

In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)

Present:

Mr. Justice ASM Abdul Mobin

with

Mr. Justice S.M. Masud Hossain Dolon

Criminal Appeal No. 4556 of 2017.

Md. Masud Bepari

..... convict-appellant.

-versus-

The State

.....respondent.

Mr. Muhammad Jamiruddin Sircar, senior
advocate with Mr. Md. Zahirul Islam,
advocate

..... for the appellant.

Mr. Sujit Chatterjee, Deputy Attorney
General with Mr. Mohammad Abdul Aziz
with Mr. Md. Shah Newaj with Mr. Md.
Anichur Rahman, Assistant Attorney
Generals,

..... for the state

Judgment on 31.08.2022.

S.M. Masud Hossain Dolon, J:

This appeal is preferred against the judgment and order of conviction and sentence dated 22.02.2017 passed by the learned Additional Sessions Judge, 5th Court, Dhaka in Session Case No. 741 of 2012 arising out of Duhar Police

Station Case No. 01, dated 06.05.2011, corresponding to G.R. No. 64 of 2011 convicting the appellant under Section 302 of the Penal Code and sentencing him to suffer rigorous imprisonment for life with a fine of Tk. 20,000/- in default to suffer rigorous imprisonment for 1(one) year more.

The Prosecution case, in short, is that one Md. Malak Molah as informant lodged an FIR with the Dohar Police Station on 06.05.2011 against the appellant and others alleging interalia, that his daughter Mst. Nurunnahar Akter Noni was married to the appellant Md. Masud Bepari 10/11 years ago. They had one son namely Md. Lion. All the accused used to torture her physically and mentally on demand of dowry. In spite of holding several salish, their torture was not stopped. Meanwhile, her daughter conceived again. In that situation, while his daughter passing through the days, accused Samu Chowdhury came to his house at about 5.30 am on 06.05.2011 and informed him that his daughter died by taking poison and she was at Duhar Hospital. Having heard the news, he went to the house of the appellant but could not find anyone there. Then he went to the Duhar Hospital where he found the dead body of his daughter. He was

informed by the doctor on duty that they had received his daughter's dead body at 2.00-2.15 am at night. Keeping the dead body at the hospital, the appellant, and others left the hospital. The informant suspected that the appellant along with other accused might have strangled his daughter to death.

Police took up the case for investigation and after holding investigation, charge sheet No. 119 dated 01.12.2011 was submitted against all the accused under section 302/34 of the Penal Code. When the case was ready, the learned Magistrate sent it to the Court of Sessions Judge, Dhaka. The learned Sessions Judge in turn transferred it to the Court of Additional Sessions Judge, 5th Court, Dhaka for trial. The learned Additional Sessions Judge framed charge against the appellant and others under sections 302 and 34 of the Penal Code. Charge was read over them to which they pleaded not guilty and claimed to be tried. Appellant Masud Bepari was absconding and his trial was held in absentia.

During trial, 13 witnesses out of 18 cited witnesses were examined by the prosecution. While the defence examined none.

After recording of evidence of prosecution witnesses, the accuseds were examined under section 342 of the Code of Criminal Procedure. In their examination they did not make any statement.

The defence case, as it transpires from the trend of cross examination of the P.Ws. is that they are totally innocent. They have not committed the alleged offence and have been falsely implicated in this case.

The learned Additional Sessions Judge, after considering oral and documentary evidences led by the prosecution passed the impugned Judgment and order of conviction and sentence as stated above.

P.W. 1 Md. Jahiruddin Bapery is a neighbor of the informant. He stated that deceased Nurun Nahar Noni got married with accused Masud. He (pw-1) once settled their disputed about 7/8 months back of the incident. He came to know at about 9.00-10.00 am on the day of occurrence that Noni died in her husband's house. Some of the people told that she had committed suicide, while the other told that she died due to strangulation. In cross-examination P.W. 1 repeated his statement made in examination in Chief.

P.W. 2 Dr. Harunur Rashid Khan, Associate Professor of Solemullah Medical College Hospital stated that lung and heart of the deceased were sent to him. He did pathological test and autopsy and found those normal. He prepared a report. The defence declined to cross examine him.

