

(2012) 08 CAL CK 0065
In the Calcutta High Court

Case No : Death Reference No. 1 of 2012 and C.R.A. No. 165 of 2012

State of West Bengal

APPELLANT

Vs

Binoy Bagdi alias Bhulo Bagdi
 Binoy Bagdi alias Bhulo
Bagdi Vs State of West Bengal

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, 302, 376

Citation : (2012) 4 CALLT 332

Hon'ble Judges : Toufique Uddin, J;Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Asimesh Goswami and Ms. Jaita Roy, for the Appellant;Debasish Roy, Ld. P.P., for the Respondent

Judgement

Ashim Kumar Roy, J.—The appellant in a sessions trial was charged under sections 376/302/201 IPC for committing rape and murder one minor girl Sima Sen, aged about 14 years and then causing disappearance of evidence of offence. The case of the prosecution is summarized below;

On April 28, 2011 the victim girl aged about 14 years left her parents home at around 2.30 p.m. for their ancestral house to watch T.V. programme. It takes about 10 minutes to reach there but she never returned home. On the next day a missing diary was lodged and on 3rd May, 2011, 4 days after her missing a street dog was found in the village with a piece of flesh, following that a dead body was found lying on the Eastern bank of Irrigation Canal and was identified as that of the victim girl. Then police was informed, police came, held inquest and on post-mortem it was found she was raped and killed.

It was the further case of the prosecution that on April 28, 2011 at around 2.30 the victim and the appellant both were found together by PW/3 Sudeb Ray who reported the PW/1 Bimal Sen and PW/17 Sandip Kr. Sen, the father and the

uncle of the victim girl about the same and they at once rushed to the house of the appellant but he was not available there. According to the witness PW/10 Bittu Ghosh on the date of her missing at about 3.30 p.m. he heard a sound of moaning coming from the cowshed of Ratan Ghosh and as he came close to the place he was sure that same was coming from that cowshed. He then called the PW/11 Nara @ Khelaram Bag who was in a nearby place, as they were about to enter inside the cowshed, Bhulo came out and on their query he told that a goat had entered there and had been driven out and also did not allow them to enter in the cowshed. Thereafter the appellant was also found to enter in the cowshed with a bucket of water and after sometime came out and washed his hands outside. At that time he was found little nervous and was sweating. The PW/11 fully corroborated PW/10 over such facts.

It is also the case of the prosecution after his arrest Bhulo, confessed his guilt and pursuant to his statement the wearing apparels of the victim and her "Orna" which was used as ligature and her "Chappal" were recovered.

2. In support of its case the prosecution examined as many as 18 witnesses. However, defence examined none and innocence and false implication were pleaded.

3. In the trial the appellant was found guilty for the offences punishable under sections 302/376/201 IPC and sentenced to death, R.I. for 10 years and R.I. for 5 years with fine and default clause.

The present death reference and the criminal appeal at the behest of appellant Bhulo Bagdi both are arising out of the selfsame judgment and order.

4. The learned Counsel for the appellant vehemently contended before us that this is a case, rests on circumstantial evidence. The circumstances relied against the appellant have not been proved against him beyond all reasonable doubts nor the circumstances so relied formed a complete chain pointing towards the guilt of the appellant. Apart from above he contended as follows;

(a) The identification of the dead body before the autopsy surgeon has not been proved.

(b) The circumstance "last seen" is a very weak piece of evidence and there was no evidence to show soon after the victim was found in the company of the appellant she was killed.

(c) The claim of the PW/10 that a sound of groaning was coming out from the cowshed where the victim was allegedly killed never received any support from the PW/11.

(d) The recovery of the alleged incriminating articles pursuant to the statement of the appellant cannot be admitted u/s 27 of the Evidence Act because such leading statement was never exhibited during the trial.

(e) According to the PW/1, the father of the victim girl, near the dead body her,

wearing apparels were found lying, therefore the recovery of those wearing apparels pursuant to the statement of the appellant lost all significance and cannot be admitted into evidence u/s 27 of the Evidence Act, inasmuch as there cannot be any re-discovery of the facts already discovered.

(f) The prosecution case of recovery of wearing apparels of the victim from the Eastern Bank of Mosdhighi Irrigation Canal stand contradicted by the Exhibit - 2 where it was clearly noted the wearing apparels were concealed in the cowshed.

