

(2013) 10 CAL CK 0008

Calcutta High Court

Case No: C.R.A. No. 147 of 2008

Subhas Chandra Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Oct. 9, 2013**Citation:** (2014) 1 CHN 724**Hon'ble Judges:** N. Patherya, J; Asim Kumar Roy, J**Bench:** Division Bench**Final Decision:** Dismissed

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### Judgement

Asim Kumar Roy, J.

This appeal is directed against the judgment and order dated 30-1-2008 and 31-1-2008 respectively passed in Sessions Case No. 115 of 2003 by learned Additional Sessions Judge, 2nd Court, Dakshin Dinajpur thereby convicting the appellants under sections 302/34 of the IPC and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs. 20,007/- in default to suffer rigorous imprisonment for one month each. The appellants were found not guilty to the charges under sections 498A/304B of the IPC and were acquitted accordingly of the said charges. Factual matrix of the prosecution case is that Shibani Mondal was given in marriage with appellant Subhas Ch. Mondal on 18th day of Baisakh, 1407 B.S. corresponding to 1st May, 2000 according to Hindu Rites and Customs. After marriage she started living at her matrimonial home at village Lohajung under P.S. Kusmundi, District-Dakshin Dinajpur. Six months after the marriage appellant Subhas Ch. Mondal took a sum of Rs. 5,000/- from the father of the victim for starting a tailoring shop and he again took another sum of Rs. 5,000/- six months thereafter for improvement of the said shop. After expiry of another six months Subhas Ch. Mondal had been to his father-in-laws house and demanded a cash of Rs. 10,000/- as his tailoring shop was not running well. The informant, father of the victim refused to pay the said sum. Thereafter the victim was subjected to physical and mental torture. On 19-7-2002 appellant Subhas Ch. Mondal's uncle and his

sister's husband came to the house of the de facto complainant and reported that the condition of Shibani was serious. The informant rushed to the house of the appellants and found his daughter hanging from the ceiling and according to him the death of his daughter was unnatural.

2. He submitted a written complaint at Kusmundi police station. On the basis of that complaint Kusmundi police station Case No. 53 of 2002 dated 19-7-2002 u/s 304B of IPC was started against the appellants. The investigation was undertaken and in course of investigation Investigating Officer submitted a prayer for adding section 302 of IPC.

3. On completion of investigation charge sheet under sections 498A/304B/302/34 of IPC was submitted against the appellants. The case was committed to the Court of Sessions, Dakshin Dinajpur, Balurghat and the same was subsequently transferred to the Additional Sessions Judge, 2nd Court, Dakshin Dinajpur at Balurghat for trial. On receipt of the case on transfer the Additional Sessions Judge, 2nd Court, Dakshin Dinajpur framed charge against the appellants under sections 498A/304B/302/34 of IPC by explaining the substance of the charge to the appellants to which they pleaded not guilty and claimed to be tried.

4. In order to prove the case the prosecution examined in all 12 witnesses and a number of documents including inquest report and post-mortem report which have been exhibited. At the close of the trial the appellants were examined u/s 313 Cr.P.C. On analysis of the evidence on record the Additional Sessions Judge, 2nd Court, Dakshin Dinajpur found appellants not guilty for the offence punishable under sections 498A/30B of IPC but found them guilty for the offence punishable u/s 302 of IPC and passed the impugned judgment and order of conviction and sentence. In this backdrop this appeal was filed.

5. Mr. Milon Mukherjee, learned Senior counsel appearing for the appellants have contended that more than one first information report were filed. All the first information reports have not been produced before the Court. The Exhibit-1 is not the only F.I.R. All the witnesses of the inquest report and the closed door neighbour of the appellants have not been examined. There was no allegation at the time of inquest that Shibani was murdered. There is nothing on record to show that the death of Shibani is homicidal. Autopsy Surgeon did not find any blood or hemorrhage in the site of fracture of hyoid bone. Postmortem record does not state that the death of the victim was homicidal in nature. P.W. 11, Autopsy Surgeon was not competent as he was not a recognised Autopsy Surgeon. Post-mortem report is silent regarding the dissection and the injury appearing on the subject (dead body of the victim). The dead body was transported by lorry covering a period of 17 hours. There was every possibility that the hyoid bone might have been fractured at the time of transportation of the dead body. Post-mortem report cannot be taken into account as the signature of the Autopsy Surgeon has not been exhibited. The judgment and order of conviction and sentence be interfered with and set aside.

6. Mrs. Kakoli Chatterjee, Learned Counsel appearing for the State has contended that uncle of appellant Subhash Ch. Mondal and his sister's husband informed the parents of the victim Shibani regarding her serious condition and having learnt about the said condition they rushed to the house of the appellants being the matrimonial home of their daughter Shibani and found their daughter in partially hanging condition. Autopsy Surgeon has opined that the death of Shibani was due to asphyxia following strangulation. He has stated about the knot and ligature mark appearing around the neck of the Shibani, the victim. The death of the victim was homicidal in nature. She has cited the decisions reported in [Satya Narayan Tiwari @ jolly and Another Vs. State of U.P.](#), . She has contended that the doctor is to be treated at par with other witnesses. The impugned judgment and order of conviction may not be interfered with.

