

5 SCOB [2015] AD 102**APPELLATE DIVISION****PRESENT:****Mrs. Justice Nazmun Ara Sultana****Mr. Justice Syed Mahmud Hossain****Mr. Justice Hasan Foez Siddique****CRIMINAL APPEAL NO.14 OF 2013 WITH CRIMINAL APPEAL NO.15 OF 2013.**

(From the judgment and order dated 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008 with Criminal Appeal No.8716 of 2008 and Jail Appeal No.100 of 2009)

Haji Mahmud Ali Londoni : Appellant.
(In Crl.Ap.No.14/2013)

The State : Appellant
(In Crl.Ap. No.15/2015)

Versus

The State : Respondent.
(In Crl.Ap.No.14/2013)

Banca Begum and others : Respondent.
(In Crl.Ap. No.15/2015)

For the Appellant : Mr. Abdul Matin Khasru, Senior Advocate, instructed
(In Crl.Ap.No.14/2013) by Mr.Zahirul Islam, Advocate-on-Record.

For the Appellant : Mr. Khondakar Diliruzzaman Deputy Attorney General,
(In Crl.Ap.No.15/2013) instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For the Respondent : Mr. Khondakar Diliruzzaman Deputy Attorney (In
Crl.Ap.No.14/2013) General, instructed by Mr. Shamsul Alam, Advocate-
on-Record.

For the Respondents : Mr. Abdul Matin Khasru, Senior Advocate, instructed
(In Crl.Ap.No.15/2013) by Mr. Zahirul Islam, Advocate-on-Record.

Date of hearing : 11-11-2015

Date of judgment : 12-11-2015

Circumstantial evidence:

It is settled principles that where the inference of guilt of an accused is to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency

pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused excluding any other hypotheses. ... (Para 22)

JUDGMENT

Hasan Foez Siddique, J:

1. These two criminal appeals being Criminal Appeal No.14 of 2013 and Criminal Appeal No.15 of 2015 are directed against the judgment and order dated 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008, Criminal Appeal No.8716 of 2008 and Jail Appeal No.100 of 2009 affirming the judgment and order of conviction of Haji Mahmud Ali Londoni (the appellant) and reducing his sentence from death to imprisonment for life.

2. The prosecution case, in short, was that on the morning of 08.07.2004 3(three) victims Fazlul Huq @ Babul, Mujahid and Md. Abdul Mutalib were found dead in the house of the appellant. The appellant informed Jagannathpur Police Station that at about 1.30 a.m. on 08.07.2004 the victims went to sleep in a room of the ground floor of his two storied building. At about 2.30 a.m., he went out his room to answer his natural call. At that time, he did not find those 3(three) victims in the said room. At about 9.30 a.m., the appellant's Khalu Eshaque Ullah went there and called the victims but they did not respond. Thereafter, they entered into the said room and found the dead bodies of those 3(three) victims. Getting such information, the police, starting an U.D. Case, rushed to the place of occurrence and held inquest of the dead bodies of the victims and, thereafter, sent those dead bodies to morgue for holding autopsy. The P.W.19 Doctor, holding postmortem examinations, did not find any marks of violence on the persons of the victims and kept the opinion pending till arrival of pathological report of chemical examination of the viscera of the victims. On chemical examinations, the Chemical Examiner found alcohol and methanol in the viscera. Accordingly, the Doctor submitted P.M. reports stating that the death of the victims was caused due to poisonous effect of Methanol and Alcohol. Thereafter, on 29.09.2004, P.W.1 Jamirul Huq as complainant filed a petition of complaint in the Court of Cognizance Magistrate, Jagannathpur, Sunamgonj against the appellant and three others namely Banesa Begum, Enamul Huq Tony and Emamul Huq Rony under Section 302/201/34 of the Penal Code stating, inter alia, that appellant's daughter Setu Begum had love affairs with victim Babul and she was given in marriage elsewhere but she was not happy. In the evening of 07.07.2004 accused persons invited the victims in a dinner in their house and thereafter, in collusion with each other, killed them administering poisons. Similar two other petitions of complaint were filed by the family members of other victims. However, the complaint petition filed by P.W.1 was sent to police station to treat the same as First Information Report. Accordingly, Jagannathpur Police Station Case No.6 dated 13.10.2004 was started.

3. After holding investigation, the Investigating Officer submitted Charge Sheet against the present appellant and others under sections 302/201/34 of the Penal Code.

4. The case was ultimately tried by the Druto Bichar Tribunal, Sylhet, where the case was registered as Druta Bichar Tribunal Case No.13 of 2004.

