

15.09.2021
SL No.14
Court No.30
(gc)

**CRA 580 of 2019
With
CRAN 3 of 2020**

(Via video Conference)

In the matter of : **Sanjoy Rajbangshi & Anr.** – Appellants.
Versus
State of West Bengal & Anr. – Opposite Party.

Mr. Debasish Roy,
Mr. Soham De Dhara,
... For the Appellants.

Mr. Saibal Bapuli, Ld. A.P.P.,
Mr. Bibaswar Bhattacharya,
... For the State.

The death of the youngest son of Rajbangshi family has resulted in a criminal proceeding initiated against the present appellants. The appellant No.1 is claimed to be the paramour of the appellant No.2. The appellant No.2 is the wife of the deceased. The case in brief on behalf of the prosecution was that on 15th August, 2016, near about in the midnight the deceased was murdered by the appellant No.1 with an iron crowbar and in order to conceal the said fact they have tried to make out a case that the deceased died due to motor accident. The body of the deceased was recovered from N.H.-34 at about 3.30 a.m., in the early morning of 16th August, 2016. The prosecution relied upon the evidence of several witnesses out of which emphasis was laid on the deposition of the minor child of the deceased being PW-17 and the evidence of the Doctor. The prosecution before the learned

Trial Judge has argued that on the basis of the clinching evidence coming out from the deposition of the said two witnesses, the chain of committing the offence by the appellant Nos.1 and 2 is squarely and conclusively established.

Mr. Debasish Roy, learned Counsel representing the appellants in this proceeding has argued that the conviction is based on circumstantial evidence but unfortunately a chain of evidences failed to establish the completeness and, accordingly, the conviction is faulty. Mr. Roy has referred to the deposition of the several P.Ws which consist of the cousin brothers and the neighbours of the deceased and submits that the deposition of the said persons would unmistakably show that as if they have seen the murder although the evidence is in the nature of hearsay. It is submitted that the charges framed against the appellants were not established at the trial. Mr. Roy has tried to pick holes in the evidence of the witnesses to create a doubt in our mind that on the day when such murder was alleged, there was a Mela in the village where a large number of people were there and it is impossible to arrive at any conclusion that no one seen the commission of such offence as the Mela went upto 10.30.P.m. in the night on the fateful day, as would be evident from the statements of the several witnesses.

Our attention is also drawn to the evidence of the accused No.2 under Section 313 of the Code of Criminal Procedure to submit that no credence was shown to the statement of the accused No.2 that the murder could have resulted of a rivalry between the two families as the evening preceding the fateful night

there has been a dispute between the brothers. It was suggested that the outcome of such dispute between the two brothers could be an immediate cause of the murder. Mr. Roy also tried to emphasize that it is childish to assume that the murderer after the act is completed would carry the dead body from the house of the deceased to the Highway in a Motor Bike as if the person was alive and treated as a pillion rider.

We have heard the learned Counsel for the parties and perused the judgment under appeal.

The conviction is based on circumstantial evidence. No one has seen the murder nor anyone has vouched for it. It is impossible in the facts and circumstances for anyone to come and depose that he was an eye witness to the murder as it was done secretly and behind the curtain. In the instant case there is no eye witness. The Court has to dig out the truth from the mass of evidence led before the Trial Court. Although the Appellate Court exercises the same kind of power as that of the Trial Court but the Appellate Court does not have the benefit to observe the conduct and behavior of the witness which the Trial Court had and, in fact, the learned Trial Judge has meticulously dealt with the evidence adduced on behalf of the parties after observing their behavior and did not admit the version of the P.Ws as gospel truth on all counts in arriving at his finding. On the contrary, it was based on the appreciation of the evidence. When direct evidence is not possible, the circumstantial evidence can provide the basis for arriving at a finding. It is not unknown in criminal jurisprudence that conviction can be based on circumstantial evidence provided the

chain is complete and the evidence is credible. The sole testimony of a child witness can also form the basis of a conviction provided the Court is satisfied that the child is not a tutored and has honestly deposed before the learned Trial Judge. The said evidence is voluntary and without any influence. Moreover, it is highly unbecoming of a child to speak against his mother as in the ordinary circumstances the child is attached to his mother. The evidence does not bring out that the relationship between the mother and the child was sore. In the instant case, we have carefully considered the deposition of two witnesses, namely, the deposition of P.W.-17, the child and the P.W.-13.

Mr. Roy argues that the child was not examined by the I.O. U/S 161, Cr.P.C and his name does not figure in the charge-sheet as a witness. So, his evidence should not be taken into account for consideration. It appears from the record of the trial court that the learned Trial Judge allowed the prosecution to examine the child in exercise of power U/S 311, Cr.P.C.

