

**(2011) 07 CAL CK 0015**  
**In the Calcutta High Court**  
**Case No : CRA No. 681 of 2005**

Kochiram Ghosh @ Kochi

APPELLANT

Vs

State of West Bengal

RESPONDENT

**Date of Decision :** 12-07-2011

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Evidence Act, 1872 — Section 26, 27  
Penal Code, 1860 (IPC) — Section 201, 302, 34

**Citation :** (2011) 5 CHN 150

**Hon'ble Judges :** J.N. Patel, C.J.; Ashim Kumar Roy, J

**Bench :** Division Bench

**Advocate :** D.C. Kabir, for the Appellant; Debasish Roy for the State, for the Respondent

**Final Decision :** Allowed

## Judgement

J.N. Patel, CJ.

1. This appeal is filed against the judgment and order dated 19.07.2005 and 20.07.2005 passed by the learned Additional District & Sessions Judge, Fast Track Court-II, Diamond Harbour, South 24 Parganas in Sessions Trial No. 40 (7) 04 arising out of Sessions Case No. 105 (1) 04 convicting the appellants Kochiram Ghosh @ Kochi and Badal Ghosh for having committed offence u/s 302 of IPC and sentencing them to suffer imprisonment for life and fine of Rs. 5000/- in default to suffer simple imprisonment for two years, they are also found guilty for having committed offence u/s 201 IPC and sentenced to suffer simple imprisonment for two years along with fine of Rs. 2500/-, in default, to suffer imprisonment for one year. It is the a prosecution's case that the deceased Tapan Halder was dealing in selling fish in Shasan Bazar. He got acquainted with the appellant Kochiram Ghosh @ Kochi of Muldia Ghoshpara who used to work in the sweetmeat shop of Shankar Mondal which was situated in front of the house of the de-facto complainant i.e. Swapan Halder, brother of deceased Tapan

Halder. After the appellant/accused Kochiram Ghosh left the sweetmeat shop of Shankar Mondal he started working as a fishmonger with the deceased Tapan. According to the prosecution, the deceased Tapan had lent a sizeable amount of money to Kochiram Ghosh. On 21.09.2003 Kochiram Ghosh had agreed to repay a sum of Rs. 3000/- out of the amount due to Tapan before Durga Puja and therefore, Tapan had gone to Kochiram Ghosh to Ghoshpara at Muldia to realise the money but on that day he came back in the evening as appellant/accused Kochiram Ghosh asked him to come on the next day. Therefore on 22.09.2003 Tapan Halder left the house in the morning for going to the house of Kochiram Ghosh and did not return on the next day i.e. 23.09.2003. Thereafter appellant/accused Kochiram Ghosh met the complainant Swapan Halder at Shasan Station, so he asked him the whereabouts of his brother, Kochiram Ghosh showed his ignorance, so, the complainant started searching for his brother Tapan and on 26.09.2003 a missing report came to be lodged at Baruipur Police Station which came to be recorded as G.D. No. 1965 (Exbt. 10). It is on 27.09.2003 the defacto complainant went to Ghoshpara at Muldia in search of his brother. He came to know that on 23.09.2003 deadbody of an unknown person was found lying in the marshy land of the western field and that it was taken away by Police Officer of Mandir Bazar Police Station and that the said unknown person whose dead body was taken away by the police was actually seen by the villagers in the company of appellant/accused Kochiram Ghosh and since then Kochiram Ghosh had not returned home. On receiving the said information, the complainant along with his relatives and friends visited Mandir Bazar P. S. They were taken to a morgue of medical college to see the deadbody of unknown person which they identified as that of Tapan Halder. Thereafter the dead body of Tapan was cremated. Swapan Halder P.W. 1 lodged an FIR (Exbt. 1) on 07.10.2003 at Mandir Bazar Police Station in which he suspected that Kochiram Ghosh had killed his brother Tapan Halder when he went to meet Kochiram Ghosh to Ghoshpara at Muldia in order to realise the amount of money due to him and then dumped the deadbody in the paddy field and that many others were involved with him in this act. The complaint came to be registered as FIR Case No. 72/03 dated 07.10.2003 against the appellant/accused Kochiram Ghosh and others under sections 302, 201 and 34 of IPC.

2. In the course of investigation, police arrested the appellants/accused Kochiram Ghosh and Badal Ghosh of Muldia Ghoshpara under P.S. Mandir Bazar. At their instance one sabal made of iron and some coconut coir and blood stained mud from the house of Badal Ghosh came to be seized, vide seizure list dated 09.10.2003 (Exbt. 3). The inquest report (Exbt. 2) dated 23.09.2003 which came to be prepared vide U.D. Case No. 20 dated 23.09.2003 in respect of a deadbody of unknown male person and the post-mortem report (Exbt. 7) dated 26.09.2003 which was prepared by Dr. Laxmi Kanta Ghosh were collected and came to be filed along with the charge sheet filed against the appellants/accused as well as three others who came to be acquitted.

