

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.904 of 2010

Arising Out of PS.Case No. -0 Year- null Thana -null District- PURNIA

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1. Bajar, son of Late Sayeedur Rahman @ Sajidur Rahman, resident of village- Bara hal toil, P.S.- Amour, District- Purnea
 2. Shamima Khatoon, wife of Bajar, resident of village- Bara hal toil, P.S.- Amour, District- Purnea

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant/s : Mr. Vikramdeo Singh with Mr. Bijendra
Kumar Singh, Advocate
For the Respondent/s : Mr. Satya Narain Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

CAV JUDGMENT DATED 03-01-2018

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Appellant No.2, Shamima Khatoon, is the second wife of appellant No.1, Md. Bajar. Deceased in the present case is the first wife of appellant Md. Bajar. Both the appellants were held guilty under Sections 302/34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life with a fine of Rs.10,000/- each with default clause. They were, however, acquitted of the charge under Sections 201/34 of the Indian Penal Code.

2. The prosecution case narrated in the written report (Ext.1), in brief, is that on the night intervening 28/29.6.2007 while the victim was at her matrimonial home, she was strangled to death and the dead body was placed on the darwaja of the house. The written report



(Ext.1) was lodged on 29.6.2007 at 12.30 P.M. by Md. Abid (P.W.7), who is the brother of the deceased. As a motive it was alleged in the written report that Abida Khatoon (deceased) was married to appellant No.1 several years ago. 4 to 5 years ago appellant No.1 again married with appellant No.2. Both the wives were residing in the house of appellant No.1. There was perennial quarrel(s) between them, inasmuch as the victim used to be physically harassed by the appellants on numerous occasions. At times she used to flee from her sasural and come to the house of the informant who, expressing his inability to support her due to his poverty, used to persuade her to return back to sasural. A formal FIR (Ext.3) was drawn. The Investigating Officer went to the place of occurrence, prepared the inquest report, inspected the place of occurrence and upon receipt of the post mortem report concluded the investigation and submitted charge sheet against the appellants. The trial of the case was assigned to learned trial judge where charges were framed and explained to the appellants. They abjured the guilt and claimed to be tried. On going through the record it appears that appellants took a plea of alibi as well as their false implication merely on suspicion.

3. In order to buttress their defence, D.W.1, Nadima Khatoon, being daughter of the deceased and D.W.2, Abdul Majid, being the uncle of appellant No.1, were examined. On bare narration of the case it appears that it is based on circumstantial evidence.



Learned trial court has also proceeded on that premise and evaluated the evidence.

4. With a view to bring home the charge the prosecution examined 14 prosecution witnesses. They are as follows : P.W.1, Md. Islamuddin is the co-villager of the informant. He had traveled to the house of the deceased along with the informant on getting information about the death of the victim. P.W.2, Md. Abrul @ Abdin, is the son of the deceased and appellant No.1. P.W.3, Hussain Ahmad, is the own brother-in-law of the deceased. P.W.4, Jamil Akhtar, P.W.5, Md.Sajjad Alam, Mukhiya, P.W.6, Gulam Mustafa and P.W.8, Md.Takair were declared hostile by the prosecution. None of the parties has made any submission referring to their evidence. P.W.7, Md. Abid, is the brother of the deceased and the informant of the case. P.W.9, Pratap Singh is the second Investigating Officer of the case, who took over the investigation from P.W.10, Chandrika Yadav, who had registered the case on the basis of the written report presented by P.W.7 at the Police Station and carried out initial investigation. He is the author of the inquest report (inadvertently also marked as Ext.1). P.W.11, Kuldip Yadav, is the formal witness, who has proved the signature on the inquest report (inadvertently marked as Ext.1). He also proved the material exhibit 1 (Patua Rope). P.W.12. Md. Suleman, is a formal witness, who has proved the recovery and seizure of the rope from one of the rooms of the house of the



appellants, which was found tied to the wooden beam (dharein) of the room. Dr.Umesh Kumar (P.W.13) is the autopsy surgeon, who conducted the post mortem examination on the cadaver and submitted the post mortem report (Ext.3). P.W.14, Md. Latif, has taken the dock to formally prove the first information report, which was again mistakenly marked as Ext.3.

5. Learned trial court on carefully scrutinizing the evidence adduced by the prosecution held that the death of the deceased was homicidal and the circumstances proved at the trial by the prosecution unerringly establish their guilt. The plea of the defence propounded at the trial through evidence of D.Ws. that the deceased had actually committed suicide by hanging herself from the wooden beam of the room was negated. Their further plea of alibi was also turned down. Both the appellants were convicted accordingly.

