

CASE NO.:
Appeal (crl.) 932 of 2000

PETITIONER:
Raj Kumar Prasad Tamarkar

\005Appellants

RESPONDENT:
State of Bihar & Anr.

\005Respondents

DATE OF JUDGMENT: 04/01/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
JUDGMENT

W I T H
CRIMINAL APPEAL No. 1103 OF 2001

S.B. SINHA, J :

Raja Ram Sao (Respondent) was prosecuted for commission of an offence under Section 302 of the Indian Penal Code. He was a convoy driver employed by Tata Engineering Locomotive Company (TELCO) at Jamshedpur. He married Usha Devi (deceased) on 3.07.1995 at Calcutta at her maternal grandfather's place. She had all along been residing at Calcutta with him. She, after solemnization of the marriage, went to her matrimonial home at Jamshedpur on several occasions. She, however, stayed at Jamshedpur only for a total number of 10 days. The deceased's father Raj Kumar Prasad Tamarkar (Appellant) was a resident of Giridih.

Allegedly, the respondent had an affair with a lady named Shahnaj. The deceased allegedly raised objection in regard thereto. She, at the material time, was staying with her parents at Giridih. At about 4.00 p.m. on 13.07.1996, the respondent came to his in-laws place at Giridih. He asked for 'Bidai' of his wife. It was agreed that Bidai ceremony would be held on 17.07.1996. He stayed at Giridih on the said date. On 14.07.1996, allegedly, the respondent went to see a movie in a theater known as 'Jivan Talkies' along with the deceased and her brother Ranjit Kumar Prasad (PW-3). The residential premises of the parents of the deceased consisted of only two rooms, one on the second floor which was being used as a bedroom and other on the first floor which was also used as a kitchen. There was a terrace on the second floor just in front of the said bed room. When the dinner was to be served the brother-in-law of the respondent was asked to have it in the kitchen situate at the first floor, the deceased took the food for dinner of the respondent to a room in the second floor in which he was staying.

It is not in dispute that although as a convoy driver of TELCO, the respondent visited Calcutta on several occasions after solemnization of the marriage, he never visited the deceased although she was staying with her maternal grandfather at Calcutta. It is furthermore not in dispute that when the incident took place the deceased was alone with the respondent on the second floor of the house.

The prosecution case is when the deceased had gone upstairs with the dinner of the respondent, a sound of a gunfire was heard by the informant at the first floor. PW-3 rushed to the second floor immediately and found the deceased lying in a pool of blood in the terrace having a gun shot injury. Allegedly, he exclaimed "DIDI KO KISEE NEI GOLU MAR DIYA". Hearing these words, the parents of the deceased also rushed to the second floor and found her lying in the terrace in the pool of blood with a gun shot injury on her forehead. Respondent was seen hiding something by PW-2.

When the mother of the deceased Gouri Devi (PW-2) took the deceased's head on her lap, the respondent also came out. She was brought downstairs and taken to a nursing home. Respondent was also said to have accompanied them in a rickshaw. She was declared dead. Before the deceased was taken to the nursing home, PW-2 had locked the room from outside.

Information about the said incident was lodged by Raj Kumar Prasad Tamarkar, the father of the deceased (PW-13).

The investigating officer, on opening of the lock, found a revolver from which smoke was still coming out. It was found from the bedstead of the room.

Respondent was arrested. Principal witnesses examined on behalf of the prosecution to prove the offence against the respondent before the learned Sessions Judge were PW-2, PW-3 and PW-13, mother, brother and informant - father of the deceased respectively. Indisputably, they were present in the house when the occurrence had taken place. The autopsy report was prepared by Dr. Kaushlendra Kumar (PW-1) posted at Sadar Hospital, Giridih. He found the following injuries on the person of the deceased:

"(i) one circular lacerated wound over glabella (middle of forehead) = " x 1/2" cranial cavity deep with inverted margin, blackening and charring was present.
(ii) Crescentic mark over the side of the nose (left) below left eye \026 nail mark.
On further desection \026 subcutaneous tissues under the lacerated wound on the forehead in middle i.e. Glabella region and the underlying frontal bone consisted a circular hole = " x =" Cranial cavity deep.
On further desection the meninges and the brain were lacerated and terro posteriorly with extra cranial blood clot. On bullet was taken out from the posterior cranial fossa. The bullet was sealed and handed over the investigating agency."