5. The Tribunal framed charge against the appellant and others under Section 302/201/34 of the Penal Code. The trial of the co-accuseds Banesa Begum, Enamul Huq Tony, Emamul Huq Rony and Bedena Begum were held in absentia. The appellant pleaded not guilty and claimed to be tried.

6. The prosecution examined 24 witnesses in support of its case and defence examined none. From the trend of cross examination of the P.Ws. it appears that the defence case was of innocence and false implication. His further case was that the victims used to look after the interest of the appellant at his village home. The appellant and his family member had been living in London and occasionally came to Bangladesh. On the night of occurrence, after taking dinner, the appellant went to bed. Perhaps, thereafter, the victims went outside the house and after having alcohol they went to sleep but due to have poisonous alcohol they died.

7. The Tribunal convicted the appellant and 4(four) others namely Banesa Begum, Enamul Huq Tony Amamul Huq Rony and Bedena under section 302/109 of the Penal Code and sentenced the appellant to death and pay fine of taka 9,00000/-(nine lacs) and the sentenced the rest accuseds to suffer imprisonment for life and to pay fine of 2,00,000/- to accused Banesa Begum, Anamul Huq Tony and Emamul Huq Rony and taka 10,000/- to accused Bedena, in default, each of them to suffer R.I. for a period of 2(two) years more. The Tribunal transmitted the case record in the High Court Division for confirmation of sentence of death of the appellant. The appellant preferred above mentioned criminal appeal and Jail appeal which was heard together. The High Court Division rejected the death reference but upheld the judgment and order of conviction of the appellant. However, his sentence was reduced from death to rigorous imprisonment for life. The High Court Division acquitted the other accuseds of the charges. The appellant, thus preferred Criminal Appeal No.14 of 2013 and the State preferred Criminal Appeal No.15 of 2013 against the order of commutation of sentence of the appellant from death to imprisonment for life.

8. Mr. Abdul Matin Khasru, the learned Senior Counsel appearing on behalf of the appellant, who is the respondent of Criminal Appeal No.15 of 2013, submits that there was no eye witnesses of the occurrence and that the appellant had been convicted and sentenced on the basis of circumstantial evidence but the prosecution hopelessly failed to prove any such circumstances where from it could be inferred beyond reasonable doubt that the appellant had killed the victims by administering poison. He submits that the story of love affairs of Setu Begum with the victim Babul Miah had not been proved. He further submits that on the night of occurrence, the victims after having dinner, went to bed. Perhaps they took alcohol, which was poisonous, from outside the house and, then, went to sleep and died. He submits that the respondent is aged about 80 years and he had been implicated in the case falsely.

9. Mr. Khondakar Diliruzzaman, learned Deputy Attorney General appearing on behalf of State, in both the appeals submits that in the afternoon on 07.07.2004, the accuseds called the victims in a dinner and at the time of having dinner; they administered poisons, consequently, the victims died. There was love affairs of the appellant's daughter Setu Begum with victim Babul Miah and she was unhappy at her husband's house and denied to go there. So, in order to take revenge, the accused persons, in collusion with each other, had killed the victims administering poisons.

10. Admittedly victims Babul, Mujahid and Motaleb died in the house of the appellant on the night following on 07.07.2004. It appears from the evidence on record that the appellant, knowing about the death of victims, informed the same to the local Police Station. On the basis of such information, an U.D. case was started and the police sent the dead bodies to morgue for holding autopsy. The Doctor, after receiving opinion of the Chemical examiner, opined that death was due to poisonous effect of methanol and alcohol. The chemical expert, in his opinion observed that- *ÓÇMÓ†Ki c†î i††Z ††mvi†q ÒGj †K†rj Ó I Ò tg_vbj (††l) Ó c†l q† ††q††Q/Ò* Thereafter, at the instance of P.W.1, the case was started.

11. The function of the Court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. In this case it appears that out of the 24 prosecution witnesses, P.W.1 is the informant and father of victim Babul, P.W.2 is the mother of victim Mujahid, P.W.3 is the son of victim Motaleb, P.W.4 is the “Khalato Bhai” of victim Babul, P.W.5 is the son of Motaleb, P.W. 6 is the “bhagina” of victim Mujahid, P.W.7 is the “Chachato bhai” of victim Babul, P.W. 8 is the brother-in-law victim Mujahid, P.W. 10 is wife of victim Motaleb, P.W.11 is the maternal uncle of the victim Mujahid, P.W.12 is the son of victim Motaleb and P.W.15 is the sister of Babul. P.W.13 was declared hostile, P.W.14, a seizure list witness, was also declared hostile. P.W.16 is a constable who went to morgue along with dead bodies of victims. P.W.17 is a Magistrate, who recorded the statements of witnesses under Section 164 of the Code of Criminal Procedure. P.W.19 is the Doctor who held Post Mortem examination of the persons of victims. Rest witnesses P.W.18, 20, 21, 22, 23 and 24 are Investigating Officers of the case.

