HIGH COURT GAUHATI
Bench: Justices Manish Choudhury and Robin Phukan
Date of Decision: 22nd May 2024

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 84 OF 2017

ABDUL SUKKUR …APPELLANT(S)

VERSUS

STATE OF ASSAM …RESPONDENT(S)

Legislation:

Section 302 of the Indian Penal Code (IPC)
Section 383 of the Code of Criminal Procedure (CrPC)

Subject: Criminal appeal against the conviction for murder under Section 302 IPC. The appellant challenges the judgment of the Sessions Court which convicted him for the murder of his wife, Jamila Begum.

Headnotes:

Criminal Law – Conviction for Murder – Circumstantial Evidence – Hostile Witnesses – Appeal against the conviction under Section 302 IPC based on circumstantial evidence – Trial Court convicted appellant for the murder of his wife – Prosecution witnesses P.W.2, P.W.3, and P.W.5 declared hostile – Hostile witnesses did not support the prosecution case during trial – Trial Court relied on the remaining testimonies and circumstantial evidence to convict appellant – High Court held that the testimonies of hostile witnesses were not properly confronted with their previous statements – Lack of direct evidence or witness to the act of murder – Prosecution failed to establish guilt beyond reasonable doubt – Accused entitled to benefit of doubt – Conviction set aside and appellant acquitted.

Hostile Witnesses – Role and Evidentiary Value – Analysis: Hostile witnesses (P.W.2, P.W.3, and P.W.5) did not support the prosecution's case during the trial. The prosecution failed to confront these witnesses with their previous statements recorded under Section 161 CrPC to prove contradictions. The High Court emphasized that without proper confrontation and proof, previous inconsistent statements cannot be used to contradict the witnesses. [Paras 21-23]

Circumstantial Evidence – Legal Principles – Application: In cases based on circumstantial evidence, the prosecution must establish a complete and unbroken chain of events leading to the accused's guilt. The evidence must be consistent only with the hypothesis of guilt and exclude any possibility of innocence. Suspicion, however strong, cannot replace proof beyond reasonable doubt. [Para 32]

Evaluation of Evidence – Lack of Direct Witnesses: None of the prosecution witnesses directly witnessed the murder or the assault. The evidence primarily consisted of post-occurrence witnesses who arrived after the incident. The explanation provided by the appellant during his examination under Section 313 CrPC was deemed plausible. [Paras 28-31]

Decision – Acquittal – Benefit of Doubt: The High Court found that the prosecution did not present sufficient evidence to conclusively establish the appellant's guilt. The chain of circumstantial evidence was incomplete, and the prosecution failed to rule out the possibility of innocence. Consequently, the appellant was entitled to the benefit of doubt, leading to the acquittal. [Paras 33-34]

Referred Cases:

- Sharad Birdhichand Sarda v. State of Maharashtra [1984] 4 SCC 116
- V.K. Mishra v. State of Uttarakhand [2015] 9 SCC 588
- Satpaul v. Delhi Administration [1976] 1 SCC 727
- Bhajju @ Karan Singh v. State of Madhya Pradesh [2012] 4 SCC 327
- Koli Lakhmanbhai Chanabhai v. State of Gujarat [1999] 8 SCC 624
- Prithi v. State of Haryana [2010] 8 SCC 536
- Manu Sharma v. State (NCT of Delhi) [2010] 6 SCC 1
- Ramkrushna v. State of Maharashtra [2007] 13 SCC 525

Representing Advocates:

Ms. L. Devi, Amicus Curiae for the appellant
Ms. S.H. Borah, Additional Public Prosecutor, Assam for the respondent

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

The instant criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 ['the CrPC' or 'the Code', for short] is directed against a Judgment and Order dated 12.06.2017 passed by the Court of learned Sessions Judge, Karimganj at Karimganj ['the trial court', for short] in Sessions Case no. 46/2016 [The State of Assam vs. Sri Abdul Sukkur]. By the Judgment and Order dated 12.06.2017, the accused-appellant has been convicted under Section 302, Indian Penal Code [IPC] and he has been sentenced to undergo imprisonment for life and to pay a fine of Rs. 500/-, in default of payment of fine, to undergo simple imprisonment for another period of 2 [two] months.

2. We have heard Mr. L. Devi, learned Amicus Curiae for the accused-appellant and Ms. S.H. Borah,learned Additional Public Prosecutor, Assam for the respondent State of Assam.

3. Ms. Devi, learned Amicus Curiae appearing for the accused-appellant has submitted that out of the7 [seven] nos. of prosecution witnesses, only one witness, that is, P.W.2 appeared to be present at the place of occurrence in and around the time when the incident had happened. P.W.2 and two other prosecution witnesses, that is, P.W.3 and P.W.5 were declared hostile by the prosecution. Though the prosecution side had cross-examined the three of them, that is, P.W.2, P.W.3 and P.W.5, but none of them were confronted with their previous statements so as to prove any contradiction with their testimonies adduced before the court vis-à-vis their previous statements. The learned Amicus Curiae has contended that though the incident had occurred inside the house of the accused-appellant and the deceased but they were not alone as there were other inmates in the house at the relevant time. None of the prosecution witnesses had attributed the act of assault to the accused-appellant and as such, the learned trial court had erred to reach a finding that the prosecution had brought the charge for the offence of murder beyond all reasonable doubts.