Bharti Devi (PW-4) was the aunt of the deceased, i.e., the brother's wife of informant (PW-13). She was staying in the same house. She deposed that at the relevant time the respondent was staying in the house and he had come asking for Bidai of the deceased. Suresh Kumar (PW-3) is another brother of the informant living in the same house. He was informed by the informant that it was the respondent who was responsible for the death of his daughter (deceased).

Kameshwar Prasad (PW-5) is another brother of the informant who was also living in the same house. He also supported PW-3. Bishwanath Sharma (PW-7) was a neighbour who came to the place upon hearing commotion. To him also the occurrence was reported by the informant. Kali Prasad Sao (PW-8), Shambhu Prasad (PW-9), Surender Sao (PW-10) and Ramdeo Prasad Yadav (PW-11) were witnesses of seizure of a blood-stained revolver from the bedstead of the room which was being occupied by the respondent at the relevant time. Shesil David Khalkho (PW-12) is a Sargent Major. He had examined the seized revolver and opined that the same had been in a working condition and had been used recently. He examined himself as PW-12.

The learned Sessions Judge on the basis of the aforementioned evidence found the respondent guilty of commission of murder and sentenced him to undergo rigorous imprisonment for life.

The said judgment having been appealed against has been reversed by the High Court by reason of the impugned judgment. The High Court was of the opinion that the circumstances said to be obtaining in the prosecution case could not be said to have connected all the links in the chain. The High Court also noticed that there was no eye-witness to the occurrence.

The circumstances which have been found by the learned Sessions Judge to prove the involvement of the respondent in the case are as under:

- "(i) The marriage between the accused-appellant and the deceased was solemnized some time prior to the occurrence and the accused \026 appellant although visited Calcutta in course of his duty but he did not meet his wife Usha Devi the deceased, in Calcutta while she was residing at her Nanihal at Bhawanipur.
- (ii) At the time of occurrence in the upstairs of the house only the accused \026 appellant and the deceased were present. There was none other than them.
- (iii) Soon after the occurrence when the inmates of the house went upstairs hearing the sound of firing, the accused \026 appellant was in the room while the deceased, Usha Devi, was lying with gun shot injury in pool of blood on the terrace and he was found concealing something inside the bedstead.
- (iv) On examination of the seized revolver it was found to be an unbalanced one and recently it was used as still there was smell of firing in the barrel.
- (v) The accused \026 appellant was having some illicit relationship with one lady, namely, Sahnaj and only with the ulterior motive of clearing his path of illicit relationship with Sahnaj, Usha Devi was murdered. A letter to that effect as alleged was written by the accused \026 appellant to the deceased had been proved in the case."

We have noticed hereinbefore certain admitted facts which we need not advert to once over again.

No positive defence was taken by the respondent. Merely a suggestion was given while cross-examining the prosecution witnesses that the deceased might have been killed by an outsider.

Our attention was drawn to a letter dated 30.10.1995 (Ext. 7) written by the respondent to the deceased. In that letter indisputably the respondent had warned the deceased of grave consequences if she continued to accuse him in regard to his affair with Sahnaj.

The learned Judges of the High Court opined that there was nothing to show that the revolver belonged to the respondent, particularly, when the same had not been sent to a ballistic expert nor the blood which was found thereupon was sent for chemical examination.

The High Court held that the prosecution could not be said to have proved any motive against the respondent, nor had it been able to show that the relationship of the respondent with the deceased was abnormal as it stood admitted that immediately after the brother-in-law of the respondent arrived, the respondent came out from his room and helped the deceased in being taken to the nursing home. The High Court opined that such sort of conduct was not expected from a criminal.

The High Court moreover opined that nobody had stated that the revolver was kept in the jhola which was carried by the respondent. It was furthermore observed that the room wherein the respondent was staying cannot be said to be in his exclusive possession and, thus, if anything incriminating had been found therein, the same could not 'finger towards the conscious possession' of the respondent. It was furthermore opined that the fired bulled recovered from the body of the deceased having not been sent for chemical examination along with the revolver to prove that the same had been fired from the revolver seized; there remained a gap constituting a missing link.

Ext. 7 was proved to be in the handwriting of the respondent. The contents of the said letter are not in dispute. It contained threatenings to the deceased. She was warned of grave consequences even to the extent of killing her.

Mr. Ranjan Mukherjee, learned counsel appearing on behalf of the appellant in Criminal Appeal No. 932 of 2000 and Mr. B.B. Singh, learned counsel appearing on behalf of the State of Jharkhand would submit that the judgment of the High Court suffers from a manifest error insofar as it failed to take into consideration that not only the motive but also all other links in the chain of circumstances have been proved by the prosecution.

