Sri. Sujit Biswas vs State Of Assam on 28 May, 2013

Equivalent citations: AIR 2013 SUPREME COURT 3817, 2013 AIR SCW 3281 AIR 2013 SC (CRIMINAL) 1487, AIR 2013 SC (CRIMINAL) 1487, 2013 AIR SCW 3281, 2013 (3) AJR 543, 2013 CRI. L. J. 3140, 2014 (1) SCC (CRI) 677, (2013) 127 ALLINDCAS 25 (SC), 2013 CRILR(SC MAH GUJ) 589, (2013) 3 JCR 247 (SC), 2013 CRILR(SC&MP) 589, 2013 (7) SCALE 546, 2013 (127) ALLINDCAS 25, (2013) 2 CRILR(RAJ) 589, (2013) 3 CHANDCRIC 138, 2013 (12) SCC 406, (2013) 7 SCALE 546, (2013) 2 MAD LJ(CRI) 871, (2013) 2 ORISSA LR 744, (2013) 55 OCR 1036, (2013) 2 CURCRIR 635, (2013) 3 BOMCR(CRI) 352, (2013) 3 DLT(CRL) 8, (2013) 82 ALLCRIC 467, (2013) 3 ALLCRILR 612, (2013) 3 RECCRIR 227, 2013 (2) ALD(CRL) 618

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Bench: Dipak Misra, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1323 of 2011

Sujit Biswas
…Appellant

Versus

State of Assam …Respondent

J U D G M E N T

Dr. B.S. CHAUHAN, J.

1. This appeal has been preferred against the judgment and order dated 23.4.2010, passed by the High Court of Guwahati in Criminal Appeal No. 13(J) of 2010 rejecting Death Reference No. 1 of 2010 made by the Additional Sessions Judge (FTC), No. 3, Kamrup, Guwahati on 21.12.2009 in

Sessions Case No. 309(K) of 2009, convicting the appellant under Sections 376(2)(f) and 302 of the Indian Penal Code, 1860 (hereinafter referred to as `the IPC'), sentencing him to death. The High Court commuted the death sentence of the appellant to life imprisonment, with a direction that the appellant would breathe his last in jail, and that he would not be given the benefit of remissions etc. under Sections 432 and 433-A of the Code of Criminal Procedure, 1973 (hereinafter referred to as the `Cr.P.C.').

2. Facts and circumstances giving rise to this appeal are that:

A. On 17.10.2007 at about 7.00 P.M., Sultana Begum Khatoon (PW.8), aged 12 years, was enjoying the celebrations of the festival of Durga Pooja alongwith her sister Sima Khatoon, aged 3 years, at the Nepali Mandir, Guwahati. The appellant was alleged to have been standing behind them at such time. After a shortwhile, Sultana Begum Khatoon (PW.8) noticed that her sister Sima Khatoon was missing, and she also happened to notice that the appellant had disappeared as well. Sultana Begum Khatoon (PW.8) thus began to look for her sister, and when she could not find her in the nearby areas, she went back to her house and informed her brother Gulzar Ali (PW.3) and her parents etc. of the said incident.

B. Apin Dulal (PW.1) and Gulzar Ali (PW.3) therefore began to search for Sima Khatoon, and while doing so, they came across the appellant and asked him whether he had seen Sima Khatoon. The appellant allegedly demanded a sum of Rs.20/- to pay for his evening food, in lieu of showing them the place where Sima Khatoon could be found. Apin Dulal (PW.1) agreed to pay him the said amount and thus, the appellant pointed to a place by the side of a municipal canal. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thus began to approach the said place, and at such time, the appellant ran away and boarded a bus. Apin Dulal (PW.1) chased him and managed to catch hold of him, forcing him to get off the bus. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thereafter succeeded in locating the girl, who they found gasping, wrapped in a jute-sack (gunny bag). The mouth of the bag had been closed. Sima Khatoon was alive, but in a critical condition. She was then taken by her brother Gulzar Ali (PW.3) to the house. The appellant was also taken there. Sima Khatoon was taken to a Nursing Home, and then to the Guwahati Medical College where she breathed her last at about 1.30 A.M. i.e., in the intervening night of 17/18.10.2007.

C. Father of the deceased Sima Khatoon approached the Paltan Bazar police station, where a report was endorsed only in the General Diary. After the death of Sima Khatoon, her father also lodged an FIR at the said police station on 18.10.2007. The appellant was taken to the police station by the relatives of Sima Khatoon, and he had thus been arrested on 17.10.2007 itself.

