

Sl. No. 44

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Appellate Side

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 145 of 2011

Biswajit Hembram & Ors.

Versus

The State of West Bengal

For the appellants : Mrs. Manasi Roy

For the State : Mr. Saswata Gopal Mukherjee
Ms. Sreyashee Biswas

Heard on : 07.09.2022

Judgment on : 16.09.2022

Ajay Kumar Gupta, J:

1. The appeal is directed against the judgment and order dated 22.12.2010 passed by the Learned Additional Sessions Judge, Kalna, Burdwan in connection with Sessions Trial No. 01 of 2008 arising out of

Sessions Case No. 73 of 2007, thereby convicting the Appellants namely, Biswajit Hembram, Mithun Murmu and Bhadu Tudu for commission of offence of committing rape upon the minor victim girl and murdered her jointly in furtherance of their common intention punishable under Section 376 (2) (f) (g) /302 /34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and pay a fine of Rs. 5,000/- each, in default, to suffer rigorous imprisonment for further 1 year more.

2. The prosecution as alleged against the Appellants/convicts is to the effect that the father of the victim girl filed a written complaint on 28.05.2007 alleging that his daughter aged about 11 years was found missing and he searched everywhere but he could not find her. At about 6 p.m, when he again went to search for his daughter, he saw Appellants Biswajit Hembram, Mithun Murmu and Bhadu Tudu near the jute field of Nemai Pal, when he enquired about his daughter, all of them fled away. This raised suspicion in his mind and on going to the jute field of Nemai Pal, he found his daughter lying in the field with blood oozing from her nose and private parts, her wearing apparels were torn.

3. On the basis of the written complaint lodged by the father of the victim at the police station, Officer-in-Charge, Kalna Police Station started Kalna P.S. Case No. 126/2007 dated 28.05.2007 under Section 376 (2) (f) (g) /302/34 of the Indian Penal Code and U/D Case No. 93/2007 dated 28.05.2007. After completion of investigation, charge sheet was submitted against all the Appellants. Accordingly, charges were framed under Section 376 (2) (g) /302/34 of the Indian Penal Code. The appellants pleaded not guilty and claimed to be tried.

4. In course of trial, prosecution examined 15 witnesses and exhibited number of documents as Exhibits 1 to 28 respectively.

5. Defence of the Appellants was that they are innocent and have been falsely implicated. No evidence, however, was led on behalf of the defence.

6. After appreciation of the oral evidence and considering the documents exhibited by the prosecution, the Trial Judge, by impugned judgment and order, convicted and sentenced the appellants as mentioned above.

7. Mrs. Manasi Roy, learned counsel, appearing on behalf of the Appellants, submitted that there is no eye witness. This case is totally based on circumstantial evidence. Chain of circumstances is not complete to prove the guilt. As such Trial Court erred in law in convicting the Appellants. Learned Counsel further pointed out that the Appellants were not last seen together with the victim. It is further submitted that the Trial Court erred in law in relying on the confessional statement made before the villager in presence of the police officer is inadmissible. Evidences of prosecution are not reliable due to vital contradictions and inconsistencies. Accordingly, the appellants cannot be held responsible for the rape and murder of the victim.

8. On the other hand, Ms. Sreyashee Biswas, learned advocate, supported the prosecution case.

9. I have gone through the evidence on record meticulously which reveal as follows:

P.W. 1 is the father of the minor victim girl. He deposed on 25th November, 2009 his daughter had gone to collect paddy stalks in a nearby field. She did not return. He searched for his daughter from 12 noon when she went missing but she was not found. Finally at about 6 p.m., he again

went out to search and when he reached on the road near the jute field of Nema Pal, he saw a bundle of paddy lying on the ground. At the same time, he found three persons namely, Mithun and two others. He enquired about her daughter but they fled away. At that point of time, he also saw some of the jutes lying broken in the jute field and doubted something was wrong. He found his daughter lying dead on the ground. Her nose and private parts were bleeding and her apparels were in torn condition. He knew the appellants on account of his regular visit to Kashipur. He further stated in his evidence after apprehension of the accused persons by the Police they admitted their guilt.

P.W. 2 is a photographer by profession. He proved the photographs and negatives of the minor victim girl marked as Exhibit 1 series.

P.W. 3, a constable of Kalna P.S. went to the spot with his senior Allauddin and found the dead body of the minor girl aged about 10/11 years in the field. Her nose and private parts were bleeding. Alluddin Sk, held inquest over the dead body and prepared report marked as Exhibit 23. He took the dead body to Kalna Hospital for post mortem examination. He collected the viscera and also specimen of blood in a tube and deposited the same at the P.S. He also collected semen of the accused for test and collected P.M. report of the deceased.

