

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. 469 of 2014

With

CRAN 3 of 2015 (Old CRAN 783 of 2015)

Mofikul Islam @ Mofiqul Islam

-Vs-

The State of West Bengal

With

C.R.A. 119 of 2014

Mofikul Islam @ Mofiqul Islam

-Vs-

The State of West Bengal

For the Appellant : Ms. Sabana Hasin, Adv.

**For the State
In CRA 469 of 2014** : Mr. Noguive Ahmed, Id. A.P.P.,
Ms. Trina Mitra, Adv.

**For the State
In CRA 119 of 2014** : Mr. Abhra Mukherjee, Adv.
Ms. Mayukhi Mitra, Adv.

Heard on : 10.05.2022

Judgment on : 10.05.2022

Joymalya Bagchi, J. :-

Two appeals have been preferred against the self-same judgment and order dated 20.12.2013 and 21.12.2013 passed by the learned Additional Sessions Judge, Fast Track, 2nd Court, Lalbagh, Murshidabad convicting the appellant for commission of offence punishable under Sections 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.3,000/-, in default, to suffer rigorous imprisonment for six months more.

As Criminal Appeal No. 119 of 2014 is prior in point of time, we hold Criminal Appeal No. 469 of 2014 is not maintainable and is accordingly dismissed.

Criminal Appeal No. 119 of 2014 is taken up for hearing and disposed of on merits.

Prosecution case against the appellant is as follows:-

On 17.5.2011, the victim Dibarani Mondal, a young widow had gone to Lalbagh Hospital along with his brother Madhusudan Mondal (P.W.2) for treatment. They left their residence at 7.00 A.M. Dibarani was treated by Dr. Bibhash Mukherjee at the hospital who prescribed medicines. After purchasing medicines, Dibarani and Madhusudan came to the house of their relation Chhidam Mondal at village Amaipara under Jiaganj Police Station around 2.00 P.M. They had food and left for their residence around 4.00 P.M. On their way, an unknown person started following them in a bi-cycle near a bridge over river Bhairab at village

Ranitala. When they reached Char Bathanpara village, the unknown person suggested they could take a route through the open field which would be shorter. On his suggestion, Dibarani and her brother took the route through the open field. The said person followed them. After some time, he assaulted Madhusudan who left the spot in his bi-cycle out of fear. Madhusudan saw the unknown person drag his sister into the field. He rushed to his house and informed his parents. His parents and other villagers searched for Dibarani. They found her lying dead in the jute field. She had a black spot around her neck and her clothes were dishevelled. Police came to the spot and body of Dibarani was removed to the hospital. Tulshi Mondal (P.W.1), father of the victim lodged written complaint resulting in registration of Raninagar P. S. Case No. 283 of 2011 dated 17.05.2011 under Sections 376/302 of the Indian Penal Code. Inquest and post mortem were held over the body of the victim. In course of investigation, appellant was arrested. He was identified by P.W.2 during test identification parade. Charge sheet was filed against him and charges were framed under Sections 376/302 IPC. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 12 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial, the trial Judge by the impugned judgment and order dated 20.12.2013 and 21.12.2013 convicted and sentenced the appellant, as aforesaid.

Ms. Sabana Hasin, learned Advocate for the appellant submits there is no eye-witness to the incident. P.W.2, a 13 year old boy, had not named the appellant. He had described the miscreant as a 35 year old man but the appellant was barely out of his teens at the time of occurrence. There is possibility appellant was shown to P.W.2 prior to T.I. Parade examination. Hence, identification of the appellant by P.W.2 is unreliable. Relying on the cross-examination of the post mortem doctor (P.W.9), she submits the doctor opined death occurred 36/48 hours prior to the post mortem examination which was held around 2.00 P.M on 18.05.2011. Although P.W.2 claimed they had lunch around 2.00 P.M. and the incident occurred five hours later around 7.30 P.M., post mortem doctor found food in the stomach of the deceased and opined death was one hour after taking food. Opinion of the doctor regarding time of death completely demolishes the prosecution case. Offence of rape had not been proved and motive to commit crime has not been established. Investigation in the instant case was done in a perfunctory manner. Prescriptions were not seized and exhibited. Investigating Officer (P.W.11) did not explain what prompted him to arrest the appellant and implicate him in the crime. Place of occurrence also has not been established. Cause of death was not put to the appellant during his examination under Section 313 Cr.P.C. In view of such glaring infirmities in the prosecution case, she submits the appellant is entitled to the benefit of doubt.

