

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

Present:

The Hon'ble Justice Chitta Ranjan Dash

AND

The Hon'ble Justice Partha Sarathi Sen

**CRA 186 of 2001
With
CRAN 2 of 2004 (Old No: CRAN 2011 of 2004)**

**Rabin Malik
Vs.
The State of West Bengal**

For the Appellant : Ms. Jharna Biswas

For the State : Ms. Zareen N. Khan
Mr. Ashok Das

Heard on : 07.02.2023

Judgement on : 07.02.2023

PARTHA SARATHI SEN, J.:

1. The appellant is represented by Ms. Jharna Biswas, learned *amicus curiae* as appointed by this Court and the State is represented by Ms. Zareen N. Khan learned Counsel and Mr. Ashok Das, learned Counsel.

2. This present appeal is now taken up for hearing. Heard learned *amicus curiae* for the appellant and learned advocates for the State at length.
3. The present appeal is now taken up for passing judgment.
4. The instant appeal arises out of the judgment of conviction dated 27.02.2001 and order of sentence dated 28.02.2001 as passed by the learned Additional Sessions Judge, Hooghly in Sessions Trial No. 214 of 1997 whereby and whereunder the said Court by the impugned judgment and order of sentence found the present appellant guilty under Sections 302/201 IPC and thus, sentenced him to suffer imprisonment for life and to pay a fine of Rs. 2,000/- I.D. to suffer R.I. for 60 days more for the offence committed by him under Section 302 IPC and to suffer R.I. for two years with fine of Rs. 1,000/- I.D. to suffer R.I. for 30 days more for the commission of the offence under Section 201 IPC with a further direction that both the sentences as awarded by the said court would run concurrently.
5. The convict Rabin Malik felt aggrieved and thus, preferred the instant appeal.

6. For effective adjudication of the instant appeal, the facts leading to initiation of the aforesaid criminal case is required to be dealt with in a nutshell. One Gosta Majhi, son of late Hiru Majhi of village- Rashidpur, P.S. Jangipara, Dist- Hooghly gave an oral statement on 17.04.1994 which was reduced into writing by the O.C. of the aforesaid P.S. stating, *inter alia*, that the marriage of his eldest daughter Budi Malik @ Sundari was solemnized with the present appellant only a month back.

It was the further version of the defacto complainant that after marriage his said daughter started living at her matrimonial home and on the day of the incident, i.e., on 16.04.1994 his said daughter and his son-in-law Rabin Malik came together to his home at about 8.00 p.m. After taking some refreshment when both the present appellant and his wife were about to leave, the defacto complainant requested them to stay, but the present appellant was not agreeable to stay and, thereafter, they left the home of the defacto complainant by riding a bicycle through the road approaching Damodar dam.

It was the further version of the defacto complainant that at the time of their departure, he made an attempt to restrain the present appellant not to go through the road

approchaing the said dam as it was lonely at night, but in spite of such request he did not pay any heed to such request.

It was the further version of the defacto complainant that within a hour thereafter, the present appellant again came back to his home and disclosed that when he and his wife were crossing the Damodar dam, some unknown miscreants had snatched his wife as well as his bicycle. He further stated that after getting such information, the defacto complainant and his co-villagers rushed to the said dam and in course of searching, the dead body of the victim (Budi) was recovered and it was noticed that there are several wounds in her person and he at that time also noticed that bicycle of in-law was lying by the side of the said dead body. It has also been stated by the defacto complainant that after becoming suspicious about the situation, he and the other co-villagers of him asked the present appellant as to how the said incident occurred on which he disclosed that at the time of return through the dam, an altercation started between present appellant and his wife (Budi) and at that time the present appellant committed murder of his wife by throttling and, thereafter, reported a false incident to his father-in-law after reaching his in-laws' home.

7. On the basis of such oral intimation which was reduced into writing, Jangipara P.S. Case No. 32 dated 17.04.1994 under Sections 302/201 IPC was started. Investigation was taken up and on completion of the same, charge-sheet under Section 302/201 IPC was submitted.
8. Trial court record reveals that the learned trial court after perusal of the entire materials as placed before him framed charges under Section 302/201 IPC as against the accused and since the present appellant pleaded his innocence and claimed to be tried, the trial proceeded.
9. On perusal of the trial court record, it reveals that in order to bring home the aforesaid two charges, prosecution has examined 14 witnesses in all and several documents have been exhibited on their behalf. Though before the learned trial court, the accused has not adduced any evidence on his behalf but from the trend of cross-examination and from the answers as given by the accused in course of his examination under Section 313 of the Code of Criminal Procedure, it appears to us the defence case is based on denial and false implication.
10. In support of the instant appeal, Ms. Jharna Biswas, learned *amicus curiae* as appointed by this Court draws attention of this Court to the written complaint as lodged in

this case vis-à-vis the evidence of P.W. 1. It is contended by her that the facts as mentioned in the written complaint materially differs from the evidence of the P.W. 1 who himself is the FIR maker and on that score of contradiction, learned trial court ought not have place much reliance upon the evidence of the P.W. 1.

