

CRA 669 of 2010

20.03.2023
S/L. 12
Court No.12

In the matter of: **Sk. Mosaraf**

....Appellant.

Sourav/cm

Mr. Pratick Kumar Bhattacharyya, *Amicus Curiae*
Mr. Avishek Sinha

...for the Appellant.

Mr. Swapan Banerjee
Ms. Purnima Ghosh

... for the State.

1. Heard Mr. Pratick Kumar Bhattacharyya, learned *amicus curiae* and Mr. Avishek Sinha, learned Counsel appearing for the appellant and Mr. Swapan Banerjee, learned Counsel being assisted by Ms. Purnima Ghosh, learned Counsel appearing for the State.
2. The appeal was heard at length on 18.01.2023. Finding *prima facie* that the appellant may be acquitted, we adjourned the hearing of the case awaiting the report as to where the appellant is lodged now to suffer his sentence. While the matter was pending for receipt of report from the competent authority of the police. Mr. Avishek Sinha, appeared for the appellant. Today, in the course of hearing, he raised the same points and made the same submissions as had been raised and made by Mr. Bhattacharyya, learned *amicus curiae* in course of detailed hearing on 18.01.2023.
3. The present appeal arises out of judgment of conviction and order of sentence dated 30th September, 2010 passed by learned Additional Sessions Judge, Fast Track, 1st Court at Arambagh, Hooghly in Sessions Trial No. 32(8) of

2008 arising out of Sessions Case No. 57 of 2008 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 simple imprisonment for five months more with benefit of set off admissible under Section 428 Cr.P.C.

4. The occurrence happened in the intervening night of 3/4.8.2006 in an open Varandah of the dwelling house of the deceased Matiar Rahaman Mallick @ Mati. Sofia Begum, P.W.1 is the second daughter of the deceased and she was married to the present appellant. Aforesaid P.W. 1 is the informant in the present case. On the next day morning, i.e., 4.08.2006, oral information was given by P.W. 1 before Sub-Inspector Rabisankar Roy of Arambagh police station who reduced the said information into writing and sent the report to the Arambagh police station through A.S.I. Debdas Chakraborty P.W.11. On the basis of said information, formal FIR was registered by P.W.13 and Arambagh P.S. Case No. 135 dated 04.08.2006 under Section 302 IPC was registered. The report was lodged by P.W.1 at 10.35 A.M. and it was alleged in the report that the present appellant (husband of P.W.1) has committed the murder of the deceased by stabbing him with a knife on his chest.
5. The inquest was, however, held at 9.40 A.M. by the I.O. (P.W. 19). P.W. 19 who had already initiated the investigation prior to lodging of the report, held inquest

over the dead body which according to P.W. 19 started at 8.40 A.M. and completed at 9.40 A.M. During investigation, the I.O. (P.W.19) received the information from P.W. 1 at the spot and dispatched the report to the police station for registration of formal FIR and formal FIR was registered by P.W. 13 (as described supra).

6. In the course of investigation, I.O. (P.W.19) visited the spot, prepared the spot map, examined the witnesses, challaned the dead body for post mortem, obtained the post mortem report, recorded the statement of the appellant under Section 27 of the Evidence Act, made recovery of the knife i.e. the weapon of offence at the instance of the appellant and seized the same in presence of the witnesses; seized the wearing apparels of the deceased on production by the accompanying constable, seized blood sample and wearing apparels of the accused and on completion of the investigation filed charge-sheet against the appellant under Section 302 I.P.C.
7. Prosecution has examined 19 witnesses to prove the charge against the appellant out of whom P.W.1 as introduced (supra) is the wife of the appellant and daughter of the deceased and she is also the informant in this case but she has turned hostile beyond repair. P.W. 3 is another daughter of deceased and sister of P.W.1. Her matrimonial house is situated by the side of the house of the deceased. P.W. 15 is the widow of the deceased. P.W.16 is the son-in-law of the deceased being the husband of

Kaisara Begum another daughter of deceased. P.W. 17 is the son of the deceased who resides in Park Street, Calcutta. P.W.18 is the another daughter of the deceased who resides in village Muzaffarpur. P.W. 19 is the I.O. Besides the aforesaid witnesses P.W.4 is the social worker of the village who is testified to have tried to settle the dispute of Sofia and her husband (present appellant) several times. P.W. 2 is a neighbour of the deceased. P.W.6 and P.W.7 are the medical officers who jointly conducted the post mortem over the dead body of the deceased. Others are officials and independent witnesses to the seizures etc., and one of them is a photographer who took the photographs of the spot and the deceased.