(g) The Sandal allegedly recovered from the cowshed was never identified as that of the victim girl.

(h) Recovery of spade from a tank at the instance of the present appellant is wholly unreliable inasmuch as the villagers, who took out the same from water were never examined.

(i) No wearing apparels were exhibited during the trial.

(j) Abscondence of the accused is not at all relevant in a case where serious allegation has been brought against such accused and thus it is quite natural for him to flee away out of fear.

(k) The learned Trial Court most illegally put much reliance on the extrajudicial confession of the accused which was admittedly made after his arrest in police custody.

(l) Lastly, it is contended that this is not a "rarest of rare cases", therefore the death sentence is not called for.

In support of his contention that in this case last seen theory is of no help to the prosecution the learned Counsel for the appellant relied on the decision of the Hon"ble Supreme Court in the case of Sk. Yusuf Vs. State of West Bengal, . In support of his contention that this is not a case where death sentence is called for, reliance is placed in the case of Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra,

The learned Counsel for the appellant in support his contention the alleged recovery in this case shall not come u/s 27 of the Evidence Act relied on two decisions of the Hon"ble Supreme Court, viz. in the case of Vijay Pal Singh v. NCT of Delhi, reported in (2001) 10 SCC 45 and State of U.P. Vs. Arun Kumar Gupta, and one decision of this Court in the case of State of West Bengal Vs. Amar Rai, was relied upon to contend that the alleged extra-judicial confession of the accused is totally inadmissible in evidence.

5. On the other hand, the learned Public Prosecutor first contended this is a case where a girl aged about 14 years was raped and killed and although according to the medical evidence it is found there was an anal intercourse but for the reason best known to the Trial Court no charge was framed for such offence. He contended that non-exhibition of the statement of the accused which led to the discovery of the incriminating articles is of no consequence when there are other

materials including the contemporaneous record to show that those incriminating articles were recovered actually pursuant to his statement and on being led by him. He further contended the factum of recovery of the aforesaid articles was never challenged during the cross-examination of the Investigating Officer of the case. In this regard he relied on the decision of the Hon''ble Supreme Court in the case of State of Karnataka Vs. David Razario and Another, . He further submitted that the defence has not been able to shake the evidence of the PW/3 Sudeb Ray that the victim was last seen alive in the company of the appellant near the cowshed of PW/6 Ratan Ghosh and the presence of the appellant at that particular place, at that particular point of time was also not disputed from the side of the appellant. According to him there is nothing to disbelieve the evidence of PW/3 Sudeb Ray that he had seen the deceased alive in the company of the appellant. He further submitted the evidence of PW/10 Bittu Ghosh that he heard a sound of moaning soon after the victim was found in the company of the appellant by the PW/3 Sudeb Ray has been amply corroborated by the PW/11. He then contended in this case the ascension of the accused is a very strong circumstance showing his involvement in the commission of the offence. He strongly disputed the submission of the learned Counsel for the appellant that the dead body was not identified as that of the deceased: In this regard he draws our attention to the evidence of PW/8 and PW/16. According to him non-examination of the local boys who brought out the spade from the pond has no bearing when the factum of the seizure as deposed by the seizure witnesses could not be shaken.

The learned Public Prosecution relied on the following decisions, viz. (i) State of Karnataka Vs. David Razario and Another, , (ii) Haru Ghosh Vs. State of West Bengal, (iii) Vikram Singh and Others Vs. State of Punjab, (iv) G. Parshwanath Vs. State of Karnataka, (vi) Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, (vii) Atbir Vs. Govt. of N.C.T. of Delhi, (viii) Mohd. Farooq Abdul Gafur and Another Vs. State of Maharashtra, (ix) State of Punjab Vs. Manjit Singh and Others, , (x) State of U.P. Vs. Sattan @ Satyendra and Others, , (xi) C. Muniappan and Others Vs. State of Tamil Nadu,

Out of the aforesaid 11 case laws, the first one relates to the point under what circumstances recovery of an article can be admitted into evidence u/s 27 of the Evidence Act, without the statement being exhibited during the trial and the rests relate to the cases where the Supreme Court either upheld the order of capital sentence or while altering the sentence of death to imprisonment for life directed the accused shall not be released from prison till the rest of his life (Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka, while he served out a minimum period of actual Jail sentence (Haru Ghosh Vs. State of West Bengal,

