

(2018) 11 CAL CK 0008

In the Calcutta High Court

Case No : Criminal Appeal No. 699 Of 2015,C.R.A. 432 of 2016

Liyakat Ali Saha @ Dabla & Anr,Mukim Beg @APPELLANT@Hash State of West Bengal

Date of Decision : 12-11-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 498A

Indian Evidence Act, 1872 — Section 30

Code of Criminal Procedure, 1973 — Section 164, 313, 437A

Citation : (2018) 11 CAL CK 0008

Hon'ble Judges : Joymalya Bagchi, J;Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : Sudipto Moitra, Sourav Chatterjee, Vijay Verma, Ranadeb Sengupta , Rana Mukherjee, Arijit Ganguly

Final Decision : Disposed Off

Judgement

The appeals are directed against the judgment and order dated 7th October, 2015 passed by the learned Additional Sessions Judge, Contai, Purba

Medinipur in Sessions Case No.458/August/2008 [Sessions Trial No.03/December/2008] convicting the appellants namely, Mukim Beg, Liyakat Ali

Saha @ Dabla and Nazrul Khan for commission of offence punishable under Section 302 IPC and sentencing them to suffer rigorous imprisonment

for life each and to pay fine of Rs.5,000/-each, in default, to suffer simple imprisonment for six months more.

The prosecution case as alleged against the appellants is to the effect that the victim, Asema Bibi was married to Mukim Beg. The marriage had

taken place fourteen years prior to the incident. Four children were born from the marriage. After the marriage Mukim used to torture his wife. On

25th May, 2007 at 6:00 A.M. Mannu Mallick (PW1), father of the victim was informed that his daughter had died. He went to her matrimonial home

and found the body of his daughter lying in the varendah with marks of injury. He suspected that Mukim along with the other in-laws namely, Muslim

Beg and Lokman Beg had committed the murder of his daughter. In the course of investigation, police interrogated Rupsana Bibi (PW2), who

disclosed that she had seen the incident and had noticed appellants Liyakat Ali Saha @ Dabla and Nazrul Khan fleeing away from the spot.

Subsequently, Mukim was arrested and he made an extra-judicial confession before the villagers not only implicating himself but also the other

appellants. Charge-sheet was filed in the instant case and the case being a sessions triable one was committed to the Court of Sessions and

transferred to the Court of the Additional Sessions Judge, Contai, Purba Medinipur for trial and disposal.

Charges were framed against the appellants and co-accused Lokman Beg, brother-in-law of the victim under Sections 498A/302/34 of the Indian

Penal Code.

The appellants and co-accused Lokman Beg pleaded not guilty and claimed to be tried.

In the course of trial, prosecution examined 18 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and

false implication.

In conclusion of trial, learned trial judge by judgment and order dated 06.10.2015 and 7.10.2015 convicted the sentenced the appellants, as aforesaid.

By the selfsame judgment and order, the appellants were acquitted of the charge under Section 498A of the Indian Penal Code while the co-accused

Lokman Beg was acquitted of all the charges levelled against him.

Mr. Moitra, learned senior Counsel appearing in Criminal Appeal No. 699 of 2015 on behalf of the appellants, namely, Liyakat and Nazrul, argued that

there is no direct evidence connecting his clients with the alleged crime. They are not related to the victim and have been falsely implicated out of

political rivalry. He argued that P.W. 2 is not a reliable witness. Although other witnesses claimed that P.W.2 narrated the incident to them

immediately after the occurrence, P.W.2 herself contradicted such stance and claimed that she had remained mum. There is no reference of the fact

that P.W. 2 had seen Liyakat and Nazrul run away from the place of occurrence in the FIR although P.W. 4, scribe of the FIR, claimed that P.W.2

had narrated the incident to him. It is, therefore, difficult to rely on the version of P.W. 2 that Liyakat and Nazrul were seen fleeing from the place of

occurrence immediately after the incident. Confessional statement of the appellant Mukim with regard to the involvement of Liyakat and Nazrul is also

unreliable as the witnesses admitted in cross-examination that such implication was stated by them for the first time in Court and not before the

Investigating Officer. That apart, confessional statement of a co-accused is a very weak piece of evidence and can only be used to corroborate other

evidence on record in terms of Section 30 of the Evidence Act. Accordingly, he pleaded for acquittal of the appellants.

Nobody appeared for the appellant Mukim in Criminal Appeal No. 432 of 2016. Mr. Sengupta, learned Counsel, was requested to appear as amicus

curiae. He argued that there is no direct evidence connecting Mukim with the alleged crime. Extra judicial confession of Mukim as deposed by the

villagers is unnatural and does not inspire confidence. Cross-examination of the witnesses show that Mukim was a mason who used to stay away

from the village in connection with his professional work and accordingly it cannot be said with certainty that Mukim was present at the house when

the victim was murdered.

