

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 513 of 2012

Dibyendu Gayen

-Vs-

State of West Bengal & Anr.

For the Appellant : Mr. Uday Sankar Chattopadhyay, Adv.
Mr. Suman Sankar Chatterjee, Adv.
Mr. Santanu Maji, Adv.
Mr. Pronay Basak, Adv.
Ms. Trisha Rakshit, Adv.

For the State : Mr. Bidyut Kumar Ray, Adv.
Mr. Arabinda Manna, Adv.

Heard on : 27.06.2022 & 30.06.2022

Judgment on : 30.06.2022

Joymalya Bagchi, J. :-

Appeal is directed against judgment and order dated 17.07.2012 and 18.07.2012 passed by the learned Additional District & Sessions Judge, Fast Track Court, Kakdwip, South 24-Parganas in Sessions Trial No.2(2) of 2011 arising out of Sessions Case No.54(9) of 2010 convicting

the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.1,000/-, in default, to undergo rigorous imprisonment for six months more.

Prosecution case as alleged against the appellant is to the effect the victim-housewife viz. Jyotsna Gayen was married to him 10-11 years ago. Two children were born from the wedlock. Jyotsna was subjected to torture by the appellant and her parents-in-law i.e. Saktipada Gayen (father-in-law) and Menoka Gayen (mother-in-law). On the fateful day there was a quarrel in the evening and appellant hit Jyotsna with a sharp weapon and fled away. Neighbours took Jyotsna to hospital where she was declared dead. Arun Kumar Maity (PW1) heard about the incident and went to the hospital. He also lodged written complaint at the police station resulting in registration of Sagar Police Station Case No.84 of 2010 dated 21.05.2010 under Section 302 IPC against the appellant.

In conclusion of investigation, charge-sheet was filed against the appellant and parents-in-law viz. Saktipada Gayen and Menoka Gayen.

Charges were framed against Saktipada Gayen and Menoka Gayen under Section 498A IPC and against the appellant under Sections 498A/302 IPC. The accused persons pleaded not guilty and claimed to be tried.

In course of trial prosecution examined 17 witnesses including one Manasi Gayen, sister of the appellant (PW5) who was declared hostile. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 17.07.2012 and 18.07.2012 convicted and sentenced the appellant, as aforesaid. Appellant as well as co-accuseds viz. Saktipada Gayen and Menoka Gayen were acquitted of the charge under Section 498A IPC.

Mr. Uday Sankar Chattopadhyay, learned advocate appearing for the appellant submits there is no evidence to show the appellant was present at the residence when the incident occurred. PW5 did not support the prosecution case. In absence of her evidence, trial court erred in convicting the appellant by drawing adverse inference under Section 106 of the Evidence Act. Allegation of torture on the housewife was not proved and the appellant has been acquitted of the charge under Section 498A of the Indian Penal Code. Hence, the appeal may be allowed.

Mr. Bidyut Kumar Ray, learned advocate appearing for the State submits victim-housewife suffered brutal injuries at the matrimonial home. Appellant was residing with his wife and did not raise any plea of *alibi*. PWs. 8 & 10 deposed he used to torture and assault his wife. Post-mortem doctor (PW15) found number of injuries on the vital parts of the body clearly disclosing the intention to murder. Hence, the prosecution case is proved beyond doubt.

I have gone through the evidence led on behalf of the prosecution in the light of the aforesaid submissions. Most of the prosecution witnesses including the most vital witness, Manasi Gayen (PW5) had turned hostile.

PW1 (Arun Kumar Maity) is the de-facto complainant. He deposed he received a telephone call from a person in the village who informed Jyotsna Gayen had suffered injuries and had been taken to Sagar hospital. He went to the hospital and found Jyostna lying dead. He noted severe injuries on her body. Local villagers told him appellant had attacked his wife with sharp cutting weapon. As a result, she died. He lodged written complaint. He had also signed on the inquest report.

In cross-examination, he was unable to names the persons who reported the incident to him. He also admitted he had no personal knowledge of the case.

PW5 (Manasi Gayen) is the sister of the appellant. She deposed on the fateful day around 5:30/6:00 P.M. she came to her residence and found her sister-in-law with bleeding injuries. Para people were taking her to hospital. She did not know whether her sister-in-law expired on the way to hospital. She also did not know the cause of death. She deposed she made statement before the Magistrate. She proved her signatures on the said statement. She was declared hostile and during cross-examined she was confronted with her statement before the Magistrate.

PW8 (Aditya Mondal) is the cousin of the deceased. He deposed he heard the news of the death of Jyostna and rushed to her matrimonial home. Sahadev Ghata, Sukumar Ghata and Gopal Pandit reported to him appellant had committed the murder. He further deposed one year prior to the death, Jyostna told him appellant and her in-laws were not behaving well with her.

PW10 (Malay Patra) is another cousin of the deceased. He deposed after three months of marriage Jyostna reported that her parents-in-law used to rebuke her and her husband assaulted her. After three years of marriage, her parents died. From co-villagers he came to know that Dibyendu had attacked his wife with an axe.

