

(2023) 02 CAL CK 0012
In the Calcutta High Court
Case No : Criminal Appeal No. 437 Of 2005

Arjun Kora

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 03-02-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 302
Code Of Criminal Procedure, 1973 — Section 164, 235(2), 313
Evidence Act, 1872 — Section 3, 24, 25, 26, 27, 30

Citation : (2023) 02 CAL CK 0012

Hon'ble Judges : Chitta Ranjan Dash, J; Partha Sarathi Sen, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharya, Asim Kumar Niyogi, Prasun Kumar Dutta, Md. Kutubuddin, Santanu Deb Roy

Final Decision : Allowed

Judgement

Partha Sarathi Sen, J

1. The instant appeal arises out of judgement of conviction dated 18.03.2004 and order of sentence dated 19.03.2004 as passed by the Learned Additional Sessions Judge, 2nd Court, Burdwan in Sessions Trial No.23/2002 arising out of Sessions Case No. 73/2001 whereby and whereunder the said Court by the impugned judgment convicted accused no.1 Arjun Kora, under Section 235(2) Cr.P.C for the offence committed by him under Section 302 IPC and thus, sentenced him to suffer imprisonment for life and to pay fine of Rs.2,000/- i.d to suffer imprisonment for a period of one year more for the offence punishable under Section 302 IPC. By the self same judgment the said trial court also convicted accused no.1 Arjun Kora and accused no.2 Purnima Kora under Section 235 (2) Cr.P.C for the offence committed by them under Section 201 IPC and thus, sentenced both the convicted persons to suffer RI for a period of three years each and to pay a fine of Rs.1,000/- each i.d to suffer imprisonment for a further period of six months each for the offence punishable under Section 201

IPC.

2. The convict no.1 Arjun Kora felt aggrieved and thus, preferred the instant appeal.

3. For effective disposal of the instant appeal the facts leading to the initiation of the aforesaid Sessions Trial No.23/2002 is required to be narrated in a nut shell.

4. One Bablu Kora of Village Dombadi, P.S Ausgram, District Burdwan, lodged a written compliant with the O/C Ausgram P.S stating, inter alia, that one Smt. Chandana Kora the 1st wife of the present appellant of their village went missing since 22.01.1999. It was his further version in the said written complaint that on account of such disappearance of the said lady the villagers asked the present appellant and his second wife about her whereabouts but of no effect. The de facto complainant further stated that though the villagers advised the present appellant to report the missing of his first wife to her paternal home he did not pay any heed to such advice. It has also been stated in the said written complaint that after marrying for the second time the present appellant started neglecting his first wife as well as children and since the day of disappearance of the said lady Chandana Kora, the appellant was found roaming by the side of Bajarbandh. It has also been stated that on 03.02.1999, at about 12 p.m. when a co-villager namely; Durga Mete was coming back to his village with his cattle at that time the foot of the cattle went inside the earth from where he got some foul smell. The said Durga Mete became suspicious and informed the matter to the co-villagers and the co-villagers suspected that in the said place some dead body might have been there and thus, they brought the present appellant and his wife (convict no.2) there where both the convict disclosed that they have murdered the victim Chandana Kora and buried her dead body at that place. On the basis of the said written complaint Ausgram P.S. Case No.13/1999 dated 03.02.1999 under Sections 302/201/34 IPC was started.

5. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 302/201/34 IPC against both the accused persons.

6. After commitment the said case was transferred to the learned trial court for trial and disposal.

7. Trial Court Record reveals that on 25.07.2002 learned trial court on consideration of the entire materials as placed before him framed charges under Sections 302/201/34 of the Indian Penal Code against both the accused persons i.e. the present appellant and his wife Purnima Kora and since both the accused persons pleaded their innocence and claimed to be tried the trial proceeded. Trial Court Record reveals further that to bring home the charges as against the accused persons prosecution has examined nine witnesses in all and several documents have been exhibited on their behalf.

