

27.02.2023
S/L. 14
Court No.12
Sourav

CRA 456 of 2007
With
CRAN 1 of 2008 (Old No: CRAN 363 of 2008)

In the matter of: **Banai Choudhury**

....Appellant.

Mr. Debabrata Roy
Ms. Sarbani Mukhopadhyay

... for the appellant.

Mr. Prasun Kumar Dutta, Ld. APP
Mr. Santanu Deb Roy
Md. Kutubuddin

... for the State.

1. Heard Mr. Debabrata Roy, learned Counsel being assisted by Ms. Sarbani Mukhopadhyay, learned Counsel for the appellant and Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor being assisted by Mr. Santanu Deb Roy, learned Counsel and Md. Kutubuddin, learned Counsel for the State.

2. The judgment of conviction dated 22.05.2007 and the order of sentence dated 23.05.2007 passed by the learned Additional Sessions Judge, 5th Fast Track Court, Malda, in Sessions Trial No. 69 (10) of 2006 arising out of Sessions Case No. 193 of 2006 convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life and to pay fine of Rs. 5,000/- in default to suffer R.I. for two years more is under challenge in this appeal.

3. This is a case of uxoricide. The FIR has been lodged by deceased's father (P.W. 2) being scribed by one Anowar Hossain (P.W. 3). The occurrence happened in the intervening night of 17.10.2005 and 18.10.2005. The place of occurrence is one hut situated in banana garden of one Tukun Mondal

(not examined), where the appellant along with his deceased wife and four children was residing. The occurrence happened after 18 years of marriage of the appellant with the deceased.

Prosecution allegation as found from the FIR is that P.W. 2, father of the deceased went to the house of the appellant at Malihat and found the dead body of the deceased lying there with injuries on her body.

4. On the basis of the FIR, the I.O. (P.W. 10) took up investigation, prepared the sketch map, recorded the statements of the available witnesses, held inquest over the dead body of the deceased in presence of the witnesses, challaned the dead body for Post Mortem through P.W. 6, home guard, seized the wearing apparels of the deceased on collection by P.W. 6, seized one blood stained 'kantha', one blood stained shirt of the accused person, one blood stained sharp cutting 'da', some blood stained earth and controlled earth from the spot and sent all the incriminating articles seized from the spot for serological examination. He, on transfer, handed over charge of investigation to P.W. 11, who during his part of investigation received the report prepared by P.W. 1 from R.F.S.L. On his transfer, he (P.W. 11) handed over the investigation to P.W. 12, who arrested the accused, forwarded him to the Court in custody and submitted charge-sheet against the appellant under Section 302 IPC.

5. Prosecution has examined 12 witnesses to bring to home the charge against the appellant. Besides the witnesses introduced (Supra), P.W. 4 is a local resident who is witnesses to seizure of incriminating articles from the spot, P.W. 5 is the

mother of the deceased who is alleged to have testified that in the fateful night of the occurrence four children of the appellant and deceased had gone to a 'mela' with her daughter-in-law, Sumitra (not examined) and on return from 'mela' her daughter-in-law saw the dead body of deceased and one 'da' at the spot. This witness (P.W. 5) in her examination-in-chief and her cross-examination, has specifically stated that she was not examined by the I.O. and her grandson informed her about the incident. Said grandson of P.W. 5 has also not been examined. P.W. 7 is the medical officer who conducted Post Mortem over the dead body of the deceased. P.W. 8 is a witness to the inquest over the dead body. P.W. 9 is the recording officer who received the FIR from P.W. 2. P.W.s 10, 11 and 12 are the I.O.s.

The defence plea is one of complete denial and the appellant has taken the plea of *alibi* by giving answer to question no. 9 in his statement under Section 313 Cr.P.C. to the effect that in the fateful night, he had also gone to watch 'mela' and he was not in the house; coming from the 'mela', he found the ghastly scene of murder of his wife and out of fear he fled the spot.

