
(2009) 12 CAL CK 0019
In the Calcutta High Court
Case No : Criminal A. No"s. 141 and 214 of 2008

Dilip Kumar Dey	Vs	APPELLANT
State of West Bengal	 Sristidhar Roy Vs State	RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2011) 2 CHN 118

Hon'ble Judges : Raghunath Ray, J;Amit Talukdar, J

Bench : Division Bench

Advocate : Sekhar Basu, Prasun Kr. Dutta, Soubhik Mitra, in C.R.A. 141 of 2008 and Debabrata Roy, in C.R.A 214 of 2008, for the Appellant;S.K. Mahato, Id. PP for the State, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.—Ablutions over, she was preparing to repair for the night when death claimed her in some horrendous circumstances.

2. Since her Father-in Law, P.W.2, Bishnupada Dutta grew restive on account of her non-arrival from the pond of Lakhpukur, where she had gone to wash herself, he set on a search along with some co-villagers. The same yielded to the discovery of her mortal remains in a dishevelled condition under a wood apple tree in the vicinity of the said pond with injuries.

3. It is the cause of such death, circumstances leading to it and the role played by these two Appellants in the commission of the same, is required to be tracked by us in this appeal so as to appreciate the impact of the finding of the learned Additional Sessions Judge, Second Court, Burdwan in Sessions Trial No. 7 of 2007 arrived at on 29.01.2008 whereby the Appellants (both the appeals being heard analogously, are being disposed of by this common judgment and the Appellant Dilip Kumar Dey @ Dilip @ Dilu in C.R.A. No. 141 of 2008 is referred to as "A-1" whereas Appellant in C.R.A. No. 214 of 2008 Shri stidhar Roy @

Bhombal @ Hambul is referred to as A-2") were sentenced to suffer imprisonment for life and to pay rupees six thousand each; in default to suffer rigorous imprisonment for one year more in respect of their conviction for the charge of Section 302/34 of the Indian Penal Code.

4. Even though both the Appellants were found guilty in respect of the charge of Section 201/34 of the Indian Penal Code; however, No. separate sentence was awarded as already they were directed to cover a life term.

5. Background facts leading to the initiation of the present case can be traced back to a monsoon evening of 16.08.2006 when Chandra Dutta @ Khuku the Daughter of P.W.1, Kartick Ch. Roy, who was given in marriage to P.W.4, Maloy Dutta had been to the nearby pond for a wash. But since she did not return till late evening, this persuaded P.W.2, Bishnupada Dutta to conduct a search. The dead body of deceased Chandra was found with her wearing apparels ajar under a wood apple tree standing near the pond.

6. He took out a written complaint (Ext.3) before P.W. 26, Jugal Chandra Biswas, the Investigating Officer, who directed P.W.20, Md. Ayub Hossain to submit the same to the police station which resulted in registration of the formal FIR (Ext.8) at the instance of the P.W.24, Ajoy Dey, Sub-Inspector of police, who at the relevant date and time was posted as sub inspector of police, Khandaghosh Police Station.

7. On the same night an inquest (Ext. 1) over the dead body of Deceased Chandra was conducted by P.W.26, Jugal Chandra Biswas, the Investigating Officer of this case in the presence of P.W.1, Kartick Ch. Roy, father of the Deceased her Sister-in-Law, P.W.8, Sabitri Juin, her Father-in-Law, P.W.2, Bishnupada Dutta, P.W.10, Md. Hanif, P.W.19, Constable Nepal Chandra Kundu and A-1.

8. Thereafter the dead body was sent through P.W. 19, Constable Nepal Chandra Kundu against a dead body challan (Ext.5) for the purpose of postmortem Examination which was held by P.W.23, Professor Dr. B.N. Kahali, Professor and Head of the Department of Forensic & State Medicine, Burdwan Medical College & Hospital on 17.08.06, who is now posted as Professor in the Department of Forensic and State Medicine, N.R.S. Medical College & Hospital.

9. In the meanwhile, on 19.08.06 the Appellants were produced under arrest before the learned Chief Judicial Magistrate, Burdwan and they were sent on police remand till 26.08.06 in connection with G.R. 1140 of 2006.

