

**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 450 of 2003
With
CRAN 3 of 2011 (Old No: CRAN 1828 of 2011)**

**Nabin Sardar
Vs.
The State of West Bengal**

For the Appellant : Mr. Asim Kumar Niyogi
Mr. Sumanta Chakraborty

For the State : Mr. Prasun Kumar Dutta, Ld. APP
Ms. Faria Hossain
Md. Kutubuddin

Heard on : 06.02.2023

Judgement on : 06.02.2023

PARTHA SARATHI SEN, J.:

1. Heard Mr. Sumanta Chakraborty, learned Counsel led by Mr. Asim Kumar Niyogi, learned *amicus curiae* for the appellant and Mr. Prasun Kumar Dutta, learned Additional Public

Prosecutor being assisted by Ms. Faria Hossain, learned Counsel and Md. Kutubuddin, learned Counsel for the State.

2. The instant appeal arises out of the judgment of conviction dated 29.08.2003 and order of sentence dated 30.08.2003 as passed by learned Additional Sessions Judge, Fast Track Court – I, Barasat, North 24 Parganas, in Sessions Trial No. 6(3) of 2003 arising out of Sessions Case No. 48(8) of 2002 convicting the present appellant under Section 235(1) of the Code of Criminal Procedure for committing offence under Section 498A and 302 IPC and thus, sentencing him to suffer R.I. for life and to pay fine of Rs. 5,000/- in default R.I. for further one year for the offence committed by him under Section 302 IPC and to suffer R.I. for one year and to pay fine of Rs. 1,000/- in default to suffer R.I. for three months more for committing the offence under Section 498A IPC. By the impugned judgment and order, it was further directed that both the sentences shall run concurrently.
3. The convict felt aggrieved and, thus, preferred the instant appeal.
4. The facts leading to initiation of the aforesaid Sessions trial is required to be discussed in a nutshell. On 19.05.2000, one Nema Das of Hridaypur Kailash Nagar, P.S. Barasat, lodged a

written complaint with the Officer-in-Charge, Barasat Police Station stating *inter alia* that on 19.05.2000, at about 1.30 P.M. he came to learn that his sister Mita Sardar, wife of Nabin Sardar (the appellant herein) was lying dead in her room and immediately, thereafter, he rushed to the matrimonial home of his said sister, Mita Sardar where he found her in dead condition in her bedroom. In the written complaint, it was stated further that marriage of his said sister with Nabin Sardar was solemnised in the year 1990 and out of their marital wedlock, when a male baby was born to them, the said sister of the defacto complainant lost her mental balance and since, thereafter, her husband Nabin Sardar, the appellant herein, started torturing her physically and mentally. It is the further version of the defacto complainant that in spite of repeated request as made by him, such torture was not stopped at the instance of the present appellant.

5. On the basis of such written complaint, Barasat P.S. Case No. 306 dated 19.05.2000 under Sections 498A and 302 IPC was started. Investigation was taken up and on completion of the same charge-sheet under Sections 498A/306 IPC was submitted. Trial court record reveals that on perusal of the entire material as placed before him the learned Trial Court by

an order dated March 19, 2003 framed charges under Sections 498A/302 IPC as against the present appellant and since the present appellant before the learned Trial Court pleaded his innocence and claimed to be tried, the trial proceeded before the learned Trial Court.

6. From the trial Court record, it also reveals that for bringing home the charges as against the present appellant, prosecution has examined 15 witnesses in all and several documents have been exhibited on their behalf. As discussed above, learned trial court on perusal of the evidence of the prosecution witnesses both oral and documentary and after giving due thought over the answers given by the accused while examining him under Section 313 of the Code of Criminal Procedure found the appellant guilty and thus convicted him for the offences as discussed above.

7. Mr. Sumanta Chakraborty, learned *amicus curiae* led by Mr. Asim Kumar Niyogi, another learned *amicus curiae* for the appellant in course of their submissions draw attention of this Court to the evidence of the prosecution witnesses, more specifically to the evidence of P.W. 5, P.W. 6, P.W. 12, P.W. 15 i.e., the Investigating Officer of this case. It is argued by the learned *amicus curiae*s that the learned Trial court by passing

the impugned judgment ought to have considered the evidence of aforesaid four witnesses conjointly and thus ought to have come to a conclusion that the evidence as adduced by the said P.W.s 5 and 6 are full of contradiction and at the same time, learned trial Court ought to have held the omissions as evident from the evidence of the P.W.s 5 and 6 tantamounts to the material contradictions for which learned trial court ought to have passed a judgment of acquittal.