The Medical Superintendent-Cum-Vice Principal at NRS Medical College at Calcutta in his deposition has clearly stated that the death was due to effects of asphyxia as a result of strangulation along with intra cranial hemorrhage as a result of head injury. It was homicidal in nature. The strangulation in this case is possibly by pressing the neck of the deceased through iron crow bar as noticed during Post Mortem examination. The son being the P.W.-17 in his deposition has deposed that the deceased and his uncles were residing separately. The deceased died on 15th August, 2016. On the date of death of his father when he was

alive, his mother sent him to the house of his grandmother (maternal) by saying that he should go to the house of the maternal grandmother and his parents would visit the said place later. His grandmother stayed in village Fatepur. He went there in the evening hours. He returned back at around 7.00/8.00 a.m. on 16th August, 2016 and enquired from his mother about the whereabouts of his father. The mother replied that his father left the house on 15th August, 2016 and thereafter did not return. In his deposition, he has also said that the accused No.1 used to frequently visit the house of the deceased which is almost 6 days a week during the time when his father was in the factory. He was asked to go to a separate room and was provided with the Mobile Phone so that he did not disturb his mother. He has categorically denied that there is any property dispute between his father and uncle or his cousin brothers. The aforesaid evidence remains unshaken throughout the proceeding.

It is significant to mention that the defence taken by the accused No.2 that she visited the house of Subhash Rajbanshi on 15th August, 2016 and told him that her husband went out but did not return at about 2.30 a.m. at Night on 15th August, 2016. She again went to the house of Subhash Rajbanshi and informed him that possibly his husband met with an accident is completely belied by the version subsequent thereto in the evidence of the son and her own statements recorded under Section 313 of the Code of Criminal Procedure.

The recovery of incriminating articles as well as the report of the forensic examination and serology report is vital. The

recovery has been made as a consequence of the disclosure by the accused Sanjoy Rajbangshi. It is settled law that discovery of facts/articles are admissible under Section 27 of the Indian Evidence Act. No argument has been advanced in the appeal to disprove that the offending weapon was not recovered as a consequence of the disclosure made by the accused. As observed by the Hon'ble Supreme Court in **A.P. Hyderabad vs. S. Sardar Ali; 1983 SCC (Criminal) 827** it was held that:

"It is a fallacious impression that when any recovery is effected pursuant to any statement made by the accused the document prepared by the Investigating Officer contemporaneous with such recovery, must necessarily be attested by any independent witnesses". It was also been held that when a police official gives the evidence in the court that the some articles were recovered by him on the strength of the statement made by the accused it is always open to the court to believe the version to be correct if it is not otherwise shown to be unreliable.

The recovery from the house of the deceased at the instance of the accused Sanjoy Rajbangshi was found trustworthy and believable must specifically in the light of the inconsistent plea taken by the accused persons and the report of forensic examination and serology report. The appellant must have realized the weakness of the defence plea and accordingly it was not highlighted before us. The evidence of the wife of the deceased clearly establishes the common intention to commit the crime.

The issue regarding admissibility of evidence of a child witness is no more res integra. In the case of **Rajkumar v. State of M.P** reported in **2014 (5) SCC 353** the Hon'ble Supreme Court held:

"18. It is a settled legal proposition of law that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by

reason of tender age or extreme old age or disease or because of his mental or physical condition. Therefore, a court has to form an opinion from the circumstances as to whether the witness is able to understand the duty of speaking the truth, and further in case of a child witness, the court has to ascertain that the witness might have not been tutored. Thus, the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. The trial court must ascertain as to whether a child is able to discern between right or wrong and it may be ascertained only by putting the questions to him.

19. This Court in *State of M.P. v. Ramesh*, after considering a large number of its judgments came to the conclusion as under:

“14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.”

20. In view of the above, as the courts below have found the child witness worth reliance, we do not see any cogent reason to take a view contrary to the same.”

24. In *Prithipal Singh v. State of Punjab*, this Court relying on its earlier judgment in *State of W.B. v. Mir Mohammad Omar*, held as under:

“53. ... if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.”

The evidence of the child in this case was spontaneous and with confidence. The deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement thereon, the Court may rely upon his evidence. (See ***State of M.P. vs.***

Ramesh and another reported at **2011 (4) SCC 786**). There are unimpeachable and eloquent materials on record which lent an unfailing assurance that PW 17 is a witness of truth and not a witness of imagination.

Although, he was only 14 years old when the statement was recorded under Section 164 of the Criminal Procedure Code. He was found competent and matured enough to testify and deposed.

There are clinching circumstances against the appellants and there was no missing link in the chain of circumstances demonstrated before the trial court. The ultimate conclusion is that the circumstances were incapable of being explained on any other reasonable hypothesis. In the case of **GaganKanojia v. State of Punjab** reported in **2006 (13) SCC 516** the Hon'ble Supreme Court held as under:

"9.The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between "may be true" and "must be true". Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to the guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on record and analyse and assess the same objectively.

10.We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms:

“(1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

(2) Circumstantial evidence can be reasonably made the basis of an accused person’s conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.

(3) There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

(4) On the availability of two inferences, the one in favour of the accused must be accepted.

(5) It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

23.Extra-judicial confession, as is well known, can form the basis of a conviction. By way of abundant caution, however, the court may look for some corroboration. Extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved can be relied upon by the courts.