10. In terms of their statement (Ext. 10 and 10/1) recorded by P.W.26, Jugal Chandra Biswas, the Investigating Officer of this case on being pointed out by the Appellants the Saree (Mat. Ext.-I) was recovered from the mud of the pond on 21.08.06 in the presence of P.W.5, Provakar Dutta, P.W.7, Suchandra Dutta, Sister-in-Law and the husband of the deceased, P.W.4, Maloy Dutta by P.W. 15, Ajit Santra, P.W.13, Guru Prasanna Chakraborty, P.W. 14, Shyamal Singh on the

strength of a Seizure List (Ext.4) along with P.W.21, Haru Khara, P.W.16, Pintu Majhi and P.W.22, Srikanta Santra who however, did not attest the Seizure List (Ext. 4)

11. Earlier, innerwear (Mat. Ext.-II) of the deceased Chandra was also seized by P.W.26, Jugal Chandra Biswas, the Investigating Officer on the strength of the Seizure List (Ext.2) on 16.08.06 on the same night of the incident in the presence of A-I, P.W.10, Md. Hanif, a co-villager, P.W.5, Provakar Dutta, P.W.12, Tarun Kr. Dutta and P.W.1, Kartick Ch. Roy, father of the deceased.

12. The conclusion of the investigation by P.W.26, Jugal Chandra Biswas, the Investigating Officer saw the filing of a charge sheet which resulted in the commitment of the present Appellants before the learned Trial Court.

During the trial the Appellants were directed to answer two heads of charges, they are:

Firstly "That you on or about the 16th day of August, 2006 at about 6 p.m. committed murder by causing the death of Chandra Dutta @ Khuku w/o Maloy Chand Dutta and thereby committed an offence punishable u/s 302 Indian Penal Code and within the cognizance of this Court of Sessions.

That you on or about 16.8.06 at about 6 p.m. having reason to believe that the offence u/s 302 Indian Penal Code has been committed, did cause certain evidence of the said evidence to disappear the wearing apparels of the victim Chandra Dutta and thereby committed an offence punishable u/s 201 Indian Penal Code and within the cognizance of this Court of Sessions" Secondly "

That you have committed the murder with common intention and thereby committed an offence punishable u/s 34 Indian Penal Code and within the cognizance of this Court of Sessions.

13. Since they pleaded not guilty, they were placed on trial, which ended in their conviction as above.

14. We have had the occasion to hear Shri Basu, learned Senior Counsel for the A-1 and Shri Roy for A-2, who has practically adopted the submissions of Shri Basu.

15. Learned Public Prosecutor represented the State.

Shri Basu relied on a written notes of argument. The mainstay of his argument in a concise form reveals;

a) The extra-judicial confession made by A-1 before P.W. 18, Shyamal Dutta and P.W.12, Tarun Kr. Dutta does not inspire much confidence in the mind of a prudent man as the same was made at a very belated stage;

b) it is not clear as to why would A-1 repose confidence on P.W.12, Tarun Kr. Dutta and P.W.18, Shyamal Dutta for confiding about the guilt;

c) the conduct of P.W.18, Shyamal Dutta, a practising lawyer of Burdwan Court before whom extra-judicial confession was made, was absolutely improbable. Even after having heard about the said incident, he asked the Appellant to leave the place after assuring him that he will see the matter;

d) it is not understood why A-1, who was all through present when the dead body was located in the place of occurrence and who signed on the inquest report (Ext.1) and attended the funeral and signed on the seizure list (Ext.2) pertaining to the seizure of saya ((petticoat)) had a change of mind subsequently;

e) the evidence of P.W.1, Jyotsna Dutt, the sole eye-witness of this case was liable to be discarded since it was most unnatural conduct of a person, who had seen one of her relatives being done to death would keep quiet, and simply return back to her home and divulge the same only after the lapse of several hours to her husband;

f) the evidence of P.W.26, Jugal Chandra Biswas, the Investigating Officer that on 20.08.06 he had brought the Appellants in the presence of other witnesses but could not find anything from the place of occurrence and it is only on 21.08.06 the recovery was made. This was also, according to Shri Basu, extremely mysterious.

16. As a part of his submission Shri Basu relied on the decision of Supreme Court in Ram Kumar Pandey Vs. State of Madhya Pradesh, , to submit when the FIR was contradicted to a major extent by the maker of the same, the whole prosecution case was liable to be disbelieved.

