

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

Present:-

The Hon'ble Mr.Justice Ashim Kumar Roy
and
The Hon'ble Mr.Justice Ishan Chandra Das

CRA No.805 of 2013
Babu Molla
-Vs-
State of West Bengal
With
Death Reference 4 of 2013
With
CRA No. 179 of 2014
Manjuma Bibi
Vs.
State of West Bengal

For the Appellants : Mr. Rajdeep Majumdar,
Mr. Kushal Mukherjee

For the State. : Mr. Manjit Singh, Ld. P.P.,
Mr. Pawan Kumar Gupta

Heard on: January 20, 2015.

Judgement on: 16.02.2015

Ashim Kumar Roy, J.-

The appellant Babu Molla, appellant in CRA No. 805 of 2013 and the Appellant Manjuma Bibi, appellant in CRA No. 179 of 2014 and three others were placed on trial before the learned Additional Sessions Judge, 4th Court, Murshidabad to answer charges under section 376/34

IPC for allegedly kidnapping the victim boy Sohel Biswas aged about 5 years and for killing him so that his eyes be implanted on the appellant Babu Molla who is blind. During the pendency of the trial the accused Gulamajan Molla expired and case against him was filed. However, in the said trial both Babu Molla and Manjuma Bibi were found guilty for committing the offence punishable under section 364/34 IPC and under section 302/34 IPC, whereas the other two accuseds, viz., Rijaul Molla and Firoja Bibi were found not guilty and acquitted. While Babu Molla for his conviction under section 302/34 IPC was sentenced to death and Manjuma Bibi was sentenced to suffer imprisonment for life and to pay fine with default clause for their conviction under section 364/34 IPC, both of them were sentenced to suffer rigorous imprisonment for 8 years and to pay fine of Rs. 5,000/- each and in default to suffer rigorous imprisonment for 2 years.

The Death Reference as well as the appeals preferred by the convicts are taken up for hearing together as the same were arising out of self-same judgment and order. It appears from the perusal of the records there was no eyewitness to the commission of the offence and the case of the prosecution entirely rests on circumstantial evidence.

We find that the trial Judge at the concluding portion of his judgment has summarized the circumstances on the basis of which the appellants are convicted and those are noted below.

- (a) On April 6, 2009 in the morning the victim boy Sohel was playing in front of his house with a friend and thereafter he was found missing.
- (b) The factum of missing of the boy was testified by the PW/1 to PW7 and PW/10 to PW12 and the question of missing was not challenged by the defence during the cross-examination of the said witness.
- (c) On April 9, 2013 three days after the missing of the boy, at dawn it was found by PW/4 Hasina Bibi, a neighbour of both the appellants and the victim, the appellant Manjuma Bibi was throwing a sack in a doba, adjacent to their house and hearing the hue and cry raised by PW/4, the said sack was brought out from water and the dead body of the victim boy Sohel with both his eyes uprooted, was found inside.
- (d) On April 14, 2013 after arrest pursuant to the information given by the appellant Babu Molla and led by him, a knife, the offending weapon material Ext. 1 was seized by the

police from an adjacent doba in presence of the independent witnesses.

- (e) Appellant Babu Molla having lost his eyesight in his both eyes and his family members were in search of eye donors for eye implantation.
- (f) After the recovery of the dead body, the house of the accused persons were searched and during such search, the wall of the room inside their house were found stained with blood and photographs of wall marked with blood was exhibited during the trial, being material Ext. 2.

Since the case in hand against the appellant is entirely based on circumstantial evidence according to the well recognized principle of criminal jurisprudence, all incriminating circumstances appearing from the evidence against them must be proved beyond all reasonable doubt and when proved, same must be consistent only with the hypothesis of guilt of the accused and not be capable of being explained by any other hypothesis, namely, the innocence of the accused. Then the chain of circumstantial evidence must be so complete that would lead to the only irresistible conclusion that the accused and none else is the perpetrator of the crime. It is also the well recognized principle of criminal jurisprudence that all

