

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 176 of 2019
with
CRAN 1 of 2019 (Old No. CRAN 1730 of 2019)

Md. Firoz Ala @ Firoj Alam
-Vs-
State of West Bengal

For the Appellant : Mr. Kallol Kumar Basu, Adv.
Md. Jannat Ul Firdous, Adv.
Ms. Tithi Majumder, Adv.

For the State : Mr. Swapan Banerjee, Adv.
Ms. Purnima Ghosh, Adv.

Heard on : 13.05.2022 & 18.05.2022

Judgment on : 18.05.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 15.02.2009 and 16.02.2009 passed by the learned Additional Sessions Judge, Fast Track Court-II, Tamruk, Purba Medinipur, in Sessions Trial Case No. 3(8)14 convicting the appellant for

commission of offence punishable under Sections 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs. 5,000/-, in default of payment of fine to suffer rigorous imprisonment for six months more for the offence punishable under Section 302 of the Indian Penal Code.

On 27.12.2013 Sk. Farhad, a 10 year old boy, had gone out to fly kite with his friends. He did not return home in the evening. His mother Rasida Begum (P.W.2) became worried and started searching for him. The boy could not be found. On the next day, that is, 28.12.2013 in the morning, one Sk. Salauddin (P.W.7) found the body of a boy lying in the canal near Simulhanda Primary School. He informed his father Sk. Badiruddin (P.W. 8) who in turn informed the family members of the missing child. Body of the child was identified by his mother and other relations. It was sent for post mortem examination. Two days later, father of the boy, Sk. Khalilur Rahaman (P.W. 1) returned to his native village from his place of work at Mumbai. He lodged written complaint alleging his son had been murdered by an unknown person and Panskura P.S. Case No. 392/13 dated 30.12.2013 was registered for investigation. Couple of days later, Sk. Khalilur Rahaman made statement implicating the appellant who was the Moulabi of a nearby mosque. It was alleged that the appellant had illicit relationship with Rasida, mother of the boy. The child had disclosed the illicit relationship to his father and

accordingly appellant nursed a grudge against him. In course of investigation, a gunny bag and rope were recovered from an open spot near the mosque. Appellant absconded and was later arrested on 12.03.2014. Charge sheet was filed against him and charges were framed under Sections 302/201 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. Prosecution examined 16 witnesses to prove its case. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellant as aforesaid.

Mr. Basu, learned Counsel appearing for the appellant submits there is no direct evidence implicating the appellant in the crime. First Information Report was registered against unknown accused. Motive to commit the crime has not been proved. There is no evidence on record that the child was last seen with the appellant prior to his death. Gunny bag and rope were recovered from an open space and did not implicate the appellant in any manner whatsoever. Appellant had gone to his native place in Bihar and was subsequently arrested at Panskura Railway Station. It cannot be said that he had absconded. Even so, mere abscondence does not establish guilt of an accused. Circumstances proved in the instant case do not lead to an irresistible conclusion of guilt against the appellant. Hence, he is entitled to an order of acquittal.

Mr. Banerjee, with Ms. Ghosh, learned Counsels for the State argues appellant had strong motive to commit the crime. The child had seen the appellant and his mother Rasida in a compromising position. He reported the matter to his father, Sk. Khalilur Rahaman who reprimanded the appellant. Hence, he nursed grudge against the child. Victim suffered ante mortem head injury and died due to drowning. Appellant had removed his body in a gunny bag tied with a rope and dumped it in the canal. The said gunny bag and rope were recovered from a spot behind the mosque. After the incident, appellant absconded and repeatedly changed his SIM Card to avoid being detected. Finally, he was arrested on 12.03.2014. These circumstances clearly establish his guilt and prove the prosecution case beyond doubt.

From the evidence on record and the submissions at the Bar it appears the prosecution case is based on circumstantial evidence. Admittedly, there is no direct evidence that the appellant had murdered the victim.

When a case is based on circumstantial evidence it is the duty of the prosecution: -

- (a) to prove all the circumstances relied upon against the appellant, beyond doubt;

(b) the circumstances so proved must form a complete chain which irresistibly points to the guilt of the accused and rules out all other possible hypothesis of innocence.

Let me examine whether the aforesaid requirement of law have been satisfied in the facts of the present case.