8. Though before the learned trial court no evidence was adduced on behalf of the defence but from the trend of cross examination and the answers as given by

the accused persons in course of their examination under Section 313 Cr.P.C. it transpires that the defense case is of clear denial as well as of false implication. As discussed above learned trial court on perusal and consideration of the entire evidence has passed the impugned judgement as against the present appellant as well as his wife and hence this appeal is at the instance of the present appellant i.e. the convict no.1.

9. In course of his argument Mr. Asim Kumar Niyogi, learned Amicus Curiae duly led by Mr.Partha Sarathi Bhattacharya, learned amicus curiae draws attention of this court to the impugned judgement as well as to the evidence of the prosecution witnesses. It is argued by Mr. Niyogi that on comparative study of PW 2 and PW3 it would reveal that while passing the impugned judgement learned trial court placed his reliance upon the said two prosecution witnesses and thus, came to a wrong finding that the extra judicial confession as made by the present appellant in presence of them are admissible in evidence. It is argued by Mr. Niyogi, learned amicus curiae that learned trial court while passing the impugned judgement has failed to appreciate the evidence of the prosecution witnesses more specifically the evidence of PW 2 and PW3 in its proper perspective. It is further argued that from the evidence of PW 2 and PW9 (IO), it would reveal that the actual time of lodging of FIR is not only confusing but also misleading and, therefore, learned trial court ought to have given the benefit of doubt to the present appellant while passing the impugned judgement. It is further argued that learned trial court misinterpreted the provisions of Section 27 of the Evidence Act as well as the proposition of law which deals with the acceptability of an extra judicial confession vis-a-vis retracted confession. Mr. Niyogi, thus, argued that it is a fit case for allowing the appeal by setting aside the impugned judgment.

10. While opposing the contention of Mr. Niyogi, learned amicus curiae, learned State Counsel, Mr. Prasun Kumar Dutta duly assisted by Md. Kutubuddin and Mr. Santanu Deb Roy, however, contended that learned trial court is very much justified in passing the impugned judgement of conviction. It is submitted by him that on conjoint perusal of the deposition of PW2 to PW5 it would reveal that the said prosecution witnesses have adduced clinching and corroborative evidence to the effect that the present appellant made extra judicial confession before them that it is he who had murdered his wife Chandana Kora and thereafter, buried her dead body beneath the earth. It is thus, argued that from the evidence of I.O i.e. PW9 and Exhibit 12 and 13 i.e. the statement of the present appellant before the IO and the statement of the co-accused Purnima Kora, it would reveal that the dead body of the deceased Chandana Kora was recovered as per showing of the present appellant and, therefore, the learned trial court made no mistake in applying the provisions of Section 27 of the Evidence Act while passing the impugned judgement.

11. We have perused the entire materials as placed before us including the charge, evidence of the prosecution witnesses, both oral and documentary,

examination of the present appellant under Section 313 Cr.P.C and the impugned judgement. We have given our anxious consideration over the submissions of the learned advocates of both the sides.

12. On perusal of the impugned judgement, it appears to us that learned trial court while passing the impugned judgment analyzed the evidence of the prosecution witnesses; both oral and documentary and at the same time placed his reliance upon the following points namely:-

- I. Alleged extrajudicial confession made by the present appellant before the I.O.;
- II. Retracted confession of a co-accused i.e. Purnima Kora;
- III. Statement of the present appellant before the I.O. i.e. PW9 leading to discovery of the dead body of the deceased.

13. In order to assess as to whether the learned trial court is at all justified in coming to his conclusion based on the aforesaid provisions of law, it becomes necessary to have a look to the evidence of the prosecution witnesses as recorded by the learned trial court. Before discussing the oral evidence as adduced by the PWs in short, the description of the prosecution witnesses are required to be narrated in a nut shell and the same is as under:-

PW2 is the de facto complainant and a co-villager of the present appellant before whom the present appellant alleged to have made extra judicial confession. PW2, PW3, PW4 and PW5 are also co-villagers of the present appellants before whom also the present appellant alleged to have made extra judicial confession. PW6 is the Judicial Magistrate who have recorded the statements of PW1 and co-accused Purnima Kora. PW7 is the Autopsy Surgeon, PW8 is the B.D.O in whose presence the inquest over the dead body was conducted, PW 1 is the constable of police and PW9 is the I.O. of the case.

