

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 205 of 2021

Basudeb Rajbonshi @ Basu

Vs.

The State of West Bengal

For the Appellant : Mr. Sandipan Ganguly, Ld. Sr. Adv.
Mr. Dipanjan Dutt, Adv.
Mr. Surojit Saha, Adv.

For the State : Mr. Swapan Banerjee, Adv.
Mr. Suman De, Adv.

Hearing Concluded on : January 31, 2023
Judgement on : February 9, 2023

DEBANGSU BASAK, J.:-

1. The appellant has preferred the present appeal against the judgement of conviction dated February 22, 2021 and the order of sentence dated February 23, 2021 passed by the learned Additional Sessions Judge, Fast Track Second Court, Purba Bardhaman in Sessions Trial No. 10 (06)/2018 arising out of Sessions Case No. 222 of 2018.

2. By the impugned judgement of conviction, the learned trial judge has convicted the appellant under Sections 302/450/379/411 of the Indian Penal Code, 1860. By the impugned order of sentence, the appellant was sentenced to

suffer rigorous imprisonment for life and also to pay a fine of Rs.10,000 in default to suffer further rigorous imprisonment for one year for commission of offence punishable under Section 302 of the Indian Penal Code, 1860; rigorous imprisonment for 8 years and also to pay a fine of Rs.5,000 in default to suffer further rigorous imprisonment for 3 months for commission of offence punishable under Section 450 of the Indian Penal Code, 1860; rigorous imprisonment for 3 years and also to pay a fine of Rs.1,000 in default to suffer further rigorous imprisonment for 3 months for commission of offence punishable under Section 379 of the Indian Penal Code, 1860; rigorous imprisonment for 3 years and also to pay a fine of Rs.1,000 in default to suffer further rigorous imprisonment for 3 months for commission of offence punishable under Section 411 of the Indian Penal Code, 1860.

3. Learned advocate appearing for the appellant has submitted that, the case of the prosecution against the appellant is based on circumstantial evidence. He has contended that, the circumstances relied upon by the prosecution is on the basis of the appellant being allegedly seen leaving the house of the victim on the date of the death.

4. Learned advocate appearing for the appellant submitted that, the testimony of prosecution witnesses who claimed that the appellant was seen to exit the house of the victim cannot be relied upon. He has highlighted the discrepancies in the versions of PW 8 and PW 14. He has also drawn the attention of the Court to the statement of PW 2 in this regard.

5. Learned advocate appearing for the appellant submitted that, the list of jewellery recovered belonging to the victim, at the instance of the appellant was also suspected. In this connection, he had relied upon the deposition of PW 3 and PW 12. The claim that the appellant had been to the jeweller for disposal of the jewellery articles was also misplaced. He had drawn the attention of the Court to the deposition of PW 17 in this regard.

6. Learned advocate appearing for the appellant has submitted that, the motive for the crime suggested on behalf of the prosecution was not plausible. The theory that, the victim was murdered in order to steal the jewellery did not have substance. The jewellery allegedly stolen were not of much value.

7. Learned advocate appearing for the appellant has submitted that, the prosecution collected hair and blood samples. It had been claimed by the prosecution that, the victim had struggled and resisted the assailant as a result where of which the victim had clutched strands of the hair of the assailant in hand. Samples thereof had been collected and sent to forensic examination. However, the report of such forensic examination although available, was not tendered in evidence at the trial.

8. In support of his contentions, learned advocate appearing for the appellant has relied upon **2008 Volume 3 Supreme Court Cases 210 (Sattatiya versus State of Maharashtra)**, **2006 Volume 10 Supreme Court Cases 681 (Trimukh Maroti Kirkan versus State of Maharashtra)** and **2015 Volume 7 Supreme Court Cases 178 (Tomaso Bruno versus State of UP)**.

9. Learned advocate appearing for the State has submitted that, the First Information Report was lodged on the date of the incident itself and therefore there was no chance of false implication. The post-mortem report of the victim had been tendered in evidence and marked as an Exhibit. On the date of the incident, the appellant had been

seen in the area by a number of prosecution witnesses from morning till afternoon. PW 8 had seen the appellant to take the exit from the outer gate of the house of the victim on the date of the incident. While in police custody, articles of the victim had been recovered as shown by the appellant, from the house of the appellant. The daughter of the victim, PW 13 had identified the articles during the test identification parade of the articles. Test identification parade sheet of the articles had been tendered in evidence and marked as Exhibit 21 by PW 19. Therefore, according to the learned advocate for the State, all circumstances completing the chain of events, leading to the guilt of the appellant had been proved beyond reasonable doubt. Consequently, the impugned judgement of conviction and the order of sentence should be upheld.

