

(2011) 05 CAL CK 0126
In the Calcutta High Court

Case No : C.R.A. No. 60 of 2003 and CRAN No. 2113 of 2010

Md. Kuddus Alam @ Kuddus Alam @ Md. Alam @ Kuddus
Ansari and Another

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2011) 4 CHN 489 : (2011) 8 RCR(Criminal) 685

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

Bench : Division Bench

Advocate : P.S. Bhattacharyya, Sukla Das Chandra, Ranjit Kumar Sanyal and Ashok Majumdar, for the Appellant;Ashimesh Goswami and Minoti Gomes, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Roy, J.—The Appellants Md. Kuddus Alam @ Kuddus Alam @ Md. Alam @ Kuddus Ansari and Md. Eklakh @ Eklakh were placed on trial before the learned Judge, 9th Bench, City Sessions Court, Calcutta to answer charges u/s 302/34 IPC, u/s 364/34 IPC and u/s 201/34 IPC. In the said trial they were found guilty for all the offences, they were charged with and accordingly convicted u/s 302/34 IPC, u/s 364/34 IPC and u/s 201/34 IPC and thereunder sentenced to suffer imprisonment for life and to pay a fine of Rs. 2,000/- and in default to suffer rigorous imprisonment for a further period of one year, to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/- and in default to suffer rigorous Imprisonment for further period of one year and to suffer rigorous imprisonment for 3 years and to pay a fine of Rs. 1,000/- and in default to suffer rigorous imprisonment for six months.

Hence, this appeal.

2. Shorn of details the prosecution case is as follows;

On August 13, 1994 in the morning at about 7 a.m., Md. Hadish dropped his son at his school Progressive Day School and went to his place of employment. In the evening when he returned home he was reported by his wife that his son has not returned from school. Immediately Md. Hadish came out for search of his son and went to the places where his son used to go for play and also to some other places. During such search he met one Lal Md., the landlord of 36, Aga Mehendi Street, Calcutta who reported him that after school hours he saw his son with the accused Kuddus. The Darwan of the building also told him the same thing that he had seen his son with the accused Kuddus and also told after few minutes both Kuddus and his son left their building. Thereafter, he met one Alimuddin, the elder brother of the father-in-law of the Appellant Md. Kuddus but he could not tell him anything. On the next morning, i.e. on August 14, 1994 he went to the school of his son and came to learn from the darwan of the school that after school hours when his son Haroon with his classmate one Golan Sabbir came out from the school he was called by a person standing on the opposite footpath. Thereafter, on being advised by the secretary of the school he lodged a missing diary with the local police station. In the meantime, at around 3 p.m. Md. Hadish received a telephone call at his factory from an anonymous caller, who asked him to come at Picnic Garden at about 8 p.m. with Rs. 25,000/-, otherwise his son's life would be at stake. Md. Hadish in response to the call went to Picnic Garden and waited for few hours after 8 p.m. but did not find anybody. Thereafter, on being advised by his friends and relations he informed the Park Street Police Station about the receipt of such demand of ransom and apprehending some foul play behind the missing of his son. In the meantime, Md. Hadish met S.K. Sahabuddin, who having his grocery shop near Taltala area, who told him on August 13, 1994 he saw his son in the company of Appellant Kuddus and another when his son was in school uniform. Then again he was informed by one of his friend Md. Nasim that day while he was trying to find out a taxi for going to Park Street, a taxi was found near Taltala area but the taxi driver refused to go to Park Street, at that time Kuddus and another came there with a big trunk and asked the taxi driver to take them to Howrah Station. On being asked by Nasim, Kuddus told him he was supposed to drop his friend at Howrah Station and is not going to his native. As the taxi driver refused to take him to Park Street for lodging complaint against him to the police Nasim noted down the number of the taxi. Then again Md. Hadish reported the further development in the matter. On August 16, 1994 that the school of his son received an intimation over phone that a dead body of a child was found at Barielly Station concealed in a trunk and the whereabouts of the boy was ascertained from his school uniform and bag. Since Md. Hadish was very much mentally perturbed, his brother Md. Safique and brother-in-law Sahabuddin accompanied a police team to Barielly and identified the dead body as that of his son.