6. This is a case entirely rests on circumstantial evidence and it is an well-recognized principle of criminal jurisprudence that before a Court reaches to its conclusion as to the guilt of the accused, all the circumstances so relied by the

prosecution not only form a complete chain at the same time all the links in the chain of circumstance must be proved beyond all reasonable doubts and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, in other words the circumstances have not only to be fully established but also the same to be of conclusive nature and consistent only with the guilt of the accused, i.e. when all the circumstances cumulatively taken together should lead the only irresistible conclusion that the accused alone is the perpetrator of the crime and furthermore those circumstances should not be capable of being explained by any other hypothesis compatible with the innocence of the accused.

7. In this case neither before the Trial Court nor before us, the findings of the Autopsy Surgeon, PW/8 that the death was due to homicidal strangulation and before the victim was killed she was raped were challenged from the side of the appellant.

8. Before us, the case of the appellant was opened challenging the identification of the dead body. It is vehemently contended although the Autopsy Surgeon (PW/8) claimed that the dead body was identified to him by Naren Hansda (PW/16) but according to the PW/16 the S.I. Rajat Kanti Paul (PW/18) is the person who identified the dead body before the Autopsy Surgeon but the PW/18 has never corroborated the same.

Now from the perusal of the evidence on record, we find at the time of the inquest held by Rajat Kanti Paul (PW/18) the dead body was identified by Bimal Sen (PW/1) the father of the victim girl and her Uncle Sandip Kumar Sen (PW/17). It is true it was the evidence of Dr. Dipankar Guha Roy (PW/8) to him the dead body was identified by the police constable Naren Hansda (PW/16) but according to PW/16 the dead body was identified by the PW/18. At the same time the evidence of the PW/16 goes to show that after the inquest was held over the dead body by S.I. Rajat Kanti Paul (PW/18), the same was sent to the morgue through him and he proved his signature on the dead body challan. It was also his evidence that he went to the hospital along with Rajat Kanti Paul (PW/ 18) and was although present at the time of the post-mortem examination. Therefore on the face of the aforesaid evidence we do not find any flaw on the question of identification of the dead body as that of the victim girl before the post-mortem doctor.

9. The victim was last found alive together with the appellant before her missing is one of the circumstances on which the prosecution heavily relied to link the appellant with the commission of the offence. On this count the PW/3 Sudeb Ray is the key witness to the prosecution. According to the said witness on April 28, 2011 at about 2.30 p.m. he saw the appellant talking with the victim girl and soon thereafter when he met the father and uncle of Sima who were searching for her, the PW/3 told them about such fact. Both, the father and the uncle of the victim, who were examined during trial as PW/1 and PW/17 respectively

corroborated the evidence of PW/3. During the cross-examination of the PW/3 his such evidence was challenged by the defence suggesting that he never disclosed to the Investigating Officer of the case that he saw appellant talking with the victim. Not only the PW/3 denied such suggestion but he stood in his evidence. It is pertinent to note, the Investigating Officer of the case was never cross-examined by the defence on the point to contradict the PW/3. Therefore, we find no reason to disbelieve the PW/3 Sudeb Ray and the circumstance that before missing the victim was last seen together with the appellant thus stands proved.

It needs no mention when a witness is believed, his evidence that the victim was last seen alive together with the accused before missing and subsequently the victim was found killed, the same can always be accepted as a strong incriminating circumstance against the accused and it becomes much stronger when the accused failed to satisfactorily account for the victim's disappearance, who was later found killed. It is of course true the circumstance of last seen together cannot by itself is sufficient to reach the conclusion of guilt of the accused but it assumes great importance when considered together with other incriminatory evidence. In this regard the reliance may be placed on the decision of the Apex Court in the case of State of Maharashtra Vs. Suresh, State of Karnataka Vs. Khaja Hussain,