Mr. Neguive Ahmed, learned Additional Public Prosecutor submits P.W.2 is the most vital witness. He identified the appellant as the person who had followed them and dragged her sister away inside the jute field on the fateful day. Soon thereafter, her dead body with injuries was recovered from the field. He identified the appellant during T.I. Parade as well as in court. Post mortem doctor opined death was due to asphyxia arising out of manual strangulation. He also noted injuries in the private parts of the deceased. His opinion with regard to time of death is bereft of justification and militates against his own findings in the post mortem report with regard to the body. Trial Court rightly disbelieved such opinion and came to a finding of guilt against the appellant. In view of the injuries in the private parts of the victim, acquittal on the charge of Section 376 IPC is wholly unmerited. Cause of death has not been disputed by the appellant and, therefore, failure to pose any question with regard thereto during examination under section 313 Cr.P.C. has not caused prejudice to the appellant or misled him in his defence. Hence, the appeal is liable to be dismissed.

From an analysis of the evidence on record, it appears P.W.2 is the sheet anchor of the prosecution case. He is the brother of the deceased Dibarani. They went together for the treatment of his sister at Lalbagh hospital by Dr. Bibhash Mukherjee. On their way back, they stopped at their uncle's house at Amaipara and had lunch. Around 4.00 P.M. they proceeded for their residence. From the bridge across Bhairab

river, an unknown person started following them. When they reached Bathanpara, said person suggested they may take a village path through the field. On the suggestion of the said person, P.W.2 and his sister took the village path. After some time, said person brought down his sister from the bi-cycle. When P.W.2 resisted, he was threatened and he fled away from the spot in his bi-cycle and came home. He narrated the incident to his parents. His parents informed local people. Gram Panchayat member informed the police. Thereafter, all of them went to the spot and found the dead body of his sister lying in the jute field. His sister's wearing apparels were in disarray. He suspected his sister had been murdered after being raped. He also noted marks of injuries on the face and chin of his sister. Police took away the body of his sister to the hospital. He signed on the inquest report. Police seized clay, jute plants, broken bangles and control earth from the place of occurrence under a seizure list. He signed on the seizure list. He identified the articles. He also identified the appellant in court.

In cross-examination, he stated police had taken him to jail where he identified the appellant.

P.W.2, Madhusudan Mondal has been corroborated by his parents (P.Ws.1 and 4). Both of them stated P.W.2 and his sister Dibarani had left the residence for treating Dibarani at Lalbagh hospital. Upon returning, P.W.2 narrated the incident to them. They along with local people and

others including police went to the spot and found the body of the victim girl. They suspected she had been raped and murdered.

P.W.1 lodged written complaint which was scribed by P.W.3.

P.W.8, Shankar Mondal, cousin brother of P.W.2 corroborated the evidence of parents (P.Ws.1 and 4).

P.W.5, Sridam Mondal and P.W.6, Nripen Mondal are the uncles whose house P.W.2 and the victim girl viz., Dibarani had visited in the afternoon. Both of them corroborated P.W.2 and stated after having lunch, P.W.2 and the victim had left their residence.

P.W.9, Dr. Jadab Kumar Jana is the post mortem doctor. He found the following injuries on the deceased;

"I found that rigor mortis was present. Bleeding from right nose. I found the following external injuries are injury (avulsion) to right ear lobule, minor injury to chin, multiple bruise mark over neck, injury to left heel. I found the following internal injuries are haemorrhage into the neck muscle. Fractured hyoid bone on the both corner. Both lungs had haemorrhage, stomach filled with food and fluid. There are injury to labia minora and majora."

He opined death was due to asphyxia arising out of manual strangulation. He proved the post mortem report, Exhibit 6.

P.W.12, Satyajit Maity held T.I. Parade with regard to the appellant. He deposed P.W.2 identified the appellant in course of T.I. Parade.

