

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

CRA 583 of 2013

Bibhas Mondal

Vs.

State of West Bengal

For the Appellant(s) : Md. Sabir Ahmed, Adv.
Mr. Kunal Ganguly, Adv.

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

Heard on : 05.01.2023

Judgment on : 05.01.2023

Joymalya Bagchi, J.:-

1. Appeal is directed against judgment and order dated 25.3.2013 and 26.3.2013 passed by the learned Additional Sessions Judge, Fast Track 4th Court Alipore, South 24 Parganas in Sessions Trial no 1 (12)/2006 arising out of Sessions Case No. 21(11)/ 2006, convicting the appellant for commission of offence punishable under Sections 394/302 of the Indian Penal Code and sentencing him to suffer life imprisonment on both counts. Both the sentences shall run concurrently.

Prosecution case:-

2. Prosecution case, as alleged, against the appellant is to the effect that the appellant was initially employed by a labour contractor Golam Mustafa @ Dulal (PW20) to work at the construction site belonging to one Nikhil Ranjan Das (PW8) under Bishnu Lohia, a developer. Appellant developed acquaintance in the locality and used to work as a mason for the local people. On 25.6.2002, PW3, Banabehari Kundu, husband of the deceased Monorama asked him to do masonry work at his house. Appellant came to his house at 9 am. He asked Banabehari to bring various articles like iron wire, nails etc. from a hardware shop. Banabehari went to a hardware shop at Behala and brought the articles.

3. When he returned home around 2.30 - 2.40 p.m., appellant asked him to bring a hacksaw blade. He became irritated but went to Tollygunge to purchase the item. He returned home around 3.30/3.45 p.m. He found the front and rear gate of his house was under lock and key. He called for his wife and the appellant but there was no response.

4. He searched for his wife in the neighbouring houses but in vain. His nephew Ajoy Kundu @ Bochon (PW7) came to the spot. Bochon entered the house from the roof of the adjoining premises of Lakshmi Narayan Bhandar. Entering the house, Bochon found Monorama lying in the toilet. He came out of the house through the roof. Perplexed he did not respond to the queries of Banabehari. Then

the lock of the southern gate of the house was broken. Banabehari and others entered the house and found Monorama lying dead in the toilet.

5. A '*gamcha*' was tied round her neck. Blood stains were found in her mouth and ear. Her personal gold ornaments like gold chain, bangles, ear-top, finger ring were missing. Banabehari informed the incident to his daughters Nellie Poddar (PW4), Shelly Shaw (PW6) and son-in-law, Subhen Shaw (PW5).

6. Police was informed. PW 24 Rajib Dey attached to New Alipore PS along with other police officers came to the spot. He recorded the statement of Banabehari which was treated as FIR and New Alipore PS case no. 120 dated 25.6.2002 under sections 394/302 IPC was registered for investigation. Appellant absconded and could not be arrested.

7. PW 27 Susanta Dhar, investigating officer attached to Homicide Squad, Detective Department issued look out notices. Photograph of the appellant was published in Kolkata Police Gazette. Finally, PW 26 SI Bireswar Chatterjee arrested the appellant on 8.7.2006 from the railway ticket counter at Belghoria railway station.

8. On the leading statement of the appellant stolen ornaments, namely, gold ear tops and finger ring with the mark "MK" were recovered from the jewellery shop owned by the father of PW22. Key to the lock of the southern gate of the building was also recovered.

9. Charge was framed under sections 394/302 IPC. Appellant pleaded not guilty and claimed to be tried.

10. In the course of trial, prosecution examined 27 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial the learned Judge by the judgment and order convicted and sentenced the appellant, as aforesaid.

Arguments at the Bar:-

11. Mr. Ahmed with Mr. Ganguly for the appellant submits there is no direct evidence implicating the appellant in the murder. Circumstances sought to be probalised by the prosecution does not unerringly point to his guilt. Presence of the appellant at PW 3's residence is improbable. It was a rainy day and it is unlikely masonry work could have been undertaken. No sand/cement was recovered from the place of occurrence. Finger print or foot print of the appellant could not be detected. Earlier appellant had been suspected of committing theft in the house of PW 3. It is unlikely PW3 would have relied upon him and summoned him to do masonry work after the incident. They strenuously argued PW 10 who claims to have seen the appellant coming out of the house is an unreliable witness. Recovery of the key on the showing of the appellant from a drain four years after the incident is most improbable. Identification of the appellant by PW 22 (son of the jeweller) is also not convincing. Origin and group of blood on the

wearing apparels of the deceased could not be ascertained. Hence, the appellant is entitled to an order of acquittal.

