

**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. 260 of 2009

**Nuna @ Kanai Singh
-Vs-
State of West Bengal**

For the Appellant : Ms. Meenal Sinha, Adv.

For the State : Mr. Parthapratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 29th March, 2022

Judgment on : 29th March, 2022

Joymalya Bagchi, J. :-

The appellant has assailed the impugned judgment and order dated 19.02.2009 and 20.02.2009 passed by the learned Additional District & Sessions Judge, Fast Track Court, Bishnupur, Bankura, in Sessions Trial No. 1(12)07 arising out of Sessions Case No. 15(9)07 convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and directing him to suffer

imprisonment for life and also to pay fine of Rs.1,000/-, in default of payment of fine, to suffer further imprisonment for one month.

Prosecution case as alleged against the appellant is as follows:-

Jamuna was married to one Gurupada Ghosh. A girl child named Dulali Ghosh (the deceased herein) was born to the couple. She was eight years old at the time of the incident. Jamuna separated from her first husband and started residing with the appellant at Uttar Pradesh. Dulali remained in the house of her maternal uncle, Mahadeb Patra. In 2006 Jamuna and the appellant returned from Uttar Pradesh and resided with Mahadeb Patra for some time. Thereafter, Jamuna constructed a house and started residing there with her minor child, Dulali. Appellant ordinarily resided in the said house but would go to his native place in Uttar Pradesh off and on. On 01.04.2007, in the morning, Jamuna went to the brickfield to work. When she returned home she found one of the rooms in the house under lock and key. She broke open the padlock and noticed a little finger peeping out in the bedding kept there. On removing the bedding she found the dead body of her daughter with injuries on her neck. A broken knife was also found at the spot. Appellant was not found in the house. Jamuna informed his brother, Mahadeb and others and a written complaint was lodged by Mahadeb at Bishnupur Police Station. On the basis of the written complaint Bishnupur Police Station Case No. 34 of 2007 dated 01.04.2007 under Section 302 of the Indian Penal Code was registered against the appellant. In the course of investigation appellant was arrested from Radhanagar Bus Stand. Charge-sheet was

filed against the appellant and charge was framed under Section 302 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. In the course of trial prosecution examined thirteen witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned trial Judge by impugned judgment and order dated 19.02.2009 and 20.02.2009 convicted and sentenced the appellant, as aforesaid.

Mrs. Sinha, learned Counsel appearing for the appellant argues there is no direct evidence that the appellant had committed the murder. Evidence has come on record that appellant used to go to his native place in Uttar Pradesh off and on. Hence, he did not always reside with Jamuna and her daughter. Presence of the appellant on the fateful day in the house is doubtful. Jamuna's (P.W. 4) statement that appellant was present at the house is not trustworthy. Her post-occurrence conduct throws doubt with regard to such claim. Identification by voice by P.W. 2, who was neither a relation nor a neighbour, ought to be taken with a pinch of salt. P.W. 2, also deposed Jamuna may have falsely implicated the appellant. Police did not seize the broken padlock from the room. Hence, prosecution withheld the best evidence with regard to breaking open the padlock of the room where the dead body was found. No motive to commit the crime has also been established. Abscondence of the accused after the incident has not been proved. Neither has such circumstance been put to the appellant under section 313 Cr.P.C. Hence the appellant is entitled to an order of acquittal.

On the other hand, Mr. Das, learned Counsel appearing for the State submits appellant was in the house with Dulali on the fateful day. Her mother had gone out to work and PW 2 heard the voices of the appellant and Dulali in the house. Soon thereafter Jamuna returned home and found one of the rooms was under lock and key. Upon breaking the padlock, she recovered the mutilated body of her daughter. Appellant was not seen at the place of occurrence and was subsequently arrested after a month in the course of investigation. He did not take up any plea of alibi during his examination under section 313 Cr.P.C. No defence evidence was led to show the appellant was elsewhere on the fateful day. Hence, the circumstance relied by the prosecution unerringly point to the guilt of the appellant. PW 4 stated appellant did not like her step daughter. Motive of the crime is, therefore, established.

