

Present:

Mr. Justice Borhanuddin

and

Mr. Justice Md. Ruhul Quddus

Criminal Appeal No. 4652 of 2008

Babul and others

...Appellants

-Versus-

The State

...Respondent

Mr. Mohd. Lokman Hossen, Advocate

...for the appellants

Mr. Matiur Rahman Howlader, A.A.G.

...for the respondent

Judgment on 21.7.2011

Md. Ruhul Quddus, J:

This appeal is directed against judgment and order dated 18.6.2008 passed by the Additional Sessions Judge, Lakshmipur in Session Case No.86 of 1999 convicting the appellants under sections 302/34 of the Penal Code and sentencing each of them thereunder to suffer rigorous imprisonment for life with a fine of Taka 20,000/- for each in default to suffer rigorous imprisonment for one year more.

Facts leading to this appeal, in brief, are that one Ayati Begum (P.W.1) filed a petition of complaint before the Magistrate of first class, Lakshmipur on 17.11.1997 alleging *inter alia*, that her son Abdur Rashid was a young man of 20 years of age. He used to maintain his family by catching fish in different canals and rivers. Before 20/22 days of the date of occurrence, there was a quarrel between the said Abdur Rashid and appellant Nos.1 and 2, following

which they assaulted him (Abdur Rashid). In the background of such enmity, appellant Nos.1 and 2 called him on 13.10.1997 at about 1.00 p.m. to go for fishing. At about 6 p.m. they (appellant Nos.1 and 2) came back and handed over his wearing apparels with some fishes to her husband. He asked them his (Abdur Rashid's) whereabouts, when they replied that he had gone to Chandragonj Bazar to ply rickshaw. On the following day, his dead body was found in WAPDA Canal. The local people lifted the dead body from the canal. The complainant rushed there and identified the dead body to be of her son. Appellant No.3 Abdur Rab Chokwidar told her that he communicated to local police station and the police asked him to burry the dead body immediately. The said Abdur Rab Chowkidar also took her left thumb impression on a paper. A few days later, she wanted back the paper, but appellant No.3 avoided on different plea, which created doubt in her mind that they might killed her son.

On receipt of the said complaint, the Magistrate sent it to Lakshmipur police station with a direction to treat it as an *ejahar* and do the needful. In compliance therewith, the police recorded Lakshmipur Police Station Case No.4 dated 6.1.1998 under section 302/34 of the Penal Code. The police had investigated the case and submitted charge sheet under sections 364/302/201/34 of the Penal Code against the appellants and another.

The case after being ready for trial, was sent to the Sessions Judge, Lakshmipur and was registered as Session Case No.86 of 1999. The learned Sessions Judge by his order dated 10.4.2000 framed charge against the appellants and another under sections 302/201/34 of the Penal Code, to which

they pleaded not guilty and claimed to be tried. During trial the case was transferred to the Court of Additional Sessions Judge, Lakshmipur for disposal.

The prosecution in order to prove its case examined as many as thirteen witnesses. After closing the prosecution, the learned Judge examined the appellants under section 342 of the Code of Criminal Procedure, when they reiterated their innocence and examined nine defense witnesses. The defense case, as it appears from the evidence of defense witnesses as well as from the trend of cross-examination, is that the victim Abdur Rashid was drowned in strong current of the canal, while he along with appellant Nos.1 and 2 were crossing the canal by swimming. After conclusion of trial, the learned Additional Sessions Judge, Lakshmipur found the appellants guilty under sections 302/34 of the Penal Code and accordingly pronounced his judgment and order on 18.6.2008 convicting the appellants under sections 302/34 of the Penal Code and sentencing each of them thereunder to suffer rigorous imprisonment for life with a fine of Taka 20,000/- for each in default to suffer rigorous imprisonment for one year more and acquitted co-accused Abdus Satter as the allegation was not proved against him. The appellants preferred the instant criminal appeal against the said judgment and order. Subsequently appellant No.3 was granted bail by this Court.

