

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Apurba Sinha Ray

C.R.A. 11 of 2019

Alia Bibi @ Alea Bibi @ Aleya Bibi

-Vs-

The State of West Bengal & Anr.

For the Appellant : Mr. Hillol Saha Podder, Adv.

For the State : Mr. Aditi Shankar Chakraborty, Id. A.P.P.
Mr. Nilay Chakraborty, Adv.

Heard on : 11.12.2023 & 12.12.2023

Judgment on : 12.12.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 30.05.2015 and 31.05.2015 passed by the learned Additional Sessions Judge, 3rd Court, Cooch Behar in Sessions Trial No. 02(10) of 2013 arising out of Sessions Case No. 388 of 2013 convicting the appellant for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentencing her to suffer imprisonment for life and to pay fine of

Rs.10,000/-, in default, to suffer simple imprisonment for six months more.

Genesis of the case :-

2. Prosecution case as alleged against the appellant is as follows :-

Jakir Hossain (the deceased) is the husband of the appellant. In the night of 07.01.2013 the couple were in the house. Around 11.00-11.30 P.M. unknown persons came to the house and called for Jakir. Hearing the cries Jakir opened the iron gate. Thereafter the miscreants entered the house. They tied the appellant and took Jakir to another room. There Jakir was strangled to death. After they left appellant untied herself and informed the incident to Gobinda Paul (PW 2), a neighbour. Jahangir Hossain (PW 1), brother of the deceased and others came to the spot. Jahangir lodged written complaint resulting in registration of Tufanganj Police Station Case No. 5 of 2013 dated 08.01.2013 under Section 302 of the Indian Penal Code against unknown persons. In course of investigation, it was found appellant used a mobile phone with a SIM card bearing No. 7602177797 standing in the name of her daughter viz. Jasmin Parveen. Call Detail Records (CDRs.) collected from the service provider showed on the fateful day she had made calls to another mobile phone with SIM card bearing No.9954859605 standing in the name of her son Hamidur Rahaman. During investigation, co-accused viz. Saiful was arrested and he made a confessional statement implicating other accused including the appellant and her son viz. Hamidur in the murder. Appellant was

arrested and her statement was recorded under Section 164 of the Code of Criminal Procedure before Magistrate. Charge sheet was filed against the appellant and others viz. Anowar Hossain, Ainul Hoque @ Driver, Ajijul Hoque @ Dorjee, Saiful Hoque and Hamidur Rahaman under Sections 302/34 IPC. As Hamidur was absconding, charges were framed against the appellant and others (apart from Hamidur) under Sections 302/34 IPC. Appellant and others pleaded not guilty and claimed to be tried.

3. In course of trial, prosecution examined 15 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication.

4. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 30.05.2015 & 31.05.2015 convicted and sentenced the appellant, as aforesaid. By the selfsame judgment and order other accused including Saiful Hoque were acquitted of the charges levelled against him.

Arguments at the Bar :-

5. Mr. Hillol Saha Podder for the appellant submits there is no direct evidence that the appellant had committed the murder. Motive to commit the crime is vague and non-specific. In course of trial, the appellant gave out the circumstances in which her husband was murdered by persons who had their faces covered. Her version cannot be said to be improbable. Prosecution relied on inadmissible evidence

i.e. confession of co-accused Saiful before police officer to establish the guilt. Accordingly, appellant is liable to be acquitted.

6. On the other hand, Mr. Chakraborty for the State submits appellant was present in the house when the incident occurred. She belonged to the same village wherefrom co-accused Saiful hailed. Her conduct during and after the incident is strange. It is unlikely that she remained senseless for three hours and how she untied herself is a mystery. CDRs show she had telephonic conversation with the absconding accused i.e. Hamidur Rahaman who is her son. Hence, the prosecution case is proved beyond doubt. The appeal is liable to be dismissed.

Evidence on record :-

7. PW 1 (Jahangir Hossain) is the younger brother of the deceased and the de-facto complainant. He stated on 07.01.2013 at 01.45 A.M. Gour Hari Paul and Gobinda Paul informed him that a dacoity had been committed in the house and his elder brother had been murdered. Going to the spot he found his elder brother lying dead with a rope tied around his neck. His wife i.e. the appellant told her that someone knocked at the door and her husband opened the door. Then four persons entered the room, tied her and took her husband to another room. He lodged FIR. He also signed on the inquest report. Police seized articles from the house. He signed on the seizure list.