10. At the trial, the case of the prosecution in brief had been that, the appellant on March 14, 2018 at any time before 8 PM committed house trespass and entered the house of the victim with the intention of murdering the victim and, in fact murdered the victim by assaulting and throttling her, committed theft of articles, and dishonestly retained stolen properties knowing or having reason to believe that such property was stolen.

11. On June 30, 2018, charges under Sections 450/302/379/411 of the Indian Penal Code, 1860 had been framed against the appellant. The appellant had pleaded not guilty and claimed to be tried.

12. At the trial, the prosecution had examined 20 witnesses and relied upon various documentary and material evidences to bring home the charges as against the appellant.

13. The son of the victim had deposed as PW 1. He had stated that, he was an employee of a private concern. He used to go to work every day except Sunday from his residence at about 7:15/7:30 AM and returned at about 9/9:30 PM. His mother, the victim, used to reside alone in the house. The incident had taken place on March 14, 2018. On that date, he had returned to his house at around 8 PM. Having reached his house, he noticed the main door of the house to be partly closed. He had proceeded to the dining room and he could see the legs of the victim, who was apparently lying on the floor of the kitchen. Thereafter, he attended the kitchen and noticed that the victim was lying on the floor. He had noticed the injuries suffered by the victim. He had also noticed a cut injury on the left earlobe and that blood was oozing out from there. He had noticed that the ear ring was missing. He had

also noticed that gold chain, one gold finger ring and gold bangles of the victim were also missing. He had informed his friends and neighbours about the incident. They had reached his house. He had asked his friend to inform the police station.

14. PW 1 had stated that, on March 12, 2018, the victim had rang him up on phone between 12:45 hours to 1 PM informing him that one person disclosing his name as Prasanta had entered their house to sell flowers saplings.

15. PW1 had stated that on March 14, 2018, having noticed the victim in such a condition, he saw one used steel cup on the dining table and another used steel cup near the basin which the victim used to provide tea to known labourers. He had the impression that 1 or 2 miscreants had entered into the house and murdered the victim and took away the gold ornaments

16. PW1 had lodged the written complaint with the police on March 14, 2018. Such written complaint had been tendered in evidence by PW 1 and was marked as Exhibit 1. He had witnessed the inquest of the victim. He had tendered the inquest report in evidence which was marked as Exhibit 2. He had identified the appellant in Court.

17. PW 1 had witnessed the seizure made by the police on March 15, 2018 and tendered the seizure list dated March 15, 2018 which was marked as Exhibit 3. He had identified the wearing apparels of the victim which was marked as material Exhibit. He had also tendered the photographs taken at the place of occurrence which was marked as material Exhibits.

18. PW2 had reached the place of occurrence on being informed by PW 1. He had identified his signature on the inquest report and also the seizure list. He had seen the appellant to proceed towards Bali Ghat toll tax direction on March 14, 2018 at about 3:30/3:40 PM. He had identified the appellant in Court.

19. PW 3 and PW 12 had seen the appellant to identify the stolen articles to the police on March 21, 2018 and signed the seizure list prepared on that date as witnesses. They had identified the appellant in Court. They had recorded their statements under Section 164 of the Criminal Procedure Code. In cross examination, PW 3 had stated that, the police had asked them as to which jewellery shop was open and they informed the police about the same whereupon, the police visited one of the shops to weigh the seized gold ornaments.

20. The forensic expert who had collected the samples from the appellant produced before him on March 23, 2018 had deposed as PW 4. He had tendered his report dated March 23, 2008 which was marked as Exhibit 6.

21. The doctor who had conducted the post-mortem on the dead body of the victim had deposed as PW 5. He had described the injuries which he found on the dead body of the victim. He had stated that in his opinion, the death was due to the effects of the injuries, ante mortem and homicidal in nature. He had noticed a few bunch of scalp hairs held firmly clenched in the right hand of the deceased. He had tendered the post-mortem report which was marked as Exhibit 7. In cross examination, he had stated that the injuries which are found on the dead body of the victim were caused by striking by any type of hard blunt weapon.

