

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPIGURI
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Rajarshi Bharadwaj
And
The Hon'ble Justice Md. Shabbar Rashidi

C.R.A. (DB) 50 of 2023

Mimgur Sherpa @ Mimba Sherpa

-Vs-

The State of West Bengal

For the Appellant : Mr. Satarudriya Mukherjee
Ms. Oshmita Mukherjee
Ms. Anindita Chakraborty

For the State : Mr. Aditi Shankar Chakraborty, Ld. APP
Mr. Ujjwal Luksom
Mr. Subhasish Mishra

Reserved On : 09.07.2024.

Pronounced On : 16.08.2024

Rajarshi Bharadwaj, J.:

1. This appeal is preferred against the judgment and order dated 18.07.2023 and 20.07.2023 passed by the Learned Sessions Judge at Darjeeling, convicting one Mimgur Sherpa herein appellant/accused under Section 302 and 354 of the Indian Penal Code 1860 sentencing him to suffer

imprisonment for life and pay fine of Rs.10,000/- in default to suffer simple imprisonment for 5 months for the offence under Section 302 of the Indian Penal Code 1860 and is also sentenced to suffer rigorous imprisonment for 5 years and pay a fine of Rs.2000/- in default to suffer imprisonment for one (01) month for the offence under Section 354 of the Indian Penal Code 1860. The sentences of imprisonment were ordered to run concurrently.

2. The facts of the prosecution case relate to Pul Bazar Police Station Case No. 07 of 2022 dated 17.03.2022 under Sections 302/376 of the Indian Penal Code which was set into motion pursuant to an FIR and a written complaint lodged by one Kharka Dhoj Limbu herein the de-facto complainant.
3. Cheki Sherpa (deceased), a sixty-year-old woman, resided alone at her Upper Lamagaon, Mazua, Darjeeling residence following the passing of her husband and suffered from various age-related ailments. On 16.03.2022 the deceased was found lifeless on her bed. Subsequent to this discovery, during the process of preparing her body for funeral rites, visible injuries were observed on her neck and chest.
4. The de-facto complainant, therefore, taking necessary action in the situation lodged a written complaint. On the basis of the aforesaid complaint, investigation commenced. The Investigating officer on completing his investigation submitted the Charge Sheet against the accused person herein the appellant under sections 302/376 of the Indian Penal Code. Thereafter, the Learned Chief Judicial Magistrate took cognizance upon the same and on complying all legal formalities committed the case before the Learned Sessions Court, Darjeeling. On receiving the case records, the Learned Sessions Judge, Darjeeling was pleased to alter the charges from Section 302 and 376 of the Indian Penal Code 1860 to Section 302 and 354 of the Indian Penal Code against the appellant on 10.09.2022 in Sessions Case No. 24 of 2022. The appellant pleaded not guilty and claimed to be tried.

5. In the course of trial, prosecution examined twenty-two (22) witnesses and exhibited number of articles as Exhibits 1-15 respectively. The appellant led no evidence and was examined under Section 313 of Cr.P.C.
6. The learned Counsel appearing on behalf of the State submits that in order to prove the charges against the appellant under sections 302/354, the prosecution examined twenty-two (22) witnesses including the de-facto complainant, daughters of the appellant, the Investigating Officer, Autopsy doctor and Medical officer. Vital documents such as investigation report, inquest report and post-mortem report prove that death was homicidal and the deceased was subjected to sexual assault before her death. Moreover, the appellant had no plea of alibi as he was paying visit to the deceased with the other co-villagers. The evidence relied upon sings to the tune of the prosecution case, is cogent and consistent and the punishment of such brutal act sentenced by the Learned Sessions Judge, Darjeeling shall be upheld.
7. The learned Counsel appearing on behalf of the appellant has pleaded that that there is not only absence of direct evidence implicating the appellant of the alleged act but also, the prosecution has failed to bring the charges against the appellant under sections 302/354 of the Indian Penal Code 1860 beyond reasonable doubt by relying on unreliable and vague circumstances not forming a complete chain pointing to his guilt. In the instant case, there are many contradictions and discrepancies regarding the alleged incident between the written complaint lodged by the de-facto complainant and evidences presented by the prosecution witness. The ingredients of the offence charged have not been conclusively established; motive of the appellant is based on conjecture and surmises not warranted by the evidence on the record. No witness deposed details of the immovable property owned by the deceased and no deed or document relating to such agricultural land were retrieved by the investigating officer thereby making the allegation of demand of property by the appellant false and irrelevant. In cases of

conviction upon circumstantial evidence there ought to be usage of force leaving marks upon the body and subsequently marks of overpowering of resistance if the act is committed successfully, however there are variations in the medical examination and post mortem examination of the deceased, which is fatal for the prosecution case. The Learned Sessions Judge has erred in sentencing the appellant by placing reliance on highly unreliable evidence and thus the learned Counsel for the appellant prays that the appeal may be allowed by setting aside the impugned judgment of the Learned Sessions Judge, Darjeeling in Sessions Case No. 24 of 2022.