P.W. 3 Halim Gormi is a Rickshaw puller. He stated that accused Masud called him at night at about 1.00-1.30 am. Accused Madud Bepari and Abul Bepari took Noni to Joypara Hospital by his rickshaw. After ½ an hour, he entered into hospital and found the body of Noni lying on the floor. He further stated that while the body of Noni was boarded in his rickshaw, it was covered by a cloth. He further stated that while proceeding towards the Hospital, he did not hear any utterance from Noni. In cross examination pw-3 stated that he could not say whether Noni took poison or not.

P.W. 4 Rabeya Khatun is the mother of the deceased. She stated that on the date of occurrence at 1.00 a.m. the younger sister of appellant Masud called her and apprised her that Noni had faced an accident. Thereafter, she went to the house of the appellant. She found some of the accuseds there who took the body of her daughter to hospital. She followed

them and saw that they laid the body at her daughter down on sand and ran away.

In cross examination she admitted that she found her daughter at the corridor of the hospital.

P.W. 5 Md. Abdul Qadir Mia stated that the deceased was married to the appellant 10/12 ago. They had a son. Father of the deceased asked him through his nephew to go to his house. He went to his house. He (father of the deceased) got an information from acquitted accused Shamim Chowdhury that his daughter either had abdominal pain or any other problem and she was taken to hospital where she died. They both went to hospital and saw the dead body. Police arrested acquitted accused Shmim Chowdhury. He (PW-5) further stated that their (deceased and her husband) relationship was strained due to demand of dowry. They settled their dispute. Police held inquest on the dead body in his presence. He signed the inquest report.

In cross examination PW-5 stated the informed was his brother in village terms. Father of the deceased, Barek Mollah and Shamim Chowdhury asked him to go to the hospital. He did not see how the deceased had died. He was recalled by

the prosecution. In re-examination he stated that police prepared a seizure list at 12 pm on 06.05.2011 and he signed the seizure list. In further cross examination, he stated that seized articles were wearing apparels of the deceased. Police seized those in his presence.

P.W. 6 Md. Akbar Molla stated that the deceased was married off to the appellant. Their relationship was good at the beginning. But after birth of their son, their relationship became strained. They settled their dispute on a few occasions. At one point of time, she back to her father's house and stayed there for about 3(three) months. They again settled their dispute on the request of the appellant. She then went to the house of the appellant. About 3(three) months thereafter, acquitted accused Shamim Chowdhury came to their house and told him that the deceased was sick. He asked him to take her to hospital. He went to hospital in the morning. He saw the deceased dead body. A Rickshaw puller told him that she shifted the deceased to the hospital at about 2.00 am.

In cross examination on behalf of acquitted accused P.W. 6 stated that house of Shamim Chowdhury was over the

other side of the canal. The village of the accused was next to their village. The informant party kept putting pressure upon the accused just after the occurrence. The accused were not ousted. They went on hiding due to fear of police. He denied the defence suggestion that the accused party did not say the ingestion of poison by the deceased. In cross examination on behalf of the appellant he stated that he did not see the brewing. The informant party told him that the deceased had ingested poison. He found the mother and sister of the appellant at the hospital. But the appellant went on hiding. He denied that his claim of quarrel between the deceased and the appellant was false or that when the deceased was not allowed to go her brother's house, she committed suicide or that he deposed falsely in favour of his sister.

P.W. 7 Abdur Rob Chowdhury, stated that he could not say the reason for the death of the deceased. But there was a dispute between the parties. He settled their dispute.

In cross examination on behalf of acquitted accused PW-7 stated that a brother of the informant was chairman of their Union Parishad. He heard that the informant party had reaped the paddy from the field of the appellant and evicted

them from their house. In cross examination on behalf of the appellant he stated that he did not see the quarrel between the appellant and the deceased. He did not hear that the deceased wanted to go to her father's house and when she was not allowed to go, she committed suicide.

P.W.8 Dr. Abu Nayem stated that he was a lecturer of forensic medicine at Sir Solimullah Medical college Hospital on 07.05.2011. He held post mortem examination on the dead body of Nurunhaheer Akter Noni. He sent viscera for chemical examination. After receiving the report he opined that cause of death could not be ascertained. In cross examination pw-8 again stated that he could not ascertain the cause of death.

