

Prakash Sen Vs. the State

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Court : Kolkata

Decided On : Feb-29-1988

Reported in : 1988CriLJ1275

Judge : Sankar Bhattacharyya and; J.N. Hore, JJ.

Appellant : Prakash Sen

Respondent : The State

Judgement :

J N. Hore, J.

1. This is, an appeal by Prakash Sen against the judgment and order passed by Sri L.C. Banarjee, learned Additional Sessions Judge, 2nd Court, Alipore convicting the appellant under Section 302, Penal Code and sentencing him to imprisonment for life in Sessions Trial No. 2(3) of 1986.

2. The prosecution case may briefly be stated as follows:

Appellant Prakash Sen married Susama Adhikary (the deceased), daughter of Urmila Adhikary (PW2) and sister of complainant Anima Adhikary (P.W. 1) and Archana Adhikary (PW 9) about 9 months before the date of occurrence i.e. 6-9-1983. After marriage, Prakash and his wife Susama resided in the house of Prakash's father at Japur, Bongaon for 2/3 months and thereafter they lived

together in a rented house at Gandhipally, Bongaon. They finally shifted to Madhyamgram where they were living together in a rented house at the time of occurrence.

3. On 6-9-1983 Prakash and Susma came to the house of Rabi Adhikari (PW. 5), son-in-law of PW 1 Anima Adhikari, at Paschimpara, Bongaon in the morning. On the same day in the evening Prakash and Susama came to the house of Putul Sarkar (PW 10) at Japur, Bongaon where Susama's mother Urmila (PW 2) met her daughter and son-in-law and talked with them. After staying for about half an hour Prakash and Susama left the house of Putul Sarkar.

4. Around 7.00 P.M. on the same day Susama was found on the road at Peadapara, Bongaon in front of the house of one Sub hash Paramanik with her throat cut. She was unable to speak. P.W. 4 Minati Paramanik removed her to the hospital on a rickshaw at 7.15 P.M. where she expired at 7.20 P.M.

5. PW 1 Anima Adhikari lodged information with the Bongaon Police Station at 10.18 P.M. on the basis of which the police registered a case. PW 13, S.I. Samir Garai took up investigation of the case. He could not apprehend the appellant in spite repeated attempts. After completion of investigation he submitted chargesheet against the appellant showing him as absconder. The appellant was subsequently arrested and in the usual course, the case was committed to the Court of Session.

6. Upon a consideration of the evidence on record the learned Additional Sessions Judge found that the victim and the accused were found in the house of PW 5 Rabi Adhikary in the morning, that they were found together in the evening in the house of PW 10 Putul Sarkar, that thereafter they were found proceeding towards Peadapara, and that shortly thereafter the victim was found with her throat slit and almost in an unconscious state around 7.00 P.M. at Peadapara. He has further found that the relation between the appellant and his wife was strained due to the fact that the appellant was unemployed and used to extort money from his wife who was doing tailoring job and sell household articles and the appellant, therefore, has some motive, though weak, for murder of his wife. He also found that the appellant absconded for a longtime after the occurrence. The learned

Judge felt that these circumstances together with the absence of explanation consistent with the innocence of the appellant formed a complete chain of events which is consistent only with guilt of the accused and inconsistent with any reasonable hypothesis of his innocence. On such a view of the matter, the learned Judge found the appellant guilty under Section 302, Penal Code and sentenced him to imprisonment for life. Being aggrieved by the said order of conviction and sentence, the appellant has preferred the present appeal.

7. Mr. Dutta, learned Advocate appearing on behalf of the appellant has argued that there is no evidence in support of the alleged motive and the finding of the learned Judge is based on the statement of PW 8 made to the police and recorded under Section 161, Cr.P.C., which cannot be used as substantive evidence. He has further contended that the alleged abscondence of the appellant has not been proved and that even if proved, this must be excluded from consideration inasmuch as this was not put to the appellant in his examination under Section 313, Cr.P.C. The further contention of Mr. Dutta is that the sole circumstance that the appellant and the deceased were last seen together in the evening does not lead to the irresistible inference that the appellant committed the murder. Mr. Dutta has also contended that the First Information Report is hit by Section 162, Cr.P.C.

Mr. Das, learned Advocate appearing on behalf of the State has not controverted the contentions of Mr. Dutta and conceded that the order of conviction and sentence is unsupportable.

8. There is no dispute that the appellant's Wife Susama met with violent death and this has been proved by the prosecution beyond any shadow of doubt. PW 4 Minati Paramanik removed Susama to Bongaon Hospital from Peadapara. The evidence of Dr. S.R. Chakraborty, (PW 11) Superintendent of Bongaon Sub-Divisional Hospital, shows that Sqsama was brought to the hospital at 7.15 P.M. on 6-9-1983 and after admission she expired at 7.20 P.M. PW 11 who conducted autopsy on the dead body of Susama on 7-9-1983 found the following injuries:

One incised wound on the throat in the neck caused by a sharpcutting weapon on the left lateral part of the neck arund front of the neck up to right lateral part of the neck from left to right covering the frontal part of the throat. All vessels of the neck

with trachea and oesophagus were cut completely in front of the neck.