8. PW 2 (Gobinda Paul) stated that in the night appellant came to his house and informed that dacoits had come to their house. He

informed Gour Hari Paul (PW 3) to the house of Jakir. They found the latter had died. Household articles had been ransacked. He informed Jahangir Hossain (PW 1), brother of Jakir about the incident.

9. PW 4 (Jahanara Sarkar) is the sister of the deceased. On the next day she heard about the incident. She went to the police station. Police had apprehended a person. The said accused viz. Saiful stated that he along with five others had gathered at Assam more. Therefrom they came to the house of the deceased. They pushed the back door which was opened from inside. Hamidur came out of the house and asked him to sit in the vehicle. Others came to the vehicle with Hamidur. Then they left the place. During cross-examination, she stated appellant and the deceased were husband and wife. There were allegations against the character of his elder brother. This resulted in quarrels between the couple. His elder brother had transferred major portion of the property in his wife's name. She has also inherited property after the death of her husband. She had issued '*no objection*' for transfer of ration dealership belonging to her deceased husband in the name of another person.

10. PW 5 (Mojammel Hossain) is the brother of the deceased. He stated he had gone to the police station. He found one person viz. Saiful had been arrested. Saiful confessed his guilt. He stated they pushed the door and the appellant had opened the door. During cross-examination, he stated that there was a dispute with his elder brother regarding a lady.

11. PW 7 (Ainul Mia) is a neighbour. He corroborated PWs 4 and 6 with regard to confessional statement made by Saiful in presence of police.

12. PW 13 (Noor Islam) is also a neighbour. He stated that Saiful had been apprehended at the police station. Saiful made a confessional statement at the police station. He stated that the door was opened from inside and they entered the house.

13. PW 8 (Dr. Pradip Kumar Sinha Sarkar) is the post-mortem doctor. He conducted post mortem on the body of the victim. He found the following injuries :-

“(1) On dissection, I found on transversely places continuous ligature mark around mid neck. The skin under the ligature mark in perchedmentised abraded and contused. On dissection, subcutaneous tissue under the ligature mark is contused and torn at places with extravasation of blood in and around; (2) Fracture of the body of thyroid cartilage with extravasation of blood, abrasion of right and middle ring and finger is seen. Abrasion is seen below right sub-mandibular region. Cause of death is asphyxia due to effect of strangulation by ligature as noted above and ante mortem and homicidal in nature.”

He opined cause of death was asphyxia due to effect of strangulation by ligature ante mortem and homicidal in nature.

14. PW 15 (SI Sanjoy Dutta) is the Investigating Officer. He stated he visited the spot, drew rough sketch map with index and recorded statements of witnesses. He held inquest over the body of Jakir. He prepared inquest report. He seized articles from the place of occurrence.

He recorded statements of witnesses. He collected CDRs from the service provider. He seized a NOKIA phone with two SIM cards bearing Nos. 9954859605 and 954641890. Aleya Bibi used the mobile phone standing in the name of Jasmin Parveen. He took the finger prints from the almirah but the finger prints did not tally with that of Saiful. He arrested the appellant and Saiful. He submitted charge sheet.

15. From the evidence on record and the submissions at the Bar it appears that the case is based on circumstantial evidence.

Principles regarding circumstantial evidence:-

16. In *Sharad Birdhichand Sarda vs. State of Maharashtra*¹, the Apex Court laid down five golden principles pertaining to circumstantial evidence :-

“153. ... (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

¹ (1984) 4 SCC 116

Circumstances relied upon by the prosecution:-

17. Analysis of the evidence on record shows that the prosecution has relied on the following circumstances against the appellant :-

- i) The appellant was in the house when the incident occurred;
- ii) She made false explanation before Magistrate under Section 164 of the Code of Criminal Procedure alleging masked dacoits entered the house, tied her and strangled her husband in the other room;
- iii) Co-accused viz. Saiful made confessional statement implicating the appellant in the crime;
- iv) CDRs collected in course of investigation (Ext.13) showed telephonic communications between the appellant and her son, Hamidur, an absconding accused;
- v) Deceased had illicit relationship which caused matrimonial trouble. Hence, appellant had motive to commit the crime.

Do these circumstances establish the guilt of the appellant?

