
(1997) 2 ILR (Cal) 252

Calcutta High Court

Case No: Criminal Appeal No. 350 of 1990

Kesto Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Feb. 25, 1997

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 201, 302, 34

Citation: (1997) 2 ILR (Cal) 252

Hon'ble Judges: Gitesh Ranjan Bhattacharjee, J; Debi Prasad Sircar, J

Bench: Division Bench

Advocate: Dilip Kumar Dutt, Arup Chandra Chatterjee and Jayashree Chakraborty, for the Appellant; Kazi Safiullah and Sushil Mahato, for the Respondent

Judgement

Gitesh Ranjan Bhattacharjee, J.

This appeal is directed against the judgment and orders of sentence passed by the learned Additional Sessions Judge, 4th Court, Burdwan in Sessions Case No. 26 of 1988/ Sessions Trial no". 2 of 1987. By the impugned judgment the learned Court below convicted the three Appellants u/s 302/34 Indian Penal Code and also u/s 201 Indian Penal Code and sentenced them to imprisonment for life and to a fine of Rs. 2,000.00 each, in default to Rigorous Imprisonment for six months for their conviction u/s 302/34 Indian Penal Code and also to Rigorous Imprisonment for seven years each and to a fine of Rs. 1,000.00 each, in default to Rigorous Imprisonment for three months each for their conviction u/s 201 Indian Penal Code. The sentences, were, however, directed to run concurrently. The present appeal is directed against the said orders of conviction and sentence.

2. The prosecution case, in short, is that in the evening of the March 14, 1984 a married woman aged about 18 years, Mira, was murdered by the accused persons in the house of her husband by strangulation and thereafter her dead body was hung from the beam of

the room stimulating it to be a case of suicide. It may be mentioned here that the Appellant-accused No. 2 Babulal Ghosh is the husband of the deceased Mira and the Appellant-accused No. 1, Kesto Ghosh is her father-in-law. The Appellant-accused Dilip Ghosh is the cousin brother of the husband of the deceased. It is the further prosecution case that in that evening at about 7/7.30 p.m. while P.W. 1 Ashok Kr. Mallick, the brother of the deceased Mira and P.W. 2 Subol Mallick" and P.W. 3 Santosh Mallick were passing along the path by the side of the house of the Appellant Kesto Ghosh they heard some sound coming from the said house and on hearing the same they entered into the house and saw that Kesto Ghosh was standing on the varandah and on seeing them he expressed that Mira had committed suicide and on hearing the same Ashok Mallick and his two companions entered inside the room and saw that Babulal Ghosh and Dilip Ghosh were hanging the body of Mira from the beam of the room by a cloth tied to the neck of the body of Mira and on seeing the complainant Ashok and his companions the said two accused Babulal and Dilip rushed out of the room and fled away. It is also the case of the prosecution that thereafter the complainant Ashok lifted the body of Mira a little and P.W, 2 Subal cut the cloth with which her body was hung. It is the further case of the prosecution that the other persons who were there around the house of Kesto Ghosh, such as, Lalu Ghosh, Adhir Bag, Chandu Ghosh, Madhu Hazra, Monoranjana Ghosh and Ranjit Ghosh also fled away one by one. After completion of investigation police submitted charge-sheet against nine persons. Out of those nine persons who were charge-sheeted, four were discharged by the learned trial court at the stage of framing of charge as there was no material for framing charge against them and charge was framed against the remaining five accused persons including the present three Appellants u/s 302/34 Indian Penal Code and u/s 201 of Indian Penal Code. On trial, however, the learned trial Judge acquitted two of the accused persons as they were found not guilty but convicted and sentenced the remaining three, namely, the three Appellants herein" under the aforesaid sections and also sentenced them as stated above. The convicted accused persons have thereafter preferred the present appeal.

