

Fatima Khatun Vs State Of Assam.

Court: Gauhati High Court

Date of Decision: Aug. 2, 2023

Acts Referred: Code Of Criminal Procedure, 1973 â€” Section 161, 313, 374

Indian Penal Code, 1860 â€” Section 302

Evidence Act, 1872 â€” Section 7, 106

Hon'ble Judges: Michael Zothankhuma, J; Malasri Nandi, J

Bench: Division Bench

Advocate: A Tiwari

Final Decision: Allowed

Judgement

1. Heard Mr. A. Tewari, learned Amicus Curiae. Also heard Ms. B. Bhuyan, learned Public Prosecutor for the State/respondent.

2. By this appeal filed under Section 374 Cr.P.C., the appellant seeks to challenge the judgment and order dated 25.06.2019 passed by the learned

Additional Sessions Judge, Hojai in S.C. No. 19(N)/2017, whereby the accused/appellant was convicted under section 302 IPC and sentenced to

undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default, to further undergo simple imprisonment for two months.

3. The case of the prosecution is that the informant who is the grandmother of the deceased lodged an FIR on 17.01.2017 before the in-charge

Nakhuti Police Outpost, stating inter alia that her four years old granddaughter of her youngest son Hussain Ali had been missing from her house since

15.01.2017. After failing to trace her out even after extensive search, suspicion arose in her mind against her daughter-in-law, i.e. the

accused/appellant. On questioning her daughter-in-law with the help of the public, her daughter-in-law confessed that she had thrown her into a kutcha

well located at No.3 Khring Khring Chadhayaghar village. It is also stated that on 17.01.2017 at around 7/8 a.m., the informant along with some

people of her village, went to Nakhuti police out post and informed them about the incident. She along with police personnel then went to the said

kutcha well at Khring Khring village and when the accused/appellant showed them the well, they saw the dead body of her granddaughter floating in

the water inside the well. The appellant confessed that she took the deceased and killed her by throwing her into the well.

4. On receipt of the FIR, a GD Entry was recorded vide GDE No. 252 dated 17.01.2017 and forwarded the same to O/C, Lumding P.S. for

registering a case under proper section of law and accordingly, a case was registered vide Lumding P.S. Case No. 14/2014 under Section 302 IPC.

Subsequently, the investigating officer started the investigation. During investigation, the investigating officer visited the place of occurrence and

recorded the statement of the witnesses. The inquest was done on the dead body of the victim and after inquest, the dead body of the deceased was

sent for postmortem examination to the Civil Hospital, Nagaon.

5. After completion of investigation, charge-sheet was submitted against the accused/appellant under Section 302 IPC before the SDJM, Hojai. As the

offence under Section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

6. During trial, on appearance of the accused/appellant before the court of Sessions, charge was framed under Section 302 IPC which was read over

and explained to the accused/appellant, to which she pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused, the prosecution examined 8(eight) witnesses and exhibited 5(five) documents. On the other hand, the

accused/appellant did not choose to adduce any evidence in her defence. After completion of trial, the statement of the accused/appellant was

recorded under Section 313 Cr.P.C. wherein incriminating materials found in the evidence of the witnesses were put to her, to which she denied the

same and pleaded her innocence.

8. In her statement under Section 313 Cr.P.C., the accused/appellant stated that prior to the incident, a quarrel took place between her and her

mother-in-law i.e. the informant. On the next day, the victim accidentally fell into the well and died. However, her mother-in-law accused her of killing

the victim. On the day of the quarrel, her husband assaulted her by demanding Rs.20,000/- and asked her to bring the said money from her parents.

Due to assault, she went to her parents house. In connection with the instant case, the police sent her to jail hajot and during her tenure to stay in jail,

her husband married another woman. Her husband and her mother-in-law, after making a plan to oust her from her matrimonial home, lodged this

case. The accused/appellant also stated that she would not adduce any witness in support of her case.

9. After hearing learned counsels for the parties, the learned Additional Sessions Judge, Hojai convicted the accused/appellant as aforesaid.

