

**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 294 of 2021

With

CRAN 1 of 2021

Suklal Hembrom @ Patar

VS.

The State of West Bengal

For the Appellant : Mr. Jayanta Banerjee,
Mr. Ruxmini Basu Roy, Advocates

For the State : Mr. Rudradipta Nandy, Id. APP
Ms. Sonali Das, Advocates

Hearing concluded on : February 13, 2023 & April 5, 2023

Judgement on : April 5, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against a judgment of conviction dated August 12, 2021 and an order of sentence dated August 13, 2021 passed by the learned Additional District and Sessions Judge, Fast Track 2nd Court, Paschim Medinipur in Sessions Trial no. 01-(01)/08.

2. By the impugned judgment of conviction, the learned Judge found the appellant guilty under Section 302 of the Indian Penal Code, 1860. By the impugned order of sentence, the learned Judge sentenced the appellant to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default to suffer rigorous imprisonment for six months.

3. The case of the prosecution at the trial was that, the appellant along with Hapan Murmu @ Mandi on September 5, 2006 at the house of the victim, in furtherance of common intention committed murder of the victim intentionally or unnaturally causing death to the victim and thereby committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code, 1860.

4. Police received a written complaint dated September 5, 2006, being Exhibit-1, from prosecution witness (P.W. 1). On the basis of which, police started Kotwali police station F.I.R. no. 190/06 dated September 5, 2006 under Section 302 of the Indian Penal Code, 1860.

5. On conclusion of the investigations, police submitted a charge sheet against two persons being the appellant and one Hapan Murmu @ Mandi. The Court framed charges under Sections 302/34 of the Indian Penal Code, 1860 against the appellant and Hapan Murmu @ Mandi on March 28, 2008. The accused persons including the appellant claimed to be not guilty and consequently they were put on trial.

6. During trial, Hapan Murmu @ Mandi expired and the case was filed forever in respect of the deceased accused by an order dated May 17, 2018.

7. At the trial, prosecution examined 10 witnesses to bring home the charges. The prosecution also relied upon various documents and material exhibits.

8. Learned advocate appearing for the appellant submits that, the prosecution could not prove the charges as against the appellant beyond reasonable doubt. The charges framed were against the appellant and one deceased co-accused, *inter alia*, under Section 34 of the Indian Penal Code, 1860. Prosecution

failed to establish any common intention between the appellant and such deceased co-accused.

9. Learned advocate appearing for the appellant submits that prosecution did not produce any eye-witness to the incident. Prosecution relied upon circumstantial evidence to bring home the charges. According to him, prosecution failed to complete the chain of circumstances so as to raise an irresistible conclusion of guilt so far as the appellant is concerned.

10. Referring to the evidences on record, learned advocate appearing for the appellant submits that, P.W. 4 is a person, who saw the appellant in the vicinity of the place of occurrence. In the facts of the present case, according to him, it cannot be said that the appellant was last seen together with the victim. According to him, no witness from the prosecution side came at the trial to claim that the appellant was last seen together with the victim. According to him, although the appellant was in the vicinity of the place of occurrence, it cannot be said that the appellant is guilty of murder. He relies upon **2023 SCC Online SC 50 [Boby vs. State of Kerala]; (1984) 4 SCC 116 [Sharad**

Birdhichand Sarda vs. State of Maharashtra]; (2015) 4 SCC 393 [Ashok vs. State of Maharashtra]; (1979) 3 SCC 316 [State (Delhi Administration) vs. Sri Gulzari Lal Tandon]; (2014) 4 SCC 715 [Kanhaiya Lal vs. State of Rajasthan]; and. 2022 (5) SCC 438 [Satye Singh and Anr. Vs. State of Uttarakhand].

11. Learned advocate appearing for the appellant submits that in order to comply with the theory of last seen together, the prosecution is required to establish that, the appellant was last seen together with the victim prior to the discovery of the dead body. In the facts and circumstances of the present case, P.W. 4 did not claim that she saw the appellant with the victim prior to his death.

