SUPREME COURT OF INDIA

Dinesh Borthakur

Vs.

State of Assam

Crl.A.No.687 of 2007

(S.B. Sinha and Dalveer Bhandari,JJ.)

13.03.2008

JUDGMENT

S.B. Sinha, J.

1. Appellant was convicted and sentenced to undergo rigorous imprisonment for life on the charge of murder of his wife Mala Borthakur and adopted daughter Munni @ Mayuri. He was residing with the first deceased at Sibnath Bhattacharya Lane, Chiring Chapari in the town of Dibrugarh.

2. He is an Engineer by profession. At about 4.00/5.00 p.m. on 25.5.1999, when he returned from his place of work, he allegedly knocked the main door of the house. There was no response. He called his immediate neighbour Pranab Kumar Borah (PW1).

3. PW1, whose house is separated only by a wall, opened the window and asked him as to what had happened. To that the appellant allegedly replied "they are not opening the door". He responded thereto saying that "they are perhaps sleeping". He went to the rear side of the premises. He found the same open.

4. He was heard shouting loudly calling the name of his daughter Munni and wife Mala several times. He found his wife and daughter lying dead on separate beds. After a few minutes, Appellant called PW1 again shouting "Boruah! Boruah!". On his query as to what had happened, he asked him to come and have a look. PW1 found the wife of the deceased lying on the bed with her face down. He also saw the lower part of her legs looking pale. His attention was also drawn by the appellant to the corpse of Munni. The leg of the girl was shaken by the appellant stating, "look, she is also not moving". Appellant remarked, "Mala should not have done this".

5. PW1, thereafter, asked somebody (whose name has not been disclosed) to inform the police. As the said request was not complied, he himself informed the officer-in-charge of the police station about the incident.

6. For the purpose of investigation, a sniffer dog was brought into service. The dog was taken near the dead bodies. It allegedly went close to the appellant only and no one else when he was inside the house.

7. PW1, in his deposition before the Court opined 'that even though such a shocking incident had taken place, Borthakur did not show any reaction as he should have'. He, however, in his cross-examination stated 'having seen the occurrence, I had lost my senses. He too might have been out of his mind to some extent. Reactions vary with people. As the deceased were accused person's wife and daughter respectively, his reaction should have been more acute. Reaction of the accused person that I had noticed might have been for the unexpected turn of event. He was repeatedly going near the dead body of his daughter but not that of his wife.'

8. Apart from PW1, his wife Purnima Devi examined herself as PW-2. According to her, at about 10.10 A.M. when she had been going to her office, the daughter of the accused, Munni, had been crying. On being asked the reason therefor, Mala had replied that Munni had been crying because she had been giving her a bath.

9. PW3 Binu Bezborauah was also a neighbour of the appellant. She was also a witness to the unusual crying of the girl.

10. PW4, Sri Manash Borpujari is an employee of the Education Department. He is the brother-in-law of the appellant.

11. According to him, when the appellant having been asked at around 3.30/4.00 PM as to what had happened, he replied "she killed Munni, she killed herself too". Reaction of PW4 upon seeing the dead body, however, was that she had been murdered. He accepted that the marriage between the deceased Mala and the appellant took place 16-17 years prior to his date of deposition and, apparently they had good relations. According to him, he had not witnessed any quarrel between them.

12. PW5, Dr. R.Chaliha conducted the post mortem examination.

13. PW6 is Rubul Sharma. He allegedly had seen a skipping rope around the neck of Mala as also a gold chain. He also allegedly noticed blood dipping out from the corners of her lips. He also found black marks around the neck of Munni.

14. The Investigating Officer also found a bottle of poison.

15. According to PW6, sheets of the bed on which the dead bodies were found, had neatly been spread. He also noticed arrival of the police dog. According to him, after having smelt the dead bodies, the dog did not go out of the room but stayed inside it near and about the appellant.

16. PW7, Sri Dhiraj Sarmah, was a neighbour. He came to the place of occurrence. According to him, Manas Barpujari came crying and told him "Someone has killed Bubli baiden (elder sister) and her daughter Munni and had left their dead bodies on the bed."

