Shri Krishna Kanta Roy Vs State of Tripura

Court: Gauhati High Court (Agartala Bench)

Date of Decision: July 30, 2010

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 313
Evidence Act, 1872 â€" Section 106, 8
Penal Code, 1860 (IPC) â€" Section 302, 34

Citation: (2010) CriLJ 3956 : (2010) 4 GLT 332

Hon'ble Judges: U.B. Saha, J; T. Vaiphei, J

Bench: Division Bench

Advocate: P. Roy Barman, for the Appellant; A. Ghosh, Addl. P.P., for the Respondent

Final Decision: Dismissed

Judgement

T. Vaiphei, J.
This criminal appeal is directed against the judgment and order dated 26-4-2005 passed by the learned Sessions Judge,

West Tripura, Agartala in S.T. (WT/A) No. 5 of 2004 convicting the Appellant u/s 302, IPC and sentencing him to undergo rigorous

imprisonment for life with a fine of Rs. 5,000/-.

2. The case of the prosecution is that on the day before Dashami of Durga Puja of the year 2002, while the village youths of Bin Para including the

deceased Jogesh Bin under West Agartala Police Station were dancing at the puja pandal, the deceased had a quarrel with one Mukul Bin. On

hearing this, his mother, Kamala Bin (P.W. 4), rushed to the Puja pandal and sent for her other son, namely, Manoj to intervene. The said Manoj

accordingly went there and brought the deceased home. When they were returning home, the said Mukul Bin came near the gate of their house

and threatened him saying that he would meet him the next day. On the following night also, the dancing at the pandal continued and at about 8

p.m. on the same night, the Appellant whispered something to the deceased whereafter the Appellant and the deceased left the Puja pandal and

proceeded towards south. After about 20 minutes, P.W. 4 heard the cry of the deceased whereupon she rushed towards south i.e. the direction

from where she heard the cry and found the deceased lying in the house of Parshuram with profused bleeding. P.W. 4 then held the deceased and

asked him the person who caused his injuries, to which the deceased told her that the said Mukul Bin and the Appellant had inflicted the injuries.

The deceased was then taken to the hospital by an autorickshaw and on the way he was uttering in delirium ""Krishna, don"t assault me!"".

However, by the time he was examined by the Medical Officer, he had already succumbed to his injuries. On the following morning, Pradip Bin,

the brother of the deceased lodged an ejahar with the Agartala Police Station, which accordingly registered West Agartala P.S. Case No. 212/02

u/s 302, IPC. The West Agartala Police Station investigated the case and, on completion of the investigation, charge-sheeted the Appellant and the

said Mukul Bin for commission of the offence punishable u/s 302 read with Section 34, IPC. As the case is exclusively triable by the Sessions

Court, the same was committed to the learned Sessions Judge for trial. On the basis of the charge-sheet and after hearing the counsel for the

defence and the prosecution, the learned Sessions Judge framed the charge against the Appellant and the said Mukul Bin u/s 302 read with Section

34, IPC. In the course of trial, the prosecution examined twelve witnesses to bring home the charges against the Appellant and the said Mukul Bin.

The case of the defense was that of total denial. On completion of the trial and after examining the accused u/s 313, Cr. PC. the trial Court

convicted the Appellant u/s 302, IPC and sentenced him accordingly. However, the trial Court acquitted the said Mukul Bin for lack of evidence.

Aggrieved by the impugned judgment of conviction and sentence, this appeal has been preferred by the Appellant.

3. Before proceeding further and for better appreciation of the rival contentions of the counsel appearing for the rival parties, we proceed to record

the salient features of the findings of the trial Court. The trial Court rejected the dying declaration of the deceased made to P.W. 4 in the presence

of P.Ws. 6 and 7 implicating the Appellant and the non-Appellant for the crime on the ground that the same was never mentioned by her to P.W. 8

before he lodged the ejahar with the police the following day. According to the trial, nondisclosure of the names of assailants of the deceased in the

FIR lodged by P.W. 8, who is none other than the brother of the deceased, the following day clearly indicated that the deceased did not disclose

the name of his assailants to his mother (P.W. 4). However, the trial Court recorded the finding that the version of P.W. 4, P.W. 6 and P.W. 7 that

the Appellant came to the puja pandal on the night of the incident while the deceased and others were dancing and took the deceased from the

puja pandal towards south had remained un-rebutted and unshaken in spite of exhaustive cross-examination of these witnesses. The trial Court

then took the view that since it had been clinchingly established from the evidence of these witnesses that it was the Appellant who took the

deceased out of the puja pandal towards (sic) and since the deceased was found lying injured within 20 minutes thereafter, the burden was upon

the Appellant to explain as to how the deceased had sustained those injuries. The trial Court also took note of the evidence of P.Ws. 6 and 7, who

had unequivocally stated that while the deceased was being taken to the hospital in an auto-rickshaw, he on the way uttered in delirium that