P.W. 4, Doctor was assigned to hold post mortem examination of the victim girl. Due to gravity of the case, he formed a medical board and performed the examination. The Board comprised of forensic doctors and surgeon who opined rigor mortis was present in both limbs, multiple abrasions over upper part of chest wall and upper part of abdomen along

with marks of nail scratches. Bruise and recent bleeding were found over the left arm and neck region and vagina was ruptured. Vaginal swab was taken and sent to police personnel. The uterus and vaginal swab were preserved. The cause of death was due to shock from multiple injuries over the body and due to vaginal rupture and bleeding.

P.W. 5, Dr. Snehangshu Kalna was also a member of the board who conducted post mortem examination over the dead body of the minor victim girl along with other two doctors. He deposed report was written by Dr. Monoranjan Adhya under the supervision of three doctors.

P.W. 6, one of the villagers of Kashipur stated that he knew de-facto complainant (P.W. 1) and submitted that he used to come along with his family and others for last 7 to 8 years twice in a year once during boro cultivation and again during sowing of potato seeds. P.W. 1 came in 2007 and the alleged incident occurred on 25.07.2007 at about 12/1 p.m. P.W. 1 informed them that his daughter aged about 10/11 years was missing. Accordingly, P.W. 6 along with other villagers searched everywhere but did not find her. At about 4 to 5 p.m, when he went to visit his land, while he was returning home from his field, he found the Appellants passing through the land of Nemai Pal at high speed. After 10 minutes he heard hue and cry and went towards the jute field of Nemai Pal from where hue and cry was coming. He found the minor victim girl lying dead. Parts of her body were tied with jute bark. Her frock was torn and lower garment was open and there was bleeding from her nose, mouth and private parts.

P.Ws. 7, 8, 11 and 13 also stated that they heard the sound of crying from the jute field of Nemai Pal and when they went they found the dead body of the victim girl as stated by P.W.6.

P.W. 9 stated that he heard that someone had murdered a girl in the jute field of Nemai Pal and went to the spot hearing hue and cry there from. He found that blood was oozing out from the mouth, nose and private part of the victim. Her hands and legs were tied with jute bark. He further stated he could understand that she was raped and then murdered. Many people had gathered at the P.O. The police came on the next day and arrested the Appellants, who confessed their guilt before the police and villagers.

P.W. 10 stated the facts that on the next day when he went in front of the school near the village where public were interrogating the Appellants where they confessed before the public that they had raped the girl and thereafter, murdered her.

P.W. 12 is a Judicial Magistrate who recorded the statements of the witnesses namely, 1. Purna Chandra Pal, 2. Madan Soren and 3. Mantu Pal under Section 164 of the Cr.P.C. The statements were marked as Exhibit 14, 15 and 16 respectively.

P.W. 13 stated on the next morning local villagers searched three accused persons, brought them and handed them over to police. The accused persons confessed their guilt before the villagers and the police and thereafter police took away the accused persons.

P.W. 14, another Judicial Officer recorded the statement of one Subhas Pal on 17.07.2007, Kusodwhaj Halder on 25.07.2007 and Rasid Sk

on 26.07.2007 under Section 164 Cr.P.C. The statements were marked as Exhibits 18, 19 and 20 respectively.

P.W. 15, I.O. visited the place of occurrence and prepared rough sketch map. He also took photographs of the dead body with the help of expert photographer. He held inquest over the dead body and made seizure lists. He also seized wearing apparels of the appellants under three separate seizure lists. He also produced the Appellants for medical examination. He also collected the semen of the accused for forensic test. He collected semen of the deceased during investigation and finally after conclusion of investigation, submitted charge sheet against the accused persons under Section 376 (2) (f) (g) /302 /34 of the Indian Penal Code.

10. Upon perusal of the evidence and judgment delivered by the trial Court, I find the trial Court had accepted the extra judicial confessions made before the villagers in presence of police and also de-facto complainant. Trial Court contended that confession made before the police need not be admissible but extra judicial confession made before the public is admissible in law and being satisfied that it is reliable, trustworthy, voluntary and beyond reproach and made by the accused in a fit state of mind can be relied on for conviction on the basis of decisions reported in 2010 Cr.LJ 3247. Trial Court also observed that the confession of the appellants to the villagers is strong evidence. Such confession requires no corroboration.

11. It is an admitted fact that the victim was raped and subsequently murdered but there is no eye witness. The case is totally based on circumstantial evidence.