D. The post-mortem examination of the dead body of Sima Khatoon was conducted by Dr. Pradeep Thakuria, who found various injuries on her body, including an injury to her vagina. However, the doctor has stated that the vaginal smears taken had

tested negative for spermatozoa.

E. The blood stained jute-sack in which the Sima Khatoon had been found, the blood stained underwear of the appellant, as well as the apparel i.e., frock of Sima Khatoon were taken into custody. It was noted that she was not wearing any undergarment at the said time. All the seized material objects were sent to the Forensic Science Laboratory, and the report received thereafter, revealed that the blood group of the blood found on the underwear of the appellant, was the same as the blood group of the victim, Sima Khatoon.

F. After the conclusion of the investigation, a chargesheet was filed against the appellant under Sections 376(2)(f) and 302 IPC. As the appellant denied all charges, criminal trial commenced.

G. In the course of the trial, the prosecution examined 10 witnesses in support of its case, and a large number of material objects were also exhibited. The appellant in his defence, denied his involvement in entirety. In his statement under Section 313 Cr.P.C., the appellant has stated that he was a resident of Kuch-Bihar (West Bengal), and that he had come to Guwahati three years prior to the incident, to earn his livelihood as a rickshaw puller. On the date of the said incident, when he had gone to the place of occurrence to answer the call of nature, he had found Sima Khatoon lying on the ground. When he returned from the said place, and while he had been waiting near the Nepali Mandir, Apin Dulal (PW.1) and Gulzar Ali (PW.3) had asked him whether he had seen one Sima Khatoon, and thus, he had taken them to the place where Sima Khatoon had been lying. He had then boarded a bus, but had been asked by Apin Dulal (PW.1) to get off the same, and many people had gathered there. They had beaten him severely, and had handed him over to the police, though he was completely innocent.

H. After the conclusion of the trial, the learned Sessions Judge vide judgment and order dated 21.12.2009, found the appellant guilty for the offences punishable under Sections 376 (2)(f) and 302 IPC, and awarded him the sentence of death as has been referred to hereinabove.

I. The appellant preferred Criminal Appeal No. 13(J) of 2010, which was heard alongwith Death Reference No. 1 of 2010. The High Court disposed of the said appeal vide its judgment and order dated 23.4.2010, and commuted the death sentence to life imprisonment, with directions as have been referred to hereinabove.

Hence, this appeal.

3. Shri Ratnakar Dash, learned senior counsel, Amicus Curiae, has submitted that the same is a case of circumstantial evidence. The courts below, while convicting the appellant for the offences punishable under Sections 376(2)(f) and 302 IPC, have not followed the parameters laid down by

this court that are to be followed for conviction in a case of circumstantial evidence. There are material discrepancies which go to the root of the case, and the courts below have simply brushed them aside, without giving any satisfactory explanation for not considering the same in correct perspective. The circumstances against the appellant, as per the case of the prosecution are, that he had demanded Rs.20/- to point out the place where Sima Khatoon had been found and immediately thereafter, he had run away from the said place and had boarded a bus. No other evidence exists to connect the appellant to the said crime. Furthermore, the trial court has put a large number of irrelevant and unconnected questions to the appellant under Section 313 Cr.P.C., while failing to put the most incriminating circumstance to the appellant, i.e. questions regarding the fact that the underwear of the appellant bore upon it, blood stains of the same blood group as that of the victim. Thus, the appellant had no opportunity to provide any explanation with respect to the same. It was not permissible for the courts below to rely entirely on such a circumstance, without verification of the same. The High Court was also not competent to issue a direction to the effect that the appellant should not be given the benefits available under Sections 432 and 433-A Cr.P.C. Therefore, the appeal deserves to be allowed.

4. On the contrary, Ms. Vartika Sahay Walia, learned counsel appearing on behalf of the State has opposed the appeal, contending that the prosecution had fully met the standard of proof required to convict a person in a case of circumstantial evidence. The circumstances relied upon by the courts below have fully established the involvement of the appellant, and the chain of evidence furnished by the circumstances is also complete. The appeal thus lacks merit, and is liable to be rejected.

5. We have considered the rival submissions made by learned counsel and perused the record.

6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that `may be' proved, and something that `will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between `may be' and `must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between `may be' true and `must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between `may be' true and `must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: Hanumant Govind Nargundkar & Anr. v. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, AIR 2011 SC 1017; and Ramesh Harijan v. State of U.P., AIR 2012 SC 1979).