10. It was urged by Mr. A. Tiwari, learned Amicus Curiae that the learned Additional Sessions Judge, Hojai convicted the accused/appellant only on

the basis of last seen evidence and extra judicial confession made by the accused/appellant before P.W.1 and other witnesses. He further submits that

there is no eye witness to the incident. The evidence of last seen only by itself is a weak piece of evidence and therefore, it may not be safe for the

court to base the conviction of the accused on such solitary evidence, unsupported by any other circumstantial evidence, which should unerringly point

to the guilt of the accused, totally inconsistent with his innocence. The learned Amicus Curiae further submits that the last seen together theory must

qualify two primary tests, test of proximity of time and test of proximity of distance. In the present case, the prosecution has failed on both the counts.

11. The learned Amicus Curiae has also submitted that though P.W.2 and P.W.3 stated that they had seen the deceased Khadeja Khatun along with

accused/appellant but subsequently, they also admitted that they did not state before the police, the facts they have stated in the court. According to

the learned Amicus Curiae, the same is fatal to the prosecution case.

12. It is also submitted by the learned Amicus Curiae that time was not mentioned by the witnesses as to when the victim went missing, last seen with

accused/appellant and when the dead body of the victim was recovered. From the evidence of the witnesses, it reveals that the victim was not found

in her house on 15.01.2017 and her dead body was recovered on 17.01.2017 i.e. after two days of the incident. There is a long gap between the last

seen and the recovery of dead body of the deceased. Under such backdrop, the accused/appellant cannot be convicted on the basis of last seen

theory.

13. The learned Amicus Curiae further stated that it is a blind murder case and the appellant had been unnecessarily roped in, merely because she

was the step mother of the deceased. The learned Amicus Curiae also stated that the so called extra judicial confession made by the

accused/appellant before the police, cannot be taken into consideration to convict the accused/appellant.

14. In support of his submissions, the learned Amicus Curiae has placed reliance on a case law:- 2009 78 AIC 10 (State of Punjab vs. Harjagdev

Singh).

15. In response, Ms. B. Bhuyan, learned Additional Public Prosecutor has submitted that the learned trial court has considered the evidence on record

and the last seen theory. She further submits that the present case is based on circumstantial evidence and the chain of circumstance is complete,

considering the fact that the victim was last seen together with the accused/appellant before her death. On the accused/appellant being questioned by

the villagers at large, she confessed that she had thrown the body of the deceased into the nearby well. The learned trial court has also considered the

extra judicial confession, while convicting the accused/appellant, which also can be taken into consideration, as some of the witnesses had stated that

the accused/appellant had disclosed that she had thrown the body of the victim inside the well. According to the learned Addl.P.P., there is no

necessity to interfere with the judgment of the learned trial court by this Court and prays for dismissal of the appeal.

16. We have considered the submissions made by the parties. Admittedly, there is no eye witness to the incident. The case is based on circumstantial

evidence, last seen theory and extra judicial confession made before the witnesses.

17. According to P.W.1, who is the informant of this case, on the date of the incident, a quarrel took place between her daughter-in-law i.e. the

present appellant and her. She told her to go out of the house. Then PW-1 went out to tell the villagers about the matter. At that time, her

granddaughter Khadeja and accused Fatima were at home. When she came home, she did not see both of them. While she was in search of her

granddaughter, people said that they saw Khadeja going to the house of Fatima's father. She immediately went to the house of Fatima's

father but did not see Fatima and her granddaughter there. Though they were in search of Khadeja, but she could not be traced out. She again went to

the house of Fatima and she enquired about her granddaughter. Then Fatima threatened her. Later, Fatima's sister-in-law informed her that both

Fatima and Khadeja went out together, but Fatima returned alone. Thereafter, she along with village headman went to the house of Fatima's

father and informed the police about the incident. When the police asked Fatima about the girl, she confessed that she killed her. Two days after the

incident, the dead body of the victim was recovered from a well. The police lifted Khadeja from the well as shown by Fatima.

18. In her cross-examination, P.W.1 stated that the girl went missing on Sunday. The police came on Monday evening and examined Fatima. Police

again came on Tuesday as she could not find her granddaughter. Thereafter, she lodged the FIR in the police station. She did not see the dead body in

the well. She did not mention in the FIR that when the accused showed the well, she saw the girl floating in the well.