17. He next referred to the decision of the" Apex Court reported in Heramba Brahma and Another Vs. State of Assam, , on the point that unless the exact words are reproduced and it is established that the accused could place confidence on a person before whom he is making a confession, is satisfied the conviction based on the said piece of evidence is not reliable.

18. He also relied on the decision of the Supreme Court in Vikramjit Singh alias Vicky v. State of Punjab 2007 (1) SCC (Cri) 732, to illustrate his point that the statement (Ext. 10 & 10/1) leading to the recovery of the Saree(Mat. Ext.-I) on the strength of Ext A, was not trustworthy and the statement of the Appellants purportedly u/s 27 of the Evidence Act did not meet the required standard.

19. Learned Public Prosecutor with Shri Sushil Kumar argued that it is not in dispute that the deceased Chandra Dutta was found murdered near her house on the banks of a local pond known as Lakhpukur.

20. Learned Public Prosecutor further submitted that there was No. dispute with regard to the various injuries seen by P.W.23, Prof. Dr. B.N. Kahali, the Autopsy Surgeon.

21. Learned Public Prosecutor did not find any fault with regard to the conduct of

P.W.11, Jyotsna Dutta, an eye-witness in keeping quiet about the incident of the Appellants jostling with the deceased and banging her head before she could divulge the same to the other witnesses.

22. Learned Public Prosecutor also relied on the decision of Alope Nath Dutta and Others Vs. State of West Bengal, .

23. Lastly, learned Public Prosecutor also submitted that the recovery held at the instance of the Appellants could not be disputed even for a moment in view of the strong evidence in this regard. He urged us to accept the statements of P.W.11, Jyotsna Dutta and P.W.12, Tarun Kr. Dutta, eyewitnesses and submitted that as leading to their statement, recovery was made, it was not open to the accused to turn around and point out to some technical difficulties.

24. He has prayed for dismissing the appeal.

25. For a profitable discussion, we would be of the view that it would be appropriate to set out the witnesses examined by the prosecution in their respective perspective.

The prosecution has, in all, examined twenty six witnesses. First we have the police witnesses. They are;

26. P.W. 24, Ajoy Dey, Sub-Inspector of police attached to Asansol (South) Police Station, who at the relevant time was attached to Khandaghosh Police Station as Sub-Inspector of Police. He registered the Written Complaint (Ext.3) as the formal FIR (Ext.8) on the direction of P.W.26, Jugal Chandra Biswas, the Investigating Officer of this case.

27. P.W.25, Sudip Ghose, Sub-Inspector of Police of Khandaghosh Police Station effected the seizure (Ext. 6) on 17.08.06 at the police station in respect of wearing apparels of the deceased including the viscera, blood samples etc. etc. as produced by some constables (not examined).

28. P.W.26, Jugal Chandra Biswas, Sub-Inspector of police, Khandaghosh Police Station investigated the case and ultimately, filed charge sheet.

Witnesses before whom extra-judicial confession was made. They are;

P.W. 12, Tarun Kr. Dutta was a clerk in the office of the District Judge, Burdwan and;

P.W. 18, Shyamal Dutta was a practising lawyer of the Burdwan Court.

The so-called eye-witnesses are;

P.W.11, Jyotsna Dutta and;

P.W.12, Tarun Kr. Dutta.

29. In the category of Hostile Witnesses we have before us P.W. 13, Guru Prasanna Chakraborty, a co-villager and P.W.14, Shyamal Singh also a co-villager,

who were also party to the recovery of the Saree (Mat. Ext.-I).

30. The Medical Evidence covers P.W.23, Professor Dr. B.N. Kahali, professor in the Department of Forensic & State Medicine, N.R.S. Medical College & Hospital who, at the relevant time of the incident was serving in his capacity as Professor and Head of the Department of Forensic & State Medicine, Burdwan Medical College & Hospital conducted the autopsy over the body of the deceased Chandra.