4. Ms. Bora, learned Additional Public Prosecutor appearing for the respondent State has submittedthat the entire testimonies of the prosecution witnesses who were declared hostile by the prosecution, were not washed off the records altogether. The remaining parts of the testimonies of the prosecution witnesses – P.W.2, P.W.3 and P.W.5, who were declared hostile, can definitely be relied upon along with other corroborating evidence if such remaining parts of their testimonies are found creditworthy. In the case in hand, the remaining parts of the testimonies of the hostile witnesses were found reliable enough to consider with other evidence/materials on records and the learned trial court after proper appreciation of the entire evidence/materials on record, has rightly arrived at the finding on the charge of murder. The learned Additional Public Prosecutor has submitted that from the evidence/materials on record, it has emerged that there was no possibility of any third person to commit the crime. Thus, it was the accused-appellant who had, in all probability, committed the murder of his wife. As such, there is no occasion for interference with the Judgment and Order of conviction and

sentence and the present appeal is deserved to be dismissed being bereft of any merits.

5. The learned counsel for the parties have drawn attention of the Court to the testimonies of theprosecution witnesses and have also referred to the documentary evidence that are available on case records of Sessions Case no. 46/2016.

6. We have given due consideration to the submissions of the learned counsel for the parties andhave also gone through the evidence/materials available in the case records of Sessions Case no. 46/2016, in original. We have also gone through the decisions referred to by the learned counsel for the parties at the Bar.

7. The accused-appellant had been charged with **uxoricide**. In order to bring home the charge of murder under Section 302, IPC, the prosecution side during the course of the trial had examined 7 [seven] nos. of witnesses viz. [i] P.W.1 – Mahabbat Ali; [ii] P.W.2 – Rahima Begum; [iii] P.W.3 - Sahab Uddin; [iv] P.W.4 - Dr. Zakir Hussain Laskar; [v] P.W.5 - Abdul Mannan; [vi] P.W.6 - Samsul Islam; and [vii] P.W.7 – Ashim Ranjan Das. In addition, 7 [seven] nos. of documents were exhibited and those documents were – [i] Ext.-1 – First Information Report; [ii] Ext.-2 – Seizure list; [iii] Ext.-3 – PostMortem Examination Report; [iv] Ext.-4 – Inquest Report; [v] Ext.-5 – Sketch Map of the place of occurrence; [vi] Ext.-6 – Charge Sheet; and [vii] Ext.-7 – Certified copy of General Diary Entry. Two material exhibits viz. [i] Mat.Ext.-1 – Spade; and [ii] Mat.Ext.-2 – Broken lance, were also exhibited.

8. The events leading to the institution of the First Information Report [FIR], Ext.-1 and the Charge-Sheet [Ext.-6] can be stated as follows :-

8.1. The General Diary Entry [GDE] no. 427 was registered on the basis of a telephonic informationgiven by Mahabbat Ali [P.W.1], who was the VDP Secretary of Simsimpur. The GDE no. 427 was registered at 09-00 a.m. on 30.11.2015. As per GDE no. 427 [Ext.-7], P.W.1 informed over phone that in the previous night, his co-villager viz. Abdul Sukkur, that is, the accused killed his wife by assaulting her and the deadbody was lying inside his house. The said entry was made by Ashim Ranjan Das [P.W.7], In-Charge, Nivia Police Watch Post under Ratabari Police Station, who was also the Investigating

Officer [I.O.] of the case. After registering GDE no. 427, P.W.7 recorded therein that he would make efforts to take necessary action. After registering GDE no. 427 [Ext.-7], P.W.7 proceeded to the place of occurrence, that is, the house of the accused at Village – Simsimpur along with his accompanying staff. Reaching the place of occurrence at 11-30 a.m., he found the victim, Jamila Begum [the wife of the accused] lying dead inside the house with injury marks over her body. The accused was also found at the place of occurrence as the co-villager kept him apprehended.

8.2. The I.O. of the case, P.W.7 commenced the inquest on the deadbody of the deceased, JamilaBegum at the place of occurrence at 11-30 a.m. and completed the same at 12-30 p.m. vide Ext.-4, Inquest Report. In Ext.-7, Inquest Report, it was described that the deadbody was lying in a sleeping position inside her dwelling house with cut marks on her head and knee. Ext.-7, Inquest Report was signed by P.W.1, Mahabbat Ali and P.W.3, Sahab Uddin. Opining the apparent cause of death as murder, the deadbody was sent to the Karimganj Civil Hospital for post-mortem examination. On 30.11.2015, the I.O. of the case, P.W.7 also prepared a Sketch Map of the place of occurrence vide Ext.5. Vide Ext.-2, Seizure List, the I.O. of the case, P.W.7 seized [i] one hoe, stained with little blood of about 3 feet 10 inches in length; and [ii] two pieces of wooden rolls, as shown by Rahima Begum [P.W.2], who was the daughter of the accused and the deceased, at 02-45 p.m. on 30.11.2015. P.W.3, Sahab Uddin and one Nazim Uddin signed Ext.-2, Seizure List as seizure witnesses.