14. PW2 in course of his examination-in-chief practically echoed his version as made by him in his written complaint. In course of his examination-in-chief he testified as to how a suspicion arose in the mind of one Durga Charan, a co-villager that a dead body might have been buried in a dry pond. It has been stated by him that the villagers including him apprehended that the present appellant and his second wife Purnima and on the insistence of the villagers the present appellant Arjun Kora admitted before them that he wrapped a napkin (gamcha) on the mouth of Chandana and murdered her by throttling. It has been stated by him further that police dug out the earth and brought out the dead body of Chandana from the pond. He further stated that he was examined by the I.O and that his statement was recorded by the Judicial Magistrate.

PW2 has been extensively cross-examined by the defence. In his cross-examination it is stated by him that in his village there is a club where the village disputes which lead to disturbances of breach of peace are adjudicated by the intervention of the club members and the guilty ones are reprimanded and chastised also. He further testified that the present appellant Arjun Kora, was

also called along with his two wives but Arjun disobeyed them. He further stated that the present appellant Arjun, at their insistence removed some earth for which they could see the face of the dead body. He further stated that out of suspicion they had called Arjun because his wife was missing prior to digging of the spot further and they became sure prior to digging of the earth by Arjun that removal of earth would lead to recovery of the dead body of Chandana Kora. In his Cross-examination he further stated that after the said incident of recovery he along with two other co-villagers went to Office of the BDO wherefrom BDO made a telephone call to the local Police Station in their presence. It is his further version that thereafter he had gone to Police Station along with one Nimai and Ram Prasad and they reached the P.S at 5 p.m where police did not write down anything. He further stated that on the said day at about 8 p.m police came to their village. He further stated that three hours after the arrival of the police he returned to his village when it was late at night. It is his further version in his cross-examination that thereafter a written complaint was written after one hour of his arrival from police station and the same was thereafter handed over to the police.

15. PW3 in course of his examination-in-chief stated the same thing as stated by PW1. He stated that as to how a suspicion occurred in their mind with regard to the presence of a dead body beneath the earth at their village. It has been testified by him that they suspected Arjun i.e. the present appellant and asked him to tell the truth with regard to his wife and at that time they assured him that they would not beat him if he speaks the truth. It is his further version that Arjun confessed before the villagers including him that he had strangled Chandana and thereafter concealed her dead body beneath the earth. The appellant also stated that before him that he tied a 'gamcha' around her mouth and strangled her to death. It is his further version that in his presence the said 'gamcha' and one 'takna' (spade) was seized.

In course of his cross-examination he stated that the present appellant Arjun had excavated the earth and the dead body of his first wife was brought out by him. He further stated that he had suspicion over Arjun behind the incident as the present appellant was found moving in and around the said place for the last two days.

16. PW4 in his examination-in-chief stated that on the relevant day and hour he and his co-villagers detained the present appellant Arjun and his wife Purnima since the present appellant's first wife Chandana was missing since 22.01.1999. He further stated that the police was informed and on interrogation by the police Arjun made confession and he excavated the earth that led to the discovery of the dead body of Chandana. He further stated that such confession was made before the villagers.

In his cross-examination he repeated that the present appellant made confession in presence of the persons of the village, police and others including him.

17. PW5 in course of his examination-in-chief stated in the same line like PW2 to PW4 as to how the suspicion arose in the mind of the villagers that a dead body was lying beneath the earth in the village and in his examination-in-chief he further testified that the present appellant Arjun and his wife Purnima were kept detained by the villagers and after the arrival of the police the present appellant was made to dig out the earth at the spot and on removal of the earth the dead body of Chadana was recovered and on query the present appellant Arjun disclosed as to how he had murdered Chandana and thereafter buried her dead body into the earth.