P.W.11, Bivas Chandra Mondal is the Investigating Officer. He deposed on 17.05.2011 he received written complaint. He went to Gadhanpara BPHC and made inquest over the body of the deceased

marked as Exhibit 1/2. Magisterial inquest was held over the dead body. He prepared rough sketch map along with index, Exhibit 9. He seized articles from the place of occurrence under a seizure list, Exhibit 2/2. He collected the post mortem report. He seized the wearing apparels of the deceased. On 22.05.2011 he arrested the appellant. He made prayer for T.I. Parade examination. On 06.06.2011, T.I. Parade was conducted. He collected semen from the accused and sent it for FSL examination. He filed charge sheet.

Identification of the appellant by P.W.2 :-

Ms. Sabina Hasin has challenged the identification of the appellant by P.W.2. She contends the miscreant was described as an unknown person aged about 35 years in FIR but appellant was aged around 18/20 years at the time of occurrence. Hence, he cannot be the person who committed the crime. It is also argued appellant was arrested on 22.05.2011 and T.I. Parade was held on 06.06.2011. In the interregnum he had been taken out for medical examination on 02.06.2011. There was possibility of P.W.2 being shown the appellant prior to T.I. Parade examination.

With regard to the first issue regarding the age of the appellant, I note first information report was lodged by the father of the deceased (P.W.1). He is not an eye-witness. He heard the incident from his son, P.W.2. Whether P.W.2 had divulged the age to his father or the latter had stated the age as per his own information is unclear. No question was put

to P.W.2 in cross-examination to elicit whether he had disclosed the age of the miscreant to his father or not. Approximation of age of a person is a subjective matter and it is possible P.W.1 (who had not seen the appellant) had made an error in that regard. However, it is disclosed in the first information report P.W.2 would be able to identify the miscreant. P.W.2 identified the appellant as the miscreant both in Court as well as during T.I. Parade. Prayer for T.I. Parade was promptly made upon the production of the appellant after his arrest on 22.05.2011 and date was fixed for T.I. Parade examination on 04.06.2011. Due to poor light, T.I. Parade examination could not be held on that date and was conducted on 06.06.2011. The chronology of events show there was no delay in making prayer for T.I. Parade at the behest of the investigating agency. Within a fortnight of the arrest of the appellant, T.I. Parade examination was held. As per P.W.12 who conducted T.I. Parade and the T.I. Parade examination report, Exhibit 10, no grievance was raised by the appellant that he had been shown to the witness. All necessary precautions were also taken by P.W.12 during such examination. T. I. Parade was conducted in the sub-jail which corroborates P.W.2 who stated he had been taken to jail khana where he identified the appellant. As an afterthought during his examination under Section 313 Cr. P. C., appellant claimed he had been shown to the witness at the police station. Admittedly, after arrest appellant had been remanded to jail custody. P.W.2 came to know of the arrest of the appellant only after notice for T.I.

Parade was served upon him. Hence, possibility of the appellant being shown to P.W.2 at the police station prior to his production before Magistrate is not borne out from the evidence on record.

In view of the aforesaid discussion, I am of the opinion identification of the appellant by P.W.2 both in court as well as during T.I. Parade does not suffer from any infirmity and can be the foundation of guilt of the appellant.

Time of death is at variance with medical evidence :-

It is contended medical evidence on record is at variance to the prosecution case. Referring to the cross examination of post mortem doctor (PW 9) it is argued death occurred 36/48 hours prior to the post mortem examination i.e. on 18.05.2011 at 2 p.m. Victim had taken lunch around 2 p.m and as per prosecution she was murdered around 7.30 p.m. But post mortem doctor noted food in her stomach and opined she died within one hour of taking food. Upon reading the evidence of post mortem doctor (PW 9) as a whole, I find it difficult to accept his opinion with regard to time of death as a convincing one. In cross examination post mortem doctor made a bald statement: *"I ascertain that the deceased died about 36 to 48 hours before post mortem examination"*. He has not indicated how he ascertained the time of death. Though opinion of an expert ought to be given adequate weightage and due respect, but when the expert's opinion is bereft of reasons and runs against the well

established tenets of medical jurisprudence it cannot be accepted as sacrosanct. In ***State of Haryana Vs. Bhagirath And Others***¹ the Apex Court succinctly elucidated this issue as follows:-

“15. The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.”