12. Learned advocate appearing for the appellant submits that, no seizure list was marked as an exhibit at the trial. P.W. 5 claimed that a sharp cutting weapon was seized by the police. Seizure list with regard to same was not produced at the trial on behalf of the prosecution. Stone was seized by the police which was claimed to be used in the murder of the victim. Such stone

was not seized pursuant to a statement recorded by the appellant and admissible in evidence under Section 27 of the Evidence Act, 1872. In support of such contention, he relies upon **2002 Calcutta Criminal Law Reporter (Cal) 694 [Fulan Debi @ Pankhi @ Dulhan vs. The State of West Bengal]**.

13. Learned advocate appearing for the appellant submits that, all incriminating materials as against the appellant were not placed by the learned Judge when the appellant was being examined under Section 313 of the Criminal Procedure Code. The alleged incriminating materials with regard to seizure of the stone were not placed by the appellant in his examination under Section 313 of the Criminal Procedure Code. In such circumstances, appellant suffered a prejudice. In support of such contention, he relies upon **2023 (2) SCC 583 (Kalicharan & Ors. vs. State of Uttar Pradesh)**.

14. Learned advocate appearing for the appellant submits that, Section 106 of the Evidence Act, 1862 is not attracted in the facts and circumstances of the present case. The death occurred in the bedroom of the deceased. The appellant is,

therefore, not required to explain the death of the victim happening in the bedroom of the victim. The appellant and the victim are not related to each other.

15. Learned advocate appearing for the appellant submits that the prosecution did not establish at the trial that, no other person entered into the house of the victim prior to his death. P.W. 4 did not claim that she was present all morning till the discovery of the dead body of the victim in the house of the victim. Therefore, according to him, the prosecution failed to prove the complicity of the appellant in the alleged murder of the victim.

16. Learned advocate appearing for the appellant submits that, prosecution failed to establish any motive for the murder. The claim for motive is based on hearsay.

17. Learned advocate appearing for the State submits that the prosecution was unable to prove the charges beyond reasonable doubt. He refers to the evidence of the prosecution witnesses. He submits that P.W.4 saw the appellant entering into the

house. The appellant sent P.W.4 away to buy an article. P.W.4 on returning to the house found the victim dead.

18. P.W.1 is the scribe of the written complaint. He stated that he wrote the written complaint on the instructions of P.W.4. He read over the contents of the written complaint to P.W.4. She heard the contents of the written complaint and signed the same. The written complaint was tendered in evidence and marked as Exhibit-1. The signature of the P.W.1 was marked as Exhibit.1/1. Signature of P.W.4 was marked as Exhibit-1/2.

19. P.W.1 stated that after the written complaint, police came and saw the deadbody of the victim. Police seized certain articles and prepared a seizure list. The seizure list was tendered in evidence and marked as Exhibit-Y. He signed thereon and marked as Exhibit-Y/1. He identified the accused persons in Court.

20. P.W.2 is a witness to the seizure list being Exhibit-Y. He identified his signature on such seizure list which was marked as Exhibit-Y/2.

21. P.W.3 is a police Constable. He stated that on May 5, 2006, he was posted at Kotwali Police Station as Constable. On that day, one unnatural death case was started. He escorted the deadbody of the victim to the morgue and identified the body to the Post Mortem Doctor. The deadbody challan was tendered in evidence and marked as Exhibit-2 and his signature was marked as Exhibit-2/1. Wearing apparels of the deadbody of the victim was seized by the police. Such seizure list was marked as Exhibit-3. His signature on the seizure list was marked as Exhibit-3/1.

22. P.W.4 was a minor at the time of deposition. Questions were put to her by the learned Judge so as to identify as to whether the P.W.4 possessed sufficient capability to understand the questions and give rational answers. Learned Judge found that the P.W.4 was capable of understanding the questions and giving rational answers thereto. Subsequent to such finding being returned her the learned Judge, P.W.4 was examined in chief on behalf of the prosecution.

