

**Criminal Appeal**

**Present: The Hon'ble Mr. Justice Ashim Kumar Banerjee  
And  
The Hon'ble Mr. Justice Kishore Kumar Prasad**

**C.R.A. No.290 of 2004**

**Judgment on: April 5, 2010.**

**Uttam Rajbangshi & Others  
-VS-  
The State of West Bengal**

**POINTS:**

BURDEN OF PROOF: Victim found dead in the courtyard of his house-Quarrel and dispute over landed property with his estranged wife-Victim last seen with accused-No explanation as to how and when they parted company rendered to the satisfaction of the Court-The learned Judge, whether justified in holding the accused guilty- Indian Penal Code, Ss.302&34-Code of Criminal Procedure, 1973 Ss.106, 313

**FACTS:**

The victim was found dead in the courtyard of his house. There had been quarrel and dispute over landed property between the victim and his estranged wife, when she had invited him for dinner and drinks. At about 11 p.m. the victim left her place and reached his new house where he was found dead the next morning by a villager.

The learned Judge upon considering the evidence on record held the accused guilty of the offence under Section 302 . Being aggrieved, the appellant preferred the instant appeal.

**HELD:**

If a person is last seen with the deceased he must offer an explanation as to how and when he parted with the company. He must furnish an explanation that appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden cast upon him by Section 106 otherwise it must be held that he failed to discharge his burden. Para-19

The Court is of the view that although there was no direct evidence, the circumstances, coupled with a total non-explanation on the part of the accused as to how and when they parted with the company of the victim, adverse inference must be drawn against the accused and the Court below was right in convicting the appellants for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code. Para-21

#### **CASES CITED:**

- i) The State of Maharashtra –VS- Dr. R.B. Chowdhari, 1968, Criminal Law Journal, Page-95.
- ii) Yusufalli Esmail Nagree –VS- The State of Maharashtra, 1968, Criminal Law Journal, Page-103.
- iii) Shri Ram –VS- The State of Uttar Pradesh, 1975, Supreme Court Cases (Criminal), Page-87.
- iv) Banmali Samal –VS- State of Orissa, 1979, Supreme Court Cases (Criminal), Page-646.
- v) Ramreddy Rajesh Khanna Reddy –VS- State of Andhra Pradesh, 2006, Volume-X, Supreme Court Cases, Page-172.
- vi) State of Rajasthan –VS- Kashi Ram, 2007, Volume-I, Supreme Court Cases (Criminal), Page-688.
- vii) State of Uttar Pradesh –VS- Satish All India Reporter, 2005, Supreme Court, Page 1000

For the Appellant : Mr. Partha Sarathi Bhattacharyya  
Mr. Ranjit Kumar Sanyal

For the State : Mr. Subir Gangully

**THE COURT:**

1) On November 6, 2000 Beranu Rajbanshi was found dead lying on the courtyard of his own house on the bank of Fulbari Kuchiamari Pukur under Gazole Police Station in the district of Malda. On the said day at about 7 a.m. in the morning Tapan Saha, a villager informed the police that Beranu was lying dead in his house.

2) The police immediately rushed to the place and removed the dead body and sent it for post mortem examination after preparing the inquest report. The police arrested the close relatives of Beranu being his wife Sahani Rajbanshi, his son Khusen, his son in-law Uttam Rajbanshi and one Kalipada Kanshari, a friend of Uttam.

3) PW-1, Naren Rajbanshi, the brother of Beranu deposed that there had been a long dispute between Beranu and Sahani with regard to immovable property. Beranu left his house and constructed a new house where he was living alone. On November 5, 2000 Sahani invited Beranu for dinner. They drunk together. There had been a quarrel between Beranu and Sahani. Beranu was taken to his new house from the old building. Next morning he was found dead in his house lying on the courtyard. On being asked by the police, he gave a written complaint by putting his thumb impression in the written complaint. He categorically asserted that he had his firm belief that Sahani, Khushen and the son in-law Uttam along with Uttam's friend Kalia murdered Beranu by slitting his throat.