6. Learned trial court on the basis of the opinion of the medical officer (P.W.7) has come to the finding regarding the homicidal death of the deceased. So far as the complicity of the present appellant is concerned, it has been fairly recorded by the learned trial court that the case is based entirely on circumstantial evidence. The circumstances he has relied on are as follows:

i) The appellant, deceased and their four children were living in the spot house which has been proved by P.W.s. 2 and 5.

ii) The scientific officer (P.W. 1) has found blood of human origin on the 'kantha', shirt and 'da' seized from the spot though the blood group could not be ascertained on any other item except 'kantha'. The blood found on 'kantha' is B+ (positive) and it is also an admitted fact that blood group of neither the deceased nor the appellant is of group B+ (positive).

iii) The appellant has taken the plea of *alibi* in his statement under Section 313 Cr.P.C but he could not prove the same by adducing any cogent evidence.

7. On the basis of the aforesaid circumstances, learned trial court has come to the finding of guilt against the appellant. Though the learned trial court has not discussed in so many words, he has impliedly shifted the onus to the appellant under Section 106 of the Evidence Act to explain the circumstances surrounding the murder of the deceased as it was within his special knowledge.

8. Mr. Debabrata Roy, learned Counsel for the appellant submits that the case is entirely based on circumstantial evidence and it is no more *res integra* since the case of ***Sharad Bridhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116*** that principles of Panchsheel as elucidated by Hon'ble Supreme Court in the

aforesaid case should be followed sacrosanctly before coming to return the finding of guilt of the accused. Further the Hon'ble Supreme Court in a rather recent decision in the case of ***Nagendra sah Vs. State of Bihar (2021) 10 SCC 725*** has discussed in detail as to when onus under Section 106 of the Evidence Act can be shifted on the accused. It is submitted by the learned Counsel for the appellant that the circumstances relied on by the learned trial court has not at all been proved in the present case. The circumstances having not been proved to make the appellant culpable for the offence alleged, possibly the onus under Section 106 of the Evidence Act could not have been shifted to the appellant. Lastly, it is submitted by learned Counsel for the appellant that assuming *arguendo*, the circumstances relied on by the prosecution to be proved, then also no liability can be saddled on the appellant because from the proved circumstances, it cannot be inferred unerringly that in all probability the appellant has committed the crime and non else.

Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor, for the State on the other hand support the impugned judgment and submits that on the basis of the fact established, the impugned judgment should be affirmed and the appeal be dismissed.

9. While dealing with the submissions advanced by the learned Counsel for the parties and the evidence on record, we are very much conscious about the principle of 'panchasheel' enunciated by Hon'ble Supreme Court in the case of ***Sharad Baidhichand Sarda (Supra)***. Hon'ble

Supreme Court in the case of ***M. G. Agarwal Vs. State of Maharashtra AIR (1963) SC 200*** followed in ***(1973) 4 SCC 17*** has held that inference of guilt can be drawn only, if the proved facts are wholly inconsistent with the innocence of the accused and is consistent with his guilt. It is well-established rule of criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person's conviction, if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. But in applying the principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way and in the application of evidence in respect of the proof of the basic or primary facts, there is no scope for the application of the doctrine of benefit of doubt.

From the aforesaid decision of Hon'ble Supreme Court, it is clear that the primary or basic facts are to be treated as 'proved' or 'disproved' and there cannot be anything in between them.

10. With the aforesaid principles in our mind when we take of re-appreciation of evidence on record, it is found that the first circumstance is to the effect that the appellant, his deceased wife and their four children were staying in the spot

house. Though P.W.s. 2 and 5 are stated to have seen the dead body of their daughter with bleeding injury on the next day of the occurrence, both are fair to the extent that, they have not seen the occurrence. From their evidence, it is not clear as to whether in the night of occurrence, the appellant was there in the house with the deceased. The evidence of P.W. 5 cannot be taken into account inasmuch as she has not been examined by the police and she in her cross-examination, has specifically testified that she came to know about the incident from her grandson. Said grandson of P.W. 5 has also not been examined by the prosecution. Evidence of P.W.s. 2 and 5 is, **therefore, relevant to the extent that the appellant, his deceased wife and their four children were staying in the spot house.** Such evidence of P.W. 2 or for that matter P.W. 5 cannot be stretched further to suggest that in the night of occurrence also the appellant was there in the spot house when the deceased was murdered. Rather from the evidence of P.W. 5, it is clear that in the night of occurrence her daughter in law Sumitra (not examined) had taken the four children of the deceased to the 'mela'. Said Sumitra has not been examined by the prosecution. Had she been examined by the prosecution, she could have testified as to whether the appellant was present in the spot house when she took the four children with her to the 'mela'. Therefore, we are constrained to hold that prosecution has failed to prove the circumstance to the extent that in the night of occurrence, the appellant was also there in the spot house along with his deceased wife. The first circumstance is, however, proved to

the extent that the appellant, his deceased wife and their four children were living ordinarily in the spot house/hut.

