

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 322 of 1991

Dilip Kumar Man @ Naba Kumar Man

-Vs-

State of West Bengal

For the Appellant : Mr. Jayanta Narayan Chatterjee,
Mr. Apalak Basu.

For the State : Mr. Partha Pratim Das,
Ms. Manasi Roy.

Heard on : 11.04.2022 & 18.04.2022

Judgment on : 18.04.2022

Joymalya Bagchi, J. :-

Appellant has assailed judgment and order dated 7.9.1991 passed by the learned Additional Sessions Judge, Midnapore in Sessions Trial Case No. II of July, 1989 convicting the appellant for commission of offence punishable under Sections 498A/302 of the Indian Penal Code and sentencing him to suffer rigorous

imprisonment for two years and to pay fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for six months more for the offence punishable under Section 498A IPC and to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer rigorous imprisonment for two years more for the offence punishable under Section 302 IPC; both the sentences to run concurrently.

Prosecution case as alleged against the appellant is to the effect that the appellant was married to one Jharna (the deceased herein), daughter of Jugal Karak (P.W.1) on 28th of Baisakh, 1380 B.S. As she was not fair skinned, she was subjected to torture by the appellant who used to threaten that he would drive her out from the house. In the afternoon of 4.12.87, Jugal received information from the Pradhan of Jara Gram Panchayet that Jharna had suffered unnatural death the previous night. Hearing the news, Jugal along with others rushed to the matrimonial home of Jharna. He found her daughter lying dead in the kotha ghar and her tongue had come out from the mouth. There were nail marks around her neck and mouth. At that time Jharna was seven months' pregnant. On the complaint of Jugal (P.W.1), Chandrakona Police Station Case No.2 of 1987 dated 4.12.1987 was registered for investigation against the appellant. Inquest and post mortem was conducted over the body of the deceased. In conclusion of investigation, charge sheet was filed

against the appellant. Charges were framed under Sections 498A/302 IPC. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 18 witnesses and exhibited number of documents. During his examination under Section 313 Cr.P.C., appellant stated two days prior to the incident, he had gone for work after giving money to Jharna. On return, he found Jharna had expired. Appellant, however, did not adduce defence evidence to prove the alibi. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 7.9.1991 convicted and sentenced the appellant, as aforesaid.

Mr. Jayanta Narayan Chatterjee along with Mr. Apalak Basu appearing for the appellant argues there is no direct evidence connecting the appellant with the murder of Jharna. Independent witnesses stated relationship of the couple was good. Appellant did not have motive to commit the murder. Chowkidar of the village (P.W.2) stated appellant was seen by him two days prior to the incident. He did not see the appellant on the next day or when he went to the P.O. after the occurrence. P.W.8 claimed that the appellant came to his house after the police had arrived and started crying. He stated he was not in the village at the material point of time. Post Mortem Doctor (P.W.16) found injuries on the private parts of the victim. Her wearing apparels were also torn. This probabalises a case of attempted sexual intercourse by a stranger

and not her husband. No explanation is forthcoming from the prosecution in that regard. Under such circumstances, appellant is entitled to the benefit of doubt.

Mr. Partha Pratim Das, learned Advocate appearing for the State argues appellant used to misbehave with his wife. As she was dark skinned, he threatened to drive her away from the matrimonial home. He had sufficient motive to commit the murder. Incident occurred at the matrimonial home at the dead of night. Alibi taken by the appellant has not been probalised. Stray sentences from the evidence of P.W.2 and P.W.8 would not establish that the appellant was not present at his residence on the fateful night. Post Mortem Doctor (P.W.16) denied the suggestion that the injuries in the private parts of the victim would depict a case of attempted sexual assault. On the other hand, he opined such injuries were evidence of torture upon the victim housewife. Accordingly, he prays for dismissal of the appeal.

P.W.1, Jugal Karak is the father of the deceased and the informant in the present case.

P.W.4, Biswanath Karak is a cousin of the deceased while P.W.5, Anil Karak is another relation of the deceased.

P.W.9, Smt. Swarnalata Santra is the aunt of the deceased and P.W.10, Smt. Maya Karak is her mother.

They deposed Jharna was married to the appellant about 8 months prior to the incident. Relationship between the couple was strained as Jharna was dark skinned. Appellant used to beat Jharna. Jharna resisted such torture and continued to stay at the matrimonial home. In the night of 16th Agrahayan i.e. 3rd/4th December, 1987, Jharna died at her matrimonial home. On the next day, P.W.1 received information about her unnatural death from the Pradhan of the village. He along with P.Ws.4, 5, 9 and 10 went to the matrimonial home and found Jharna lying dead wrapped in a katha. There were nail marks around her throat. Her tongue had come out from her mouth. The accused confessed that he had committed murder by pressing her throat. Thereafter police came to the spot. P.W.1 lodged written complaint which was scribed by P.W.4 and marked as Ext.1.

P.Ws.4, 5, 9 and 10 have corroborated P.W.1 with regard to the aforesaid facts. Their evidence remained unshaken in spite of lengthy cross-examination.