31. The witnesses to the recovery of the Saree (Mat. Ext.-I) on the showing of the Appellants, were;

P.W.4, Maloy Dutta, husband of the deceased;

P.W.5, Provakar Dutta, a co-villager;

P.W.7, Suchandra Dutta, Sister-in-Law of the deceased;

P.W.15, Ajit Saha

P.W. 16, Pintu Majhi

P.W.14, Shyamal Singh, hostile witness

P.W.22, Srikanta Santra;

P.W.21, Haru Khara and;

P.W. 13, Guru Prasanna Chakraborty

32. Location of the dead body on the date of incident under a wood apple tree near the pond known as Lakhpukur within the vicinity of the house of the Deceased, as reflected from the Sketch Map (Ext.9) prepared by P.W.26, Jugal Chandra Biswas, the Investigating Officer in a revealed position has been spoken by P.W.2, Bishnupada Dutta, Father-in-Law of the Deceased, P.W.1, Kartick Ch. Roy, father of the deceased, P.W.3, Maya Rani Dutta, P.W.4, Maloy Dutta, husband of the deceased P.W.8, Sabitri Juin, P.W.6, Saday Dutta, P.W.5, Provakar Dutta, P.W.7, Suchanda. Dutta, P.W.12, Tarun Kr. Dutta, P.W.13, Guru Prasanna Chakraborty, P.W.14, Shyamal Singh, P.W. 18, Shyamal Dutta and the Investigating Officer of the case P.W.26, Jugal Chandra Biswas.

33. Signatories to the inquest (Ext. I) prepared by P.W.26, Jugal Chandra Biswas, the Investigating Officer-were, P.W.2, Bishnupada Dutta, P.W. 10, Md. Hanif, P.W.8, Sabitri Juin, P.W. 19, Constable Nepal Chandra Kundu, P.W.1, Kartick Ch. Roy and the A-1 himself.

34. In respect of the seizure of the innerwear purportedly worn by Deceased Chandra Dutta which was made under a seizure list (Ext.2), was signed by A-1, P.W.10, Md. Hanif, P.W.5, Provakar Dutta, P.W.12, Tarun Kr. Dutta and P.W.1, Kartick Ch. Roy as prepared by P.W.26, Jugal Chandra Biswas, the Investigating Officer.

35. We have to view the entire appeal firstly in the prism of the Extra judicial

confession made by A-1 before P.W.12, Tarun Kr. Dutta and his younger brother P.W.18, Shaymal Dutta secondly the statements of the Appellant leading to the recovery. Their statements (Ext. 10 and Ext. 10/1) recorded by P.W.26, Jugal Chandra Biswas, the Investigating Officer led to the recovery of the Saree (Mat. Ext.-I) from the mud of the Lakhpukur on 21.08.06 in the presence of P.W.4, Maloy Dutta, P.W.5, Provakar Dutta, P.W.7, Suchanda Dutta, P.W. 15, Ajit Santra, P.W. 16, Pintu Majhi, P.W.14, Shyamal Singh and P.W.22, Srikanta Santra, P.W.21, Haru Khara and P.W.13, Guru Prasanna Chakraborty.

36. The profile of the prosecution case has been already gleaned through. It would be now required for us to assess the submissions of Shri Basu on the anvil of the evidence on record seen by us in the backdrop of the reservations of the learned Public Prosecutor.

37. Shri Basu has raised a question with regard to the police station case number mentioned in the inquest report (Ext. 1) which was prepared on 16.08.06 at about 22.25 Hrs. although the case was registered for investigation on 17.08.06. We have carefully seen the contents of Ext. I. It appears that in the same process it was written "...Surathhal Report...in C/W Khandaghosh P.S...." but it appears that the word "in c/w" was penned through by a different ink and with a carrot sign Khandaghosh P.S. was preceded by the word "Ref to".

38. In either direction Shri Basu may have a point as it has been borne out from the evidence that the written complaint (Ext.3) was lodged by P.W.2, Bishnupada Dutta, Father-in-Law of the deceased on the night of occurrence itself, was forwarded by P.W.26, Jugal Chandra Biswas, the Investigating Officer to the police station from the spot through P.W.20, Md. Ayub Hossain, Assistant Sub-Inspector of Police, Khandaghosh P.S., which was received by P.W.24, Ajoy Dey resulting in the registration of the formal FIR (Ext.8) on 17.08.06 at about 00.15 Hrs. that means more or less after one hour to forty five minutes from the preparation of the inquest report (Ext.1).

39. It is unexplainable that the inquest report (Ext. 1), which was anterior to the registration of the formal FIR (Ext.8) could contain the case number. Even if, we leave aside from our consideration the interpolation on a different ink which has been fortified by the cross-examination of P.W.26, Jugal Chandra Biswas, the Investigating Officer, who deposed that the said inquest report was completed by him in his own hand writing in the same sitting - we need not detain ourselves with regard to the said aspect of the matter in view of the larger issues awaiting decision ahead of us.