Mr. Arup Banerjee, learned counsel appearing on behalf of the respondent, on the other hand, supported the judgment of the High Court.

The conspectus of the events which had been noticed by the learned Sessions Judge as also by the High Court categorically go to show that at the time when the occurrence took place, the deceased and the respondent only were in the bedroom and the terrace connecting the same. There was no other person. The cause of death of the deceased Usha Devi i.e. by a gun short injury is not disputed. The fact that the terrace and the bedroom are adjoining each other is not in dispute.

The autopsy report shows that 'a blackening and charring' existed so far as Injury No. (i) is concerned. The blackening and charring keeping in view the nature of the firearm, which is said to have been used clearly go to show that a shot was fired from a short distance. Blackening or charring is possible when a shot is fired from a distance of about 2 feet to 3 feet. It, therefore, cannot be a case where the death might have been caused by somebody by firing a shot at the deceased from a distance of more than 6 feet. The place of injury is also important. The lacerated wound was found over grabella (middle of forehead). It goes a long way to show that the same must have been done by a person who wanted to kill the deceased from a short distance. There was, thus, a remote possibility of causation of such type of injury by any other person, who was not in the terrace. Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.

This legal position would appear from a decision of this court in *Nika Ram v. The State of Himachal Pradesh* [AIR 1972 SC 2077] wherein it was held:

"It is in the evidence of Girju PW that only the accused and Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle of the accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p.m., while Poshu Ram, (PW 7) saw the accused and the deceased at their house on the

evening of the day of occurrence. The accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the accused, according to plan PM, consists of one residential room one other small room and a varandah. The correctness of that plan is proved by A. R. Verma overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt."

In Trimukh Maroti Kirkan v. State of Maharashtra [JT 2006 (9) SC 50], the law is stated in the following terms:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime\005"

We furthermore fail to understand as to how the High Court could say that the Exhibit 7 had not been proved. The same was proved by PW-13. No objection in regard to its admissibility was taken. The alleged motive on the part of the respondent in killing his wife, viz., his illicit relationship with Shahnaj was admittedly put to him under Section 313 of the Code of Criminal Procedure. He did not deny the same. He did not even deny that he was the author of the letter.

It is interesting to note that the respondent did not raise any positive defence. He in answer to all the questions merely stated that he was not aware thereof.

If the said letter dated 30.11.1995 stands proved, the motive on the part of the respondent to kill his wife becomes explicit. A threat to kill her had been given. It would, thus, not be correct to say that the prosecution had not been able to prove the motive. Another strong circumstance in regard to motive of the respondent which is again not in doubt or dispute is the abnormal relationship between the parties. The death of the deceased took place within a year's time from the date of marriage. Within a period of one year, admittedly, the deceased stayed at Jamshedpur for a total period of ten days although she had been visiting Jamshedpur off and on. She had been even after marriage ordinarily living with her maternal grandfather at Calcutta. The respondent had been frequently visiting Calcutta. It is wholly unnatural that, despite the fact that the deceased had been visiting Calcutta, her husband would not visit her.

For one reason or the other, Bidai ceremony had not been held. Respondent evidently had come to her in-laws' place at Giridih without any prior information. He demanded Bidai ceremony to take place immediately and it was agreed that it would be done on 17.07.1996.

Parents of a married daughter would wish her a happy married life. The respondent had been treated by in-laws with usual courtesy. Even some lapses on the part of the son-in-law may be ignored keeping in view the societal condition. We do not see any reason to disbelieve the disposition of

the prosecution witnesses to show that the deceased was alone with the respondent at the material time.

The observation of the High Court that the deceased had not been proved to be in possession of the revolver cannot be accepted. The respondent at the relevant time was with the deceased. In the event, the death has been caused by an outsider, he could have shouted. He would have been the first person to point out to her in-laws as to from which side the shot was fired. Even he could have been the first person to offer his explanation to the investigating officer. He chose not to do so.

Respondent was found to be hiding something under the bed-stead by his mother-in-law. It may be true that PW-3 brother of the deceased when came to the room shouted that somebody had killed his elder sister but the same would not mean that even if the circumstances are so glaring pointing out the guilt of the accused and accused alone, the same should be ignored only because of the said statement.

Other brothers of PW-13 including PW-4 came to the spot immediately. PW-7 who was the neighbour also came to the spot immediately after the incidence. To them also the respondent did not offer any explanation. To them also he did not say as to how his wife had suffered a gun shot injury.

