

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

**C.R.A. 298 of 2018
+
CRAN 2 of 2019 (Old CRAN 3449/19)**

***Srikanta Gantait*
Vs.
*State of West Bengal***

For the Appellants : Mr. Himanshu De, Sr. Advocate
Mr. Amal Krishna Samanta, Advocate,
Mr. Srinjan Ghosh, Advocate.
Ms. Monami Mukherjee, Advocate.

For the State : Mr. Partha Pratim Das, Advocate,
Ms. Manasi Roy, Advocate.

Heard on : 2nd August, 2023

Judgment on : 2nd August, 2023

Joymalya Bagchi, J. :-

1. Appellant has assailed judgment and order dated 24.4.2018 and 25.4.2018 passed by the learned Additional Sessions Judge, 3rd Court, Tamluk, Purba Medinipur convicting the appellant for commission of offence under section 302/201 IPC and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 20,000/-, in

default, to suffer simple imprisonment for one year for the offence punishable under section 302 IPC and to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 5,000/-, in default, to suffer simple imprisonment for three months more for the offence punishable under section 201 IPC. Both the sentences shall run concurrently.

2. Prosecution case, as alleged against the appellant is to the effect that on 30.01.2010 around 11 p.m., the appellant brought his wife Bulti Gantait to Moyna BPHC. She was examined by Dr. Ashok Kr. Maity (PW8). Upon examination Dr. Maity found that Bulti had already died. He intimated the Officer-in-Charge Moyna PS resulting in registration of Moyna P.S UD case no. 4/10 dated 31.1.10.
3. SI Nirmal Kr Majhi, the then Officer-in-Charge, Moyna P.S handed over the investigation of the unnatural death case to SI P K Sarkar (PW 16). PW16 held inquest over the dead body. Magisterial inquest was held by PW11, the then BDO Moyna. Thereafter, body was sent for autopsy examination. PW 14 autopsy surgeon deposed he held post mortem examination over the body on 31.1.2010 and 1.2.2010. However, no post mortem report was submitted for three years. Finally, on 24.10.2013 post mortem report was received by post at the police station. Post mortem report revealed the victim housewife had died due to combined effects of smothering and neck compression, ante mortem and homicidal in nature.

4. Pursuant thereto, Officer in charge, Moyna PS, SI Raja Mukherjee PW1 lodged suo motu FIR against the appellant and other in-laws namely Tapas Gantait (father-in-law), Smt. Jhampirani Gantait (mother-in-law) and Khukurani Gantait (sister-in-law) under sections 498A/302/201 IPC.
5. In conclusion of investigation, charge sheet was filed and charges were framed against the appellant and co-accused under sections 201/302/498A/34 of the IPC. In course of trial, prosecution examined 17 witnesses and exhibited a number of documents. Defence of the accused persons was one of innocence and false implication. In conclusion of trial, learned trial Judge by judgment convicted and sentenced the appellant, as aforesaid. By the self-same judgment, co-accused were acquitted.
6. Mr. De, learned Senior Advocate for the appellant submits there is no direct evidence that the appellant had murdered his wife. On the other hand, he had taken his wife to the hospital where she was declared dead. Appellant informed that it was a case of poisoning. No viscera report was produced by the prosecution to rule out death by poisoning. No complaint was lodged from any quarter alleging cruelty or ill-treatment upon the housewife. Evidence of PWs 5 and 6 mother and uncle of the victim lady with regard to torture is an afterthought and was rightly disbelieved by the trial court which acquitted the appellant of the charge under section 498A of the IPC. Prosecution case of murder solely rests on the opinion of post mortem doctor

PW14. He prepared post mortem report after three years of the incident. Hence, his opinion is highly suspected and cannot form the basis of conviction. Moreover, notings in the post mortem report with regard to injuries on the face and mouth have neither been corroborated by the inquest report prepared by PWs 11 and 16 nor by PW8, the doctor who first examined the victim and declared her dead. No injuries were found on the neck though it was opined that one of the causes of homicidal death was neck compression. Trial Judge failed to take into consideration the prosecution case of homicidal death and illegally shifted the onus on the appellant to prove that the death was due to poisoning. Appellant is entitled to an order of acquittal.

7. On the other hand, Mr. Das, learned Advocate for the State submits post mortem doctor deposed he had examined the body on 30.1.2010 and 1.2.2010. Post mortem examination was conducted contemporaneous to the death. Delay in preparing post mortem report was due to bureaucratic reasons. The reasons are noted by post mortem doctor PW14 in the post mortem report itself. Hence, post mortem report is reliable and establishes the homicidal death of the victim beyond doubt. PW 8 was misled by the false plea of the appellant that it was a case of poisoning and had not examined the victim properly. His opinion cannot overrule the post mortem doctor's findings. Appellant was present with the victim in the house when she suffered homicidal death. He came out with a false explanation of

poisoning. This falsehood reinforces the prosecution case and establishes the guilt of the appellant beyond reasonable doubt.

