

102. Criminal Appeal
PRESENT: The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Kishore Kumar Prasad

Judgment on : February 17, 2010.

C.R.A No. 157 of 1994
Ansar Ali & Another
-Vs-
The State of West Bengal & Others

Point:

CHILD WITNESS: Statement of a child which has no corroboration from any other witness – Whether be taken into account as evidence – Code of Criminal Procedure, 1973, Ss. 161, 164.

Fact: The appellants preferred the instant appeal challenging the order passed by the Ld. Court below found both of them guilty of the charges and imposed punishment of imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code.

Held: It would not be safe to affirm the conviction merely on the basis of the statement made by Ayesha under Section 161 of the Criminal Procedure Code which is not admissible in evidence except the recovery of the weapons used for strangulation. Even if we rely on the evidence of the witnesses that Ayesha helped the police to seize the weapons it was not proved whether those were used for strangulation. It is also not safe to conclude that the accused were last seen with the victim. There were other family members in the house. They were not examined as we find from the record.

Paragraph – 12

Thus we are left with the statement made by the child aged four and half years old before the Magistrate and that too, without the same being tendered as exhibit or being proved by the

concerned Magistrate. It is not clear from the record as to how such statement could find place in the record without a formal proof. If we rely on the said statement we can safely hold Ansar guilty of the offence. Statement of PW-3 to the effect that the boy had told the police that his father had murdered his mother. Such statement however did not find any corroboration from any other witness. Had there been any corroboration we could affirm the conviction and sentence of Ansar.

Paragraph – 13

Had the statement made by the child under Section 164 of the Criminal Procedure Code been brought on record being supported by the evidence of the Magistrate we would have thought otherwise.

Paragraph – 14

Cases:

- i) State of Assam –VS- Mafizuddin Ahmad reported in All India Reporter, 1983, Supreme Court, Page-274.
- ii) Sharad Bridhi Chand Sarda –VS- State of Maharashtra reported in All India Reporter, 1984, Supreme Court, Page-1622.
- iii) Alok Nath Dutta and Others –VS- State of West Bengal reported in 2008, Volume-II, Supreme Court Cases (Criminal), Page-264.

For the Appellants : Mrs. Chandreyi Alam
Mr. Suprio Roy Chowdhury
Ms. Runu Mukherjee

For the State : Mr. Jayanta Narayan Chatterjee

The Court:

1. Md. Yasin was offering his prayer at about 1:20 p.m. on September 19, 1989 at the Mosque when Manjur Alam the cousin brother of his son in-law Ansar Ali came and informed him that his daughter Asheda Bibi had died. He rushed to his daughter's place where he found Asheda dead having a black spot on her throat. He lodged a complaint with the police with a request to find out the cause of the death. He however, did not make any complain against her in-laws. The police investigated into the matter and ultimately arrested Ansar Ali, the husband and the mother-in-law, Asheda. Both of them pleaded not guilty and faced trial.

2. P.W. 2, a child being four and half years old was the only eye-witness. Asheda was expecting her second child. PW-1 reiterated what he had stated in the complaint. In addition, he narrated in detail what he had seen at her daughter's place. He deposed that he had not found any rope which could be used by Asheda if she had died of hanging. He asked his son in-law to ascertain how the spot could appear on the neck of Asheda. Ansar expressed his inability having no knowledge of the same. The local people however observed that Asheda was murdered by strangulation. PW-2 was the only son of the victim who was aged about seven years at the time of trial. He deposed that his mother was dead and he could not remember how she had died which had taken place three to four years back. PW-3 was a neighbour of Ansar. He was a post-occurrence witness. He found mark over the neck of the victim. He also deposed that Asheda's son had told the police that his father had murdered his mother. The witness identified Ansar and Ayesha present in Court on the dock. PW-4 was also a neighbour. He also noticed mark on the neck of the victim. He accompanied Majidul (Panchayat member) to the Police Station to inform about the incident. The police arrested Ansar along with his mother. He also deposed that next day the police again came with Ayesha who helped the police to recover the rope and a small piece of lathi made of bamboo out of an