P.W. 9 Md. Jasimuddin, at the relevant time was posted at Upazila Health Complex, Dohar, Dhaka. He stated that the deceased was brought to Health Complex on 06.05.2011. He examined her. On examination he found that she died before she was taken there. He sent a letter to the police station.

In cross examination on behalf of acquitted accused PW-9 sated that in the letter he did not state how the

deceased died. It was only stated that it was a case of unnatural death. On cross examination by the appellant, he stated that on examination he did not suspect anything. As she died at her in-laws house, he informed the police. He could not find the apparent cause of death.

P.W. 10 Zahangir Jamader was tendered and the defence declined to cross examine him.

P.W. 11 Sheikh Abul Hossain stated that sister of appellant Masud informed him regarding the death of Noni. The defence declined to cross examine him.

P.W. 12 Dr. Md. Kaysar Rahman stated that he examined the viscera and he did not find poison. He submitted a report. In cross examination he reiterated that he did not detect poison in the viscera.

P.W.13 Mohammad Fazlul Hoque is the investigating officer of this case. He stated that Recording Officer of the Dohar Police station had filled up column of the first information report. He proved the F.I.R form which was marked Exhibit-6 and signature of the recording officer was also marked Exhibit-6/1. Having been appointed investigating officer of this case, he visited the Place of

occurrence and drew up a sketch map with index. He seized salwar of the deceased by preparing seizure list. He proved the seizure list. He also proved the sketch map and index. He recorded statements of witnesses under section 161 of the Code of Criminal Procedure, 1898. After completion of investigation, he submitted charge sheet against the accused persons under section 302/34 of the Penal Code. The defence declined to cross examine him.

These are all about evidences adduced by the prosecution for proof of the charge framed against the accused appellants.

Mr. Muhammad Jamiruddin Sircar, learned Senior advocate appearing on behalf of the appellant submits that prosecution has totally failed to prove the case. There is no specific allegation in the FIR and his name has been included in the charge sheet at the instance of the informant party. The learned Judge of the trial court has failed to consider this aspect of the case resulting miscarriage of justice. He further submits that there is no eye witness of the occurrence and in absence of incompatible circumstantial evidence, his conviction and sentence is illegal and cannot be sustained in

law. He also submits that the very charge of murder framed against the appellant is not at all sustainable as there is no evidence that the death of the deceased was homicidal death and as such the judgment and order of conviction and sentence is liable to be set-aside.

On the other hand Mr. Sujit Chatterjee, the learned Deputy Attorney General appearing with Mr. Anisur Rahman, the learned Assistant Attorney General submits that the learned Additional Sessions Judge after evaluating the evidence has correctly found the appellant guilty and rightly convicted and sentenced him. The learned Deputy Attorney General further submits that it is admitted fact that there is no eye witness of the incident and the doctor has also failed to ascertain the real cause of death of the deceased. There is no evidence that the deceased was suffering from any critical disease. But if some of the circumstances i.e. deceased Noni used to live in the house of appellant and until her death she was in the house of the appellant, are considered, then it would be found that he (appellant) being husband of the deceased is liable for her death. He refers to the evidence of prosecution witnesses and submits that the witnesses claim

the deceased to have been tortured physically and mentally many times prior to the occurrence at the hands of the appellant. They also claim settlement of their dispute amicably but previous tortured speaks a volume against the defence. The learned Deputy Attorney General contends that the conduct of the appellant is very much relevant according to section 8 of the Evidence Act. He submits that the occurrence took place on 06.05.2011 and just after the occurrence the appellant went on absconson. He surrendered on 09.04.2014 only after pronouncement of judgment. He had been remained absent for the period of 6 years. In support of his contention, the learned Deputy Attorney General relies upon the case of Abdul Khaleque vs. The State 45 DLR at 75. The learned Deputy Attorney General also refers to the cases of State vs. Md. Abul Kalam Azad and others, 8BLC, 464, Rias Hussain (Md) vs. State, 54 DLR(AD), 78.

Now, in this appeal the point for determination is that as to whether the impugned judgment and order of conviction and sentence is tenable in law and as to whether the prosecution has been able to prove the case by adducing

legal evidences against the appellant beyond the shadow of all reasonable doubt.

