In The High Court At Calcutta
Criminal Appellate Jurisdiction
Appellate Side

CRA 256 of 2007
Prasanta Biswas
-Vs.-
The State of West Bengal

Before : The Hon'ble The Chief Justice Thottathil B. Radhakrishnan

&

The Hon'ble Justice Arijit Banerjee

For the appellant : Mr. Ankit Agarwala, Adv.
Mr. Subir Debnath, Adv.
Mr. Soham Banerjee,Adv.
Mr. Alotriyo Mukherjee, Adv.
Ms. Roma Roy, Adv.

For the State : Mr. Madhusudan Sur, Ld. A.P.P.,
Mr. Monoranjan Mahato, Adv.

Heard On : 28.08.2019 & 15.07.2019

CAV on : 28.08.2019

Judgment On : 03.09.2019

Arijit Banerjee, J.:-

(1) This is an appeal against the judgment and orders dated 30 March, 2007 and 31 March, 2007 passed by the learned Additional Sessions Judge, Fast Track Court-II, Ranaghat in Sessions Trial No. 77 of Sept., 2004 arising out of Sessions Case No. 60 of April, 2004 convicting the appellant under Section 302 of the Indian Penal Code (in short "IPC") and sentencing him to suffer imprisonment for life and to pay

fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for six months.

(2) The victim (Shrimati), was the wife of the appellant. A written complaint was lodged by the victim's father (Ramdhun Biswas) on 5 November, 2002 (date of occurrence) to the effect that the victim was given in marriage to the appellant about four years back. A few days after the marriage, disturbance started between the victim and the appellant over the issue of illicit relationship between the appellant and a lady of the same village. The matter was settled by the villagers on some occasions. On 5 November, 2002 at about 7 A.M. he received information that his daughter had died. He went to the place of occurrence, i.e., the appellant's house, and found his daughter lying dead and a mark was found on her neck. He suspected that she was murdered by the appellant in order to fulfil his ill motive.

(3) Based on the written complaint a First Information Report was registered. Inquest and post-mortem was conducted on the body of the victim. Charge-sheet was issued on 7 July, 2004. The appellant was convicted under Section 302 IPC on 30 March, 2007 and was sentenced on 31 March, 2007. He was immediately taken into custody and has been in custody since then.

(4) The prosecution examined ten (10) witnesses. The defence examined none. However, the accused was examined under Section 313 of the Criminal Procedure Code. The appellant also made a judicial confession before the Judicial Magistrate, 3rd Court, Ranaghat on 7 November, 2002. However, such confession was not relied upon by the learned Trial Judge and was discarded, holding that the prescribed procedure had not been followed in recording such statement of the accused.

(5) PW1 is the Autopsy Doctor. As recorded in the post-mortem report, he found one nail mark on the right lateral side of the neck and four nail marks on the left lateral side of the neck. He also found on dissection of neck, blood clots in the neck muscle. He opined that the death was caused due to throttling which was ante-mortem and homicidal in nature. He also deposed that he did not mention in the post-mortem whether the neck mark was old or recent. He further said that he has not heard any person committing suicide by throttling himself.

(6) PW4 is the father of the victim. He deposed about the appellant torturing the victim from time to time. He also spoke about alleged illicit relationship between the appellant and another lady of the same

village but he could not say her name. His evidence contains nothing which touches the incident.

(7) PW6, PW7 and PW8 are local witnesses. They all claimed to be neighbours of the accused. PW6 deposed that he knew that the victim's death was unnatural. After marriage there was good and cordial relationship between the victim and the accused. After a few days, the accused started assaulting and torturing the victim. On hearing hue and cry raised by the mother of the accused he went to the house of the accused and found that the dead body of the victim was lying on the lap of the mother of the accused. He found the mark of throttling on the victim's neck. He knew that there was illicit relationship between the accused and Swapna of the same village and for this reason the victim made protest as a result whereof there was quarrel going on between the victim and the accused. In cross-examination he said that he did not see the accused mixing with Swapna. He saw with his own eyes the accused assaulting and torturing the victim several times but could not say the exact date, month or year of such torture or assault.