It is further argued by her that since the evidence of P.W. 1 is not convincing, learned trial court ought not to have apply the theory “last seen together” while passing the impugned judgment, since except the uncorroborated evidence of P.W. 1 nothing could be placed before the learned trial court to show that just before the alleged incident of murder, the present appellant and his wife (deceased) were last seen together at the house of the in-laws’ of the present appellant. Drawing attention to the evidence of the other prosecution witnesses, more specifically; P.W.s. 2, 3, 4, 5 and 6, it is submitted on behalf of the present appellant that their evidence has got no probative value, in view of the fact that their evidences are based on hearsay evidence, which are explicit from the evidence as adduced by them.

It is further argued by learned *amicus curiae* that since from the evidence of the aforesaid prosecution witnesses i.e., P.W.s.

2 to 6, it would reveal that the alleged confession as has been alleged to have been made by the present appellant out of threat and force, the said confession cannot be acted upon in accordance with the provisions of the Evidence Act. It is, thus, argued on behalf of the present appellant that it is a fit case for allowing the instant appeal by setting aside the impugned judgment.

- 11.** Mr. Ashok Das, learned Counsel duly led by Ms. Zareen N. Khan, learned Counsel for the State, however, opposes the contention as raised by the learned *amicus curiae*. It is argued by Mr. Das that under no stretch of imagination, it can be said that FIR and/or written complaint is a substantive piece of evidence. It is further argued by him that the evidence of P.W. 1 with regard to the last seen theory as applied by the learned trial court while passing the impugned judgment not only gets corroboration from the other prosecution witnesses i.e., the co-villagers but the same has been practically admitted in course of his examination under Section 313 of the Code of Criminal Procedure by the present appellant.

It is further argued by Mr. Das, learned Counsel that since before the learned trial court the prosecution is successful in proving the togetherness of the present appellant

and his deceased wife immediately before the occurrence of the crime, burden is cast upon the present appellant to explain as to homicidal death of the deceased happened. Mr. Das, thus, submits that it is a fit case for dismissal of the instant appeal.

12. We have meticulously gone through the written complaint as lodged in this case, the evidence as recorded by the learned trial court, the exhibits as well as the impugned judgment. In considered view of us, a brief discussion with regard to the identity of the prosecution witnesses are necessary for effective adjudication of the instant appeal.

13. P.W. 1 is the father of the victim and the FIR maker while P.W. 2 to P.W. 6 and P.W. 8 are the co-villagers of the P.W. 1, P.W. 7 is the relative of the P.W. 1, P.W.s. 9 and 10 are the medical practitioners by whom autopsy over the dead body of the deceased was conducted while P.W. 11 is the R.O. and P.W. 12 the O.C. of the concerned P.S. who recorded the statement of the P.W. 1 and took up investigation of this Case as a first I.O. and P.W. 13 is the second I.O. and P.W. 14 is the last I.O. of this case who has submitted charge-sheet in this case.

14. On perusal of the evidence of P.W. 1, it reveals to us that his testimony in his examination-in-chief is almost same as stated by him while making the FIR. From his statement, it

reveals to us that on the relevant night and hour both the present appellant and his said daughter came together by riding a cycle and after sometime they departed the house of the P.W. 1 through the road leading to Nabagram through the dam on of the river Damodar. It was his further version that within 30 minutes thereafter, the present appellant came back to his house again and reported that some miscreants have snatched his cycle as well as his wife near the 'bandh' (Dam). It was his further version that thereafter he and his neighbours along with others rushed to the spot and under a culvert the dead body of his daughter was recovered.

- 15.** So far as the deposition of the P.W.s. 2, 4 and 5 are concerned, it appears to us that in their respective examination-in-chiefs they have categorically stated that immediately after reporting of the incident by the appellant to P.W. 1 they rushed to the P.O. wherefrom the dead body of the victim and the cycle of the accused were recovered and on being asked by them the accused admitted his guilt. From the evidence of the P.W.s. 9 and 10 i.e., the doctors who performed the autopsy over the dead body of the deceased, it appears to us that it is not disputed that the death of the deceased was homicidal.

