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**(1997) 12 CAL CK 0005**  
**In the Calcutta High Court**  
**Case No : Criminal Appeal No. 482 of 1989**

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| Giddu alias Mongal Mudi (In Jail) | Vs | APPELLANT  |
| The State of West Bengal          |    | RESPONDENT |

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**Date of Decision :** 05-12-1997

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313  
Penal Code, 1860 (IPC) — Section 302

**Citation :** (1998) CriLJ 1798

**Hon'ble Judges :** S.K. Tiwari, J;K.J. Sengupta, J

**Bench :** Division Bench

**Advocate :** D.P. Sengupta, for the Appellant;Arun Mukherjee and Pradip Mitra, for the Respondent

**Final Decision :** Allowed

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## Judgement

K.J. Sengupta, J.—This appeal has been directed against the judgment and order dated 7th July, 1989 passed by the learned Additional Sessions Judge, Sri S.K. Das, First Court, Midnapore, in sessions trial case No. VI of January, 1989.

2. The appellant before us has been indicted and later on convicted by the impugned judgment and order to suffer life imprisonment for life for the charge u/s 302 of the Indian Penal Code. The prosecution was started pursuant to a complaint made by the P.W. 1 herein which is part of the FIR. The contents of the FIR in gist, is on 31st August, 1986 about 6.30 a.m. informant the PW-1 found a dead body of an unknown woman lying on her chest in the eastern side of the Chandmari Maidan, Kharagpur, District-Midnapore. It is suspected that she had been killed. One small frock, small pant of a baby and a printed saree was lying near the dead body. A three month old female baby was lying by the side of the dead body, in living condition. Pursuant to the complaint the Sub-Inspector of the local Police Station, viz., Kharagpur (Town) Police Station came to the place and started investigation and did all the formalities regarding preparation of inquest report, seizure of the articles lying and scattered around there. The identity of

the dead body could not be traced and/or ascertained until, according to the prosecution, PW-2 reached at the spot around 2 O'clock in the afternoon of the same day and identified the dead body. After investigation the appellant was arrested by the police. The charge was framed u/s 302 of the I.P.C., on 1st March, 1989 to which the appellant pleaded not guilty. The prosecution produced and examined as many as 12 witnesses which include Doctor who held post mortem examination and report, and Investigating Officer. The defence produced none.

3. The defence version as it will appear from the answers given by the accused to the questions put u/s 313 of the Cr.P.C., is that the deceased victim was no way related to him nor he was responsible for and/or in anyway involved in killing of the victim.

4. Admittedly there was no eyewitness to the occurrence. The learned trial Judge found him guilty on the basis of extra-judicial confession allegedly made by the accused before the PW-2 and one Binod who is said to have been running restaurant and/or tea stall at Barabati Rickshaw stand near Kharagpur. The extra-judicial confession was proved by according to the learned trial Judge, by the PW-2 alone. Admittedly there is no corroboration to the aforesaid extra-judicial confession.

5. Mr. D. P. Sengupta, learned Advocate, appearing for the appellant, submits that, the prosecution has not been able to prove by cogent evidence identity of the victim. The story of identity of the victim has been first time disclosed by the PW-2 during the trial in his evidence. PW-2 at no point of time stated before anybody else that said victim was the wife of the accused or her name was Sambari. He submits further that even the brother of the accused being the PW-8 could not identify the victim when photograph was shown to him.