6. We have heard Mr. Vikramdeo Singh, counsel for the appellants and Mr. Satya Narayan Prasad, APP for the State.

7. As the defence has questioned the finding of the learned trial court on the death of the deceased being homicidal in nature, the Court would first examine the same with reference to the evidence on record. In that sequence, what the autopsy surgeon found would be relevant. On 30.6.2007 while P.W.13 was posted as the Medical Officer, Sadar Hospital, Purnea, he conducted autopsy on the body of the deceased and found the following ante mortem injuries :-



”On external Examination- Rigor Mortis present in all four limbs. Froathing from Nostril was found. Ligature Mark over neck around the neck was found. Tongue was protruded between the teeth.

On dissection – Head normal, neck fracture of trachea. Blood clot present in the trachea. Chest, heart chamber full, liver empty. Lungs congested. Abdomen, Liver, Spleen, kidney congested. Stomach contained semi digestive food. Small and long intestine- Gass and feacus matter. Urinal bladder empty. Uterus – normal & empty.

Time elapsed since death- within 24 hours.”

The significant finding of the Doctor was presence of ligature mark around the neck, which could have been caused by using rope or articles, such as, belt/cloth. Tongue was protruded between the teeth. He also found fracture of trachea ring. In the opinion of the Doctor, the victim was strangled to death.

8. Counsel for the appellant has submitted that the informant has deposed that when he visited first her house on hearing the death of his sister his one of the sons and daughter were present at the house. Both of them, on query said that they could see the victim in the room hanging by neck with a rope which was tied to wooden beam of the house. However, the informant became suspicious as it was noticed that the wooden beam was not so high wherefrom any



one can commit suicide. Son and daughter present there had also disclosed that the victim was seen in a position where her legs were grounded on the floor. It has been argued by defence that it is a case where the victim, due to some depression, had committed suicide. In this connection, the defence has also drawn attention of the court to the relevant evidence wherefrom it appears that the victim was aspiring to get her eldest son married to some other girl but the son (P.W.2) had solemnized marriage with the daughter of the informant. This was a shock to the deceased which she could not bear and committed suicide.

9. The State has argued that there is nothing on record to show that the son of the victim (P.W.2) had actually married the daughter of the informant on a day prior to the occurrence as suggested by the defence. It is also urged that except the evidence of the daughter of the victim as D.W.1 there is nothing convincing on record to show that the victim was first seen hanging from the beam or that the appellants were not in home on the relevant night.

10. The trial court having considered at great length the evidence with reference to observations/findings of the Modi's Medical Jurisprudence found the presence of continuous ligature mark around the neck the fracture of the larynx and the ecchymosis round the edge of ligature mark present on the deceased found in the inquest report as well as in post mortem report were conclusive to hold that



the death of the deceased was homicidal and not a suicidal. We entertained no doubt that it was a case where the deceased was done to death. The post mortem report read with evidence of Doctor in court completely rules out the case of suicidal death. In our view, the contention of the defence is not well founded. We have no hesitation to hold that the death of the deceased in the matrimonial home was homicidal in nature.

11. Having held so, the Court would proceed to examine the other relevant evidence to consider whether the prosecution has discharged the onus as expected of it in the given facts and circumstances of the case. The learned trial court has considered the facts and circumstances of the case and invoked Section 106 of the Indian Evidence Act to hold the appellants guilty.

12. We are mindful that the victim was residing in matrimonial home where the death occurred. Both parties have argued at length on the legal principles to be applied in such a case where there is no eye-witness. It has been argued on behalf of the appellants that in the case at hand there were at least two eye-witnesses present in the house, namely, the daughter of the victim (D.W.1) and one son of the victim (not examined). Their non-production by the prosecution casts serious doubt on the prosecution case. Conversely, it has been submitted on behalf of the State that the offence was committed secretly within the four walls of the sasural of the deceased and even



the son and the daughter (D.W.1) of the victim have not claimed themselves as eye-witness to the occurrence. D.W.1 has primarily been produced by the defence to support their alibi, which has rightly been negated by the trial court referring to the evidence on record, particularly that of P.W.2.

13. In the State of West Bengal vs. Mir Mohammad Omar and others : (2000) 8 SCC 382, the Apex Court held that if the fact is specially within the knowledge of any person, the burden of proving that fact is upon him. It is impossible for the prosecution to prove such facts, particularly within the knowledge of the accused. Section 106 of the Indian Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

14. In the case of Trimukh Maroti Kirkan vs. The State of Maharashtra : (2006) 10 SCC 681, the Apex Court, while dealing with a case analogous to the facts of the present case held that when the victim is killed secretly within the four walls of the sasural, the burden on the prosecution is comparatively lighter. If such burden is



discharged by adducing cogent and reliable evidence, like the present case, the onus shifts on the accused to explain the circumstances that led to the death of the victim. The apex court in paragraphs No.14 and 15 of the said case held as under :