40. As we have seen the prosecution case is mainly based on the extrajudicial confession and the recovery of Saree (Mat. Ext.-I) on the showing of the two Appellants, which has of course been caught in the eye of a storm raised in the course of the argument of Shri Basu - the same is under severe criticism.

41. We will see the veracity of the extra-judicial confession and its effect on the prosecution case. Before doing so, we have to again retrace to the various stages

from which the dead body of Deceased Chandra Dutta was discovered under a wood apple tree near the pond known as Lakhpukur by P.W.2, Bishnupada Dutta, Father-in-Law of the Deceased followed by her father, P.W.1, Kartick Ch. Roy, the Mother-in-Law, P.W.3, Maya Rani Dutta, co-villager, P.W.5, Provakar Dutta, her elder brother, P.W.6, Saday Dutta and Sister-in-Law P.W.7, Suchanda Dutta and P.W.8, Sabitri Juin as well as her husband P.W. 4, Maloy Dutta and the other witnesses whom we had noted earlier.

42. Even at the cost of repetition, we have to keep in mind that the written complaint (Ext.3) was lodged by P.W.2, Bishnupada Dutta, Father-in-Law sometimes after the dead body was found in the evening before P.W.26, Jugal Chandra Biswas, the Investigating Officer by which time already P.W.12, Tarun Kr. Dutta had visited the place of occurrence, which was already infested with a gathering and informed his brother P.W.18, Shyamal Dutta and also the police station over phone which led to the arrival of the police party to the village.

43. He was a signatory to the seizure of the innerwear (petticoat) near the dead body which was seized by P.W.26, Jugal Chandra Biswas, the Investigating Officer at about 23.45 Hrs. in the presence of A-1, P.W.5, Provakar Dutta, P.W.10, Md. Hanif, P.W.12, Tarun Kr. Dutta and P.W.1, Kartick Ch. Roy from the northern side of the pond known as Lakhpukur.

44. Shri Basu is quite correct that even though P.W.12, Tarun Kr. Dutta, a man of some letters, as it is found that he is a clerk attached to the District Judge, Burdwan who saw that the Appellants were placing the dead body of a woman under the wood apple tree by the side of the pond and again visiting the place of occurrence being attracted by the hue and cry after sometime and saw the dead body of Chandra Dutta in the condition described hereinabove under the wood apple tree - even then he did not disclose about his earlier experience with regard to the Appellants carrying the dead body of a woman under the wood apple tree. This is absolutely incredulous. This would pass beyond the comprehension of any prudent person.

45. Adding to the said confusion, we would look into the evidence of P.W.11, Jyotsna Dutta, an Aunt-in-Law of the Deceased Chandra. Towards the first part of the evening of the fateful day she had also been to the Lakhpukur to cleanse herself. She saw both the Appellants were jostling with Deceased Chandra in the water. Thereafter, they were dashing the head of the Deceased on the staircase of the said pond. It is quite curious to note that even though after some time she came to know about the discovery of the dead body of Chandra near the bank of the pond, she did not disclose the same to anyone. It is only on the next day after her husband P.W. 17, Samar Dutta returned from the cremation, she informed him, who advised him to contact P.W.18, Shyamal Dutta on the next morning.

46. Accordingly, she visited the house of P.W.18, Shyamal Dutta on 18.08.06 along with P.W. 17, Samar Dutta. She narrated, the entire incident to P.W.12,

Tarun Kr. Dutta as P.W.18, Shyamal Dutta was not available.

47. P.W.12, Tarun Kr. Dutta, also an eye-witness also divulged that he had seen the Appellants to place the body on the northern bank of Lakhpukur and that both of them disclosed that both the Appellants committed the murder.

48. It would be pertinent to refer to the evidence of P.W.12, Tarun Kr. Dutta, who deposed that he had seen in the early evening the Appellants placing the dead body of a woman under a wood apple tree near the side of the pond. Later, when he heard hue and cry, he went to the place of occurrence and discovered the dead body. It may be that P.W.11, Jyotsna Dutta, a rustic lady out of fear may not have ventured out in the night and on her own volition narrated the incident but it passes beyond our comprehension that P.W.12, Tarun Kr. Dutta, a clerk of the District Judge would keep absolutely silent before the Investigating Officer when he attested the seizure list (Ext.2) with regard to the seizure of petticoat (Mat. Ext.-II) purportedly found near the dead body.