6. Mr. Sengupta further submits that the conviction is based on extra-judicial confession allegedly made by the accused/appellant before the PW-2 who however at no point of time divulged anybody else about such confession excepting in Court. There is no evidence from any corner that PW-2 stated before the Investigating Officer about such extra-judicial confession. From the evidence of PW-2 it will appear that extra-judicial confession was also made in presence of Binod. Admittedly Binod has not come forward to corroborate this part of evidence of making extra judicial confession. It will appear from the records that no sincere and positive effort was made to bring Binod for corroboration of extra-judicial confession. Mr. Sengupta further submits that it is settled law that extra-judicial confession is a weakest piece of evidence and more so when there is no corroboration from any corner. In this case, he submits, the conduct of the PW-2 is very doubtful for the reasons as aforesaid. So his testimony should be discarded altogether. Even at the time of alleged identification of the dead body at Chandmari Maidan, PW-2 did not tell anybody else about such extra-judicial confession, although, according to his evidence in the morning on the very same day at 7.30 a.m. such alleged confessional statement was made to him. In

support of his submission he has cited two decisions of the Supreme Court reported in Makhan Singh Vs. State of Punjab, AND Lakhanpal Vs. State of Madhya Pradesh, The ratio and/or principle decided by the aforesaid two decisions of the Supreme Court that when there is no corroboration from any other circumstances or any witness, to the extra-judicial confession and particularly when the story of extra-judicial confession was disclosed for the, first time in the witness box the Court will discard the same and will not convict on that ground alone. He submits, this conviction order should be set aside, it cannot stand under the law.

7. Mr. Mukherjee, appearing for the State prosecution, fairly submits that the present conviction order is based on extra-judicial confession and he also submits that it is true that there is no corroboration by any other witness to the extra-judicial confession. But he submits the facts of the case would be corroborating to the extra-judicial confession. Binod could not be produced despite best effort as he had disappeared from Kharagpur and went to Raipur city of M.P. without leaving any recognisable and/or identifiable address thereat. Therefore, it is not true that Binod was not produced deliberately. He could not be produced for the reasons as stated hereinbefore. He submits, that upon appreciation of the totality of the evidence and the circumstances the order of conviction would be justified.

8. We have heard the respective submissions of both the learned lawyers and have perused the records and exhibits produced before us. It appears from the almost unchallenged evidence of PW-7 being the Doctor who held the post mortem examination that the victim died of throttling. The doctor had also found non-continuous oblique ligature marks on the throat. The Doctor has opined, death was due to asphyxia; as a result of throttling the hyoid bone was broken. This ligature marks are homicidal and anterior in nature. So, death of the victim has been proved beyond reasonable doubt, as an unnatural one. The prosecution case is that the, victim was named as Sambari and she was married to accused/ appellant. From the trend of the answer to the question put u/s 313 of the Cr.P.C. to the appellant/accused, it would appear, that appellant has denied having married the victim. The appellant has been charged to have murdered his wife, being the victim. Therefore, it is necessary to examine whether or not the allegation of the victim being wife of the appellant has been proved beyond reasonable doubt or not. The evidence of PW-2 in examination-in-chief speaks only a sweeping statement that victim was the wife of appellant and the tiny girl was the daughter of appellant and victim, but in the cross-examination the same witness has stated that he does not know whether the appellant married the victim or not. The sum and substance of the evidence of PW-2 on this aspect at best can be said to have been established that the appellant and the said deceased lived together. The prosecution has also produced one Ram Mudi of Gokulpur village being PW-8. In his evidence he said that Sambari was the wife of appellant but he could not identify with certainty from the material exhibit No. 2 as to whether that was of Sambari or not. In his evidence he has also said that

he does not know the place of Sambari's father. He came to know from his brother, appellant that Sambari was his wife. It is unbelievable that a brother of a person will not be knowing the place of father of his brother's wife or cannot say when the appellant married Sambari. It is further evidenced that Sambari and appellant used to lead their usual conjugal life. In totality of the evidence we are of the view that it has not been proved beyond reasonable doubt that Sambari was the wife of appellant but they lived together. It is alleged that the three months' female baby is fathered by the appellant. We do not find any evidence, apart from the evidence of PW-2 that it was his daughter. It is very paradoxical to normal human conduct that a man would kill his wife leaving his daughter alive at an open field by the side of the dead body of his wife and allowed it to be devoured and/or killed by animal. A real father, who has not killed his daughter along with his wife, will not allowed to be finished by animal, howsoever cruel he is. Even in the alleged confessional statement the appellant has not spoken of the fate of the female baby. Therefore, it is very difficult for us to believe the said female baby is fathered by the appellant.