P.W.2, Nakul Sal and P.W.8, Sunil Kumar Chakravortty are the Chowkidar and Pradhan of the village respectively.

P.W.2 deposed he received information from Pradhan that Jharna had died. He went to the house of the appellant and found the body of Jharna lying in the bedroom. Pradhan sent him to police station. He returned to the house of the appellant with police. In

cross-examination, the witness stated when he initially went to the house of the appellant, he did not find him there. He came back with police around 5.30 p.m. At that time he found the appellant sitting in his house crying. P.W.2 also stated he had met the appellant two days prior to the incident. On the next day, he did not see him in his house.

P.W.8, Pradhan of the village deposed appellant used to live alone in the house with his wife. His brother used to live in a separate house which was 1½ bighas away. At 7.00 A/M. on 4.12.1987 he got information from Jaladhar, brother of the appellant that Jharna had died. He went to the house of the appellant. He sent Chowkidar (P.W.2) to the police station. He found the dead body of Jharna. Police came at 5.00 P.M. When police came at 5.00 P.M., he again went to the house of the appellant.

In cross-examination, he stated appellant reached his house after police arrived. He started crying and stated when he had gone for work, someone may have murdered his wife.

These are the witnesses of fact.

P.W.16, Dr. Tapan Kanti Hazra is the post mortem Doctor. He found the following injuries on the deceased :-

- 1) *That the victim was of average built and of black complexion, average nutrition. Rigor mortis present in both lower limbs and left upper limb, but absent in right upper limb. Face congested,*

neck congested, eye closed, conjunctive congested and edematous, blood stained froth, tongue slightly protruded.

- 2) *Triangular abrasion 5" x 3" x 2" in the right flank of the abdomen.*
- 3) *Three nail marks extending obliquely from 1½" below right side of the right breast 1" in size.*
- 4) *In the back side*
 - (a) *In lumber region one black abrasion 3" x ½".*
 - (b) *Other two abrasions ½" x ½", ½" above (a).*
- 5) *In the right arm (in black side) 3 linear abrasions 1" x 1/6" appearing to be nail marks.*
- 6) *In the left arm one ½" x ½" abrasion and another abrasion behind the left elbow ½" x ¼".*
- 7) *One nail mark 1/6" below the left eye over the left cheek skin.*
- 8) *Four nail marks over the right side of the skin of the neck anteriorly over the right sterno clavicular muscle just below the angle of the mandible and other 3 nail marks behind the nape of neck right side.*
- 9) *Fracture greater corno of the hyoid bone right side.*
- 10) *Three nail marks over the walls of the ribs and cartilage.*
- 11) *Larynx found congested, swollen and fracture greater corno of the hyoid bone right side. Both lungs found congested.*
- 12) *The left chamber of the heart found empty and right chamber contained 15 c.c. of liquid dark blood. Vessels of the heart found healthy.*
- 13) *Stomach contained food materials and secretion of gastic juice. Liver found congested.*
- 14) *On dissection, foetus was found in the womb. The foetus was viable at the time of death.*
- 15) *Another abrasion found on the left labia majora (private parts) ½" x ½".*
- 16) *Blood clot found below the muscles of the neck, dark in colour.*

He opined death was due to asphyxia arising out of throttling, homicidal in nature. Time of death was 30 to 40 hours from the time of examination. He proved the post mortem report. He gave reply to queries raised by the investigating officer which was marked as Ext.7.

In cross-examination, he stated there was vigorous scuffling between the victim and the assailant. He, however, denied the suggestion that from the injuries found in the private parts, it could certainly be said there was an attempt of committing sexual assault on the victim. He clarified the injuries caused on the labia majora might be caused by hard blunt substance. Such injuries might be caused for opening the private parts for the purpose of coitus. An attempt of making forcible coitus is a kind of torture.

P.W.15 (Krishna Kanto Mandal) and P.W.17 (Sisir Kumar Chaki) are the investigating officers of the case.

P.W 18, Pannallal Goswami was the officer in charge of Chandrokona police station at the material point of time.

P.W 15 deposed he was holding charge of the police station at 12.35 p.m. on 4.12.1987. At that time chowkidar, P.W 2 came with a letter of Pradhan, P.W 8. On the basis of the letter UD case was registered. He proved the copy of the FIR which was treated as UD case being UD case no. 51 of 1987 (Ext 3). He also proved the original letter marked as Ext 4. He proceeded to the place of

occurrence. He held inquest over the body of the deceased which was marked as Ext 2. He sent the dead body to the hospital. He collected wearing apparels of the deceased.

Jugal Karak submitted written complaint at the place of occurrence. The written complaint was received by PW18, officer in charge of the police station who endorsed the investigation to PW15. Appellant was arrested at the spot. Subsequently, investigation of the case was taken over by PW17 who submitted charge sheet against the appellant.