- 16.** Such being the position, a duty is cast upon us to come to a logical finding as to whether the learned trial court is at all justified in coming to a finding with regard to the guilt of the present appellant in an appropriate manner or not.
- 17.** Admittedly, the present case is based on circumstantial evidence and in view of such, we are to come to a logical finding as to whether in a case based on circumstantial evidence all the circumstances which are required to be proved have been fully established so as to complete the chain of circumstances towards the guilt of the accused.
- 18.** As rightly argued by the learned amicus curiae, in our considered view that the learned trial court is not at all justified in placing his reliance upon the alleged confessional statement and/or extra judicial confessional statement made by the present appellant before the prosecution witnesses in view of the fact it is the evidence of all the private prosecution witnesses that on being pressurized by them the accused admitted his guilt.
- 19.** In view of such, we are of considered view that learned trial court is not at all justified in placing his reliance on the alleged confessional statement as made by him before the P.W. 1 as well as other private prosecution witnesses. As discussed

above, the learned trial court while passing the impugned judgment has also come to a finding that the theory of 'last seen together' can be squarely applied in this case and while passing the impugned judgment of conviction and order of sentence, he has practically placed his reliance on this theory.

In innumerable judgments as passed by the Hon'ble Supreme Court of India and different High Courts of our country, the applicability of last seen theory in a criminal case have been time to time discussed and explained. In the reported decision of ***State of U.P. Vs. Satish*** reported in ***(2005) 3 SCC 114***, the Hon'ble Apex Court expresses the following view:

“the last seen theory come into play where the time gap between the point of time when the deceased was seen last alive with the accused and the deceased found dead is so small that possibility of any other person other than the accused being the author of the crime becomes impossible.”

In another reported decision ***Kusuma Ankama Rao Vs. State of U.P.*** reported in ***2008 Criminal Law Journal, Supreme Court 3502***, the Hon'ble Apex Court while

dealing with the last seen theory case expresses the following view:

“It is important to note that whenever the court intends to rely upon the circumstantial piece of evidence of ‘last seen together’, time gap between the point of time when appellant and deceased were seen together and deceased found dead should not be large.”

20. Coming to the factual aspects of this case, it appears to this Court that the prosecution has adduced clinching evidence that on the relevant night, the present appellant and the victim came together in the house of the P.W. 1 and after spending some time there, they left the house of the P.W. 1 through the road approaching the dam of Damodar and within 30 minutes the present appellant returned with a plea as discussed (Supra).

It is pertinent to mention herein that the present appellant in course of his examination under Section 313 of the Code of Criminal Procedure were asked about his presence with his wife in the house of P.W. 1 immediately before the incident to which he answered in affirmative. In the said examination on being asked he also admitted that within half an hour from his departure from his in-laws' home he came to

P.W. 1 stating that some miscreants had kidnapped his wife from the P.O. Such being the position, there is no doubt in our mind that just half an hour back of the alleged incident of murder of the victim, the present appellant and his wife (victim) were together.

At this juncture a question arises as to whether based on such circumstances coupled with the evidence of P.W.s. 2, 4 and 5 any adverse inference can be drawn against the present appellant. In this regard, the reported decision of ***Satpal Vs. State of Haryana*** reported in ***(2018) 2 CCrLR (SC) 465*** is very much relevant and the same is reproduced hereinbelow:-

“Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be weak kind of evidence by itself to found conviction upon the same singularity. But when it is coupled with circumstances such as the time when the deceased was last seen with the accused, the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under

which death may have taken place. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and there is corroborative evidence available inter alia, in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there is any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused.”

Keeping in mind the proposition of law as enunciated in the reported decision of **Satpal (Supra)** it appears to us that admittedly it would be very risky and improper to uphold the conviction of the present appellant based on the last seen theory only. However, when it has been proved beyond reasonable doubt by the oral evidence of the P.W.s. 1, 2, 4 and 5 that within a span of 30 minutes prior to the homicidal death of the victim the present appellant and the victim were found together and that in view of the clinching evidence of the aforesaid prosecution witnesses, the dead body of the victim was recovered beneath a culvert as per showing of the present appellant very close to the village of P.W. 1 and since the present appellant failed to discharge his onus to explain as to

how such incident occurred with his wife (Buri) as per provision of Section 106 of the Evidence Act, the conviction of the present appellant based on last seen together ought to have been upheld.

21. In view of discussion (supra) coupled with the circumstances attending the occurrence and following the occurrence like non-infliction of injury to the appellant and non-putting of any defence by the appellant when his wife was being dragged and non-examination of the accused by Medical Officer as testified by the I.O., we are constrained to concur with the finding arrived at by the learned trial court to the effect that it is the appellant who committed the murder and put the dead body underneath the culvert to destroy the evidence.

22. As a result the instant appeal fails and the impugned judgment of conviction and order of sentence dated 28.02.2001 as passed by the learned Additional Sessions Judge, Hooghly in Sessions Trial No. 214 of 1997 is hereby affirmed.

23. The appellant is hereby directed to surrender before the learned trial court within a month from the date of passing of this judgment for serving remaining part of his sentence failing

which, learned trial court is hereby directed to issue non-bailable warrant of arrest as against the present appellant.

24. Department is directed to transmit the trial court record along with a copy of this judgment forthwith for the needful action on the part of the learned trial court.

25. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(PARTHA SARATHI SEN, J.)

26. I agree.

(CHITTA RANJAN DASH, J.)