8.3. The I.O. of the case, P.W.7 also arrested the accused from the place of occurrence. After conducting the inquest, the I.O. of the case, P.W.7 returned to the Police Patrol Post along with the deadbody and the accused. At around 08-15 p.m. on 30.11.2015, the VDP Secretary, Mahabbat Ali [P.W.1] had lodged the formal First Information Report [FIR] before P.W.7 and P.W.7 on receipt of the FIR, forwarded the same to the Officer In-Charge, Ratabari Police Station for registering a case under proper sections of law, while taking up the investigation of the case himself. On receipt of the FIR, the Officer In-Charge, Ratabari Police Station registered the same as Ratabari Police Station Case no. 269/2015 [corresponding G.R. Case no. 2660/2015] under Section 302, IPC [Ext.-1]. In FIR [Ext.-1], the informant, P.W.1 had ***inter alia*** mentioned that at around 08-00 a.m. on 30.11.2015, a covillager, Abdul Mannan [P.W.3] came to his house and informed him that at around 12-30/01-

00 p.m. on the night intervening 29.11.2015 and 30.11.2015, the accused, Abdul Sukkur had cut his wife inside his house with a hoe and the deadbody was lying inside the house of the accused. The informant, P.W.1 stated that he went to the house of the accused immediately thereafter and on finding the deadbody there informed the Police about the matter. As the accused was arrested, the I.O. of the case, P.W.7 produced him before the Court on 01.12.2015.

8.4. The Post-Mortem Examination [PME] on the deadbody of Jamila Begum was performed at the Civil Hospital, Karimganj on 01.12.2015 by the Senior Medical & Health Officer, Karimganj Civil Hospital viz. Dr. Jakir Hussain Laskar [P.W.4]. The Autopsy Doctor, P.W.4 in the PME Report [Ext.-3] had opined that the death was due to haemorrhage and shock as a result of the injuries sustained. In Ext.-3, PME Report, the Autopsy Doctor, P.W.4 recorded that on examination of the deadbody, he found the following injuries :-

<u>External Appearance</u> :-
An average built female aged about 45 years, whose rigor mortis present. Eyes – closed, mouth – closed.

[i] ***One incised wound of size 5”[L] x 1 ½” [W] x bone depth seen over the rightfronto-parietal region of scalp. The bones underlying the wound fractured [5”[L] x 1”[W]] and the brain matter seen coming out through the skull fracture.***
[ii] ***One incised wound [size 2 ½” [L] x 1” [W] x bone depth] seen over leftknee joint.***

<u>Cranium and spinal canal</u> :
Membrane – ruptured on right fronto-parietal region, brain and spinal cord – laceration of brain matter of right fronto-parietal region seen and hemorrhage seen over the area. Others are pale and healthy.

<u>More detailed description of injury of deceased</u> :
The injuries sustained as described above were ante-mortem.

8.5. During the course of investigation, the I.O. of the case, P.W.7 recorded the statements of a number of witnesses under Section 161, CrPC. After completing the investigation into the case, Ratabari Police Station Case no.

LAWYER
E NEWS

269/2015 [corresponding G.R. Case no. 2660/2015], the I.O. of the case, P.W.7 submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 11/2016 dated 29.02.2016 finding a prima facie case against the accused for the offence under Section 302, IPC.

9. On receipt of the Charge-Sheet, the Court of learned Sub-Divisional Judicial Magistrate [S],Karimganj as the committal court secured the production of the accused from Jail custody. As the accused stated that he would be unable to engage a lawyer, a Legal Aid Counsel was appointed on his behalf. As the copies were ready, the copies which included the statements of the witnesses recorded under Section 161, CrPC and under Section 164, CrPC [not exhibited during the trial] the FIR [Ext.-1], the Seizure List [Ext.-2], the Post-Mortem Examination Report [Ext.-3], the Inquest Report [Ext.-4], the Sketch Map [Ext.-5], and the Charge-Sheet [Ext.-6], were furnished to the accused in compliance of the provisions of Section 207, CrPC. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate [S], Karimganj by his Order of Commitment dated 09.05.2016 committed the case records of G.R. Case no. 2660/2015 to the Court of Sessions, Karimganj under Section 203, CrPC. The learned Public Prosecutor was notified accordingly. The accused was directed to be produced before the learned Court of Sessions from Jail custody on 20.05.2016. On receipt of the case records of G.R. Case no. 2660/2015, the learned Court of Sessions registered the same as Sessions Case no. 46/2016.

10. On appearance of the accused before the learned trial court from Jail custody, the learned trialcourt after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials on record, framed the following charges :-

That you on 29.11.2015 at night at about 12-30/01-00 a.m. in your house at Village – Simsimpur under Ratabari Police Station committed murder of your wife Jamila Begum by intentionally or knowingly causing her death, and thereby committed an offence punishable under Section 302 of the Indian Penal Code, and within my cognizance of this Court.