18. The foundational plank on which the prosecution rests is the confessional statement of Saiful is inadmissible in law. PWs. 4, 5, 7 & 13 claimed on the next day they went to the police station. At the police station they found a person viz. Saiful had been arrested. In presence of police Saiful made a confessional statement. He claimed he along with others including Hamidur committed the murder. Appellant had opened the door.

19. The aforesaid piece of evidence suffers from twin legal embargo. Firstly it is a confessional statement of an accused before a police officer which is inadmissible in evidence under Section 25 of the Evidence Act. That apart, it is a confession by a co-accused which cannot be treated as substantive evidence against another.

20. Hence, I am of the opinion the trial Judge erred in law in relying on the aforesaid inadmissible piece of evidence as an incriminating circumstance to implicate the appellant in the murder.

21. Another piece of evidence which the learned Judge relied to bring home the guilt is the statement of the appellant under Section 164 of the Code of Criminal Procedure. Evidence on record shows that the appellant was arrested and produced before the Magistrate on 21.01.2013. Thereafter, on 31.01.2013 her statement was recorded under Section 164 of the Code of Criminal Procedure. Defence exhibited the statement as Ext.-A as the explanation offered by the appellant with regard to circumstances leading to the murder of her husband. Trial Judge considered the statement as a confession of the appellant. The statement by no stretch of imagination can be said to be a confession. It is an exculpatory statement made by the appellant before the Magistrate during investigation. Hence, by no stretch of imagination the said statement can be used against the appellant as her confession.

22. Learned Advocate for the State has sought to establish the prosecution case by exposing the hollowness of the explanation offered by the appellant in her statement (Ext. 'A'). He contends though the

appellant claimed her husband had opened the door, Saiful stated she had opened the door. No injuries were found on the appellant and it is absurd that she remained senseless for a couple of hours. Though it alleged that the miscreants had committed dacoity, no articles were stolen. This exposes the falsehood of her version and points to her guilt.

23. I have given anxious consideration to the aforesaid submissions. Statement of the appellant that she had opened the door finds resonance in the FIR lodged by PW 1. Without prejudice to the fact that the statement of Saiful, a co-accused before police is inadmissible, it may be relevant to note none of the witnesses (apart from PW 5) i.e. PWs 4, 7 and 13 who proved Saiful's statement deposed Saiful had stated appellant had opened the door.

24. Hence, there is no legally admissible evidence that the appellant had opened the door which would contradict her version that it was her husband who had opened the door on the fateful night. Conduct of the appellant during and after the incident also cannot be said to be improbable. She stated that the masked miscreants entered the house and tied her. Thereafter, they took her husband to another room. After sometime she heard the sound of a key. Then the miscreants assaulted her and she became senseless. After she regained senses she untied herself and went to the other room and found her husband strangled to death.

25. Post mortem doctor (PW 8) corroborates her version. He opined that death was due to strangulation. Fact that the miscreants had

attempted to commit dacoity is evident from the deposition of PW 2 who found that the articles in the house had been ransacked. These independent circumstances lend credence to the version of the appellant with regard to unknown miscreants entering the house, ransacking the household articles and murdering her husband. Her version cannot be said to be so patently absurd and inherently improbable that it may be considered as an incriminating circumstance against her.

26. The motive to commit the crime is also vague. It is contended that the deceased had illicit association which caused quarrel between the couple. If the relationship was so bitter it is inexplicable why the deceased during her lifetime would bequeath a large portion of his own property to the appellant herein.

27. CDRs show telephonic conversations between the appellant and his son viz. Hamidur Rahaman. Conversation between mother and son is most natural. By itself it cannot be treated as an incriminating circumstance. Moreover, involvement of Hamidur in the crime is founded on the confessional statement of Saiful who however, has been acquitted by the trial Judge.

28. In this backdrop, I am constrained to observe the circumstantial evidence on record against the appellant is too flimsy and by no stretch of imagination unequivocally points to her guilt.

Conclusion:-

29. Accordingly, I set aside the conviction and sentence imposed upon the appellant.

30. The appeal is accordingly, allowed.
31. Appellant shall be discharged from her bail bonds after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.
32. Lower court records along with copies of this judgment be sent down at once to the trial Court for necessary compliance.
33. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Apurba Sinha Ray, J.)

(Joymalya Bagchi, J.)

as/akd/PA