22. The police constable who brought the dead body of the victim for the purpose of post-mortem had deposed as PW 6. He had identified the dead body before the autopsy surgeon.

23. The police constable who had gone to the house of the appellant along with the appellant and other police personnel pursuant to the confessional statement made by the appellant with regard to the stolen articles, had deposed as PW 7. He

had stated that, the Investigating Officer had asked the appellant to bring out the stolen articles whereupon, the appellant brought out the same from under a wooden table beside the bed. He had witnessed the seizure made on March 21, 2018. He had narrated that, he had taken the appellant for medical examination and collection of blood and plucked scalp hair and cut scalp hair of the appellant. He had collected the fingerprint and chemical examination report of the viscera.

24. PW 8 knew the appellant and had seen him on March 14, 2018 at about 3:30 PM to exit from the outer gate of the house of a neighbour. He had seen the appellant carrying a nylon bag in his hand at that time. He had stated that the appellant was caught red-handed on the allegation of theft of cycle about 8/10 years ago and was assaulted by the general public. He had identified the appellant in Court.

25. Another person who knew the appellant had deposed as PW 9. He had stated that, the appellant used to sell flowers saplings. On March 14, 2018 he was standing along with his friend in between 3:30 to 4 PM at the new bus stand when the appellant was proceeding towards the bank of the river from the site of the old bus stand whereupon, his friend asked the

appellant as to where the appellant was going. The appellant had replied that he was returning from the marketplace. He had identified the appellant in Court.

26. A neighbour of the appellant had deposed as PW 10. He had stated that on March 18, 2018 in the evening, the appellant had come to his house to borrow money from a jewellery shop by pledging gold ornaments. He had asked the appellant from where he got the gold ornaments. The appellant said that he had committed theft and therefore he was in possession thereof. He had identified the appellant in Court. On being shown the gold ornaments, he had identified the same in Court.

27. A relative of the appellant had deposed as PW 11. He had stated that on March 14, 2018, the appellant had come to his house at about 11 AM and left after about 20 minutes. He had identified the appellant in Court.

28. PW 12 and PW 3 had witnessed the seizures made by the police on March 21, 2018. In cross examination he had stated that, the appellant used to reside with his parents, his wife and a son and daughter as also his elder brother and the wife of the elder brother.

29. The daughter of the victim had deposed as PW 13. She had identified the gold ornaments which the police had seized. She had stated that, she had participated in the test identification parade for identification of the gold ornaments where she had identified the same. She had identified the gold ornaments in Court as those belonging to the victim and owned by them. She had stated that, subsequent to the incident, she came to know that the gold ornaments of the victim were recovered from the house of the appellant.

30. A neighbour of the victim had deposed as PW 14. He had reached the place of occurrence subsequent to getting information about the murder. He had witnessed the inquest. He had identified his signature on the inquest report. He had also witnessed the seizures made by the police on March 15, 2018. He identified the appellant in Court.

31. A neighbour of the victim had deposed as PW 15. She had stated that, on March 14, 2018 she went to school as usual at about 10:30 AM. She had returned after 4 PM. She had got a smell of burning milk when she entered her house at 4 PM. She had tried to find out the source after opening the window but could not understand the source. At about 8/8:30 PM in the evening, she had heard a hue and cry outside her

house. Then she had come to know about the death of the victim. She had asked PW 1 about the smell of burning milk whereupon PW 1 stated that, milk was burnt in his kitchen. PW 1 had told her that, on March 12, 2018 the appellant had visited his house to sell flowers saplings. At that time, she recalled that in the morning of March 14, 2018 at about 10 AM, while she was proceeding to her school, one person had asked her whether she would purchase flower saplings from him when she had replied in the negative. She had stated that such person disclosed his name. She had identified the appellant in Court as such person.

32. The jewellery shop owner where the appellant had gone to sell the stolen jewellery had deposed as PW 16. He had stated that on March 14, 2018 at about 8 PM/8:30 PM, the appellant came to his shop and showed him some gold ornaments and asked him to purchase the same. Since the appellant had a reputation of committing theft in a temple about one and half months back he refused to purchase the same.