19. P.W.2 deposed in his evidence that on the date of the incident, i.e. Sunday, while he returned home from Lalmati, he saw Fatima and Khadeja

going by road towards Haldibari. On Tuesday, police recovered the dead body of Khadeja from a well.

20. In his cross-examination, P.W. 2 replied that he did not tell the informant that Fatima was going with Khadeja. He did not state before the police

that he met Fatima on the road.

21. The evidence of P.W.3 discloses the fact that the incident took place on Sunday in the month of January. On that day, while PW-3 was working in

the field where turmeric was cultivated, he saw Fatima accompany Khadeja. They were proceeding towards her father's house. When she

returned, Khadeja was not with her. He heard that the dead body of Khadeja was recovered from a well on Tuesday.

22. In his cross-examination, P.W.3 replied that he did not know who had killed Khadeja. On Sunday, Khadeja was going with Fatima. The witness

was confronted that he had not stated before the police about the statements he had made before the trial court, during recording of his evidence.

23. P.W.4 is the VDP Secretary of No.3 Khring Khring village. He deposed before the court that on the date of incident, the informant lodged an FIR

before Nakhuti Out Post stating that her granddaughter was missing. The informant also required him to make a search for her granddaughter. On the

following day, the informant again lodged an FIR alleging that the accused took the victim girl to the house of her father. On her return, she did not

bring the victim with her but brought her own daughter. When the accused was questioned, she confessed that she threw the victim into a well. When

the police interrogated the accused, the accused showed them the well where she threw the victim. Then they along with police personnel went to the

well and lifted the dead body of the victim from the well.

24. P.W.4 in his cross-examination replied that the dead body of the girl was recovered after three days of the incident. He admitted that he stated

before the police that people made a search and three days after the incident saw the dead body of Khadija, floating in a well near the house of the

parents of the accused. He also stated that on the matter being informed to police, Magistrate came from Sankardev Nagar and then the dead body

was lifted from the well.

25. P.W.5 is the medical officer who conducted the postmortem examination on the dead body of the deceased. He deposed before the court that on

17.01.2017, he was working as Sub-divisional Medical & Health officer, Nagaon. On that day, he conducted postmortem on the dead body of Khadeja

Khatun, 4 years, female on police requisition and found positive findings regarding the presence of muddy water in mouth, pharynx, esophagus,

stomach and both the lungs. No other injury seen; changes were antermortem in nature. The medical officer opined that death was due to suffocation,

asphyxia as a result of the effect of drowning.

26. In his cross-examination P.W.5, replied that the exact time of death was not mentioned in his report. Rigor mortis was present. It could be more

than 4 hours. If one accidentally falls in water body, it may happen as such.

27. P.W. 6 is the investigating officer. He deposed in his evidence that on 17.01.2017, he was working as an attached officer at Lumding police

station. On that day, one Malika Khatun lodged an FIR at Nakhuti out post and after receiving the said FIR, I/C Nakhuti out post recorded a GD Entry

vide GD Entry No. 252 dated 17.01.2017 and forwarded the same to O/C Lumding P.S. to register a case. Accordingly, a case was registered vide

Lumding P.S. case NO. 14/17 and endorsed him to investigate the case. On receipt of the FIR, he along with O/C and other staff and Executive

Magistrate visited the place of occurrence. After arrival at the place of occurrence at No. 3 Khring Khring village, nearby a small tilla in a small well

about 10 feet deep, the dead body of the victim Khadeja Khatun aged about 4 year was found floating. They recovered the dead body and Executive

Magistrate conducted inquest over the dead body. He drew the rough sketch map vide Ext.2 of the place of occurrence and he examined the

witnesses present on the spot. Thereafter, he sent the dead body to Nagaon Civil Hospital for postmortem examination. Then they came back to

Nakhuti out post. On arrival at Nakhuti Outpost, they found that the local people had detained the accused Fatima Khatun and they handed her over to

them. Then he took custody of the accused and interrogated her. This witness also proved the FIR vide Ext. 3. On the direction of the O/C Lumding

police station, he handed over the case diary to the I/C Jugendra Nath Deka for further investigation.