9. It has to be seen now whether dead body was of Sambari or not. Apart from the evidence of the PW 2 with regard to identification there is no other legal evidence that dead body was of Sambari and who used to live with appellant. The prosecution has relied on the statement of PW 2 on the point of identification. It is significant to mention that the Investigating Officer went to village Gokulpur, at the appellant house to arrest him and met several persons of his relation, but no attempt was made to get the dead body identified by the relations of the appellant. On the proof of identification the relations of the appellant inclusive of his brother who is also the witness here, could have been the best persons, it appears further from the evidence of Investigating Officer, PW 10 that he is alleged to have shown the photograph to Ram Mudi, PW 8, Smt. Kali Mucii being the wife of Ram Mudi, Ganga Mudi and Parbati Mudi and they were said to have identified the photograph was of deceased Sambari. It is significant to mention that those persons were neither cited nor they have been called as witnesses. It is pertinent to mention that Rani Mudi while giving evidence in the Court could not identify the photograph with certainty. Therefore, the evidence on the point of identification of the dead body was of deceased Sambari is seriously clouded. The case was started with the FIR mentioning (he dead body of an unknown person. Therefore, it has not been proved that the dead body was of Sambari and she was wife of the appellant. The findings of the learned trial Judge on the point of identification of the dead body as well as marriage between appellant and Sambari are based on surmises and without any cogent evidence. We, accordingly do not accept the findings of the learned trial Judge. The learned trial Judge while convicting the appellant has relied on extra judicial confession alleged to have been made by the appellant to the PW 2 in presence of Vinod. It is true under the law, extra judicial confession might be accepted as an evidence for conviction. Even Apex Court and various High Courts have also accepted in various cases extra judicial confession as basis for

conviction provided the same is overwhelming and beyond any shred of doubt having regard to the facts and circumstances and situation leading to making such extra judicial confession. In this case, the evidence of the PW 2 on the point of extra judicial confession is that around 7.30 a.m. in the morning of the day when dead body was found to be lying at the vacant and open wide field namely, Chandrnari Maidnn, the appellant confessed his guilt when the PW 2 was taking tea at the tea stall of one Vinod Tewari. It is further evidenced that the appellant is said to have stated that he had killed his wife and the police might be after him so he would not ply rickshaw any more. This alleged confession was made in presence of Vinod. Further confession was made by the appellant saying that after murdering Sambari he had thrown the dead body in the ground of Chandrnari. It is significant to mention that along with the dead body 3 years old girl was lying by it side. The way the alleged confession is made appears to be very unnatural. The appellant is alleged to have been admitted his guilt but he has not stated in details how he has killed and what was his motive or reason. It is strange that the appellant omitted to mention how and why the three years old girl has been left at the site. Had the appellant really made confession he would not have omitted to mention the fate of tiny girl. The alleged confession has been carefully made pointing and/or confirming to prove the guilt of the appellant. Therefore, having regard to the text of the so-called extra judicial confession the story of making of the same appears to be far from true.

10. Our conclusion to disbelieve the story of extra judicial confession has been strengthened by unusual behaviour and reaction of the PW 2 as after having learnt such revelation of the appellant no reasonable prudent man could restrain his temptation and motive to verify such statement. Normal human conduct in such situation would have been to rush then and there to the said place where the dead body has been thrown and/or left as per the version of the appellant in his alleged confessional statement, it does not appear from the evidence of PW 2 and Vinod rushed to the said place to verify the statement of the appellant. On the contrary, PW 2 neither did go to the place immediately nor did he go to the police station to inform such confession. Of course he has tried to explain that he did not belief such statement of the accused to be true, but he went at the said spot at about 2.15 p.m. in his ingenuity to identify the dead body to be of Sambari and also to describe the tiny girl was of the daughter of appellant. PW 2 for the first time in his evidence has come out with the story of making extra judicial confession. On the facts and circumstances the confessional statement appears to be unbelievable and lacks detail particulars and further does not have complete link of entire incident. Therefore, we are of the view the appellant could not make such confession and the same will appear from further fact that the alleged confessional statement is pointed to the commission of murder and nothing has been mentioned with regard to abandonment of the child. Therefore, the portion of the alleged confessional statement appears to be abnormal in this particular case and situation and that is why it has prompted us to disbelieve altogether. Our disbelief is also strengthened by the fact that there is no evidence

