

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. 495 of 2016

Swaminath Roy & Ors.

-Vs-

State of West Bengal

For the Appellants : Mr. Tapan Dutta Gupta, Adv.
Mr. P. Roy, Adv.
Mr. Parvej Alam, Adv.

For the State : Mr. Abhra Mukherjee, Adv.
Mr. Dipankar Mahato, Adv.

Heard on : 23.02.2022

Judgment on : 23.02.2022

Joymalya Bagchi, J. :-

This is second round of litigation. Earlier all the appellants had been convicted and sentenced under Section 498A/302/34 of the Indian Penal Code. The appellants appealed against such conviction and sentence. In the course of hearing of the appeal, a Division Bench of this Court noticed incriminating materials particularly the medical evidence on record had not been put to the appellants. On such premise, the matter was remanded to the trial Court for holding fresh examination under

section 313 Cr.P.C. and to proceed with the trial from the stage after giving opportunity to the appellants to lead defence evidence, if they chose to do so. Upon remand, the trial Judge examined the appellants under section 313 Cr.P.C. Questions were put to them with regard to the medical evidence and other incriminating materials on record. Appellants did not choose to adduce defence evidence. Upon hearing arguments of the parties, the trial Court again by the impugned judgment and order dated 12th May, 2016 and 13th May, 2016 convicted and sentenced the appellants for the commission of offences punishable under Sections 498A/302/34 of the Indian Penal Code. Hence, the present appeal.

This Court is informed during the pendency of the appeal, appellant No. 2 namely Jageswar Roy has expired. Hence the appeal abates so far as appellant No. 2 is concerned.

Mr. Dutta Gupta, learned Advocate appearing for the appellants argued the sole eye-witness (P.W. 5) is not a reliable one. He was a student of Class-II at the time of occurrence. He was in the care of his maternal uncle who tortured him and brought him to Court to depose against the appellant. His evidence is not corroborated by other witnesses. Allegation of physical assault by appellant Nos. 3 and 5, namely Kalabati Roy and Sabita Roy are embellishments in Court. He further submitted none of the appellants apart from appellant No.1 were armed. They did not share common intention to murder the victim. Hence, the appellants may be acquitted of the charges levelled against them.

Mr. Abhra Mukherjee, learned Advocate appearing for the State submits P.W. 5 is the son of the deceased housewife. His presence in the house is most natural. He clearly narrated the brutal assault upon his mother. All the appellants conjointly participated in the assault. Number of injuries were noted by the post-mortem doctor which corroborates the version of P.W. 5. The prosecution case is proved beyond doubt.

P.W. 5 (Kishan Roy) is the son of the deceased and the most vital witness in the case. He was studying in Class-II at Vivekananda Bidyapith at Kushida at the time of occurrence. Due to his tender age, the trial Judge posed questions to him to test his capacity to depose. Upon being satisfied of his competence, the trial Court recorded his evidence. He deposed all the appellants used to reside with his mother at the matrimonial house. They used to ill-treat and assault her. On the fateful day, his father, his grandparents and his two uncles assaulted his mother. Two uncles caught hold of his mother's hand and feet. His father assaulted her with lathi and pressed her neck. When she requested her grandmother to intervene, she stated "let her die". He disclosed the incident to his uncle Balaram and maternal uncle, Meghnath. His statement was recorded before Magistrate. He is presently residing with his maternal uncle at Bihar. He was extensively cross-examined. In cross-examination, he stated all the accused persons including his father assaulted his mother. His father was armed with lathi but the other

accused persons were empty-handed. He also stated that he came to court with his maternal uncle.

Evidence of the minor has been criticized on the ground he was tutored by his maternal uncle who had brought him to court. I find little substance in such submission.