In the present case, findings of the post mortem doctor runs counter to his opinion with regard to time of death. PW 9 did not note any putrefaction in the body during post mortem examination. On the other hand he found bleeding from right nose. He also found rigor mortis present. Medical treaties show rigor mortis ordinarily sets in within 2/3 hours of death and disappears within twenty four hours. In **Lyon's Medical Jurisprudence for India, 10th Edition** it observed:-

“Order of onset and disappearance of rigor follows a definite course. It appears first in the jaw and face, rapidly spreads to the muscles of the neck and back, then to the upper extremities, and finally to the lower extremities. The time of onset varies somewhat, but rigor is generally present in the jaw by the end of two hours after death, the upper extremities are probably rigid in three hours, and rapidity is complete in another hour. The order of disappearance is the same as that of onset and all trace of rigidity has, in the majority of cases disappeared in from twenty to twenty-four hours after death.

¹ (1999) 5 SCC 96

These figures relate to cases on the plains; in the Hills and in Northern India during the cold weather, the times of onset and disappearance approximate more closely to those observed in Europe.

In cases in which, previous to death, the muscles have undergone great fatigue, and after death from any septicaemic condition, rigor sets in early and is of short duration. On the other hand, in cases of sudden death in the healthy, rigidity comes on late, provided that the muscles just previous to death have not been subjected to fatigue.”

Though P.M. doctor noted presence of rigor mortis in the body during post mortem examination, he opined death was between 36 to 48 hours- which run counter to the established views in medical treatises relating to onset and disappearances of rigor mortis. Similarly, bleeding from the nose and absence of putrefaction or decomposition of the body also contradicts his view death occurred 36 to 48 hours prior to P.M. examination.

In a catena of decision the Apex Court held² determination of time of death on the basis of presence of food in the stomach is not a sure method. Speed of digestion of food depends on various factors unique to the person concerned. There is no fixed time frame for digestion of food. Hence, opinion of the doctor that the victim had consumed food one hour prior to the incident ought to be taken with a pinch of salt. On the other hand evidence has come on record, couple of hours prior to the incident victim had taken lunch at her uncle's place between 2 to 4 p.m. Thereafter, she proceeded on her way back but unfortunately her life was

² Sadul Singh And Others Vs. State of Punjab, 1993 Supp (3) SCC 678 (para 6);
 Puran Singh Vs. State of Punjab, 1995 Supp (3) SCC 665 (para 6);
 Sanjay Khanderao Wadnane, (2017) 11 SCC 842 (para 15 to 18)

cut short by the brutal act of the accused around 7.30 p.m. i.e., 3 to 5 hours of consumption of food. In ***Charan Singh And Others Vs. State of Punjab***³ the Apex Court held normally a vegetarian diet containing mostly farinaceous food as usually taken by an Indian does not leave the stomach completely within six to seven hours after its ingestion. Hence, presence of food in stomach does not render the prosecution case improbable.

Injuries found on the body of the victim and the opinion of post mortem doctor (PW 9) show that the victim had been subjected to brutal assault and murdered. She died due to asphyxia arising out of manual strangulation. Post mortem doctor also found injuries in her private parts i.e. labia minora and majora. His opinion that such injuries may be due to itching is a hypothetical one and does not militate against extensive injuries on the other parts of the body including neck which shows victim was subjected to brutal indiscriminate assault by her predator. Thus I am of the opinion, medical evidence in the present case is not in consonance and consistent with the prosecution case.

Motive of crime :-

It has been argued motive to commit crime is not established. Victim was a young widow who had gone for her medical treatment with her younger brother. Noticing the victim along with her younger brother

³ (1975) 3 SCC 39 (para 18)

on the road the appellant took advantage of the situation and dragged her into a jute field and brutally assaulted her. His perversion is evident from the injuries caused on the deceased. Not only did he strangle the victim to death but also caused injuries in her private parts. No doubt, trial Court acquitted the appellant of the charge of rape as no definite opinion could be given by post mortem doctor, vaginal swab as well as the chemical examination report on the semen of the appellant had not been produced before it. Acquittal of the appellant under such circumstances was essentially on the anvil of the benefit of doubt and not one which disproves the prosecution case of a brutal assault on various parts of the body of the victim including her private parts. One cannot go into the working of the mind of a criminal to pin point exactly what had prompted him to indulge into such brutal and perverted act. However in view of unassailable evidence on record showing the injuries on the body of the victim including her private parts were caused by the appellant, I have no doubt in my mind that the prosecution case has been established beyond doubt.