The defence plea is one of complete denial and false implication.

8. Learned trial court relied on the following circumstances to find the appellant guilty of offence under Section 302 IPC. The circumstances are:

- i) The daughter of deceased Sofia Begum is the wife of accused Mosaraf.***
- ii) There was long pending matrimonial dispute in between them and a criminal case was also filed by the wife of accused.***
- iii) All the P.Ws. including the mother, sisters and brother corroborated the fact of matrimonial dispute in between accused and his wife.***
- iv) On the previous day of the incident accused Mosaraf came to the house of deceased and asked him to***

send back his wife Sofia to his house otherwise he would finish them all.

v) That on the previous date of incident wife of accused was in the house of her father i.e. in the house of deceased.

vi) It is also proved that due to threatening of accused Sofia was sent to the house of her brother Siraj in the night for staying there.

vii) It has also been proved that wife of deceased saw the accused at the dawn fleeing from her house while she discovered that her husband was murdered with stab injury lying on the cot of her varanda.

viii) It has also been proved that hearing the shouting of wife of deceased para-men and other daughter came to the spot whom P.W.15 told that she saw Mosaraf fleeing from her house at the relevant time.

ix) I.O. arrested the accused Mosaraf on 07.08.2006 at 9.10 hours and recorded disclosure statement of accused (Ext. 12) that he may show the weapon if he be taken to the place.

x) It has also been proved that in presence of P.W.3 and other witness and pursuant to the disclosure statement of accused one knife was discovered from the bush of bank of river Temni Ghat and he (accd) handed over it to police which was seized by the seizure list.

xi) The seizure witness proved the seizure of crime weapon at the instance

of accused.

xii) It has been proved by the doctor who held P.M. that death of Motiar Rahaman was caused due to stabbing on his chest by sharp weapon i.e. alleged knife, ante-mortem homicidal in nature and due to direct injury to heart.

9. Mr. Bhattacharyya, and Mr. Sinha, learned Counsel submit that though many circumstances have been enumerated by learned trial court on his understanding that the case is based entirely on circumstantial evidence all those circumstances are not real in the factual matrix of this case but the case is based on the direct testimony of P.W.15 i.e. widow of the deceased to the effect that immediately after the occurrence she saw the appellant fleeing from the spot with a knife in his hand. Another corroborative circumstance may be to the effect that there was some matrimonial dispute between P.W.1 and her husband (appellant) but there is discrepant evidence to that effect. The circumstance relied on very much by the prosecution is to the effect that a knife, alleged weapon of offence had been seized at the instance of the appellant but no connection having been proved by the prosecution between the said knife and the commission of offence, said circumstance is of no avail to the prosecution inasmuch as the independent witness has specifically testified that he signed on a blank paper which has been proved to be the seizure list in respect of the alleged knife. It is submitted

by Mr. Bhattacharyya and Mr. Sinha learned Counsels that it is a fit case where the appellant should be set at liberty and the learned trial court's judgment of conviction and order of sentence be set aside.

Mr. Swapan Banerjee, being assisted by Ms. Purnima Ghosh, learned Counsel for the State, on the other hand submits that there is cogent evidence to make the appellant culpable so far as the offence is concerned and the impugned judgment be affirmed.

10. Coming to the circumstances enumerated by the learned trial court, we find that many circumstances have been enumerated which has not at all been proved by any evidence. The case is based on direct evidence of P.W. 15, widow of the deceased to the effect that

- (i) immediately after the occurrence she saw the appellant fleeing from the spot with a knife in his hand.
- (ii) On raising of shout by her (P.W.15) her other daughters came over the spot and she (P.W.15) told them that appellant fled from the spot at the relevant time.

Other circumstances are corroboration to the aforesaid evidence of P.W.15, widow of the deceased.

11. Having perused the evidence on record, we feel it proper to recast the circumstances as follows:

- 1. There was matrimonial dispute between P.W.1 and her husband (appellant).

2. On account of such dispute Sofia (P.W.1) was residing in her parents house.

3. On the previous day, the appellant had come to the house of deceased, asked him to send back his wife Sofia to his house otherwise the family members shall suffer dire consequences.

4. Recovery of the knife at the instance of the appellant on the basis of statement given by him (appellant) which assumes relevance under Section 27 of the Evidence Act.

12. It is admitted at the Bar that the death of the deceased is a homicidal death but the question is who caused such homicidal death of the deceased.