In course of investigation the police arrested both the Appellants, on the basis of information they collected from different persons showing their alleged complicity in the commission of the offences and after completion of investigation submitted

charge-sheet against them.

In course of the trial, in absence of any eyewitnesses to the occurrence, the prosecution proceeded to prove its case on circumstantial evidence and examined as many as 39 witnesses and exhibited several documents and materials collected with the offences. Whereas the defence examined none and it was their case of complete innocence.

3. The main thrust of the argument of the learned Counsel of the defence is this that there is no eyewitness to the occurrence and the prosecution case entirely rests on circumstantial evidence, however none of the circumstances relied upon by the prosecution against the Appellants has been proved beyond all reasonable doubt. He pointed out that this is a case where there are very serious contradictions in the evidence of the witnesses on very material and vital aspects. Although, the case is based on circumstantial evidence no motive behind the crime has been proved. The Court has relied on the evidence of a child witness but before acting on that never assessed the ability of the child to understand the questions put to him and to give rational answers. It was also contended, the most of the witnesses are interested witnesses being the relations of the informant or his acquaintances and rests are planted witness, who came to depose before the Court at the behest of the police. The decision of the Trial Court entirely rests on surmises and conjectures there is no supporting material.

On the other hand, the learned Public Prosecutor vehemently urged that this is a case which is full proved there is no infirmities in the prosecution case and all the circumstances have been proved beyond all reasonable doubt. He further submitted all the witnesses were cross-examined at length but defence has miserably failed to bring out anything from them to touch their credibility.

4. The circumstances pitted against the Appellants during the trial by the prosecution are as follows;

(a) The victim boy was taken away by the accused/Appellant Md. Eklakh from his school on the date of his missing. Thereafter, the victim boy was found with the accused/Appellant Kuddus at different places by quite a few number of witnesses. The said witnesses identified the Appellant in the T.I. Parade.

(b) The trunk in which the dead body of the victim was found at Barielly Station was purchased from a particular shop and the owner of such shop identified the trunk as well as the Appellant Md. Kuddus as the buyer of the same.

(c) The rickshaw puller in whose rickshaw the trunk was taken from Aga Mehendi Road to a place near Taltala Police Station, identified both the Appellant one Kuddus and the trunk.

(d) The taxi driver in whose taxi the trunk was taken to Howrah Station also identified the trunk as well as both the Appellants.

(e) The motive behind the crime according to the prosecution is the refusal of the father of the victim to get the Appellants reinstated in their factory where they were working together.

5. Before we proceed to deal with the respective cases of the parties, we must record that this is a case where at least before us the learned Counsel of the Appellants has not disputed that the victim boy has suffered a homicidal death. We have however for our own satisfaction very carefully gone through the evidence of the P.W. 32 Satya Prokash Varshney, who held the postmortem as well as the postmortem report, Exhibit - 24 and do not find any reason to doubt his opinion that the victim suffered a homicidal death due to asphyxia as a result of strangulation. It may be noted the postmortem was held on August 16, 1994 and according to the doctor the death took place 3/5 days before.

6. The victim boy was last seen alive in the company of the Appellants is the first circumstance, on which the prosecution relied on against the Appellants. In this regard prosecution examined P.W. 10 Golam Sabbir, P.W. 11 Md. Raffique, P.W. 12 Lal Mohammad and P.W. 13 Sk. Sahabuddin.

(a) The P.W. 10 Golam Sabbir is the classmate of victim Haroon Rashid. According to him, on August 13, 1994 at about 11 a.m. both of them came out together from school and the Appellant Md. Eklakh, who he latter identified in T.I. Parade and in Court, called Harun, standing on the opposite side footpath of the school. Thereafter they all three together proceeded a short distance, when the Appellant Md. Kuddus, whom he known from before joined them and Md. Eklakh left. Then the Appellant Md. Kuddus took the victim boy Harun with him and went towards Aga Mehendi Street and the witness left for him.