8. I have heard learned Advocates for the parties and have gone through the evidence of record meticulously which reveals as follows:

I. P.W.1 is a resident of Sikkim, brother of the deceased and the de-facto complainant. He testified that after the death of her second husband, he had called his sister to Sikkim for her medical treatment where she was treated in Gezying Hospital. The deceased had been living alone since 2021, when she returned home after receiving medical treatment. He was informed of her death on 16.03.2022 and observed strangulation marks and bite marks on her body. He lodged an FIR on 17.03.2022 and thereafter inquest over the dead body was conducted in his presence. He stated that he had no personal knowledge about Mingur Sherpa's daily life or the circumstances surrounding the murder.

II. P.W.2 , a co-villager at Lamagaon, Darjeeling and a neighbour of the deceased deposed that Cheki Sherpa was living alone immediately prior to her death but received occasional visits from people. He was informed about her death on 16.03.2022 at 6:30 am, with relatives reporting bruises on her body, but he claimed to have no personal knowledge or witness the incident

III. P.W.3 is a resident at Mazua, Upper Lamagaon, Darjeeling and a neighbour of the deceased. He deposed that on the basis of several injuries on the dead body, the de-facto complainant (P.W.1) suggested foul play regarding

the cause of death and lodged a written complaint on 16.03.2022. He did not have any insight about the incident.

IV. P.W.4 is the daughter of the appellant and niece of the deceased. She stated that on 16.03.2022 at 6:00am, the appellant told her that the deceased had died in her sleep, and she subsequently went to the house, denying any direct knowledge or involvement in the incident

V. P.W.5, a resident of Mazua Upper Lamagaon and a neighbour of the deceased testified that, due to the distance between their houses, he was unaware of anyone visiting the deceased and did not see the perpetrator of the alleged crime.

VI. P.W.6 is a resident of Lamagaon and a neighbour of the deceased She deposed that she received information about the death on 16.03.2022 at approximately 6:30 am, and upon entering the house, she found the deceased lying dead in the bedroom. She further stated that she had no personal knowledge about the incident of murder.

VII. P.W.7 daughter of the appellant stated that as she mostly stayed away from her house, she had no firsthand knowledge relating to the death of the deceased.

VIII. P.W.8 , the daughter of the deceased residing in Soreng, Sikkim testified that she received news of the passing of her mother on 16.03.2022 and while bathing and changing clothes of the dead body as part of last rituals, blood stains and several marks of injuries were found on the dead body namely bite marks on the left breast and deformed nipple of the right breast but no marks of injury were noticed on the private parts. The inquest was conducted in her presence and she affixed her signature to the inquest report prepared. She asserted that she did not witness the incident of murder but she was sure that the appellant had committed the murder because her mother would inform her on phone calls about the physical and mental torture inflicted by him.

However, such allegations of torture were never investigated or inquired by her.

IX. P.W.9 is the daughter of the deceased residing in Sikkim. She deposed that on 16.03.2022, she was informed by her sister that their mother had passed away. Suspecting it to be a case of murder, she thereafter informed the matter to the de-facto complainant (P.W.1). She stated that her mother owned huge agricultural property and would have altercations with the appellant because she did not agree to sell the landed properties. During her treatment in Sikkim, Cheki Sherpa was compelled to return to Lamagaon to safeguard her properties and started living alone at her residence. Though the on and off quarrels were conveyed by occasional phone calls, she could not recollect any particular instance of torture inflicted upon her mother. She reiterated that since she and her sister lived far from their mother, they never visited Lamagaon and did not witness Mimgur Sherpa torturing Cheki Sherpa.