When the charge was read over and explained to the accused person, he pleaded not guilty and claimed to be tried. During the course of the trial,

the above prosecution witnesses were examined and cross-examined; and afore-mentioned documents were exhibited. After closure of the evidence from the prosecution side, the accused was examined under Section 313, CrPC and his plea was denial. The defence did not adduce any evidence.

11. After appreciation of the evidence on record and hearing the learned counsel for the parties, thelearned trial court has convicted the accused for the offence of murder, mentioned above. The accused was heard on the point of sentence and on the quantum of fine and thereafter, he has been sentenced in the manner, indicated above. In the impugned Judgment and Order of conviction and sentence, the learned trial court has observed that as a result of the death of their mother, the children would fall in the category of victims, as defined under Section 2[wa] of the Code and any fine imposed on the accused would have a bearing upon the financial condition of the minor children. It is in such view of the matter, the learned trial court has decided to impose a nominal fine of Rs. 500/-.

12. The prosecution witnesses – P.W.2 and P.W.3 – were related to the accused and the deceased. Thedeceased was the wife of the accused. P.W.2 is/was a daughter of the accused and the deceased. P.W.3 and P.W. 5 are brothers of the accused. P.W.1 who was the VDP Secretary and the informant, is also a co-villager being a resident of Village – Simsimpur. Like P.W.1, P.W.3 and P.W.5 are also residents of the same village. The houses of P.W.3 and P.W.5 are located near the house of the accused and the deceased.

13. In his testimony, P.W.1 stated that he knew both the accused and the deceased. Narrating about theincident, P.W.1 deposed that at around 08-00 p.m. about 6/7 months ago, P.W.5 came to his house and informed him that the accused had killed his wife on the previous night. On being so informed, he immediately went to the house of the accused. Reaching there, he saw the body of the victim there with a head injury. The victim was lying dead with blood oozing out from the head injury. He stated that he then informed the matter to Ratabari Police Station and the Police personnel arrived thereafter. P.W.1 exhibited the FIR [Ext.-1] with his signature therein as Ext.-1[1]. He further stated that the Police personnel took away the deadbody. When he went to the house of the accused, the accused person's brother and children were there.

13.1. In his cross-examination, P.W.1 stated that he did not witness the incident.

14. P.W.2, the daughter of the accused and the deceased, deposed in her evidence-in-chief to the effectthat on one night about 7/8 months ago, she was sleeping with her parents and her younger brother. She suddenly woke up to the sound of a commotion. Waking up, she heard her father and her mother screaming. Her father, that is, the accused told her to call her uncle, Sahab Uddin [P.W.3], whose house was on the top of the same hillock. When she returned, she saw her mother lying on the ground and her father standing there. At that time of midnight, two/three people arrived at the place. In the morning hours, many people assembled. She offered water to her mother but at about 03-00 a.m., her mother died and her mother had injuries on her head. P.W.2 stated that her statement was recorded by Magistrate.

14.1. At that stage, the prosecution declared P.W.2 as hostile and the learned Public Prosecutorsought permission from the court to cross-examine P.W.2. On being granted the permission, P.W.2 was cross-examined by the prosecution. During such cross-examination, P.W.2 declined suggestions that she had stated before the Police and the Magistrate that on the night of the incident when she woke up, she found her father assaulting her mother and her mother was writhing and trembling; and that out of fear, she went and called her uncle who came and rebuked her father. P.W.2 also denied suggestions that her father killed her mother and she had given false evidence to save her father.

14.2. In her cross-examination by the defence, P.W.2 stated that she did not state before the Policeand the Magistrate that her father killed her mother.

15. P.W.3 in his examination-in-chief, deposed that the accused was his elder brother; and that thehouse of the accused was in the same field below his house. Narrating about the incident, P.W.3 stated that in one midnight around 01-30 a.m. about 7/8 months earlier, he was sleeping in his house. At that time, P.W.2 coming to his house screaming, informed him that somebody entered their house and assaulted both her father and her mother. Then, he went to the accused person’s house and saw the victim lying with blood oozing out of her head. He found the accused standing there like a dumb struck person. P.W.3 stated that Police personnel seized one blood stained

LAWYER E NEWS

spade and two sticks. He identified his signature in Ext.-2, Seizure List as Ext.-2[1].

15.1. The prosecution declared P.W.3 as a hostile witness at that stage and the learned PublicProsecutor sought permission from the court to cross-examine P.W.3. On being granted the permission, P.W.3 was cross-examined by the prosecution. During his cross-examination by the prosecution, P.W.3 denied a suggestion that he stated before the Police that on the night of the incident, P.W.2 came and informed him that her father killed her mother.

15.2. In his cross-examination by the defence, P.W.3 stated that he did not witness the incident. Hestated that the paternal house of the deceased was at Durlavchara Tea Estate and it was about 15/20 kilometres away from their house. P.W.3 stated that nobody from there came to the house of the accused person, except the victim's elder brother. He too left before the burial.