(8) PW7 and PW8 both deposed substantially to the same effect. However, both of them said that they had only heard about the illicit relationship between the accused and Swapna and neither of them had

seen the accused and Swapna mixing together. PW7 further said that he did not know how the victim was murdered.

(9) In his examination under Section 313 of the Criminal Procedure Code, the prosecution case and substance of the prosecution evidence were put to the accused which the accused denied. Furthermore, in answer to question no. 4 of the statement recorded on 13 November, 2006 the accused said: “I was not in my house when she died”.

(10) Learned counsel for the appellant submitted that there is nothing whatsoever in the evidence adduced by the prosecution to establish the presence of the accused in his house at or around the time of occurrence of the incident. Further, the allegation of the appellant having illicit relationship with Swapna is also unfounded. It is significant that although in the written complaint PW4 mentioned about such alleged illicit relationship between the appellant and another lady, in the inquest report there is no such mention, although PW4 was a witness to the inquest report. Learned counsel submitted that none of the prosecution witnesses had anything material to say about the incident and nothing that they said inculpates the accused in so far as the death of the victim is concerned. He further submitted that the reliance placed by the learned Trial Judge on Section 106 of

the Evidence Act in convicting the appellant, was erroneous. Section 106 is not attracted to the facts of this case.

(11) Learned counsel for the prosecution urged that in his statement under Section 313, the accused merely said that he was not in his house when the victim died. It was incumbent upon the accused to divulge where he was if he was not in the house. He has not done so. Hence, his statement that he was not in the house at the time of the occurrence cannot be accepted. It was a clear case of homicide and apart from the accused there was nobody who could commit the murder of the victim. As regards Section 106 of the Evidence Act, learned counsel relied on two decisions of the Hon'ble Supreme Court in the cases of **Jaspal Singh- vs- State of Punjab, (2012) 1 SCC (Cri) 1 and Babu Alias Balasubramaniam & Anr. –vs- State of Tamil Nadu, (2013) 8 SCC 60** in support of his contention, that Section 106 of the Evidence Act is squarely applicable to the facts of the present case.

(12) We have carefully considered the rival contentions of the parties, the evidence on record, both oral and documentary and the impugned judgment.

(13) The learned Judge entered the conviction entirely on the basis of Section 106 of the Indian Evidence Act which states that when any fact is especially within the knowledge of any person, the burden of proving

that fact is upon him. The learned Judge held that it is the accused who has special knowledge of the facts and circumstances in which his wife was murdered and the burden is on him to explain those circumstances. Such burden has not been discharged. Merely denying his presence in the house at the time of occurrence would not provide the accused with a good alibi since he has failed to disclose actually where he was if he was not in the house. Upon these premises, the learned Judge convicted the appellant.

(14) We are unable to agree with the learned Trial Judge. There is no eye-witness to the incident. None of the witnesses has deposed that the accused was in or around the place of occurrence at or about the time of occurrence. That the victim was throttled to death is fairly established from the post-mortem report which was proved by PW1 being the doctor who conducted autopsy on the dead body of the victim. However, there is nothing on record to connect the accused to the killing of the victim. PW6 deposed that on the date of occurrence he heard hue and cry being raised by the appellant's mother and upon rushing to their house he found the victim lying dead on the lap of the appellant's mother. The appellant's mother was not interrogated by the police at all. There was no effort on the part of the Investigating Officer (I.O.) to ascertain where the accused was at the time of

occurrence. The learned Judge has noted the evidence adduced on behalf of the prosecution as regards alleged illicit relationship between the appellant and Swapna and has proceeded on the basis that the same furnished a motive for the accused to murder his wife. Here also we are unable to agree. The alleged illicit relationship between the appellant and Swapna has not been proved by cogent evidence. PW6, PW7 and PW8, on whose evidence the learned Judge relied in this regard, all said that they did not see the accused and Swapna mixing with each other. In other words, their evidence in that is hearsay evidence, which is not admissible in law.