49. P.W.18, Shyamal Dutta was a practising lawyer of Burdwan Court. On being informed by P.W.12, Tarun Kr. Dutta with regard to the death of Chandra Dutta, he came to the village at about 9.00 in the evening and found the dead body of the deceased under the wood apple tree near the bank of Lakhpukur.

50. It is his evidence that on 18.08.06 in the wee hours of the morning A-1 came and started weeping. He and his elder brother, P.W.12, Tarun Kr. Dutta admitted A-1 in their sitting room when before both P.W.12, Tarun Kr. Dutta and P.W.18, Shyamal Dutta, A-1 made a confession that he with the help of A-2 committed the murder of deceased Chandra @ Khuku.

51. After hearing about the confession he asked A-1 to leave the place and thereafter with his cousin Abhoy (not examined) came to the police station and narrated the incident.

52. P.W.12, Tarun Kr. Dutta spoke in the same breath of his younger brother P.W.18, Shyamal Dutta with regard to the confession.

53. Even though extra-judicial confession is a weak piece of evidence, it can be acted upon in the event the same is corroborated by the surrounding circumstances. It is also required to see whether the same was voluntary and made before a person and under such circumstances which would inspire confidence in the mind of the Court before accepting it. More particularly, whether it was probable that the accused making such confession before the person upon whom he can place reliance. The decision of Apex Court relied upon by Shri Basu in *Heramba Brahma and Anr. v. State of Assam* (supra) is of some avail in the factual matrix of the present case.

54. A wholesome appreciation of the tenor of the extra-judicial confession made by A-1 before P.W.12, Tarun Kr. Dutta and P.W.18, Shyamal Dutta two days after the incident; although A-1 was a signatory to the inquest (Ext. I) he was also found loitering near the place of occurrence by P.W.2, Bishnupada Dutta, who

borrowed the torch light from him in the evening of the occurrence and was present in the funeral of Deceased Chandra-was, in the ordinary sequence of events highly improbable.

55. It is furthermore curiouser to look into the evidence of P.W.18, Shyamal Dutta, a practising lawyer, who after listening to the extra-judicial confession in presence of his elder brother P.W.12, Tarun Kr. Dutta (who had seen both the Appellants to carry the dead body in the very evening of the incident) to have asked A-1 to leave the place as they would look into the matter and thereafter go and inform the police station, which, as if, prompted them to come and apprehend the Appellants on the self-same day.

56. Even though we would not be very much emboldened by the suggestion of Shri Basu that the exact words spoken by A-I were not produced, which, however, is one of the factors for the purpose of considering the confession; but in the instant case even otherwise we did not feel very much persuaded to abide by such confession in view of its fragile nature.

57. We would be of the view that the piece of extra-judicial confession relied upon by the prosecution in the present case would be of No. value and in our considered opinion it would be unsafe to rely upon the same for the purpose of recording an order of conviction. We would have No. hesitation in disbelieving the same.

58. This would now bring us to the recovery of Saree (Mat. Ext.-I) worn by the deceased Chandra at the time of her death on the showing of the Appellant as deposed by P.W.26, Jugal Chandra Biswas, the Investigating Officer.

59. The recovery was made within the ambit of Section 27 of the Evidence Act. Law in this regard is quite well-settled that an object, which has been recovered in terms of a statement made by an accused is at best a fact discovered. Nothing more, nothing less. In order to connect the accused with the crime, it is further required to be established that the object so discovered was either used for the purpose of commission of said crime or such discovery was connected directly with the crime itself, otherwise, simple discovery of an object leading to the statement by an accused cannot be treated anything beyond an object discovered.

60. This position is absolutely well-settled as to what would be considered relevant fact in terms of the statement of the accused leading to discovery made purportedly u/s 27 of the Evidence Act. The Supreme Court in Pandurang Kalu Patil and Anr. v. State of Maharashtra 2002 C Cr. LR (SC) 257; had taken into account the classical locus decision of the Privy Council Pulukuri Kotayya v. Emperor 74 Indian Appeals 65, which was followed by a Division Bench decision of this Court in Nowsad Sk. v. State of West Bengal 2002 C Cr. LR (Cal) 960.

