
(1987) 07 CAL CK 0047
In the Calcutta High Court

Amar Layek

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 17-07-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 27, 3, 8
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 364

Citation : (1988) CriLJ 1293

Hon'ble Judges : Sankar Bhattacharyya, J; Jyotirindra Nath Hore, J

Bench : Division Bench

Judgement

Jyotirindra Nath Hore, J.—The instant appeal is against the judgment and order passed by a learned Additional Sessions Judge, Midnapur convicting Amar Layek alias Sant, the appellant before us Under Sections 302, 364 and 201, Indian Penal Code and sentencing him to Imprisonment for life u/s 302, Indian Penal Code and to rigorous imprisonment for 6 years on each count Under Sections 364 and 201, Indian Penal Code. The appellant was further charged along with wife of the deceased Lalita u/s 120B, Indian Penal Code but both of them were acquitted of the charge.

2. Briefly stated, the prosecution case was as under:

Adwaita Das alias Neul (the deceased) aged 22/23 years married Lalita, second daughter of Prabhakar Saha of Village Bansdiha, on 7th Jastha, 1390 B.S. and since then Lalita had been living with Adwaita at her matrimonial home at Baromeshia within P.S. Galtore.

3. Appellant Amar Layek alias Sant was at the material time servant of Prabhakar Saha, father of Lalita. He had illicit connection with Lalita for a long time. He met Lalita at Dole fair at Dolebagan of Bagri a few days before the occurrence and they hatched a conspiracy to murder Adwaita.

4. On 30-3-84 between 2.00 P.M. and 2.30 P.M. Amar Layek came to the house of

Adwaita and took him away on a Hercules bicycle which Adwaita had got as dowry at the time of his marriage, to Bansdiha but when Adwaita did not return till 11-4-84, Bhagabat Das (PW 1,) elder brother of Adwaita, his uncle Anil Das (PW 8) and two villagers Hira Mondal and Mena Rakshit (PW 9) went to the house of the father-in-law of Adwaita at Bansdiha, They came to learn there that Adwaita and Amar had returned on the same day. On their way back, they met Amar coming on a bicycle in the Indkuri forest. At first Amar did not tell them any thing about Adwaita but at their persistent query he made a confession that he had taken Adwaita to Chandrakona Road on the pretext of seeing a cinema show and thereafter killed him in the Godapeasal forest with an axe. He also confessed that he had illicit connection with Adwaita's wife Lalita.

5. Amar was brought to village Baromesia and detained there. Bhagabat Das (PW 1) then went to Goaltore P.S. and lodged complaint which was recorded by S.I. Ashim Sengupta (PW 10), the then O.C. Goaltore P.S. at 4.45 P.M. since the place of occurrence fell within the jurisdiction of Salboni P.S. P.W. 10 forwarded the complaint to the O.C. Salboni P.S. He came to Baromesia and arrested Amar who had been detained by villagers. P.W. 10 then went to Salboni P.S. with Amar, Bhagabat Das and force and handed over the complaint and Amar to PW 11 S.I. Anil Chandra Dey, the then O.C, Salboni P.S. P.W. 11 drew up the formal First Information Report and started a case against Amar and took up investigation. Amar led the police party to Godapeasal forest and at his instance a pair of slippers and remnants of the wearing apparel of Adwaita (the deceased) were recovered. On 13-4-84 PW 11 recovered a human skull, skeleton and bones from a spot in the Godapeasal forest pointed to by Amar.

6. After completion of investigation, police submitted charge-sheet against Amar which in usual course ended in comittal of the case to the court of session.