incriminating piece of circumstances appearing from the evidence must be put to the accused in his examination under section 313 CrPC giving him the opportunity to explain the same. In a case based on circumstantial evidence such necessity is more rigid. It is also well settled that if there is any omission on the part of the trial court to put any such incriminating circumstances to an accused during his examination under section 313 CrPC and thereby denying the opportunity to explain the same, such circumstances ought to be excluded from consideration when it is found such omission has caused prejudice to the accused and occasioned a failure of justice. In this regard the decision of the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra*** reported in ***AIR 1984 SC 1622*** where the Apex Court considered all its previous decisions on this score is quite relevant. Now, in the case at hand, we find besides 5 formal questions, 3 other questions were put to the appellant Manjuma Bibi in her examination under section 313 CrPC. The questions so put are reproduced below,

Q.4. Look here, witness no. 4, Hasina Bibi has said in her evidence that about 3 years 10 months back early in the morning when she was going toward the latrine, she saw that you were throwing away a yellow bag into the pond near her latrine. Say what you have to say on this?

Q.5. Look here, that witness also stated that when she raised an alarm, people from the village gathered and when later the police arrived, and upon the bag being opened, the dead body of Sohel was found with his head decapitated and eyes gouged out. Say, what you have to say about this?

Q.6. See witness No. 1 Rahasan Biswas, witness No. 2 Ayub Biswas, witness No. 3 Subera Bibi, witness No. 4 Hasina Bibi, witness No. 5 Jinnat Biswas, witness No. 7 Asmat Mandal and witness No. 12 Ahsan Mandal have stated in their evidence that about 3½ years ago you and other accuseds have murdered Sohel Biswas aged 5½ years inside your house and gouged his eyes. What do you say to this?

So far as the last question that is the question no. 6 is concerned, we find from the deposition of the witnesses that the PW/1, PW/2, PW/3, PW/4, PW/5, PW/7 and PW/12 has no direct knowledge about the killing of the minor boy victim Sohel by the appellant, they are only the witnesses to a few circumstances.

Although the circumstances that the appellant Manjuma Bibi was found throwing a bag in a doba which was noticed by PW/4 Hasina Bibi and from inside the bag the dead body of the victim Sohel was found with his head decapitated and eyes gouged out but no question as regards to the circumstances relating to the motive, recovery of the offending

weapon, a knife on being led by the son of the appellant, namely, the appellant Bablu Molla who has been sentenced to death nor at the time of search of their house, the blood marks were found in the wall was put to her. However, the trial Judge merrily relied on the same. Similar is the position so far as the examination of the appellant Bablu Molla under section 313 CrPC is concerned, total 10 question were put to him, out of that 5 were formal questions, the remaining 5 are reproduced below,

Q.4. See witness no. 1 Rahasan Biswas, witness no. 2 Ayub Biswas, witness no. 3 Subera Bibi, witness no. 4 Hasina Bibi, witness no. 5 Jinnat Biswas, witness no. 12 Ahasan Mandal and witness no. 7 Asmat Mandal have stated in their evidence that you and the other accused had called 5 ½ years Sohel Biswas to your house and murdered him and gouged his eyes. What do you say to this?

Q.5. You will find that witness no. 1 Raheman Biswas, witness no. 2 Ayub Biswas and witness no. 5 Jinnat Biswas have stated in their deposition that on 21st Chaitra that is four years ago, at 8 in the morning when Sohel was playing with his friends in front of his house at that time you called him inside your house and thereafter he was found no more, rather his dead body was found with his throat slit and eyes gouged out. What do you have to say about this?

Q.6. You will find that witness Nos. 1 to 5 and witness no. 7 have further stated that from the 'doba' (pool) of Alumuddin Mondal adjacent to your house a sack was found and when the police came and opened the sack Sohel's corpse was found with the throat slit and the eyes gouged out. What do you have to say about this?

Q.7. You will find that witness No. 12 Ahasan Mondal has stated in his deposition that when the police brought you to your house you fetched a knife from your abandoned lavatory in his presence and that knife has been marked as Mat. Ext. I. What do you have to say about this?

Q.8. See the witness No. 17 S.I. Nil Madhab Nandi has stated in his evidence that you had admitted before him that you and other accuseds at first murder Sohel by throttling him and later on you slashed his throat and gouged his eyes and if you are given the opportunity you will recover the knife and eyes and you recovered the knife. This portion of the deposition has been marked as Ext. No. 13. What have you got to say in this regard?