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* – quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads :

“(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will



be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

15. In a case based on circumstantial evidence, the motive has a very important role to play. What has been established through the evidence in the present case is that the appellant No.1 had a few years ago contracted a second marriage with the appellant No.2. Since then skirmishes between the appellants and the deceased was going on. On several occasions the appellant No.1 had even physically assaulted and ill treated the deceased who had to run away from the matrimonial home and come to the house of the informant (P.W.7), who used to persuade her to go back to sasural as he was unable to support her due to his poverty. Even Panchayati on few occasions was called for by the informant to resolve the dispute between the husband and the wife and to allow the deceased to live peacefully in the matrimonial home. The other witnesses, including P.W.2 (own son) have also supported the informant on this point. The motive propounded by the prosecution for committing murder of the deceased is fully established.

16. It has been argued with much emphasis that D.W.1, being daughter of the deceased and appellant No.1, has stated that she was only present in the house with her brother when the incident



occurred. The appellants had gone to village Simalbari in connection with the death of a distant relative. She has further stated about the sleeping with the deceased on the relevant night and when woke up she found her mother hanging with the noose. D.W.2 has also spoken about the alibi of appellants. It is submitted that the evidence adduced by the defence indicates that while the appellants were away from the home, the victim committed suicide. The court on carefully analyzing their evidence does not find them truthful. The evidence of P.W.2 (son of the deceased) indicates that he too was present at the last rites of the deceased in the family of the appellants where he had not seen the appellants present and participating in the last rites. That apart, the death of the victim, according to D.Ws., was suicidal. The court has already held that it was a homicidal death. In a case based on circumstantial evidence the experience of the court is that the accused (s) generally take a plea of alibi. It is easy to take plea of alibi but extremely difficult to prove the same to the satisfaction of the court.

17. At this stage, the court would again refer to the findings of the Doctor where it was opined that the death had occurred due to asphyxia caused by strangulation. This was so because the Doctor found fracture of trachea and there was no fracture/dislocation of cervical vertebra which is generally found in the case of death by hanging. The Autopsy Surgeon found ligature mark around the neck. It was continuous around the neck. Other findings of the Doctor



which form the basis of the opinion, such as abrasions and bruises around the edges of the ligature mark led him to conclude that it was a case of strangulation to death either using the hand or rope.

18. In a situation like this, it was expected of the appellants to immediately inform the police or the informant or other family members of the deceased. It was not done so until the lodging of the written report on 29.6.2007 at 12.30 P.M. by the informant. It is further brought on record that the appellants were later found absconding from the house.

19. We turn to the statements made by the appellants under Section 313 Cr.P.C. The examination of the accused under Section 313 of the Code is not a mere formality. Answers given by the accused to the questions put to him during such examination have a practical utility for the court apart from affording an opportunity to the delinquent to explain incriminating circumstances against him, they help the court in appreciating the entire evidence adduced during trial and to reach a conclusion. (Ref: AIR 1997 SC 768, paragraph-20). When the circumstances proved at the trial placed before the appellant soliciting their reply only a denial of the occurrence was pleaded. Surprisingly, both the appellants have not taken a plea of alibi also in their respective statements. Both of them have failed to offer explanation about the circumstances in which the deceased was strangled to death. The rope (material exhibit) produced before the



court was found not long enough which can be used in commission of suicide. That apart, prosecution has proved that the height of the wooden beam in the room was not high enough from where the deceased, who was reasonably tall in size, could have committed suicide by hanging herself by neck. The dead body was not found in the room but on the verandah of the house.

20. The circumstances proved at the trial by the prosecution, in the opinion of the court, are sufficient enough to discharge the comparatively lighter burden, in these circumstances, cast on the prosecution. Now it was the turn of the accused(s) to explain satisfactorily the circumstances in which the deceased received those ante mortem injuries resulting in her death. As noticed above, no such plausible explanation has been offered by them. To repeat, the death of the victim had occurred at the dead of night while she was at her sasural. It was homicidal in nature. There was a strong motive on the part of the appellants to do away with her life to put a hiatus to the ongoing quarrel between the appellants and the deceased which started soon after the appellant No.1 contracted second marriage with the appellant No.2 few years prior to the incident.

21. The aforesaid conclusions leave no doubt that the charges leveled against the appellants have been proved beyond shadow of reasonable doubt.

22. The appeal fails. It is accordingly dismissed.



23. Appellant No.2 is stated to be on bail. Her bail bond is cancelled. She is directed to surrender forthwith to serve out the sentence.

(Kishore Kumar Mandal, J)

spa/-

(Vinod Kumar Sinha, J)

AFR/NAFR	
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