11. Coming to the second circumstance, i.e., the presence of human blood stain on one 'kantha', one shirt and one 'da' seized from the spot, it is found that on all the aforesaid incriminating articles human blood was found but human blood of group B+ (Positive) was found on 'kantha'. It has, however, not been proved by the prosecution that the blood group of either the appellant or his deceased wife luer of group B+ (positive). There is also no evidence to the effect that the shirt and 'da' seized from the spot belongs to the appellant. Therefore, this evidence by the prosecution is totally inconsequential and cannot be held to be incriminatory so far as the appellant is concerned.

12. So far as the third circumstance is concerned, that is the plea of *alibi* by the appellant which he has answered in response to question no. 9 in his statement under Section 313 Cr.P.C. We feel persuaded to reproduce the question and answer below:

“Q.9. Where had you been at the time of death of your wife?”

A. At the time of death I went to “MELA” of Malihat to enjoy the song. After returning home, I found the dead body of my wife in my room. After seeing the dead body I fled away towards “Paglaghat” out of fear and told nothing to anybody.”

13. From the question, we find that the fact stated in the question is not a fact proved by the prosecution. In the

case of ***Kalpnath Rai Vs. State (through CBI)***, reported in **(1997) 8 SCC 732** Hon'ble Supreme Court has held that Section 313 of the Code is intended to afford opportunity to an accused "to explain any circumstance appearing in the evidence against him. It is trite that an accused cannot be confronted during such questioning with any circumstance which is not in evidence."

In the present case, there is nothing in evidence that the appellant was present in the spot house at the time of occurrence. If there would have been any evidence to the effect that the appellant was present in the spot house just before the occurrence or during the occurrence and thereafter, if he would have absconded, the aforesaid question would have been a relevant question. But here as discussed (supra), there is no iota of evidence to the effect that the appellant was either present in the spot house before the occurrence or at the time of occurrence. Therefore, the question No. 9 formulated by the learned trial court is totally defective and the answer given by the appellant to that question becomes totally inconsequential and on that answer conviction cannot be based.

14. Be that as it may, if we accept the answer given by the appellant to question no. 9 giving some allowance to the prosecution then also culpability of the appellant cannot be held to have been proved. The appellant has answered that at the time of death of his wife he had been to 'mela' at Malihat to enjoy song and after returning home he found the dead body of his wife in his room and after seeing the dead body he

fled away towards Paglaghat out of fear. Absconding by a husband out of fear is a natural or obvious reaction when the wife is found to be murdered in a mysterious circumstance in his absence and even if, this answer is accepted, the onus under Section 106 of the Evidence Act in view of the ruling of Hon'ble Supreme Court in the case of ***Nagendra sah (Supra)*** cannot be shifted on the appellant.

Further on the basis of the extent of proof of circumstance no. 1 to the effect that the appellant, his deceased wife and their children were ordinarily living in the spot house and the appellant absconded after the incident no inference can be drawn to the extent that it is the appellant only who has committed the murder. Because the chain of circumstances is not complete unerringly pointing to the guilt of the appellant and none else.

15. Regard being had to our discussion (Supra), we are constrained to hold that prosecution has failed to prove the charge levelled against the appellant and he is entitled to be acquitted.

16. Accordingly, the judgment of conviction dated 22.05.2007 and the order of sentence dated 23.05.2007 passed by the learned Additional Sessions Judge, 5th Fast Track Court, Malda, in Sessions Trial No. 69 (10) of 2006 arising out of Sessions Case No. 193 of 2006 are set aside and the appellant is acquitted of the charge.

The appeal being CRA 456 of 2007 is accordingly allowed.

The appellant be released forthwith from custody if his

detention is not required in any other case.

17. Department is directed to send a copy of this order forthwith to the Superintendent, Baharampur Central Correctional Home in due course.

The trial court record along with a copy of the judgment be sent down to the concerned trial court.

18. Judgment is dictated in Court i.e. on February 27, 2023.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