17. PW8 is Sri Manik Barkakoty. He was only a witness in regard to the conduct and/or reaction of the appellant. Evidence of PW9, Sri Chapan Sarmah, was confined to the scene of the bed rooms.

18. PW10, Sri Bijoy Prasad is the owner of a pan shop. According to him the accused did not buy any pan from his shop on the date of incident, i.e., 25.5.1999.

19. PW11, Sri Ganesh Borthakur is the brother of the accused. He, having been informed, visited the place of occurrence. His evidence is not very material.

20. PW12 is Smt.Manjuri Borthakur. According to her, she found the accused sobbing and moving hither and thither in the room in which his daughter had been lying dead.

21. PW13, Sri Anup Baruah was a resident of a place which was at a distance of four furlongs from the appellant's house. Somebody informed him about the said deaths whereupon he went there.

22. PW14, Sri Anupma Dutta also deposed to the same effect. PW15, Sri Samudra Baishya is a Chemical Engineer. According to him the bottle contained organophosphorus pesticide which is a kind of insecticide used in vegetable cultivations.

23. PW16, Sri Kusheswar Borah was the officer in-charge of Lakhimpur, Police Station. He is the investigating officer in the case. He admitted that PW1 Pranab Baruah had not stated before him that 'Mala should not have done this nor did he inform that the accused had frequently gone near his daughter but not near his wife'. Similarly, PW4 Manas Barpujari did not state before him about the alleged remark of the appellant that 'deceased Mala had killed Munni and killed herself too and that he had seen scratching marks on the back of the appellant'. PW6 Rubul Sharmah did not inform him that he had seen blood coming out of Mala's mouth and that some milk like things had been found in the glass at the scene. Similarly, PW9 Chandan Sharmah did not state before him that that Mala and Munni had been found lying on the same bed.

24. Only on the basis of the aforementioned materials brought on records by the prosecution, a judgment of conviction against the appellant was recorded by the learned Trial judge. The High Court dismissed the appeal preferred thereagainst.

25. The fact that Munni suffered a homicidal death is not in dispute. However, there appears to be some dispute as to whether death of Mala was homicidal or suicidal in nature. The dead bodies of both Mala and Munni were having ligature marks but the doctor opined that only Munni died of asphyxia. No such opinion was rendered in respect of the death of

Mala. However, the result of the chemical examination showed presence of organ phosphorus pesticide, a poison.

26. In regard to death of Mala, PW5, in his deposition, stated:

> "Regarding Mala Borthakur, in my post mortem report, I have not mentioned word "homicide". Report is/was silent about homicide.. In the instant case, my opinion is/was silent regarding Mala Borthkur whether it was suicidal or homicidal."

27. What has been noticed hereinbefore clearly demonstrates that the prosecution led only circumstantial evidence before the learned Trial Judge. The learned Trial Judge, apart from the statements made by the prosecution witnesses in regard to the conduct of the appellant, also took into consideration the fact that he had not informed the police in regard to the death of 'his own wife and adopted daughter'. It was furthermore opined that the appellant had failed to establish his own innocence. An adverse inference was drawn against the accused in regard to his failure to inform about the death of his wife and adopted daughter till the arrival of the police party to his house. The learned Trial Judge also noticed that the sniffer dog had gone near the appellant only and nobody else when he had been inside the house. According to the learned Trial Judge, the behaviour of the accused was abnormal as he had neither wept nor cried nor shown any sign of shock or being upset at the scene of death of 'his own wife and adopted daughter'. Emphasis was also laid on the fact that when the appellant was being interrogated by the Investigating Officer, allegedly, he had told him that he was feeling hungry and had bought some food from a line hotel.

28. In his judgment, the learned Trial Judge referred to the statements of the appellant in his examination under Section 313 of the Code of Criminal Procedure in great details. Statements of PW1 was also quoted in extenso.

29. The learned Trial Judge, however, in our opinion, failed to analyse the evidence of the prosecution witnesses in a proper and effective manner. Although opining that he had no motive to kill his wife and the adopted daughter, the effect thereof was not considered keeping in view the fact that the prosecution rested its case only on circumstantial evidence. The learned Trial Judge, although took notice of the statements of PW13 that the spectacles of the appellants were found lying on a book of Munni, drew no inference therefrom. He also did not make any attempt to determine the relevance of the said evidence. We, however, do not find the said evidence having any relevance to the prosecution case. The learned Trial Judge furthermore placed on record that according to PW13, marks of blood on the nails of the deceased having been noticed, the Investigating Officer got the shirt removed from the body of the appellant and found two nail marks on his back.