8. I have examined the evidence in the light of the aforesaid submissions at the Bar. Bulti Gantait, the victim was the wife of the appellant. On 30.1.2010 appellant took her to Moyna BPHC. PW8 doctor Ashok Kr. Maity examined Bulti and found her dead. He recorded the history given out by the appellant that the death was due to poisoning i.e. thiodan which had been taken around 10 p.m. that night. On examination he noted pupils dilated and fixed. He did not find any sound in the chest, breath or heart. He proved the injury report (Ext 8). He reported the matter to the officer in charge of the police station and requested the latter to take action. He proved his intimation to the police station, (Ext 9). In cross examination, he stated he did not find any external injury on examination of the patient.
9. S.I., Prabhat Kumar Sarkar (PW16) took up the investigation of the unnatural death case. He held inquest at the hospital. He proved the inquest report (Ext.6/1). He clarified he had not found any external injury on the dead body.
10. Indrajit Sarkar (PW11), the then BDO, Moyna held magisterial inquest over the body of Bulti. He proved the report (Ext.4). In cross-examination, he stated he did not find any injury at the time of examination, apart from some stretch marks on the backside of the body.

11. Evidence has also come on record, during investigation of the unnatural death case, no complaint was lodged from any quarter regarding the death of the victim. As a result, no FIR was registered. On the other hand, investigation in the UD case proceeded. After PW16 had been transferred, ASI, Ananda Hazra (PW13) took over the investigation of the case. He deposed on several occasions, he went to Tamluk District Hospital to collect the post mortem report but was unable to do so. The hospital authorities told him post mortem report had not been prepared. He was transferred on 23.12.2011. Thereafter, SI Jagir Hossain (PW7) took over investigation of the case. As post mortem report had not been received, he sent requisition to the Superintendent, District Hospital Tamluk (Ext.7) for supply of post mortem report. Superintendent of the hospital was unable to supply the report as the same had not been prepared.
12. Finally, the investigation of the UD case came to the hands of ASI, Pranab Samanta (PW9). He also went to Tamluk Hospital and the post mortem section-in-charge, Saroj Biswas informed him that post mortem report had not been prepared. On 24.10.2013 post mortem report was received from the District Hospital through post. After perusing the post mortem report, he handed over the same to the Officer-in-charge, Raja Mukherjee who started the case.
13. Raja Mukherjee has been examined as PW1. He deposed on 23.10.2013 he received the post mortem report. He found that the death was due to smothering and neck compression which was ante

mortem and homicidal in nature. He examined the parents of the victim. He lodged written complaint (Ext.1/1) and registered FIR. Investigation of the case was handed over to SI, Joygopal Barai (PW15). In cross-examination, he admitted he had not received any complaint from any one regarding the death of the victim. He also admitted he had not examined the parents of the victim after receiving the post mortem report.

14. Tulasi Samanta (PW5) and Manoranjan Samanta (PW6) are the mother and uncle of the victim lady respectively. PW5 deposed her daughter Bulti was not happy in the conjugal home. During her life time, Bulti stated appellant used to inflict torture upon her. Police had told her that Bulti had been murdered. She came to know of the incident from the Panchayat Prodhan that Bulti had been taken to Moyna BPHC by the accused persons. In cross-examination, she admitted that she was stating these facts for the first time in Court.

15. PW6 also claimed that once Bulti had come to their house in the evening after a family dispute. Thereafter, appellant took her back to her matrimonial home. Subsequently, they came to know from the Panchayat about the incident. In cross-examination, PW6 admitted he was stating these facts for the first time.

16. Analysis of the aforesaid evidence would show that there is hardly any evidence with regard to torture or ill-treatment upon the housewife. Statements of PWs.5 and 6 with regard to ill-treatment or family dispute were made for the first time in Court. Though Bulti had

died in 2010, no complaint was made by her family members to any quarter whatsoever.

17. Mr. Das argues that Bulti's father is a deaf and dumb person. Owing to his physical disability, the family was unable to prosecute the case effectively. It is true Bulti's father suffered from physical disability but there were other family members including her uncle (PW6) who could have lodged complaint before the police or other authorities after the unfortunate death of the housewife. They kept mum with regard to torture till the criminal case was registered on a suo motu complaint by the Officer-in-charge on the strength of a belated post mortem report. The aforesaid evidence persuades me to hold prosecution has failed to prove torture upon the housewife or any motive on the part of the appellant to commit the murder.