7. The defence of the accused appellant was a plea of innocence.

8. One of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused caused the death of the person alleged to have been killed. In this case there was no discovery of the deadbody of the victim bearing physical evidence of violence. What was discovered was a mere human skeleton with skull and bones incapable of being directly identified. PW 6 Dr. Madan Mohan Das who held the post-mortem examination reserved his opinion as to the cause of death pending chemical examiner's report. The skeleton was not, however, sent to the chemical examiner for examination. Even where the deadbody of the victim is not found, homicidal death may be proved by other cogent and satisfactory evidence. In *Rama Nand and Others Vs. State of Himachal Pradesh*, the Supreme Court observed as follows:

Discovery of the deadbody of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the deadbody is impossible. A blind adherence to this old "body" doctrine would

open the door wide for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim.... Where the deadbody of the victim in a murder case is not found, other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. Such proof, Way be by the direct ocular account of an eye-witness, or by circumstantial evidence, or by both. But where the fact of corpus delicti, i.e. "homicidal death is sought to be established by circumstantial evidence alone" the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world and absolute certainty is a myth. That is why u/s 3, Evidence Act a fact is said to be "proved", if the court considering the matters before it considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculcating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned.

9. Prosecution case solely rests on circumstantial evidence including extra-judicial confession of the accused, since retracted. The circumstances on which the prosecution seeks to rely may be catalogued as follows:

- (1) The accused-appelknt used to work as a servant at Lalita's father's house,
- (2) He developed illicit connection with Lalita.
- (3) On 30-3-84 he came to the house of the deceased and took him away on a green-coloured Hercules bicycle which the deceased had got as dowry at the time of his marriage. Since then, the deceased remained untraced.
- (4) When the deceased did not return even after 11/12 days, PW 1 Bhagabat Das, elder brother of the deceased, and others Went to Lalita's father's house at Bansdiha on 11-4-84 and enquiries revealed that Prabhakar, father-in-law of the deceased, had not sent the accused to bring the deceased to his house and that both the accused and the deceased had left on the same day.
- (5) The accused and the deceased were seen together alighting : from a train at Godapeasal Railway Station on 31-4-84 at dawn.
- (6) Recovery of a pair of slippers of the deceased and remnants of the wearing apparel of the deceased and some human hairs from Godapeasal jungle on 12-4-84 on the showing of the accused.
- (7) Recovery of human skull and bones from the Godapeasal jungle on the showing of the accusedon 13-4-84.
- (8) Recovery of the green-coloured Hercules bicycle of the deceased on which the accused carried the deceased on 30-3-84 from the house of the accused on

14-4-84.

(9) Recovery of one axe containing brownish stains on production by the accused from his house.

(10) Recovery of a red shirt and lungi of the accused from the house of Prabhakar upon production by the accused.

(11) Extra-judicial confession made by the accused when accosted by PWs 1, 8 and 9 at Indkuri jungle and then at village Baromeshia.

10. Let us consider if the above circumstances have been proved beyond reasonable doubt and if so, whether they are not only inconsistent with the innocence of the accused but also irresistibly lead to the conclusion that the victim had been murdered by the accused.

11. Both PW 1 Bhagabat Das, elder brother of the deceased and PW 8 Anil Das, uncle of the deceased have deposed that Amar used to work in the house of Lalita's father at Bansdiha. This part of their testimony has not been challenged in cross-examination. Circumstance No. 1, therefore, stands clearly established.

12. The evidence in support, of the alleged illicit connection of Amar with Lalita is quite unsatisfactory. PW 1 has deposed that a few days before the occurrence, the witness, the deceased, Lalita and other relations went to a fair at Bagri and met Amar there. Amar and Lalita talked to each other at some distance, PW 8 supports the testimony of PW 1. The mere fact that Amar met Lalita in the Dole fair at Bagri and talked to her out of hearing of the witness does not show that Amar had illicit connection with Lalita. Circumstance No. 2 has not, therefore, been proved by the prosecution.