16. Dr. Jakir Hussain Laskar [P.W.4], Senior Medical & Health Officer at the Karimganj CivilHospital had deposed, in his evidence-in-chief, to the effect that on 01.12.2015, he performed the postmortem examination on the deadbody of the deceased, Jamila Begum on Police requisition. He mentioned about the injuries, already stated hereinabove, which he found on examination of the deadbody. He exhibited the PME Report as Ext.-3 with his signature therein as Ext.-3[1].

16.1. The cross-examination of P.W.4 was declined by the defence.

17. P.W.5, in his examination-in-chief, stated that he knew both the accused and the deceased, JamilaBegum. P.W.5 testified to the effect that on one night about 3/6 months earlier, he heard a commotion emanating from the house of the accused as P.W.2 was raising an alarm. Hearing the commotion, he went to the house of the accused and found Jamila Begum lying dead in her house premises. He noticed blood stained in the place. P.W.5 further deposed that when he went to the place of occurrence, he found the presence of the accused and P.W.3 there. P.W.5 testified that he did not know anything about the incident nor he was informed by the persons present there as to how the incident took place. He stated that his statement was not recorded by the Police.

17.1. At that stage, P.W.5 was declared hostile by the learned Public Prosecutor and the learnedPublic Prosecutor had sought permission from the court to cross-examine P.W.5. On such permission being granted, P.W.5 was cross-examined by the prosecution. In his cross-examination by the prosecution, P.W.5 denied suggestions that he stated before the Police to the effect that when after going to the house of the accused hearing alarm he found Jamila Begum lying dead inside the house, P.W.3 informed him that the accused killed his wife due to a dispute. He also denied a suggestion that he stated before the I.O. of the case that it was he who informed the VDP Secretary, P.W.1 about the incident. P.W.5 stated that it was P.W.3 who informed the VDP Secretary, P.W.1 about the incident.

17.2. In his cross-examination by the defence, P.W.5 stated that the I.O. of the case did not interrogate him and he did not give any statement before the I.O. regarding the incident.

18. P.W.6, in his examination-in-chief, stated that he knew both the accused and the deceased, whodied about 8/9 months earlier. As regards the incident, P.W.6 deposed that on one morning P.W.2 came and informed him that her mother died during the previous night. He went to the house of the deceased at about 08-00/-09-00 a.m. and noticed an injury in the head of the deceased. He stated that he did not know how the deceased died.

18.1. The defence chose not to cross-examine P.W.6.

19. P.W.7, the I.O. of the case, narrated about the steps he had taken in the course of investigation,which are already stated hereinabove. In his evidence-in-chief, P.W.7 deposed that he recovered one spade and one broken stick from the place of occurrence on being shown by P.W.1, P.W.2 and other witnesses. P.W.7 further stated that it was stated to him by them that those were used by the accused in killing the deceased. He identified Mat.Ext.-1, Spade and Mat.Ext.-2, broken lance, which were seized vide Ext.-2, Seizure List. P.W.7 stated that he collected the PME Report [Ext.-3] and thereafter, submitted the Charge Sheet, Ext.-6. P.W.7 also exhibited the certified copy of the GDE no. 427 dated
30.11.2015 as Ext.-7.

19.1. P.W.7 stated that the witness, Rahima Begum [P.W.2] stated to him during investigation thaton the night of the incident, when she woke up, she had

LAWYER E NEWS

found her father assaulting her mother and her mother was writhing and trembling with fear and that thereafter, she went and called her uncle who after coming there, had rebuked her father. She had stated to him that her father killed her mother.

P.W.7 further stated that the witness, Sahab Uddin [P.W.3] stated to him that on the night of the incident, P.W.2 came to him to tell him that her father had killed her mother.

P.W.7 also stated that the witness, Abdul Mannan [P.W.5] told to him that when, on hearing the alarm, he went to the house of the accused he found the deceased, Jamila Begum lying dead in the house; and that Rahima Begum [P.W.3] informed him that due to dispute in the family, the accused had killed his wife. P.W.5 further stated to him that P.W.5 had informed the VDP Secretary, P.W.1 about the incident.

19.2. In his cross-examination by the defence, P.W.7 stated that the phone number of the caller wasnot written in Ext.-7, GDE no. 427 dated 30.11.2015. He further stated that he did not mention the cause of delay of around three hours in Ext.-2, Seizure List for seizing the items. He admitted that in the labels on Mat.Ext.-1 and Mat.Ext.-2, signatures of the witnesses were not taken and the date and time of seizure were also not mentioned. He denied a suggestion that Mat.Ext.-1 and Mat.Ext.-2 were not seized in connection with the case. P.W.7 admitted that he did not seize any blood stained cloth from the place of occurrence and he did not remember if any blood stained cloth was at the place of occurrence.

19.3. In his cross-examination, P.W.7 denied a suggestion of the defence that the witness, RahimaBegum [P.W.2] did not state to him that the accused had killed his wife.

P.W.7 also denied a suggestion of the defence that the witness, Sahab Uddin [P.W.3] did not state to him that Rahima Begum [P.W.2] had informed him that the accused had killed his wife.

