

Kagen Bera and another

Vs

State of W.B.

Criminal Appeal No. 142 of 1986

(K. Jayachandra Reddy, G. N. Ray JJ)

02.09.1992

JUDGMENT

1. There are two appellants and both of them are convicted under Section 302/ 34, I. P.C. for the offence of committing the murder of one Badal Bera. The trial Court sentenced both of them to death. They preferred an appeal and the matter was also referred to the High Court for confirmation of the death sentence. The High Court, after considering the evidence, however, reduced the sentence to imprisonment for life and dismissed the appeals filed by the convicts.
2. In this appeal, the learned Counsel submitted that the case entirely rests on the circumstantial evidence and both the courts below have convicted the appellants on the mere suspicion and that suspicion, however, strong cannot take place of proof.
3. The prosecution case is as follows:-

The first appellant, Kagen Bera (A-1) is alleged to have illicit connections with Smt. Jyotsna Bera (A-2) even prior to her marriage with the deceased. The first appellant was the resident of Baharpota and the second appellant before her marriage was a resident of Nilkunthia where she used to live along with her parents. Both of them used to work in a bidi factory and while working there they developed intimacy and cordiality between them. Later A-2 was given in marriage to the deceased in the year 1976. Two months after the marriage A-2 left her job and joined her husband. It is alleged, however, that the intimacy between the two appellants continued and they decided to murder the deceased. With that object the two appellants induced the deceased to accompany them to Village Bahhichar along the railway track on 14-10-76 at about 10.30 p.m. All of a sudden, they caught hold of him and murdered him by cutting his throat. The first appellant is alleged to have purchased the dagger from a cutlery shop. The deceased died instantaneously. It is further alleged that after the murder, the second appellant Smt. Jyotsna Bera rushed towards the house of PW 3 which is nearby and cried out that her husband was killed by some unknown persons and fainted. Some neighbours gathered near the railway track and a report was given to the police and PW 23, the investigating officer conducted the investigation. He rushed to the village and found the dead body but due to darkness, inquest could not be held on that night. Next day, the investigating officer held inquest and he also examined A-2, who told him that some unknown persons killed her husband. It is also on record that A-1 also was present during the inquest. The investigating officer, however, interrogated many persons and also the two accused and it is alleged that at their instance certain incriminating articles, along with the dagger, were recovered.

The further prosecution case is that a sandal was found at the scene of occurrence, which was also recovered and the expert's evidence is to the effect that the sandal fitted to the foot of A-1. The further case of the prosecution is that judicial confession of A-1 was recorded by PW 22, the Judicial Magistrate. After completion of the investigation, a charge-sheet was filed. Both the courts below have rejected the extra-judicial confession as well as the judicial confession. They relied mainly on the recoveries. The circumstances relied upon by the courts below are:-

- a) there was a friendly relationship between the two appellants before the marriage of appellant Jyotsna.
- b) the presence of both the appellants along with the deceased on the fateful night was proved by the material on record;
- c) the recovery of various articles near the place of occurrence, including the sandal, corroborated by the evidence of foot-print.

4. It must be mentioned here that with regard to the presence of both the accused, the courts below appeared to have entirely relied on the statement of A-2, under Section 313, Cr. P. C. i.e. that on that night she, along with her husband was going somewhere as they could not get the bus. It became late to reach their house. When they were walking at that time, some miscreants caught hold of her husband and assaulted him by the side of the railway track. She then got up and tried to save her husband but when she realised that she would not be able to rescue her husband, she rushed to PW 3 and informed him and others that her husband was murdered. As a matter of fact, the evidence on record, particularly the evidence of PW 3 and others show that on the very night A-2 came running and cried out that her husband was killed by unknown persons and so saying she got fainted. Her version appears to be probable. However, nobody has spoken about her presence at the scene of occurrence, but the courts below appeared to have relied on this statement fixing her presence at the scene of occurrence. Such a statement of the accused under Section 313, Cr. P. C. cannot be split up and taken into consideration. However, if there is other clear evidence then the presence of A-2 can be inferred by taking assurance from her statement but that is not the case now. In coming to the evidence of PW-7, whose evidence is to be considered carefully, admitted that he did not know A-1 previously. He further admitted that next morning A-1 was with the Daroga and he was also present at the time of inquest. Though PW-7 was examined at the time of inquest report, and in spite of A-1's presence there, P.W. 7 did not say anything. He was examined five days after the occurrence. Therefore, his evidence also is highly suspicious and then we are left only with the recoveries. The recoveries by themselves cannot in any way connect the accused with the crime. Now coming to the motive, the prosecution case is that A-1 and A-2 had illicit relationship prior to A-2's marriage. The occurrence is stated to have taken place in the year 1976 and the trial Court while delivering the judgment in 1981 mentioned that A-2 was only 20 years old. If that be so, she would be less than 15 years at the time of occurrence. It is difficult to infer that even at that age there were illicit relationship between A-1 and A-2. However, as pointed out above, except recoveries, there was no other evidence to connect the accused with the crime. So far as A-2 is concerned, her immediate conduct was spoken to by PW 3 and the same shows that she could not have been a participant in the murder. With regard to A-1, as mentioned above, he was present at the time of inquest report and he did not abscond. However, as mentioned above, his presence at the scene of occurrence is most doubtful. If that is the position, except strong suspicion, there is no other proof of the guilt of the appellants.

5. In the circumstances mentioned above, the convictions and sentences awarded to the appellants are set aside and the appeal is allowed. If the appellants are in jail, they shall be set at liberty.

Appeal allowed.

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