30. The learned Trial judge accepted that there was no evidence brought on record to show that the accused was seen at the place of the occurrence of crime during the period between 11.30 A.M. in the morning hours and at about 4.00/5.00 P.M. in the afternoon, so as to enable it to infer that he could forcibly administer poison to the deceased or strangulate them or to do the both so as to cause their deaths. He further recorded that PW6 admitted in his

evidence that the nail scrapping taken from the two deceased did not correspond to the skin scrapping taken from the body of the accused. Thus, there was no evidence of any mark of struggle by and between the two deceased with the accused.

31. The purported absence of any reaction on the apart of the appellant in regard to the death of two deceased was for all intent and purpose made the sole basis for his conviction by the learned Trial Judge of the offence. It was concluded:

> "So, taking the gamut of all the circumstances analyzed in para No.19, 24, 25, 31, 33, 37, 38, 43, 46, 47 and 54 above in particulars and the case-laws mentioned in para no. 55 above in entirety, I am very much persuaded to presume that it was the present accused Dinesh Borthakur, and none else who had intentionally caused the death of his wife Mala Borthakur and his adopted daughter in a cold blooded manner to eliminate them from this earth with some motive best known to himself. The evidence on record of this instant case relating to circumstances and conduct of the accused sufficiently and clearly established all the links in the chain of circumstances leading to the guilt of present accused and no reasonable ground was left for consideration consistent with his innocence."
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> (Emphasis supplied)

32. Judgment of the High Court with respect is no different.

33. A finding of guilt cannot be based on a presumption. Before arriving at an inference that the appellant has committed an offence, existence of materials therefor ought to have been found. No motive for committing the crime was identified which, in the facts and circumstances of the case, was relevant. How the links in the chain of the circumstances led to only one conclusion that the appellant and the appellant alone was guilty of commission of the offence has not been spelt out by the learned Trial Judge.

34. The courts below did not record any finding on the basis of any material brought on record by the prosecution that the appellant was seen at the place of occurrence of crime between 11.30 am to 4/5.00 pm. The least the prosecution, in this behalf, could do was to examine the co-employees of the appellant who had been working in his office to find out as to when he had reached his office or whether he had left his office at any time prior to 4.00 pm. No evidence was also led to bring on record the distance between the house of the appellant and his office. No witness also deposed in regard to the mode of his travelling. He had been seen going out of his house for his place of work by the prosecution witnesses. PW1 found him calling the name of his wife and the adopted daughter for opening of the main door. He went to the backside of the premises only when PW1 expressed his opinion that they might have been sleeping.

35. The time lag between the appellant's calling PW1 for the first time and the second time was a few minutes. The prosecution did not suggest nor any finding has been arrived at that the offence could have been committed during the said interval.

36. PW1 on seeing the deceased Mala lying on the bed gathered an impression that the matter was not normal. Further, PW1 in his evidence states that the accused shook the leg of the child 'Munni' stating that she was also not moving. It is the admitted case of the prosecution that the accused had asked PW1 to come and have a look PW1 himself was uncertain as to whether Mala and child Munni were already dead or not. The conduct of the appellant, so far his initial reaction to the occurrence is concerned, appears to be most natural as he suspected that something was wrong but was unsure thereabout at the same time. In any view of the matter, it does not give rise to an inference which is consistent with the hypothesis of guilt.

37. At this juncture, we may place on record that PW6, in his evidence, in no uncertain terms, admitted that the scraping of nails taken from the two deceased did not correspond to the scrapping of skin taken from the body of the appellant. The prosecution, therefore, did not bring on record any material to show that the deceased had put up any resistance when the appellant had allegedly tried to commit the crime. Medical evidence brought on record also does not conclusively show that Mala Borthakur suffered a homicidal death as is evident from the autopsy report, which we have noticed hereinbefore.