18. Prosecution case is solely founded on the evidence of the post mortem doctor Dr. Pradip Kumar Das (PW14). PW14 deposed he examined the body of Bulti on 31.1.2010 and 1.2.2010. On examination he recorded the following findings:-

“On examination I found that colour of the dead body was not blackish, well built, nutrition average. Colour of her face was darker than the other portion of her body. Rigor mortis was found all over the dead body except eyelids. Feature of mopping of blood tinged oral and nasal secretion. Nares are clubbed with blood stained gelatinous secretion. Fingers were partially flexed and stiffed with nails bluish. Auricles and canals were normal. Breast were flabby. Eyes were closed. Conjunctiva was suffused i.e. sharp conjuncival blood vessels were filled with blood with eyes having scanty blood shots. Gaping of anus through which solid yellow stool seen and on next day it came

to perennially. No marks of I.V. channel. A hand lenses was used. No stomach tube insertion features in the elementary canal.

Wounds found at the time of examination

1. Multiple nails scratch abrasion at places abraded bruise around mouth, one nail scratch abrasion over mid region of forehead with curvature i.e. concavity towards left and down words. Other above mention abrasion were haphazard in distribution. On dissection vital reaction positive.
2. Lips were lacerated left more than right and inside having imprint abraded bruise of teeth. Gum margins were bruised and bleeds. Froth mixed blood intra-orally and in the alveolo – labial and buccal cleft. Tongue and floor of mouth including teeth were smeared with blood – bloody froth mixed. Vital reaction positive.
3. Nostril canals having scanty dark blood and luminal wall including septum were hematomised. Vital reaction positive.
4. One abraded bruise seen at right upper back. On dissection haematoma and vital reaction positive.
5. Chin and right cheek having bruise and on dissection haematoma, vital reaction positive. Left cheek normal.

Did & Seen

I did not find any mark of ligature over neck on dissection thyroid cartilage having permanent tinged of blood and on opening luminal wall haematoma seen. Thyroid and hyroid were found intact.

Lungs both were congested and hyper inflated and hearts anterior surface invisible. Blebs and bully over anterior surface seen, few of which were ruptured.

Regarding brain, a small degree of loss of elasticity. Sulci, gyri intact sulci vessles intensely ingorged – proof of anti mortem venus drainage obstruction. On dissection no intrapenial haemorrhage on haematoma.

Stomach and other parts :- Thick and digested (utter ruti) like material around 400 gms. No irrosion or ulcer. No malodour. Genital organs were within normal limits. Few viscera like stomach with proximal portion of intestine and content, a portion of liver each half of both kidney, nail scrapping, scrapping – if any, blood pubic hair,

vaginal swab, scalp hair etc. were preserved and sent through the police personnel as per recommendation of National Human Right Commission.

Right eye having blood shot more than that of left eye and for that I opined that assailant as on the right side of the victim.”

19. He deposed he took 42 hours plus minus four hours to conduct the post mortem. He opined death was due to smothering and neck compression ante mortem and homicidal in nature. He proved the post mortem report (Ext.10/1). In cross-examination he stated CMOH gave instruction to give the report as soon as possible. Accordingly, he gave his note in the report. He also clarified no FSL report was produced before him for further opinion.

20. Mr. Das submits post mortem examination had been done on 31.1.2010 and 1.2.2010 i.e. within 24 hours of death of the victim. Examination was conducted meticulously and the injuries have been noted in the report. Due to extraneous circumstances the post mortem report was not prepared on time and was finally sent to the police station through post on 24.10.2013. Hence, the report ought to be relied upon.

21. Evidence on record shows an inordinate delay in preparation of the post mortem report. Evidence of the investigating officers conducting the investigation of the unnatural death case viz., PWs 16, 13 and 7 show that the post mortem report had not been prepared for more than three years from the death of the victim. Only on 24.10.2013, the report was received by post at the police station. No explanation for the

delay has been offered by PW14 apart from claiming that he had given a note in the post mortem report.

22. I have examined the post mortem report (Ext10). The note appended to the report states that the post mortem doctor did not have a seat either in the morgue or in the hospital building and pursuant to the order of the Sessions Judge and CMOH, the report had been prepared. The post mortem doctor is silent how he could graphically reproduce the injuries which were seen by him three years ago in the post mortem report.

23. I am conscious that bureaucratic glitches may result in some delay in preparation of post mortem report but the delay in the present case is an inordinate one i.e. over three years. In such a case, it was incumbent on the prosecution to produce the field notes of the post mortem doctor as corroborative evidence with regard to the entries made in the post mortem report. Prosecution has singularly failed to do so. Even otherwise, the findings in the post mortem report with regard to extensive injuries around mouth, lips and forehead of the victim are not corroborated by Dr. Ashok Kumar Maity (PW8) who examined the victim at Moyna BPHC and declared her dead. The said doctor categorically stated on examination he had not noted any external injury.