Krishna, don''t assault me, I will die!"" and of the evidence of the I.O. of the case (P.W. 12) that just after the occurrence, he had raided the house

of the Appellant but had found him absconding which, according to it, was a relevant factor u/s 8 of the Evidence Act and had the effect of

destroying the plea of his innocence. Thus, from the evidence so established that the Appellant took the deceased just 20 minutes before the

incident and the witnesses heard the cry of the deceased 20 minutes thereafter and was found lying injured, that the Appellant had failed to explain

as to how the deceased sustained the injuries and that the Appellant was found absconding immediately after the incident the trial Court concluded

that the only presumption which could be drawn was that it was the Appellant who murdered the deceased. This was the basis of the conviction of

the Appellant.

4. On revisiting the evidence of P.W. 4, P.W. 5, P.W. 6 and P.W. 7, we are of the view that there is no infirmity in the view taken by the trial

Court that the so-called dying declaration of the deceased in which he was alleged to have told his mother P.W. 4 in the presence of P.Ws. 6 and

7 could not be acted upon. It may be noted that P.W. 4, in her cross-examination, revealed that Pradip Bin (P.W. 8), who lodged the ejahar,

came home after about one hour of the incident and on hearing the incident from her, he went to the police station. P.W. 8 deposed that he brought

P.W. 4 to their house from the house of Parshuram whereafter he proceeded for hospital where he met his brother and that when he returned

home from the hospital in the night, he slept in the same room with P.W. 4 and that on the following morning, he went to the Police Station to lodge

the ejahar. It is be noticed that in the ejahar lodged by him, he did not mention the names of the assailants. Now, if the deceased had disclosed the

names of the assailants to P.W. 4 within the hearing of P.W. 6 and 7, surely, any of these witnesses would have disclosed the same to him so as

enable him to name these assailants (or this assailant) in the ejahar. Under the circumstances, the so-called dying declaration cannot be believed.

The trial Court has rightly discarded this evidence. Having said that, we cannot countenance the finding of the trial Court in respect of the other

dying declaration alleged to have been made by the deceased to P.Ws. 6 and 7 when he was taken to the hospital by an auto-rickshaw. The

deceased was alleged to have stated in delirium that ""Krishna, don''t assault me, I will die"". It is the submission of Mr. PR. Barman Roy, the

learned Counsel for the Appellant, that when the deceased was admittedly in a state of delirium, how could he be held to be in a fit state of mind to

make correct declaration, and it will be absolutely unsafe to rely on such a dying declaration for convicting the Appellant. We find force in this

contention. The term ""delirium"" is defined by Concise English Dictionary. 11th Edn. to mean ""an acutely disturbed state of mind characterized by

restlessness. illusions, and incoherence of thought and speech, accurring in fever and other disorders and in intoxication"". As per this dictionary

meaning, there can be no manner of doubt that the deceased was apparently not in a fit state of mind when he uttered those words. In this

connection, it may be apposite to quote the observations of the Apex Court in Sham Shankar Kankaria v. State of Maharashtra (2007) 2 SCC

(Cri) 663, which are in the following terms:

11. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a

power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying delaration should be

of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not

as a result of either tutoring or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of

mind after a clear opportunity to observe and identify the assailant, Once the Court is satisfied that the declaration was true and voluntary,

undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying

declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence....

(Underlined for emphasis)

5. This much for the discussion on dying declaration. However, Mr. P. R. Barman Roy, the learned Counsel for the Appellant, vehemently attacks

the findings of the learned Sessions Judge for applying the ""last seen together"" circumstances to convict the Appellant. At this stage, we may note

that the learned Sessions Judge has also acted illegally in invoking Section 8 of the Evidence Act to hold that the abscondence of the Appellant just

after the occurrence was another circumstantial evidence to prove his guilt. We find force in the contention of the learned Counsel for the Appellant

that if this were held to be an incriminating circumstance, if ought to have put this circumstance to the Appellant in his examination u/s 313, Cr. P.