3. The prosecution have led evidence to show that the marriage between the accused Babulal and the deceased Mira took place as a sequel to an incident of forcible dragging of hand of Mira by Babulal on one occasion and the subsequent intervention of the villagers in the matter. It is also the prosecution case that although Babulal married Mira in the abovementioned circumstances yet she was not treated well by Babulal and the members of his family and she was not allowed to go to the house of her parents although situated in the same village. The death of Mira took place about 7/8 months after their marriage. It is in evidence that on the date of occurrence a Kali Puja was sheduled to be hold in that village and in order to see whether the arrangement of the Kali Puja was complete, the three witnesses P.W. 1 Ashok, P.W. 2 Subal and P.W. 3 Santosh together went to the place of Kali Puja which was at a distance of about 100/150 cubits from the house of Appellant Kesto Ghosh. It may be mentioned here that P:W. 1 Ashok Mallick is the brother of the deceased Mira, P.W. 2 Subal Mallick is the cousin brother of P.W. 1 Ashok and P.W. 3 Sontosh Mallick also a cousin brother of P.W. 1 Ashok Mallick. The

evidence of these three P.W.s, namely, P.W.s 1, 2 and 3 in substance is that in the evening of the occurrence at about 7/7.30 p.m. while they were returning from the Kaiisthan along the path adjacent to the house of the Appellant Kesto Ghosh they heard some sort of sound and then they entered the house of Kesto Ghosh and saw that Kesto Ghosh was standing on the varandah and the door of the room was open and then they three entered inside the room and saw that the Appellants-accused Babulal and Dilip were handling the body of Mira tying the same with the beam of the room by a cloth and on seeing them the said two a plants rushed out of the room by pushing them aside and fled away. As regards Kesto Ghosh it is the prosecution case that he was standing on the Varandah and he expressed that a calamity had fallen and Mira had committed suicide. According to the prosecution case, after the Appellants Babulal and Dilip rushed out of the room Ashok lifted the body of Mira a little and Subal cut the cloth which was tied to the neck of Mira, with Bonty and it was detected that Mira had already expired and her body was Said on the floor. P.W. 1 Ashok says that when, they were returning they heard a sound inside the house of Kesto Ghosh and being attracted by that sound, particularly because he knew that her sister used to be assaulted in the house of her father-in-law, he and his two other cousin brothers Subal and Santosh entered into the house of Kesto Ghosh and found Kesto Ghosh standing on the varandah in front of the room near the door and on seeing them immediately Kesto Ghosh burst into tears and told them that his daughter-in-law had committed suicide by hanging. It is also the evidence of P.W. 1 Ashok that they then immediately entered into the room and found that Babulal and Dilip were either bringing down or putting his sister tied with the beam inside the room but on seeing them Babulal and Dilip immediately left the body on the floor and fled from the room pushing arm aside. P.W. 1 Ashok next says that in order to ascertain whether his sister was alive or not he grasped the body of her sister and lifted the same a little and his cousin Subal immediately cut the piece of cloth with a straw cutting Bonty and he saw that her tongue was protruded and then they laid down the body on the floor and found her dead. It is suggested to him on behalf of the defence in cross-examination that Mira committed suicide by hanging and that on returning home from Kalitala Kesto Ghosh found Mira hanging from the beam and out of fear he shouted and they along with the other local people had gone to the house of Kesto Ghosh on hearing his shout and found that Mira was hanging from the beam. It is further suggested on behalf of the defence that they did not see Babulal and Dilip in that night in the house of Kesto Ghosh. The evidence of P.W. 1 Ashok Mailick is that on hearing shout Naba Kumar Ghosh and others came here but the inmates of the house had fled away. It is his further evidence that Ranjit Ghosh, Adhir Bag, Madhu Hazra, Lalu Ghosh who were the persons present around the house also fled away. P.W. 2 Subal Mailick wants to say that while they were passing by the side of Kesto Ghosh's house they heard some sound occurring from some confusion in the house and on hearing that they entered into the house of Kesto Ghosh and saw that Kesto Ghosh was standing on the varandah in front of the room and the door of the room was open and at that time Kesto Ghosh told them that his daughter-in-law had committed suicide by hanging and they entered into the room as the door was open and found that Dilip was holding the body and had lifted it a little and