Mr. Mohd. Lokman Hossen, learned Advocate appearing for the appellants submits that the alleged occurrence took place on 13.10.1997 and the dead body was recovered and buried on the following day, but the complaint was filed on 17.11.1997 without offering any satisfactory explanation of such inordinate delay. It indicates subsequent embellishments

on the prosecution case and casts doubt over the case. The evidence of the prosecution witnesses are inconsistent and contradictory in material particulars, which casts further doubt over the case. The alleged murder of the victim Abdur Rashid has not been proved beyond reasonable doubt inasmuch as the attending circumstances and other materials on records strongly suggest that the victim Abdur Rashid was drowned in the canal, while they were crossing it by swimming. The learned Advocate pointed out that in the complaint, the complainant-informant Ayati Begum stated that appellant Nos.1 and 2 called Abdur Rashid out from the house at about 1 p.m, came back at about 6 p.m. and handed over his wearing apparels to her husband, but in her deposition she stated that they called her son at about 10 a.m., came back at 4 p.m. and handed over his wearing apparels to her daughter Nasima Akhter. Moreover, the motive as disclosed in the complaint has not been proved by her evidence or that of any other witnesses and in that count the allegation was not proved against the appellants. The theory of "last seen" is not mechanically applicable in all cases. In this regard, the learned Advocate refers to the cases of Ismail Sarker alias Sudan Member and others Vs. The State reported in 33 DLR 320, Soleman and others Vs. The State reported in (1990) 10 BLD 179, The State Vs. Sree Ranjit Kumar Pramanik reported in (1992)12 BLD (HCD) 284 and The State Vs. Arman Ali and others reported in 42 DLR (AD) 50. On delay in filing the complaint, he refers to the case of Rustum and others Vs. The State reported in XIV BLT 435.

The learned Advocate for the appellants lastly submits that the trial Judge without proper assessment of evidence convicted the appellants on mere surmise and conjecture, which is not sustainable in law.

On the other hand, Mr. Matiur Rahman Howlader, learned Assistant Attorney General appearing for the State submits that the complainant-informant disclosed clear motive in her complaint. The witnesses of both the sides proved that the appellants called the victim out from his house and went together for catching fish. On the following day, his dead body was found in the canal. Since the victim was “last seen” in the company of the appellants, it was incumbent upon them to explain the cause of his death. In absence of any such explanation, inference would be drawn that the appellants drowned him in the canal and to suppress the fact, misled the members of his family telling that he had gone to Chandragonj Bazar to ply rickshaw. The prosecution has been able to prove its case at least by one eye-witness and also by circumstantial evidence, and the Additional Sessions Judge rightly convicted and sentenced the appellants.

In order to appreciate the submissions of the learned Advocates of both sides, we have examined the evidence on records and gone through the decisions cited as well as the impugned judgment and order of conviction and sentence.

In the case of 33 DLR 320 a Division Bench of this Court set aside a judgment and order of conviction and sentence passed under sections 302/109 of the Penal Code, on the reason:

“ 6. *Even if it is presumed that deceased Mohor Ali was last found in the company of the accused appellant at about 10-00 p.m in the night of occurrence and subsequently his dead body was seen in river Titas at about noon on the next day, from such facts alone it can not be held that the accused appellant in any way had any plan to murder deceased Mohor Ali or had in any manner abetted the commission of the murder of deceased Mohor Ali. In this case the circumstantial evidences are not such as are incapable of explanation on any reasonable theory except that of guilt of the accused persons....”*

In (1990) 10 BLD 179 their lordships of the High Court Division allowed an appeal preferred against a judgment and order of conviction and sentence under sections 302/109 of the Penal Code on the reason:

“20. ... mere taking away of the victim from his house without any overt act or animus expressed in the form of any hostile attitude or initial intention to kill, will not justify the conviction under section 302/109 of the Penal Code. The theory of ‘last seen’ must carry along with it, a high degree of probability excluding all other theories save and except the hypothesis of guilt of the accused.”

In passing the above judgment, their lordships relied on the case of Shamsuddin Sarker Vs. State reported in 11 DLR (SC) 365, wherein similar view is echoed.

In (1992) 12 BLD 284 another Division Bench of the High Court Division under similar circumstances, observed:

“ 28. It is well settled law that last seen together is a weak type of circumstantial evidence on which to have a conviction, where evidence is necessary to find a link between the accused and the murder....”

In the case of 42 DLR (AD) 50 the Appellate Division dismissed a leave petition filed by the State challenging a judgment of acquittal passed by the High Court Division. In so doing their lordships of the Appellate Division observed:

“ 7. ... In a case based on circumstantial evidence, before any hypothesis of guilt can be drawn on the basis of circumstances, the legal requirement is that the circumstances themselves have to be proved like any other fact beyond reasonable doubt. If the witnesses examined to prove the circumstances are found to be unreliable or their evidence is found to be unacceptable for any other reason the circumstances cannot be said to have been proved and therefore there will be no occasion to make any inference of a guilt against the accused.”