12.1. On the question of complicity, We propose to deal with each primary evidence regarding circumstances individually on the basis of evidence obtained on record. It is pressed vehemently by learned Counsel for the State that there was long-standing dispute between P.W.1 and her husband (appellant). On this aspect, P.W.1 has turned hostile but in her examination-in-chief she has testified that she had filed criminal case against her husband (appellant) but that case was filed out of misunderstanding. She has further testified that when she had filed criminal case against her husband at that time she left her matrimonial home and came to reside in her father's (deceased's) house. She has further testified that

her husband came to their house and asked her to go to his house and her father sent her to the house of her husband.

12.2. P.W.3, is the sister of P.W.1 and another daughter of the deceased. In her evidence-in-chief she has testified that Sofia (P.W.1) had filed another case against the appellant under Section 498A of the IPC and after filing of that case Sofia was compelled to reside in her father's house. P.W.3 has further testified that the appellant had come to their house (did not specify when) and asked his father to send Sofia back to his house but her father did not pay heed to his request. In cross-examination she has specifically testified that she is not able to say when the appellant had come to her father's house and requested her father to send back Sofia (P.W.1) to his house.

12.3. P.W.4 who is testified to be a social worker and CPIM supporter has testified that Sofia had filed a case against the appellant with reference to the matrimonial dispute and he had tried to settle the dispute of P.W.1 and her husband on several times.

12.4. P.W.15, the mother of P.W.1 and widow of the deceased has testified that her daughter Sofia was staying in their house because of dispute with her husband. She has further testified that at the time of incident, the appellant had come to their house and requested them to send his wife to his house, but, they refused to his

proposal. Appellant being infuriated owing to rejection of his proposal threatened them and stated to her that if she did not send his wife to his house within 4.00 O'clock evening then he will kill them. She has further testified that on apprehension of happening of any untoward incident, they sent their daughter Sofia (P.W.1) to the house of Siraj (brother of P.W.1) in that night. In her cross-examination, she has testified that the appellant had come to their house prior to the date of incident at about 10 A.M.

12.5. P.W.16 is another son-in-law of the deceased. His house is situated at a distance of about 100 cubits away from the house of the deceased. He has testified that his father-in-law (deceased) one day before the incident told him that the appellant met with him (deceased) by the side of river and asked him to send his wife and if he does not send his wife then he shall finish them. He further testified that relationship between P.W.1 and her husband was strained.

12.6. P.W.17 is the son of the deceased. He has testified that after marriage of his sister (P.W.1) she used to reside in her matrimonial home with the appellant and the appellant was behaving well with his sister. He has further testified that his mother (P.W.15) did not tell him how the incident happened.

12.7. P.W.18 is the another daughter of the deceased. She has testified that she does not know how the

appellant was behaving with her sister.

12.8. From the aforesaid evidence of the witnesses, it is clear that there was some strained relationship between P.W.1 and her husband (appellant) but P.W.1 being the wife of the appellant has *ipse dixit* testified that such strained relationship was because of miss-understanding. In course of the strained relationship, the P.W.1 had come to live in the house of her father.

12.9. So far as the evidence to the effect that prior to the occurrence the appellant had come to the house of the deceased and had threatened P.W.15 and the deceased to finish them if they do not send his wife back cannot be believed in view of the discrepancy in the evidence of P.W.15 and P.W.16. P.W.15 has testified that the appellant had come to their house. P.W.16 has testified that her father-in-law had told him that appellant had met him (deceased) on the bank of river and threatened him to finish them if they do not send his wife back. Other family members like P.W.3, P.W.17 and P.W.18 do not support the prosecution case as to when the appellant had come to the house and threatened the deceased to finish them.

In view of the nature of evidence as discussed (Supra), we are constrained to hold that this circumstance Nos. 1, 2 and 3 (Supra) is proved to the extent that there was matrimonial dispute between P.W.1 and her husband (appellant) and P.W.1 was staying in the house of her father (deceased).

13. Next evidence which is direct in nature is to the effect that P.W.15 saw the appellant fleeing from the spot with a knife in his hand. So far as this evidence is concerned, we must find out what was the relevant time when P.W.15 saw the appellant. Admittedly as found from the evidence of P.W.15 herself it was the time of First Azan before the dawn in between 3.30 A.M. to 4.00 A.M. Admittedly, the spot or the surrounding of the spot was not an illuminated area. The deceased was sleeping on the varandah of the house which is an open place as admitted by the prosecution in the mouth of P.W.15. P.W.15 has testified that at the time of the incident she was sleeping inside the room and her husband was sleeping outside the room on the varandah. Hearing the Azan she woke up and came outside near the bed of her husband. At first, she noticed backside of the appellant. Thereafter, she went inside the room and after fetching lantern, she came to see with the light of the lantern that bloodstain is there on the dead body of her husband. She has specifically testified that she has not seen the incident but noticed that the appellant was fleeing away from the house.