3. The appellants/accused pleaded not guilty and came to be tried. It was their

case that they have been falsely implicated by the police, mainly on the basis of suspicion. During the trial, the prosecution examined P.W. 1 the defacto complainant Swapan Halder, brother of the deceased, P.W. 2 Sikha Halder, widow of the deceased, P.W. 16 Nakul Halder, father of the deceased and examined in all 20 witnesses relating to the inquest report, seizure of sabal etc. and so on. On conclusion of the trial, the learned Judge found that the prosecution has proved that the appellants/accused committed murder of Tapan Halder and threw his body in the paddy field. Therefore, he convicted and sentenced them for having committed offence under sections 302 and 201 of IPC and acquitted rest of the accused.

4. The learned Counsel appearing for the appellant/accused has submitted that the prosecution's case depends on circumstantial evidence which do not go to show that the appellants/accused are guilty. It is submitted that the appellants/accused have been falsely implicated in the case mainly on the basis of suspicion. It is further submitted that the FIR in the case came to be lodged on 07.10.2003 after dead body of Tapan Halder was cremated i.e. on 27.09.2003. It is submitted that in the missing report of the deceased dated 26.09.2003 which was lodged by Nakul Halder (P.W. 16), father of the deceased, there is no mention of the fact that his son Tapan Halder has left the house on 22.09.2003 in order to visit Kochiram Ghosh for receiving a sum of Rs. 3000/- in spite of the fact that they were searching for him for all these days. It is further submitted that the police has recorded confessional statement of the appellants/accused (Exbt. 8 & 9) while they were in police custody which has no evidentiary value and further on the basis of alleged confessional statement though the police claimed that they were able to discover one sabal from the house of co-accused, namely Badal Ghosh, the same has not been produced before the Court though seizure list of the same is tendered in evidence by examining the witnesses Tapan Ghosh (P.W. 8) and Madhai Ghosh (P.W. 12) to that effect.

5. It is, therefore, submitted by the learned Counsel for the appellants/ accused that there is no evidence produced by the prosecution to connect the appellants/accused with the murder of Tapan Halder and from the evidence on record it is quite clear that none of the witnesses have actually seen the deceased with the appellants/accused and the Trial Court has convicted the appellants/ accused mainly on suspicion. Therefore, the appellants/accused deserve to be acquitted.

6. The learned Public Prosecutor has submitted that the appellant/accused Kochiram Ghosh @ Kochi knew Tapan Halder and that he had borrowed a sum of Rs. 3000/- from him is not disputed as in his statement u/s 313 Cr. PC, he has admitted that Tapan Halder owed him Rs. 3000/- but took a stand that it was repaid to him before he died. It is submitted that the victim Tapan Halder was last seen along with the appellant/accused Kochiram Ghosh which came to the knowledge of P.W. 5, P.W. 6, P.W. 7, P.W. 8 & P.W. 9 having learnt from the villagers coupled with the fact that the body of the deceased was recovered from the paddy field where it was thrown by the appellants/accused, having injuries

which could have been caused by Sabal (Iron Rod) and pursuant to the statements made by the appellant/accused which are recorded vide Exhibits 8 and 9 the said Sabal (Iron Rod) was discovered at the instance of the appellants/accused. In that way It establishes the prosecution case. The learned Public Prosecutor stated that he has no explanation to offer as to why the said article Sabal (Iron Rod) which is alleged to have been recovered at the instance of the appellants/accused was not produced before the Court and submitted that the Court may decide the appeal on the basis of available evidence on record.

7. With the assistance of the learned Counsel for the appellants/accused and the learned Public Prosecutor, we have gone through the evidence on record and find except for the fact that the said Tapan Halder died homicidal death, the prosecution has not been able to establish under what circumstances the said person was killed and by whom.

8. In the inquest report (Exbt. 2), it came to be noted that there was a mark of wound on the head. The post-mortem report (Exbt. 7) described in all six injuries and in the column "Remarks by Civil Surgeon", it is recorded that it was due to the effect of head injury as stated above ante-mortem and homicidal in nature.