On the other hand, Mr. Mukherjee, learned Additional Public Prosecutor, appearing with Mr. Ganguly, learned advocate, argued that P.W. 2 saw the

appellants at the place of occurrence when the victim was murdered. Her evidence is corroborated by other witnesses including the extra-judicial

confession of the appellant, Mukim. In fact, Mukim, in the course of examination under Section 313 of the Code of Criminal Procedure admitted that

all the appellants were present at the place of occurrence. Hence the appeals are liable to be dismissed.

P.W. 1, Mannu Mallick, is the father of the victim and the first informant of the instant case. He, however, is not an eye-witness. He deposed that the

victim was married to Mukim 15 to 16 years ago. Four children were born from the marriage. He deposed as his daughter Asema Bibi was not good

looking, she was tortured at her matrimonial home. A number of salishes were held over the matter. When he went to the matrimonial home of

Asema after receiving information about her death, he found her lying in the room of Mukim. He found finger impressions on the throat of Asema. He

lodged first information report which was scribed by P.W.

Â 4. He proved his left LTI on the F.I.R.

P.W. 2, Rupsana Bibi, is the sister-in-law of the victim and the star witness of the prosecution. She deposed her house was close to that of Mukim.

On the night of the occurrence she heard a groaning sound from the room of Asema. When she went near the room she found a person dressed in

black clothes standing by the side of Mukim. Two persons viz. Dabla and Nazrul were fleeing from the spot. He could not identified the person in

black clothes. In cross-examination, she stated that she was examined by the Investigating Officer two or three days after the incident. CPI(M) was

the major political party in the area. Liyakat switched over to T.M.C. and thereafter his wife started winning in the area. She could not describe the

dressess of Liyakat and Nazrul at the time of incident.

P.W. 3, Jahar Mallick, deposed that conjugal life of Asema was not peaceful and there were quarrels in connection with domestic work in her

matrimonial home. Asema Bibi was physically assaulted. In the morning of 10th Jaistha about two years ago he heard a noise from the house of

Mannu Mallick. He heard from Mannu that his daughter had been killed. He accompanied Mannu to the matrimonial home of her daughter. He

noticed marks of injuries on the body of the Asema. After having a talk with Rupsana, he advised Mannu to go to the local police station and

accordingly the latter went to the police station.

P.W. 4, Abed Mallick, is the scribe of the first information report. He deposed that Asema was not a fair looking girl, hence Mukim wanted to marry

for the second time. Asema did not agree to such proposal. There was quarrel between them. On 25.05.2007 at about 6.00 a.m. they came to know

Asema had been killed. They went to the house of Mukim and found the dead body of Asema lying there. Rupsana Bibi informed them that she found

a man in black dress covering the face of Asema and Nazrul and Liyakat were fleeing away from the house of Mukim. He scribed the F.I.R. as per

the dictation of Mannu Mallick. He proved the F.I.R. which was marked as exhibit-1. He proved his signature thereon marked as exhibit-1/1. In

cross-examination, he stated that he had not mentioned the names of Liyakat or Nazrul during his statement before the Investigation Officer.

P.W. 5, Soleman Begg, is the brother of appellant Mukim. He deposed that on the

night of the incident at about 5.30 a.m. he heard a noise and went to the house of Mukim and found the dead body of Asema lying inside the room. Rupsana resided near the house of Mukim. He found Rupsana was lying unconscious in her house. On query, Rupsana informed him that in the morning she had seen two persons, namely, Nazrul and Liyakat, fleeing away from the house of Mukim and a man in black dress was embracing Mukim.

P.W. 6, Fazlu Saha deposed that Rupsana informed him that she saw Dabla and Nazrul leaving the house of Mukim and man in black dress catching hold of Mukim inside latters room. Mukim was arrested 22 days after the incident. Villagers confined Mukim and handed him over to local people. He was declared hostile.

P.W. 7, Rahim Box Saha deposed that Mukim was absconding for about 20/21 days after the death of his wife. Thereafter when Mukim returned to the village. Villagers asked him how his wife had died. Mukim replied that Liyakat and Nazrul provoked him and made him drunk and thereafter he killed his wife. After hearing this, villagers handed over Mukim to police. In cross-examination, he stated that Mukim was a mason and stayed outside the village occasionally due to his occupation.

P.W. 8, Srerajul Mallick, is the brother of the victim. He deposed regarding the torture of the victim by Mukim and other in-laws. After hearing the death of Asem, he went to the matrimonial home along with others. He found injuries on the throat of Asema and Rupsana informed them that four persons had killed Asema and fled away. She named all the four persons. In cross-examination, he stated Mukim used to work as a mason and on some occasions he went out of the village for work.

P.W. 10, Hussain Mallick, deposed Mukim tortured the victim as she was not fair looking. After the incident Rupsana informed him that she saw Liyakat and Nazrul fleeing away from the place of occurrence.

