

05.04.2023
Item Nos.1 & 2
Court No.32
Avijit Mitra

FMA 388 of 2020
with
IA No. CAN 1 of 2018 (Old No.CAN 8518 of 2018)

Smt. Shyamali Karmakar
Versus
The Union of India & ors.
with
WPA 7483 of 2018

Mr. Achyut Basu,
Ms. Punam Basu,
Mr. Somen Bose,
Mr. Anirban Saha,
....for the appellant
Mr. Subhobrata Datta,
Mr. Sanatan Panja
....for the State

1. The present appeal has been preferred challenging an order dated 10th August, 2018 passed in a writ petition being WP 7483 (W) of 2018.

2. The writ petition was preferred stating *inter alia* that one Kaushik Karmakar @ Raja (in short, Raja) married one Riya Bhattacharya (in short, Riya) 17th February, 2014. Riya was a divorcee. She earlier married one Arnab Bhattacharya (in short, Arnab) in the year 2010 and their relationship stood dissolved through a mutual divorce in the year 2012. On the fateful day, i.e., 10th February, 2015 at about 9.30 am, Raja went to a garage for some repair works of his car and left his car in the garage for some repairs. In the evening at about 6.45

pm Raja received a phone call and left his house informing her mother, namely, Shyamali Karmakar (in short, Shyamali) that he was going to the garage to bring back his car. At about 12.04 am on 11th February, 2015, Riya received a call from Raja's mobile and she was informed that Raja had met with an accident. As Shyamali's complaint alleging that Raja had been murdered was not been received by the local police station, she preferred an application under Section 156(3) of the Code of Criminal Procedure (in short, the said Code) on 5th August, 2015 and on the basis of the order passed in the said application, Nabadwip P.S. case no.309/2015 dated 12.08.2015 under Section 302/120B and 34 of IPC was registered. It was contended that though Raja was murdered, the police authorities sought to project it as an accidental death and as such the writ petition was preferred primarily praying for CBI investigation in Nabadwip P.S. Case No.309 of 2015 dated 12.08.2015.

3. Records reveal that considering two reports dated 14th June, 2018 and 9th August, 2018 filed on behalf of the State, the writ petition was disposed of by an order dated 10th August, 2018 observing that there was no reason to direct further investigation in the matter.

4. In the present appeal, a Co-ordinate Bench of this Court passed an order on 27th January, 2022 directing constitution of a special investigation team (in short, SIT)

to look into the circumstances and to conduct a fresh investigation as to the cause of death of Raja on 10th February, 2015. Pursuant to such direction SIT submitted a status report dated 24th December, 2020 and a further supplementary status report dated 21st January, 2023 along with a tabular sheet. The appellant has also filed an exception to the status report.

5. Mr. Basu, learned advocate appearing for the writ petitioner/appellant submits that SIT had sought to fill up the lacunae by examining new incumbents about five years after the alleged incident. SIT had placed reliance upon the statements of one Shyamal Saha, describing him to be an eyewitness though he was not examined at the initial stage.

6. Drawing our attention to the post mortem report, Mr. Basu submits that though it had been specifically alleged in the status report that Raja met with an accident in a drunken condition, no explanation is forthcoming, as to why the contents of his stomach were not sent for forensic examination. In the absence of such forensic examination, the authorities have failed to establish that Raja was in a drunken condition.

7. According to Mr. Basu, Raja had been a victim of a deep rooted conspiracy and the principal accused persons are Arnab, the previous husband of Riya and the garage owner, namely, Chanchal Sarkar. In spite of their being

strong incriminating materials against them, none was arrested.

8. Mr. Basu submits that the prosecution case is that Raja was driving a car which met with an accident. However, the car itself was not seized by the police authorities instead liberty was granted to Raja's father to take back the same. Though the circumstantial evidence completes the chain of events which conclusively establish that Raja had been murdered, SIT had sought to dilute the rigors setting up a case that Raja was victim of a road traffic accident.

9. *Per contra*, Mr. Dutta, learned senior Government advocate appearing for the State submits that the alleged incident occurred on 10th February, 2015. On the very next date an unnatural death case was registered being U/D case no.10/2015 dated 11th February, 2015. No complaint was contemporaneously lodged alleging that Raja had been murdered. It is only about six months thereafter an application under Section 156(3) of the Code was filed. No explanation is forthcoming as regards the delay which had occurred.

10. To rebuff the allegation that SIT had sought to fill up the lacunae by examining new incumbents, Mr. Dutta submits that Court constituted the SIT and in course of investigation, SIT had visited the place of occurrence, prepared a fresh sketch and examined further witnesses

in its endeavour to ascertain as to whether there had been any foul play behind Raja's death.

11. Mr. Dutta emphatically denies that Raja's car did not meet with any accident on the fateful date and in support of such contention he has drawn our attention to the mechanical examination report and the photographs of the car, as annexed at pages 38 and 42 in Volume – I of the Case Diary. The car was removed from the spot and kept at a known place. It was subsequently seized in course of investigation and mechanical test was conducted. In the examination report it was observed that *'the accident happened due to other than mechanical false/failure'*.