10. The next circumstance against the appellant, a moaning sound coming out from the cowshed of one Ratan Ghosh, which was noticed by the PW/10 Bittu Ghosh. The said witness deposed to the effect about 8 days back from the date of recovery of the dead body of the victim he heard a sound of moaning which was coming out from the cowshed of Ratan Ghosh as he came close to the cowshed he heard the same sound. Near the place he found one Nara @ Khelaram Bag taking water from the tube-well and he called him. Thereafter when he was about to enter into the cowshed he found the appellant was coming out and he was sweating and tensed. On being asked by him the appellant told that a goat had entered the cowshed and already driven out by him. Thereafter the appellant was found cleaning his hands and legs with water. Again the appellant entered the cowshed with a bucket full of water and after coming out started cleaning his hands and legs. The said Khelaram Bag was examined as PW/11, who fully corroborated the PW/10 and stated in his evidence on that day at around 3.30 p.m. he was taking water from a cylinder, at that time he was called by PW/10 who told him that he heard some sound coming out from the cowshed of Ratan Ghosh. When they were going towards the cowshed they found appellant coming out and then stopped seeing them and on being asked by the PW/10 about moaning sound, they were told by the appellant that a goat entered into the cowshed and did not allow them to enter there. The defence during the cross-examination of both PW/10 and PW/11 could not highlight anything that may create doubt as to their credibility on the facts they deposed in Court. On being challenged by the defence the PW/10 categorically affirmed that he disclosed such facts to the police while was examined during the investigation,

defence has not cross-examined the Investigating Officer of the case to bring out any contradiction but the PW/11 during cross-examination was suggested by the defence that he was deposing everything after having heard from the PW/10, which the said witness denied. The evidence of PW/11 was not challenged by the defence and no suggestion was given that he was telling lie. Thus, the evidence of both the PW/10 and PW/11 can safely be acted upon.

In this regard it is also pertinent to note while the circumstances disclosed from the evidence of PW/10 and PW/11 was put to the appellant in his examination u/s 313 Cr. PC, he admitted his presence at the cowshed and the fact that a goat entered there.

11. The disappearance of the accused soon after the missing of the victim girl is another circumstance prosecution used against him. The PW/17 Sandip Kumar Sen is the uncle of the victim, according to the said witness while they were searching for the victim in the village they met PW/3 Sudeb Ray who told them that on that day around 3 p.m. he saw both the appellant and the victim standing near the cowshed of Ratan Ghosh and thereafter the PW/17 tried to contact the appellant at different places but he was not found. The defence has not been able to discredit the witness on this score even though he was cross examined at length.

It is true that mere absconding by itself is hardly any evidence of guilt but can always be used to fortify the other evidence for establishing the guilt of the accused. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime and such is the instinct of self preservation, thus the value of asconsion would depend on the circumstances of each case. However, this is not a case, where accused was not available after the discovery of the dead body and a criminal case was started and police started searching for him but here in this case he was not available soon after the victim was found missing. Therefore, even accepting that the factum of asconsion is a very weak link in the chain of circumstance, still on the face of the aforesaid evidence more particularly the point of time from which he was not available, we are not inclined to overlook its importance.

12. The most vital circumstance according to the prosecution case is the recovery of the wearing apparels of the victim, her sandal, the spade which was used to dig the soil to bury the dead body, the "orna" with the help of which she was strangled pursuant to the statement of the appellant and being led by him. Much has been argued from the side of the defence that the alleged recovery of the aforesaid articles cannot be admitted into evidence with the aid of section 27 of the Evidence Act because the alleged statement of the appellant was not exhibited and proved during the trial. It is true that the alleged statement of the appellant pursuant to which the articles in question were recovered were not exhibited and proved during the trial but the learned Public Prosecutor very aptly relied on the decision of the Hon"ble Supreme Court in the case of State of Karnataka v. David Rozario & Anr. (supra), to overcome the

crisis. In the aforesaid decision the Apex Court observed.....The statement which is admissible u/s 27 is the one which is the information leading to discovery. Thus, what is admissible being information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while In custody which led to recovery of the articles has to be proved.

It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in section 27 of the Evidence Act is the doctrine of confirmation by subsequent events."