Death in the opinion of the doctor, was due to shock and haemorrhage as result of the injury mentioned above which was ante-mortem and homicidal in nature. According to the doctor after sustaining such injury it was not possible for her to speak or remain alive for more than an hour or so. There is, therefore, no doubt that it is a case of gruesome murder perpetrated in a most cruel and inhuman manner.

9. The next question - and the crucial one - is whether the appellant was responsible for the death of the deceased

There is no direct evidence of eye witness implicating the appellant. The prosecution case rests entirely on circumstantial evidence. The circumstances relied on by the prosecution are as follows:

(1) The relation between the appellant and his wife was strained and the appellant had motive for murder;

(2) The appellant and the deceased were last seen together in the evening some time before the occurrence;

(3) Absence of the appellant after the occurrence.

10. Before we proceed to examine the evidence in support of the alleged circumstances we may dispose of the objection raised with regard to the First Information Report (Ext. 1). The First Information Report was lodged at 10.18 P.M. on 6-9-1983 and according to PW 13, after registering a case on the basis of the First Information Report he took up investigation and left for Peadapara at 10.30 P.M. and reached there at 10.40 P.M. The consistent evidence of PWs 1, 2, 5, 9 and 10 is that before the lodging of the First Information Report some police officer came to the house of these witnesses and made enquiries regarding the death of Susama and disclosed to them that Susama had been murdered. All these witnesses including complainant PW 1 came to know about the murder of Susama for the first time from the said police officer. It is clear, therefore, that police had already received information about the murder of Susama which was a cognizable

offence and started investigation. Ext. 1 is, therefore, hit by Section 162, Cr.P.C. and cannot be treated as the First Information Report in this case.

11. With regard to the alleged motive, there is absolutely no evidence in support of it. Both PWs 1 and 2 have stated that they do not know anything about the relationship between the appellant and his wife. According to PW 1, Prakash used to sell lungis etc. PW 2, mother of the victim has stated that Prakash had a grocery shop and his wife Susama did tailoring job. PW 8 Sova Sen, mother of the appellant, also states that both Prakash and Susama had tailoring job. PW 8 has stated that the Prakash and Susama had a happy conjugal life and they had no dispute or quarrel. She was declared hostile and confronted with her statement made to the police and recorded under Section 161, Cr.P.C. to the effect that Prakash was not doing any work and his newly married wife was doing tailoring job and Prakash used to take money from his wife and by selling household articles he used to spend money lavishly and for all these there was strained relation between them. It is most unfortunate that the learned Judge used this statement of PW 8 made to the police and recorded under Section 161, Cr.P.C. as substantive evidence and held that there was motive for murder though such motive was not strong. The learned Judge has observed as follows:

That statement before the police should not be rejected as it is something improper to suggest that whatever police does is wrong or motivated or purposive...that considered as a whole it will not be proper to suggest that there was no motive for murder at all but such motive was weak'. It is most unfortunate that the learned Judge is not aware of the provisions of Section 162, Cr.P.C. which impose a complete ban on the use of statements recorded under Section 161 Cr.P.C. for the purpose of corroboration or as substantive evidence. Such a statement can be used by the accused, and with the permission of the court, by the prosecution, only for the purpose of contradicting the witness who has made such a statement in the manner provided by Section 145 of the Evidence Act and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness but for the purpose only of explaining any matter referred to in the cross-examination. The prosecution has hopelessly failed to prove the alleged motive for murder.

12. Let us next consider the circumstance No. 2. The unchallenged evidence of PW 5 Rabi Adhikari, son-in-law of PW 1 Anima Adhikari, is that the appellant and the deceased paid a visit to his house on the day of Susama's death in the morning. He left home in connection with his work and when he returned at mid-day he found that the appellant and his wife had already left his house. PW 9 Archana Adhikari, sister of PW 1 Anima Adhikari and the deceased, has also deposed that she saw the appellant and her sister Susama in the house of Rabi Adhikari in the morning on the date of her death. The appellant has also admitted in his examination under Section 313, Cr.P.C. that he went to the house of Rabi Adhikari with his wife in the morning on the date of the occurrence. So the prosecution has proved satisfactorily that the appellant and the deceased were seen in the house of Rabi Adhikari in the morning of Sept. 6, 1983.

