

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 7 of 2021

Hasmat Molla & Anr.

Vs.

The State of West Bengal

For the Appellants : Mr. Dhananjay Banerjee
Ms. Oindrila Ghosh

For the State : Mr. Partha Pratim Das
Mrs. Manasi Roy

Hearing concluded on : May 10, 2023

Judgment on : May 10, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against a judgment of conviction dated January 11, 2019 and the order of sentence dated January 17, 2019 passed by the learned Additional District and Sessions Judge, Fast Track Court, Kalna in Sessions Trial No.40 of 2016 arising out of Sessions Case No.30 of 2016.

2. By the impugned judgment of conviction, the appellants were convicted under Sections 498A/302/201 of the Indian Penal Code, 1860. By the impugned order of sentence, the appellant no.1 was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default, to suffer further simple imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code, 1860. Appellant no.1 was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.3,000/- and in default to suffer further simple imprisonment for three months for the offence punishable under Section 498A of the Indian Penal Code, 1860 and appellant no.1 was sentenced to suffer simple imprisonment for seven years for the offence punishable under Section 201 of the Indian Penal Code, 1860. The appellant no.2 was sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- and in default, to suffer further simple imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code, 1860. Appellant no.2 was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.3,000/- and in default to suffer

further simple imprisonment for three months for the offence punishable under Section 498A of the Indian Penal Code, 1860 and appellant no.2 was sentenced to suffer simple imprisonment for seven years for the offence punishable under Section 201 of the Indian Penal Code, 1860.

3. Mother of the victim, the prosecution witness (P.W.) no.1 lodged a written complaint with the police on November 3, 2014 with regard to the death of the victim. In such written complaint, it was stated that, the victim was married 20 years ago to the appellant no.1. Right after marriage on different grounds, appellant no.1 started torturing both physically and mentally and frequently threatened to kill her. Appellant No.1 tried to burn the victim 15 years ago and about 10 years ago, the appellant no.1 tried to kill the victim by pressing the pillow on her face. On that occasion, the victim somehow escaped and survived. Appellant no.1 married again about three years ago and after marriage, degree of torture increased upon the victim. On November 2, 2014, appellant nos.1 and 2 along with the mother of the appellant no.1 with the help of two or three women killed her daughter and drowned her in the water

of the pond. After searching continuously, on November 3, 2014 at 4.30 pm, the dead body of the victim was found floating in the pond.

4. On the basis of such written complaint, Monteswar Police Station Case No.185/14 dated November 3, 2014 under Sections 498A/302/201/120B/34 of the Indian Penal Code, 1860 against the two appellants and the mother of the appellant no.1 was registered.

5. Police submitted charge sheet against the two appellants and the mother of the appellant no.1 and framed charges against three persons on December 6, 2016 under Sections 498A/302/34/201 of the Indian Penal Code, 1860.

6. The accused persons pleaded not guilty and claimed to be tried. At the trial, prosecution examined thirteen witnesses and relied upon various documentary and material exhibits to bring home the charges against the accused persons.

7. Learned Advocate appearing for the appellants submits that the prosecution was unable to prove the case beyond any reasonable doubt. Referring to the testimonies of the various prosecution witnesses, learned Advocate appearing for the

appellants submits that, although presence of appellant no.2 in the house was sought to be established by the evidence of P.W.3 and defence witness (D.W.) 1, the prosecution failed to establish any active role being played by the appellant no.2.

8. Learned Advocate appearing for the appellants relies upon **2013 (12) Supreme Court Cases 406 (Sujit Biswas vs. State of Assam)** and submits that, there is a distinction between proof beyond reasonable doubt and suspicion. He contends that, the circumstantial evidence established by the prosecution at the trial does not lead to the conviction of any of the appellants.

9. Learned Advocate appearing for the appellants submits that there are no eye-witnesses to the incident. The prosecution relied upon circumstantial evidence to bring home the charges.