PW 4, Jamuna is the mother of the deceased. She deposed on the day of occurrence appellant and Dulai were at home. She went to the brickfield to work. When she returned home, she found one of the rooms was under lock and key. She thought her daughter had gone somewhere. She went to cook and as potatoes were kept in the room which was under lock and key, she broke open the lock to enter the room and found a finger peeping out of bedding stacked inside the room. She removed the beddings and found the body of her daughter with injuries on her neck. She informed the incident to her brother Mahadeb Patra, PW 1 who was at the tea stall. Police came to the spot. She narrated the incident to the police. She claimed as the appellant did not like her daughter, he

murdered her. In cross examination, she stated appellant used to go to his native place at Uttar Pradesh. Appellant had fled away after the incident. He was arrested at Radhangar bus stand. Appellant had talked over telephone with her and she had informed him that her daughter Dulai was good and nothing had happened to her.

PW 1, Mahadeb is the brother of Jamuna and the informant in the case. He deposed his sister had left her first husband. She went away with the appellant. Dulali, her daughter born from the first marriage, used to stay with him. In 2006 the appellant and Jamuna returned to the village. They stayed in their residence for some time. Jamuna constructed a separate house and thereafter the appellant used to stay with Jamuna and her daughter Dulali. On 1.4.2007 he was at the tea stall when Jamuna came and informed the incident to him. He informed the police at Radhanagar police camp. Thereafter he came to the house of Jamuna and found the body of Dulali. He lodged written complaint at Bishnupur Police Station which was scribed by Bidyanath Dey, PW 3. After the incident appellant was not seen in the village.

Evidence of Jamuna, PW 4 with regard to presence of the appellant on the day of the incident in the house is sought to be corroborated by PW 2, Suman Mukherjee. He deposed on 1.4.2007 while coming by the side of the house of the appellant, he heard the sound of the appellant and Dulali in the house. He however did not hear the sound of Jamuna. Thereafter at 10/10.30 a.m. Jamuna started shouting in the village that the appellant had killed Dulali and gone away. In cross examination, the witness,

however, stated that he was not sure whether Jamuna had falsely implicated the appellant or not.

Other witnesses, namely, PWs 5, 6, 8 and 11 have corroborated the fact that on 1.4.2007 in the morning Dulali had suffered injuries on her neck and died in the house.

PW 9 post mortem doctor held post mortem over the body of Dulali. He found the following injuries:

- “1. Presence of rigor mortis,
2. 3 incised wounds over the neck right side,
 - (I) one horizontal incised wound on sub mandibular region right side, 1”x $\frac{1}{4}$ ”x2”, bone deep,
 - (II) Similar injury with same measurement $\frac{1}{4}$ ” below above injury,
 - (III) Horizontal incised wound 1”x $\frac{1}{2}$ ”x2” bone deep on right chin,
4. Fracture third cervical vertebrae,
5. Spinal nerve cut,
6. Right sided common carotid/artery torn.”

He opined that death was due to multiple incised wounds, ante mortem and homicidal in nature.

PW 13 was posted as SI of police at Bishnupur P.S at the relevant time. On 1.4.07 he received a telephonic call that a child, namely, Dulali Ghosh was murdered in her house at Amral village. He diarised the information and proceeded to the spot. He received written complaint from Mahadeb Patra. He sent the complaint to the police station for registration as the FIR through a constable. Thereafter, he visited the place of occurrence and held inquest over the dead body. He sent the dead body for post mortem examination. He seized a broken knife from

the place of occurrence under a seizure list. He also seized blood stained articles from the place of occurrence. On 8.5.07 he arrested the appellant and filed charge sheet against him.

From the evidence of the aforesaid witnesses it is clear that Dulali, daughter of Jamuna PW 4 had been murdered in the house of Jamuna in the morning of 1.4.07.

The moot question is whether the appellant was the perpetrator of the crime?

Prosecution essentially relies on PW 2 and PW 4 to prove the appellant was present in the house on the fateful day. PW 4 stated she left for the brickfield around 8 am. On that day, her husband i.e the appellant and Dulali were in the room. Subsequently, she returned and found her daughter murdered. Appellant was missing. Her brother lodged FIR against the appellant. The post occurrence conduct of PW 4 as transpiring from cross-examination, however, renders the aforesaid version improbable. During cross-examination, the witness stated the appellant had telephoned her and she told him daughter was good and nothing had happened to her. Had the appellant murdered the minor child and absconded, would he telephone the victim's mother and enquire of child's well being? Why would PW 4 who had alleged that the appellant had murdered her daughter, inform him that her daughter was well? These un-answered questions cast doubt with regard to the truthfulness of P.W. 4 regarding her claim that her husband, that is, the appellant was present in the house on the fateful day. Trial court sought to explain away this