In 2006 (XIV) BLT 435, the High Court Division allowed an appeal on setting aside a judgment and order of conviction under section 302/34 of the Penal Code, on the grounds amongst others that delay in lodgment of first information report and in transmission of the same to the Chief Metropolitan Magistrate was given a room of doubt to the authenticity of the first information report and its creditworthiness was put to challenge, and an inference had been legitimately drawn that there were chances of manipulation in the first information report by falsely roping in the accused.

On examining the evidence, it appears that P.W. 1 Ayati Begum, the complainant-informant stated that two years back it was on Monday at 10 a.m., when Rafique, Babul (herein appellant Nos.1 and 2) and Satter called her son out from house on the plea of catching fish in WAPDA Canal. At about 4 p.m. Babul and Rafique came back and handed over his (Abdur Rashid's) wearing apparels with some fishes to her daughter Nasima Akhter. On her (Nasima Akhter's) query, they told that he had gone to Chandragonj Bazar to ply rickshaw. On the following day at about 10 a.m. the local people found his dead body in the canal under water-hyacinth with his head downwards and legs upwards. They lifted the dead body from the canal. On receipt of the news, she (P.W.1) rushed there and identified the dead body of her son. Subsequently appellant No.3 Abdur Rab Chowkider took her thumb impression on a paper for the purpose of burial of the dead body.

P.W. 2 Naderr Zaman, a local independent witness, stated that the informant was his neighbour. On 13.10.1997 at about 4 p.m. he heard an alarm from her (informant's) house. Instantly he rushed there and came to learn from Nasima Akhter (P.W.5) that her brother Abdur Rashid along with his friends (indicating appellant Nos.1 and 2) had gone to catch fish, but thereafter his whereabouts was untraceable. She further stated that appellant Nos.1 and 2 had come back and handed over his wearing apparels to her. On the following day at about 9 a.m. people found his dead body at the foot of Gunagaji Bamboo Bridge. On receipt of the news he (P.W.2) rushed to the spot and found the dead body at northern bank of the canal. In cross-examination he stated that the canal was 100 yards wide and in the month of Bhadra/Ashwin there was strong

current. He further stated that the Investigating Officer had examined him after one and half/two months of the occurrence.

P.W.3 Rezia Begum, sister of the informant, stated that near about two years back she went to Bashurhat. On the way, near to WAPDA Canal, she saw that appellant Nos.1 and 2 were drowning the victim Abdur Rashid in the canal. She asked them why they were doing so. In reply, they asked her to go away. After coming back from Bashurhat, she heard an alarm from the house of the informant and rushed there. She further stated that on the following day she was present at the time of lifting the dead body from the canal. At the instance of the villagers including appellant No.3, the dead body was buried. In cross-examination she stated that while she saw drowning of the victim Abdur Rashid, she did not raise any alarm and further stated that she did not narrate the incident to anybody. The Investigating Officer examined her after two months of the occurrence. She knew appellant No.3 from her childhood and there was no enmity between the informant and appellant No.3.

P.W. 4 Adbur Rab stated that on the date of occurrence at about 10 a.m. the appellants Rafique and Babul along with the victim Abdur Rashid went to WAPDA Canal for fishing. He was cutting grass beside the canal at about 12 o'clock. He saw Halima Begum (P.W.10) to ask appellant Nos.1 and 2 the whereabouts of victim Abdur Rashid. At this stage, he was declared hostile and the prosecution cross-examined him.

P.W.5 Nasima Akhter, daughter of the informant, stated that about two years back, her brother Abdur Rashid along with Babul, Rafique, and Satter went to WAPDA Canal for fishing at about 2 p.m. Rafique and Babul came

back to their house and handed over his wearing apparels. She made a query on whereabouts of her brother, when they told that he (Abdur Rashid) had gone to ply rickshaw at Chandragonj Bazar. On the following day a rickshaw puller told them that the dead body of Abdur Rashid was found in the canal with his head downwards and legs upwards. After lifting the dead body, appellant No.3 told that the police had asked to burry the dead body at once and accordingly the dead body was buried. In cross-examination she could not mention the name of rickshaw puller, who apprised them about recovery of the dead body. She further stated that she herself did not see any occurrence and could not ascertain whether her brother Abdur Rashid was drowned in the canal.