12. In response Mr. Banerjee, Senior Government Advocate with Mr. De submits appellant's presence at the place of occurrence has been proved. PW 3 husband of the deceased stated appellant was present in the house from 9 am. When he returned home around 2.45 p.m. he found the appellant in the house. Appellant told him to purchase a hacksaw. He went out to purchase the hacksaw. At 3.30 pm when he returned, the house was under lock and key. Appellant was missing. Around the same time PW10 saw the appellant leaving the house after locking the southern door from outside. Soon thereafter body of the deceased was recovered. PW 18 Dr. P. B. Das conducted post mortem and opined death was homicidal. Appellant absconded and was arrested after four years. On his showing stolen ornaments were recovered. Key of the lock to the southern door was also recovered. Hence, the prosecution case is proved beyond doubt.

13. Let me examine the prosecute case in the light of the evidence on record.

Presence of the appellant at the place of occurrence:-

14. PW 3 Banabehari Kundu is the husband of the deceased. He deposed appellant used to do masonry work in the locality. On the fateful day he had requested the appellant to come to his house to do masonry work. Appellant came to his house around 9 am. He asked

him to bring iron rod, wire etc. He went to a shop in Behala and brought the item. He returned home at 2.30 pm. Then the appellant asked him to bring a hacksaw. He was irritated but proceeded to Tollygunge to purchase the items. When he returned home he found his residence under lock and key. Appellant was missing. He called for his wife but there was no response. He searched for her in the neighbouring house but in vain. At that time his nephew Ajoy Kundu @ Bochon (PW7) came to the spot. Bochon entered the house through the roof from an adjoining premises, namely, Laxmi Narayan Bhandar. Soon thereafter, he came out from the house in the same manner. Upon query Ajoy remained silent. PW 3 and others broke the lock on the southern gate. They entered the house and found Monorama lying motionless in the toilet. A '*gamcha*' was tied round her neck. There were blood stains in her mouth and nostrils. Her personal ornaments, namely, gold bangles, gold chain, gold ear-top and gold finger ring with mark "MK" were missing. PW 1 informed her daughters. Police was informed. Police came to the spot. He lodged FIR. Police held inquest over the dead body. He signed on the inquest. They seized wearing apparels, '*gamcha*', broken padlock coranic, iron cheni, hacksaw etc. from the place of occurrence. He signed on the seizure list. PW 3 further stated during the month of Chaitra (i.e., March-April) appellant had come to their house to do cleaning work. He had taken a jewellery box of his wife.

Some cash was found missing. Though his daughters asked him to lodge complaint he did not do so.

15. PW 3 is corroborated by his nephew PW7. P.W. 7 deposed his uncle Banabehari came to their house searching for his wife, Monoroma. He informed his house was under lock and key. P.W. 7 accompanied his uncle to his house. He found both the gates of the house under lock and key. He entered the building from the adjoining premises of Lakshmi Narayan Bhandar through a door on the roof. He found his aunt lying senseless inside the toilet. He came out. Lock on the southern gate was broken. All of them including his uncle entered the house. Another nephew, i.e., PW 19 had also come at the spot when the lock was broken and had entered the house with PW 3. He is a signatory to the inquest report.

16. PWs 4 and 6 are the daughters of the deceased. PW 5 is the husband of PW6. They also corroborated PW 3.

17. PW 10 Paritosh Biswas, a neighbour deposed he was proceeding to the house of PW 3 for some discussion. He found the appellant coming out of the house from the southern gate. Appellant locked the southern gate from outside and informed PW 10 that PW 3 and his wife had gone to their daughter's residence. In the evening he heard about the murder. He informed this fact to PW 19 nephew of PW 3. PW 19 has corroborated PW 10 on this aspect.

