



HIGH COURT OF SIKKIM, GANGTOK
(Criminal Appellate Jurisdiction)

D.B. : HON'BLE SHRI SUNIL KUMAR SINHA, C.J. &
HON'BLE SHRI S.P. WANGDI, J.

Crl. A. No. 16 of 2014

Shri Bhim Biswakarma,
S/o Late Purna Singh Biswakarma,
Resident of Middle Dalapchand,
Kalimpong, West Bengal. ... **APPELLANT**

Versus

State of Sikkim. ... **RESPONDENT**

Criminal Appeal under Section 374(2) of the Cr. P.C. 1973.

Appearance :

Mr. B.K. Gupta, Advocate (Legal Aid Counsel) for the
Appellant.

Mr. Karma Thinlay, Addl. Public Prosecutor with Ms. Pollin
Rai, Asstt. Public Prosecutor for the Respondent.

J U D G M E N T (Oral)
(20.04.2015)

Following Judgment of the Court was dictated on Board by
SUNIL KUMAR SINHA, CJ.

1. This Appeal is directed against the Judgment dated
31.08.2013 passed in S.T.(F.T.) Case No. 08/2013 by the Fast Track
Court, South Sikkim at Namchi. By the impugned Judgment the



Appellant has been convicted under Sections 302 and 376 IPC and sentenced to undergo imprisonment for life and RI for seven years with direction to run the sentence concurrently.

2. The facts, briefly, stated are as under: -

2.1 Deceased, Kaushila Tamang, was aged about 8 years. She was daughter of Kanchi Tamang (PW-1). Kanchi Tamang (PW-1) and the Appellant both were working as labourers on the construction site of civil contractor Bhakta Bahadur Chettri (PW-10). The deceased used to bring tiffin for her mother. On 11.09.2009, at about 12.00 noon, the dead body of the deceased was found under a culvert, which was at a distance of about 200 feet from the construction site. Information was given to the mother of the deceased, Kanchi (PW-1), who lodged the First Information Report (Exhibit-1).

2.2 Inquest on the dead body was prepared and it was sent for postmortem. The postmortem examination was conducted by Dr. O.T. Lepcha (PW-33). He found following injuries on the dead body of the deceased: -

1. Circular abrasion 2 cm. over the left side of forehead situated 4 ½ cm. above the left eyebrow and placed 3.5 cm. left to midline.
2. Linear scratch abrasion 0.4 cm. below the left eyebrow.
3. Linear scratch abrasion 0.6 cm. over right angle of eye.



4. Abraded contusion 5 x 3 cms. Situated over the right side of face around 3.5 cm. right to the angle of mouth.
5. Two faint linear abrasion 2.5 x 0.4 cms. And 4 x 0.4 cms with a pale intervening space placed obliquely just above right side of mandible.
6. Two crescentric shaped (convexity upwards) measuring 0.3 x 0.3 cms. Placed over the upper part of the right side of the neck and 2.5 cm. below injury No. 5.
7. Two linear abrasion 3 x 0.8 cms and 5 x 0.8 cms over the chin placed over the right side.
8. Abraded contusion 0.5 x 0.5 cm over the tip of left shoulder.
9. Contused abrasion 0.5 x 0.8 cm placed just at the midline and over an area of 6 x 5 cm.
10. Hymen ruptured, bleeding present from the vaginal vault.

The Autopsy Surgeon opined that all the injuries were ante-Mortem and the cause of death was asphyxia as a result of homicidal strangulation. The injury over the private part was also suggestive of rape against the victim. The Postmortem report is Exhibit 24.

2.3 Admittedly, there was no eye witness to the incident and the case of the prosecution was based on circumstantial evidence. The learned Sessions Judge relied on the following circumstances and held that it was proved beyond all reasonable doubts that the Appellant had

committed forcibly sexual intercourse against the deceased and he also committed her murder: -

1. the Appellant, Kanchi (PW-1) and the deceased were well known to each other;
2. the Appellant was not seen on the construction site at the relevant time i.e. in between 12.00 noon and 1.30 pm;
3. the Appellant absconded from the village on the 3rd day of the incident, whereas the Investigating Officer had directed all the labourers not to leave the construction site; and
4. the mud collected from the place of occurrence and the mud found over the full pant of the Appellant were found similar in CFSL Report.

3. Mr. B.K. Gupta, learned counsel appearing on behalf of the Appellant, has argued that none of these circumstances were fully established; the circumstances set forth by the prosecution were not of conclusive nature and tendency; almost all the circumstances were capable of being explained and the chain of the said circumstantial evidence was also not complete.

