(2020) 02 CAL CK 0045

Calcutta High Court

Case No: Criminal Appeal (CRA) No. 140 Of 2007

Lachhu Indower	APPELLANT
Vs	
State Of West Bengal	RESPONDENT

Date of Decision: Feb. 12, 2020

Acts Referred:
Indian Penal Code, 1860 â€" Section 302 Code Of Criminal Procedure, 1973 â€" Section 161, 313#Evidence Act, 1872 â€" Section 25, 106, 11

Citation: (2020) 02 CAL CK 0045

Hon'ble Judges: Thottathil B. Radhakrishnan, CJ; Arijit Banerjee, J

Bench: Divison Bench

Advocate: Partha Sarathi Bhattacharya, Negaive Ahmed, Sayanti Santra

Final Decision: Disposed Of

Judgement

Arijit Banerjee, J.:-

1. This is an appeal against the judgment and order of conviction dated August 16, 2004 passed by the Learned Additional Sessions Judge, 1st Fast

Track Court, Alipurduar, Dist.- Jalpaiguri in Sessions Trial No.28 of 2004 arising out of Sessions Case No.51 of 2004. The Learned Trial Court found

the appellant to be guilty of offence punishable under Section 302 of Indian Penal Code (for short Ã¢â‚¬ËœIPCÃ¢â‚¬â„¢), for murdering his brother Ram

Indower (the victim), and sentenced the appellant to imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer further imprisonment for

one year.

2. The prosecution case as appears from the written complaint lodged by Ramesh Indower (P.W.1 and father of both the victim and the appellant)

and from the prosecution evidence is that on September 8, 2003 P.W.1 along with his wife left the family house for their respective works. At that

time, the appellant and the victim were present in their family house. The other son of P.W.1 viz., Chikla Indower was in the Pan shop which he ran

as a business. At around 2/2:30 p.m. P.W.1 and his wife returned home and found the victimÃ¢â‚¬â„¢s dead body. The people in the locality told them that

the appellant had killed the victim. He lodged a complaint with the police. The police arrived at the place of occurrence which is the family house of

P.W.1. The appellant surrendered before the police and then confessed his crime before P.W.1 and the police.

3. Pursuant to investigation, charge-sheet was issued against the appellant. He was charged with commission of offence punishable under Section 302

IPC. The charge read as follows: Ã¢â‚¬Å“You, on or about the 8th day of September/2003 during altercation committed murder of your elder brother Ram

Indower by intentionally cutting his neck by a Ã¢â‚¬Ëœkalam knifeÃ¢â‚¬â„¢Ã¢â‚¬. The charge was read over and explained to the appellant who pleaded Ã¢â‚¬Ëœnot

guiltyÃ¢â‚¬â„¢ and claimed to be tried. Hence the Trial.

4. The prosecution examined 12 witnesses to substantiate its case. The defence examined none. The appellant was examined under Section 313 of

Criminal Procedure Code. His case was that he was not present at the place of occurrence. The following questions and answers from the Section

313 Cr.P.C. statement of the appellant would sum up the defence case:

Ã¢â‚¬Å“Q.5: Where is he Ã¢â‚¬" Ram Indowar?

A: My elder brother has died

Q.6: How he has died? You Know?

A: I cannot say as I was not present there.

Q.7: P.W.1, Ramesh Indowar is your father. He said that on the day of occurrence at 12 noon when he was in the office then you Ã¢â‚¬" Lachhu and

your elder brother Ã¢â‚¬" Ram Indowar was remain in the house. What do you say?

A: No, I was not remain in the house. I lived in the shoproom and I was then in the shop

Q.8: P.W.1 Ramesh Indowar said further that your another brother Chikla then remained in the Ã¢â‚¬ËœPan ShopÃ¢â‚¬â„¢. What do you say?

A: It is true then Chikla was then at Pan Shop

Q.13: P.W.1, your father Ã¢â‚¬" Ramesh Indowar said further that the people of the locality present there and his wife told him that you went to the

Police Station to inform police after causing murder to your elder brother. What do you say?

A: No, it is not a fact. My father said falsely.

Q.14: P.W.12, I.O. of this case, S.I. Harendra Nath Barman said in his evidence that on the day of occurrence i.e. on 08.09.2003 at about 8:15 p.m.

you surrendered yourself before the police arriving at the police station and police then arrested you. What do you say?

A: I did not surrender before the police station on 08.09.2003. On 08.09.2003 and 09.09.2003 I remained in the shop. On 10.09.2003 police arrested

me from the road.