10. Learned Advocate appearing for the appellants relies upon **AIR 1956 SC 404 (Shambhu Nath Mehra vs. The State of Ajmer)**, **CRA 25 of 2016 (Bulu Bag & Ors. Vs. State of West Bengal)**, **2022 SCC OnLine SC 1399 (Md. Anowar Hussain vs. State of Assam)** in support of the contention that even on

the basis of the provisions of Section 106 of the Evidence Act, 1872, the appellant no.2 cannot be convicted. He contends that prior to the Section 106 of the Evidence Act, 1872, being attracted, the prosecution is required to establish the charge as against the accused beyond reasonable doubt. According to him, the prosecution failed to do so.

11. Learned Advocate appearing for the State submits that the prosecution was able to establish the charges as against the appellants beyond reasonable doubt. He refers to the various testimonies of the prosecution witnesses. He submits that, the victim was strangled and then drowned in a pond which was at a distance from a house where the victim and the appellants lived. The dead body of the victim was discovered one day subsequent to the incident of murder. He refers to the post-mortem and submits that the victim died by strangulation. He submits that there was a motive for both the appellants to get rid of the victim.

12. The mother of the victim deposed as P.W.1. She stated that the victim was given in marriage with the appellant no. 1 about 20 years ago. The victim used to reside at her

matrimonial home. Since after marriage, the appellant no. 1 and the mother of the appellant no. 1 used to torture the victim by various means. They did not provide the victim food. The victim was compelled to work under 100-days work scheme at the Panchayet. Appellant no. 1 and his mother used to assault the victim. Once, appellant no. 1 tried to kill the victim by pouring kerosene oil upon her. Appellant no. 1 made another attempt to kill the victim by putting pillow in her mouth. Appellant no. 1 married for the second time to the appellant no. 2. On the relevant date of the incident, the accused persons locked all the three children of the victim in a room and forced the victim to sleep outside the room. On the fateful night, the accused persons killed the victim and after committing murder, they plunged the victim in a nearby pond and placed boulder upon her. On such night, appellant no. 1 rang her elder son and informed her that the victim fled away with someone. On such fateful night, she could not go to the matrimonial home of the victim. On the following morning, she along with her son-in-law and another daughter went to

the matrimonial home of the victim who could not find her. They searched for the victim.

13. P.W. 1 stated that appellant no. 1 told them to go to the police station. She went to the police station, when they were informed of the discovery of the dead body of the victim. She along with police personnel of the police station rushed to the place where the dead body of the victim was found, in a police vehicle. The police lifted the dead body of the victim from the pond and held inquest over the dead body of the victim. She put her left thumb impression on the inquest report. She lodged the written compliant with the police station. She identified the accused persons in Court.

14. P.W. 1 was cross-examined at length on behalf of the defence. Nothing favourable to the defence was extracted from such lengthy cross-examination.

15. P.W. 2 is the son of the appellant no. 1. He stated that he heard about the incident from his younger brother, P.W. 3. He was living at Mumbai for the last 11 months from the date of the death of the victim. He stated that the victim used to reside in a distressed condition. She used to earn her

livelihood by dint of manual labour. Appellant no. 1 was with no employment and there was quarrelling between the appellant no. 1, victim and the mother of the appellant no. 1. The mother of the appellant no. 1 sometimes told the victim to leave the house. Once, the victim and the children left the house and settled at Burdwan in a rented house. There, the appellant no. 1 worked as a rickshaw puller. They stayed there for three months. Then they came back to the house. Appellant no. 1 used to assault the victim. During his stay at Mumbai, he used to send money to the victim. Appellant no. 1 married to appellant no. 2 and the victim accepted such marriage.

16. P.W. 2 stated that appellant no. 1 in presence of police pointed out the place where he plunged the victim. As per instruction of the police, he dove into the point and as pointed out by the appellant no. 1, he found few boulders and pillows strained with blood from that place of pond. The boulders belonged to their house. The boulders and pillows were marked as material exhibits. He recorded a statement under

Section 164 of the Criminal Procedure Code, which was tendered in evidence and marked as Exhibit-1.