P.W.6 Md. Zakir Hossain, a constable of police, stated that at the relevant time he was posted at Lakshmipur police station. He and another constable named Nurul Amin carried the dead body of Abdur Rashid to Noakhali General Hospital for autopsy.

P.W.7 Mukesh Chandra Biswas, Magistrate of first class, stated that on 3.12.1997 at about 3.50 p.m. he along with Sub-Inspector Purna Chandra Barua and two constables of police, lifted the dead body of victim Abdur Rashid from grave yard. The victim's aunty Rezia Begum (P.W.3) identified the dead body.

P.W.8 Noor Hossain stated that he knew nothing about the occurrence. At this stage, the prosecution declared him hostile and cross-examined him. He denied the prosecution's suggestion that he had suppressed any fact.

P.W.9 Ali Ahmed, husband of the informant and father of the victim Abdur Rashid stated that the occurrence took place before seven/eight years. On the date of occurrence, appellant Nos.1 and 2 called his son out from house

on the plea of catching fish, but subsequently beat him to death. In cross-examination he stated that he himself did not see the occurrence. They went to catch fish together in WAPDA Canal. At that time there was strong current in the canal. As his son did not return home on that day, they searched to find him out. On the following day, his dead body was found at the foot of a bamboo bridge over the canal. One rickshaw puller lifted the dead body from the canal. On receipt of the news, they rushed to the spot. He further stated that the appellant Nos.1 and 2 were contemporary and friendly to his son and all of them used to ply rickshaw.

P.W.10 Halima Begum stated that the occurrence took place about seven years back. Appellant Nos.1 and 2 and victim Abdur Rashid had gone together for fishing. Subsequently she heard that Abdur Rashid died. In cross-examination she could not ascertain as to who were liable for the occurrence.

P.W.11 Dr. Md. Abdur Rahim stated that on 4.12.1997 he was posted at Noakhali General Hospital. He conducted post-mortem on the dead body of victim Abdur Rashid and submitted a report. He further stated that nothing was found in his viscera and the cause of his death could not be detected.

P.W.12 Purna Chandra Barua, a Sub-Inspector of police and one of the Investigating Officers, stated that after being assigned for investigation he visited the place of occurrence, prepared sketch map with index, lifted out the dead body of victim from grave yard, prepared the inquest report and sent it to the morgue. In the midst of investigation he was transferred. In cross-examination he stated that before filing of the complaint by Ayati Begum, he had arrested Rafiqullah (appellant No.2) under section 54 of the Code of

Criminal Procedure. He filed a report to the Magistrate on 1.1.1998 stating that the victim Abdur Rashid was drowned in the canal, when he along with appellant Nos.1 and 2 was crossing the same by swimming. In cross-examination he stated that P.W.2 and some other witnesses (who were named in charge sheet, but not examined) did not tell him that the appellants had drowned victim Abdur Rashid in WAPDA Canal.

P.W.13 Dr Shafizul Alam stated that he along with Dr. Md. Abdur Rahim conducted post-mortem on the dead body of Abdur Rashid on 4.12.1997. They did not find any injury on the dead body, for which they sent his viscera to the Chemical Examiner for examination and submission of a report.

P.W.14 Md. Kamrul Hassan stated that being a Sub-Inspector at Lakshmipur police station, he was assigned for part investigation of the case. After so assignment, he visited the place of occurrence, recorded the statement of the witnesses under section 161 of the Code of Criminal Procedure and after completion of investigation submitted charge sheet on 27.10.1999. In cross-examination he stated that there was no sign of assault or mark of injury on the dead body of victim Abdur Rashid. He further stated that he himself did not record the statement under section 161 of the Code of Criminal Procedure, but he got it written by some other person under his dictation.

On the other hand, the defense examined nine witnesses. All of them stated that they heard from the villagers that appellant Nos.1 and 2 and the victim Abdur Rashid went together to catch fish in WAPDA Canal and the victim Abdur Rashid was drowned in strong current of the canal. Being

hearsay witnesses, their evidences were not admissible and we are not going to discuss those evidence.

It appears from the impugned judgment and order that the learned Additional Sessions Judge mentioned all the evidence of the prosecution witnesses, but without sifting their evidence and making critical analysis over the same, proceeded on assumption that it was unbelievable that a young man of 15/20 years age would drown in the water. Even if, it happened so, appellant Nos.1 and 2 did not raise any alarm to save his life. They did not communicate the tragic incident to the family members of the victim. Therefore, it was presumed that appellant Nos.1 and 2 called him out from his house and drowned him in the canal in planned way, and that is the reason of not finding any water in his stomach.