14. As we have discussed (Supra) prior to the registration of FIR, the investigation had already been initiated by the I.O. (P.W.19) and the inquest was done in between 8.40 A.M. and 9.40 A.M. P.Ws.15 and 16 are the witnesses to the inquest. In the inquest report there is a column (opinion of the witness as to the cause of death),

where a witness is required to say about the cause of death and who is the assailant if the assailant is known. If P.W.15 would have seen the appellant fleeing from this spot, she would have told such fact to persons who immediately gathered at the spot when she raised hue and cry. She has stated such fact to none and she has not given any opinion uttering the name of the appellant regarding the cause of death in course of preparation of inquest report.

14.1. The opinion or statement of a witness in the inquest report being the first available statement of the witness, if a witness is silent about the assailant in course of preparation of the inquest report, evidence of such witness implicating the assailant during her examination in court or even by the I.O. under Section 161 Cr. P.C. becomes doubtful inasmuch as a witness who has had knowledge about the assailant shall be prompted to implicate him at the very first instance.

14.2. In the present case, P.W.15 being silent about the assailant in the inquest report though a witness to the inquest, we are compelled to hold that she might have been prompted to take the name of the appellant subsequently as according to P.W.3, another daughter of the deceased, she heard from the persons present at the spot that the appellant might have killed the deceased and they were suspecting that the appellant might be the murderer. She has further testified that she heard such

conversation and her mother P.W.15 also heard such conversation from them.

14.3. P.W.3 has further testified that when she came to the spot hearing hue and cry her mother told her that the appellant stabbed her father and she saw it, but such evidence is of no credence as a corroborative evidence in view of the specific evidence of P.W.15 to the effect that she has not seen the incident and also for the reason that she has not stated about the assailant in her statement under the relevant column of the inquest report. There is also no evidence about the source of light at the spot which facilitated identification by an old lady like P.W.15. Rather it is admitted that there was no source of illumination at the spot. The evidence of P.W.15 is further put to doubt in view of her specific deposition that she saw the appellant from the backside and it is not possible to identify a person from the backside in darkness in absence of any cogent evidence peculiar to special characteristics of the identified person.

14.4. In view of our discussion (Supra) we are constrained to hold that it is not safe to accept the evidence of P.W.15 to be believable so far as identification of the appellant as testified by P.W. 15 is concerned.

15. The next circumstance is the recovery of the knife, the alleged weapon of offence at the instance of the appellant. P.W. 3 is the independent witness so far as the recovery is concerned. P.W. 3 has testified that at the instance of

police appellant took out the knife from the bush and handed over the same to the police. He has further testified that at the time of putting his signature on the seizure list it was completely blank. The evidence of P.W.3 therefore makes the entire process of seizure doubtful inasmuch as P.W. 3 is none other than the neighbour of the deceased and has testified the truth that transpired at the time of seizure.

In view of such fact and discussion (Supra), we are constrained to hold that this circumstance has also not been proved.

16. From the proved circumstances viz. (i) there was strained relationship between P.W. 1 and her husband (appellant) and (ii) for that P.W. 1 had come to live in her father's house leaving her matrimonial home, it cannot be held that it was the appellant who must have committed the murder of his father-in-law (deceased).

17. In fine, therefore, we are constrained to hold that the prosecution has failed to prove the charge against the appellant.

18. Accordingly, the appellant is acquitted of the charge under Section 302 IPC in connection with Sessions Trial No. 32(8) of 2008 arising out of Sessions Case No. 57 of 2008 passed by the learned Additional Sessions Judge, Fast Track Court, 1st Court, Arambagh, Hooghly, and the impugned judgment and order of sentence dated 30.09.2010 are hereby set aside.

19. Accordingly, the appeal being **CRA 669 of 2010** is allowed.
20. The appellant, **Sk. Mosaraf** be set at liberty forthwith if his detention is not required in any other case.
21. A copy of the order be sent to the Superintendent of Hooghly District Correctional Home forthwith for immediate release of the appellant, if his detention is not required in another case.
22. The trial court record be sent down to the concerned court along with a copy of this order.
23. Department is directed to send a copy of this judgment to Secretary, Calcutta High Court Legal Services Committee for needful action at his end.
24. Judgment dictated in open Court.
25. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