C. and having not done so, it could not be used as evidence against him. Once the so-called dying declarations and the fact of abscondence as a

circumstantial evidence are discarded as evidence, the only question remaining to be determined is whether the circumstances of last seen together

can be the sole basis for conviction of the Appellant. It is the contention of the learned Counsel for the Appellant that there is no evidence to prove

that the Appellant was seen together with the deseased before or at the time of the incident : the statement made to this effect made by PWs. 4, 6

and 7 could be believed. He further submits that even assuming without admitting that he was indeed last seen with the deceased just before the

latter sustained the injuries, this is a solitary circumstance and a solitary circumstance cannot be used for conviction of the Appellant, more-so,

when it is murder case involving punishment for life imprisonment. It is maintained by the learned Counsel that each and every incriminating

circumstance must be clearly established by reliable and credible evidence and the circumstances so proved must form a chain of events from

which the only irresistible conclusion about the guilt of the Appellant can be safely drawn and no other hypothesis against the guilt is possible and

that the instant case is conspicuous by the absence of proved circumstances to form a-chain of events from which the guilt of the Appellant could

be established. If the doctrine of last seen is applied on the facts and circumstances of this, submits the learned Counsel, there is likelihood of gross

miscarriage of justice. He also contends that in a case of circumstantial evidence, the prosecution is duty-bound to establish motive for the crime,

but the prosecution has miserably failed to do so in this case. In support of his contentions, he relies on the following decisions of the Apex Court :

(a) Hatti Singh Vs. State of Haryana, (b) State of Goa v. Sanjay Thakkan (2007) 2 SCC (Cri) 162 : AIR 2007 SCW 2226 , (c) Ramreddy

Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, (d) Jaswant Gir v. State of Punjab (2005) 12 SCC 438 , (e) State of U.P. Vs.

Satish, , (f) State of Orissa etc. Vs. Babaji Charan Mohanty and Another, (g) Balu Sonba Shinde Vs. State of Maharashtra, (h) Tanviben Pankaj

Kumar Divetia Vs. State of Gujarat, and (i) Dasari Siva Prasad Reddy Vs. The Public Prosecutor, High Court of A.P., He also relies on the

decisions of this Court in (i) Parmeshwar Reddy alias Baburam and Ors. v. State of Assam (2010) 2 GLR 1 , (ii) Smt. Laxmi Chakraborty and

etc. Vs. State of Tripura, Contending that there is absolutely no shred of evidence to uphold the conviction of the Appellant, he strenuously urges

this Court to allow this appeal and set aside the impugned judgment of conviction and sentence. On the other hand, Mr. A. Ghosh, the learned

Additional Public Prosecutor, submits that there is no ground for interfering with the impugned judgment, which is based on unimpeachable

circumstantial evidence. To fortify his submission, he strongly relies on the decisions of the Apex Court in (i) State of Rajasthan Vs. Kashi Ram, (ii)

State of Rajasthan Vs. Parthu, and (iii) Sahadevan v. State AIR 2003 SC 215 : 2003 Cri LJ 424.

6. In order to reassure ourselves that the deceased was last seen with the Appellant on the fateful night, we have read and re-read the statements

of PW 4, PW 6 and PW 7 upon which the trial Court concluded that they were indeed last seen together. PW 4 testified that on the night of the

incident, the villagers started dancing in the puja pandal, that she herself went there at about 8 p.m. and was sitting on the road. She then saw the

Appellant whispering something to the deceased (her son), and after hearing something from the Appellant, the latter and the deceased left the puja

pandal and proceeded towards south. She further deposed that after about 20 mintues, she heard the cry of the deceased. She then rushed

towards that direction and saw the deceased lying at the house of Parshuram with profused bleeding. Her sons and other villagers came to the spot

and removed him to the hospital. This portion of her statement were not shaken in any manner in her cross-examination, which are mostly in the

nature of denial and/or suggestion. Coming now to the deposition of PW 6, who is the brother of the deceased, he stated that in the evening of the

incident, he along with the deceased and another brother, Amarjit and other villagers were dancing at the puja pandal and that at about 9 p.m., the