Babulal was making attempt for tying the body with the beam and on seeing them both Babulal and Dilip immediately ran out of the room pushing them aside. He says that Ashok immediately lifted the body a little and he (Subal) collected a straw cutting Bonty with which he cut the cloth and the body was laid down on the floor. He says that a little bit of her tongue had protruded and saliva was coming down from her nose and mouth. P.W. 3 Santosh Mallick says that after entering the house of Kesto Ghosh they found Kesto Ghosh standing on the varandah in front of the room and the door was open and they also noticed that inside the room Dilip Ghosh was holding the body of Mira and Babulal Ghosh was tying a cloth with the beam of, that room and then they rushed out of that room when P.W.s 1, 2 and 3 were trying to enter the room one after another. In cross-examination he says that when they entered the room they found Mira hanging from the beam. He, however, says that he did not find any mark of injury on the body of Mira besides the mark on her throat. From the evidence of these three P.W.s, namely, P.W.s 1, 2 and 3 Ashok, Subal and Santosh it is difficult to get an exact idea of the situation associated with the body of Mira when they first saw the body. As we have seen, P.W. 3 Santosh says in cross-examination that he found Mira hanging from the beam which suggests that the process of hanging was complete by that time, although in his examination-in-chief he wanted to say that Dilip was holding the body of Mira and Babulal was tying the same with the beam of that room which would rather suggest that the process of making the body hanging was not yet complete. Then again P.W. 2. Subal says that Dilip was holding the body and lifted it a little and Babulal was making attempt for tying the body with the beam whereas P.W. 1 Ashok Mallick, as we have seen, is not sure whether Babulal and Dilip were bringing down the body or tying it with the beam, but on seeing them Babulal and Dilip left the body on the floor and fled from the room. Now if the body was found hanging from the beam as said by P.W. 3 Santosh Mallick in his cross-examination, it appears quite confusing as to how Babulal and Dilip could files away from the room after leaving the body on the floor as said by P.W. 1 Ashok. On the other hand it is the evidence of these witnesses that the cloth with which the body was found tied was cut by the P.W. 2 Subal with a Bonty and the body was then laid on the floor. Now if really Babulal and Dilip were trying to bring down the body while it was hanging which is a possibility suggested by the evidence of P.W. 1 Ashok himself, in that case the same will not be consistent with the prosecution case that the accused persons hung the body of Mira after murdering her.

4. P.W. 4, Kumari Sohagi Ghosh aged about 15 years on the date on which she gave evidence in Court is the sister of the accused Babulal. She was aged only about 11 years on the date of occurrence. Her statement was recorded by a Judicial Magistrate u/s 164 Code of Criminal Procedure. According to her statement recorded u/s 164 Code of Criminal Procedure Mira was murdered by strangulation by her brother Babulal and cousin Dilip, The gist of her statement recorded u/s 164 Code of Criminal Procedure is that in the evening of the date of occurrence she and her brother's wife Mira went to bed after finishing their dinner at about 6 p.m. and about 7 p.m. Babulal and Dilip came and awoke Mira and then suddenly Babulal placed a jute string on the throat of Mira and then