13. Bhagabat Das (PW 1), Anil Das (PW 8), and Mena Rakshit (PW 9), a co-villager of the deceased, seek to prove circumstance No. 3 the testimony of PW 1 is that about 2 years ago shortly before "Dolpurnima" Amar Layek came to their house between 2.00 P.M. and 2.30 P.M. and took Adwaita on a Hercules bicycle which Adwaita had got as dowry at the time of his marriage. PW 8 has deposed that a few days after Dolfair Amar came to their house and took away the deceased on the Hercules bicycle which the deceased had got at the time of his marriage and since then he remained untraced. PW 9 has stated that 2 1/2/3 years ago one day Amar took away Adwaita. It transpires from the cross-examination of PW 1, that he did not himself see Amar visiting their house and taking away Adwaita. His evidence in this regard is, therefore, hearsay and must be discarded. PW 9 has stated in the cross-examination that she came to know that Adwaita had gone to his father-in-law's house only when PW 1 came to her and requested her to accompany her to the house of the father-in-law of Adwaita. Her testimony must also be discarded as hearsay. The Evidence of PW 8, however, remains unshaken in the cross-examination and there is no reason to disbelieve his testimony. Moreover, the green hercules bi-cycle belonging to the deceased was subsequently recovered from the house of the accused as we

shall see later. This fact lends assurance to the testimony of PW 8. Circumstance No. 3, therefore, stands clearly established.

14. The evidence of PW 1 is that when Adwaita did not return even after 10/12 days he went to the house of Adwaita's father-in-law at Bansdiha accompanied by his uncle Anil Das (PW 8), Mena Rakshit (PW 9) and Hira Mondal. Enquiries revealed that Adwaita had come a few days before and on the same day he had returned with the accused. Both PW 8 and PW 9 corroborate him. It is proved that PWs. 1, 8 and 9 and another went to the house of father-in-law of the deceased at Bansdiha in search of the deceased but did not find the deceased or the accused there. The evidence that Adwaita's father-in-law told them that Adwaita and Amar had come to the house a few days before but left his house on the same day is not, however, admissible in the absence of examination of Adwaita's father-in-law.

15. Dilip Kumar Ghosal (PW 7), owner of a tea shop at Godapeasal Railway Station, has deposed that on 31-3-84 at about 5.30 A.M. he saw the accused who was known to him from before alighting from Kharagpur Assansol passenger train accompanied by another man at Godapeasal station. The accused and his companion took tea and biscuits in his shop. But from his evidence to the identity of companion of the accused has not been established. Circumstance No. 5 has not, therefore, been established.

16. PW 1 lodged information at Goaltore P.S. on 11-4-85 at 4.45 P.M. PW 10 S.I. Ashim Sengupta, the then Officer-in-charge of Goaltore P. S. recorded the complaint. Since the place of occurrence was within the jurisdiction of Salbani P.S., he forwarded the complaint to the Officer-in-Charge of Salbani P.S. PW 10 visited village Barameshia being accompanied by PW 1 and arrested the accused who had been detained by villagers, PW 10 went to Salbani P.S. with the accused and PW 1 and handed over the written complaint to PW 11, S. I. Anil Chandra Roy, the then Officer-in-Charge, Salbani P.S. at 1.15 A.M. PW 11 drew up the formal First Information Report and started a case against the accused and took up investigation. PW 11 went to Godapeasal Railway Station with PW 1, PW 10 and the accused and collected three local witnesses, namely, Angad Roy (PW 2), Ashoke Ghosal and Sakti Pada Nandy (PW 3). The evidence of PWs. 1, 2, 3, 10 and 11 shows that the accused led them to Godapeasal forest. After some search the accused finally led them to a drain where from a pair of slippers were recovered on the showing of the accused. PW 11 seized the pair of slippers under the seizure list (Ext. 2/3). PW 1 has identified the pair of slippers as those of the deceased (Mat. Ext. I). The seizure list witnesses - PWs. 2 and 3 proved the seizure of the pair of slippers from a drain in the Godapeasal forest being shown by the accused. The seizure list bears their signatures and L.T.I. of the accused. The evidence of P.Ws. 1, 2, 3, 10 and 11 shows that the accused then led them to a spot about 200 yards away where torn pieces of panjabi, pajama and short pant with marks of burning and a tuft of human hair were recovered on the showing of the accused. PW 11 seized the same under a seizure list (Ext. 3/3).