In his cross-examination it has been stated by PW5 that on the relevant day and hour the dead body was discovered in presence of police and the villagers before whom Arjun made the confession of his guilt. It is his further version that at about 8:30/9 p.m police arrived at their village and at that time the written complaint was not drafted though a preparation was going on for scribing the same. It is his further version in the cross-examination that the present appellant Arjun was penalized by local Gram Sabha by imposition of fine which the present appellant had paid.

18. PW6 being the Judicial Magistrate in course of his examination-in-chief had given a vivid description as to how recording of statement under Section 164 of PW1 and co-accused Purnima Kora was done by him. In our estimation discussion of his cross-examination is not necessary for the disposal of this appeal.

19. PW7 is the autopsy surgeon who in his examination-in-chief duly proved his post mortem report and in his examination-in-chief he had stated categorically that the death of the victim occurred on account of throttling (manual strangulation) and the same is ante mortem and homicidal in nature.

In his cross-examination nothing could be elicited to come to a conclusion that the death of the victim was not unnatural.

20. PW8 being the BDO of Ausgram II in course of his examination-in-chief stated as to how the dead body was exhumed from the earth in his presence as well as in presence of the local people and police personnel. He also stated that he performed inquest over the dead body.

21. PW9 is the IO of this case who in his examination-in-chief stated that on receipt of the written complaint he started Ausgram P.S case no. 13/1999 dated 03.02.1999. He stated that he himself took charge of the examination and thereafter he sent the message to ADM General, Burdwan for deployment of a Magistrate. He further stated that after the arrival of BDO he took him to the spot and thereafter the said dead body was exhumed by accused Arjun Kora in presence of the said BDO i.e. PW8, the other villagers and him i.e. IO. After inquest he sent the dead body for post mortem examination. He arrested both the accused persons. He made necessary arrangement for recording of the statements of the accused persons by a Judicial Magistrate under Section 164

Cr.P.C and before the Judicial Magistrate the co-accused Purnima had given a statement. He examined the available witnesses and recorded their statements. He also seized the napkin of the accused and the spade with wooden handle by execution of seizure list(s). He collected the post mortem report and on completion of the investigation he submitted charge sheet.

PW9 has been extensively cross-examined on behalf of the defense. In his cross-examination he stated that at 16:25 hours he had sent messages to the higher authority through his superior for deployment of Executive Magistrate for holding inquest over the dead body. He further stated that at 17:05 hours he got information from his superior that he had to go to Amargarh for accompanying BDO therefrom. He denied the suggestions as given by the learned advocate for the accused persons. PW 9 was again re-examined on recall by the prosecution. In his re-examination the said IO stated that both the accused persons made statements before him and on the basis of such statements the dead body of Chandana Kora was recovered as per showing of the accused persons. He was cross-examined by the defence wherein he stated that he could not recollect as to whether he stated earlier that he had recorded the statements of the accused persons or not. He denied all the suggestions as given to him in his re-cross-examination.

22. As discussed above Mr. Niyogi, learned amicus curiae in course of his argument repeatedly pointed out that there lies a serious contradiction with regard to the actual time of lodging of the FIR since the prosecution witnesses in course of their respective testimony adduced contradictory evidence. In order to assess as to whether the argument of Mr. Niyogi, learned amicus curiae has got any force or not, a further look is necessary to the statement of PW2 who according to the prosecution is the de facto complainant. As discussed above from the cross-examination of PW2 it reveals that after recovery of the dead body of the deceased Chandana the matter was reported to the BDO who in turn intimated the matter to the local police and thereafter the de facto complainant with one Nimai and Ram Prasad went to the police station and reached there at 5 p.m. He further testified that on the self same day at about 8 p.m the police reached at their village and the de facto complainant thereafter arrived at his village three hours after the arrival of the police i.e. at about 11 p.m. and about 1 hour after his arrival from police station, the written complaint was scribed. Such being the position the arithmetical calculation shows that as per the version of the PW1 the written complaint was handed over to the police in and around 12 'o' clock in the midnight. At this juncture we propose to peruse the formal FIR being Exhibit 10 and the written complaint i.e. Exhibit 2 wherefrom it reveals that Ausgram P.S. Case No. 13/1999 dated 03.02.1999 was started on the self same day at about 16:05 hours. In view of the aforesaid discussion it thus, appears that there lies a strong contradiction with regard to the actual time of the lodging of FIR which in considered view of us definitely affect the prosecution case adversely.