Appellant and the non-Appellant (Mukul) also came to join the dancing. According to this witness, after a while, the Appellant called the deceased

and then took him towards south and after about 15 minutes, he heard the cry of the deceased. He then rushed towards the house of Parshuram

and met Ram Sur Bin on the way and was told by him that the deceased had been murdered. He further testified that when he reached the

courtyard of Parshuram, he found his mother (PW 4) sitting there holding the head of the deceased on her lap. Apart from extracting the statement

from him that the Appellant alone came to the pandal, which can be ignored considering the lapse of time, there is no material contradiction coming

out from his cross-examination except for denial and/or suggestion. Then comes the evidence of PW 7, who is also the brother of the deceased. In

his testimony, this witness deposed that on the following night of Bijaya Dashmi two years back, they were dancing in the puja pandal including the

deceased; that at that time, the Appellant come there and called the deceased towards the house of Parshuram; that after 10/15 minutes, he heard

the cry of the deceased and rushed towards the house of Parshuram and found his mother sitting on the courtyard taking the head of the deceased

on her lap. From the cross-examination of PW 7 also, nothing tangible has been brought out to impeach this part of his testimony. In our opinion,

the testimonies of these eyewitnesses tallied with each other. Under the circumstances, the evidence of these witnesses are credible and trustworthy

and can be relied on. It is thus crystal clear that the prosecution has established the factum of the presence of the Appellant at the puja pandal on

the fateful night, of his leaving together with the deceased from the puja pandal, of their proceeding towards south, of the cry of the deceased

within 20 minutes or so of their departure from the puja pandal and of PW 4 sitting at the courtyard of Parshuram with the head of the injured on

her lap and of the presence of multiple injuries on his person. At this stage, it may be observed that no dispute has been raised by the learned

Counsel for the Appellant regarding the finding of the Medical Officer, who conducted the postmortem examination on the deceased, that the

multiple injuries found on the body of the deceased were sufficient in the ordinary course of nature to cause his death.

7. In our judgment, from the evidence of PWs. 4, 6 and 7, the trial Court was perfectly correct in coming to the conclusion that the Appellant was

last seen with the deceased on the fateful night. The trial Court also carrectly observed that in the absence of any explanation by the Appellant in

the course of his examination u/s 313, Cr. P. C. as to how the deceased sustained those injuries, the only presumption which could be drawn was

that it was none other than the Appellant who murdered the deceased. The question which is to be determined then is whether the solitary

circumstance of last seen together can form the basis of conviction, against which much grievance is made by the learned Counsel for the

Appellant. At this stage, we may also note another circumstance clearly established by the prosecution against the Appellant. PW 6 in his testimony

stated that PW 4 had stated to him that the deceased was being assaulted by Mukul (non-Appellant) whereupon he brought the deceased home

and when they came near the gate of their house, Mukul came there and threatened his brother saying that he would see him the next day. He

further testified that on the following day i.e. the date of incident, he saw Mukul and the Appellant loitering nearby his house. This portion of the

examination-in-chief of PW 6 remained undenied. The aforesaid statement of PW 6 plainly shows that the Appellant developed enmity against the

deceased, most probably, at the instigation of, or to help Mukul. If there is any doubt in the minds of the counsel for the Appellant in this behalf,

such doubt can be dispelled by the observations of the Apex Court in the case of State of Rajasthan Vs. Kashi Ram, cited by the learned

Additional Public Prosecutor. This is what the top Court said:

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are

unambiguous and categoric in laying down that when any fact is specially within the knowledge of a person, the burden of proving that fact is upon

him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an

explanation which appears to the Court to be probable and satisfactory. If he does do so he must be held to have discharged his burden. If he fails

to offer an explanation on the basis of facts specially within his knowledge, he fails to discharge the burden cast upon him by Section 106 of the

Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed

on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a

criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are

especially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court consider his failure

to adduce any explanation, as an additional link which completes the chain.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the Respondent

having seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his knowledge.

Since the Respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This

circumstances, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.

8. It may be noted that in the examination of the Appellant u/s 313, Cr. P. C., the incriminating evidence that PWs. 4 and 6 had stated that at

about 8/9.30 p.m., he (the Appellant) whispered something to the ear of the deceased and took him towards south of the puja pandal, was put to

his notice, which was merely answered by him as false. The trial Court further put the evidence of PWs. 4, 6 and 7 that after about 15/20 minutes,

the cry of the deceased, they rushed towards the house of Parshuram, to the Appellant, who again simply answered that it was false. The effect of

non-explanation of proved circumstances by the accused in his examination u/s 313, Cr. P. C. was considered by the Apex Court in Aftab Ahmad

Anasari Vs. State of Uttaranchal, in the following manner:

58. This Court further notices that this Court in Vasa Chandrasekhar Rao v. Ponna Satyanaryana and Geetha v. State of Karnataka 2000 Cri LJ

3175 while explaining the law relating to circumstantial evidence has ruled that where circumstances proved are put to the accused through his

examination u/s 313 of the Code and the accused merely denies the same, such denial would be an additional link in the chain of circumstances to

bring home the charge against the accused.