From a close reading of the evidence of prosecution witnesses, it appears that P.Ws.1, 3, 5 and 9 are members of same family, who tried to establish the prosecution case. There is a sharp departure in the deposition of P.W.1. from her statement made in the complaint in terms of time and manner of the events. There is no explanation of delay in filling the complaint.

It appears from the record that the complainant-informant made a G.D. entry on 29.10.1997, upon which Sub-Inspector Purna Chandra Barua made an inquiry and submitted a report on 1.11.1998 stating that the victim Abdur Rashid was drowned in the canal with a fishing net on his back, when he along with appellant Nos.1 and 2 was crossing the same by swimming. In the said report he also stated that the victim and appellants were friendly to each other and there was no evidence that any altercation ever took place between them.

In the inquest report signed by Magistrate Mukesh Chandra Biswas (P.W.7), it is mentioned that he made query on the incident, when the local people, in presence of the victim's aunty and sister, disclosed that on the date of occurrence while victim Abdur Rashid with a fishing net on his back was crossing the canal by swimming, was drowned. We also fail to understand why the informant's left thumb impression on a paper, as claimed to had been procured by appellant No.3, would require for the purpose of burial of the dead body, and as to why denial of appellant No.3 to return that paper would cast doubt in her mind that they might killed her son. On this point, a question pinches us, whether there was any other dispute between the informant and appellant No.3, which instigated her to file the complaint.

P.W.3 Rezia Begum, sister of the informant stated in her cross-examination that she did not raise any alarm while saw appellant Nos.1 and 2 to drown her nephew inside the water. It is unbelievable and against usual human conduct. In the complaint, there is nothing that she had communicated the occurrence to the informant. If she saw the occurrence, there would be no reason of not communicating the incident to the mother of the victim. So, this unusual conduct of P.W.3 makes her evidence unworthy of credit.

The inquest report, and inquiry report dated 1.1.1998 and the evidence of P.W.12 Purna Chandra Barua strongly suggest that the victim Abdur Rashid was drowned in strong current of WAPDA Canal. P.Ws. 2, 4, 6, and 10 are independent local witnesses. Out of them P.W.2 stated that he heard alarm from the informant's house at about 4 p.m. on 13.10.1997. P.W.1 herself stated that the appellants Babul and Rafique came back at about 4 p.m. and handed

over the wearing apparels of Abdur Rashid to her daughter Nasima Akhter. The evidence of P.Ws.1 and 2 are inter-linked on this point. It might happened that appellant Nos.1 and 2, while came back to the house of victim Abdur Rashid communicated the incident to the inmates of the house and after such communication, family members of victim Abdur Rashid raised alarm and P.W.2 heard the said alarm. For that reason, the informant was silent over the matter for long days. From this angel there is a strong presumption of subsequent embellishments on the prosecution case, which makes the case doubtful. All the events together do not lead us to the only hypothesis that the appellants drowned the victim in the canal.

We also notice that the post-mortem on victim's dead body was held on 4.12.1997 i.e. long after fifty days of burial of the dead body. After such laps of time, no water is likely to be found in his stomach. So, on that basis any factual inference should not be drawn that the victim was not drowned, but the appellants had drowned him. Moreover, the alleged murder of the victim by forceful drowning in the water having not been proved otherwise, the "last seen" theory cannot be mechanically applied to justify the conviction. These aspects of the case have not been considered by the learned Additional Sessions Judge in juxtaposition with the prosecution case. The decisions as referred to above are also identical and applicable in the facts and circumstances of the present case.

For all the reasons stated above, we do not find that the prosecution has been able to prove the charge of murder against the appellants beyond reasonable doubt. There is a strong possibility that the victim Abdur Rashid

being wrapped by the fishing net was drowned in the strong current of the canal, while he along with appellant Nos.1 and 2 was crossing the same by swimming and therefore, the appellants are entitled to get benefit of doubt.

In the result the appeal is allowed. The impugned judgment and order of conviction and sentence dated 18.6.2008 passed by the Additional Sessions Judge, Lakshmipur in Session Case No.86 of 1999 is hereby set aside.

Let appellant Nos.1 and 2 be set at liberty forthwith, if they are not wanted in connection with any other case. Since appellant No.3 Abdur Rab Chowkider is on bail, he is released from his bail bond.

Send down the lower Court records.

Borhanuddin, J.

I agree.