61. P.W.26, Jugal Chandra Biswas, the Investigating Officer of this case sought the arrest of the Appellants on 19.08.06 and on the same day produced them in

Court whereupon they were sent on police remand.

62. It is during such remand, on 21.08.06 the Saree (Mat. Ext.-I) was recovered on the basis of a seizure list (Ext.4) prepared by P.W.26, Jugal Chandra Biswas, the Investigating Officer in the presence of P.W.4, Maloy Dutta, husband of the Deceased P.W.2, Bishnupada Dutta, Father-in-Law of the deceased, her Sister -in-Law P.W.7, Suchanda Dutta and P.W.5, Provakar Dutta, a co-villager.

63. The statements of the Appellants leading to the discovery of the said Saree (Mat. Ext.-I) have also been perused by us including the evidence of the persons, who fished out the same from of water of the pond (P.W.16, Pintu Majhi, P.W.21, Haru Khara, P.W.22, Srikanta Santra and P.W.15, Ajit Santra) in the morning of 21.08.06, who, however, although deposed about the factum of such recovery, did not attest the seizure list (Ext.4) pertaining to the recovery of the Saree (Mat. Ext.-I) 64. P.W.7, Suchanda Dutta, a Sister-in-Law of the deceased Chandra deposed that the deceased Chandra Dutta was wearing a Green Saree with white print on it at the time of her leaving for the pond. She identified the said Saree as that of the deceased Chandra.

65. In her cross-examination she deposed that this type of Sarees are generally available and it does not bear any particular label. Such question of identification by P.W.7, Suchanda Dutta was also deposed by P.W.5, Provakar Dutta, a co-villager including her husband, P.W.4, Maloy Dutta.

66. If we see the cross-examination of her husband, P.W.4, Maloy Dutta, which reads "...This type of Saree is worn by many women. There is No. specific identification mark in the seized Saree."

Many woman of our locality used to go to the said Love @ Lakh pukur for bathing or washing purpose.

67. If we see the cross-examination of P.W.4, Maloy Dutta, husband of the deceased, it would transpire that he works in a rice mill in Memari and used to come to his home once or twice in a month in the event of any emergency. His cross-examination further reveals that he was not present at the relevant time when his wife left for having her bath on the date of incident. In such circumstances it would be difficult to absolutely placate the ownership of the Saree (Mat. Ext.-I) by the Deceased Chandra Dutta in the light of the evidence of her husband P.W.4, Maloy Dutta and her Sister-in-Law, P.W.7, Suchanda Dutta.

68. The cross-examination of P.W.5, Provakar Dutta, a co-villager, who also signed on the seizure list (Ext.4) on the basis of which Saree (Mat. Ext.-I) was recovered on the showing of the Appellants may be seen.

69. P.W.5, Provakar Dutta is a school teacher. He deposed that "...I did not see any Saree on the bank of the said pond after going there at about 10.30 a.m. on 21.08.06. I was therefore about 1 hour on that date".

70. That apart there is another very important feature which require our

attention. P.W. 25, Sudip Ghose of the Khandaghosh Police Station prepared a seizure list (Ext.6) on 17.08.06 at about 16-45 hrs. The place of seizure was at the police station itself. The materials, which were seized were; 1) green colored saya (petty coat) 2) blue cotton blouse, 3) viscera of the Deceased, 4) blood sample, 5) nail cutting, 6) scrap of finger, 7) scalp hair, 8) vaginal swab, 9) smear.

71. The aforesaid articles were produced by one assistant Sub-Inspector of Police, a Constable and a Home Guard. None of them were however, examined.

72. P.W.25, Sudip Ghose in his cross-examination admitted "...I stated to I.O. that after P.M. examination, Nepal Chandra Kundu produced one Saree, blouse, viscera etc. and I seized the same under a S.L., but there was No. Saree...." This piece of evidence of the said police officer assumes a little bit of importance in the backdrop of the entire set of events, which led to the recovery of the article.

73. In the ordinary course of events the same would not have been of much consequence but considering the preceding incongruities, it cannot be absolutely brushed aside.

74. Recovery of the said Saree (Mat. Ext.-I) also cannot be a determining factor for the purpose of connecting the Appellants with the crime.

75. Furthermore, failure on the part of the prosecution to have the attestation of the seizure list (Ext.4) on the basis of the statement leading to the recovery of the seized Saree (Mat. Ext.-I) by P.W.21, Haru Khara, P.W.16, Pintu Majhi and P.W.22, Srikanta Santra also would lend a shadow "over the entire process.