38. The mainstay of the prosecution case is the evidence of PW6, PW8, PW9 and PW13 who testified about the sniffer dog's staying near the accused and the reaction of the accused was not natural as he did not exhibit his emotion or sadness despite the fact that a shocking incident had occurred. So far as the evidence relating to the reaction of sniffer dog is concerned, this Court in Abdul Rajak Murtaja Dafedar v. State of Maharashtra [(1969 (2) SCC 234 stated the law, thus :

"There are three objections which are usually advanced against reception of the evidence of dog tracking. First since it is manifest that the dog cannot go into the box and give his evidence on oath and consequently submit himself to cross-examination, the dog's human companion must go into the box and the report the dog's evidence and this is clearly herarsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inference."

Yet again in Gade Lakshmi Mangaraju alias Ramesh v. State of A.P [2001 (6) SCC 205], this Court opined :
"There are inherent frailties in the evidence based on sniffer or tracker dog. The possibility of an error on the part of the dog or its master is the first among them.. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. Last, but not the least, is the fact that from scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Investigation exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."
39. The law in this behalf, therefore, is settled that while the services of a sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused.

40. Let us now consider another aspect of the matter viz., the so called abnormal conduct on the part of the appellant. PW1 was considered to be the star witness by the prosecution. He was in his house upto 11.30 am. It can safely be inferred from his deposition that he had come back to his residence much prior to the appellant. He had not noticed any abnormality in the locality. Other witnesses who were the neighbours of the appellant and/or the shop owners who have their shops on the other side of the road were also not aware of any incident before the appellant reached his residence. PW1 and PW2, in their deposition, did not notice any unusual conduct on the part of the appellant or the deceased Mala on that day. The only unusual thing noticed by PW1, PW2 and PW3 was the abnormal crying of Munni in the morning for a long time. Something, therefore, must have happened between the mother and the daughter. It is difficult to believe that a six year old girl would cry so loudly and that too for such a long span of time so as to draw the attention of the neighbours only because the mother was giving her a bath. Something, therefore, must have happened which the deceased was trying to hide.

41. We fail to see any abnormality in the initial reaction of the appellant. He knocked at the door vigorously. He called the deceased in a loud voice which attracted the attention of PW1. On a query made by the latter, he had stated that they had not been opening the door and only when PW1 opined that they must have been sleeping, he went to the rear side of the premises and discovered the dead bodies lying on the bed and again without any loss of time called PW1. PW1, in his cross-examination, admitted that reactions vary from person to person. Absence of any exhibition of sadness on the part of the appellant, according to PW1, was not the conduct of a normal human being. Manjuri Borthakur's evidence, however, is otherwise.

42. We may notice that this Court in Rana Partap and others vs. State of Haryana reported in [1983 (3) SCC 327] opined :

"Yet another reason given by the learned Sessions Judge to doubt the presence of the witnesses was that their conduct in not going to the rescue of the deceased when he was in the clutches of the assailants was unnatural. We must say that the comment is most unreal. Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

{See also Marwadi Kishor Parmanand and Another Vs. State of Gujarat [1994(4)SCC 549] and State of U.P. Vs. Devendra Singh [2004 (10) SCC 616)]}.

43. No hard and fast rule having any universal application with regard to the reaction of a person in a given circumstance can, thus, be laid down. One person may lose equilibrium and balance of mind, but, another may remain a silent spectator till he is able to reconcile himself and then react in his own way.

44. Thus, merely because the appellant did not cry or weep on witnessing the dead bodies of his wife and daughter, cannot be made the basis for informing his guilt.

45. If he had gone to his office and come back therefrom between 11.30 am till 4/5.00 pm, the matter might have been different. If the theory that he could have committed the murder within a couple of minutes is ruled out, we fail to see on what basis even a suspicion could have been raised that the appellant had committed the crime. It is not the case of the prosecution that the deceased were last seen in the company of the appellant. Nobody had seen him going inside his house or coming out at the time of or near about the commission of the crime. The matter might have been different if some evidence had been introduced to suggest that the offence was committed sometime between 11.30 am and 4/5.00 pm. Ordinarily, an accused person after commission of such a ghastly crime would run away from the scene of occurrence but he did not do so. Even if he was to pretend that he did not know about the said occurrence, he could have stayed back in his office waiting for the call of his neighbours about the death of his wife and daughter.

