REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1330 OF 2018
(arising out of SLP(Crl.) No.2440 of 2018)

REENA HAZARIKA ....APPELLANT(S)

VERSUS

STATE OF ASSAM ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

Leave granted.

2. The appellant is the wife of the deceased convicted under Section 302 I.P.C. and sentenced to life imprisonment with fine of Rs.1,000/- and in default, imprisonment for one month.

3. The deceased resided along with the appellant and his minor daughter CW-1, Miss Puja Hazarika, aged about 9 years, in the tenanted premises belonging to PW-1 Manoj Kumar Deka, PW-2 Dipen Deka and PW-3 Bhrigumoni Deka, who are brothers. The appellant is stated to have assaulted the deceased

in the intervening night of 10.05.2013/11.05.2013. PWs. 1, 2 and 3 are stated to have heard noises and on going there, found the deceased with head injury attributed to a fall, but that the deceased was otherwise alright. They were unable to take him to the hospital because of rains and the unavailability of an ambulance. According to the post-mortem report proved by PW-6, Dr. Ritu Raj Chaliha the deceased had the following injuries on his person :-

(i) Chop wound of size 11 cm x 2 cm x muscle deep present on left side of cheek 6 cm medial tragus and 1 cm above angle of mandible.
(ii) Chop wound of size 9 cm x 2 cm x muscle deep present back of occipital region.
(iii) Chop wound of size 4 cm x 2 cm x muscle deep present on left side of forearm.
(iv) Laceration of size (5 x 4) cm present over left wrist joint on posterior aspect.
(v) Chop wound of size (4 x 1) cm x muscle deep, present over temporal region on right side.
(vi) Chop wound of size (6 x 2) cm of muscle deep present over back of scapula.
(vii) Fracture of temporal bone on both sides.

All injuries were ante mortem and caused by moderately heavy sharp cutting weapon and homicidal in nature.

4. The Trial Court and the High Court held that the present was a case of circumstantial evidence. The last seen theory establishes the presence of the appellant with the deceased at night. Her unnatural conduct because she was not crying, she was the assailant of the deceased.

5. Mr. Singh, learned counsel for the appellant submitted that the courts below have erred in holding that the links in the chain of circumstances stood established leading to the only inescapable conclusion of the appellant being the assailant and no other hypothesis of innocence being possible. PW-6 has deposed that the injuries were caused by a moderately heavy sharp cutting weapon such as a *dao*, and that the fracture of the temporal bone may have been caused by a moderate heavy weapon. The recovery from the place of occurrence, as proved by PW-7 S.I. Nilomani Malakar, is of an ordinary knife used for cutting betel nut, one feet long with a bent sharp point. Chop injuries were not possible with the same. The alleged knife was not even shown to PW-6 for eliciting opinion if the injuries could have been caused by the same.

6. Miss Diksha Rai, learned counsel for the State submitted that the appellant was last seen with the deceased in the room, confirmed by CW-1. The appellant has failed to offer any explanation of the circumstances as to how the death occurred at night. Her unnatural conduct in not even weeping was also noticed by PW-7. The knife used for assault, and blood soaked clothes of the deceased have also been recovered.

7. We have considered the respective submissions, the orders of the courts below, as also the evidence available on record. Normally this court under Article 136 of the Constitution, would be reluctant in appeal to interfere with the concurrent findings of two courts by reappreciating the facts and evidence. But in an appropriate case, if this court finds that there has been erroneous consideration and appreciation of facts and evidence, leading to miscarriage of justice, this court is duty bound to ensure that ultimately justice prevails. It is a well established principle of criminal jurisprudence that several accused may go free, but an innocent person should not be punished. In ***Anant Chintaman Lagu v. State of Bombay,*** (1960) 2 SCR 460 this court observed as follows :-