13. The next phase of the prosecution case is that the appellant and his wife Susama went to the house of Putul Sarkar (PW 10) at Japur, Bongaon in the evening. PWs. 1, 2 and 10 support this part of the prosecution case. PW 1 has deposed that on 6-9-83 she saw her sister Susama and her husband Prakash in the house of Putul Sarkar (PW 10) in the evening for the last time. She had no talk with them as she was proceeding to 'Kuthibaif where she used to work as a cook. This part of her testimony has not been challenged in the cross-examination. The unchallenged testimony of PW 2 Urmila Adhikari, mother of the deceased, is that on the day of occurrence Putul Sarkar (PW 10) called at her house and asked her to go to Putul's house to meet her daughter Susama and her husband Prakash. Accordingly she went to the house of Putul Sarkar in the evening and had a talk with Susama and Prakash. Prakash and Susama left the house of Putul Sarkar after some time and she then returned home. PW 10 Putul Sarkar has also deposed that Prakash and Susama came to her house in the evening on the date of Susama's murder. They stayed for about half an hour and then left her house together. Regarding the time of visit she has, however, been contradicted by her statement recorded under Section 161, Cr.P.C. wherein she stated that Prakash and Susama came to her house in the afternoon. Her testimony in court that Susama and Prakash came to her house in the evening cannot, therefore, be accepted. The evidence of these witnesses does not show precisely at what time Prakash and Susama left the house of Putul Sarkar. It has, however, been clearly

established that appellant Prakash and his wife Susaraa were last seen together in the house of Putul Sarkar some time around the evening.

14. The evidence discloses that the occurrence took place around 7.00 P.M. at Peadapara. There is no clear evidence regarding the distance between Putul's house and the place of occurrence. It cannot be said that the departure of the appellant and his wife from the house of Putul Sarkar was in close proximity as to the time and situation. In his anxiety to establish close proximity in time and situation the learned Additional Sessions Judge again fell into a grave error in using the statements of PW 3 Jagdish Dutta, PW 7 Mantu Dutta and PW 6 Kesto Paul made to the police and recorded under Section 161, Cr.P.C. as substantive evidence. PWs. 3, 6 and 7 have all turned hostile. All these witnesses have stated that they do not know appellant Prakash Sen or his wife. They were contradicted by their statement recorded under Section 161, Cr.P.C. Both PWs 3 and 7 stated before the police that while chatting at Peadapara mohr at about 7.00 P.M. on 6-9-1983 they saw accused Prakash Sen with his wife going through Peadapara galli and some time thereafter they heard shouts of gandogol inside Peadapara and after going in front of the house of Bibhuti Paramanik they saw a woman who had covered her throat with cloth and she was unable to speak and her wearing apparel became soaked with blood. PW 6 made a statement before the police that while standing on Gandhipally road at 7.15 or 7.30 P.M. on 6-9-1983 he saw the accused Prakash Sen leaving the place running. The learned Judge relied on such statements of the witnesses recorded under Section 161, Cr.P.C. as substantive evidence He has observed as follows:

Mantu Dutta, Jagdish Dutta and Kesto Paul are young men of the locality and almost of the same age of the accused and as such it is most likely that accused Prakash was known to them from before. That considered in the aforesaid context, it will appear that what the witnesses Jagdish and Minati Dutta and Kesto Paul and Mantu Paramanik stated before the police are true and I.O. did not manufacture such evidence to fill up the lacuna of the prosecution case to complete the chain of circumstantial evidence by their tyes men' as I.O. recorded their statements on the particular night and nothing has ever been suggested that they had any line with the police... such evidence (the statements of the witnesses recorded under

Section 161, Cr.P.C.) itself establishes another independent subsidiary chain of circumstantial evidence to supplement the prosecution case which would unerringly show complicity of the accused with the commission of the offence.' It appears that the learned Judge was greatly influenced by the statements of witnesses recorded under Section 161 Cr.P.C. which can never be used as substantive evidence. The question whether the statements were honestly and faithfully recorded by the police officer is entirely irrelevant. The proviso to Section 162(1) imposes a complete ban on the use of the statements, however faithfully recorded under Section 161, Cr.P.C. for the purpose of corroboration or as substantive evidence unless the statement comes within the purview of Sub-section (2).