33. PW 16 had stated that on March 21, 2018 at about 10:30 to 11:30 PM the police came to his shop. The police had asked him to assist them with regard to the verification of the

gold ornaments and taking their weight. On being shown the gold ornaments, he had recognised some of the gold ornaments as those which the appellant had brought on March 14, 2018 to sell. He had identified the certificate he issued which was tendered in evidence and marked as an Exhibit. He had identified the gold ornaments which the appellant had brought to him for the purpose of selling on March 14, 2018.

34. Another jewellery shop owner had deposed as PW 17. He had stated that, on receipt of a notice he had visited the police station on March 24, 2018. He had stated to the police that on March 16, 2018 at about 8 in the morning, the appellant came to him and offered to sell some gold ornaments whereupon, he refused to purchase the same. He had identified the gold ornaments which the appellant had offered to sell to him in Court. He had identified the appellant in Court.

35. The judicial magistrate before whom, some of the prosecution witnesses had recorded their statements under Section 164 of the Criminal Procedure Code had deposed as PW 18. He had stated about the recording of such deposition on various states.

36. Another judicial magistrate before whom, some of the other prosecution witnesses had recorded statements under Section 164 of the Criminal Procedure Code deposed as PW 19. The test identification parade of the articles had also been held in his presence. He had tendered the report of such test identification parade in evidence which was marked as Exhibit 21.

37. The sub- inspector of police who had conducted the investigation deposed as PW 20. He had narrated the course of the investigations he had undertaken. He had been cross-examined at great length on behalf of the defence. In cross examination, he had stated that he made a prayer before the learned chief judicial magistrate for collecting sample hair, blood and fingerprint of the appellant. Such prayer had been allowed. Samples of hair, blood and fingerprint of the appellant had been collected and sent for forensic examination. The fingerprint report and the forensic examination report had been filed.

38. On conclusion of the evidence of the prosecution, the appellant had been examined under Section 313 of the Criminal Procedure Code where, he had claimed that the allegations against him were false and he was innocent. He

had stated that, he did not have any nickname as claimed by the prosecution. He had been known as Basudeb Rajbangsi only. He had been falsely implicated by the Investigating Officer in collusion with 3 other persons. The police did not recover any gold ornaments from his house. He had declined to adduce any evidence.

39. The victim had been found dead on March 14, 2018. A police complaint had been lodged by the son of the victim on March 14, 2018 itself. The dead body of the victim had been sent for post-mortem. PW 5 had conducted the post-mortem on the dead body of the victim on March 15, 2018. He had prepared the post-mortem report of the victim which was tendered in evidence and marked as Exhibit 7. Exhibit 7 and the oral testimony of PW 5 had specified 11 injuries found on the dead body of the victim. PW 5 had opined that, the death of the victim was due to the effects of such injuries ante mortem and homicidal in nature. Therefore, that the victim had been murdered was established by the prosecution at the trial.

40. The appellant had been tried amongst others for the offence of murder of the victim. The prosecution did not produce any witness claiming to have seen the incident of

murder. The prosecution had relied upon circumstantial evidence to bring home the charges. However, PW 8 had seen the appellant to take the exit from the outer gate of the house of the deceased on the date of the incident. The appellant had been seen in the area of the house of the victim by a number of prosecution witnesses. PW 2 was a neighbour of the victim who had seen the appellant on March 14, 2018 at about 3:30 to 3:40 PM to be proceeding towards Bali Ghat Toll Tax direction. PW 9 had seen the appellant in between 3:30 PM to 4 PM around the new bus stand area. PW 15 who was the next neighbour of the victim had seen the appellant at around 10:30 AM in the morning on March 14, 2018.

41. PW 8 who had seen the appellant to exit the outer gate of the house of the deceased on the date of the incident was cross-examined at length by the defence. The defence could not elicit anything favourable to it from such cross examination. No material has been placed before the Court to doubt the veracity of the oral testimony of PW 8.

42. PW 1 had lodged the police complaint on March 14, 2018 itself. Apart from the murder, he had complained about articles being stolen. Stolen articles belonging to the victim had been recovered from the house of the appellant. Such

stolen articles recovered from the possession of the appellant had been identified to be belonging to the victim by the daughter of the victim being PW 13. She had identified the stolen articles during the test identification parade of such stolen articles.