8. It is further argued by the learned *amicus curiae*s as appointed by this Court that the evidence of the Autopsy Surgeon, i.e., P.W. 12 does not support the prosecution case and thus in absence of any positive corroborative evidence it cannot be said that it is none but the present appellant who assaulted his wife on her head by using an iron rod. In course of their argument, learned *amicus curiae*s also draws attention of this Court to the impugned judgment. It is argued by them that while passing the impugned judgment, learned trial court has unnecessarily roped the present appellant with the burden as envisaged under the provisions of Section 106 of the Evidence Act especially when there is no material evidence to that effect that the present appellant was there at the time of the alleged assault upon the present victim. It is thus argued by the

learned *amicus curiae* that it is a fit case for allowing the instant appeal by setting aside the impugned judgment of conviction and order of sentence.

9. *Per contra*, Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor duly assisted by Md. Kutubuddin also places his reliance upon the evidence of the prosecution witnesses. It is argued by him that on conjoint perusal of the evidence of P.W.s.1 to 9, it would reveal that they had testified consistently to the effect that the present appellant in the garb of treatment of the victim with the help of a Ojha had mercilessly beaten the victim with an iron rod and on account of such assault, the victim sustained bodily injuries and later on, she succumbed to such injuries which is also evident from the evidence of the Autopsy Surgeon i.e., P.W. 12. It is further argued that the learned trial court has rightly interpreted the provision of Section 106 of the Evidence Act in the impugned judgment for which the instant appeal may be dismissed.

10. We have minutely gone through the evidence of the prosecution witnesses both oral and documentary as recorded by the learned trial court, the examination of the accused under Section 313 of the Code of Criminal Procedure and the

impugned judgment. We have also given our due consideration over the submissions of the learned counsel of both sides.

11. In our considered view for effective disposal of the instant appeal, a brief discussion with regard to the prosecution witnesses are very much necessary. From the trial court record, it reveals that the P.W. 1, P.W. 5 are the full blooded brothers of the deceased, P. W. 6 is the sister-in-law of the deceased being the wife of P.W. 5, P.W. 7 is the cousin brother of the deceased while P.W. 9 is the another sister-in-law of the deceased i.e., the wife of P.W. 1. Before the learned trial court, three neighbours of the convict were examined who were P.W.s. 2, 3 and 4. P.W. 11 is the scribe while P.W. 15 is the Investigating Officer of this case.

12. As discussed above, the learned trial court while passing the impugned judgment have discussed the deposition of the near relatives of the victim as well as the neighbours of the victim and thus come to a conclusion that immediately before the death of the victim, the appellant was present in his house when the victim was treated by an Ojha. In order to decide as to whether the view of the learned trial court is sustainable or not, the evidence of P.W. 5 and P.W. 6 are required to be discussed in a nutshell. Both P.W.s. 5 and 6 who are the

husband and wife in their respective examination-in-chiefs stated that on the relevant day and hour the convict came to their house and took them to his house on the plea that his wife Mita Sardar would be treated by an Ojha and in course of such treatment, the said convict as per instruction of such Ojha started assaulting the victim with an iron rod. They have also stated that seeing such inhuman torture, they returned home and reported the matter to their other relatives and on that very day at about 1/1.30 P.M. they came to learn from the present appellant who came to their house that 1.30 P.M. that the victim died. The cross-examination of P.W. 5 is very much relevant in this regard who testified thus:-

“I have not stated before the I.O. that Nabin Sardar called me at about 11/11.30 a.m. on the date of death of Mita Sardar on the plea of that Mita Sardar would be treated by ‘Ojha’ or that ‘Ojha’ sat in front of Mita and Nabin Sardar started assaulting Mita Sardar with an iron rod. I have not stated to police that at about 1-30 p.m. Nabin Sardar called me and I accompanied him to his house and found Mita lying dead or that I found marks of

injury on her hands, legs and neck. I have not stated before the I.O. that Nabin Sardar used to commit torture on Mita or that he used to deny proper food to Mita.”

13. From the aforementioned cross-examination, it thus reveals to us that in course of his cross-examination, P.W. 5 contradicted himself under Section 145 of the Evidence Act read with Explanation 162 of the Code of Criminal Procedure. It appears to us that the version of P.W. 5 as recorded in his examination-in-chief was stated by him for the first time and it was never stated by him to the I.O. previously that is at the time of investigation which in our considered view tantamounts to material omission amounting to contradiction.