7. It is an admitted fact that Shibani, daughter of de facto complainant Krishna Ch. Mondal was given in marriage with appellant Subhas Ch. Mondal on 18th day of Baisakh, 1407 B.S. corresponding to 1st May, 2000 according to Hindu Rites and Customs. She was residing with her husband and in-laws at her matrimonial home at village Lohajung under P.S. Kushmundi, Dakshin Dinajpur. She has died at her matrimonial home on 18-7-2002. Her death was unnatural. Appellants faced charge for the offence punishable under sections 498A/304B/302/34 of IPC. On appreciation of the evidence on record the Additional Sessions Judge, 2nd Court, Dakshin Dinajpur found all the appellants not guilty to the charges under sections 498A/304B of IPC. They were acquitted accordingly of the said charges. No appeal has been filed by the State challenging the said order of acquittal. The appellants being aggrieved by the order of conviction and sentence for the charge u/s 302 IPC preferred this appeal. Therefore, we concentrate and confine ourselves to the finding of the learned Court below in connection with the charge u/s 302 IPC.

8. P.W. 1, 5, 7 and 8 are scribe brother-in-law (sister's husband), father, mother and brother of the victim respectively. They have stated in their evidence that uncle of Subhas, appellant and his sister's husband arrived at the house of Shibani's father on 19th July, 2002 around 9.30 a.m. and informed them about the critical condition of Shibani. They thereafter rushed to the house of the appellants and found Shibani in hanging condition. None of the appellants were present though at the time of inquest on the dead body of Shibani appellant Narayan Ch. Mondal was present.

9. P.W. 11, Dr. Anup Kumar Kar is a Medical Officer (Surgeon) who conducted the post-mortem examination over the dead body of Shibani and found ligature mark around her neck without any gap at the site of knot and knot was placed on the left side of the neck. The hyoid bone was fractured on the right side. He did not find any secretion of saliva at the angle of mouth. The mark of secretion of saliva at the angle of mouth is must in case of ante-mortem hanging. Even in the case of partial hanging, the gap of 2" to 3" on the left side of neck posterior region will be found. As he did not find any such symptom he came to the positive finding that it was a

case of strangulation and accordingly recorded his opinion in the report. He was cross-examined at length and in such cross-examination he has stated that he does not agree to the suggestion that the hyoid bone may be fractured for various reasons apart from strangulation such as transportation of dead body to the mortuary from the place of occurrence or "Surgeon induced breaking" during post-mortem. He has stated further in his cross-examination that generally there cannot be any fracture of hyoid bone in case of suicidal hanging.

10. P.W. 2, Pranab Kumar Ghosh B.D.O.-cum-Executive Magistrate of Kushmundi, on 19-7-2002 held inquest over the dead body of the victim Mondal, wife of the appellant. The inquest report has been marked as Ext. 2 wherefrom it appears that the body was in half standing position and both the knees touched the floor. The neck portion was tightly fastened by a loop of nylon rope. Eyes were half closed. Grips were not also fully closed and tongue was protruding. A secretion from vagina and anus was also found near the dead body.

11. On making critical analysis of inquest report (Ext. 2), post-mortem report (Ext. 8) and the evidence of P.W. 11 Dr. Anup Kumar Kar, Autopsy Surgeon it reveals that:

- (1) Tongue of the victim had protruded,
- (2) Secretion from vagina and anus found near the dead body,
- (3) No secretion of saliva at the angle of mouth,
- (4) Fracture of hyoid bone on the right side,
- (5) Ligature mark around the neck without any gap at the site of knot and knot was placed on the left side of the neck,
- (6) Sign of asphyxia due to strangulation.

12. In the decision reported in 2005 (2) C.Cr. L.R. (Cal) 533 it has been observed that composition of human bone is such a peculiar composition that breaking of hyoid bone is not possible in the ordinary course either by bringing out the dead body or dispatching the same even through a primitive form of transport.

13. There is no dispute that the death of the victim occurred in her matrimonial home. The appellant husband at the time of his examination u/s 313 Cr.P.C. has stated that he was not present in the house at the time of death of his wife. He did not disclose as to where he was at that point of time. The evidence of Autopsy Surgeon and the report of inquest suggests that the death of the victim was homicidal.

14. Section 106 of the Evidence Act be looked into as the prosecution has discharged its burden to bring home the offence against the accused persons. Section 106 reads as follows:

Section 106 - Burden of proving fact especially within knowledge.◆When any fact is especially with in the knowledge of any person, the burden of proving that fact is upon him.

15. While examining the aforesaid provisions, the principles laid down by the Hon"ble Apex Court in [Trimukh Maroti Kirkan Vs. State of Maharashtra](#), is relied on. The relevant paragraph is set out below:

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

16. In the present case, the appellants are the husband and in-laws of the victim and as such the burden was upon them to prove how the victim met an unnatural death since that fact was within their special knowledge. If the appellants failed to do so, it is to be held that they failed to discharge the burden cast upon them by section 106 of the Indian Evidence Act - AIR 2002 SC 144 (State of Rajasthan vs. Kashi Ram).

17. On appreciation of the evidence on record it emerges that the opinion of Autopsy Surgeon is specific and the said opinion is also in conformity with the authority HWV Cox's Medical Jurisprudence and Toxicology (Seventh edition) page 361 that in case of ligature strangulation tongue is generally protruded, there will be an absence of running out saliva of the mouth and it is commonly seen that there will be an involuntary discharge of the faeces and urine.

18. Viewed in the light of the aforestated facts and circumstances, the impugned judgment and order of conviction dated 30-1-2008 and 31-1-2008 respectively passed in Sessions Case No. 115 of 2003 by the Additional Sessions Judge, 2nd Court, Dakshin Dinajpur calls for no interference and is hereby affirmed.

19. In the result the appeal fails and stands dismissed. Urgent Photostat certified copies of this order, if applied for, be given to the parties on usual undertaking.

N. Patherya, J.

I agree.