earthen pitcher. In cross-examination he also deposed that Ansar had been staying with his brothers, one sister and his parents. However, they were in separate mess. He also deposed in cross-examination that when the police had brought Ayesha next day she had been fumbling initially and then she had taken out the piece of rope and the small piece of bamboo from inside the earthen pitcher kept at the corner of the room. The police officer prepared a seizure list and he put his thumb impression as a seizure witness.

3. PW-5, Manjur Alam was also a neighbour. He also corroborated the other witnesses. He also said that Ayesha told them that Asheda died of heart failure. He also found mark on the neck of the victim. PW-6, the police officer recorded the complaint. PW-7, another neighbour of Ansar, also corroborated the other witnesses. He said that Ayesha told him that Asheda had fallen down from the bed and had died. He also noticed mark on the throat. He also deposed that the police came on the next day along with Ayesha who helped the police to seize the rope and the bamboo stick. PW-8 was also a neighbour who was declared hostile. PW-9, the investigating officer deposed that on being arrested Ayesha had confessed her guilt and made statement that had been recorded under Section 161 of the Code of Criminal Procedure which laid the recovery of rope and bamboo stick. PW-10, the doctor, conducted postmortem. He proved the injuries caused to the victim and certified the cause of death. According to him, it was "homicidal strangulation" caused between 10:00 a.m. to 12:00 noon on September 19, 1989.

4. The police submitted chargesheet to Ansar and Ayesha. The learned Judge of the Court below framed charge under Section 498-A, 302 read with Section 34 and 201 of the Indian Penal Code against both of them who pleaded not guilty and faced trial.

5. The learned Judge of the Court below found both of them guilty of the charges and imposed punishment of imprisonment for life coupled with a fine of rupees two thousand each and, in default, to suffer further rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. Ayesha was separately sentenced to suffer imprisonment for two years and to pay a fine of rupees five thousand, in default, to suffer rigorous imprisonment for two months more. However, such sentence would run concurrently. The second sentence imposed on Ayesha was due to her conviction under Section 201 of the Indian Penal Code.

6. Being aggrieved, both Ayesha and Ansar preferred the instant appeal that was heard by us on the above mentioned dates.

7. Mrs. Chandreyi Alam, learned counsel appearing for the appellant contended before us that the learned sessions Judge convicted the appellants guilty of the offence, solely based upon the evidence of a seven-year old child who could not remember what had happened on the fateful day when he had been about four and half years old. Mrs. Alam further contended that the statement recorded by the learned Magistrate said to be under Section 164 of the Criminal Procedure Code was not tendered in evidence. The learned Magistrate did not come forward to depose in support of the same. Hence, the learned Judge was not right in relying upon the said statement from the records which was not tendered in evidence. We however do not find any specific mention about the statement made before the learned Magistrate by the child, from a combined reading of the judgment.

8. In support of her contention Mrs. Alam relied on the following decisions :

i) State of Assam –VS- Mafizuddin Ahmad reported in *All India Reporter, 1983, Supreme Court, Page-274.*

ii) Sharad Bridhi Chand Sarada –VS- State of Maharashtra reported in *All India Reporter, 1984, Supreme Court, Page-1622.*

iii) Alok Nath Dutta and Others –VS- State of West Bengal reported in *2008, Volume-II, Supreme Court Cases (Criminal), Page-264.*

9. Opposing the appeal, the learned counsel appearing for the prosecution contended that the circumstantial evidence could complete the chain that led to only one conclusion that the appellants and the appellants only were responsible for the death of Asheda. He prayed for dismissal of the appeal.