> "16. Ordinarily, it is not the practice of this Court to re-examine the findings of fact reached by the High Court particularly in a case where there is concurrence of opinion between the two Courts below. But the case against the appellant is entirely based on circumstantial evidence, and there is no direct evidence that he administered a poison, and no poison has, in fact been detected by the doctor, who performed the post-mortem examination, or by the Chemical Analyser. The inference of guilt having been drawn on an examination of a mass of evidence during which subsidiary findings were given by the two Courts below, we have felt it necessary, in view of the extraordinary nature of this case, to satisfy ourselves whether each conclusion on the separate aspects of the case, is supported by evidence and is just and proper. Ordinarily, this Court is not required to enter into an elaborate examination of the evidence, but we have departed from this rule in this particular case, in view of the variety of arguments that were addressed to us and the evidence of conduct which the appellant has sought to explain away on hypotheses suggesting innocence. These arguments, as we have stated in brief, covered both the factual as well as the medical aspects of the case, and have necessitated a close examination of the evidence once again, so that we may be in a position to say what are the facts found, on which our decision is rested."

8. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it

to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act,1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.

9. Before proceeding with the discussion further, we deem it proper to notice that the appellant did not have the benefit of a lawyer of her choice, both before the trial court and the High Court, naturally because of some handicap. She had to be provided legal assistance by the Legal Services Authority. This is

not to make any comment or observation on the nature of the defence made available to the appellant, but only to notice her handicap in establishing her innocence.

10. PW-1 deposed that he was told by the deceased at about 11:00 p.m. on 10.05.2013 that he had suffered a head injury because of a fall, and that the witness did not provide any first aid to the deceased though he along with his brother PW-2, did try to call an ambulance at about 12:00 am. Additionally, that he did not see any other injuries on the deceased. On the contrary, CW-1 deposed that PW-1 had applied Dettol to the wounds of the deceased.

11. Contrary to the statement of PW-1, his brother, PW-2 deposed that he was woken up at about 2-3 a.m. by the appellant who was crying and told him that her husband had suffered head injury. The deceased is then stated to have himself told the witness that the injury was not serious. The contradiction in the evidence of PW-1 and PW-2 is further compounded by the third brother PW-3, deposing that PW-2 informed him of the injury to the deceased at 12.00 am. All the

three witnesses have deposed that the deceased was of heavy built, because of which they were unable to take him to the hospital on the motor-cycle, for treatment. The post mortem however recites that the deceased was of average built. If the deceased had merely suffered a head injury by fall and was otherwise fit to talk to the witnesses, we see no reason why he could not have been taken to the hospital on a motorcycle. While PW-3 states that the deceased was wearing clothes, the post-mortem report shows that the deceased was brought in an underwear only. The clothes of the deceased were found near the well in a gunny bag. But PW-7 did not consider it necessary to have the blood group examined by the FSL, which in our opinion in the facts of the case is a major lapse.

12. The post-mortem report makes it evident that the chop wounds could not have been caused by the small knife alleged to have been recovered. Fracture of the temporal bone with the knife was an impossibility. PW-6 in the deposition ruled out that the injury could be caused by a fall. The post mortem did not find any alcohol in the body of the deceased. The witness also opined that injury no. 4 could have been caused while the

deceased may have attempted to save himself from assault. The multiple injuries could certainly not have been caused by one person and tells an entirely different story by itself that the assailants may have been more than one. The chop injuries were possible by a moderate and heavy weapon like a *dao*. In our opinion also, if the deceased was of average built, it is difficult to accept, according to normal prudence and human behaviour and capacity, that the appellant being a woman, could have made such severe and repeated assault on the deceased, who was her husband, with a small knife, without any resistance and suffered no injury herself.