18. Mr. Ahmed has assailed the deposition of PW3 as improbable. He contends no masonry work was possible due to rain. Sand and other articles were also not found which would support the prosecution case. It is improbable that the appellant would have been summoned for masonry work after he was suspected to have committed theft. No finger print or foot print of the appellant was found at the place of occurrence.

19. I am unable to accept such submission. PW3 candidly stated in spite of suspecting the appellant for committing theft on an earlier occasion, he ignored the suggestion of his daughter and had chosen not to initiate action. He and his wife continued to rely on him. Under such circumstances, it is not improbable that PW3 would request the appellant to come to his house to do masonry work. It is unclear whether the masonry work was proposed to be done on the outside or inside the premises. Hence, summoning the appellant for such work in the rainy season cannot be wholly ruled out.

20. Prior to the investigating agency being summoned, PW7 and others had entered the house. As the place of crime was tampered, no finger print or foot print could be detected.

21. It is relevant to note hammer, cheni and other items for masonry work were recovered from the place of occurrence. This probabalises the prosecution case.

22. PW3 is the husband of the deceased. His presence in the residence is most natural. His deposition regarding the presence of the

appellant in the house till 2.30-2.45 PM when he returned after purchasing iron wire, rod is convincing. Thereafter, he again went out to purchase a hacksaw. When he returned, the house was under lock and key and the appellant was missing. Upon breaking the lock he found his wife lying dead in the toilet.

23. Presence of the appellant at the place of occurrence is further reinforced by PW10. He is a local neighbour. Around 3.30 PM he was proceeding towards the house of PW3 for some discussion. At that juncture he saw the appellant coming out from the house of PW3 from the southern gate. Appellant was seen locking the southern gate. Appellant informed PW10 that PW3 and his wife had gone to the residence of their daughter. After coming to know of the incident PW10 immediately informed all the aforesaid fact to PW19, nephew of PW3. PW10 is an uninterested witness. His deposition leaves no doubt in one's mind with regard to the presence of the appellant at the residence of PW 3 till 3.30 PM on the fateful day. Faint plea that PW3 owing to his previous suspicion may have falsely implicated the appellant falls to the ground in the light of the unequivocal evidence of the uninterested witness (PW10) with regard to the presence of the appellant at the place of occurrence.

24. In the light of the aforesaid evidence, presence of the appellant in the house when Manorama was murdered is clearly established. Nothing is placed on record by the defence to show any other person

was present in the house. It would be argued that PW7 entered the house through the roof where the door was open. This leaves open a possibility that someone may have sneaked into the house through the said door. This hypothesis is wholly fanciful and not supported by materials on record.

25. PW7 had entered the house climbing the roof from an adjacent premises where the grocery shop of Bimal Dutta was situated. PW23 was working in the shop. If anyone had entered the house through the roof, it could not have gone unnoticed by PW23. No suggestion that an intruder had entered the house by jumping onto the roof of the house through the adjacent grocery shop was not even suggested by the appellant.

26. A prosecution case is to be proved beyond reasonable doubt. Every fanciful hypothesis would not derail a prosecution case which is firmly founded on clinching circumstances proved beyond doubt. Proof to the extent of absolute certainty is a myth. In order to prove the case beyond reasonable doubt, the prosecution is required to dispel all reasonable and probable hypothesis of innocence and not be jettisoned by vague and unrealistic suppositions¹.

Cause of death:-

27. Post mortem doctor (PW18) opined that death was due to strangulation by ligature ante mortem and homicidal in nature. He

¹ State of Andhra Pradesh vs. IBS Prasada Rao And Others, (1969) 3 SCC 896 (para 7)
State of U.P. vs. Ashok Kumar Srivastava, (1992) 2 SCC 86 (para 9)

deposed the '*gamcha*' could have been used as a ligature to cause injury around the neck which was sufficient to cause death in ordinary course of nature.

28. PW15 (Susanta Mukherjee) was the Assistant Director of Physics Division, Forensic Laboratory, Government of West Bengal, Belgachia. He examined the napkin/'*gamcha*' and opined the article bore strains and had been subjected to force.