17. P.W. 3 is another son of the victim. He stated that, on the fateful night, he along with his sister and another cousin sister were sleeping in the room. Appellant no. 1 and the victim were sleeping at the attached veranda. Appellant no. 1 used to assault the victim, used filthy languages to her and did not provide family expenses to her. Once, little finger of the victim was broken by the appellant no. 1. The victim also received injury at her forehead caused by the appellant no. 1. He saw such incident of assault. The appellant no. 1 also tried to hang the victim by rope. Appellant no. 1 tried to kill the victim by pressing pillow in her mouth.

18. P.W. 3, with regard to relevant night, stated that at about 10 P.M., he woke up for answering nature's call when he went outside the room. At that time, he saw the victim and appellant no. 1 sleeping at the veranda. After answering the nature's call, he again entered into his room and went to sleep. After a while, he heard a sound from outside and again woke up and tried to go outside the room and found the door

was closed from outside by sikal. He again went to bed for sleep. At about 2 P.M. appellant no. 1 called him and woke him up. Appellant no. 1 asked him whether the victim entered into the room, when he said 'no'. He told appellant no. 1 that the victim was sleeping with appellant no. 1. Appellant no. 1 told him that the victim fled away with someone. He then started searching for the victim but could not find the victim at that night. He rang the maternal uncle from his mobile phone. On the following morning, his maternal grandmother and maternal uncle and his wife came to his house. They also searched for the victim but could not find the victim. When they failed to find the victim in spite of search, they went to the police station for filing missing diary at about 5 P.M. The dead body of the victim was found floating in the nearby pond. Police came there and lifted the dead body of the victim. He recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit-2. He identified the accused persons in Court.

19. P.W. 4 is a seizure list witness. He identified the material exhibits as well as signature of seizures list.

20. Daughter of P.W. 1, sister of the victim deposed as P. W. 5. She narrated how the appellants used to torture the victim. She was not an eye-witness to the incident of murder. She is a witness to the inquest report.

21. P.W. 6 is also not an eye-witness to the incident of murder. She stated that she went to the nearby pond when the dead body of the victim was found floating.

22. P.W. 7 is a seizure list witness. He identified the seized articles which were marked as material exhibits. He also identified his signature on the seizure list.

23. A police personnel deposed as P.W. 8. He prepared the dead body challan, which was tendered in evidence and marked as exhibit 4. He seized certain articles by a seizure list, which was tendered in evidence and marked as exhibit 5.

24. A relative of the victim, namely, brother-in-law, deposed as P.W. 9. He stated that, on November 2, 2014 after midnight, the appellant no. 1 informed him over phone that the victim was found missing. P.W. 3 also informed him over phone that the victim was found missing. He stated that on

the following morning, he, P.W. 5 and the brother of the victim went to the matrimonial home of the victim. After arrival at the village, they started looking for the victim but all their attempts went in vain. Finding no alternative, they went to the police station to report to the missing of the victim from her matrimonial home. Police told them that the husband is required to lodge a missing diary for which the appellant no. 1 was called to the police station to lodge the missing diary of his wife when in reply the appellant no. 1 informed that he would be arriving shortly. They were waiting at the police station when a message was received that a dead body was found floating in a local pond. Accordingly, they rushed to such spot when they found that the body was that of the victim. He was a witness to the inquest. He spoke about P.W. 1 lodging a written complaint written by P. W. 13 in his presence. He spoke about the appellant no. 1 marrying the appellant no. 2 for the second time. He also spoke about attempts made by the appellant no. 1 to murder the victim on previous occasions.