43. Apart from the incriminating evidence of PW 13 linking the appellant with the articles belonging to the victim found in his possession, PW 16, an owner of a jewellery shop had stated that, on March 14, 2018 at about 8 PM/8:30 PM the appellant had come to his shop to sell gold articles. PW 17, another jewellery shop owner had stated that on March 16, 2018, at about 8 AM, the appellant had come to him for selling gold ornaments. PW 10 had stated that the appellant had come to him with the stolen articles to obtain money by pledging the same with the stolen articles.

44. Therefore, according to us, the prosecution had established at the trial that, articles belonging to the victim had been found in possession of the appellant. The appellant had also tried to deal with the same.

45. Mere possession of stolen articles of the victim would not ipso facto lead to an inference that the appellant was guilty of murdering the victim. In the facts and circumstances

of the present case, not only were articles belonging to the victim found in the possession of the appellant, but also the appellant was seen at the place of occurrence at about the time when the incident of murder had occurred. PW 8 had seen the appellant to exit the outer gate of the house of the victim on the date of the incident at the relevant point of time. Therefore, the appellant had been placed at the place of occurrence on the date of the incident and about the time of the incident.

46. In ***Sattatiya (supra)*** the Supreme Court has observed that, an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The Court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. The circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In the facts of that case, it has been held that, the prosecution failed to establish that the accused and the victim were last seen together. The Court has found contradictions in the

testimonies of the prosecution witnesses. In such circumstances, the judgement of conviction was set aside and the accused was acquitted.

47. *Trimukh (supra)* has dealt with a dowry death. It has reiterated the principle as to when conviction can be solely based on circumstantial evidence. It has observed that, when the case of the prosecution is based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of guilt of the accused and inconsistent with their innocence.

48. *Tomaso Bruno and another (supra)* has held that, the presumption under Section 114 illustration (g) of the Evidence Act, 1872 is only a permissible inference and not a necessary inference. The Court may or may not raise the presumption on the proof of certain facts as it has the option

to do or not to do so. Drawing the presumption under Section 114 illustration (g) of the Evidence Act, 1862 depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party. In the facts and circumstances of that case, CCTV footage which ought to have been produced was not produced and therefore, the Court held that it was a fit case to draw an adverse inference against the prosecution.

49. In the facts of the present case, the filing of the fingerprint report and the forensic report with regard to the hair clutched by the victim and not producing the same at the trial have been cited as instances on which, the Court should draw adverse inference as against the prosecution and acquit the appellant.

50. When such a contention had been raised for the first time, on January 24, 2023, the Court found the 2 reports in the records of the trial Court and at the invitation of the learned advocate for the appellant proceeded to open those 2

reports for consideration. On opening the 2 reports, the contents thereof were noted and copies of the 2 reports were made over to the learned advocate for the appellant as also to the learned advocate for the state. The hearing of the appeal had been adjourned and fixed on January 31, 2023 for the purpose of allowing the learned advocate for the parties to consider the two reports and make their respective submissions.

51. On the next date of hearing, that is, January 31, 2023, learned advocate appearing for the appellant had contended that, none of the 2 reports established the guilt of the appellant. However, in response to a query of the Court as to whether the 2 documents should be marked as Exhibits on behalf of the appellant, he had submitted that they should not be marked as Exhibits as he did not possess the requisite instructions to such effect. In absence of the 2 reports being marked as Exhibits, we should not consider the same. The appellant has not substantiated that the 2 reports spoken of does not establish the guilt of the appellant.

52. Moreover, no adverse inference need be drawn as in the facts and circumstances of the present case, it cannot be contended that, best evidences favouring the appellant had

been suppressed or withheld from the appellant. The two reports that the appellant has contended to exonerate him were not allowed to be looked into by the Court on the refusal of the appellant to have such documents marked as Exhibits even at the appeal stage.

53. In view of the discussions above, we have not found any ground to interfere with the impugned judgement of conviction and the order of sentence. We affirm the same.

54. CRA No. 205 of 2021 is dismissed.

55. All the sentences imposed shall run concurrently. The period of detention undergone by the appellant during investigation, enquiry and trial of the case shall be set off against the term of imprisonment under Section 428 of the Criminal Procedure Code imposed hereinabove.

56. Trial Court records be sent to the appropriate Court forthwith for necessary action.

57. Urgent Photostat certified copy of this judgement and order be supplied to the parties upon compliance with the requisite formalities.

[DEBANGSU BASAK, J.]

58. I agree.

[MD. SHABBAR RASHIDI, J]