29. PW16 (Subrata Narayan Chowdhury) is the Senior Scientific Officer. He detected blood on the items which were seized at the place of occurrence. These circumstances establish beyond doubt the victim had been murdered.

Recovery of stolen articles:-

30. Recovery of stolen articles on the showing of the appellant have also been proved. PW27, second Investigating Officer deposed on interrogation the appellant made a disclosure statement to the effect that he would be able to take the officer to the jewellery shop where he had sold the gold ornaments. The disclosure statement was exhibited as Ext.21. Pursuant to the disclosure statement appellant took PW27 to a jewellery shop viz., Sarojini Jewellers.

31. PW22 is the son of the jeweller. He identified the appellant and stated the appellant had come to the shop and sold one gold chain, one pair of gold bangles, one pair of ear ring with leaf design and one ladies finger ring engraved with red stone to his father. He brought out

the gold finger ring and one pair of ear tops which had remained unsold. The finger ring and the ear tops were produced in court and identified by the relations of the deceased viz., PWs 3 to 6.

32. Mr. Ahmed contends it is improbable PW22 could have identified the appellant after a lapse of four years. He also contends description of all the stolen articles had not been given in the first information report. PW22 was present in the shop when the appellant had come to sell the jewellery. He explained his father was initially unwilling to buy the jewellery but the appellant started crying and stated his mother was unwell. He required money for her treatment. These circumstances may have created an indelible mark on the mind of the witness which enabled him to identify the appellant notwithstanding lapse of a couple of years. The recovered ornaments had been identified by the husband of the deceased (PW3), her daughters (PWs4 and 6) and son-in-law (PW5). The finger ring bears her initial "MK".

33. Statement of PW 3 was taken by the police officer immediately after the incident. He was in a state of shock. Due to his agitated state of mind, it is possible he failed to mention the finger ring had also been stolen. This is a minor omission and does not affect the credibility of the prosecution case. Accordingly, I am of the view evidence on record clearly establishes the prosecution case that the appellant had stolen the gold ornaments including gold finger ring and ear tops of the victim

which were subsequently recovered on the basis of his leading statement.

Abscondence:-

34. Soon after the incident, the appellant absconded. PW27 (Inspector, Susanta Dhar) deposed he took out look out notices to arrest him. His picture was published in the Calcutta Police Gazette. After four years on 18.6.2006 appellant was arrested by PW26 from Belghoria Railway Station. His abscondence is an additional circumstance which reinforces the prosecution case and points to his guilt.

Chain of circumstances proved by prosecution:-

35. In the light of the aforesaid discussion, I hold the prosecution has been able to prove the following circumstances beyond doubt:-

- i) Appellant was present at the residence of PW3 on 25.6.2002 from 9.00 AM onwards;
- ii) He was seen by PW 10 leaving the premises at 3.30 PM after putting a lock on the southern door of the premises;
- iii) Soon thereafter PW3, husband of the deceased came and found the house under lock and key. Upon breaking the lock he found his wife i.e. the deceased lying dead with a '*gamcha*' tied around her neck;
- iv) Post mortem doctor (PW18) opined that the victim had died due to strangulation by ligature which is

ante mortem and homicidal in nature. He opined 'gamcha' around her neck could be used as a ligature to cause such injury. Scientific officers found marks of violence on the 'gamcha' and blood on the wearing apparels and other seized articles at the place of occurrence;

- v) PW3 noticed ornaments of his wife including gold ring bearing mark "MK" and gold ear tops with leaf mark were missing. "MK" is the initial of the deceased;
- vi) After the incident, appellant absconded and could be arrested after four years;
- vii) On the leading statement of the appellant, the stolen gold ornaments, namely, gold eartops and ring were recovered from a jewellery shop owned by the father of PW22. Relations of the deceased identified the stolen articles.

36. These circumstances have been proved beyond doubt and establish a complete chain unerringly pointing to the guilt of the accused. Any reasonable or probable hypothesis of his innocence is wholly ruled out.

Conclusion:-

37. Accordingly, I uphold the conviction and sentence of the appellant.

38. The appeal is dismissed.

39. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

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

41. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)