28. In his cross-examination, P.W.6 replied that he performed the investigation of this case only for one day i.e. 17.01.2017 and subsequently, he

handed over the case diary to the O/C Lumding P.S. After arrival at Nakhuti out post, they found that some people brought the accused Fatima at

Nakhuti Outpost. However, he had not mentioned the name of those persons who had brought the accused to the Nakhuti Outpost.

29. P.W.7 is another I/O who collected the postmortem report from Civil Hospital, Nagaon. As he found the investigation was complete, he submitted

the charge-sheet against the accused/appellant vide Ext. 5.

30. P.W.8 is the Executive Magistrate who conducted inquest over the dead body of the deceased. According to P.W.8, during inquest over the dead

body of the victim, he had noticed blood on her face, lips were white and stomach was swollen. Some of the witnesses told her that the victim was

killed by her step mother Fatima by throwing her in a well. She prepared the inquest report vide Ext. 1.

31. In her cross-examination, P.W.8 admitted that no GD Entry or any P.S. Case number was written in the inquest report prepared by her. The dead

body was found on 17.01.2017 and the time was around 9.30 a.m. The approximate time and date of death was 17.01.2017 at about 6.30 a.m.

32. From the evidence of the witnesses, it appears that the victim went missing from 15.01.2017, but time was not mentioned by any of the witnesses

when she was seen along with accused/appellant prior to her death. The Last seen evidence is one of the species of circumstantial evidence. The

Last seen evidence as per Part III, Section 7 of the Indian Evidence Act, 1872, is relevant evidence against the accused. For proving this evidence, it

is essential for the prosecution to prove two things, being that the accused was seen alone in the company of the deceased and at a place where no

other person is expected to interfere. Once this is proved, the burden of proof under section 106 Indian Evidence Act, 1872, falls upon the accused to

prove his innocence. It is pertinent to mention that the first burden of proof is on the prosecution to prove the above said elements and it is only after

the prosecution successfully proves them, the burden shifts on the accused to prove his defence.

33. Last seen evidence does not by itself necessarily lead to an inference that the accused committed the crime, unless the same is duly supported by

other links in the chain of circumstantial evidence, unerringly pointing to the guilt of the accused. The theory of last seen together evidence is, thus,

held to be not of universal application based on which the conviction of accused can be sustained. It should also be noted that the last seen evidence is

only a relevant evidence to complete the chain of circumstantial evidence. However, conviction cannot be based solely on this piece of evidence.

34. Dealing with the principle of last seen evidence, the Hon'ble Apex Court in the case of Rishi Pal V. State of Uttarakhand, reported in 2013 (2)

ACR 147, held as under:

In Mohibur Rahman and Anr. v. State of Assam, (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily

lead to the inference, that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases

where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of

death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the

victim suffered the death or should own the liability for the homicide. Similarly in Arjun Marik and Ors. v. State of Bihar: 1994 Supp (2) SCC 372, this

Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to

record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded.

So also in Godabarish Mishra v. Kuntala Mishra and Anr. : (1996) 11 SCC 264, this Court declared that the theory of last seen together is not of

universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In Bharat

v. State of M.P. : (2003) 3 SCC 106; two circumstances on the basis whereof the Appellant had been convicted were (i) the Appellant having been

last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held: ... Mere non-explanation cannot lead to the proof of

guilt against the Appellant. The prosecution has to prove its case against the Appellant beyond reasonable doubt. The chain of circumstances, in our

opinion, is not complete so as to sustain the conviction of the Appellant....

Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the Appellant

and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the Appellant of the offence

of murder under Section 302 Indian Penal Code. The order passed by the High Court deserves to be affirmed giving to the Appellant the benefit of

doubt. We accordingly dismiss the appeal filed by the Appellant and discharge the notice of show-cause issued to him.