that Vinod while making statement u/s 161 of Cr.P.C. divulged before the Investigating Officer of making alleged confession in his presence. From the statement made u/s 161 it does not appear that he made such statement before the I.O. It is curious that Vinod was not produced as a witness to corroborate his alleged confession. It is evidence of the prosecution that Vinod was having a tea stall and/or hotel for his livelihood and he is also a resident of Kharagpur and was living with his mother. A witness being PW 6 has been called to prove that despite best effort Vinod could not be traced and as such summons, could not be served upon him to give evidence. It is the version of the said witness that he had left Kharagpur one year ago for Kanpur and he found his mother was at Kharagpur. We have examined the summons which returned unserved and we have found from the endorsement that the said Vinod has left for Raipur in the State of Madhya Pradesh. It has not been stated that why Vinod had left his old mother and his restaurant and/or tea stall near Rickshaw stand Barabati. From the above position of the fact the version of the prosecution that Vinod was not available, is thoroughly unbelievable. We are of the view that Vinod was not deliberately produced. Therefore, the fact remains if we assume for argument sake, the version of the appellant as stated by PW 2 is a confession, then it has corroboration at all.

11. Mr. Sengupta, appearing for the appellant has rightly submitted that Vinod has not been produced by the appellant hence the case of the prosecution making extra judicial confession would not be corroborated and rather it would be negated. He further submits that all the modes and procedure for bringing a particular witness under the law have not been exhausted. There was no serious effort to bring Vinod to corroborate the alleged confessional statement. We accept the submission of Mr. Sengupta and accordingly we hold as stated hereinabove.

12. Mr. Sengupta has further rightly submitted and, we hold so, that extra judicial confession is a very weak piece of evidence and is hardly of any consequence as it has been held by the decision of the Apex Court, reported in Makhan Singh Vs. State of Punjab, Moreover, in this case, the text and nature of so-called extra judicial confession is such that the same is unbelievable for the reason we have stated hereinabove. In a reported decision Lakhanpal Vs. State of Madhya Pradesh, cited by Mr. Sengupta the Supreme Court disbelieved the evidence of extra judicial confession being made as it was not narrated to anybody else, excepting to police. In this case the PW 2 even did not narrate such extra judicial confession to police.

13. Mr. Mukherjee, the learned counsel appearing for the State has conceded to the position of the law that extra judicial confession is a very weak piece of evidence and cannot be relied on unless it is overwhelmingly corroborated by other evidence, for conviction. His argument is that in totality of this facts and circumstances would be of corroborate (corroborative) value. We are unable to accept with great respect this submission of Mr. Mukherjee. We are of the

opinion, that the facts and circumstances do not lend any support of making any alleged extra judicial confession," rather it rules out and/or destroy any inference and possibility of making such alleged confession. In our view the story of making alleged confession is concocted for the first time in the witness-box and this would also be suggestive from the nature of the so-called confession which really aimed at and/or pinpointed, to prove the alleged guilt of the appellant. Unfortunately the learned trial Judge has not gone into this great details rather relied on superficial and apparent version of the story. We allow the appeal and set aside the judgment and sentence. Hence the appellant is entitled to be and is hereby acquitted from all charges. He shall be forthwith enlarged from the jail. He will also be entitled to costs assessed at 100 G.M.S. to be paid by the State.

S.K. Tiwari, J.

14. I agree.