(b) The next witness P.W. 11 Md. Raffique, was the Darwan of Progressive Day School, where the victim boy was studying. According to the said witness when the victim boy Haroon and the P.W. 10 his classmate, after the first sessions of school was over, went out together and at that time the witness saw one person, whom he latter identified as Eklakh, standing on the opposite footpath called the victim boy and then all three left the place.

(c) The witness Lal Mohammad., who was examined by the prosecution as P.W. 12 is the landlord of 36/C/1, Aga Mehendi Street. According to the said witness previously, the family of the victim boy and one Samsuddin and his son-in-law Kuddus and his brother Alimuddin used to reside there. The witness further stated on August 13, 1994 about 11.30 a.m. while entering his house he found Kuddus and Haroon in his school uniform and with school bag entering into their building. At that time he had a task with Haroon and after sometime he found both Haroon and Kuddus leaving their building.

(d) The P.W. 13 Sk. Sahabuddin is the maternal uncle of the father of the victim boy. He knew the Appellant Md. Kuddus, the son-in-law of Samsuddin Bhai, as both the family of the victim and the family of Samsuddin were residing together in the same building. The witness is a grocer and having his shop at 65, Taltala

Lane, Calcutta. According to said witness on August 13, 1994 at noon while he was at his shop he found Haroon Rashid along with Md. Kuddus and another passing his shop. At that time he had a talk with the victim Haroon as well as the Appellant Kuddus and Kuddus told him they are in hurry and he has to drop the victim boy at his house. The witness in T.I. Parade as well as in Court identified Md. Eklakh as the person, who was with them.

(e) The prosecution also examined P.W. 7 Sahanaaz Hassan, the class teacher of the victim boy and the P.W. 15 Zoinal Abedin, the Secretary of the school to prove that on the fateful day the victim boy Haroon attended his school and was in the class from 7.30 a.m. and till the morning sessions was over at around 11 a.m. They also produced the Attendance Register and relevant page where the attendance of the victim boy was recorded was marked as Exhibit - 7.

7. The second circumstance which prosecution relied in support of its case that the trunk in which the dead body of the victim boy was found at Barielly Station was purchased by the Appellant Md. Kuddus from the shop of P.W. 8 Md. Sahid and the same was taken to a flat situated at Aga Mehendi Street in a rickshaw of P.W. 9 Md. Samsad and then the said trunk was removed to Howrah Station in a taxi belonging to P.W. 5 Md. Akbar.

(a) According to P.W. 8 Md. Sahid, the trunk marked Material Exhibit - XIX was sold from his shop on August 11, 1994. This witness identified the Appellant Md. Kuddus as the person who purchased the trunk both in T.I. Parade as well as in Court.

(b) One Md. Samsad was examined as P.W. 9, he is a rickshaw puller, this witness testified before the Court. On August 13, 1994 between 12.45/1 p.m. he was passing through Abdul Latif Street with his rickshaw, at that time one person came and hired his rickshaw. Thereafter, his rickshaw was taken to Aga Mehendi Street, from there the said person brought a still trunk to a place situated by a side lane of Taltala Police Station, where he dropped the passenger as well as the trunk. The witness identified Md. Kuddus as the person whom he carried in his rickshaw both in T.I. Parade and in Court and also the trunk, Material Exhibit - XIX.

(c) In this regard prosecution also relied on the evidence of P.W. 12, who also deposed to the effect that on August 13, 1994 at about 1 p.m. while he was returning home after his lunch he found Appellant Kuddus taking away a still trunk in a rickshaw. He identified the Material Exhibit XIX as the trunk in question.