13. PW-7 claimed to have found a knife with the smell of Dettol. Even if the knife had been wiped to erase traces of blood the wooden handle could have revealed much if it had been sent to the FSL. The witness again offers no explanation why he did not do so. No bottle of Dettol has been recovered. There is absolutely no evidence that the deceased would often assault the appellant and the minor child in a drunken condition. The fact that PW-7 did not notice tears in the eyes of the appellant, deemed as unnatural conduct by the courts below, cannot be

sufficient to draw an adverse inference of guilt against the appellant. The appellant being in a helpless situation may have been stunned into a shock of disbelief by the death of her husband. It is not uncommon human behaviour that on the death of a near relative, or upon witnessing a murderous assault, a person goes into complete silence and stupor showing no reaction or sensibility. We also find it difficult to believe and rely upon the evidence of CW-1 primarily because of her minority. If the deceased had been assaulted by the appellant in the room at night, it would certainly have led to noise and shouts and the witness could not have possibly slept throughout without waking up.

14. PW-1 deposed that he informed the police the next morning at about 8:00 a.m. But PW-7 has deposed that information was given at the police station by PW-1 at about 12:00 p.m. on 11.05.2013 and the General Diary entry no. 452 made in the police station at 12.20 p.m., and the F.I.R. registered at 7:45 p.m. These are suspicious circumstances which leaves enough time for planning after thinking for the manner in which allegations were to be made for deflecting that

the occurrence took place in a manner other than what may have happened actually.

15. In the background of the aforesaid discussion regarding the nature of evidence and the manner of its appreciation, we deem it proper to set out the English translation in the paper book of defence taken by the appellant under Section 313 Cr.P.C. as follows:-

> "Ans: On the date of occurrence at about 8-8:30 while I have returned from my work at Satgaon, I saw that my husband was lying in the room with bleeding injury. On my cry, Manoj Deka and his brothers come there with drink in the hand of one brother. Thereafter I saw Manoj Deka was putting Dettol on the wound of my husband. I also rang to 108 ambulance. When, I wanted to call police Manoj Deka, snatched the phone from me. On my crying neighbouring peoples arrived there. I tried to take my husband to medical but due to non-co-operation my Manoj Deka and others, I failed to take him to Medical. On that night at about 9.30 expired and Manoj Deka and other neighbours were sitting. Subsequently Manoj Deka has falsely implicated me. I have the suspicion that my husband was physically assaulted earlier at some place by Mintu Nath, Dipak Das and Jeetu Deka while taking liquor and brought by husband on injured condition and laid in the room. I also saw the lock of my room in broken condition, when I arrived here. I have not killed my husband. I am innocent."

PW-2 has acknowledged in his evidence that he would have drinks with the deceased. According to the post-mortem report, the stomach of the deceased was found empty, suggesting that the assault had taken place earlier in the evening contrary to the evidence of PWs. 1, 2 and 3 suggesting the assault in the late hours of the night by which time the deceased would undoubtedly have had his dinner.

16. Section 313, Cr.P.C. cannot be seen simply as a part of *audi alteram partem*. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to

confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

17. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the

appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in ***Hate Singh Bhagat Singh vs. State of Madhya Bharat***, AIR 1953 SC 468 observing as follows :-

> "26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to the assess, the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person but for the word a reasonable defence which is likely to be true,..... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true friend pitted against AV and vacillating case is bound to raise a reasonable doubts of which the accused must get the benefit...."

A similar view is expressed in ***M. Abbas vs. State of Kerala,*** (2001) 10 SCC 103 as follows :-

> "10....On the other hand, the explanation given by the appellant both during the cross-examination of prosecution witnesses and in his own statement recorded under Section 313 CrPC is quite plausible. Where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities...."

18. The entirety of the discussion, in the facts and circumstances of the case, the nature of evidence available coupled with the manner of its consideration, leaves us satisfied that the links in the chain of circumstances in a case of circumstantial evidence, cannot be said to have been established leading to the inescapable conclusion that the appellant was the assailant of the deceased, incompatible with any possibility of innocence of the appellant. The possibility that the occurrence may have taken place in some other manner cannot be completely ruled out. The appellant is therefore held entitled to acquittal on the benefit of doubt. We accordingly order the acquittal and release of the appellant from custody forthwith, unless wanted in any other case.

19. The appeal is allowed.

.....J.
[R.F. NARIMAN]

.....J.
[NAVIN SINHA]

NEW DELHI
OCTOBER 31, 2018.