4. On the other hand. Mr. Karma Thinlay, learned Addl. Public Prosecutor appearing on behalf of the State, has opposed these arguments and supported the Judgment passed by the Sessions Court.

5. We have heard counsel for the parties.

6. In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have



not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof. (Vide ***Dhananjay Chatterjee vs. State of West Bengal : (1994) 2 SCC 220; Bodh Raj @ Bodha & Ors. vs. State of Jammu & Kashmir : AIR 2002 SC 3164*** and ***State of Goa vs. Sanjay Thakran and Anr. : 2007 (4) SBR 321***).

7. In the instant case, the first circumstance i.e. the Appellant, the deceased and her mother were well known to each other was not at all incriminating. The case of the prosecution is that the Appellant and the mother of the deceased and many other labourers were working together at the construction site of Bhakta Bahadur Chettri (PW-10). How it can be an incriminating circumstance when the deceased, her mother and other labourers working there were well known to the Appellant.

8. The second circumstance was that the Appellant was not seen near the construction site in between 12.00 noon and 01.30 pm.



This also does not appear to be incriminating. The witnesses have said that they had seen the Appellant at about 01.30 pm. It is not the case that the Appellant and the deceased were seen together at the construction site. It is also not the case that even the Appellant had met the deceased on the date of incident and the deceased was seen in the company of the Appellant at any point of time. There can be many reasons for the Appellant not being present near the construction site in between 12.00 noon and 01.30 pm and thus, the above circumstance was capable of being explained and it cannot be held that it was conclusively incriminating against the Appellant. We are of the view that the learned Sessions Judge completely erred in holding the above circumstance as incriminating against the Appellant.

9. The third circumstance relied by the Sessions Judge that the Appellant absconded from the place of work on the third day of the incident. Mr. Karma Thinlay has argued that it comes in the evidence that the Investigating Officer had directed the labourers not to leave the Village without his permission and as the Appellant left the village without intimating the Investigating Officer, it was incriminating against him and was a proof of his guilt-conscious.

10. In ***Sk. Yusuf vs. State of West Bengal : AIR 2011 SC 2283***, it was held that "it is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the



doctrine of innocence. It is quite possible that he may be running away merely being suspected, out of fear of police arrest and harassment. (Vide ***Matru @ Girish Chandra vs. The State of U.P. : AIR 1971 SC 1050***; ***Paramjeet Singh @ Pamma vs. State of Uttarakhand : AIR 2011 SC 200***; and ***Rabindra Kumar Pal @ Dara Singh vs. Republic of India : (2011) 2 SCC 490***".

11. In the instant case, after the incident, the police during the course of investigation was suspecting upon the labourers that any one of them may have committed the offence. It is for these reasons, it appears that all the labourers working on the site were called by the Investigating Officer and they were directed not to leave the construction site without his permission. The Appellant, as stated, left the working site after three days and, then few days thereafter, he was arrested. Merely on the above solitary circumstance that the Appellant absconded from the construction site after three days, he cannot be held responsible for a heinous crime like rape and murder of the deceased. As stated by the Supreme Court in the above judgment, it may be the Appellant may have absconded on account of fear and police arrest because the Investigating Officer was suspecting that the offence may have been committed by the labourers working at the construction site. Therefore, the said circumstance alone was not incriminating in the fact situation prevailing.

12. The last circumstance, that the mud found on the pant and mud collected from the place of occurrence were found to be similar by



the CFSL, also cannot be held incriminating and conclusive against the Appellant. The prosecution has not brought on record that the kind of mud collected from the place of occurrence was not found at any other place in the locality or in the nearby area. There may be a possibility that such kind of mud was also found at many places in the locality and if the mud of the same quality was found on the cloth (full pant) of the Appellant, that along would not be held to be conclusive because in the above manner this circumstance was also capable of being explained.

13. On the above discussion, we find that all the circumstances set-forth by the prosecution were not fully established. These circumstances were not of a conclusive nature and tendency and almost all the circumstances were capable of being explained and the chain of circumstantial evidence was also not complete.

14. For all these reasons, we allow this Appeal and set aside the conviction and sentences awarded to the Appellant under Sections 302 and 376 IPC. The Appellant is acquitted of the charges framed against him. It is stated that the Appellant is in jail. He be set at liberty, if not required in any other case.

(S.P. Wangdi)
Judge
20.04.2015

(Sunil Kumar Sinha)
Chief Justice
20.04.2015

Approved for Reporting : Yes/~~No~~
Internet : Yes/~~No~~

pm/jk