23. During such examination, P.W.4 described the composition of her family. She said that her biological father died when she was young. The victim was her uncle. She used to address the victim as her father. The victim was murdered. She identified the appellant as the murderer. She said that she was 10 years of age when the victim was murdered. On the date of the incident at about 12 noon, the appellant came to her house and asked her what food was under preparation. She answered the appellant that she was preparing a curry mixed with potato and snail. The victim was sleeping in the house and none was there at that time in the house. Her brothers and mother went out for work. Appellant asked her for some curry which she offered but he refused to eat. Appellant asked her to purchase Biri from a shop and for that purpose appellant gave her a 10 rupee note. Accordingly, she went to purchase Biri. When she returned after purchasing Biri, she found that the appellant was coming out from their house. The appellant was falling down on the ground and trying to get up again. The appellant was cleaning his hands in the earthen pot which was

full of snail and water. Then the appellant explained to her that he fell down on the earth and was washing his hands. She entered inside the room and she slipped on the blood. She lit a lamp and searched for the victim and found the victim was lying dead in a pool of blood on the floor of the room. She found marks of injury on the forehead of the victim. She started crying. Then the appellant entered into the room and asked what was wrong with the victim. She rushed to her mother at her place of work and disclosed everything to her. She submitted written complaint at police station. She identified the written complaint written by P.W.1. She stated that written complaint was taken down as per her dictation.

24. P.W.4 stated that the victim was murdered by the appellant with the help of a sil (piece of stone). She stated that she recorded her statement under Section 164 of the Criminal Procedure Code before the learned Magistrate. She tendered such statement which was marked as Exhibit-4/1. She said that police seized various articles. She identified the accused in Court. She stated that Chakla, Mayra and the appellant came to

their house in the morning on that day to consume liquor. She stated that she did not see other accused on the date of the incident in her house.

25. P.W.5, is the wife of the victim. She stated that, P.W.4 used to address the victim as her father. P.W.4 was two months of age when her biological father expired. She said that she was not in her house at the time of incident. She returned to her house at about 12/1 noon. Entering the house she found that the deadbody of the victim was lying. She came to learn from P.W.4 that the appellant gave her a ten rupee note to purchase Biri and matches. Returning home, P.W.4 found that the victim was dead. P.W.4 told her that the appellant murdered the victim. She was examined by the police. Police seized the piece of grinding stone and sharp cutting weapon from her house. She identified the grinding stone that was seized from her house which was marked as Material Exhibit-I. She said that police prepared a seizure list in her place and she put her left thumb impression thereon. She said that police questioned the appellant as to what happened, who told the police that he

assaulted the victim with the seized grinding stone. Police examined the dead body of the victim. She put her left thumb impression on the inquest report.

26. P.W.6 is a co-villager who did not add any substance to the case of the prosecution or the defence.

27. A seizure list witness deposed as P.W.7. He identified his signature on the seizure list which was marked as Exhibit-5/1. He said that he saw the blood stain on the grinding stone.

28. P.W.8 is another person who did not add any substance to the case of either the prosecution or the defence. He was declared hostile by the prosecution. On cross-examination by the prosecution after he being declared hostile, he denied the suggestions put to him.

29. P.W.9 is the doctor who conducted the Post Mortem Examination of the deadbody of the victim. He tendered the Post Mortem Report in evidence which was marked as Exhibit-6. He stated that he found about 11 external injuries on the dead body of the victim. He described that some of the injuries were

caused by a hard and blunt object. He also described that one of the injuries was inflicted by a sharp cutting weapon.

30. P.W.9 opined that the death took place 1½ to 2 days before the Post Mortem. The injuries sustained by the victim could not be either accidental in nature anyway whatsoever nor can it be suicidal in nature. He stated that some of the injuries were individually capable of causing death to the victim in ordinary course of nature.