Q.15: Your father Ã¢â‚¬" Ramesh Indowar told further that you Ã¢â‚¬" Lachhu Indowar have told all the matter before the police on being surrendered

there. What do you say?

A: On being assaulted by the police I have say so i.e. I have killed my elder brother.

Q.17: P.W.1 Ramesh Indowar told further that a chopper as lying in his house which is not being traced out after the incident occurred. What do you

say?

A: The chopper is kept in conceal by my father after his work was over. I donÃ¢â‚¬â„¢t know about this matter.

Q.25: P.W.12 has stated further that at about 8.15 p.m. on the day of occurrence Lachhu Indowar surrendered himself before the Police Station.

What do you say? A: I did not surrender but police has arrested me.

Q.27: On the day of occurrence i.e. on 08.09.2003 at about 12 noon where you were remain and what you were doing? Have you say anything?

A: I was in the shop. I know nothing. I am not guilty. I donÃ¢â‚¬â„¢t know how my elder brother has been died.

Q.28: When the people of the locality; your parents and police came on the day of occurrence after the death of Ram then where are you remain? A:

I was then at my shop.

Q.29: Why have you surrendered yourself to the Police Station on the day of occurrence i.e. on 08.09.2003?

A: I did not surrender myself to the Police Station.Ã¢â‚¬â€‹

5. The Learned Trial Judge after referring to the evidence of the prosecution witnesses held the appellant to be guilty of the offence that he was

charged with, solely on the basis of circumstantial evidence. In his judgment, the Learned Trial Judge observed, inter alia, as follows:

Ã¢â‚¬Å“ ... this Court is satisfied that the circumstances from which the inference of guilt of the accused is drawn here is well established and those

circumstances unerringly on point to the guilt of the accused and further those circumstances when taken together are incapable of any explanation on

any reasonable hypothesis save the guilt of the accused.... In a case of circumstantial evidence it is not always necessary that all the links in the

prosecution case would be available and thus sometimes some missing links may be inferred from the proved facts and circumstances and in the

instant case, the incriminating facts and circumstances would taken together then the same proved the charge u/s 302 IPC against the accused.

During his examination u/s 313 Cr.P.C. the accused submitted that he was not present in his house at the time of incident and he was present in his

shop but the defence produced no witness in support of the defence case and such deemed false explanation of the accused before Court can be

taken into consideration as an additional link to the chain of evident presented by the prosecution. Further, the accused did not offer any explanation to

consistent with his innocence and the same completes the chain which proved the guilt of the accused and none else...Ã¢â‚¬â€‹.

Correctness and sustainability of the said judgment falls for determination in this appeal.

6. Before proceeding further let us briefly note the material evidence adduced by the prosecution witnesses.

7. P.W.1, who is the father of both the victim and the appellant, deposed that on the date of the incident at noon he along with his wife left their home

to attend work at the tea garden. He said: Ã¢â‚¬Å“my two sons Ram and Lachhu were present in our house at the relevant time and my other son Bichla

was in the pan shop.Ã¢â‚¬ He returned to his house at 2/2:30 p.m. and found the victim lying dead in the house. The people present their told him that the

appellant had killed the victim and had gone to the police station to inform about the murder. The appellant disclosed all facts in the police station. He

further stated that there was a Ã¢â‚¬Ëœkalam churiÃ¢â‚¬â„¢ (pen knife) in the house and after the incident the same was found to be missing. His wife told him

that the appellant assaulted the victim by the pen knife and left home. In cross-examination he said that whatever he stated was all that he had heard.

He had not seen the incident. His wife also did not see the incident.

8. The evidence of P.W.2 and P.W.3 who were local residents are not of any consequence. They said that they did not know how the murder took

place.

9. P.W.4 was a member of the village Panchayat. He said that he heard that the victim had been murdered but who committed the crime was not

known to him. He was declared hostile by the prosecution. In cross-examination by the prosecution he denied having told the police officer that he

found the victim coming out of the house and falling down by the side of their gate or that he found the appellant going away. In cross-examination by

the defence he stated that he had not seen the incident. He was then in the market. He could not say from whom he had heard about the incident.

10. P.W.5, also a local resident, stated that he heard that the victim had been murdered by his brother. He had not seen the incident. The evidence of

P.W.6 and P.W.7 is also to same effect.

11. P.W.8 is the scribe of the written complaint. He said that he only heard from local people and from the father of the appellant that the victim had

been murdered by the appellant. He wrote the petition of complaint as per instruction of P.W.1. In cross-examination he stated that he had no

personal knowledge of the incident as he had not seen the incident of killing.