4) PW-2, Bharat Sarkar was the witness to the inquest report. PW-3, Tapan Saha discovered the dead body and informed the police. PW-4, Swadhin Paramanik, another villager was seizure witness when police seized two bottles, three glasses and three talsman (Maduli). PW-5, Dilip Rajbanshi was the nephew of Benaru. He almost corroborated his father Naren, PW-1. He also deposed that on the next day Sahani was in the house. However, Uttam, Kalia and Khushen were not found. PW-6, Sago Rajbanshi was the wife of Naren. She also corroborated her husband Naren, PW-1 and her son Dilip being PW-5. She also deposed that Benaru was taken to his new house at about 11 p.m. in the night by Khushen, Uttam, Kalia and Sahani. PW-7, Hudon Rajbanshi, a villager deposed that there had been quarrel and dispute over landed property between Benaru and Sahani. Sahani invited Benaru in her house where they drunk together and at about 11 p.m. Benaru left the place and reached for his new house. Uttam, Sahani and Kalia followed him. He however, did not mention the name of Khushen. He also deposed that he found two bottles and two glasses. On the next day he also found Uttam but not Kalia. Uttam and Khushen fled away. He chased them but could not apprehend. PW-8, the police officer received the complaint. PW-9 a constable carried the dead body for post mortem examination. PW-10 was the scribe to the FIR. PW-11 was the investigating officer. He held the inquest as also arrested. The accused were absconding except Sahani. Kalipada Kansari was arrested on November 16, 2000. PW-12 was the doctor who held post mortem. According to him the injuries were caused with heavy sharp cutting weapon that caused death to the victim. During cross-examination of the accused all the accused pleaded innocence and faced trial. Sahani however admitted that she had invited Beranu to her house and there had been land dispute. While replying question no. 4, 5, 6, 7 and 10 she admitted to have invited Beranu to her house. There had been dispute over landed property between Sahani

and Beranu. On that night there had been quarrel between Sahani and Beranu. Dead body was found in his own house on the following morning. The other accused, however, did not say anything.

5) The learned Judge upon considering the evidence on record held Uttam, Sahani, Khushan and Kalia @ Kalipada guilty of the offence under Section 302 and awarded life imprisonment coupled with fine of Rs.5000/- each and in, default, rigorous imprisonment for one year more.

6) Being aggrieved, the appellant preferred the instant appeal which was heard by us on the above mentioned dates.

7) Mr. Partha Sarathi Bhattacharyay, learned counsel appearing in support of the appeal contended as follows :-

- i) The learned single Judge relied on the statement made by the Sahani in reply to her examination made by the learned Judge under Section 313 of the Criminal Procedure Code. Such procedure did not have any support of law.
- ii) Even if it was held by this Court that such statement could be relied upon, mere admission of invitation or pendency of the dispute could not per se lead to conviction of the accused.
- iii) The seizure witness being PW-4 categorically deposed that Talsman (Tabiz) was seized from the place of occurrence which was not produced at the time of trial.
- iv) The last seen theory would not apply in the present case as there had been a long gap. PW-6 and 7 deposed that at 11 p.m. Beranu was last seen alive whereas PW-3 Tapan Saha discovered his dead body and informed the police at 7'O clock in the morning.

- v) No eyewitness could be produced by the prosecution. Hence, based on circumstantial evidence, the prosecution was to complete the chain of events and in case there was any missing link the benefit must go to the accused. Unexplained link bring the long gap between 11 p.m. to 7 a.m. would rather raise doubt in the mind of the Court and benefit must go to the accused.
- vi) No sketch map was prepared by the police which was an essential ingredient in a criminal trial.
- vii) The evidence of the investigating officer that the accused were absconding did not find any corroboration from any other witnesses.

8) In support of his contention Mr. Bhattacharyay relied on the following decisions :-

- i) 1968, Criminal Law Journal, Page-95 (The State of Maharashtra –VS- Dr. R.B. Chowdhari)*
- ii) 1968, Criminal Law Journal, Page-103 (Yusufalli Esmail Nagree –VS- The State of Maharashtra)*
- iii) 1975, Supreme Court Cases (Criminal), Page-87 (Shri Ram –VS- The State of Uttar Pradesh)*
- iv) 1979, Supreme Court Cases (Criminal), Page-646 (Banmali Samal –VS- State of Orissa)*
- v) 2006, Volume-X, Supreme Court Cases, Page-172 (Ramreddy Rajesh Khanna Reddy –VS- State of Andhra Pradesh)*

9) Opposing the appeal on behalf of the prosecution Mr. Subir Gangully, learned counsel appearing for the State contended that since there was no ocular evidence, the Court was right in relying on the circumstantial evidence and the last seen theory would be squarely applicable. In the instant case Mr. Gangully contended that the witnesses deposed consistently that the accused helped

Beruna to shift to his new house at 11 p.m. in the night. There had been corroboration on that score. The victim was, thus, last seen alive in the company of the accused. Hence, they owed an explanation as to when and how they parted company. The accused preferred to remain silent on the said issue and did not unfold the narrative. Hence, adverse inference was rightly drawn against them.

10) On the issue of examination of the accused under Section 313, Mr. Ganguly contended that the statement of Sahani found corroboration from the other prosecution witnesses as referred to above. There was no evidence of involvement of any third party. Hence, the chain was complete. The chain, according to Mr. Ganguly, was strengthened by the motive which was admitted by Sahani to the effect that there had been a property dispute between Beruna and Sahani. He prayed for dismissal of the appeal.