76. Once we find that we are quite unable to abide by the same, we have to discard from our mind the fact of the recovery, which forms one of the bastions of the prosecution case.

77. The evidence on the whole, if taken at its face value, leaves much to be desired. The incident, as it is found from the evidence, took place in the early part of the evening near the pond which is adjoining the house of the deceased and covered by many villagers.

78. It is seen from the evidence of both P.W.11, Jyotsna Dutta and P.W.12, Tarun Kr. Dutta, the eye-witnesses that the Appellants had hit the head of Chandra Dutta on the cemented staircase of the pond several times.

79. P.W.2, Bishnupada Dutta, Father-in-Law of the Deceased has stated in the F.I.R.(Ext.8) that when he discovered the dead body of Chandra Dutta, he found that the same contained blood smeared marks of injury in the Chin. Professor Dr. B.N. Kahali, Professor & Head of the Department of Forensic & State Medicine, Burdwan Medical College & Hospital held the post mortem examination over the body of Deceased Chandra on 17.08.06. Professor Kahali opined "...death was due to the effects of the manual strangulation (throttling), as noted in the P.M. report, ante-mortem and homicidal in nature."

80. Professor Kahali detected nine ante-mortem injuries over the body of the

Deceased. Professor Kahali noticed presence of multiple injuries of different nature, which pointed to the involvement of more than one person.

81. As rightly pointed out by Shri Basu in the event Deceased Chandra Dutta suffered so many injuries at the time of her death, it was in all probability, she would scream for help and the same must have attracted the attention of the nearby household as well as that of her in-laws.

82. Even if we weed out from our consideration the improbable conduct of P.W.11, Jyotsna Dutta, who saw the incident and simply returned home ostensibly on the ground that she was afraid-we find that once we have decided to disbelieve the eye-witness i.e. P.W.11, Jyotsna Dutta and have No. option than to shun the piece of extra-judicial confession and the recovery, we would be left with No. other choice than to upset the order of conviction recorded by the learned Trial Court.

83. The submissions of the learned Public Prosecutor in the light of the decision referred to, has also been very carefully considered by us. In our humble view, the decision of Alope Nath Dutta and Ors. v. State of West Bengal (supra) would not have square application in the particular factual matrix of the present case in view of the reasons which we have set out hereinabove. On the contrary, the submissions of Shri Basu and the decisions cited by him in Heramba Brahma and Anr. v. State of Assam (supra) and Vikramjit Singh alias Vicky v. State of Punjab (supra) are of relevance in the present context and we would be inclined to accept the same.

84. Since we have found that the scope of the appeal is covered by the ambit of the extra-judicial confession and the discovery statement, we need not advert ourselves to the decision of Ram Kumar Pande v. The State of Madhya Pradesh (supra) and the submissions of Shri Basu relating thereof.

85. Facts leading to the death of deceased Chandra Dutta, who has left behind two innocent children and her hapless husband (P.W.4 Maloy Dutta) are grisly and No. doubt horrendous in nature. In fact, the entire surrounding circumstances are extremely dark in nature but simply on the basis of suspicion it would be unsafe to uphold the conviction of these two Appellants.

86. The Supreme Court in Ashish Batham Vs. State of Madhya Pradesh, ; have laid down that between "may be true" and "must be true" there is a long distance, which is required to be covered. The graver the charge greater should be the standard of proof required. In the absence of any legal proof, simply on the basis of suspicion it would be unsafe to uphold the conviction.

87. Once we have entertained a lurking suspicion in our judicial mind with regard to the nexus of the Appellants with the death of deceased Chandra Dutta as neither the ocular evidence of P.W.11, Jyotsna Dutta can be deemed to be of any sterling quality nor the pieces of extra-judicial confession and the discovery of the wearing apparels purportedly worn by deceased Chandra Dutta at the time of

her death, can lead us to any irresistible conclusion that it is only the Appellants and the Appellants themselves and none other are connected with the crime-we feel before we say amen we have to set aside the order of conviction and the sentence recorded by the learned Trial Court.

88. Accordingly, the appeal is allowed.

89. A-1 is directed to be released forthwith and A-2 would stand discharged from his bail bond.

90. Appeal allowed.