24. Mr. Das contends the doctor was misled by the suggestion of the appellant that victim had died due to poisoning. I am unable to accept such submission. PW8 categorically stated that he found no external

injury on examination and had recorded 'no history of physical assault' in his report. This piece of evidence contradicts the findings of the belated post mortem report prepared by PW14 and casts a doubt on the cause of death by smothering and compression of neck. It is also pertinent to note that no external or internal injuries were found on the neck, trachea or hyoid bone of the victim. Hence, I am inclined to hold prosecution has failed to prove the cause of death beyond reasonable doubt.

25. Prosecution also failed to produce the viscera report to rule out the defence version of death by poisoning. In the absence of viscera report prosecution relied on the findings in the post mortem report regarding contents in the stomach i.e. digested roti and absence of malodour to rule out the possibility of poisoning. As discussed hereinbefore post mortem was prepared after a lapse of three years. No contemporaneous field notes were placed by the prosecution to corroborate the belated entries. Viscera of the victim was collected but the viscera report was not produced in court. As the post mortem report was prepared belatedly absence of the viscera report assumes significance.

26. The best evidence to rule out a case of poisoning was not produced and the post mortem report adduced by the prosecution does not inspire confidence. Faced with this situation Mr. Das, learned Counsel argues no symptoms of poisoning likely frothing from the mouth, vomiting etc., were found by the medical officer, PW 8 or was noted in

the inquest report. These aspects may have been relevant if the prosecution had proved homicidal death of the victim beyond doubt in the first place. It is trite that prosecution must stand on its own legs and cannot rely on the weakness of the defence version to prove its case. In *Sharad Birdhichand Sarda vs. State of Maharashtra*¹ the Court held as follows:-

“151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.”

27. Mr. Das referred to *State of West Bengal vs. Pranab Roy*² in support of his contention that belated preparation of post mortem report is not a ground to reject the findings recorded therein. In the cited case, post mortem report was prepared around 84 days after the post mortem examination. In the present case the delay is of more than three years. That apart, unlike the present case the viscera report of the victim was produced to rule out the defence suggestion of poisoning. Furthermore in the said case there was no contrary opinion of another medical officer with regard to absence of external injury on the deceased. In the

¹ (1984) 4 SCC 116

² 2023 SCC OnLine Cal 225

aforesaid matrix the Court held the cause of homicidal death due to partial throttling, vagus nerve inhibition and carotid body disturbances had been proved beyond doubt. Hence, cited case was decided on its own facts and is clearly distinguishable from the present one.

28. I am of the opinion prosecution has not been able to prove its case beyond doubt. Cause of death is based on a belated postmortem report which is not corroborated by corresponding field notes of postmortem doctor. Findings with regard to injuries on the mouth, lips and forehead are not supported by another medical officer, PW 8. Though the postmortem doctor claimed death was due to smothering and neck compression, no injuries were found on the neck. Viscera report, the most clinching evidence, has not been produced to rule out a case of poisoning.

29. When the prosecution fails to prove the primary facts and establish that the victim had suffered homicidal death within the four corners of the matrimonial home onus does not shift on the defence to explain the circumstances leading to the murder of the housewife. Section 106 of the Evidence Act enjoins when prosecution has succeeded to prove facts from which a reasonable inference can be drawn regarding the existence of some other facts which are within the special knowledge of the accused, onus shifts on the other to offer explanation regarding the existence of the said other facts and if it fails to do so the court can draw an adverse inference against him. For example, in a case of

murder the prosecution must prove that the deceased had suffered homicidal death and the accused was present with the deceased at the time of occurrence. Only then the onus would shift on the accused to explain the circumstances leading to the murder and if he fails to do so an adverse inference may be drawn against him³. But if the prosecution fails to prove the cause of death beyond doubt it cannot rely on the weakness of the defence version and claim an adverse inference be drawn against the accused.

30. I am in agreement with Mr. De that the trial judge had misdirected herself in recording a finding of guilt on the ground that the accused had failed to probabalise a case of poisoning. Trial court failed to appreciate that a criminal case is not decided on preponderance of probabilities. It is the primary duty of the prosecution to prove its case beyond doubt. Failure of the defence to probabalise its version would not be a ground to hold that the prosecution case of homicide by smothering and compression of neck is proved beyond doubt.

31. In the light of the aforesaid discussion, I am of the opinion prosecution has not been able to prove its case beyond reasonable doubt and the appellant is entitled to the benefit of doubt.

32. The appeal is, accordingly, allowed.

33. The appellant shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the

³ Nagendra Sah Vs State of Bihar, (2021) 10 SCC 725 [see Para 22 and 23]

trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

34. In view of disposal of the appeals, connected application being CRAN 2 of 2019 (old CRAN 3449 of 2019) is also disposed of.

35. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

36. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

as/sdas//tkm