12. P.W.9 is the police officer in whose presence the Investigating Officer had seized some wearing apparels of the deceased. He had signed on the

Seizure List as a witness. In cross-examination he stated that he had no personal knowledge of the incident.

13. The evidence of P.W.10 and P.W.11 are of no consequence. P.W.11 stated in cross-examination that he had no personal knowledge of the

incident.

14. P.W.12 is the Investigating Officer of the case. It was he who went to the place of occurrence and investigated into the matter. He prepared the

Inquest Report and seized some materials like controlled earth, blood drenched earth, one pair chappal (slipper), one towel, one pant etc. He sent the

dead body of the victim to the Alipurduar SD Hospital Morgue for post mortem examination. He also examined some witnesses under Section 161

Cr.P.C. He stated that the appellant surrendered himself in the police station at 20:15 hrs on 08.09.2003. In cross-examination he stated that he was

endorsed with the P.S. Case at 14:55 hrs on the date of the incident. The Seizure List was prepared at 14:00 hrs on 08.09.2003 by him. He denied the

suggestion that he arrested the appellant from the pan shop.

15. We have given our anxious consideration to the facts of the case and the legal evidence on record. There are no eye witnesses to the incident.

The conviction of the appellant is based on circumstantial evidence coupled with the Ã¢â‚¬Ëœlast seen togetherÃ¢â‚¬â„¢ theory.

16. The gist of the prosecution case is that P.W.1 and his wife left for their work at noon. At that time the appellant and the victim were in the family

house according to P.W.1. When they returned from work at around 2/2:30 p.m., they found the dead body of the victim. The appellant was not there.

However, the appellant soon thereafter surrendered at the police station and confessed to have committed the murder of his brother.

17. The Learned Trial Judge was of the opinion that the facts and circumstances of the case are such that the same indicated that it was only the

appellant and nobody else who could have committed the offence. The Learned Trial Judge found the chain of circumstances to be complete. We

however, cannot agree with him.

18. The law regarding conviction on the basis of circumstantial evidence alone has been enunciated by the HonÃ¢â‚¬â„¢ble Supreme Court in several

decisions. In Padala Veera Reddy v. State of Andhra Pradesh: AIR 1990 SC 79, at Paragraph 10 of the Judgment, the HonÃ¢â‚¬â„¢ble Apex Court

observed as follows:

Ã¢â‚¬Å“1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human

probability the crime was committed by the accused and none else; and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the

guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.Ã¢â‚¬â€‹

19. We have carefully considered the legal evidence on record. In our opinion the evidence is not such as to unerringly point towards the appellant as

the culprit. There was no recovery of weapon. According to P.W.1 the pen knife that used to be there in the family house went missing after the

murder of the victim. That per se does not establish that it was the appellant who caused disappearance of the pen knife or that he murdered his

brother with that knife. On the other hand, in his Section 313 Cr.P.C. statement the appellant stated that P.W.1 used to keep the pen knife at some

place which he was not aware of. The Post Mortem Report does not mention the kind of weapon used for killing the victim nor does the report

mention the approximate time of death of the victim. In any event, the post mortem Doctor was not examined by the prosecution and the Post Mortem

Report was not tendered in evidence. It was not marked as an Exhibit. Therefore, no reliance could have been placed by the prosecution or the

Learned Trial Court on such report.

20. Even believing the statement of P.W.1 that at noon when he and his wife left for work, the appellant and the victim were in the family house, that

by itself would not establish that the appellant was the perpetrator of the crime. The dead body was discovered around 2/2:30 p.m. A lot could have

happened between midday and 2/2:30 p.m. According to the appellant he was at the pan shop run by his brother at the time of the incident on

08.09.2003. Hence, the appellant took a plea of alibi. The Learned Trial Judge held that since the appellant did not examine any witness to establish his

case of alibi, his case must have been untrue and this further is an additional link to the chain of evidence presented by the prosecution. We are unable

to agree with this.

21. In Jayantibhai Bhenkarbhai v. State of Gujarat: (2002) 8 SCC 165 the HonÃ¢â‚¬â„¢ble Supreme Court observed that the plea of alibi flows from

Section 11 of the Evidence Act and is demonstrated by Illustration (a). The word Ã¢â‚¬Ëœalibiâ€™ is of Latin origin and means Ã¢â‚¬Ëœelsewhereâ€™. The

defence of alibi is to the effect that the accused was not present at the place of occurrence and was somewhere else. Hence, he could not have

committed the crime. The burden of proving commission of offence by the accused so as to fasten the liability of guilt on him remains on the

prosecution and does not become any less by the mere fact that the accused has adopted the plea of alibi. The plea of alibi taken by the accused

needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in

discharging its burden of proving the commission of offence by the accused beyond any reasonable doubt, it may not be necessary to go into the

question whether the accused has succeeded in proving the defence of alibi.