Since in the impugned judgement the learned trial court has placed its reliance upon the alleged extra judicial confession of the present appellant, we propose to look to the legislative provisions which deals with the subject of confession i.e. the provisions of Sections 24, 25 and 26 of the Indian Evidence Act, 1872, and those are reproduced hereunder in verbatim:-

"Section 24

Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,¹ having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.—A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise,² having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him;

Section 25

Confession to police officer not to be proved.—No confession made to a police officer¹, shall be proved as against a person accused of any offence.—No confession made to a police officer¹, shall be proved as against a person accused of any offence;

Section 26

Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate¹, shall be proved as against such person.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate², shall be proved as against such person." 2[Explanation.—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George 3[***] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)4]."

23. In this regard we also propose to look to some judicial pronouncements of our country with regard to the extra judicial confession. In the reported decision of *Sanarchand Vs. State of Rajasthan* reported in (2011)¹ CCrLR SC 45 the

Hon'ble Apex Court expressed the following view:-

"there is no absolute rule that an extra judicial confession can never be the basis of a confession though an extra judicial confession should be corroborated by some other materials."

The similar view was taken by the Hon'ble Supreme Court of India in the reported decisions of *Thimma vs. State of Mysore* reported in AIR 1971 Supreme Court 1871; *Md. Azad vs. State of West Bengal* reported in AIR (2009) SC 1307, *Mulk Raj vs. State of U.P* reported in AIR (1959) SC 902 and *Shiva Kumar Vs. State of Maharashtra* reported in AIR (2009) SC 1962.

24. Keeping in mind the aforesaid legislative enactments regarding confession and the judicial pronouncements leading to extrajudicial confession as discussed (supra), a duty is cast upon us to come to a logical conclusion as to whether the learned trial court is at all justified to hold that the statements of the present appellant as alleged to have been made before PW2 to PW5 can be at all considered to be an extra judicial confession or not. On conjoint perusal of the entire testimony of PW2 it appears to us that after having a strong suspicion of presence of a dead body under the earth, the present appellant and his second wife Purnima were detained by the villagers including PW1 and it is on their insistence the present appellant admitted his alleged guilt. During the cross-examination of PW1 it also reveals that in the village of PW1 to PW5, there exists a club where at the intervention of the club members disputes of the village were being adjudicated and the guilty ones are reprimanded and chastised and it is his further version that the present appellant Arjun had disobeyed the verdict of the said adjudication as done by the club members. The evidence of PW3 in this regard is very much interesting since in his examination-in-chief he stated that after detaining the present appellant and his wife they assured the present appellant and his wife that if he (the accused) spoke the truth he would not be beaten.

25. PW4 in his examination-in-chief made a complete departure with regard to the alleged confessions made by the present appellant. He stated that such confession was made by the present appellant on interrogation by the police.

26. PW5 also stated that after the arrival of the police, question was put to the present appellant when he disclosed that he had murdered his first wife Chandana. Such being the position it thus, appears to us that from the evidence of PW 2 and PW 3 it reveals that the alleged extrajudicial confession as alleged to have been made by the present appellant Arjun was involuntary and on the contrary it was made under coercion vis-a-vis from the evidence of PW4 and PW5 it reveals that such confessional statement was made by the present appellant Arjun in presence of and/or to the police which under the provisions of Section 25 of the Evidence Act is equally inadmissible.

27. In view of the discussion made hereinabove we have got no hesitation to hold that the alleged extrajudicial confessional statement as claimed to have

been made by the present appellant is totally inadmissible in evidence and the learned trial court is thus, not justified in placing his reliance on such alleged extrajudicial confession in passing the impugned judgement.

28. In order to assess as to whether the learned trial court has rightly interpreted the provision of Section 27 of the Evidence Act in the facts and circumstances as involved in the present lis, we again propose to look to the evidence of PW2 to PW5, PW9 i.e. the IO and PW8 i.e the B.D.O (the inquest maker).