31. The Investigating Officer deposed as P.W.10. He narrated about the course of investigation. He tendered the First Information Report filled up by the lady Sub Inspector of Police. The formal First Information Report was marked as Exhibit-7. He tendered the rough sketch map with index prepared by the Investigating Officer, Mihir Kumar Goswami which was marked as Exhibit-8 and 8/1 respectively. He stated that, during investigation, such Investigating Officer seized blood stained soil and offending weapon, i.e., one grinding stone and blood stained yellow coloured half pant of the victim from the house of the victim and forwarded the same to the Forensic Science

Laboratory. Such Investigating Officer arrested the appellant and forwarded the appellant to Court. Due to transfer of the first Investigating Officer, the case was transferred to the subsequent Investigating Officer. Thereafter, the case was transferred to him for investigation. During investigation, he arrested the co-accused and forwarded the co-accused before the learned Court. He submitted charge sheet bearing no. 237/07 dated September 30, 2007 against two persons under Sections 302/34 of the Indian Penal Code, 1860.

32. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Cr.P.C. where, he claimed that he was falsely implicated. He declined to adduce any defence witness.

33. The victim was found dead on September 5, 2006 in his room. The body of the victim was taken for post mortem examination. The post mortem doctor being P.W. 9, found eleven injuries on the dead body of the victim. The injuries noted by the post mortem doctor P.W. 9 on the dead body of the victim are as follows:

- 1) Incised wound on lobule of right ear attached with ear with a tag of skin.
- 2) Lacerated wound measuring about 3.5" X 0.5" X bone deep on the left side of forehead placed above and starting from lateral aspect of left eyebrow and reaches upto medial side of the left eyebrow.
- 3) Lacerated wound 0.3" X 0.8" X bone deep on the right side of the forehead just lateral to mid line.
- 4) Incised looking lacerated wound 1.5" X 0.2" on the medial side of the left index figure.
- 5) Left ring and little figure proximal phalanx fractured with extra vasation of blood in an around.
- 6) Incised chopped wound 04" x 2" into bone deep placed over left side parietal and temporal area of scalp corresponding area had cut fracture over outer table of skull bone. When I opened the scalp of the deceased I found injuries:-

- 7) Hematoma 6.5" X 5" on the vertex and surrounding area of the scalp
- 8) Right side parietal bone fissure fracture,
- 9) Occipital bone with fissure fracture on right side,
- 10) Sagittal suture separation,
- 11) Subdural hemorrhage over whole brain surface."

34. P.W. 9 in his deposition stated that, the death was due to the effects of injuries to the head and brain ante mortem in nature. The injuries were collectively sufficient to establish that the death was caused in ordinary course of nature. He also said that the injury sustained by the victim could not be either accidental in nature in any way whatsoever nor can it be suicidal in nature.

35. Consequently, the post mortem report of the victim being Exhibit 6 read with the deposition of P.W. 9, being the doctor, who conducted the post mortem on the victim, conclusively establishes that the victim was murdered.

36. As noted above, the dead body of the victim was found in his room. The discovery was made by P.W. 4. P.W. 4 was a

minor on the date of the incident. She was about ten years age at that point of time.

37. In her deposition, P.W. 4 stated that, the victim was sleeping in his room and that she was preparing the meal for the day. No other persons were present in the premises when the appellant entered their house. Exhibit 8 is the rough sketch map of the place of occurrence. Exhibit 8 describes (A) as the place of occurrence. Exhibit 8 will demonstrate that, the house comprised of one room and an appertaining varandah thereto.

38. The deposition of P.W. 4 where it records “house” is required to be considered in the context of exhibit 8.

39. P.W. 4 saw the appellant to enter into their “house”. By “house”, therefore, it was a room that is being spoken of by P.W. 4 in her deposition. She was sent away by the appellant to purchase ‘Biri’ for the appellant. She went away. She came back and found the appellant to exit her “house”. Her “house” again is required to be understood in the context of Exhibit 8.

40. We took the assistance of Exhibit 4, which is the statement of P.W. 4 recorded under Section 164 of the Cr.P.C.

Exhibit 4 is in vernacular Bengali where, she describes that the appellant entered into the Ghar (room in Bengali). She used the word 'Ghar' in Bengali to denote room. She saw the appellant to exit the room when she came back.