PW13 (Ratan Kayal) is also a cousin of the deceased. He deposed he had heard about the incident from PW10.

PW15 (Dr. Pralay Kumar Naskar) is the post-mortem doctor. He found the following injuries on the deceased :-

1. *Lacerated wound over left frontal area 3" x ½" in the scalp deep.*
2. *Lacerated wound over left parietal area 3" x ½" of scalp deep.*
3. *Lacerated wound over left side of the neck 3" x 1" muscle deep.*
4. *Abrasion over lower part of neck and upper part of chest of right side 4" x 3".*
5. *Abrasion over right breast 5" x ½".*
6. *Abrasion turn up 4" x ½".*
7. *Intra-cerebral hemorrhage left cerebral hemisphere.*
8. *Fracture rib right side 4th, 5th and 6th.*
9. *Fracture clavicle right side.*
10. *50 cc. blood clot on right interior chest front.*
11. *Ruptured right lung.*

He deposed cause of death was due to the effect of haemorrhage and shock arising out of the aforesaid injuries, ante mortem in nature.

PW17 (Ram Krishna Das) is the Investigating Officer. He deposed he went to the place of occurrence and drew rough sketch map of the place of occurrence. He arrested the appellant with other accused persons. He held inquest over the body of the deceased. He seized her wearing apparels and viscera. He forwarded Manasi Gayen for recording her statement under Section 164 of the Code of Criminal Procedure. He collected post-mortem report and submitted charge-sheet.

Analysis of the aforesaid evidence on record shows the star witness viz. Manasi Gayen (PW5) has not supported the prosecution case. She resiled from her earlier statement before Magistrate recorded under Section 164 of the Code of Criminal Procedure. It is trite law evidence of a hostile witness ought not to be rejected in toto. Deposition of such prevaricating witness requires to be examined with due care and circumspection. Portions of her evidence which find corroboration from other materials on record may be distilled from the unreliable parts and accepted. Shifting the evidence of PW5, I find she deposed her sister-in-law viz. Jyostna was found with bleeding injuries around 5:30/6:00 P.M. on the fateful day when she reached home. At that time *para* people were taking her to hospital. She, however, is silent with regard to the presence of the appellant at the place of occurrence. Other hostile witnesses like Gopal Pandit (PW2), Srimanta Mondal (PW3), Paresh Ghata (PW4) and

Gurupada Ghorai (PW7) are also of little assistance. They merely state Jyostna had died but they were not aware of the cause of death. Thus, there is no direct evidence that the appellant was present at the place of occurrence and had committed the murder of Jyostna.

Mr. Ray argued the appellant is the husband of the deceased. Evidence has come on record that he had tortured the deceased and had motive to commit the crime. He was present at the time of occurrence and did not accompany the victim to the hospital. These circumstances clearly establish the guilt of the appellant.

I am unable to subscribe to the aforesaid submission of Mr. Ray for the following reasons.

Firstly, there is no evidence on record the appellant was present at the house when the incident occurred around 5:30/6:00 P.M. in the evening. It is nobody's case that the victim-housewife had died in the dead of night when one may ordinarily presume the presence of all the inmates in the house.

Secondly, PW5 does not state the presence of the appellant in the house at the time when she arrived and saw her sister-in-law in injured condition.

Thirdly, it is not the prosecution case that the housewife resided alone with the appellant husband. Parents-in-law of the victim-housewife viz. Saktipada Gayen and Menoka Gayen also resided with the couple.

In this backdrop it may not be correct to single out the appellant-husband as the sole person who was present in the house when the incident occurred and thereby draw an adverse inference of guilt against him. Trial Judge strongly relied on the deposition of PW5 to come to a finding that the appellant alone was present in the house with the deceased Jyostna Gayen. It may be profitable to quote the finding of the Judge which reads as follows :-

“...PW5 Manashi Gayen saw the deceased Jyotsna Gayen with accused Dibyendu Gayen at the time of occurrence and other two accused persons were not insight.....”

There is no whisper in the deposition of PW5 that upon returning home she had found the appellant at the scene of occurrence. This vital circumstance has, therefore, not been proved and trial court incorrectly relied on the said circumstance to come to a finding of guilt against the appellant.

Finally, motive of the crime has also not been proved. Evidence of PWs. 8 and 10 with regard to torture on the victim is most generic and vague. PW 8 stated one year prior to the incident victim had told him appellant and other in-laws misbehaved with her. PW 10 spoke of torture three months after marriage, while the incident occurred eight years after marriage. Hence, there is no live link between their evidence and the fatal incident. It may also be apposite to note appellant and other in-laws had been acquitted of the charge under section 498A IPC.

For the aforesaid reasons, I am of the opinion conviction and sentence of the appellant is based on surmises and conjectures and not on legally admissible evidence. Hence, appellant is entitled to the benefit of doubt.

The appeal is accordingly, allowed.

Appellant shall be released from custody, if not wanted in any other case, upon execution of 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.

Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

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

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)