The prosecution case that while taking the deceased to the nursing home, the mother of the deceased locked the door from outside has not been disputed. The lock of the door was indisputably opened in the presence of the investigating officer. Recovery of the revolver being the weapon of attack is also not in dispute. The fact that the injury could have been caused only by the weapon in question is also not in dispute. The same was not only found to be in working condition, it was also found by the investigating officer as also PW-12 that the same had been used recently.

We may also notice that the defence suggested that the deceased might have committed a suicide. It was furthermore suggested that some family members might have committed the offence. The learned Sessions Judge found, which finding is not questioned before us, that keeping in view the place where the dead body was found, the suicide theory is wholly improbable. The bangles of the deceased were found broken. If she had committed suicide in the room, it was impossible for her to run to the terrace. It was impossible that the pistol would be found hidden under a bed-stead in the room which is admittedly at some distance from the place where the deceased was found lying.

It is difficult to accept the submissions of Mr. Banerjee that had the respondent fired the shot, he could have thrown away the revolver. Under what circumstances the respondent did so can only be a subject matter of surmises. It is well known that different persons behave differently in a given situation. It is just possible that even if the revolver had been thrown, the same would have been found immediately.

Mr. Banerjee contended that the room was not in the exclusive possession of the respondent. It may be that the room was not in the exclusive possession of the respondent in the sense that he had not been living there permanently but it had not been denied or disputed that at the relevant time the deceased and the respondent were alone in the room. No other person was present there. Even the witnesses were not cross-examined in that behalf. No suggestion even had been given to that effect.

It was argued that if the respondent intended to kill the deceased, he could have done after 17.07.1996, viz., after Bidai ceremony took place. The very fact that the respondent brought a revolver is itself a pointer to the fact that he wanted to kill the deceased at one point of time or the other. He might have thought that Bidai ceremony would be held on 13.07.1996 or 14.07.1996. When it was postponed, he might have found out an occasion to

kill her. Under what circumstances, the occurrence took place is not known. Respondent, it would bear repetition to state, did not open his mouth. He was entitled to exercise the right of silence. That he did not offer any explanation itself may not be sufficient to conclusively hold that he was guilty of commission of the offence, but the legal position that the same would be considered to be a circumstance against him is not in dispute.

It was also not a case where it can be said that the incident took place in a heat of passion. There is no evidence that there had been a sudden quarrel. Even the High Court said so in paragraph 11 of its judgment. It is, therefore, not a case where the respondent can be held to be guilty for commission of an offence under Section 304 Part II of the Indian Penal Code.

In *Sandhya Jadav (Smt.) v. State of Maharashtra* [(2006) 4 SCC 653], this Court held:

"\005The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel..."

[See also *Pappu v. State of M.P.* (2006) 7 SCC 391, para 13, *Vadla Chandraiah v. State of Andhra Pradesh*, 2006 (14) SCALE 108]

In *State of Andhra Pradesh v. Rayavarapu Punnayya and Another* [(1976) 4 SCC 382], this Court held:

"In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the greatest form of culpable homicide which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part

of Section 304."

[See also Laxman v. State of M.P., JT 2006 (12) SC 495]

It is true that neither any fingerprint expert nor any ballistic expert had been examined. Even the blood found on the revolver had not been sent for chemical examination, but, in our opinion, the same by itself would not negate the circumstances which have proved the guilt of the respondent beyond all reasonable doubt.

We are aware of the limitations of this Court. It is well settled that ordinarily this Court would not interfere with the judgment of acquittal if two views are possible but having regard to the fact that the High Court has failed to take into consideration the relevant facts and misapplied the legal principles, we think it fit to exercise our jurisdiction under Article 136 of the Constitution of India as there has been serious miscarriage of justice.

The jurisdiction of this Court in a case of this nature is also well known.

In State of U.P. v. Nawab Singh (Dead) and Others , [(2005) 9 SCC 84], this Court held:

"It is well-settled that when reasoning of the High Court is perverse, this Court may set aside the judgment of acquittal and restore the judgment of conviction and sentence upon the accused. (See Ramanand Yadav v. Prabhu Nath Jha). It is further well-settled that there is no embargo on the appellate court to review evidence upon which an order of acquittal is based."

[See also Prithvi (Minor) v. Mam Raj and Others, (2004) 13 SCC 279, State of U.P. v. Satish, (2005) 3 SCC 114]

For the reasons aforementioned, we set aside the judgment of the High Court and restore that of the learned Sessions Judge. The appeals are allowed. The respondent is sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code. He may be taken in custody forthwith to serve out the sentence.