Babulal and Dilip dragged the jute string from two sides as a result of which Mira expired while waving her hands and then Dilip and Babulal hung the body of Mira from the beam of the room with the help of cloth and string. She further said that she did not tell anything although she was awake and at that time she heard that Adhir and Madhu were asking Babulal and Dilip to go away as people were coming and Babulal then placed the chain of the room and then her father came and to him she narrated that her brothers had murdered her sister-in-law, and at that time the two brothers of Mira came inside the house. This statement of P.W. 4 Sohagi, the sister of the Appellant Babulal as recorded u/s 164 Criminal Procedure Code, would prima facie implicate the accused Babulal and Dilip with the commission of murder of Mira although the same also does not wholly and consistently fit in with the prosecution version of the case inasmuch as her statement u/s 164 Code of Criminal Procedure would show that Babulal and Dilip had already left the room after hanging the body before Kesto Ghosh and the brothers of Mira had arrived there. If her version u/s 164 Code of Criminal Procedure would have been true, in that case the version of the P.W. sl. 2 and 3 that they saw Babulal and Dilip handling the body of Mira inside the room when they arrived there could not have been true. But in her evidence in Court during trial P.W. 4 Sohagi resiled from the statement she made before the Magistrate u/s 164 Code of Criminal Procedure as a result of which she was declared hostile by the prosecution. What she wants to say in that connection during trial is that she made tutored statement before the Magistrate out of fear as she was threatened with dire consequences if she did not make such statement as tutored by the police. Her evidence in Court during trial is that she was sleeping on the varanclah in front of the room and her Boudi Mira was sleeping inside the room and her father had gone to Kalitala where the Kali Puja was being held and on hearing the cries of his father she woke up and found that many of their neighbors had assembled there. She cannot say how her Boudi died, it is needless to mention that since she resiled from the statement which she made earlier u/s 164 Code of Criminal Procedure on the ground that she made such statement on being tutored and threatened by police, such statement cannot be treated as substantive evidence in this case. That apart her statement u/s 164 Criminal Procedure Code, as we have seen, also does not project a picture wholly consistent with the prosecution version of the case and rather tankers to project an aura of doubt around the prosecution version of the case thereby making it necessary to undertake a careful scrutiny before the prosecution evidence is accepted as satisfying the standard of proof beyond reasonable doubt.

5. P.W. 5 Mritunjoy Santra is the village chowkidar. He also went to the place of kali puja where he had seen Ashok, Subal, Santosh and the Appellant Kesto Ghosh amongst other persons. According to his evidence Kesto Ghosh first left the place and went to his house and a little later, say about one or two minutes after Kesto Ghosh left, he (the witness Mrityunjoy), Santosh, Subal and Ashok were also returning home and Santosh, Subal and Ashok went ahead of him and after hearing sound he had entered the house of Kesto Ghosh and found that Mira was lying dead on the floor of the room and her older brothers were also in that house, He, however, says that he could not ascertain anything regarding

the death of Mira. According to his evidence a few other persons had already come there when he entered the house of Kesto Ghosh. P.W. 6 Latika Ghosh comes to depose about ill-treatment which Mira used to receive in her father-in-laws house as reported to her by Mira, such as she was not loved by her husband and her parents-in-law and she was living in great trouble and was not given proper food etc. According to Latika's evidence she used to tell Mira that a women had to bear many troubles in her husband's house and in course of time everything would be settled. P.W. 3 Santosh is the son of the brother of Latika. P.W. 7 Lalchand Ms. Mallick and P.W. 8 Ashish Kr. Mallick came to the house of Kesto Ghosh in the evening of the date of occurrence on receiving report from Santosh about the death of Mira. According to their evidence Santosh went to their house and reported that Babulal and Dilip had hanged the body of Mira after killing her and on hearing the said news they came to the house of Kesto Ghosh. P.W. 6 Ashish found the dead body laid on the floor and also found that a piece of cloth was hanging from the beam of the room. Both of them are relations of P.W. 1 Ashok. P.W. 2 Subal is the brother of P.W. 7 Lalchand.

6. P.W. 11 Sokharlal Ghosal is an Sub-inspector of Police who held inquest on the dead body of Mira in the house of Kesto Ghosh at about 2.45 a.m. on March 15, 1985. He found the dead body lying on the floor of the room with eyes half open as recorded in the inquest report ext. 6. He also found that a little of the tangle of the deceased was protruded and blood stained saliva had come out of the mouth. He found crescent type blackish mark on the front side of the neck of the deceased. No other mark of injury, however, was found on the dead body at the time of inquest. Besides holding inquest he also seized certain articles from the room, such as one cloth about seven cubits; in length tied to the beam of the room, another piece of the same cloth about two and a half cubits in length which was lying by the side of the neck of the dead body, one jute string about four cubits in length lying on the floor and one broken piece of conch bangle lying on the floor. P.W. 9, Dr. N.C. Pal is the autopsy surgeon who held post-mortem examination on the dead body on March 15, 1984 at about 12.30 p.m. On examination he found the eyes and mouth partially open and tongue slightly protruded. He also found the face congested and blood stained froth from the mouth and nostrils. He found crescentic mark of abrasion "Vz" "xVz" on both sides of the neck and a mark low down in the neck. He did not find any other mark of injury. He also did not find any mark of violence and struggle on the dead body. He opined that the cause of death was asphyxia from strangulation which might be homicidal and ante mortem in nature. In his cross-examination he says that in his report there is no mention of the breadth of the ligature and only the position of the ligature mark has been noted as "low down the neck" but there is no note in the report as to the colour and the direction of the ligature mark. It was suggested to the autopsy surgeon in his cross-examination by the defence that the situation and the direction of the mark was above the thyroid cartilage between the larynx and the chin and was directed obliquely upward following the line of the mandible and interrupted at the back or made an irregular impression of a knot reaching the mastoid process behind the ears towards the point of suspension, and the doctor was asked whether he could contradict the suggestion as