12. In reply to the submission of Mr. Basu that after post mortem the viscera ought to have been sent for forensic examination, Mr. Dutta argues that the death was not due to poisoning. After conducting post mortem the doctor came to a conclusion that the death was due to *'shock and hemorrhage from the above mentioned injuries and Head injury which are antemortem and accidental in nature following RTA'*. In course of investigation, the Medical Board consisting of 4 experts opined *inter alia* that preservation of viscera is not mandatory in all cases. As a routine method and that when there was no suggestive finding of poisoning *'it is discretion power of the autopsy surgeon, whether viscera should be preserved or not'*. Reliance has been placed upon a judgment

delivered in the case of *Joshinder Yadav versus State of Bihar*, reported in (2014) 4 SCC 42.

13. Mr. Dutta argues that in course of investigation Raju's friends, who accompanied him to the hotel, were examined. They stated that they had consumed alcohol. The statements of the eyewitnesses stand corroborated by the statement of Samir Poi (owner of Electro Aider shop) and of Somnath Guin (Dutta), Biplab Debnath and Lalmohon Modok, who were examined in course of earlier investigation. The police personnel who recovered the victim and later removed the car from the occurrence were also examined. The attending doctor at Nabadwip hospital, who prepared the injury report noted smell of alcohol on the person of the victim. While preparing the *surathal* report, the enquiry officer in the U/D case mistakenly did not mention the fact of smell of alcohol and such mistake does not in any manner have the effect of rebuffing the corroborative evidence already on record.

14. By the order dated 27th January, 2020, the Court constituted SIT in the back drop of the observations that *'prima facie the investigation conducted by the police into the unnatural death of the petitioner's son appears not only to be misguided but fitted to deceive. It also does not appear as to how the State could convince the Court that the victim was in an inebriated state and thus, lost control of his car..... mobile phone of the victim was not seized no*

any attempt made to look into the last-called numbers or the last-received messages’.

15. The first contention of Mr. Basu that SIT had sought to fill up the lacunae by examining new incumbents is not acceptable since as per the order of the Court, SIT conducted a thorough investigation to ascertain as to whether there had been any foul play behind Raja’s death and further witnesses were examined. SIT took into consideration, the statements of Dr. Manabendra Mondal, who first examined Raja at Nabadwip hospital and the contents of the injury report prepared by him, as annexed at page 45 of volume I of the Case Diary, wherein he noted that there was smell of alcohol and that the victim had suffered a head injury. Such fact stands corroborated through the observation made by the autopsy surgeon in the post mortem report.

16. Upon post mortem, the autopsy surgeon arrived at a categorical finding that Raja had suffered shock and hemorrhage for the injuries and that such injuries were ante mortem and accidental in nature. In course of his examination, he has also stated that the post mortem was conducted at about 3.15 pm on 11th February, 2015, i.e., almost about four hours after the alleged incident. There was, thus, every possibility that the alcohol smell had faded away. In view thereof and as there was no material towards poisoning, the doctor in exercise of his discretion did not recommend forensic examination of viscera and

as such, the suspicion of foul play due to non-recommendation of forensic examination of viscera, as alleged by the appellant, is not sustainable.

17. The fact that the victim was in an inebriated state cannot be ruled out in view of the statements of the eye witnesses, the persons who brought him out from the car and took him to the hospital and the report of the doctor, who first examined the victim. The mobile phone of the victim was seized and movement of the victim was ascertained as would be evident from 8 (F) of the status report. The car was also seized and mechanical examination was conducted. The same was not handed over to the victim's family, as alleged. No contemporaneous complaint was lodged by the appellant after the incident. She preferred the application under Section 156 (3) of the Code about six months after the incident alleging *inter alia* that Raja's death was not due to any car accident and that she had heard from Riya that Arnab used to stop her on road and give threats that he would murder her husband. Such allegation of threat could not be established and as such it does not appear that there was attempt to shield any person. There was no evidence that the accused persons, namely Arnab and Chanchal were either connected or known to each other prior to the incident.

18. The entire sequence of facts need to be considered together and not in isolation. A particular

clause cannot be taken up and highlighted. The first doctor who attended Raja found head injury and smell of alcohol. The nature of injuries suffered by Raja suggests that the same were attributable to an accident.

19. A perusal of the post mortem report would reveal that Raja suffered the following injuries :

- i. Bleeding from nose and mouth;*
- ii. Lacerated injury at left side upper eye lid about 2"x1" area deep to bone;*
- iii. Abrasion at Rt. hand shoulder area (2"x1");*
- iv. Abrasion at Rt. fore arm back side (2"x2")*
- v. Nasal bone fracture and lacerated injuries at nasal bridge area to the left side;*
- vi. Fracture of both maxillary bone;*
- vii. Fracture frontal bone at Left Side.*

20. SIT had conducted a detailed enquiry and the Court in exercise of its discretionary jurisdiction cannot go into the veracity of the factual position as ascertained and cannot conduct any further roving enquiry.

21. In view thereof, no further interference is called for in the present appeal.

22. The appeal and the connected application are, accordingly, disposed of.

23. The case diary, as produced, is returned to Mr. Dutta.

24. There shall, however, be no order as to costs.

25. Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

(Raja Basu Chowdhury,J.) (Tapabrata Chakraborty, J.)