PWs. 2 and 3 proved the seizure of the same and their signatures in the seizure list. This seizure list also bears the L.T.I. of the accused. The remnants of the wearing apparels (Mat. Ext. II) were identified by PW 1 to be those of the deceased. Circumstance No. 6 has, therefore, been clearly established.

17. The accused did not make any statement leading to the discovery of the pair of slippers and remnants of wearing apparels of the deceased. Section 27 of the Evidence Act cannot, therefore, be invoked by the prosecution. The discovery of the said materials at the instance of the accused and being shown by him is, however, admissible as a conduct of the accused u/s 8 of the Evidence Act. The fact that the accused led the police party inside the dense forest and that the articles were recovered on his showing warrants a legitimate inference that the accused had at least the knowledge that the above articles were there.

18. On 13-4-84 PW 11 again went to Godapeasal jungle with the accused and local witnesses in search of the deadbody of the deceased. The evidence of PWs. 2, 3 and 11 discloses that the accused led the police party and after some search pointed to a place wherefrom a human skull, skeleton and bones were recovered. Under the direction of PW 11, PW 12 S.I. P.K.Chanda held inquest on the skull and skeleton in presence of witnesses and these were sent to Midnapur Sadar Hospital morgue for post-mortem examination. Recovery of a human skull, skeleton and bones from the Godapeasal jungle on the showing of the accused has been proved beyond any shadow of doubt.

19. PW 11 searched the house of the accused on 14-4-84 in presence of the accused and PW 3 and seized almost a new green coloured Hercules bi-cycle under a seizure list (Ext. 4/1). PW 3 on seizure list witness, proves the seizure of the bi-cycle. Ext. 4 is the signature in the seizure list. The seized bicycle (Mat. Ext. III) has been identified by PW 1 to be the bi-cycle of the deceased which he got at the time of his marriage. Recovery of one axe containing brownish stains on the blade brought by the accused from the thatched roof has been proved by PWs. 11 and 3 and the seizure list Ext. 5/1. The axe has not, however, been sent to the F.S.L. for chemical examination and there is nothing to show that the brownish stains on the blade of the axe were stains of blood. Recovery of the axe is not, therefore, an incriminating circumstance.

20. Recovery of a red shirt and lungi (Mat. Ext. 5) of the accused from the house of Probhakar upon production by the accused is proved PWs. 11 and 4 and the seizure list (Ext. 6/1). The wearing apparel of the accused was not, however, sent to the Chemical Examiner for examination and there is no proof that the wearing apparel of the accused seized under the seizure list Ext. 6/1 was stained with human blood. It is not, therefore, an incriminating circumstance against the accused.

21. PWs. 1, 8 and 9 are witnesses to the alleged extra judicial confession of the accused. The evidence of PW 1 is that he was returning to his village along with PWs. 8, 9 and Hira Mondal after making enquiries about the whereabouts of the

deceased at the house of Probhakar, father-in-law of the deceased at Bansdiha through Indkuri jungle when they met accused Amar who was coming from the opposite direction on a bi-cycle. On their query Amar told them that Adwaita had returned home on the same day. They brought him to their village. At first he did not tell them anything. Ultimately he made a confession that he had killed Adwaita in the Godapeasal jungle. Thereafter, PW 1 went to Goaltore P.S. and lodged the First Information Report. In the cross-examination the witness has stated that they took him to a place by the side of the metal road in their village where after a prolonged interrogation Amar made the confession.

22. The evidence of PW 8 is that they met the accused Amar while they were returning to their village from Probhakar's house at Bansdiha. They saw him near the forest of Indkuri. They asked him about the whereabouts of the deceased. On their query Amar confessed that he had murdered Neul. Then they brought him to their village and retained him there. A few villagers came and asked Amar regarding the whereabouts of Neul. There also Amar made a statement that he had murdered the deceased in Godapeasal forest. In the cross-examination he has stated that Amar was detained in an Atchala in the village. Villagers surrounded him so that he could not run away.