P.W. 1(Sk. Khalilur Rahaman) is the father of the victim child and the first informant. He deposed he used to work at Mumbai. He had telephoned his wife and wanted to talk with his son. His wife told him that his son was sleeping. When he wanted to talk with his daughter, his wife told him that his daughter was not at home. He heard a male voice in the house. On the next day, he again telephoned his son who informed him that the appellant had come to the house and had spent the night there. After two days he returned to his residence and reprimanded the appellant and told him he should not come to his house. He again left for Mumbai. After reaching Mumbai he was informed by his son that the appellant continued to come to his house. Subsequently, he received information that his son was missing. Hearing the news, he returned home. He was told, body of his son was found floating in the canal near the Simulhanda Primary School. He lodged written complaint at Panskura Police Station marked as "Exbt.-1". In course of investigation, he informed the police that he suspected the appellant had murdered his son as he had disclosed the illicit relationship between the appellant and his wife to

him. Police seized various articles in the course of investigation. He was a signatory to the seizure list.

His brothers Jaidul Ali and Sk. Safik Ali were examined as P.W. 3 and P.W. 12 respectively.

P.W. 3 (Jaidul Ali) deposed his nephew Sk. Farhad Ali was missing from 27.12.2013. They searched for him but could not trace him out. On 28.12.2013 one Badiruddin (P.W. 8) informed them that the dead body of a boy was lying in a 'khal' near Simulhanda Primary School. After receiving the news, he along with Rashida, mother of the missing boy and others went to the spot and identified the child as Farhad. Subsequently, his brother Khalilur Rahaman (P.W. 1) returned and lodged F.I.R.

P.W. 12 (Sk. Safik Ali) deposed appellant had illicit relationship with his brother's wife. He had informed his brother about such relationship. Farhad saw them in a compromising position. One day Farhad did not return home. On the next morning, his body was found in a 'khal' near the Simulhanda Primary School. On the next day, appellant went missing from the mosque. Police recovered a polythene bag lying at a spot in the rear side of the mosque. He was the signatory to the seizure list.

P.W. 2 (Rasida Begum) mother of the victim was examined in the present case. She deposed her son went missing on 27.12.2013.

On the next day, his body was found in a 'nala' near Simulhanda Primary School. Police came and interrogated her about the incident. Her husband returned home and lodged F.I.R. She was declared hostile.

In the course of cross-examination, she stated after the incident, appellant had fled from the village.

P.W. 4 (Sk. Saifuddin Ali) and P.W. 9 (Sk. Rijuan Ali) are friends of Farhad. Both of them deposed in the evening of 27.12.2013. Farhad was playing with them in a field near Simulhanda Primary School. Farhad stated he was thirsty and went away to drink water. Subsequently, he did not return.

P.W. 6 (Sk. Fajlur Rahaman) a local witness had also seen Farhad flying kite in the field near Simulhanda Primary School. He further deposed on 30.12.2013, police recovered a gunny bag containing wearing apparels of Sk. Farhad from the room of the appellant.

P.W. 7 (Sk. Salauddin) deposed on 28.12.2013 at about 5.00 a.m., he saw the body of a boy lying in a canal near the primary school. He informed his father, Badiruddin. Badiruddin, on his return, had informed the family members of the missing boy who came to the spot and identified the body, as that of Farhad.

P.W. 5 (S.I. Subhendu Pandit) is the police officer who held inquest over the body of the victim marked as "Exbt.-5".

P.W. 15 (Dr. Pradip Kumar Das) held post mortem examination over the body of the deceased. He opined cause of death was due to head injury with symptom of drowning, ante mortem in nature. He further stated death did not occur just after fall. Victim had taken few shallow gasps in moribund condition. He proved post mortem report marked as "Exbt.-10/1".

P.Ws. 13, 14 and 16 are the police witnesses.

P.W. 13 (Biswajit Halder) received the written complaint from P.W. 1 and drew up F.I.R.

P.W. 14 (Ex. SI Swadesh Majumdar) commenced investigation in the case. He drew up two rough sketch maps with index. He collected inquest as well as post mortem reports. He seized a plastic bag, coconut rope and gunny bag under a seizure list. He examined witnesses.

P.W. 16 (SI Kamrul Jaman) was the second investigating officer. He tried to trace out the whereabouts of the appellant. He went to Bihar to arrest the appellant but failed. He tried to locate the tower location of the mobile phone of the appellant. He collected SDR and CDR of the mobile phone of the appellant. He finally arrested the appellant on 12.03.2014. at Panskura Railway Station. He submitted charge-sheet.

From the aforesaid evidence on record it appeared that the victim boy namely Sk. Farhad had gone missing from his residence in

the evening of 27.12.2013. He had left his residence for flying kite with his friends in a field near Simulhanda Primary School. P.Ws. 4 and 9, his friends deposed on the fateful evening, Farhad was playing with them in the field. He felt thirsty and left the field in search of a glass of water. Thereafter he went missing. His relations searched for him throughout the night but failed. Around 5 a.m on 28.12.2013 his body was recovered in a canal near the primary school by one Sk. Salauddin (PW 7). After two days his father lodged FIR against unknown accused. Involvement of the appellant in the murder arose out of suspicion as his father (PW 1) and uncle (PW 12) suspected that the appellant nursed grudge against the victim because the latter had seen the appellant in a compromising position with his mother and divulged such fact to PW 1.