12. On perusal of the evidence of P.Ws.1, 2, 3, 4, 5, 6, 7, 8,10, 11, 12 and 15 it appears that they have tried to establish the facts that there was a previous love affairs with the appellant’s daughter Setu Begum with the victim Babul. The victim Babul was a poor man and used to look after the interest of the appellant at his village home. The appellant gave marriage of Setu Begum elsewhere beyond her consent and she did not accept such marriage and she started hesitation going to her husband’s house after returning therefrom. In such situation, the appellant invited the victims at his house on the night following 07.07.2004 and they, in collusion with each other, had killed the victims administering poisons. It appears that those interested witnesses have put their hands to rope in the whole family of the appellant including their maid servant Bedana Begum.

13. Admittedly, there is no eye witness of occurrence of administering poisons by the appellant to the victims. The Courts below convicted the appellant mainly on the basis of circumstantial evidence. When a case rests upon circumstantial evidence, such evidence must satisfy that the circumstances from which an inference of guilt is sought to be drawn, must be cogent and firm, those circumstances should be of a definite tendency pointing towards guilt of the accused and the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and the facts and circumstances should not only be consistent with the guilt of the accused but they must be entirely incommutably with the innocence of the accused and must exclude every reasonable hypothesis consist with his innocence.

14. In the present case let us see whether the prosecution had been able to fulfill the chain of such circumstances or not.

15. On perusal of the evidence of the witnesses, it appears that P.Ws. contradicted each other as to their claim that there was love affairs between the appellant's daughter Setu Begum and the victim Babul. Informant P.W.1, father of victim Babul, in his evidence said, "Avmigx gvingy Avj xi tQtj tqtqiv t`tk Avmmqv KLbl Mltgi evoxZ _vKZ bv Ges imtj U kni i evmiz _vKZ vK bv Avig Rmb bv]" Thereafter he said, "Avigvi tqtq I tqtq RvqvB AvqvtK evj qvtQ evej i minZ tmZz teMgti cYq vQj |----- tqtq I tqtqi RvqvB evej i minZ tmZz teMgti cYtqi m=utK K_v Kte tKv_vq AvqvtK RvbvBqvtQ evj tZ cmi e bv]" P.W.4 Md. Tajuddin, son-in-law of P.W.1 in his evidence did not say that he stated such story to his father-in-law P.W.1. He said that he heard about story of love affairs of Setu Begum and victim Babul from his wife P.W.15 Sahana but P.W.15 in her evidence did not say that she had told such story to her husband P.W.4. Though P.W.4 in his evidence has said, "Avigvi kji o gvingy Avj xi vBKU tmZz teMgti minZ evej i wevtni cUte t`q]" but the Investigating Officer P.W.22 in his cross examination has said, "evej i ever Avmigx gvingy Avj xi evoxZ wevtni c`te j Bqv hvq GBifc K_v mivjx ZvRDix Z`SKvtj Avigvi vBKU etj vBv]" That is, he has tried to improve the prosecution case adding the story of giving proposal of marriage of Babul with Setu Begum to the appellant. In view of such evidence, it appears that the story of love affairs of Babul and Setu Begum had not been proved beyond doubt. Moreover, P.W.6 Roshahid Ahmed in his cross-examination has said, "gvingy Avj xi tqtq tmZz teMgti vPvb tm j Utb _vtK]" He added, "Uvevtej i mvt_ gvingy Avj xi tKvb tqtqtK tNvvtdiv KitZ t`vL vBv]" So, it is difficult to accept the story of love affairs of Setu and Babul as true.