P.W 11, Azad Mallick, is a local witness. He deposed that Mukim used to physically assault the victim. He also deposed in the same lines as P.W. 10 with regard to the statement of Rupsana Bibi.

P.W.16, Dr. Pradip Kumar Das conducted post mortem over the dead body of the victim and noted that the cause of death was due to the effects of asphyxia resulting from strangulation, ante mortem and homicidal in nature. He

proved post mortem report (Ext 5).

In cross examination, he stated time of death could not be ascertained from the post mortem examination.

P.W. 17 was the judicial magistrate who recorded statements of Rupsana Bibi (P.W 2) and Soleman Begg (P.W 5) under section 164 Cr.P.C.

P.W 15 and 18 are the investigating officers in the instant case.

P.W. 18 went to the place of occurrence, prepared sketch map with index. He seized articles from the place of occurrence. He recorded statements

of witnesses. Upon transfer he handed over investigation to P.W 15 who submitted charge sheet.

From the evidence on record and in the light of the submissions advanced across the bar it appears that the prosecution has essentially relied on the

evidence of P.W 2 Rupsana Bibi to prove that Liyakat and Nazrul was seen fleeing away from the spot at the time when the victim was found dead in

the house of Mukim. Hence, it is vital to scrutinise the evidence of P.W 2 to determine whether she is a reliable witness or not.

P.W 2 claimed upon hearing a groaning sound from the room of Asema, she went near her room and saw a person in black dress standing along with

Mukim inside the house. At that time she also saw two persons namely, Liyakat and Nazrul running away from the spot. In cross examination, she

stated that she did not disclose the incident to anyone and had been examined by investigating officer two/three days after the incident. On the other

hand, most of the prosecution witnesses including the scribe of the FIR (P.W 4) claimed that Rupsana had disclosed such fact to them immediately

after the incident. In fact, P.W 3, Jahar Mallick who had come to the place of occurrence along with P.W 1, the defacto complainant, stated that after

having a talk with Rupsana he advised P.W 1 to go to the police station and, accordingly, P.W 1 and others went to the police station and lodged FIR.

P.W 5 stated that P.W 2 had lost consciousness after the incident and after regaining consciousness she narrated the incident to him. P.W 2, however,

is completely silent with regard to such fact in the course of her deposition. It is most unlikely for P.W 2 to remain silent with regard to this

incriminating fact witnessed by her at the time of murder of her sister in law. It is equally strange why this vital fact relating to the fleeing away of

Liyakat and Nazrul from the place of occurrence was not be disclosed in the FIR

although as per version of P.W.s 3 and 4 (the scribe) Rupsana had divulged such fact to them and others prior to lodging of FIR. It is also pertinent to note P.W 18, the investigating officer was cross examined with regard to the embellishments in the deposition of other witnesses and he admitted that many of the witnesses namely P.W 5, 10 and 11 had not narrated to him the fact that P.W 2 had stated to them Nazrul and Liyakat were seen fleeing away from the place of occurrence after the incident. I am of the opinion that the plea of Rupsana that she remained mum with regard to the incident and did not narrate it to anyone is not only unnatural and opposed to normal human conduct but also contradicted by other witnesses particularly P.W 3 and 4 (the scribe) who stated that Rupsana disclosed such fact to them prior to lodging of FIR. On the other hand, FIR is completely silent with regard to this vital fact that Nazrul and Liyakat were seen fleeing from the place of occurrence. In fact, none of them had not even been named in the FIR. It is also not out of place to mention that Liyakat and Nazrul are not related to the victim and had no motive to commit the crime. On the contrary, evidence of prosecution witnesses disclose political rivalry in the locality between Liyakat on the one hand and the villagers on the other hand due to shift in political allegiance by Liyakat. In this backdrop, I find it difficult to rely on P.W 2 Rupsana to come to a finding that Liyakat and Nazrul were seen by her fleeing away from the place of occurrence soon after the incident. This leaves the prosecution only with the extra judicial confession of a co-accused namely Mukim to bring home the guilt against Liyakat and Nazrul. Confession of a co-accused cannot be treated as substantial evidence against an accomplice and can only be used to corroborate other incriminating evidence on record. [see Kashmira Singh vs. State of M.P., AIR 1952 SC 159]. Furthermore, evidence of witnesses who deposed relating to the extra-judicial confession, namely, P.W 8, 10 and 11 also suffer from embellishments with regard to the role of Liyakat and Nazrul in the murder of the victim. P.W 18, the investigating officer admitted that P.W 10 and 11 did not state to him that Mukim had confessed that Liyakat and Nazrul had induced him to murder his wife and had got him drunk to perform the act. No doubt, Mukim admitted during his examination under section 313 Cr.P.C that all the accused persons were present at the place of occurrence and after the incident Nazrul and Liyakat

had ran away therefrom. However, this circumstance cannot be treated as substantive evidence against the co-accused Nazrul and Liyakat. I find it

unsafe to rely on the embellished and exculpatory extra-judicial confession of Mukim to implicate Liyakat and Nazrul in the alleged crime.