From the aforesaid evidence, it appears that the prosecution case with regard to the unnatural death of the housewife in the night between 3rd/4th December 1987 at her matrimonial home has not been seriously challenged by the appellant. However, the appellant has vehemently disputed the two vital incriminating circumstances relied upon by the prosecution namely:-

- (i) extra judicial confession made by him; and
- (ii) presence of the appellant on the fateful night at his residence.

Trial court had not relied on the extra judicial confession primarily on the inference that the appellant may have been forced to make such confession under duress and that too in presence of the police. I find much substance in the reasoning of the trial judge in this regard. Evidence on record shows a large number of people had

assembled after the incident. P.W 5 claimed appellant had made confession before the police though a different version emerges from P.Ws 1 and 4. Most importantly, this vital circumstance i.e. extra judicial confession by the appellant is significantly absent in the FIR lodged by P.W 1. Hence, I concur with the trial Court and hold it may not be prudent to rely on the extra judicial confession.

Even if extra judicial confession is discounted, there is no escape from the conclusion that the victim housewife suffered brutal death due to throttling in the night between 3rd /4th December 1987 at her matrimonial home which was shared by the appellant alone. During his examination under section 313 Cr. P.C. appellant raised a plea of alibi. He stated two days prior to the incident he had left for work giving money to the victim. Upon returning he came to know of the death of his wife. Appellant did not adduce any defence evidence to probabalise such alibi. Mr. Chatterjee relied on the evidence of PWs 2 and 8 as well as that of post mortem doctor, PW 16 to probabalise the defence case of murder by a stranger. He referred to PW 2 who stated he had seen the appellant two days prior to the incident. Next day he did not see him in the house. PW 2 (Chowkidar) also stated he did not see the appellant when he visited the house for the first time after the incident. Similarly, PW 8 (Pradhan) claimed appellant came after the police had arrived at the spot and started crying. He stated his wife had been murdered by someone else. Inspiration to

defence plea of attempted sexual assault and murder by a stranger is also drawn from injuries noted on the labia majora of the victim by PW 16 (post mortem doctor).

I have analysed the aforesaid pieces of evidence in the backdrop of the facts and circumstances of the case. Alibi like any other fact must be proved by the person who propounds it. In the present case alibi has been raised by the appellant and has to be proved by him. However, alibi may be proved through preponderance of probability and not beyond reasonable doubt. I have assessed the evidence on record to examine whether the onus even on the anvil of the probability has been discharged by the appellant or not. The appellant is a daily labourer. No evidence is forthcoming that he used to go away from the village for work. Appellant chose not to lead evidence to show where he had gone for work two days prior to the incident. On the other hand, he has relied on the stray observations made by PWs 2 and 8 to sustain his alibi. Analysing the evidence of PWs 2 and 8 it would appear that the witnesses are not wholly truthful and their versions are inconsistent to one another. While PW 2 claimed that appellant was already in his house when he came along with the police, PW 8 would suggest appellant came after the police had arrived at the house after the incident. PW 2 claimed he had seen the appellant two days prior to the incident. On the next day he had not seen him in the house. He is silent whether the

appellant was present in the house on the fateful night or not. PW 2 who is neither a relation of the appellant nor an inmate of the house where the incident occurred cannot be treated as a natural witness with regard to such circumstance. PW 8 is also completely silent with regard to the presence of the appellant at his house on the fateful night. Stray sentences taken from the deposition of PWs 2 and 8, therefore, in my view does not discharge the onus cast on the appellant to prove that he was not present at his residence on the fateful night. Even with regard to injuries on the labia majora of the victim as noted by post mortem doctor (PW16), the medical expert has explained such injuries in response to queries made by the investigating officer (PW 15). Doctor stated such injuries cannot be stated with certainty as an attempt to sexual intercourse. Similar injury may be caused by forceful assault by hard and blunt substance or by opening the labia majora by hand or forcible coitus. Evidence on record shows that the victim was seven months' pregnant. It is possible the appellant had physically assaulted her on various parts of the body including her private parts. He even attempted forcible coitus which the victim had resisted on the ground of pregnancy. Ultimately, she was brutally throttled and murdered. In this background I am unable to accept the submission of Mr. Chatterjee that the injury on labia majora gives rise to an inference of assault by a stranger and not her own husband.

For the aforesaid reasons, I am of the opinion prosecution case has been proved beyond doubt.

Conviction and sentence of the appellant is accordingly upheld.

Bail bonds of the appellant are cancelled and he is directed to forthwith surrender and serve out the remainder of the sentence, failing which the trial Court shall issue appropriate process to execute the sentence in accordance with law.

The appeal is, accordingly, dismissed.

This court notes the appellant had been in custody for more than 19 years. In the facts and circumstance of the case, if the appellant upon surrender before the trial court makes application for remission of his sentence in terms of section 433A Cr.P.C., the appropriate government shall consider the same in accordance with law keeping in mind all relevant factors including his conduct in the correctional home.

In view of disposal of the appeal, connected applications, if any, also stand disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellant in terms of Section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial court for necessary compliance.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

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