16. The PWs also gave contradictory evidence as to invitation of victims in the house of appellant.

17. On perusal of the evidence, it appears that the victims used to look after the interest of the appellant at his village home. P.W.1, in his testimony, said, "Avmigx` i minZ Avigvi AvZxqZvi m`co i unqtQ/ Avmigx` i evoxZ Avigvi cY Avmv hvI qv I Lvl qv `vl qv Kvi Z]" That is, it is not unlikely that the victims went to the house of the appellant and had their meals. P.W.5 Jholon Mia son of another victim Motaleb in his deposition said, "Avmigx gvingy Avj xi minZ Avigvi Avevvi m=utK` Fij B vQj |]"

18. P.W.19 Dr. Abdul Hakim, who held Postmortem examinations of the dead bodies, in his cross examination has said- "OG`ij tKinj tqqv` DE`x nBqv tMjtj velv³ nBqv hvBtZ cvti | i vmiqvBK cixvvi chZte`tb vq_vbj vetI i A`-tZj velq Dvtj vLZ nBqvvtQ/O Specific case of the defence is that after having poisonous alcohol the victims went to sleep and died. In this juncture, it is relevant to peruse the medical jurisprudence in this regard. Modi in his Medical Jurisprudence and Toxicology has observed about denatured spirit, Methyle Alcohol (wood Alcohol or spirit, phroxylic spirit, Methanol or wood Naphtha) CH3OH with the following words,

"This is formed by the destructive distillation of wood or molasses. It is a colourless mobile liquid, having a peculiar, nauseating odour and a burning taste, and boiling at 64.7°C. It mixes with water in all proportions. It burns with a pale blue, nonluminous flame, and its vapour forms an explosive mixture with air or oxygen. It is largely used as a solvent in shelliac and varnish manufacture and as an antifreeze. It is also mixed with rectified spirit to make industrial methylated spirit."

19. Modi further stated, "Cases of mass poisoning are becoming quite frequent as methyl alcohol adulterated intoxicating beverage is to persons who can not get ordinary alcohol." He added, "Ninety persons died in Khopoli in Maharashtra and 20 in Madras within a week after consuming a cheap liquor." H W V COX in his Medical Jurisprudence and Toxicology has

stated, "Methyl alcohol is not fit for human consumption and is found as impurity in a number of cheap alcoholic drinks." From the table showing the effect of different concentration of alcohol in the said book it appears that above 600 mg of concentration of alcohol in blood may cause of death of the victim. If alcohol is taken in bounts, the blood concentration rises more rapidly. Modi stated that acquit poisoning may result from consumption of an alcoholic beverage in small doses at short intervals or in an excessively large does at a time. Sometimes death occurs from asphyxia due to respiratory paralysis. It may occur from shock secondary to paralysis of the abdominal nerve centre, if a very large quantity of undiluted alcohol is taken.

20. In view of the aforesaid Medico- legal aspect of the matter the defence version that the victims after having poisonous alcohol went to sleep and died became probable. The evidence of P.W.7 supported the defence case who in his cross-examination has said, "7/7/2004 Bs Zimi L w`emMZ i vZ tKvb GK mgq evej, gZij e l gRwn` Kz Nti, wKsev Ab" tKv_vqI eumqy we/v³ মদ্য পান করিয়া মাসুদ আলীর ঘরে আসিয়া ঘুমায় এবং ঘুমের মধ্য বিষ ক্রিয়ায় মারা যায়।"

21. Since the motive of killing of the victims had not been proved and that the defence version, as it appears from the evidence, became probable, and that we do not find any earthly reason that for the alleged love affairs between Setu Begom and Babul an old man would take decision to kill Motalib and Mozahid along with Babul, particularly, when it is evident that Setu Begom had been living in London with her husband.

22. It is settled principles that where the inference of guilt of an accused is to be drawn from circumstantial evidence only, those circumstances must, in the first place, be cogently established. Further, those circumstances should be of a definite tendency pointing towards the guilt of the accused, and in their totality, must unerringly lead to the conclusion that within all human probability, the offence was committed by the accused excluding any other hypotheses. Such circumstances are totally absent in this case, particularly when the story of administering poisons is found to be doubtful.

23. Accordingly, we found substance in the appeal preferred by the appellant Hazi Mahmud Ali Londoni.

24. Thus the appeal preferred by appellant Hazi Mahmud Ali Londoni is allowed and that of the State is dismissed. The judgment and order dated 08.6.2011, 09.06.2011, 14.06.2011 and 20.06.2011 passed by the High Court Division in Death Reference No.134 of 2008 with Criminal Appeal No.8716 of 2008 and Jail Appeal No.100 of 2009 affirming the judgment and order of Druto Bichar Tribunal, Sylhet in Druto Bichar Case No.13 of 2004 arising out of G.R. Case No.117 of 2004 corresponding to Jagonnathpur Police Station Case No.6 dated 13.10.2004 is hereby set aside. The appellant is acquitted of the charge. He may be set at liberty at once if he is not wanted in any other case.

25. Communicated the order at once.