9. Swapan Halder, brother of the deceased, Sikha Halder, widow of the deceased and Nakul Halder, father of the deceased, have deposed to the effect that the deceased Tapan Halder and the appellant/accused Kochiram Ghosh have become friends and joined fish business and that a sum of Rs. 3000/- was due from appellant/accused Kochiram Ghosh. On 22.09.2003 Tapan Halder had gone to Ghoshpara of village Muldia to collect the amount from Kochiram Ghosh and since then Tapan Halder was found missing and it is only on 27.09.2003 when they had gone to Ghoshpara of village Muldia, they came to know from the villagers that Tapan Halder was seen moving with Kochiram Ghosh and that the villagers noticed the deadbody lying in the paddy field towards western side of village Muldia and police took away the dead body. On getting this information, they went to Mandir Bazar Police Station and came to know that the deadbody was sent to the medical college for post-mortem examination. On their identifying the deadbody, it was cremated by them. Their evidence also go to show that on making enquiries from various persons they learnt that Tapan Halder had been murdered by Kochiram Ghosh and Badal Ghosh along with others. Therefore, on 07.10.2003 at 16.45 hrs. Swapan Halder (P. W. 1) lodged a written complaint in Mandir Bazar Police Station which came to be registered as FIR No. 72/2003 dated 07.10.2003. On the basis of the complaint, police registered offence under sections 302 and 201 of IPC against Kochiram Ghosh @ Kochi and others. On that very day police arrested the appellants/accused Kochiram Ghosh @ Kachi and Badal Ghosh from village Muldia Ghoshpara and on the next day i.e. 08.10.2003 recorded their confessional statements (Exhibits 8 and 9). pursuant to which S.I. Dipak Kr. Sen, I.O., recovered one Sabal (Iron Rod), coconut coir and some blood stained mud from the house of Badal Ghosh, vide, seizure list dated 09.10.2003 (Exbt. 3). The prosecution failed to produce

the Sabal (Iron Rod) before the Court at the time of trial. Nor was any report from the Forensic Science Laboratory in respect of the other articles, viz., coconut coir and blood stained mud which were sent for chemical examination, tendered. For the reason that the Sabal was not available and no report was received from the Forensic Science Laboratory, on the basis of these facts, we have no hesitation to hold that the whole exercise undertaken by S.I. Dipak Kr. Sen in discovering the Sabal pursuant to the statements made by the appellant/accused vide Exhibits 8 and 9 was merely of wasteful exercise. Though the Trial Court has marked the confession made by the appellants/accused as Exhibits 8 and 9 respectively, the same is squarely hit by section 26 of the Evidence Act and in the absence of any discovery of Sabal (Iron Rod) by not producing the same before the Court, even the part of the statement leading to discovery is also of no use and, therefore, as rightly contended by the learned Counsel for the appellant/accused, the statements recorded in Exhibits 8 and 9 have no evidentiary value in the eyes of law and have to be discarded from consideration. Section 27 is in the nature of a proviso to section 26 which interdicts the provision of confessional statements made by a person in custody of the police. Section 27 partially removes the ban placed on the reception of confessional statements u/s 26. But the removal of the ban is not of such an extent as to absolutely undo the object of section 26. All it says is that so much of the statement made by a person accused of an offence and in custody of a police officer, whether it is confessional or not, as relates distinctly to the fact discovered is provable.

10. It appears that Swapan Halder and Nakul Halder had no knowledge of the fact that Tapan Halder had gone to meet the appellant/accused Kochiram Ghosh for the purpose of recovery of a sum of Rs. 3000/-. Otherwise there is no reason why this important fact would not find place in the diary entry No. 1965 dated 20.06.2003 (Exbt. 10) made on the basis of information given by Nakul Halder, father of the deceased. The diary entry is as under:-

One Nakul Halder, s/o. - Kanai Halder of Sekharbaly, P.S. - Baruipur came to this P.S. and reported that on 22.09.2003 his son Tapan Halder (27), Height 5'6", Built Medium, Complexion Black, W.A. Khayeri Shirt, NASHYA Colour Jeans full pant left for Diamond Harbour side to buy fish. But not yet turned up as yet.

Noted the fact in G.D. and sent all concerned message for trace.

Sd/-

ASI

Baruipur P.S.

21.10.2003

Certified to be true.

Sd/-

Officer-in-Charge

Baruipur P.S.

South 24 Parganas

11. The evidence of P.W. 5, P.W. 6, P.W. 7, P.W. 8 and P.W. 9 is nothing but hearsay, in so far as it relates to having seen the appellants/accused Kochiram Ghosh and Tapan Halder together, as none of the witnesses have personally seen them together. In all probability the prosecution has built up this case against the appellants/accused only after they were arrested and interrogated in police custody. The learned Trial Court was swayed away by the confessional statement of the appellants/accused recorded by the police officer and tendered in the Court and marked Exhibits 8 and 9. Conjecture or suspicion must not take the place of legal proof. We find that this is a case of no evidence against the appellants/accused, as regards committing murder of the deceased Tapan Halder or having thrown his deadbody in the paddy field. Therefore, the findings arrived at by the Trial Court holding that the appellants/accused guilty on the basis of hearsay evidence and the confessional statements which are not admissible, deserves to be quashed and set aside. We, therefore, quash and set aside the conviction and sentence imposed by the Trial Court and acquit the appellants/accused of the charge of having committed offence under sections 302 and 201 of IPC. The appellants/accused be set at liberty if not required in any other case. The appeal is allowed.

Ashim Kumar Roy, J.

I agree.