(d) The next witness P.W. 6 Md. Nasim knew Md. Kuddus before hand, who was residing in the said building where the father of the victim boy P.W. 4 Md. Hadish was residing with his family at Aga Mehendi Street. According to the said witness, on August 13, 1994 at about 2 p.m. he had been near the Taltala Police Station to find out a taxi. Although he got a taxi but taxi driver refused to take him as that was his lunch time. In the meantime, Md. Kuddus and another with a

big trunk arrived there and asked the same taxi driver to take them to Howrah Station and insisted him to start immediately otherwise they would miss the train. The taxi driver as usual refused, when the witness took the number of the taxi and as he threatened him to lodge complaint to the police the taxi driver finally agree to take Md. Kuddus and his associate along with the said trunk to Howrah Station. The witness identified Md. Eklakh as the associate of Md. Kuddus and also Material Exhibit - XIX, as the trunk in question.

(e) The P.W. 5 Md. Akbar is the concerned taxi driver, who took both the Appellants with a trunk and dropped them at Howrah Station. He corroborated what have been stated by the P.W. 6 Md. Nasim as regards to the dispute over his refusal to take them in his taxi. The witness in the T.I. Parade as well as in the Court identified both the Appellants as the passengers, whom on that day he took to Howrah Station as well as the Material Exhibit - XIX, as the trunk in question.

8. The third circumstance relied upon by the prosecution against the Appellants is the making of a phone call demanding ransom. In this regard prosecution examined one Washim Ahmed Mubarki, P.W. 14 who is the owner of a PCO Booth situated at 5, Piemental Street, Calcutta - 6. According to the said witness on August 14, 1994 between 2.15/2.25 p.m., Md. Kuddus whom he later identified in T.I. Parade and in Court, came to his phone booth and made a local call from there entering inside the close cubical, where the phone set was kept.

The P.W. 22 Apurba Kumar Tarafdar is the Sub-Divisional Engineer of Calcutta Telephone. He produced in the Court, the call chart showing all outgoing calls from the telephone number 245-0801 on 13.8.1994 and on 14.8.1994, same was marked as Exhibit - 18. The defence did not cross-examine this witness.

9. According to the prosecution case the motive behind the murder of victim boy Haroon Rashid is this that the Appellants and his father P.W. 4 Md. Hadish were working together in the same leather goods manufacturing factory, but both the Appellants were dismissed from their service as they were irregular and not serious in their work. After their dismissal the Appellants insisted the father of the victim boy P.W. 4 Md. Hadish to approach the management to reinstate them. As the P.W. 4 was not inclined to act according to their wish he was threatened with dire consequences. In this regard, the prosecution examined P.W. 4 Md. Hadish, the father of the victim and his colleagues P.W. 16 Maqbool Ahmed and P.W. 17 Pradip Kumar Basu.

10. The P.W. 35 Sabyasachi Biswas and P.W. 36 Ashim Kumar Mondal are the Judicial Magistrate, who held the T.I. Parade of the Appellants at the Correctional Home. The learned Counsel appearing on behalf of the Appellants could not be able to bring out any material from their entire evidence to create any doubt in the mind of this Court as regards to the identification of the Appellants during the T.I. Parade.

The P.W. 28 Ombir Singh, P.W. 29 Constable Hiralal, P.W. 30, Janardhan Bhutt

and P.W. 31 Constable Ram Krishna are attached to the U.P. State Police. They are the persons, who discovered the abandoned trunk containing the dead body of the victim Haroon Rashid and held inquest, seized the trunk, the wearing apparels and sent the dead body for post mortem examination. However, from their cross-examination nothing transpired in favour of the Appellants.

The P.W. 33 S.C. Katoch and P.W. 34 Vijoy Singh were the Station House Officer of G.R.P., Barielly as well as the Station Master, from their cross-examination also defence has not been able to bring out anything in their favour.

11. This Court has already observed that the victim boy Haroon Rashid suffered homicidal death has not been disputed from the side of the Appellants. Apart from that this Court has very carefully examined the evidence of the Autopsy Surgeon and the Postmortem Report and had no doubt that the victim boy died due to manual strangulation and the same was homicidal in nature.