22. In Binay Kumar Singh v. State of Bihar: 1997 (1) SCC 283, at Paragraph 23 of the judgment, the HonÃ¢â‚¬â„¢ble Apex Court observed as follows:

Ã¢â‚¬Å“It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the

prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact

that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been

discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts

the plea of alibi to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the

accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow

to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of

such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence

took place, the accused would no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid

down that in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea

of alibi.Ã¢â‚¬â€‹

23. In the present case, the quality of evidence is not such as would persuade us to hold that the prosecution discharged its burden of proving that the

accused had committed the crime beyond reasonable doubt. Hence, it was not necessary for the accused to examine any witness in support of his

plea of alibi. We are of the opinion that in the given scenario the prosecution should have examined Bichla, the brother of the accused and pan shop

owner. Had Bichla denied the presence of the accused at the pan shop at the time of occurrence, the plea of alibi would have fallen flat.

24. As regards the prosecution case that the appellant surrendered to the police and confessed his crime, the accused clearly stated in his statement

recorded under Section 313 Cr.P.C. that he was arrested by the police on 10.09.2003 and he did not surrender to the police. Except the oral testimony

of P.W.12 there is nothing to support the prosecution case that the appellant in fact surrendered to the police. No witness has been examined by the

prosecution to corroborate such testimony of P.W.12. We are inclined to give benefit of doubt on this score to the appellant.

25. In so far as the Ã¢â‚¬Ëœlast seen togetherÃ¢â‚¬â„¢ theory is concerned, the HonÃ¢â‚¬â„¢ble Supreme Court in Satpal v. State of Haryana, Criminal Appeal

No.1892 of 2017 at Para 6 of the Judgment observed as follows:

Ã¢â‚¬Å“There is no eye witness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant.

Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen

theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same

singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of

the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the

circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is

established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to

the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be

any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on

its own facts for invocation of the doctrine.Ã¢â‚¬â€‹

26. The circumstance of the accused having been last seen with the deceased only brings the accused within the zone of suspicion. But, suspicion,

however strong, cannot take the place of legally admissible evidence. The facts and circumstances of the present case are not such as would enable

the prosecution to sustain its case on the basis of Ã¢â‚¬Ëœlast seen togetherÃ¢â‚¬â„¢ theory.

27. We also cannot rely on the alleged confession made by the accused before the police. Section 25 of the Indian Evidence Act, 1872 is a statutory

bar to relying on such confession. It provides that no confession made to a police officer shall be proved as against a person accused of any offence.

That apart, in his statement made under Section 313 Cr.P.C. the appellant clearly stated that on being assaulted by the police he had to say that he had

killed his elder brother, i.e. he was coerced to make such a statement.

28. Finally, no motive has been ascribed to the appellant for murdering his twin brother. We are conscious that establishing motive is not a sine qua

non for a conviction in the case of murder, but in certain factual matrices, motive or absence of it, does make some difference. Nothing has been

brought out in the prosecution evidence that would tend to show that there was any acrimony or animosity between the accused and the appellant.

There is not a whisper in the entire evidence on record as to what could be the possible reason for the appellant to commit fratricide.

29. For the reasons aforestated and on careful consideration of the entire factual matrix and the legal evidence on record, we are of the considered

opinion that this is a case where the appellant is entitled to benefit of doubt. The testimony of the prosecution witnesses are not such as would justify

conviction of the appellant. There is a lurking doubt in our mind as regards the guilt of the appellant and we are unable to hold that the prosecution has

established its case beyond reasonable doubt. Just as it is of importance that a person proved definitely to be guilty does not go unpunished, we feel

that it is of equal, if not greater, importance that a person, whose guilt has not been definitely proved i.e. not proved beyond reasonable doubt, is not

punished and incarcerated for life or any other period of time. After all, freedom and liberty are two of the most important constitutional guarantees

for the citizens of India.

30. Accordingly, the appeal succeeds. The judgment and order of conviction impugned in this appeal are set aside. It is ordered that the appellant shall

be forthwith released from the Correctional Home where he is housed unless he is wanted by the police in connection with some other cases.

31. Let the records of this case be sent back to the Learned Convicting Court immediately for passing appropriate orders in accordance with the

provisions of the Cr.P.C.

32. CRA 140 of 2007 is thus disposed of.

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