P.W.7 further denied a suggestion of the defence that the witness, Abdul Mannan [P.W.5] did not state to him that when, on hearing the alarm, P.W.5 went to the house of the accused he found the deceased, Jamila Begum lying

dead inside the house and that the witness, P.W.3 informed him that due to dispute in the family, the accused had killed his wife.

20. On a meticulous examination of the testimonies of the prosecution witnesses, it is found that noneof the witnesses had stated that he or she had witnessed the incident or any act of assault. The informant, P.W.1 in the FIR [Ext.-1] as well as in his testimony had stated that he was reported about the incident by another person. In the FIR [Ext.-1], Mahabbat Ali [P.W.1] stated that he was reported about the incident by Abdul Mannan [P.W.5]. Apart from denying the suggestion that it was he who informed the informant, Mahabbat Ali [P.W.1] about the incident, Abdul Mannan [P.W.5] in his crossexamination, stated that it was Sahab Uddin [P.W.3] who informed the informant, Mahabbat Ali [P.W.1] about the incident. Ext.-7, GDE no. 427 has not thrown any light on the aspect as to who informed the informant, P.W.1 about the incident. The witness, Sahab Uddin [P.W.3] was silent on the said aspect.

21. It is relevant to advert to the aspect as to how much of and in what manner the testimonies of thethree prosecution witnesses - P.W.2, P.W.3 and P.W.5, who were declared hostile by the prosecution, are to be appreciated, considered and accepted. To what extent the afore-mentioned three prosecution witnesses did not support the case of the prosecution are already recorded hereinabove. It is to be borne in mind that discrediting a witness is not the only purpose of cross-examination by declaring a prosecution witness as hostile. When the prosecution with the leave of the court, confronts any of its witnesses with his/her previous inconsistent statement, it also does so with the expectation that the witness might admit the facts which he had made in his previous statement before the Police. Section 154 of the Evidence Act permits the prosecution, with the permission of the court, to cross-examine its own witness and the prosecution then could put any question which might be put in the crossexamination by the adverse party. As per Section 145 of the Evidence Act, when it is intended to contradict a witness by his previous statement reduced in writing, the attention of such witness has to be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. Section 162, CrPC has cast a restriction for use of the previous statement of a witness, recorded by the Police under Section 161, CrPC, except for the limited purpose of contradiction of such a witness, as indicated therein. The previous statement of a witness recorded under Section 161, CrPC can be used only for the purpose of contradicting

such witness on what he has stated at the trial in terms of the proviso to sub-section [1] of Section 162, CrPC. It is trite to mention that any previous statement of a witness recorded under Section 161, CrPC in the course of investigation is not a substantive piece of evidence. A previous statement can be used primarily for three limited purposes, ***firstly,*** to contradict such witness by the defence under Section 145 of the Evidence Act; ***secondly,*** to contradict such witness by the prosecution under Section 154 r/w Section 145 of the Evidence Act, with the leave of the court; and ***thirdly,*** for re-examination of the witness, if necessary.

21.1. It has been observed by the Hon'ble Supreme Court of India in ***V.K. Mishra and another vs. State of Uttarakhand and another***, reported in ***[2015] 9 SCC 588***, that at the time of recording the deposition of a witness, it is the duty of the trial court to ensure that the part of the previous statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of the witness is to be drawn to that part and the same must reflect in his cross-examination ***by reproducing it.*** If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it would be read while appreciating the evidence. If the witness denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process, the contradiction is merely brought on record, but it is yet to be proved. Thereafter, when investigating officer is examined in the court, his attention should be drawn to the passage ***marked*** for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the previous statement will depose about the witness having made that statement. The process involves referring to the previous statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the concerned side, be it by the prosecution or by the defence, wanted to contradict him, then the court cannot ***sou moto*** make use of any previous statement, not proved in compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction.

22. Reverting back to the case in hand, it is noticed that no parts of the previous statements of theprosecution witnesses – P.W.2, P.W.3 and P.W.5,

were ***marked*** for the purpose of confronting them to prove any contradiction. When these prosecution witnesses were asked as to whether in their previous statements they stated in the manner suggested to them they categorically denied those suggestions. The prosecution witnesses – P.W.2, P.W.3 and P.W.5, were not confronted with their pervious statements recorded under Section 161, CrPC nor their previous statements or any part of their previous statements were reproduced in their deposition by ***marking*** for the purpose of contradiction to be read out to the Investigating Officer of the case, P.W.7. When neither P.W.2, P.W.3 and P.W.5 on one hand nor the Investigating Officer, P.W.7 on the other hand, were confronted with the previous statements or any part of the previous statements of P.W.2, P.W.3 and P.W.5 ***marked*** for the purpose of contradicting them, the previous statements of the prosecution witnesses – P.W.2, P.W.3 and P.W.5 recorded under Section 161, CrPC cannot be looked into for any purpose and especially, to appreciate as regards contradictions.