30.Recoveries of the said articles were made pursuant to the information given by Appellant 1. The information given by Appellant 1 led to discovery of some facts. Discovery of some facts on the information furnished by Appellant 1 is a relevant fact within the meaning of Section 27 of the Penal Code. It is, therefore, admissible in evidence and the same could have been taken into consideration as a corroborative piece of evidence to establish general trend of corroboration to the extra-judicial confession made by the appellants.”(emphasis supplied)

Corroboration also could be both by direct or circumstantial evidence. In the case of ***DattuRamraoSakhare v. State of Maharashtra*** reported in **1997 (5) SCC 341** the Hon’ble Supreme Court held as under:

“5. The entire prosecution case rested upon the evidence of Sarubai (PW 2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational

answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the evidence of Sarubai (PW 2)."

Even if it is found that a child witness has been tutored and there can be severability of tutored apart from untutored part it is well settled that remaining part of the evidence which is untutored if inspires confidence can be believed or at least taken into consideration for the purpose of corroboration. (See. **Gagan Kanojia** (supra).

The learned Trial Judge on meticulous examination of the evidence of both oral and documentary held that the accused persons are guilty of committing murder on circumstantial evidence. The circumstance is being:-

- "1) Deceased Janu Rajbanshi was lastly alive with accused Afika Rajbanshi in his house on 15.08.2016.*
- 2) No explanation has been put forth by the accused persons as to how antermortem, homicidal injuries and postmortem injuries on the body of deceased Janu Rajbanshi.*
- 3) The conduct of accused Afika Rajbanshi in not informing the crime to the police is also the incriminating circumstance against her.*
- 4) Recovery of blood stained iron rod/crowbar at the instance of accused Sanjay Rajbanshi from his house is proved by the prosecution on 21.08.2016.*
- 5) Recovery of blood stained articles ie mosquito net, pillow, pillow cover and bed sheet from the safety tank in the house*

of accuse Afika Rajbanshi and deceased Janu Rajbanshi at the instance of accused Sanjay Rajbanshi is proved by the prosecution.

- 6) *Prosecution has also proved detection of human blood on wearing apparel of deceased MAT Exbt VIII and IX and the bed sheet (MAT Exbt VI), mosquito net (MAT Exbt V).*
- 7) *Detection of blood on iron rod/crowbar (MAT Exbt IV), pillow cover (MAT Exbt VI) and gauze has also been proved by the prosecution.*
- 8) *The accused Sanjay Rajbanshi has failed to explain the injury suffered by him noted by PW 8 as the injury suffered in road traffic accident on 16.08.2016 at 1.00 a.m.*
- 9) *The plea of accident of deceased Janu Rajbanshi taken by accused Afika Rajbanshi has been found a false plea.*
- 10) *The opinion of PW 13 with regard to injuries over the body of deceased Janu Rajbanshi sufficient to cause death, antemortem homicidal in nature and are possible by the iron rod/crowbar MAT Exbt IV recovered at the instance of accused Sanjay Rajbanshi is found corroborated with other evidence.*
- 11) *Strong motive of love affair/illicit relation in between accused Afika Rajbanshi and Sanjay Rajbanshi deposed by the witnesses most specifically PW 17, the minor child of accused Afika Rajbanshi and deceased Janu Rajbanshi has been proved by the prosecution.*
- 12) *Conduct of accused Afika Rajbanshi in sending her child Subrata Rajbanshi to the house of her parents and in visiting house of PW-6 Subhash Rajbanshi on the night of 15/08/2016 taking the ground of apprehending the alleged accident of her husband is a vital link into the chain of prosecution in reflecting her intention and conduct.*
- 13) *Failure of both the accused persons to put forward the reasonable explanation to the incriminating circumstances and evidence in their statement u/sec 313 Cr.P.C and taking the plea of the property dispute in between deceased Janu Rajbanshi and others on 15.08.2016 without putting the same to any of the witnesses and failing to prove the same also an additional link into the chain of prosecution. The solemn decision in Neel Kumar @ Anil Kumar Vs. State of*

Harayana (2012) 5 SCC 766; Dr. Sunil Clifford Danial (supra) is referred to. Keeping silence by the accused persons and not putting any explanation to the incriminating evidence and circumstance.

- 14) *The blood stained clothes have been found from house of the deceased and accused Afika Rajbanshi. It is highly unnatural that she claimed that deceased met with an accident and the blood stained articles have been found from his house. ”*

Each of these circumstances put together complete the chain of events as rightly observed by the learned Trial Judge. It is not possible for an outsider except the accused persons to commit murder of the deceased when the motive for commission of the crime by the accused persons has been fully established.

Moreover, the seizure list clearly shows that offending articles were seized from the custody of the accused No.1 in respect of item No.1 in the seizure list and raised from the safety tank of the house of the deceased.

Accordingly, we find no merit in the appeal.

The judgment and order of conviction and sentence under appeal is confirmed.

The application being CRAN 3 of 2020 for suspension of sentence and grant of bail stands dismissed accordingly.

However, there shall be no order as to costs.

Send down the L.C.R to the Ld. Court below.

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Rabindranath Samanta, J.)

(Soumen Sen, J.)