59. As indicated earlier, it is proved by cogent and reliable evidence that the Appellant had committed rape on the deceased and thereafter

murdered her. Here in this case, the incriminating circumstances proved were put to the Appellant while recording his statement u/s 313 of the

Code of Criminal Procedure. In his further statement, recorded u/s 313, the Appellant has merely denied the same. Therefore, such denial on the

part of the Appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to

bring home the charge against the Appellant. The circumstances proved establish the guilt of the Appellant beyond reasonable doubt.

9. Coming now to the contention of Mr. P. R. Burman, the learned Counsel for the Appellant that motive for the murder of the deceased is not

established by the prosecution and in the absence of motive, circumstantial evidence alone cannot form the basis of conviction, in view of the

incriminating circumstances against the Appellant having been proved by the prosecution, in our opinion, an adverse inference could be drawn

against the Appellant as on his part in the injuries sustained by the deceased, which resulted in his death. The plea that the Appellant has no motive

whatsoever to have committed the murder of the deceased and the prosecution case being one of circumstantial evidence, the benefit of doubt

should be given to him would not be tenable as the absence of motive would not hamper the conviction when the circumstances relied upon by the

prosecution were proved to the hilt.- See Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police, That apart, as already noted by us

earlier, this is not exactly a case where there is absence of motive. In any case, we are fortified in our view by the observations of the Division

Bench of the Delhi High Court in Hakish J. Mal Vs. State, which read thus:

27. This is a case of circumstantial evidence. There is no direct evidence. Circumstantial evidence is sometimes contrasted with direct evidence in

that facts in issue are indirectly inferred rather than directly perceived. In cases of circumstantial evidence the question of motive assumes

importance. But we know from experience that atrocious crimes have been committed from very slight motives. A leading authority says:

Motive in this sense is not relevant to responsibility (guilt or innocence), though it may be relevant to proof or to the quantum of punishment. The

prosecution may prove motive for the crime if it helps them to establish their case, as a matter of circumstantial evidence : but they are not legally

bound to prove motive, because a ''motiveless'' crime is still a crime.

(Glanville Williams - Text Book of Criminal Law (1978) page 56)

10. Thus, the net result of the foregoing discussion is that the prosecution has clinchingly established the following circumstances:

1. On the fateful night, the Appellant was found present at the puja pandal where the deceased was dancing with co-villagers.

2. He was seen leaving with the deceased and proceeding towards south on the direction of the house of Parshuram.

3. Within twenty minutes of his departure with the deceased from the puja pandal, the deceased was heard crying.

4. PW 4 was found sitting at the courtyard of Parshuram with the head of the deceased on her lap.

5. The deceased was found with multiple injuries on different parts of his body including his head.

6. On the previous night of the occurrence, there was quarrel between the deceased and Mukul (the non-Appellant) at the same puja pandal.

7. On the morning of the incident, Mukul was seen with the Appellant loitering near the house of the deceased.

8. Even after his arrest or during the trial, the Appellant did not offer any explanation as to how and when he parted company with the deceased

nor did he offer any exculpatory explanation to discharge the burden u/s 106 of the Evidence Act.

11. In our opinion, the cumulative effect of the aforementioned facts and circumstances taken together is conclusive in establishing the guilt of the

Appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence

of the Appellant. The chain of circumstances is such as to show that within all human probability the murder of the deceased was committed by

none other than the Appellant. As already observed, the Appellant merely claimed in his examination u/s 313 of the Code that the circumstances

proved against him were false. Such claim and his failure to explain the circumstances proved against him will have to be treated as additional links

in the chain of circumstances to bring home the charge against him. Thus, in our judgment, the circumstances proved establish the guilt of the

Appellant beyond reasonable doubt. Men may lie, but circumstances never. We have carefully perused the various decisions cited by the learned

Counsel for the Appellant, but, we are afraid, they pale into insignificance in the light of State of Rajasthan Vs. Kashi Ram, , Aftab Ahmad Anasari

Vs. State of Uttaranchal, , Hakish J. Mal Vs. State, . Resultantly, the impugned judgment of conviction and sentences does not suffer from any

infirmity calling for our interference.

12. For what has stated above, we do not find any merit in this appeal, which is hereby dismissed. The Appellant shall serve out the remaining part

of his sentences. Transmit the L. C. record forthwith.