23. It is also settled that merely because a witness is declared hostile his entire evidence is to beexcluded from consideration. Merely because the court has given permission to the Public Prosecutor to cross-examine his own witness describing him as a hostile witness, it does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness, if corroborated by other reliable evidence. It is for the court to consider in each case whether as a result of such cross-examination and ***contradiction***, the witness stands thoroughly discredited or can still be believed with regard to a part of his testimony. If the court finds that in the process, the credit of the witness has not been completely shaken the court may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept in the light of the other evidence on record, that part of his testimony which the court finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the court should, as a matter of prudence, discard his evidence in ***toto*** [Ref : ***Satpaul vs. Delhi Administration, [1976] 1
SCC 727***].

24. In ***Bhajju @ Karan Singh vs. State of Madhya Pradesh***, reported in ***[2012] 4 SCC 327***, the Hon'ble Supreme Court of India has observed as under :-

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to crossexamination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and crossexamined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles

LAWYER
E NEWS

have been encompassed in the judgments of this Court in the following cases:

[a] ***Koli Lakhmanbhai Chanabhai vs. State of Gujarat [[1999] 8 SCC 624];***

[b] ***Prithi vs. State of Haryana [[2010]) 8 SCC 536];***

[c] ***Manu Sharma vs. State [NCT of Delhi] [[2010] 6 SCC 1]; and***

[d] ***Ramkrushna vs. State of Maharashtra [[2007] 13 SCC 525].***

25. It needs iteration that the cross-examination of the prosecution witnesses – P.W.2, P.W.3 & P.W.5,by the prosecution after declaring them as hostile with the permission of the court, did not result in any contradiction. Taking note of the proposition that it is admissible to use the examination-in-chief as well as the cross-examination of a witness, who is declared by the prosecution, in so far as it supports the case of the prosecution and the other corroborating evidence, those parts of the evidence of the said prosecution witnesses require a look-in.

26. In the testimony of informant [P.W.1], this witness deposed that at about 08-00 a.m. on30.11.2015, he was reported about the incident which occurred in the house of the accused in the night intervening 29.11.2015 and 30.11.2015. In the FIR [Ext.-1] lodged by him, the informant [P.W.1] mentioned that the incident had occurred at around 12-30/01-00 a.m. The daughter of the accused and the deceased, P.W.2 who was with both of them inside the house at the relevant time, did not mention in her testimony at what time she heard the screaming of her father, the accused and her mother, the deceased. P.W.2 only deposed that on that night, she was sleeping with her parents and younger brother. In her testimony, P.W.2 stated that she went to the house of her uncle, P.W.3 at the instance of her father, the accused. P.W.2 did not mention the time of her return from the house of her uncle, P.W.3. According to P.W.2, when she returned to her house, she saw her mother lying on the ground with her father, the accused standing nearby her. P.W.2 also stated that at that point of time, two/three persons already arrived at the place. According to P.W.2, it was at 03-00 a.m. her mother expired. According to P.W.3, his niece [P.W.2] came screaming to his house at about 01-30 a.m. to inform that somebody entered into their house and assaulted both of her parents. On being so informed, P.W.3 stated to have gone to the house of the

accused and seen the deceased lying with blood oozing out from a head injury.

P.W.5 did not, in his testimony, mention the time at which he heard commotion from the house of the accused. He only stated that he went there hearing the alarm raised by P.W.2. By the time P.W.5 reached the place of occurrence, P.W.3 was already there as P.W.5 found the accused and P.W.3 present there. The I.O. of the case had registered the GDE no. 427 [Ext.-7] at 09-00 a.m. on 30.11.2015 and reached the place of occurrence at around 11-30 a.m. on 30.11.2015.

27. On a combined analysis of the above events stated to have occurred in the night intervening29.11.2015 and 30.11.2015, as deposed by the afore-mentioned prosecution witnesses, it is found that none of them had made any specific mention about the time at which the incident inside the house of the accused had occurred though they said that it was in that night the incident had occurred. In view of such evidence, it is difficult to reach a finding as about the specific time of occurrence of the murderous assault on the deceased.

28. It needs to mention again that the prosecution witnesses - P.W.1, P.W.3, P.W.5 & P.W.6 - had alltestified that they did not witness the incident or any act of murderous assault on the deceased which instantaneously led to her death. The Autopsy Doctor, P.W.4 had opined in the PME Report [Ext.-3] that the death was due to haemorrhage and shock as a result of the injuries sustained by the deceased. The injuries were found to be ante-mortem in nature. There were two injuries – one incised wound over the right fronto-parietel region of the skull and one incised wound on left knee joint. From the injuries, it is evident that the death of the deceased was homicidal in nature. The moot question is as to whether the evidence led by the prosecution was sufficient enough to bring home the charge of uxoricide against the accused.