As the case essentially hinges on the eyewitness version of a minor, I have scrutinized his evidence with utmost care. It is true a witness of tender age is prone to tutoring. Hence, a heavier duty is cast on the Court to scrutinize his evidence in the backdrop of other evidence on record to find out whether his version is truthful or a product of tutoring. In order to do so, I have examined the evidence of P.W. 5 in the backdrop of other evidence on record.

P.W. 5 was the son of the couple. He resided with them in the house where the incident occurred. Incident occurred in the morning before his own eyes. His deposition with regard to the assault upon his mother with lathi by his father while his uncles held her back along with her grandfather is corroborated not only in his earlier statement recorded by the Magistrate but also medical evidence on record.

P.W. 3, Ajoy Kr. Das, post mortem doctor noted a large number of injuries on the body of the victim, which are as follows:-

- “1. Abrasion 1” x ¼” at upper part of middle of forehead;
2. right upper eye lid bruise;
3. multiple bruises of varying sizes on right upper back;

4. abrasion 2" x 1" on left lower back;
5. abrasion 1 ½" x ½" at left side of anterior aspect of neck;
6. Bruise at anterior aspect of the neck.

On dissection: Subcutaneous ecchymosis found at anterior aspect of the neck. Tissues appear to be cruxed. Hyoid bone found to be fractured.

Dissection of the body:- Hematoma at frontal right parietal region of scalp. Brain membrane – congested. Subdural hemorrhage found on right side. Brain – congested and soft. Reddish fluid in nasal cavity. Mouth, tongue, pharynx vocal cords, trachea congested. Reddish frothy mucus in bronchia tree. Pleurae – congested having hemorrhagic spot. Lung – highly congested having hemorrhagic spot. On section exuding dark coloured blood. Minute hemorrhagic spot on pericardial sac. Dark fluid blood in right chamber. Dark coloured blood in pulmonary arteries. Stomach – congested having 3/4th digested rice. Intestines, liver, spleen, pancreas, kidneys – congested.”

In his opinion death was due to asphyxia arising out of strangulation associated with injuries, homicidal in nature.

That apart, minor's version is corroborated by his uncle Balaram (P.W. 7) to whom he had narrated the incident soon after the occurrence.

P.W. 7, Balaram deposed he had rushed to the house of the matrimonial home of the victim after hearing the incident. He found the victim lying with injury marks and ligature mark on her neck. He learnt about the incident of murder from Kishan, son of Nirmala who told Jagat, Baidyanath, Swaminath and their father Jogeswar assaulted Nirmala. Witnesses also deposed Nirmala had been earlier tortured at her

matrimonial home over demands of money. She had been assaulted and a case was filed in Katihar which was subsequently compromised.

These facts have also been supported by the brother of Nirmala, namely, Meghnath Singh, P.W. 6. He deposed since marriage Nirmala had been subjected to torture over demands of dowry. Accused persons used to assault his sister. On an earlier occasion she had been driven out from the matrimonial home with her minor child. She lodged criminal case against the accused persons. Subsequently, matter was compromised and she returned to the matrimonial home. On the date of occurrence, hearing the news he went to the matrimonial home of the victim. He found the victim lying dead in the veranda. He found black spot injury on her breast, one injury on the forehead, ligature mark on the neck. None of the inmates of the house except Kalabati was present. Kalabati stated that Nirmala died due to pain in her belly. He lodged written complaint. On the next day, he went to Harishchandrapur Police Station and informed the fact of death of his sister to police. Police held inquest over the dead body. He signed on the inquest report. Post-mortem examination was done on 20.08.2009. Thereafter dead body was cremated. He lodged complaint on 22.08.2009 which was scribed by P.W. 1.

It is argued that Meghnath did not disclose the minor had narrated the incident to him. Nor is such fact reflected in the F.I.R. which was registered after three days of the incident. Minor had disclosed the incident to his uncle Balaram (P.W. 7) immediately after the incident.