25. A son of P.W. 1, brother of the victim deposed as P. W. 10. He spoke about the marriage between the victim and the appellant no. 1 being turbulent. He stated that, appellant no. 1 developed an affair with the appellant no. 2 as a result of which, appellant no. 1 and his mother along with appellant no. 2 started torturing the victim. They physically assaulted the victim and also attempted to kill her by setting the victim on fire and by strangulation. Victim used to communicate the same when she visited her paternal home. He identified his signature on the carbon copy of the dead body challan, which is marked as exhibit 6. He stated that the pond from where the dead body of the victim was found was situated at a distance of 10 feet away from the matrimonial home of the victim.

26. The doctor who conducted the post mortem on the dead body of the victim deposed as P.W. 11. He described the nature of injuries he found on the dead body. He opined that the death was due to the effect of strangulation by ligature, ante mortem and homicidal in nature. The post mortem report was tendered in evidence and marked as exhibit 7. He

stated that the injury mentioned against serial no. 1 was consistent with strangulation with some ligature material.

27. The Investigating Officer deposed as P.W. 12. He narrated about the course of investigations. He tendered the sketch map with index with regard to the place of occurrence which were marked as exhibits 9 and 9/1. He spoke about the seizure list prepared by him. He stated that, on the leading statement of the appellants, he discovered and seized two big sized black stone, one wooden plank of more or less three feet, two pillows soaked with blood and one piece of sari from the pond. He submitted the charge-sheet against the accused persons.

28. The scribe of the written complaint deposed as P.W. 13. The written complaint was tendered in evidence and marked as exhibit 16.

29. On conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Cr.P.C. where they claimed to be innocent and falsely implicated.

30. The defence examined the daughter of the victim as D.W.

1. In her examination-in-chief stated that she along with the accused persons and her brothers were present at the house on the date of the incident. She stated that appellant no. 1 and the victim were sleeping in the varandah sharing the same bed. She stated that about 2 a.m./3 a.m. she woke up but did not find the victim in her bed. Thereafter, she went to her bed.

31. The dead body of the victim was discovered from a pond on November 3, 2014. Dead body of the victim was sent to Post Mortem. The Post Mortem Report being Exhibit-7 read with the deposition of the doctor conducting the Post Mortem on the victim being P.W.11 established that the victim was murdered by strangulation. The opinion of P.W.11 that the death of the victim was caused due to effect of strangulation by ligature, ante mortem and homicidal in nature was not dislodged by the accused persons despite cross-examination of P.W.11.

32. The appellant no.1 and the victim were last seen together sharing same bed in the night of November 2, 2014 at the

verandah of the matrimonial home of the victim by P.W.3 and D.W.1. P.W.3 and D.W.1 are the children of appellant no.1 and the victim.

33. P.W.3 stated that he woke up around 10 o' clock in the night to answer the nature's call. At that time, he saw appellant no.1 and the victim to be sharing the same bed in the varandah of their house. He came back after answering the nature's call and went back to sleep. He, thereafter, woke after hearing the sound from outside. He tried to go out of room but it was locked from outside. Thereafter, appellant no.1 entered the room and asked him as to whether he knew about the whereabouts of the victim with mother. He stated that he did not know of the same. Appellant no.1 told him that victim ran away with somebody else. P.W.3 called her maternal uncle over mobile and informed the maternal uncle about the same.

34. The maternal uncle of P.W.3 being P.W.10 corroborated P.W.3 with regard to the phone call made by P.W.3 to him in

the intervening night of November 2, 2014 and November 3, 2014.

35. All the prosecution witnesses spoke in unison about the torture being meted out by the appellant no.1 and his mother on the victim. It appears from the deposition of the prosecution witnesses that the marriage of the victim with the appellant no.1 was turbulent at best. There were at least two previous attempts to kill her by the appellant no.1.

36. Despite the quality of evidence of torture as against appellant no.1 and the mother of the appellant no.1, the trial Court was pleased to acquit the mother of the appellant no.1 from the charges under Section 498A of the Indian Penal Code, 1860. State did not prefer any appeal from such acquittal. The learned trial Judge, however, convicted appellant no.1 in respect of charge under Section 498A of the Indian Penal Code, 1860.