29. From the evidence/materials on record, it has emerged that the prosecution had not led any directevidence as regards witnessing of the act of murderous assault on the deceased. In case the prosecution has to bring home a charge on the basis of circumstances then also the principle that the prosecution has to prove its case beyond all reasonable doubts does not variate. Therefore, the prosecution is required to prove the case beyond all reasonable doubts by proving the entire chain of circumstances, not leaving

any link missing for the accused to escape. In the case in hand, the entire incident had occurred during mid-night hours inside the dwelling house of the accused and the deceased. The accused and the deceased were not the only inmates of the house at that point of time as they stated to be sleeping with their children. No question was put to P.W.2 as regards existence of light when she woke up from sleep hearing the screaming of her parents. Sleeping at night with lights off is more normal than sleeping at night with lights on. The prosecution had also not led any evidence as to whether the dwelling house of the accused and the deceased was connected with electricity.

30. In view of the right to maintain silence preserved to the accused, the accused is well within hisright if he remains silent. If an accused does not offer any explanation the same may not be sufficient to hold conclusively that the accused was guilty of the crime, but the act of maintaining silence without offering any explanation could be considered to be a circumstance against him in certain situations. In case the accused offers some explanation then such explanation is to be tested on the standard of plausibility. In a given facts and circumstances of a case, if a person was in a dwelling house with other members of his family and a crime got committed inside the house, then the person as an inmate of the house might require to offer some explanation as to what might have happened preceding, attending and succeeding the crime. When the accused herein was asked during his examination under Section 313, CrPC by indicating the incriminating materials against him, the accused had stated that he and his wife, on the relevant night, were sleeping in different rooms. His wife was sleeping with their two daughters and one son. Suddenly, his wife shouted and called him loudly to rush towards her room. Then, he lit a lamp and went to the room of his wife. Going there, he saw that half of his wife's body was on the bed and the rest part was on the floor and she was bleeding. When he tried to ask her what had happened to her, she did not answer as she fell unconscious. Thereafter, he sent his daughter [P.W.2] to the house of his brother [P.W.3]. The accused further mentioned that when his brother [P.W.3] came, he wanted to take his wife to hospital and asked his brother [P.W.3] to arrange for a conveyance. His brother [P.W.3] had, however, failed to arrange any conveyance and told him that his wife would be taken to hospital in the morning hours.

31. In the absence of any specific evidence as regards the time of occurrence, it is difficult to hold thatthe incident had occurred at a specific

time in the night intervening 29.11.2015 and 30.11.2015. P.W.2 was the only witness who was present inside the house along with her parents and who had testified.P.W.2, in her testimony, did not attribute anything adverse to the accused. The other prosecution witnesses were post-occurrence witnesses who did not witness the act of murderous assault on the deceased. It has not emerged from the evidence/materials on record that the relationship between the accused and the deceased was not cordial. In a case based on circumstantial evidence, motive assumes vital significance and it is considered to be a link in the chain. No evidence was led by the prosecution on motive in the instant case. From the explanation given by the accused as regards what had happened during that night it cannot be said that the same was not a plausible explanation. The explanation offered was that on that night the accused was sleeping in a different room and the murderous assault had occurred prior to his reaching the room of his wife after lighting a lamp. P.W.2 did not depose anything as to whether there was light inside the hose/room when woke up hearing the screaming of both her parents, that is, the accused and the deceased. In absence of any evidence to the contrary, it might be possible that on that night, the accused was sleeping in a different room and the deceased was sleeping in a different room with her three children though in the same house, and hearing alarm raised by his wife from the other room the accused went to that room and found his wife in an injured condition. Though P.W.2 did not say anything either in line with or contrary to such explanation offered by the accused, P.W.3 in his testimony had stated that his niece [P.W.2] came screaming to his house at about 01-30 a.m. to inform that somebody entered into their house and assaulted both her parents.

32. The law with regard to conviction in a case of circumstantial evidence is well settled. A referencein this regard can be made to the decision in ***Sharad Birdhichand Sarda vs. State of Maharashtra,*** reported in ***[1984] 4 SCC 116.*** The circumstances from which the conclusion of guilt is to be drawn should be fully established. That the circumstances concerned ‘must or should’ and not ‘may be’ established. 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 and the circumstances should be of a conclusive nature and tendency. It is also a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubts.

33. On appreciation of the evidence/materials on record in its entirety, it is not possible to hold that theprosecution was able to lead evidence which had unerringly pointed towards the guilt of the accused in respect of the murderous of assault on his wife during the relevant night by establishing all the circumstances conclusively and completely leaving no gap left in the chain to hold that it was only the accused who had perpetrated the crime and to rule out any possibility of any other person committing the crime. In case of any gap, the benefit of doubt has to go to the accused. Therefore, in the case in hand, the accused is entitled to such benefit of doubt.

34. In view of the discussion made and the reasons assigned hereinabove, the instant criminal appealsucceeds. The Judgment and Order of conviction and sentence dated 12.06.2017 of the learned trial court is set aside and quashed. Consequently, the accused is acquitted of the charge of murder under Section 302, IPC.

35. The accused-appellant is to be released forthwith from jail, if his detention is not required in connection with any other case.

36. This Court records its appreciation for the assistance rendered by the learned Amicus Curiae. Thelearned Amicus-Curiae is to be paid remuneration as per the rules in force.

37. The records of the learned trial court be sent forthwith.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy of judgment from the official website.