23. PW 9 has deposed that while they were returning to Baromesia from Bansdiha they found the accused Amar in the Indkuri forest. There they stopped him and he fumbled. To their persistent query Amar stated that he had murdered Adwaita. Amar was then taken to their village and there also he made a confession that he had killed Adwaita.

24. These witnesses have not been shaken in the least in the cross-examination and there is no reason to disbelieve their testimony. There is, however, some discrepancy between the testimony of PW 1 and that of PWs 8 and 9. According to both PWs 8 and 9 Amar made extra judicial confession twice - first, in the Indkuri forest after being accosted by the witnesses and then at the village where Amar was taken. According to PW 1 Amar made the statement near the metal road in the village. This discrepancy does not appear to be very material and the entire evidence of the witnesses regarding the confession of the accused cannot be discarded on this ground. The discrepancy may be ignored.

25. Let us see if the extra judicial confession made by the accused is voluntary and true. The evidence does not disclose that there was any inducement threat or promise made by the witnesses to the accused before the confession was made. It is true that the accused made the confession after prolonged interrogation but that does not amount to inducement or threat. In his examination u/s 313 Cr.P.C. the accused did not complain of any assault by the villagers. According to him he was beaten heavily by the police after he was taken into custody. Mr. Dey, the Id. counsel appearing for the appellant has referred to the statement of PW 11 in the cross-examination to the effect that when the accused was first produced before him on 12-4-84 he had injuries on his person for which he got him treated in the Salbani Primary Health Centre. On

receipt of the complaint at 4.45 P.M. PW 10 came to village Baromeshia and arrested the accused and the accused was produced by him to PW 11 at Salbani P.S. at 1.15 A.M. The accused was, therefore, in the custody of PW 10 for a long time before he was handed over to PW 11. PW 10 did not see any injuries on the person of the accused at the time of his arrest. There is no evidence that the villagers assaulted the accused. The accused himself states in his examination u/s 313 Cr.P.C. that he was beaten by police after arrest. It is clear, therefore, that the accused sustained the injuries after his arrest long after making the confession. We are of the opinion that the extra judicial confession made by the accused was free and voluntary. The extra judicial confession of the accused fits in well with other facts and circumstances established by independent evidence. The circumstances that the accused and the deceased were last seen together, the recovery of the Hercules bi-cycle of the deceased on which the accused took the deceased on-30-3-84 from the house of the accused and recovery of the pair of slippers and remnants of the wearing apparel of the deceased and the recovery of skull and skeleton from different parts of Godapeasal jungle on his showing lend great assurance to the truth of the extra judicial confession of the accused.

26. Circumstances Nos. 1, 3, 6, 7 and 8 and the alleged extra judicial confession of the accused have been proved by the prosecution beyond any shadow of doubt. In our opinion, these circumstances together with the extra judicial confession of the accused are inconsistent with the innocence of the accused and inevitably lead to the conclusion that the accused and the accused only committed the murder of the deceased. He was, therefore, rightly convicted u/s 302, Indian Penal Code.

27. Charge u/s 364, Indian Penal Code and conviction of the accused thereunder appear to us to be improper. As held by the Division Bench of Calcutta High Court in the case of Upendra Nath Ghose Vs. Emperor, , when the case of the prosecution is that the person abducted has been murdered by the abductor there can be no scope for a" charge u/s 364, Indian Penal Code. The abductor should be charged with murder pure and simple.

For the foregoing reasons, we uphold the order of conviction and sentence of the appellant Under Sections 302 and 201, Indian Penal Code but set aside the order of his conviction and sentence u/s 364, Indian Penal Code.

The appeal is disposed of accordingly.

Sankar Bhattacharyya, J.

28. I agree.