Accordingly, I am inclined to extend the benefit of doubt to the said appellants, namely, Liyakat Ali Saha @ Dabla and Nrzul Khan.

Coming to the conviction of appellant Mukim, I find that there is ample evidence to show that he was married to Asema and she suffered homicidal

death due to strangulation at her matrimonial home. Although some evidence has come on record in the course of cross-examination of prosecution

witnesses that Mukim used to work as a mason and sometimes used to go outside the village in connection with his occupation, it is pertinent to note

that in the course of his examination under Section 313 Cr.P.C. Mukim claimed that he was present at his residence when the incident occurred. Such

statement on the part of the appellant leaves no doubt in my mind that Mukim was present at his residence when his wife suffered homicidal death.

Thereafter, he absconded for 20/21 days and upon returning to the village he made an extra judicial confession to the villagers. In the course of trial,

he sought to shift the blame on Liyakat and Nazrul with regard to the murder of his wife. In this regard, it may be apposite to refer to some of the

answers given by Mukim to questions posed to him under Section 313 Cr.P.C.

â??Question:- P.W. No.7 stated that after the death of your wife you absconded for 20/21 days and thereafter on return to village when they asked

you regarding the death of your wife you told that accused Liyakat and Nazrul instigated you and made you drunk by consuming liquor and you

murdered your wife and for that you were given to police. What is your saying?

Answer:- It is right that I absconded for 20/22 days but the fact of consuming liquor is not right.

Question:- P.W. No.16 has stated that on 27/5/07 last he held the post-mortem over the dead body of deceased Asema Bibi and according to him her

death is caused due to strangulation. What is your saying?

Answer:- The murder has been committed in front of me. This statement i.e. the fact of strangulation is false.

Question:- If you have anything to say, you may say.

Answer:- Liyakat Ali called me and Nazrul also. Then and there I woke up. They

caught me, placed knife on me. Keeping cloth over mouth bound my hands from backside. After that murdered Asema by pressing throat. Getting the sound of Rupsana, they fled away.â??

From the aforesaid responses, it appears that Mukim admitted his presence at the time of murder but claimed Liyakat and Nazrul were instrumental in murdering his wife. This stance is contradictory to his extra-judicial confession wherein he stated that he murdered his wife on the provocation of

Liyakat and Nazrul. For reasons as discussed above, I am unwilling to rely on the exculpatory statement of a co-accused to convict Liyakat and

Nazrul. On the other hand, the evasive statement of Mukim during trial who admittedly was present at the place of occurrence when his wife was

killed is a strong circumstance pointing to his guilt. After the occurrence, he had absconded for 20/21 days after the incident and upon returning home,

he made an extra-judicial confession before the villagers that he had murdered his wife on the provocation of Liyakat and Nazrul. I am unwilling to

rely on the implication of Liyakat and Nazrul in the extra-judicial confession as that portion of the confession is an embellishment and was stated by

witnesses for the first time in Court. Separating the exculpatory embellished portion of the confession from the rest, I am inclined to rely on it to the

extent it incriminates its maker. Moreover, presence of Liyakat and Nazrul at the place of occurrence appears to hinge on the sole evidence of P.W.2.

I do not consider her version reliable as her post occurrence conduct of remaining mum is most unnatural and is not corroborated by other witnesses.

This vital fact is significantly absent in the F.I.R. although P.W.4 (scribe) claimed P.W.2 had narrated such incident to him. These circumstances

leave no doubt in my mind that it was Mukim who had committed the murder of the victim. Hence, I am inclined to uphold the conviction and sentence

of appellant Mukim Beg in the facts of the case while appellants Liyakat and Nazrul are entitled to the benefit of doubt.

The appeal being CRA 432 of 2016 is dismissed.

Conviction and sentence imposed on the appellants Liyakat Ali Saha @ Dabla and Nazrul Khan are set aside.

The appeal being CRA 699 of 2015 is allowed.

Appellants in CRA 699 of 2015, namely, Liyakat Ali Saha @ Dabla and Nazrul Khan shall be forthwith released from custody upon executing a bond

to the satisfaction of learned CJM, Contai, Purba Medinipur for a period of six months in terms of section 437A Cr.P.C. if they are not wanted in any other cases.

Period of detention suffered by the appellant in CRA 432 of 2016, namely, Mukim Beg, during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

I record my appreciation for the able assistance rendered by Mr. Sengupta as amicus curiae in disposing of the appeals.

Copy of the judgment along with L.C.R. be sent down to the trial court at once.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.