35. It is also a settled legal position that where the time gap between the point of time when the accused and deceased were last seen together and

when the deceased was found dead is so small that there can be no possibility of any person other than the accused, becomes impossible, the court

should look for some other corroboration taking such last seen evidence as an important evidence in the whole chain of circumstantial evidence.

However, where in a case there is a long gap and possibility of any other person coming in between exists, the reliability itself on this piece of

evidence becomes difficult and before placing any reliance the court must satisfy itself by other positive evidence, to conclude that there was no

possibility of any other person entering into such a gap.

36. Applying the aforesaid legal principles to the facts of the present case, the position which emerges is that the deceased child was found in the

company of the appellant on 15.01.2017, but the time has not been mentioned either in the FIR nor in the evidence of any of the witnesses. The dead

body of the victim was recovered on 17.01.2017, i.e. after two days of last seen with the accused/appellant. As per the postmortem report, the exact

time of death is not mentioned. But according to P.W.5, as rigor mortis was present, it could be more than four hours. According to P.W.8, the

approximate date and time of death was on 17.01.2017 at about 6.30 a.m. Therefore, there was a clear time gap of more than 43/44 hours between

the time when the victim was last seen in the company of the accused/appellant and the time of her death. This time gap is too wide and therefore, we

are not persuaded to place much reliance on this piece of evidence for conviction of the appellant.

37. We also cannot be oblivious to the fact that the place where the dead body of the victim was recovered is a kutchra well, which was used for

human consumption. The accused/appellant is the step mother of the victim, but none of the witnesses has stated that there was any enmity/bitter

relationship between the victim and the accused/appellant or that she used to torture the victim so that we can come to the conclusion that the

appellant had killed the deceased.

38. It also appears from the evidence of the witnesses that though P.W.2 and P.W.3 stated before the court that they had seen the accused along

with victim going towards the parental house of the accused on Sunday i.e. 15.01.2017, but the said fact was not disclosed by both the witnesses

before the investigating officer, when their statements were recorded under Section 161 Cr.P.C. The investigating officer also confirmed the said fact

when he was examined before the trial court.

39. On the aspect of motive also, we do not find anything in the evidence of the witnesses to show that the accused/appellant had any reason to

commit the crime of murder of a four years old child. There is no history of any grudge between the victim girl and the deceased as the appellant was

the step mother of the victim. It also appears from the evidence of the witnesses that the dead body of the victim was recovered from a kutchra well.

There was no wall surrounding the well. According to the appellant in her statement under Section 313 Cr.P.C., when the victim was playing near the

well, she accidentally fell into the well and died, for which she had been blamed by her mother-in-law. Possibly, this is the manner as to how the victim

died.

40. The present case is based on circumstantial evidence and as per the settled legal position, in a case based on circumstantial evidence, all the

incriminating circumstances must be supported by reliable and clinching evidence and the circumstances proved must form a chain of events so

complete, as would permit no conclusion other than one of guilt of the accused.

41. The tests applicable to cases based on circumstantial evidence are fairly well-known. The decisions of the Apex Court and various other High

Courts recognizing and applying those tests to varied fact situations are legion. In the landmark judgment of *Sharad Birdhichand Sarda v. State of*

Maharashtra reported in 1984 vol.4 SCC 116, the Apex Court declared that a case based on circumstantial evidence must satisfy the following tests:

(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 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.

42. In the present case, we find that the prosecution has failed to prove the offence against the accused/appellant beyond reasonable doubt. Only on

the basis of last seen evidence, the accused cannot be convicted for the offence of murder, keeping in view the facts of this case. After taking all the

facts and circumstances in consideration, we do not find ourselves in conformity with the findings arrived at by the learned trial court. Accordingly, the

appeal is allowed and the conviction and sentence recorded by the learned Additional Sessions Judge, Hojai against the accused/appellant in

connection with S.C. No. 19(N)/2017 under Section 302 IPC is hereby set aside. Consequently, the appellant shall be released from custody forthwith,

if not required in any other case.

43. Send back the LCR.

44. In appreciation of the assistance provided by Mr. A. Tewari, the learned Amicus Curiae, the appropriate fee payable to him should be paid by the

State Legal Services Authority.