Defective investigation vis-à-vis fair trial :-

It is argued the benefit of doubt ought to be extended to the appellant due to faulty investigation. In this regard Ms. Hasin has relied

on **Arvind Kumar @ Nemichand & Ors. vs. State of Rajasthan**⁴. In paragraph 41 and 45 of the said report the apex court held as follows:

“41. There is a subtle difference between a defective investigation, and one brought forth by a calculated and deliberate action or inaction. A defective investigation per se would not enure to the benefit of the accused, unless it goes into the root of the very case of the prosecution being fundamental in nature. While dealing with a defective investigation, a court of law is expected to sift the evidence available and find out the truth on the principle that every case involves a journey towards truth. There shall not be any pedantic approach either by the prosecution or by the court as a case involves an element of law rather than morality.

45. A fair investigation would become a colourable one when there involves a suppression. Suppressing the motive, injuries and other existing factors which will have the effect of modifying or altering the change would amount to a perfunctory investigation and, therefore, become a false narrative. If the courts find that the foundation of the prosecution case is false and would not conform to the doctrine of fairness as against a conscious suppression, then the very case of the prosecution falls to the ground unless there are unimpeachable evidence to come to a conclusion for awarding a punishment on a different change.”

Fair investigation is the foundation of a fair trial. There cannot be any dispute with the aforesaid proposition of law. Let me examine whether in the factual matrix of the case alleged deficiencies in investigation are of such nature which goes to the root of the prosecution case and discredits in toto.

It is contended investigating officer did not interrogate Dr. Bibhash Mukherjee nor did he collect the prescriptions from P.W 2. P.W 2 and other relations deposed they had handed over the prescriptions to the investigating officer. In this backdrop failure to seize the prescriptions and produced them in Court exposes remissness in investigation but does not

⁴ 2022 CRIL.J. 374

affect the intrinsic truth of the prosecution case. The uncles of victim, i.e., P.Ws. 5 and 6 proved that the victim and her brother had come to their residence after medical examination and thereafter had proceeded for their residence when the incident occurred. In this backdrop, non examination of Dr. Bibhas Mukherjee does not affect the unfolding of the prosecution case. Appellant had been arrested by the I.O out of suspicion. Thereafter he was put on Test Identification parade and PW 2 identified him as the miscreant who dragged away his sister in the jute field.

As discussed above, I have not found any infirmity in the identification of the appellant by PW 2. Under such circumstances, I am of the view although investigation may have been done with more responsibility, its failure cannot be said to be of such magnitude that it has vitiated the very foundation of the prosecution case.

Lapse in examination under section 313 Cr.P.C. whether prejudiced:-

It is contended cause of death was not put to the appellant during his examination under section 313 Cr.P.C. Purpose of examination under section 313 Cr.P.C. is to give the accused opportunity to personally explain the incrimination circumstances arising against him. Mere failure to put any particular circumstance to the accused by itself would not vitiate trial unless it is shown such lapse had prejudiced the accused. Onus is on the accused to demonstrate the prejudice due to the lapse. In

Alister Anthony Pareira Vs. State of Maharashtra⁵, the Apex Court held failure to put the chemical analysis report or the evidence of the doctor to the accused during his examination under section 313 Cr.P.C. had not prejudiced him. Similarly, in the present case the appellant has failed to show how he had been prejudiced due to the failure to put the cause of death to him during section 313 examination. From the tenor of cross-examination, it appears he was fully aware of the homicidal death of the victim and had not disputed it. Under such circumstances, such lapse could not have caused any prejudice to him or occasioned a failure of justice.

In the light of the aforesaid discussion, I am of the opinion, evidence on record clearly establish the prosecution case beyond doubt. There is no lacuna or deficiency in the prosecution case which would yield an alternative hypothesis of innocence of the appellant and the conviction and sentence of the appellant does not call for interference.

The appeal is, accordingly, dismissed. Connected application if any also stands 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.

⁵ (2012) 2 SCC 648

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

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