10. It is nobody's case that Asheda died within seven years of her marriage. It is nobody's case that she was subjected to torture on account of dowry. Hence, we do not get any benefit either under Section 113-B of the Evidence Act or under Section 304-B of the Indian Penal Code. From the circumstantial evidence being supported by the medical evidence it is clear that Asheda died an unnatural death. The opinion of the doctor to the extent that it was a case of homicidal strangulation found corroboration from the other witnesses who consistently deposed having found mark of injury on the throat and/or neck.

11. Question thus remains, who could be responsible for such crime. Ansar in reply to his examination under Section 313 of the Code of Criminal Procedure said that he was not in the

house. Ayesha in reply to the query made under Section 313 deposed that the door of the room was closed from inside and she went there after hearing a sound of fall. She peeped to the window and found Asheda lying on the floor. Her statement, however, did not find support from the neighbour witnesses. Not a single witness deposed that the room was locked from the inside. Every one came and found Asheda dead having a mark on her throat and/or neck.

12. It would not be safe to affirm the conviction merely on the basis of the statement made by Ayesha under Section 161 of the Criminal Procedure Code which is not admissible in evidence except the recovery of the weapons used for strangulation. Even if we rely on the evidence of the witnesses that Ayesha helped the police to seize the weapons it was not proved whether those were used for strangulation. It is also not safe to conclude that the accused were last seen with the victim. There were other family members in the house. They were not examined as we find from the record.

13. Thus we are left with the statement made by the child aged four and half years old before the Magistrate and that too, without the same being tendered as exhibit or being proved by the concerned Magistrate. It is not clear from the record as to how such statement could find place in the record without a formal proof. If we rely on the said statement we can safely hold Ansar guilty of the offence. Statement of PW-3 to the effect that the boy had told the police that his father had murdered his mother. Such statement however did not find any corroboration from any other witness. Had there been any corroboration we could affirm the conviction and sentence of Ansar.

14. From the medical evidence it is clear that the death was due to homicidal strangulation. There was a strong possibility of Ansar being responsible for such death. Mr. Chatterjee for the prosecution contended that there was also a strong possibility that Ayesha, upon coming to know of the death, had helped Ansar to hide the rope and the bamboo stick and such strong possibilities would lead to a conclusion that Ansar and Ayesha were responsible for the crime and nobody else. With due respect to Mr. Chatterjee, we are unable to accept such contention in absence of a better evidence. Had the statement made by the child under Section 164 of the Criminal Procedure Code been brought on record being supported by the evidence of the Magistrate we would have thought otherwise.

15. Let us now deal with the cases cited at the Bar.

i) State of Assam –VS- Mafizuddin Ahmad (Supra) – In this case a child aged about seven years deposed. The Apex Court observed that from the tenor of his deposition it was evident that he was not a free agent and had been tutored at all stages by someone or the other.

ii) Sharad Bridhi Chand Sarma –VS- State of Maharashtra (Supra) – This decision was cited to support the contention that the learned judge was not right in relying on the prosecution evidence without properly placing the same before the accused as required under Section 313 of the Criminal Procedure Code.

iii) Alok Nath Dutta and Others –VS- State of West Bengal (Supra) – This case was cited to support the contention that the contention made under Section 161 of the Criminal Procedure Code

would only be admissible to the extent of recovery of dead body or crime articles. Other part stating mode or manner in which deceased was murdered was not admissible.

16. We are constrained to hold that the evidence so came out during trial are not safe to hold the appellants guilty of the offence. They are given the benefit of doubt.

17. The appeal succeeds. The impugned judgment and orders of conviction and sentence passed by the learned Trial Judge are set aside. The appellants are set at liberty. They are now on bail which they need not surrender. Bail-bonds/Surety Bonds in respect of appellants shall stand discharged.

18. Let a copy of this judgment along with lower Court records be sent down at once.

19. Urgent xerox certified copy will be given to the parties, if applied for.

Kishore Kumar Prasad, J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[KISHORE KUMAR PRASAD, J.]