(15) Even assuming that the prosecution succeeded in establishing that the accused used to physically abuse the victim (evidence of PW6), no definite inference can be drawn therefrom that the accused is the murderer. It appears from the impugned judgment that a strong suspicion to that effect, in the mind of learned Trial Judge prompted her to return a verdict of conviction against the accused. It is trite law that however, overwhelming the suspicion may be, it cannot take the place of proof, at least where a court of law is in seisin of a criminal action and is called upon to decide the guilt or otherwise of an accused.

(16) We are also of the considered opinion that reliance by the learned Trial Judge on Section 106 of the Evidence Act was misdirected. Section 106 would have applied, had it been established that the appellant was with the victim at or around the time of occurrence or that the victim was last seen with him. The fact that the appellant and the victim were married, per se, cannot attract application of Section 106 of the Evidence Act irrespective of wherever the appellant was at the time of occurrence of the incident. Holding otherwise would lead to preposterous results.

(17) We are also unable to accept the contention of the prosecution which has been accepted by the learned Trial Judge that the accused in his statement under Section 313 of the Criminal Procedure Code was obliged to say where he was on the night of 4 November, 2002 or the morning of 5 November, 2002. Under the criminal jurisprudence in this country, an accused has the right to remain silent and such silence cannot be held to be admission of any charge brought against him. An accused is presumed innocent until proved guilty. The burden of proving him guilty is on the prosecution. The accused need not say anything at all. We may note that in this regard protections of diverse nature have been granted to an accused under Article 20(3) of the Constitution of India and Sections 132 and 138 of the Indian Evidence

Act, 1872. In the present case, the accused did not run a case of alibi. He merely said that he was not in the house at the time of the victim's death. He need not have said that also. The onus was solely and wholly on the prosecution to establish his presence at the scene of occurrence, at or around the time of occurrence to connect him with the murder of the victim. This the prosecution has failed to do even by way of circumstantial evidence. The circumstantial evidence relied upon by the prosecution and the learned Trial Judge far from completes the chain of sequence and events so as to lead to an inescapable conclusion that it was only the accused and no one else who could have committed the crime.

(18) In so far as exclusion of the judicial confession of the accused from the domain of consideration by the learned Trial Judge is concerned, we think that the same was done correctly by the learned Judge for cogent reasons recorded by him in the impugned judgment.

(19) In so far as the two Supreme Court decisions relied upon by the learned prosecution counsel are concerned, the case of **Jaspal Singh (supra)** merely reiterates the principle enshrined in Section 106 of the Evidence Act. It further goes on to say that Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. The said provision of law is designed

to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In the case of **Babu Alias Balasubramaniam (supra)**, the Hon'ble Apex Court held that in the facts of that case Section 106 of the Evidence Act was attracted. In that case it was not contended by the accused that he was not present in the house when the incident occurred. He was admittedly present in the house along with the victim at the material time. To such a fact situation, Section 106 of the Evidence Act was applied. None of these two decisions advance the prosecution case in the present fact scenario for the reasons discussed above.

(20) We are not satisfied that the prosecution has been able to establish the charge brought against the accused beyond reasonable doubt. We are of the considered view that this is a case where the accused deserves to be given the benefit of doubt and we do so. In the result the appeal is allowed. The orders of conviction and sentence under challenge are set aside. The accused shall be released from custody immediately unless he is wanted by the police authorities in connection with some other case.

(21) CRA 256 of 2007 is, accordingly, disposed of.

(21) Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.

(**Thottathil B. Radhakrishnan, CJ.**)

(**Arijit Banerjee, J.**)