12. The first circumstance the prosecution relied against the Appellants is before disappearance of the victim boy Haroon Rashid, he was found in the company of the Appellants, i.e. the victim was last seen alive together these Appellants. The witnesses prosecution examined in this regard are P.W. 10 Golam Sabbir, P.W. 11 Md. Raffique, P.W. 12 Lal Mohammad and P.W. 13 Sk. Sahabuddin. We find that all these four witnesses knew Md. Kuddus from before and in their evidence they have also disclosed how Md. Kuddus was known to them. Their evidence in this regard was never challenged by the side of the defence. whereas the P.W. 10 Golam Sabbir, P.W. 11 Md. Raffique and P.W. 13 Sk. Sahabuddin identified the Appellant Md. Kuddus as the third one who was with them. All the witnesses identified him in T.I. Parade soon after his arrest as well as in Court. We have carefully gone through the evidence of the Judicial Magistrate, viz., P.W. 35 and P.W. 36, who held the Test Identification Parade. Going through the evidence of the P.W. 35 and P.W. 36 neither the learned Counsel for the Appellants has been able to point out nor we find either the holding of T.I. Parade was defective or the identification of the Appellants was doubtful. All the aforesaid four witnesses were cross-examined at length but nothing could have been brought out from their such cross-examination to demolish their credibility. The defence except suggesting that they were not telling truth and the witnesses have not stated to the police that they saw the victim in the company of the Appellants before his disappearance, made no attempt to contradict the said witnesses with reference to their earlier statement made to the police.

However, the learned Counsel for the Appellants tried to challenge the evidence of P.W. 10 Golam Sabbir on the ground that before recording of his evidence, who happened to be a child witness the Trial Court held no enquiry to satisfy itself that the witness has the ability to understand the implication of the questions put to him and is also capable to give rational answers. It is true so far as a child witness is concerned, such an enquiry is required to be held by the Trial Court to determine the question as to whether the evidence of such witness can be acted upon or not. It is also true that we do not find anything from record

that such enquiry was held. It is never the law that merely because the Trial Judge has committed a mistake by not holding any enquiry to test the competency of the child witness and did not record his satisfaction as regards to the same, that by itself be a ground for rejecting per se the evidence of such witness. In such a situation and considering the fact a child witness is always prone and susceptible to tutoring the Court must be very careful and be extra cautious to scan the evidence of the child witness. In such circumstances the Court has to scrutinize the evidence of child witness more meticulously and sought for corroboration before acting thereupon. We, however, going through the evidence of P.W. 10 Golam Sabbir find that although his evidence-in-chief was too short but he was subjected to a scorching cross-examination at length and he was cross-examined on July 9 1996, July 11 1996, July 23 1996, July 24 1996 and on August 19 1996, i.e., almost for five days. Now, having gone through such lengthy cross-examination we find that several questions were put to the said witness by the defence and we also find that he not only able to understand the implication of the questions put to him but gave very rational answers. We find although the capacity of the witness was not tested by the Trial Court but the witness stood a scrupulous test which he subjected to during his cross-examination, therefore, we do not find any reason to discard his evidence. Furthermore, the evidence of P.W. 10 Golam Sabbir has been corroborated by P.W. 11 Md. Raffique, the darwan of the school. The prosecution to prove the theory of last seen has also not only relied on the evidence of P.W. 10 Golam Sabbir it has also relied on the evidence of P.W. 11 Md. Raffique, P.W. 12 Lal Mohammad and P.W. 13 Sk. Sahabuddin. In this regard it may also be noted the defence has denied the said evidence that the victim was in the company of the Appellants before his disappearance and according to the evidence of Autopsy Surgeon, the probable time of death of the victim matched with the time from when he was found missing. In view of above, we are of the opinion, the prosecution has been able to establish the first circumstance that have been pitted against the Appellants.