Now, we find from the perusal of the evidence of the Investigating Officer of the case that he in his deposition adduced the exact information given to him by the appellant and following which the appellant led to the recovery of those crime articles in question. The evidence of the Investigating Officer of the case (PW/19) is reproduced below;

I recorded the statement of the accused u/s 161 Cr.P.C. He stated to me that "Ektu Rat Hotai Simar Jama Kaporer Sathe Orna O Simar Mrito Deho Kandhe Chapie Sathe Ekta Chotto Kodal Nie Mosdhighir Sech Kanal Eer Fake Samay Mato Khure Simar Jama Kapor. Orna Pute Chilam O Pase Simar Deho Pute Dilam. Tar Par Kodal Paser Moira Pukurer Jaler Madhye Fele Di Ebang Simar Chappal Ratan Ghosher Gowal Ghare Rekhe Di. Amai Nie Gele Sab Ber Kare Debo.

13. The prosecution examined PW/1 Bimal Sen, PW/4 Buddhadeb Mukherjee, PW/5 Pradyut Sen, PW/7 Prosenjit Roy to prove the seizure of the crime articles and the seizure list was exhibited during the trial being Exhibit -2. The learned Counsel for the appellant has not been able to point out anything which may justify us to disbelieve the recovery of the crime articles pursuant to the statement of the appellant and on being led by him. It is true as pointed out by the learned Counsel of the appellant that according to the PW/1 when the dead body of the victim was discovered her wearing apparels were found lying near her head but the same does not persuade us to disbelieve the prosecution case that those wearing apparels were recovered pursuant to the information given by the appellant and on being led by him. We find that the prosecution has led sufficient evidence through its witnesses, viz. PW/4, PW/5 and PW/7 in whose presence the crime articles were recovered at the behest of the appellant and more so through the substantive evidence of the Investigating Officer of the case (PW/19). We also find although according to the PW/1 the wearing apparels of his daughter were lying near her dead body at the same time he stated in his evidence that police recovered the wearing apparels at the behest of the appellant vide seizure list (Exhibit - 2) and proved the seizure. However on this score the defence made no attempt to contradict him. The remaining other seizure witnesses were cross-examined at length but nothing transpired from their cross-examination which may justify us to disbelieve their evidence on the

point of seizure.

In this connection it may not be out of place to note that after his arrest the appellant was forwarded to Court on May 5, 2011. Now, going through the said forwarding report, which we find lying with the case records that the Investigating Officer seeking police custody of the appellant, categorically mentioned that the appellant on being interrogated agreed to show the police party where the crime articles were concealed if he was taken there. We further find the extract of the statement of the accused was also enclosed with the said forwarding report. Both the forwarding report and the extract of the statement of the appellant were duly countersigned by the Chief Judicial Magistrate. Burdwan.

Now, having regard to the facts that the exact information given by the appellant while in custody which led to recovery of crime articles being adduced in Court during the trial by the prosecution through the substantive evidence of the Investigating Officer of the case (PW/19), we are of the opinion "the extract of information" not being exhibited during the trial will not impede admissibility of factum of recovery of the crime articles u/s 27 of the Evidence Act. It needs no debate that aforesaid recovery is certainly a strong incriminating circumstance against the appellant.

14. We find that the Trial Court imposed the sentence of death on the following findings;

- (a) The victim was an innocent and helpless child.
- (b) The accused allured the victim and took her into cowshed.
- (c) In post-mortem it was found before she was killed, she was raped and there was evidence of anal intercourse.
- (d) After she was killed the dead body was concealed.
- (e) The victim was only 14 years at the time of the occurrence.
- (f) The accused previously committed many such offences and about 4 years back he raped one lady named Purnima.
- (g) It is evident from the aforesaid facts that the convict caused intense and extreme indignation of the community and therefore the case be regarded as "rarest of rare case".

However we do not find any foundation against the findings of the Trial Court that the appellant was previously convicted in many other similar cases and a few years back he raped another woman.

Furthermore, it would be more apposite to refer the condition Nos. 3 and 4, out of 7 conditions set out as the mitigating factors in the case of Bachan Singh Vs. State of Punjab, namely;

- (3) The probability that the accused would not commit criminal acts of violence

as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

However, in this case State has not led any contrary evidence to establish that the accused does not satisfy those conditions, therefore the Trial Court was not justified to impose death sentence against the appellant.

In the result while we uphold the order of conviction, the death reference is rejected and the sentence of death is converted to imprisonment for life.

The office is directed to send down the records together with the copy of this judgment to the Court below 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.

Toufique Uddin, J.

I agree.