11) We have considered the evidence on record. We have also considered the decisions cited at the Bar.

12) In the case of State of Maharashtra –VS- R.B. Chowdhari (Supra), the Apex Court was of the view that an examination of the accused under Section 342 could not be treated as evidence in the case unless the accused offered in writing to give evidence on his own behalf.

13) In the case of Yusufalli Esmail Nagree (Supra), the Apex Court did not allow a tape recorded version to come in evidence as according to Their Lordships the Court must be satisfied beyond reasonable doubt that the record had not been tampered with.

14) In the case of Shri Ram (Supra), the Apex Court observed, “*no adverse inference can be drawn from the appellant’s failure to explain her conduct. Such an approach is impermissible. The burden is on the prosecution to establish its case. Moreover an accused cannot while being examined under Section 342, Cr. P. C. be subjected to cross-examination, and a bald assertion to explain a piece of conduct almost always fails to convince.*”

15) In the case of Banmali Samal (Supra), the Apex Court, on appreciation of the evidence acquitted the appellant from the charges. While doing so, the Apex Court observed, High Court had mislead this statement under Section 342 of the accused on that point.

16) In case of Ramreddy Rajesh Khanna Reddy (Supra), the Apex Court considered a case relying on the circumstantial evidence. The Apex Court while doing so observed, the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

17) On analysis of the evidence we find that the prosecution witnesses consistently deposed and corroborated each other on the happening of the incident on the evening of November 5, 2003. Sahani also admitted that she invited Beruna in her house. She also admitted that there had been dispute over landed property. She also admitted that they had quarrel between themselves. The witnesses consistently deposed that they saw the accused taking the victim to his own house at about 11:00 p.m. in the night. PW-3 Tapan Saha discovered the dead body at 7:00 a.m. The



doctor conducted the post mortem on the next day i.e. on November 7, 2000. The PW-9 deposed that he carried the dead body to the doctor. From the post mortem report it appears that the dead body arrived at 4:10 p.m. on November 6, 2000 whereas the examination was conducted at 1:00 p.m. on the next day. The doctor however, did not mention any probable time when the victim died. No cross-examination was also made on that score.

18) In a criminal trial the prosecution has to prove the case beyond reasonable doubt. In our view, in the instant case, the prosecution was successful in giving details of the incident up to 11:00 p.m. Missing link is between 11:00 p.m. and 7:00 p.m. Such missing link is however filled up by the complete silence of the accused. In this regard we may rely upon the Apex Court decision in the case of *State of Rajasthan –VS- Kashi Ram* reported in 2007, *Volume-I, Supreme Court Cases (Criminal), Page-688*.

19) In the said decision the death was caused by strangulation as proved by the medical evidence. Deceased was last seen alive in the company of the accused. The prosecution seriously established that the house was found locked on the next morning and continued to remain locked till it was opened. Through out this period the appellants were not to be seen until they were arrested. The appellants did not give any explanation in defence. The Apex Court held that the provision of Section 106 of the Evidence Act would apply. According to the Apex Court, if a person is last seen with the deceased he must offer an explanation as to how and when he parted with the company. He must furnish an explanation that appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden cast upon him by Section 106 otherwise it must be held that he failed to discharge his burden. The Apex Court observed, “*this circumstance,*

*therefore provided the missing link in the chain of circumstances which proved his guilt beyond reasonable doubt.”*

20) In the case of *State of Uttar Pradesh –VS- Satish* reported in *All India Reporter, 2005, Supreme Court, Page 1000* the victim was last seen alive riding on a bicycle of the accused. Victim was found raped and killed on the next day. The accused did not offer any explanation when and how he parted the company of the victim. The Apex Court set aside the order of acquittal passed by the High Court and restored the conviction and sentence imposed by the Trial Court.

21) Relying on the above two decisions in the case of Kashi Ram (Supra) and Satish (Supra), we are of the view that although there was no direct evidence the circumstances, as discussed above, coupled with a total non-explanation on the part of the accused as to how and when they parted with the company of the victim. Adverse inference must be drawn against the accused and the Court below was right in convicting the appellants for the offences punishable under Section 302 read with Section 34 of the Indian Penal Code.

22) The appeal, thus, fails and is, hereby, dismissed.

23) The appellants are on bail. Their bail-bonds were cancelled. They are directed to surrender before the Court below for serving out the sentence. In default, the Court below is directed to take appropriate steps for arrest of the appellants for serving the sentence.

24) A copy of this judgment be sent to each of the accused in the Correctional Home/Homes where they are suffering their sentences.

25) A copy of the judgment and order along with Lower Court Records be sent down at once.

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

**Kishore Kumar Prasad, J:**

27) I agree.

**[ASHIM KUMAR BANERJEE,J.]**

**[KISHORE KUMAR PRASAD,J.]**