Mr. Banejee has strenuously contended this constitutes sufficient motive for the appellant to commit murder.

P.Ws. 1 and 12 i.e father and uncle of Farhad have spoken about the illicit relationship between the appellant and Rasida, wife of PW 1.

PW 12 stated victim had seen his mother in a compromising position with the appellant. PW 1 stated his son informed him over telephone that the appellant spent night at his residence. However, another brother of PW 1 namely Jaidul Ali (PW 3) is completely silent with regard to such illicit association between the appellant and his

sister-in-law, Rasida. Evidence of PW 12 with regard to child seeing the appellant and her mother in a compromising position ought to be taken with a pinch of salt. In cross-examination, he admitted he resides in a different house and had heard about such incident. Further analysis of the evidence on record would show apart from the victim, PW 12 had also informed PW 1 about the illicit relationship between the appellant and Rashida, wife of PW 1.

Thus, it cannot be said that the intimacy between appellant and her mother Rashida was divulged to PW 1 only by Farhad. PW 12, uncle of Farhad, had also informed his brother about such relationship.

In such view of the matter it is difficult for me to understand why the appellant would nurse grudge against the minor son of his lover and not against other relations of Khalilur (PW 1) like PW 12 who had also informed the former about his illicit relationship. Hence, motive to commit the crime does not appear to be convincing.

Coming to the other circumstance, namely, recovery of gunny bag and rope from the backside of the mosque of the appellant, I note that the articles were recovered from an open space which is accessible to all. Moreover, there is nothing on record to show that the gunny bag or rope so recovered were used to murder the victim or dispose of the body in the canal. No forensic report is placed on record to establish presence of blood or other bodily fluids in the seized

articles. Evidence of PW 6 that the wearing apparels of the deceased were found inside the gunny bag is an exaggeration and not corroborated by the evidence of the investigating officer Kamrul Jaman (PW 16), or other evidence on record. Hence, recovery of the gunny bag and rope from a place near the mosque does not in the absence of any forensic report establish a live link between the recovered articles and murder of the victim.

From the evidence on record it appears that the victim was last seen in a field which is adjoining the primary school. His body was also recovered from a canal adjoining the school. The mosque is situated at a considerable distance from the place where the victim was last seen alive or where his dead body was found. No evidence is forthcoming that on the fateful evening or immediately prior to the death of the victim, appellant was last seen with the child. Absence of this vital incriminating circumstance results in a clear snap in the chain which cannot be said to be complete to clinch the culpability of the appellant.

Faced with this predicament Mr. Banerjee has strongly relied on the abscondence of the appellant immediately after the incident. Referring to the evidences of PWs 3 and 12 he submits appellant went missing from the mosque immediately after the incident and did not return to the village. Second investigating officer (PW 16) was unable to arrest him in spite of raiding his native village in Bihar. He was

finally arrested on 12.3.2014 at Panskura railway station. It is settled law abscondence of an accused by itself does not establish his guilt. In ***Sk. Yusuf Vs. State of West Bengal***¹, the Apex Court held as follows:-

“31. ... 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 on being suspected, out of fear of police arrest and harassment.”

The aforesaid proposition of law wholly applies to the facts of the present case. Evidence on record shows apart from vague suspicion owing to a hunch that the appellant may have nursed grudge against the child for divulging his illicit association with her mother, no evidence was led to show that the appellant had clear access to the child soon before his death so as to complete the chain of circumstances pointing to his guilt. It may be apposite to note even PW 1 did not lodge FIR against the appellant in the first instance. After a couple of days out of suspicion the appellant was implicated in the instant case.

Under such circumstance, it is likely out of fear and apprehension of false implication and harassment the appellant may have ran away from the village and secreted himself. Abscondence of the appellant when judged in the backdrop of the fact and

¹ (2011) 11 SCC 754

circumstance of the case cannot by any stretch of imagination be treated to be conclusive evidence with regard to his guilt

In the light of the aforesaid discussion, I am of the opinion prosecution has failed to prove its case beyond reasonable doubt and the appellant is entitled to an order of acquittal.

Conviction and sentence of the appellant is set aside.

Appeal is allowed. Connected application being CRAN 1 of 2019 (Old No. CRAN 1730 of 2019) stands disposed of.

Appellant Md. Firoz Ala @ Firoj Alam shall be forthwith released from custody, if not wanted in any other case upon executing a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A Cr.P.C.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)