there was no note of the direction of the ligature mark. The doctor, however, says that he did not find any such mark on the body and so there was no such note. The learned Advocate for the Appellants attracted our attention to the affirmative answers given by the autopsy surgeon to the defence suggestions in cross-examination that abrasions with haemorrhage are strongly suggestive of it's having taken place during life and that face is usually pale and placid but may be swollen and congested if the body had been long suspended. It is also put to the doctor in his cross-examination that saliva is often found running out of an angle of the mouth down on the chin and chest and this is a sure sign of hanging having taken place during life, as the secretion of saliva being a vital function cannot occur after death. The doctor agrees with that suggestion. He, however, did not make any dissection of the dead body at the ligature mark. He says that during post-mortem examination he found the internal coats of carotid vessels ruptured. It is put to him in his cross-examination whether he would agree with Modi's view that a ligature is occasionally placed round the neck after throttling to stimulate suicide but on removal of the ligature finger marks on the throat accompanied by injuries to the deeper structure would be visible thus suggesting murder. This suggestion is related to the situation, as it seems, where death is said to have been caused by throttling with finger and ligature is simulated thereafter. But apart from throttling, asphyxia obviously may be by homicidal ligature also. While the doctor agrees with the aforesaid defence suggestion he, however, says that he did not find any depression of rope. The next question put to the doctor on behalf of the defence is that he did not find any other injury on the dead body except the ligature mark on the neck and blood stained froth from the mouth and nostril. The doctor, however, answers that besides the same he also found crescentic mark of abrasions on both sides of the neck but he did not find any marks of violence or struggle on the dead body.

7. The defence have denied the presence of the Appellants Babulal and Dilip in the house when P.W.s 1, 2 and 3 went there. It is their case that they were not at all present in the house at that time and they were elsewhere and they did not dare come to the house after they got the information about the death of Mira as the Appellant Kesto Ghosh was assaulted by the brothers of Mira on the baseless allegation that they committed murder of Mira. The defence have also denied the allegation of ill-treatment or torture on Mira. Now even if the case of ill-treatment to Mira by the members of her father-in-law's house is accepted, such fact may not necessarily lead to the conclusion that she was murdered by her husband and his relations, ill-treatment may also afford a ground for commission of suicide out of disgust or frustration. We, however, do not say that from the fact of ill-treatment it should be necessarily held that it is a case of suicide. What we want to say is that ill-treatment is rather a neutral fact in the since that in a given circumstance it may lend support to the theory of homicide and to that of suicide as well in the alternative. It all depends upon the total perspective of facts, circumstances and evidence in a particular case. It is also argued on behalf of the State Respondent that there is no reason to disbelieve the evidence of P.W.s 1, 2 and 3 regarding the presence of Babulai and Dilip in the room when the said P.W.s entered there. This argument, however, receives an