7. In Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773, this Court observed as under:

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

8. In Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, this Court held as under:

> "The facts so established should be consistent only with the hypothesis of the ?guilt of the accused. There should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

9. In M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200, this Court held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt. When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused, and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

Similarly, in Sharad Birdhichand Sarda (Supra), this Court held as under:

> ? "Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."

10. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

11. This Court in Babu v. State of Kerala, (2010) 9 SCC 189 has dealt with the doctrine of innocence elaborately, and held as under:

> "27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.
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> 28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."

12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.

13. In Hate Singh Bhagat Singh v. State of Madhya Pradesh, AIR 1953 SC 468, this Court held, that any circumstance in respect of which an accused has not been examined under Section 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 Cr.P.C.), cannot be used against him. The said judgment has subsequently been followed in catena of judgments of this court uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also: Shamu Balu Chaugule v. State of Maharashtra, AIR 1976 SC 557; Harijan Megha Jesha v. State of Gujarat, AIR 1979 SC 1566; and Sharad Birdhichand Sarda (Supra).

14. Whether the abscondance of an accused can be taken as a circumstance against him has been considered by this Court in Bipin Kumar Mondal v. State of West Bengal, AIR 2010 SC 3638, wherein the Court observed:

> "27. In Matru alias Girish Chandra v. State of U.P., AIR 1971 SC 1050, this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person observing as under:
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> '19. The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self- preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.'
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> 28. Abscondence by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, in view of the above, we do not find any force in the submission made by Shri Bhattacharjee that mere absconding by the appellant after commission of the crime and remaining untraceable for such a long time itself can establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience." While deciding the said case, a large number of earlier judgments were also taken into consideration by the Court, including Matru (supra); and State of M.P. thr. CBI & Ors. v. Paltan Mallah & Ors., AIR 2005 SC 733.

15. Thus, in a case of this nature, the mere abscondance of an accused does not lead to a firm conclusion of his guilty mind. An innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of the accused. Abscondance is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction. (See: Paramjeet Singh @ Pamma v. State of Uttarakhand, AIR 2011 SC 200; and Sk. Yusuf v. State of West Bengal, AIR 2011 SC 2283).

16. Undoubtedly, the FIR lodged has disclosed the previous statement of the informant which can only be used to other corroborate or contradict the maker of such statement. However, in the event that the informant is a person who claims to know the facts, and is also closely related to the victim, it is expected that he would have certainly mentioned in the FIR, all such relevant facts. The omission of important facts affecting the probability of the case, is a relevant factor under Section 11 of the Evidence Act to judge the veracity of the case of the prosecution. (Vide: Ram Kumar Pandey v. The State of Madhya Pradesh, AIR 1975 SC 1026).

17. An adverse inference can be drawn against the accused only and only if the incriminating material stands fully established, and the accused is not able to furnish any explanation for the same. However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself.

18. The present case is required to be examined in light of the aforesaid settled legal propositions. The instant is one of circumstantial evidence, and only two circumstances have appeared against the appellant, namely, I. That he had been able to point out the place where Sima Khatoon was lying, after his demand for Rs.20/- had been accepted; and II. That subsequently, he had left the said place and boarded a bus immediately.

The aforesaid circumstances in isolation, point out conclusively, that the appellant has in fact committed the said offence. Furthermore, the most material piece of evidence which could have been used against the appellant was that the blood stains found on his underwear matched the blood group of Sima Khatoon. However, the said circumstance was not put to the appellant while he was being examined under Section 313 Cr.P.C. by the trial court, and in view thereof, the same cannot be taken into consideration. Hence, even by a stretch of the imagination, it cannot be held that the aforementioned circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt. In a case of circumstantial evidence, the aforementioned burden of proof on the prosecution is much greater.

In view of the above, the appeal succeeds and is allowed. The judgments and orders passed by the courts below impugned before us, are set aside. The appellant has been in jail for the last six years, he must be released forthwith, unless wanted in some other case.

Before parting with the case, we feel that it is our duty to appreciate the services rendered by Shri Ratnakar Dash, learned senior counsel, who acted as amicus curiae.

.....J. (Dr. B.S. CHAUHAN) .....J. (DIPAK MISRA) New Delhi, May 28, 2013