurah More at 9.15/9.20 p.m. After 20 minutes i.e. at 9.35 p.m./9.40 p.m. he handed the challan to the appellant for delivery to Calcutta. As per the evidence of PW 8 and /PW 9, both of whom were helpers (khalasi) of the appellant at 10.30 p.m. they were at Pursurah More with the loaded truck, and at that time the appellant got off the truck and went to his house. This has been elicited by defence Counsel in cross-examination of P.W.8. P.W.9 on the other hand in cross-examination has stated that the appellant after consuming country liquor went to his house. The time was about 10/10:30 p.m. and on return which

was after 40 minutes they set off for Calcutta. P.W.6 (father) of the appellant in cross-examination has stated that he can see objects which are at a short distance well but his long sight is poor and on the fated day i.e. 4.7.12 while he was watching television in his room, the appellant went out by his side. In chief he has mentioned the time to be anything between 11 and 11.30 p.m. This matches the evidence of P.Ws 8 and 9 both of whom said that the appellant came after 30/40 minutes from the time they stopped at Pursurah More @ 10.30 p.m. PW7 (elder sister-in-law) has stated that P.W.6 (father) would watch television in his room upto 10 p.m. and onwards. In cross-examination she has stated that P.W.6 informed her that the appellant had come to the house on the eventful night. This piece of evidence remains unchallenged.

13. From the aforesaid therefore the presence of the appellant on 4.7.12 between 10.30 p.m. and 11/11.30 p.m. in his house cannot be ruled out.

14. There is no eye-witness to the incident and the case is based on circumstantial evidence. Each circumstance has been linked to form a link as will appear from below:-

(i) The victims are the wife and son of the accused appellant and none can doubt this relation.

(ii) The incident took place in the matrimonial home.

(iii) Although the other members of the family lived in separate mess but without a doubt they lived in one premise.

(iv) There is also nothing to show that the accused appellant did not reside in the said premise.

(v) P.W.6 found the accused appellant in the house on the fated night at 11-11.30 p.m.

(vi) P.W.8 has also said that the appellant went to his house.

(vii) P.W.9 has also stated that the appellant gave him country liquor to drink and after consuming some himself went to his house.

(viii) The victims were found dead in the morning.

(ix) The appellant returned home at 10/10.30 a.m. on 06.08.2012.

(x) On his return he informed P.W.11 that his wife had been bitten by snake.

15. There is no delink in the circumstance and the prosecution proved its case. Neither P.W.6 nor P.W.7 nor the appellant have suggested the presence of any third party. Instead P.Ws.6, 8 and 9 have stated of the presence of the appellant in the house between 10.30 p.m. and 11/11.30 p.m. This is an additional link in the chain of events and Section 106 of the Evidence Act can be made applicable as the case stands proved by the prosecution.

16. Motive is also clear from the evidence of P.W.17 sister of the victim. She has said that there was an extra marital affair between the appellant and herself which was not known to her mother (P.W.16) or the victim girl. The appellant and the victim lady met at Champadanga. This piece of evidence has emerged in cross-examination. P.W.17 did not want to disturb the family life of her sister and so did not accept the relationship. She has gone further to say that the appellant expressed his desire to marry her and if she did not visit him the appellant would harm her sister which she did not take seriously. This has not been challenged in cross-examination and remains unshaken.

17. After arrest of the appellant on 6th August, 2012 at 16 hours on the same day P.W.5 and P.W.12 were led by the appellant to the pond along with police personnel wherefrom the recovery of the offending weapon was made. In his cross-examination P.W.5 has stated that he recovered the offending weapon and this remains unshaken. He also said that they got down in that part of the water where the appellant had indicated. This too is in cross-examination and remains unshaken. P.W.12 has categorically stated that as per the statement of the appellant the offending weapon was recovered in the presence of P.W.5. The portion of the pond was shown by appellant and recovery was made on the appellant's instruction. Therefore, recovery of the offending weapon has been proved by P.W.5 and P.W.12.