14. In our further considered view, the evidence of P.W. 6 also suffers from similar discrepancy when the entire evidence of P.W. 6 is read with the evidence of Investigating Officer i.e., P.W. 10. In the cross-examination of P.W. 15, it reveals to us that P.W. 15 stated thus:-

“Kamala Das P.W. 6 did not state before me that on the date of occurrence at about 9-00/9-30 a.m. Nabin Sardar took herself and her husband Netai Das to the house of Nabin

Sardar. P.W. 6 Kamala Das did not state before me that on that very date they again wen to the house of Nabin Sardar and found Mita Sardar dead and they also found marks of injury on her head, leg, neck and other parts of her body. P.W. 6 Kamala Das has stated before me that ‘santan sambhaba holeo o gorom porle or manasik bikar dekha dito’.

15. In view of such evidence of P.W. 6 read with P.W. 15, it thus appears to us that because of such material omission as well as contradiction in the evidence of P.W. 6 it becomes very risky to place any reliance upon the evidence of P.W. 6 as to the finding of the guilt of the present appellant. Admittedly, in her examination-in-chief of P.W. 9, we have noticed that she testified that on the relevant day and hour, the present appellant visited their house and asked P.W.s 5 and 6 to go to his house on the plea of treatment of the victim Mita Sardar by one Ojha and she further testified that after returning therefrom, both P.W. 5 and P.W. 6 narrated to her about the torture of Mita by the convict. Even if, this part of evidence corroborates the respective examination-in-chiefs of P.W.s. 5 and 6 but when the entire evidence of P.W. 9 is read with the

cross-examination of P.W. 15, i.e., the I.O. of the case, it would reveal that aforesaid facts have never been stated to the I.O. by the P.W. 9 when she was examined by the I.O. of this case.

16. In view of such, in our considered view the evidence of P.W. 9 does not inspire much confidence in our mind.

17. So far as the evidence of P.W.s. 2, 3 and 4 are concerned, it appears to us that they being the neighbours of the present appellant turned hostile in course of their examination-in-chiefs and even during their cross-examinations by the prosecution nothing could be elicited from their mouth that during the lifetime of Mita, she was assaulted and/or ill-treated by the present appellant. It is, however, pertinent to note herein that in course of his cross-examination by the prosecution, P.W. 3 though stated that on account of extreme negligence and assault by Nabin Sardar that led to Mita's death after leaving of Ojha from the place of occurrence but in course of his cross-examination by the defence, it has been stated by him that on the relevant day no Ojha ever visited the house of the present appellant.

18. It is equally pertinent to mention herein that P.W. 1 being the brother and the defacto complainant of the deceased though in his examination-in-chief remained very vocal with

regard to the torture and assault by the present appellant upon his said deceased sister but in his cross-examination, it has been stated by him that present appellant and the deceased had love affairs and they got married according to their choice. It also reveals from his cross-examination that the present appellant used to get deceased treated by doctor. It also reveals from the evidence of the neighbouring witnesses that the deceased on account of her mental illness was wondering in the locality in undressed condition.

19. So far as the finding of the learned trial court that under Section 106 of the Evidence Act, the accused was duty bound to explain as to how the injury occurred on the person of the victim on account of which she died. In considered view of us, learned trial court is not correct in his approach in view of the fact that on cumulative reading of the entire evidence of the prosecution witnesses, it does not appear to us that none of the prosecution witnesses before the learned trial court had given any clinching evidence to substantiate that on the relevant day and hour the present appellant was present in his house with an Ojha and as per the instruction of the said Ojha, he had mercilessly beaten his wife by an iron rod.

20. In view of the discussion made hereinabove, it thus appears to us that learned trial court while passing the impugned judgment was not at all justified in placing his reliance upon the evidence of the prosecution witnesses because of their omissions and contradictions and at the same time, learned trial court has wrongly placed the burden as enunciated in the provision of Section 106 of the Evidence Act upon the accused to explain the injuries as suffered by the victim.
21. On the basis of the discussion made (supra), we thus find sufficient merit in the instant appeal and, accordingly, the instant appeal being **CRA 450 of 2003** is hereby allowed. Interim applications, if any, stands hereby disposed of.
22. The impugned judgment dated 29.08.2003 and order of sentence dated 30.08.2003 as passed by the learned Additional Sessions Judge, Fast Track Court – I, Barasat, North 24 Parganas, in Sessions Trial No. 6(3) of 2003 arising out of Sessions Case No. 48(8) of 2002 is hereby set aside.
23. Since the present appellant is on bail, he be discharged from his bail bonds at once.
24. Department is hereby directed to transmit the Lower Court Record along with a copy of this judgment at the earliest.

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.)