41. Exhibit 4 corroborates the oral testimony of P.W. 4 at the trial. She is consistent in both exhibit 4 as well as in her oral testimony at the trial when she says that the victim was sleeping in his room, the appellant entered into such room and sent P.W. 4 away for the purpose of purchasing 'Biri' for the appellant and when she came back after such purchase, she found the appellant to exit from such room.

42. In such circumstances, the prosecution was able to prove beyond reasonable doubt that, the appellant entered the room of the victim and came out of such room. P.W.4 was sent away by the appellant. P.W.4 on returning and entering the room of the victim found the victim dead. The last seen together theory of the prosecution as against the appellant stands established.

43. Post-occurrence conduct of the appellant is also with some consequence in the facts and circumstances of the case. When

P.W. 4 returned after running the errand for the appellant, of buying the Biri for him found the appellant to be trying to wash his hands from a pot full of water and snails. The appellant was found to be falling down on the ground and trying to stand up.

44. In the light of the facts established, the law on circumstantial evidence as cited on behalf of the appellant requires consideration.

45. **Boby (supra)** refers to **Sharad Birdhichand Sarda (supra)** and is of the view that, the accused must be and not merely may be guilty before a Court convicts the accused.

46. **Ashok (supra)** is of the view that, the initial burden of proof is on the prosecution to adduce sufficient evidence pointing out towards the guilt of the accused. However, in a case it is established that, the accused was last seen together with the deceased, the prosecution is exempted to prove exact happening of the incident as accused himself would be with special knowledge of the incident and thus endowed with the burden of proof under Section 106 of the Evidence Act, 1872.

47. In the facts of the present case, as noted above, the prosecution was able to prove the fact that, the appellant was last seen with the victim prior to his death and thereafter, the dead body of the victim was discovered.

48. In **Shri Gulzari Lal Tandon (supra)**, it was observed that, an accused can be convicted on circumstantial evidence if every other reasonable hypothesis of guilt was completely excluded and circumstances were wholly inconsistent with the innocence of the accused. It also went on to observe that in a case where the prosecution rests purely on circumstantial evidence, motive undoubtedly plays an important part in order to tilt the scale against the accused.

49. **Kanhaiya Lal (supra)** is again on circumstantial circumstance. It is of the view that, where a case rests squarely on circumstantial evidence, inference of guilt can be justified only when all incriminating facts and circumstances were found to be incompatible with innocence of the accused or guilt of any other person. Circumstances from which an inference of guilt

of the accused was drawn was required to be proved beyond reasonable doubt.

50. In the facts and circumstances of the present case, we are of the view that, the prosecution was able to prove, at the trial that, the appellant entered the room where the victim was sleeping and exited therefrom with the victim being discovered as dead immediately thereafter. In the facts of the present case, all incriminating facts and circumstances proved by the prosecution at the trial were incompatible with the innocence of the appellant or the guilt of any other person.

51. The appellant did not record a statement under Section 161 of the Code of Criminal Procedure. Consequently no portion of such Section 161 of the Criminal Procedure Code was sought to be introduced at the trial under Section 27 of the Evidence Act, 1872. Consequently, the ratio of **Fulan Debi (supra)** is not attracted in the facts and circumstances of the present case.

52. **Kalicharan (supra)** and **Jai Prakash Tiwari (supra)** are of the view that, Section 313 of the Code of Criminal Procedure

confers a valuable right upon the accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution.

53. In the facts and circumstances of the present case, since the appellant did not record statement under Section 161 of the Code of Criminal Procedure, therefore, question of marking any statement of appellant under Section 27 of the Evidence Act, 1872 did not arise and consequently, the question of putting a non-existent fact to the appellant in his examination under Section 313 of the Code of Criminal Procedure did not arise.

54. In such circumstances, we find no ground to interfere with the impugned judgment of conviction and the order of sentence. We affirm the same.

55. CRA 294 of 2021 is **dismissed**.

56. Period of detention of the appellant pre-trial, during trial and post-trial will be set off against the sentence imposed.

57. In view of the dismissal of the appeal, no order need be passed in the interim application. CRAN 1 of 2021 is also dismissed.

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

59. 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.)

60. I Agree.

(Md. Shabbar Rashidi, J.)