18. The appellant in his examination under Section 313 Cr.P.C. has not given any explanation. The injuries found in the Postmortem report resulted in the death of the victims and were caused by sharp cutting heavy weapon as deposed by P.W.19 (Postmortem Doctor). Such weapon was also recovered at the instance of the appellant. Each circumstance has been linked to form a complete chain without delink. There exists an additional link too of last seen together. Therefore, the prosecution proved its case.

19. The next question that needs to be considered is whether the punishment given commensurates with the offence and to ascertain this, the aggravating and mitigating circumstance needs to be considered.

The aggravating circumstance being -

- (i) The appellant killed his wife and 7 year old son.
- (ii) According to P.W.17 sister-in-law there was an extra marital affair between herself and the appellant and the two would meet each other.
- (iii) The appellant wanted to marry her but as it would disrupt the family life of the victim lady, sister of P.W.17, P.W.17 did not accept the relation.
- (iv) Although the appellant received the challan from the Manager (P.W.11) at 9:35/9:40 he did not immediately set-out for Calcutta. He consumed alcohol, (P.W.9) went to his house (P.W.8 and P.W.9) and on return left for Calcutta.
- (v) The father (P.W.6) found him in the house at 11/11:30 p.m. and at that time

P.W.6 was watching TV when the appellant went out by his side.

(vi) P.W.7 (Jha) has corroborated the factum of P.W.6 watching TV.

(vii) It is only after the arrest of the appellant that the offending weapon was recovered from the pond at the instruction of the appellant.

(viii) The next day on return from Calcutta, the appellant informed P.W.11 that his wife had died of snake bite. This is contrary to the Postmortem Report.

20. Contra to the aggravating circumstance mentioned above the only mitigating circumstance is the extra-marital affair of the appellant with P.W.17 and her refusal to marry him as it would disrupt her sister (victim's) family life.

21. Although the aggravating circumstance outweighs the mitigating circumstance and the death of both victims was not only pre-planned, brutal and cold blooded but the appellant was aware that if he was in his senses he would not be able to kill the victims and it is for this reason that he consumed country liquor before entering his house on the fated night before leaving for Calcutta and after committing such offence the accused appellant remained unfazed, and pursued his normal activities, but to impose death sentence the case must be the "rarest of rare case" and the nature of the crime, circumstances of the criminal and impact of the crime on the community should be considered. Undoubtedly the killings of the wife and son (7 years) is cold-blooded and the motive abhorrent but the background from which the appellant came was not refined or defined. The appellant was a truck driver and was accustomed to drinking country liquor. This would give a slight insight into his educational background and the strata of society from where he came. If he was educated he would have found out different means of marrying his lady love but this was unknown to him.

22. As held in (2011) 12 SCC 56 (Haresh Mohandas Rajput v. State of Maharashtra) the rarest of rare case comes when a convict is a menace and threat to harmonious and peaceful co-existence of the society. No such allegation can be levelled against the appellant. There is no reason to believe that the appellant cannot be reformed or rehabilitated or that he will continue with his criminal acts of violence and therefore be a continuing threat to society.

23. It is true that the act was premeditated and planned but is not such that will result in intense and extreme indignation of the community or shock the collective conscience of the society.

24. At trial the appellant was aged 32 years, i.e., in November 2015 and on the date of disposal of appeal he at best would be 34 years and although not a decisive factor is one of the mitigating factors to convert the death sentence to life imprisonment for 30 years in jail with no remission as granted in (2008) 13 SCC 767 (Swami Shraddhananda (2) v. State of Karnataka), (2012) 8 SCC 537 (State of U.P. v. Sanjay Kumar) and (2013) 2 SCC 713 (Gurvail Singh @ Gala & Anr. v. State of Punjab).

25. Another reason is while applying the test of "Rarest of Rare Case" it is the perception of society which must be considered and not the opinion of a judge and society would abhor rape and murder of a disabled woman, a mentally and physically handicapped woman or minor child and although the appellant's action calls for no sympathy life imprisonment for minimum 30 years without remission would suffice.

26. Therefore on a consideration of the facts and circumstances of the case this is not a fit case to warrant affirmation of the death sentence instead the appellant is awarded life imprisonment with minimum 30 years without remission. The sentence awarded by the Trial Court is modified accordingly and Death Reference No.4 of 2016 is disposed off. CRA 273 of 2016 is dismissed.