encounter preliminarily from the statement of P.W.4 recorded u/s 164 Code of Criminal Procedure as proved by the prosecution which, as we have seen does not corroborate the prosecution case that Babulai and Dilip were still present there and were handling the body of Mira inside the room with door open when P.W.s. 1, 2 and 3 entered or were about to enter the room. It is true that the defence have taken a plea of alibi so far as the accused Babulai and Dilip are concerned. But even assuming that they have failed to prove the plea of alibi and even assuming that Babulai and Dilip were in fact found to be present in the room and were handling the body of Mira when P.W.s 1, 2 and 3 went there, that may not necessarily prove the prosecution case that they murdered Mira and thereafter sought to hang the dead body. There is no doubt that the presence of Babulai and Dilip in the room and their handling of the body of Mira at that time when the P.W.s 1, 2 and 3 went there, if believed, and their unsuccessful denial of their presence will indeed raise a great suspicion against them but even then it is a cardinal principle of criminal jurisprudence in the framework of our criminal law that mere suspicion, however, grave, cannot take the place of proof and the prosecution must prove the charge beyond reasonable doubt. It might be that Babulal and Dilip were trying to bring down the body of Mira which was hanging from the beam - a possibility introduced by the evidence of P.W. 1 himself, but fearing that they might be accused of murdering her they might have denied their presence all together there. There is no doubt that their denial of their presence there if such presence is otherwise established by evidence, will create a grave suspicion against them but that by itself will not be a definite proof of the charge framed against them. The question whether the charge has been proved beyond reasonable doubt will have to be considered in the background of the totality of the facts, circumstances and evidence on record instead of arriving at a conclusion only on the basis of a circumstance furnishing a strong suspicion or only on the basis of failure on the part of defence to prove alibi or of disproof of alibi. As we have seen the opinion of the autopsy surgeon itself is not definite because in his opinion the death was due to asphyxia from strangulation which might be homicidal and ante-mortem in nature". The expression "might be homicidal" includes in its fold a possibility of "might not be" also. Therefore the totality of the facts, circumstances and evidence will have to be taken into consideration before arriving at a final conclusion. The officer holding the inquest and the autopsy surgeon have spoken of crescentic mark which may be suggestive of asphyxia due to strangulation by hanging. The autopsy surgeon says that he did not find any depression of rope. Now if rope was used for strangulation it was perhaps expected that there would be a depression of rope which the autopsy surgeon did not find. Then again the tongue was found to be slightly protruding and saliva was coming out of the mouth. These features, according to medical evidence, are rather consistent with a case of suicide by hanging. Again there was no mark of injury or struggle on any other part of body of the victim. Now, if the victim was put to death by homicidal strangulation first, more so in the manner as stated by P.W. 4 Sohagi in her statement u/s 164 Criminal Procedure Code, in that event it was almost certain that the victim would have offered resistance with her hands and feet and would have in the process sustained some injury or marks of violence on some other parts of her body which were not there. The absence

of marks of struggle or violence or any other injury on any part of the body of the deceased raises a great doubt as to whether she was put to homicidal death by strangulation without leaving any mark of violence or struggle on any other part of her body. Then again according to the prosecution case the accused Babulal and Dilip were, against normal probability, carrying on their operation in the room keeping the door open and a number of on-lookers around the house who were also made accused in the case but who were either found not guilty or discharged even earlier. By reason of the nature of the alleged operation, it was expected to be carried in secrecy. But according to the prosecution case, it seems, the operation was being carried on with door open and keeping a number of on-lookers around the house, but no such on-lookers have been examined in this case. The chowkidar also saw the Appellant Kesto Ghosh at the place of Kali Puja and Kesto Ghosh came only slightly ahead of them and that being so his involvement in the alleged murder is ruled out even by the ordinary standard of preponderance of probability.

Having regard to the totality of the facts, circumstances and evidence, in our considered opinion, it would not be safe to convict any of the accused persons of the offences they have been charged with. So far as the Appellant Kesto Ghosh is concerned it must be held that the prosecution have not been able to establish their case against him even by the liberal standard of preponderance of probability. So far as the other two accused Babulal and Dilip are concerned also it must be hold in view of what we have elaborately discussed that the prosecution case as sought to be proved against them is not free from reasonable doubt and therefore they must be given the benefit of doubt in view of the totality of the facts and circumstances of the case. In the circumstances we allow the appeal and set aside the orders of conviction and sentence passed by the learned Court below and acquit the Appellants-accused persons of the charges framed against them.

Debi Prasad Sircar, J.

8. I agree.