37. The oral testimony of the prosecution witnesses amply established that appellant no.1 was guilty of torturing the victim. He did not provide her with any livelihood. The victim

was left to fend for herself, worked as manual labour and earned her livelihood. He did not give her adequate food.

38. Appellant no.1 and the victim went to sleep on the fateful night in the verandah of the matrimonial house of the victim. P.W.3 and D.W.1 saw the appellant no.1 and the victim together in such place. Thereafter, the victim went missing, to be ultimately found dead from the pond nearby her matrimonial home.

39. Appellant no.1 as the husband and who was last seen together with the victim, by his two children, did not offer any explanation in his examination under Section 313 of the Code Criminal Procedure Code as to how the victim came to be strangled to death with such strangulation being homicidal in nature and her dead body found from the pond.

40. **Sambhu Nath Mehra (Supra), Bulu Bag and other (Supra)** and **Md. Anowar Hussain (Supra)** are of the view that burden of proof of the prosecution to establish a charge beyond any reasonable doubt is not reduced by the provisions of Section 106 of the Evidence Act, 1872. Section 106 of the

Act of 1872 is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience.

41. In the facts of the present case, the prosecution did not produce any person claiming that such person was an eyewitness to the incident of murder. The victim was murdered by strangulation and her dead body was thrown into a pond near her matrimonial home. She was last seen together with the appellant no.1 by their children being P.W.3 and D.W.1. Both P.W.3 and D.W.1 stated that appellant no.1 and the victim shared the same bed on the verandah of their house. The victim was, thereafter, found dead in the manner as noted above. Therefore, in the facts and circumstances of the present case, it was incumbent, by dint of Section 106 of the Evidence Act, 1872, for the appellant no.1 to explain how the victim came to be found murdered and her dead body was discovered from the pond nearby her matrimonial home. Appellant no.1 despite being given opportunity in his

examination under Section 313 of the Criminal Procedure Code chose not to offer any acceptable explanation.

42. **Sujit Biswas (supra)** notes the distinction between the proof and reasonable doubt and suspicion. It reiterates the principles that, a Court should ensure that mere conjecture or suspicion does not take place of legal proof.

43. As noted above, prosecution did not examine any person as an eyewitness. Prosecution did not bring forth any evidence establishing any role of the appellant no.2 in the murder of the victim. Presence of appellant no.2 in the house is established by the prosecution. However, prosecution did not establish that, appellant no.2 was present in the same vicinity as that of appellant no.1 and the victim at the verandah at the material point of time. That apart, the mother of the appellant no.1 was also present in the house at the material point of time along with three children and one cousin of the three children of the victim. The mother of the appellant no.1 was acquitted of the charge of murder by the learned Trial Judge with no appeal being carried from such finding by the State.

44. On the parity of such reasoning therefore, appellant no.2 is also required to be acquitted on the ground of benefit of doubt; the prosecution is not establishing the complicity of the appellant no.2 in the offence of murder or any other charges as against her. As noted in the **Sujit Biswas (supra)**, mere suspicion is no substitute of the requirement of proof beyond reasonable doubt.

45. In such circumstances, we set aside the conviction of the appellant no.2 and acquit her on the principle of benefit of doubt.

46. Appellant no.2 is on bail pursuant to order suspending the sentence awarded as against her. Appellant no.2 will furnish a bail bond to the satisfaction of the Trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

47. So far as appellant no.1 is concerned, we affirm the conviction and sentence awarded to him by the learned Trial Judge.

48. Period of detention of the appellant no.1 undergone will be adjusted against the sentences awarded. All sentences will run concurrently.

49. C.R.A. 7 of 2021 is **disposed of** accordingly.

50. A copy of this judgment and order along with trial court records be remitted to the appropriate Court forthwith.

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

(Debangsu Basak, J.)

52. I agree.

(Md. Shabbar Rashidi, J.)