contradictory stance by observing appellant may not have been sure that the victim had died and accordingly had enquired about her. I find it difficult to accept such inference. Victim had been brutally murdered and had been wrapped up in a mattress. Under such circumstance, it is most improbable to infer the murderer would have even a shadow of doubt that the victim was alive. Thus, I am constrained to observe reading the evidence of PW 4 as a whole particularly her post occurrence conduct of conversing with the appellant and informing him about the well-being of her daughter runs contrary to the accusation that the appellant was present in the house on the fateful day and had murdered the victim. In this regard even PW 2 expressed doubt whether PW 4 was right in inferring the appellant was the murderer. That apart, identification of the appellant by voice by P.W. 2 is also not creditworthy. Although the said witness is a co-villager nothing is placed on record to show that he had close relationship with the family of Jamuna and could have identified the appellant and the victim by voice. It is unsafe to rely on the identification by voice by a witness who is neither a family member nor a close acquaintance.¹

The unnatural conduct of PW 4 and the possibility of error in identification by voice by PW 2 who was neither a family member nor a close acquaintance of the appellant persuade me to hold the prosecution

¹ See *Inspector of Police, T.N. v. Palanisamy*, (2008) 14 SCC 495; *Dola v. State of Odisha*, (2018) 18 SCC 695.

has not been able to prove beyond doubt that the appellant was present in the house on the fateful day.

The other circumstances relied against the appellant also do not appear to have been proved beyond doubt. PW 4 deposed the body of the deceased was recovered from a room which had been kept under lock and key. This circumstance was relied by the trial court against the appellant by observing only a family member could lock the room from outside for searching the dead body of the victim therein. Apart from the ipse dixit of PW 4, who was other the occupant of the house, no independent evidence is forthcoming with regard to the fact that PW 4 had broken the padlock to enter the room where the dead body of her daughter was found. Broken padlock was neither noticed by any witness at the place of occurrence nor seized by the investigating officer. PW 11 who came to the spot immediately after the incident and noticed the body of the deceased covered in a mosquito net and a broken knife lying beside it, does not speak of any broken padlock lying at the place of occurrence. Lack of corroboration from independent sources with regard to the presence of the padlock at the place of occurrence is an inherent lacuna in the prosecution case which cannot be attributed to remissness in investigation. Thus, I am of the opinion prosecution has failed to prove the aforesaid circumstance too.

It is argued on behalf of the prosecution that the appellant had absconded after the incident and was arrested on 8.5.2007 i.e. more than

a month later. PW 4 herself admitted that the appellant used to go to Uttar Pradesh off and on. Hence, absence of the appellant from the village cannot be said to be an unnatural event and no adverse inference be drawn against him. On the other hand, it appears from the deposition of PW 4 even after the incident appellant had telephonic conversation with her and the latter informed him about the well-being of their daughter. Finally, he was arrested from a bus stand near the village. Absence of the appellant from the village has to be seen in the backdrop of the aforesaid circumstances which do not give rise to an irresistible inference of abscondence. It is also relevant to note no question was put to the appellant with regard to his abscondence during his examination under section 313 Cr.P.C. Abscondence by itself is a weak piece of evidence and failure to put such circumstance to the appellant during his examination under section 313 Cr.P.C disentitles the court to rely on such circumstance to come to a finding of guilt.²

Motive for commission of the crime is also based on the sole version of PW 4 that the appellant did not like her daughter. This stance of P.W. 4 does not receive support from other evidence. Couple had stayed with the daughter in the house of PW 1 for some time. But PW 1 does not speak of any ill-treatment on the daughter by the appellant. On the other hand, PW 1 strangely sought to avoid this issue and stated motive, if any, was known to PW 4 alone.

² See ***Shamu Balu Chaugule v. State of Maharashtra*, (1976) 1 SCC 438**

In the light of the aforesaid discussion, I am of the opinion the evidence led by the prosecution does not establish the incriminating circumstances against the appellant beyond doubt and prove the guilt of the appellant. Thus, I am of the opinion appellant is entitled to the benefit of doubt.

Conviction and sentence of the appellant is set aside.

Appeal is, accordingly, allowed.

The appellant, namely, Nuna @ Kanai Singh shall be forthwith released from custody, if not wanted in any other case upon executing a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A Cr.P.C.

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.)