X. P.W.10, a co-villager of Lamagaon deposed that a day prior to the deceased's death i.e. 15.03.2022, she requested him to cut grass for her paddy field. After cutting the grass, he returned home at about 4:30 pm. He was notified of her passing by his father and on reaching the home, found the dead body lying on the bed. He asserted that he had no personal knowledge regarding her demise.

XI. P.W.11 is a neighbour of the deceased. She would live alone and every now and then he would help her with work on because of her old age. On 15.03.2022, she handed over sickles to him and P.W.10 to cut the grasses of her paddy field. When he left the house at 7:30 pm, no-one else was around her house except Mimgur Sherpa. He reiterated that he had no special reason to remember the dress of Cheki Sherpa or the exact words uttered by Mimgur Sherpa.

XII. P.W.12 is the son of the de-facto complainant (P.W.1) and nephew of the deceased. He had notified the investigating officer about the torture inflicted

upon her by the appellant despite having no first-hand knowledge about the alleged torture.

XIII. P.W.13 residing at Bijanbari, Darjeeling deposed that a black coloured mobile handset marked as MAT Ext-I-PW13 was seized from the house of the appellant in his presence in the year 2022 and he put his signature in the seizure list dated 17.03.2022 marked as Ext 4/1- PW13 without reading the contents of the list at the place of seizure.

XIV. P.W.14, a taxi driver declared that a black coloured mobile handset marked as MAT Ext-I-PW13 was seized by the police from the house of the appellant in the year 2022. Thereafter, he put his signature in the seizure list dated 17.03.2022 marked as Ext 4/2-PW 14 which he could not read because he was illiterate.

XV. P.W.15 posted at Pul Bazar P.S, Darjeeling deposed that the inquest over the dead body was performed in his presence. After the articles namely wearing apparels and jewellery were seized on 14.04.2022, a seizure list was prepared wherein he put his signature marked as Ext-5/1/PW-15. Thereafter on 17.03.2022, the dead body was taken by him from Sardar Hospital to North Bengal Medical College and Hospital where he identified the body to the Autopsy Surgeon and proved his signature in the dead body challen marked as Ext-6/1/PW-15.

XVI. P.W.16 posted at Pul Bazar P.S, Darjeeling testified that on 14. 04.2022, certain wearing apparels along with one metallic bangle and two metallic rings of the deceased were seized in his presence and the seizure list was prepared which was signed by him marked as Ext-5/2/PW-16, without going through the contents of the same.

XVII. P.W.17, a medical officer/surgeon posted at Eden Sadar Hospital, Darjeeling submitted that on receiving a requisition marked as Exhibit-8 from Pul Bazar P.S for conducting potency test, he examined the appellant on 17.03.2022 and prepared a report signed by him marked as Exhibit-7. In

course of cross-examination, he reiterated that while clinically examining Mingur Sherpa, no marks of injury either on the private parts or on his whole body were discovered.

XVIII. P.W.18 is the Associate Professor and Head of the Department of Forensic Medicine at North Bengal Medical College and Hospital. On 17.03.2022, he was posted in the same hospital and had held the post mortem over the dead body on being brought and identified by constable (P.W.15). He thereafter prepared a postmortem report marked as Exhibit-9 wherein he categorically stated that deceased was sexually assaulted before her death, the death was homicidal by strangulation and the time of death was approximately 48-36 hours prior to the postmortem examination. The FSL report marked as Exhibit-15 showed no trace of poison in viscera, blood, cutting of hair and nail scrapping of the deceased.

XIX. P.W.19, ASI of Police posted at Pul Bazar PS Darjeeling on 14.04.2022 seized two wearing apparels, one metallic bangle and two metallic rings recovered from the dead body and affixed his signature in the seizure list marked as Ext-5/3/P-19.

XX. P.W.20, SI of police posted at OC Pul Bazar PS Darjeeling deposed that on the basis of written complaint received from de-facto complainant (P.W.1), a formal FIR relating to Pul Bazar P.S Case No.7 of 2022 dated 17.03.2022 was prepared and signed by him and thereafter the investigation of the case commenced.

XXI. P.W.21, SI of Police posted at Pul Bazar PS, Darjeeling stated that on 17.03.2022, the case was endorsed to him by SI of police (P.W.20) for carrying out investigation into the complaint lodged by de-facto complainant (P.W.1). During the course of investigation, he prepared a rough sketch map of the place of occurrence with index marked as Ext-12/2/P21, seized apparels of deceased and mobile hand set of the appellant and afterwards prepared seizure list in his own handwriting bearing his signature marked as

Ext-5/P-21, signed inquest report prepared and conducted by him marked as Ext-2/P-21. He further deposed that while the dead body along with dead body challen was sent for post-mortem examination, a prayer was made before the Superintendent District Sadar Hospital for potency test of the appellant. Completion of investigation and examination of witnesses under Section 161 of Cr.P.C resulted in Charge Sheet vide No.13/2022 dated 09.06.2022 under Sections 302/376 against the appellant.