So far as the first question is concerned neither the PW/1 nor the PW/2, PW/3, PW/4, PW/5, PW/7 and PW/12, as it transpired from the evidence on record had any direct knowledge that the said appellant and the other accused called the victim boy Sohel Biswas to their house and murdered him and gouged his eyes out. Admittedly, they have come to learn about such facts from one Sifon Molla who is a friend of the deceased

but he said Sifon Molla was not examined during the trial. Therefore, the aforesaid piece of evidence of the PW/3, PW/4, PW/5, PW/7 and PW/12 remains to be hearsay in nature and not legally admissible in evidence. The question no. 5, if not in verbatim reproduction of the question no. 4, same is similar to the previous question. The evidence of the said witnesses while Sohel was playing with his friend in front of his house, he was called by the appellant Babu Molla inside his house, one again inadmissible in evidence being hearsay in nature because all the three witnesses came to learn about such fact from Sifon Molla, a friend of the victim, who was not examined during the trial.

Coming to the next question, the question no. 6, we find although it was brought to the notice of the appellant that there is an evidence that from the doba adjacent to their house a sack was found and from inside thereof a corpse of Sohel was discovered with his throat slit and eyes gouged out but there was no reference that his mother, the co-accused Manjuma Bibi was found to throw such sack in the doba and that was seen by the PW/4 Hasina Bibi. In the next question it was put to the appellant what he confessed to the investigating officer of the case while in police custody. It appears the trial Judge failed to appreciate the statutory prohibition contained in section 25 of the Evidence Act and how far an evidence transpired from the accused himself during his police custody

under section 27 of the Evidence Act. We find no question was put to the accused about the alleged motive which has been attributed against him by the prosecution.

The learned Judge must first understand according to the Evidence Act what facts and circumstances are legally admissible and what are not. He must apprise himself before concluding the guilt of an accused relying on certain facts and circumstances about the mandate of law which makes it obligatory on his part to put all the incriminating facts and circumstances appearing in the evidence against an accused in his examination under section 313 CrPC for his explanation, if any of them doing so, such circumstances cannot be relied upon. Of course, omission of putting any question with reference to any facts and circumstances appearing from the evidence is completely inconsequential when such omission does not occasion any prejudice to the accused and failure of justice. However, in the case in hand, we have no iota of doubt the incriminating facts and circumstances appearing from the evidence against the appellant, which were not put to him during his examination under section 313 CrPC are very vital piece of evidence to consider his guilt. Therefore, by not putting the same to the appellant, the trial Judge has acted illegally and his decision has been vitiated.

The appellant is, however, not entitled to acquittal for the above lapse on the part of the trial court. We are of the opinion the ends of justice will be sub-served if after setting aside the order of conviction and sentence the accused is remitted back to the trial court for re-trial of the accuseds from the stage of their examination under section 313 CrPC in accordance with law. We believe our above observation will in future help to be a good and competent trial Judge.

In the result, we set aside the order of conviction and sentence and reject the death reference. The matter is remitted back to the trial court and it is directed within 4 weeks from the date of communication of this order, the examination of the appellant under section 313 CrPC be completed and judgment be delivered.

It goes without saying that the trial court must be proceeded strictly in terms of section 309 CrPC on day-to-day basis. We have not expressed any opinion as regards to the merits of the prosecution case. The learned trial Judge shall have the full liberty to decide the question of their conviction and the sentence that may be imposed upon them in accordance with law.

Office is directed to send down the Lower Court Record with this judgment to the court below at once.

Urgent xerox certified copy of this order be given to the parties,
if applied for, as early as possible.

(Ashim Kumar Roy, J.)

I agree.

(Ishan Chandra Das, J.)

Later
16.02.2015

After delivery of the judgment, the learned counsel for the appellant prays that the appellant be released on bail. Such prayer is vehemently opposed from the side of the State. We have considered the rival submissions of the parties and reject the prayer for bail.

(Ashim Kumar Roy, J.)

(Ishan Chandra Das, J.)