15. Regarding the alleged abscondence the evidence of PW 13, the Investigating Officer, goes to show that he made searches for the appellant in the house of his father at Bongaon and the neighbouring localities but he never went to Madhyamgram in search of the appellant. The evidence of PWs 1 and 8 shows that at the material time the appellant was living in a rented house at Madhyamgram. PW 13 never went to the appellant's house at Madhyamgram. The alleged abscondence has not, therefore, been proved. Assuming however, that the appellant absconded after the occurrence, this fact must be excluded from our consideration inasmuch as this was not put to the appellant in his examination under Section 313, Cr.P.C. In *Sharad Birdhi Chand Sarda v. State of Maharashtra* : 1984 CriLJ1738 the Supreme Court has held that circumstances not put to the accused in his examination under Section 313, Cr.P.C. cannot be used against him. Their Lordships have observed as follows:

As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal P.C. they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as 1953 where in the case of *Hate Singh Bhagat Singh v. State of Madhya Bharat* : AIR 1953 SC468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal P.C. cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly

taking the view that unless the circumstance appearing against the accused is put to him in his examination under Section 342 or Section 313 of the Cr.P.C. the same cannot be used against him. In *Sharnu Balu Chaugule v. State of Maharashtra* : 1976 CriLJ492 this Court held thus:

The fact that the appellant was said to be absconding not having been put to him under Section 342, Criminal Procedure Code, could not be used against him.

16. As the alleged abscondence was not put to the appellant in his examination under Section 313, Cr.P.C. it must be totally excluded from our consideration.

17. From our above discussion it would be clear that the only circumstance that has been proved in this case is that the appellant and the deceased were last seen together in the house of Putul Sarkar some time around evening. Let us now consider if this circumstance alone is sufficient to warrant a conclusion that the appellant committed the murder of his wife. It is well settled that in cases where the evidence is of a circumstantial nature, the circumstances, duly established, should be consistent only with the hypothesis of the guilt of the accused person, i.e. the circumstances should be of such a nature as to reasonably exclude every hypothesis but the one proposed to be proved. To put it in other words, the chain of evidence must be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused person. In such cases, the court must guard itself against the danger of allowing conjecture or suspicion to take the place of legal proof. In *Hanumant v. State of Madhya Pradesh* : 1953 CriLJ129 , the Supreme Court laid down the rule regarding the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone as follows:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any

reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.' This case has been uniformly followed by the Supreme Court in a large number of later decisions. Upon an analysis of this decision, the Supreme Court has laid down 5 principles which constitute the 'Panchasheel' of proof of a case based on circumstantial evidence in Sarad Birdhi Chand Sarda's case (1984 Cri LJ 1738) (SC) (supra). The following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' be and not 'may be' 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.

18. It has further been held that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

19. Bearing the above in mind, let us see if the guilt of the appellant has been proved beyond reasonable doubt. The only circumstance proved in this case is that the appellant and the deceased were last seen together in the house of Putul Sarkar at Japur, Bongaon around evening on the day of occurrence. In our considered opinion this circumstance alone does not by itself lead to the

irresistible inference that the accused must have murdered the deceased. It may at best raise suspicion but suspicion, however, strong, cannot take the place of legal proof. In *Lakhan Pal v. State of Madhya Pradesh* AIR 1979 SC 1620 : 1979 Cri LJ 1217 the Supreme Court has held that in prosecution for offence of murder the mere fact that the accused and the deceased (the real brother of the accused) were together in the field prior to the occurrence does not by itself lead to the irresistible inference that the accused must have murdered the deceased. Following this decision a Division Bench of this Court in *Mahadev Ghosh v. The State* 1983 Cri LJ 1854 has held that the mere fact that the accused was seen together with his wife, the deceased at 5.00 P.M. some time before the occurrence does not lead to the irresistible inference that he committed the murder.

20. According to the learned Additional Sessions Judge, silence on the part of the accused or absence of explanation of his subsequent conduct consistent with his innocence is itself an additional link which completes the chain. It has been held in *Mahadev's case* (supra) that in a case resting on circumstantial evidence if the prosecution has not otherwise succeeded in establishing a chain of events which with reasonable certainty fixes the liability on the accused, the mere failure of the accused to offer any explanation consistent with his innocence cannot by itself be considered as a circumstance against the accused. In a case where the various links have been satisfactorily made out and they point to the accused as the probable assailant with reasonable definiteness and in proximity to the deceased as regards time and situation and if upon proof of such facts the accused offers no explanation which might afford a reasonable basis for a conclusion consistent with his innocence, such absence, of explanation or false explanation is itself an additional link which completes the chain. We respectfully agree with this view. In *Sarda's case* (1984 Cri LJ 1738) (supra) the Supreme Court has observed that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. Where the links in the chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the

prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court. We have already seen that the chain is incomplete and the only circumstance proved by the prosecution is insufficient to point to the guilt of the accused with reasonable definiteness. So the infirmity or lacuna in the prosecution case cannot be cured or supplied by a false defence or absence of explanation.

21. In view of what has been stated above, it must be held that the prosecution has failed to prove the charge under Section 302, Penal Code, against the appellant beyond reasonable doubt and the order of conviction and sentence passed by the court below cannot be sustained.

22. In the result, we allow the appeal and set aside the order of conviction and sentence passed by the court below. The appellant who is in jail be forthwith set at liberty, if not wanted in connection with any other case.

Sankar bhattacharyya, J.

23. I agree.

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