Balaram's house was 1 km. away from the house of the appellants and he had arrived at the spot immediately after the incident. On the other hand, Meghnath (P.W. 6) is a resident of Kathiar, in the State of Bihar and presently arrived at the spot later than Balaram. Hence, disclosure of the incident by the minor to Balaram (P.W. 7) at the earliest opportunity rules out any possibility of tutoring. Meghnath (P.W. 6) came to the place of occurrence later and got busy in releasing the body of his sister from morgue and cremating her. This resulted in some delay in lodging F.I.R. Naturally, he was stunned and distraught by the unfortunate events. Under such circumstances, failure to disclose the fact that his nephew had witnessed the incident in the F.I.R. is a minor omission and would not affect the credibility of the prosecution case. One must not lose sight of the fact that F.I.R. is not an encyclopedia of facts. Minor omissions therein when lodged by a distraught brother alleging brutal murder of his sister is most natural.

It is pertinent to note in the course of investigation, statement of the minor was recorded by the Magistrate wherein he stated that his father and two uncles had assaulted the deceased. His deposition in court with regard to the aforesaid accused persons is, therefore, substantially corroborated by his prior statement before the Magistrate. However, in Court, the minor also alleged his aunt Sabita had assaulted his mother on the fateful day. This fact is significantly absent in his statement before the Magistrate and his narration to his uncle Balaram (P.W. 7). Role of his

grandmother, Kalabati in exhorting that her mother should die is also not corroborated by P.W. 7.

Analysis of the evidence of the minor shows the roles of Swaminath, Baidyanath and Jagat in the assault of the deceased on the fateful day is corroborated by other materials on record. However, I find it unsafe to rely on his uncorroborated version with regard to the role played by his aunt Sabita (appellant No. 5) and grandmother Kalabati (appellant No. 3) in the murder of his mother. Hence, they are entitled to benefit of doubt with regard to the charge under section 302/34 of the Indian Penal Code.

Mr. Dutta Gupta argues the appellant did not have common intention to commit murder. None of the appellants apart from appellant No. 1 was armed. Such argument is wholly fallacious. Though other appellants, namely, Baidyanath and Jagat were not armed, they actively participated in the incident.

Baidyanath and Jagat held the hand and feet of the victim and her husband, Swaminath assaulted her with lathi and pressed her neck. Conjoint attack on the victim was inhuman and extensive injuries were found on her body including on her vital parts like face and neck. A brutal attack launched on a helpless housewife by her husband and in-laws clearly disclose their intention to murder her. Brothers-in-law pinned her down while her husband mercilessly assaulted her with lathi and strangulated her. Intention to commit murder is, therefore, writ large in the conduct of the appellant Nos. 1, 4 and 6.

With regard to charge under section 498A/34 of the Indian Penal Code, I find the evidence of P.Ws. 5, 6 and 7 most convincing. All the witnesses spoke of continuous torture upon the housewife during her lifetime at her matrimonial home by the appellants. They ill treated and assaulted her. The victim along with her one and half year child had been drive out of the matrimonial home and she was compelled to lodge a criminal case against the appellants which, however, was subsequently compromised. Thereafter, torture continued till she met her brutal end. Thus, the charge under section 498A/34 of the Indian Penal Code is proved beyond doubt against all the appellants.

In the light of the aforesaid discussion, I uphold the conviction and sentence of the appellant Nos. 1, 4 and 6 namely, **(1) Swaminath Roy, (4) Baidyanath Roy** and **(6) Jagat Roy** for commission of offence punishable under Sections 498A/302/34 IPC. Conviction and sentence of the appellant Nos. 3 and 5 namely, **(3) Kalabati Roy** and **(5) Sabita Roy** under Sections 498A/34 is upheld but their conviction and sentence under Sections 302/34 is set aside.

The appeal is accordingly, disposed of.

As appellant Nos. 3 and 5 have already served out their sentence, they shall be 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 of the Code of Criminal Procedure.

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

Copy of the judgment along with L.C.R. be sent down to the trial court at once.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)