We have considered the submissions and in the light of the above submissions of the learned advocates for both the sides, we have carefully perused the record. It is the prosecution case that the victim died due to suffocation and in order to divert the case, pesticide was put into her month.

The prosecution in order to prove the charge examined 13 witness the informant, father of the deceased who brought the allegation of causing death of her daughter by her husband was not examined. P.W. 4 mother of the deceased in her evidence did not lay any allegation of causing death of her daughter by the appellant. She only stated that the appellant and other fled away from the hospital. It is P.W. 1 who stated that some of the person told the deceased had committed suicide and other told that she was done to death. The other local witnesses stated that they went to see the dead body P.W. 3 Richshaw puller in an important witness. He did not also allege anything in order to implicate the appellant in the murder. The evidence adduced is virtually nil to prove the complicity of the appellant for causing death of

the deceased. Their evidence may at best raise a suspicion but suspicion, however strong cannot take place of the proof. Besides, in order to prove the charge under section 302 of the Penal Code, prosecution is obliged to prove that death of the deceased is homicidal death. In this particular case, prosecution has failed to establish that the death of the deceased was homicidal in nature. In this regard, evidence P.W. 2, 8,9 and 12 are vital. P.W. 2 stated that he examined lung, heart and other viscera but he did not find anything wrong. P.W. 9, doctor of the health complex who examined the deceased first. He did not find any injury on the body. P.W.12 chemical examiner who did not detect poison in the viscera.

On perusal of the inquest report, it appears that a swelling injury was found on the neck of the victim and no other injury was found. He P.W. 8, the doctor who held postmortem examination in his evidence stated that he did not find any external or internal injury on the dead body. He sent viscera for chemical analyses. After receiving chemical examination report, he opined that the cause of death could not be ascertained. Therefore, the evidence and materials so

prodheed are not at all sufficient for an inference of homicidal death. Other than inquest and post mortem examination report, there is no other evidence or material is produced for the proof of homicidal death. If the death of the deceased is not homicidal, it is well-nigh impossible to prove the charge of murder for such death.

The contention of the learned Deputy Attorney General that a husband is under an obligation to explain how his wife met the death, if she was in his custody. It is now well settled that section 106 of the Evidence puts a burden upon a husband in case of causing death to explain the death of his wife if she died while she was under the same roof. However, prosecution by invoking the provision of section 106 of the evidence cannot relieve itself of its duty of proving the case is one of homicidal death.

In reply to the contention of abscondance of the appellant during the trial as being raised by the learned Deputy Attorney General, case of State Vs. Lalu Miah, 39DLR(AD)(1987), 117 May be referred to. In that case, our apex court held:

“absconsion by itself is not an incriminating matter, for, even an innocent person, if implicated in the ejahar for a serious crime, sometimes absconds to avoid harassment during investigation by the police. But in some cases a person with guilty knowledge also absconds. It is the facts and circumstances of the case which decide whether the absconsion is due to any guilty knowledge or to any intention to avoid police harassment.”

In the case in hand, the mother of the appellant and maternal uncle and another were arrested at the early stage of the case. P.W. 5 stated that the appellant absconded due to fear of police. P.W. 7 further stated in his cross examination that the informant party reaped paddy from the field of the appellant and also evicted him from his house. The appellant surrendered after the judgment and order of conviction and sentence. In the circumstances, it is evident that the appellant had absconded out of fear and to avoid harassment.

In view of the discussion made above, we are of the opinion that the prosecution hopelessly failed to prove the charge brought against the appellant. The learned Additional Sessions Judge on mis-appreciation of evidence and material on record convicted and sentenced the appellant. As such, the impugned judgment and order of conviction and sentence is not tenable in law.

In the result, the appeal is allowed. The impugned judgment and order of conviction and sentence dated 22.02.2017 passed by the learned Additional Sessions Judge, 5th Court, Dhaka in Sessions Case No. 741 of 2012 is hereby set-aside. The accused appellant is acquitted of the charge levelled against him. He be set at liberty if not wanted in connection with any other case.

Send down the L.C.R. along with a copy of this judgment to the concerned court at once.

ASM Abdul Mobin, J

I agree