13. Now, coming to the next circumstance relied upon by the prosecution against the Appellants, i.e. the removal of the dead body of the victim boy concealing the same in a still trunk and which was finally found in a compartment of a train at Berielly in an abandoned condition. The prosecution firstly relied on the evidence of P.W. 5 Md. Akbar, P.W. 6 Md. Nasim, P.W. 8 Md. Shahid, P.W. 9 Md. Samsad and P.W. 12 Lal Mohammad to establish the material Exhibit - XIX, the still trunk inside which the decomposed dead body of the victim was found from time to time was found in the possession of the Appellants and then P.W. 28 Ombir Singh, P.W. 29 Hiralal, P.W. 30 Janardhan Bhutt and P.W. 31 Ram Krishna, all belonging to U.P. State Police to show that the decomposed dead body of the victim in school uniform were found concealed inside the abandoned still trunk, Material Exhibit - XIX.

So far as the first group of witnesses are concerned, P.W. 8 Md. Shahid is the shopkeeper from whose shop the said still trunk, Material Exhibit - XIX was

purchased by the Appellant Md. Kuddus. The said witness identified the trunk, Material Exhibit - XIX, as the trunk he sold to the Appellant Md. Kuddus whom he identified during T.I. Parade as well as in the Court. The next witness P.W. 9 Md. Samsad is the rickshaw puller, who also identified the trunk, Material Exhibit - XIX, which was brought in his rickshaw from a place situated at Aga Mehendi Street to a place situated near the back of the Taltala Police Station as well as identified the Appellant Md. Kuddus in the T.I. Parade and in Court. The P.W. 12 Lal Mohammad is a witness of removal of the trunk from their building by the Appellant Md. Kuddus in a rickshaw, whereas P.W. 6 Md. Nasim is the witness of taking away of the said trunk in a taxi from near Taltala Police Station by the Appellants. He in T.I. Parade identified the Appellant Md. Eklakh as one of the companion of Md. Kuddus, who was known to him before hand. P.W. 5 Md. Akbar is the taxi driver in whose taxi the trunk in question, Material Exhibit - XIX was taken to Howrah Station for Taltala area. This witness has identified the trunk, the Material Exhibit - XIX as well as both the Appellants in T.I. Parade as well as in Court.

Now, going through the evidence of these witnesses, more particularly through their lengthy cross-examination, we do not find the defence has been able to create any suspicion as regards to their testimonies. Many thing was suggested to the said witnesses by the defence during their cross-examination but the defence has not been able to demolish what they have stated in their chief. Defence has also not been able to contradict their evidence with reference to their statement made to the police during the course of investigation. The P.W. 5, P.W. 6, P.W. 8 and P.W. 9 identified the Appellants in the T.I. Parade as well as in Court. We have gone through the evidence of the Judicial Officers, who held the T.I. Parade, in this time also we do not find either any defect in holding the T.I. Parade or anything to suspect the identification of the Appellants, therefore, we have no hesitation to say that prosecution has been able to establish the second circumstance they relied on against the Appellants.

14. It is the case of the prosecution the motive behind the killing of this child by the Appellants is due to the refusal of the father of the victim P.W. 4 Md. Hadish to pursue his employer to reinstate the Appellants in their service, as regards to this prosecution examined P.W. 4 Md. Hadish and two of his colleagues, viz., P.W. 16 Maqbool Ahmed and P.W. 17 Pradip Kumar Basu. The learned Counsel for the Appellants has miserably failed to dislodge the prosecution case on this score.

Therefore, now taking into consideration the circumstances relied upon by the prosecution against the Appellants which we find have been established beyond any shadow of doubt, we are of the opinion that the Trial Court has not committed any wrong to hold the Appellants guilty for causing death of the victim Haroon Rashid.

In the result the appeal fails and stands dismissed.

The Office is directed to communicate this order to the Trial Court and send down

the records at once.

Criminal Section is directed to deliver urgent Photostat certified copy of this judgment to the parties, if applied for, as early as possible.

J.N. Patel, C.J.

I agree