29. PW2 in his examination-in-chief stated that after making of extrajudicial confession by the present appellant, police dug out the earth and brought out the dead body of Chandana from the pond while PW3 in his cross examination stated that the present appellant Arjun had excavated the earth and thereafter brought out the dead body of his wife. PW4 however, stated that after arrival of police, on interrogation by police Arjun made confession and he excavated the earth that lead to recovery of dead body of Chandana.

30. PW5 however, stated that the said dead body was recovered in the presence of the police and the villagers before whom the present appellant made his confession. It thus, appears from the evidence of the said prosecution witnesses (co-villagers) that none of the said co-villagers stated that after arrival of the police on the relevant day and hour at the P.O the present appellant was taken into custody by the police and thereafter his statement was recorded by the IO and as per his showing the dead body of Chandana was recovered.

31. PW9 however, stated in his examination in recall that both the accused persons made statements before him which was reduced into writing (Exhibit 12 and 13) and thereafter both the accused persons showed the relevant place wherefrom the dead body of the victim was recovered. However such version of PW9 gets no support from the evidence of PW8 i.e. the BDO who in his examination-in-chief stated that after his arrival with the police at the P.O the dead body was exhumed from the earth with the help of local people and police personnel but nowhere it has been stated by him that the said dead body was recovered pursuant to the statements of the two accused persons and as per their showing.

32. In view of such contradictory version of the PWs, it would be highly unjust to believe that rigor of provision of Section 27 of the Evidence Act can be applied as against the present appellant.

33. Admittedly before the learned trial court the prosecution has been successful in proving the confessional statement (Exhibit 7) of the second wife of the present appellant i.e. Purnima Kora. A question, therefore, arose as to whether such confessional statement of a co-accused can be used as against the present appellant to come to a conclusion with regard to the guilt with which he has been charged with. The evidentiary value and the extent of the application of a retracted confession i.e. confession made by a co-accused against another co-

accused has been clearly and elaborately explained in the reported decision of *Pancho vs. State of Haryana*, reported in (2011) 3 CCrLR (SC) 654. Wherein Hon'ble Supreme Court held the following:

"the proper way to approach a case involving confession of a co-accused is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether , if it is believed, a conviction could safely be based on it .If it is capable of belief independently of the confession , then it is not necessary to call the confession in aid....

.....

Cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept...

.....

This court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said co-accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right ..

.....

Though confession may be regarded as evidence in genuine sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the Court cannot start with the confession of a co-accused, it must begin with other evidence adhered by the prosecution and after it has framed an opinion with regard to quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of the guilt which the judicial mind is about to react on the said other evidence."

34. The same view was take in the reported decisions of *Kashmira Singh vs. State of MP* reported in AIR 1952 SC 159: 1952 CrLJ 839; *Haricharan Kurmi vs. State of Bihar* reported in AIR 1964 SC 1184: (1964) 2 CrLJ 344.

35. Since in the case in hand the evidence of the prosecution witnesses are not clinching and corroborative and since the same does not inspire confidence of us on account of their contradictions and embellishment as discussed above, we consider it fit not to look to the confessional statement (Exhibit 7) as made by

Purnima as a substantive piece of evidence against the present appellant.

36. In view of the discussion made hereinabove we thus, find sufficient merit in the instant appeal and accordingly the instant appeal is hereby allowed.

37. As a result the impugned judgement of conviction dated 18.03.2004 and order of sentence dated 19.03.2004 as passed by the Learned Additional Sessions Judge, 2nd Court, Burdwan in Sessions Trial No.23/2002 arising out of Sessions Case No. 73/2001 is hereby set aside.

38. The present appellant is thus found not guilty under Sections 302/201 IPC and he is thus acquitted in connection with Sessions Trial No.23/2002 arising out of Sessions Case no. 73/2001 as disposed by the Learned Trial Court.

39. Since the present appellant Arjun Kora is on bail, he is thus discharged from his bail bonds.

40. Department is directed to transmit the trial court record along with a copy of this judgement forthwith.

41. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.