XXII. P.W.22 is a pathologist posted at District Sadar Hospital, Darjeeling. He submitted that he had collected blood from the appellant on the request of the Investigating Officer (P.W.21) and thereafter handed it over to concerned authority for conducting DNA test.

9. Upon careful examination of the documents presented to the Court and in consideration of the arguments put forth by counsel for both parties, this Court determines that there is an absence of evidence sufficiently compelling to unequivocally establish the appellant's guilt. In cases relying on circumstantial evidence, law postulates the following requirements as held in **Shivaji Sahabrao Bobade v. State of Maharashtra** reported in **(1973) 2 SCC 793**:

“15.....

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

(2)The facts so established should be consistent with the guilt of the accused and 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.

(5)There must be a chain of evidence so complete as to not leave any reasonable ground for a 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.”

10. The present case, lacking any ocular witnesses, relies entirely on circumstantial evidence, which fails to establish the motive and intent of the appellants concerning the murder of the deceased. Motive is crucial in cases where the charge is solely based on circumstantial evidence. The prosecution has failed to establish a motive for the appellant's alleged actions, including specific instances of ill-treatment, torture, or harassment towards the deceased, or any disputes related to the sale of property, relying instead on presumptions by P.W.1, P.W.8, P.W.9, and the investigating authorities. The existence of a strained relationship between the appellant and the deceased does not, per se, establish the appellant's intent to commit murder. Suspicion, however strong, cannot replace proof. The Learned Sessions Judge overlooked significant gaps, such as the observations recorded in Exhibit-9 and Exhibit-15, which do not conclusively implicate the appellant. A notable contradiction exists between the facts alleged in the written complaint by P.W.1 and the testimony provided by prosecution witnesses during examination-in-chief. With no ocular witnesses to the alleged act, no evidence has been presented to establish the exact time of death or identify the individual who initially found the deceased's body.

11. It is a well-established principle that in cases relying solely on circumstantial evidence, the inference of guilt can only be justified when all incriminating facts and circumstances are incompatible with the innocence of the accused or the guilt of any other person. The circumstances from which an inference of guilt is drawn must be proven beyond reasonable doubt and must be closely connected with the principal fact to be inferred. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that, in all human probability, the crime was committed by the accused, and there should be incapability of

explanation on any hypothesis other than that of the accused's guilt and inconsistent with his innocence. In the present case, the medical examination of the appellant by P.W.17, which revealed no injuries on his private parts or body, combined with the absence of any signs of struggle, resistance, or traces of his DNA on the deceased's body, supports the appellant's claim of innocence.

12. The mere circumstance that the appellant was last seen with the deceased is an unsafe hypothesis for a conviction under Sections 302/ 354 of the Indian Penal Code 1860 in this case.

13. The Hon'ble Supreme Court in the case of **Bodhraj v. State of Jammu and Kashmir** reported in **(2002) 8 SCC 45** held that-

“31..... the last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last, alive and the time when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.....”

14. In consideration of the aforementioned reasons, this Court holds that the evidentiary material presented by the prosecution in the present matter is inadequate of establishing the appellant's guilt beyond a reasonable doubt. Consequently, the appellant is entitled to the benefit of doubt and must be acquitted.

15. Therefore, upon thorough examination of the evidence on record, the criminal appeal identified as CRA (DB) 50 of 2023 is hereby allowed. The impugned judgment and order of conviction and sentence dated 18.07.2023

and 20.07.2023, issued by the Learned Judge, are accordingly quashed and set aside. Any pending related applications are consequently disposed of.

16. The appellant is hereby exonerated of all charges ascribed to him and shall be released forthwith, provided there are no other outstanding warrants or cases against him.

17. Copy of the judgement along with Lower Court Records shall be sent back to the trial court at once for necessary compliance.

18. Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all requisite legal formalities.

[Rajarshi Bharadwaj, J.]

[Md. Shabbar Rashidi, J]

Kolkata

16.08.2024

PA (BS)