46. His conduct or reaction (or lack of it) by itself, thus, cannot be a ground for arriving at a conclusion that he is guilty of commission of crime. Formation of another opinion is also possible. It may or may not be that the appellant, in presence of PW1, told "Mala should not have done that". The same by itself does not take us anywhere. Assuming that he did so, although according to the Investigating Officer, no such statement was made by PW1 before him, the same merely indicated that something had happened between the mother and the daughter in the morning which was not to the liking of the appellant.

47. We are surprised to notice the introduction of a story by the prosecution through PW4. Even if the conduct of the appellant demonstrated that he had been feeling sorry for the death of his daughter and not for his wife, it does not take us any further to arrive at one conclusion or the other.

48. More surprising is the introduction of the purported incriminating circumstances through some of the prosecution witnesses in regard to the location of the dead body and the manner in which things were discovered by some of the prosecution witnesses, although neither the Investigating

Officer had not noticed the same nor was his attention drawn thereto by the said witnesses or others.

49.0 We have noticed hereto before that the prosecution witnesses did not make any statement in regard to the purported reaction of the appellant before the Investigating Officer.

50. The prosecution made an attempt to show that the deaths of the victims were caused by administration of poison and/or strangulation. The bottle containing pesticide was found in the wash basin along with a glass inside the house. There is nothing on record to show that the appellant had purchased pesticide or brought it home. No fingerprint of the appellant was taken to show that it was he who had used the bottle or the glass for the said purpose. No incriminating evidence linking the appellant in regard to administration of poison/pesticide has been brought on record.

51. In Sharad Birdhichand Sarda v. State of Maharashtra [(1984) 4 SCC 116], this Court opined that before arriving at the finding as regards the guilt of the appellant, the following circumstances must be established:

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused and should not be explainable on any other hypothesis except that accused is guilty;
(iii) The circumstances should be conclusive nature;
(iv) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with innocence of the accused on preponderance of probability."
In that case, it was categorically held that the prosecution in a case of commission of murder by poisoning must bring in record some evidence linking the accused therewith, stating:
"In the instant case, while two ingredients have been proved but two have not. In the first place, it has no doubt been proved that Manju died of potassium cyanide and secondly, it has also been proved that there was an opportunity to administer the poison. It has, however, not been proved by any evidence that the appellant had the poison in his possession."
It was furthermore observed:
"2. That, at any rate, the evidence clearly shows that two views are possible one pointing to the guilt of the accused and the other leading to his innocence. It may be very likely that the appellant may have administered the poison (potassium Cyanide) to Manju but at the same time a fair possibility that she herself committed suicide cannot be safely excluded or eliminated. Hence, on this ground alone the appellant is entitled to the benefit of doubt resulting in his acquittal.
3. The prosecution has miserably failed to prove one of the most essential ingredients of a case of death caused by administration of poison, i.e., possession of poison with the accused (either by direct or circumstantial evidence) and on this ground alone the prosecution must fail."
52. First Information Report might have been lodged by the appellant only when the police arrived at the scene of occurrence. The Investigating Officer came to the place of occurrence at about 4.45 pm. PW1 categorically stated that he had asked someone to inform the police. When he did not comply therewith, then only he did so. If, in the aforementioned situation, the appellant had not informed the officer-in-charge of the police station, no presumption of adverse inference could be raised against him. There was no delay on the part of the appellant in informing the police, particularly, when he had informed PW1 who, in turn, informed the police.
53. The learned Trial Judge has also relied upon the evidence of PW10, the owner of a Pan shop, who testified that the appellant had not visited the Pan shop on that day. His evidence, in our opinion, is not at all reliable. He admitted in his cross-examination that in the forenoon, his brother used to sit at the shop and, thus, his inference that the appellant used to take Pan regularly cannot be trustworthy.
54. We, therefore, are of the firm view that circumstantial evidence leading to the guilt of the appellant have not been established by the prosecution, the judgment of the conviction and sentence, therefore, cannot be sustained. They are set aside accordingly. We can only record our distress that even in a case of this nature, appellant had to remain in custody for a period of four years.
54. The appeal is allowed. The appellant is directed to be set at liberty forthwith unless wanted in connection with any other case.