12. In the light of above evidence on record, it appears two most vital circumstances brought on record from the side of prosecution are that the appellants were seen at the place of occurrence by some of the prosecution witnesses and that they had made confessional statements before villagers in presence of police.

What emerges before this Court is whether such evidences are sufficient to sustain the conviction or not?

13. It is the golden principle of the criminal law that howsoever grievous or heinous a crime is, an accused shall be presumed to be innocent until the prosecution case is proved beyond reasonable doubt. Furthermore, it is well settled that in a case resting on circumstantial evidence, the circumstances put forward must be satisfactorily proved and they should be consistent only with the hypothesis of guilt of the accused.

In **Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh**¹, the Apex Court observed:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one

¹ AIR 1952 SC 343

proposed to be proved. In other words, 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."

14. Confession has been categorised in Sections 24, 25 and 26 of the Evidence Act which read as follows:

"S.24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

S.25. Confession to police officer not to be proved.- *No confession made to a police officer, shall be proved as against a person accused of any offence.*

S.26. Confession by accused while in custody of police not to be proved against him.

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

15. From the perusal of above provisions, confession must be made to a person without any inducement, threat or promise or influence. Here the confessional statement made before the villagers in presence of police falls under the purview of Sections 25 and 26 of the Evidence Act. In this regard, I rely on the following authorities. Firstly, in **State Of U.P. vs Deoman Upadhyaya**², the Apex Court held at Para 9 as follows:

“9. On an analysis of ss. 24 to 27 of the Indian Evidence Act, and s. 162 of the Code of Criminal Procedure, the following material propositions emerge :-

(a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(b) A confession made by a person whilst he is in the custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(c) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(d) A statement whether it amounts to a confession or not made by a person when he is not in custody, to another person such latter person not being a police officer may be proved if it is otherwise relevant.

(e) A statement made by a person to a police officer in the course of an investigation of an offence under Ch. XIV of the Code of Criminal Procedure, cannot except to the extent permitted by s. 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial in respect

² AIR 1960 SC 1125

of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.”

Secondly, in **State v. Gangula**³, the Hon’ble Court held that:-

“If the accused is within the ken of surveillance of the police and his movements are restricted then he is in custody. If in such state he made any statement to any person be he not a Police officer his confession is inadmissible and hit by section 26 of the Evidence Act.”

16. So, considering the above judgments, I do not find the extra judicial confessional statement made before the villagers under surveillance or movement restriction of the accused persons from the side of public and police officer is admissible in law. The Appellants must be free from police influence or possibility of being under police influence. Furthermore, none of the Appellants were last seen together with the victim. In addition, statement made by the de-facto complainant, P.W. 1 is not consistent with other witnesses. There are vital contradictions about the manner, place as well as time, where they had seen the appellants and their arrest. This creates serious doubt in the mind of this Court with regard to the prosecution case.

17. Evidences of the witnesses that they had seen the appellants near the place of occurrence is doubtful because their evidence is clearly contradictory about the place and time when they saw the appellants. The time and place as stated by P.W. 1 is the jute field of Nemai Pal at about 6

³ (1997) 1 SCC 272

P.M., by P.W. 6 is after 5 P.M. passing through the land of Nemai Pal at high speed and P.W. 10 saw them while returning home at about 4/4.30 P.M. loitering by the side of Nemai Pal's land. P.W. 13 stated he heard P.Ws. 1 and 6 had seen appellants around the jute field at about 12.30/1 P.M.

Even the time and place of arrest is unclear. P.W.1 stated police arrested the appellants at about 8/9 am on the next day when they were in the control shop of Mantu Pal. P.W.6 stated on the next day at about 12 noon police went to the village and arrested the appellants with the help of local villagers.

18. Under such circumstances, I do not find confidence to rely on the evidence led by the prosecution to prove the appellants being seen at the place of occurrence.

As discussed earlier, confessional statements of the appellants were recorded in presence of the police when appellants were not free agents. Hence, they are inadmissible in law. Accordingly, the vital incriminating circumstances relied by the prosecution have not been proved. Suspicion, howsoever high, cannot take the place of proof. Accordingly, appellants are entitled to the benefit of doubt and ought to be acquitted.

19. The impugned judgment and order of conviction and sentence is, thus, set aside.

20. The Appellants are acquitted of the charges levelled against them.

21. Accordingly, the appeal is allowed.

22. Appellants shall be set at liberty forthwith if they are not wanted in any other case, upon execution of a bond to the satisfaction of the Trial

Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

23. Lower Court records along with a copy of judgment be sent down at once to the Learned Trial Court for necessary action.

24. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I Agree.

(Ajay Kumar Gupta, J)

(Joymalya Bagchi, J)

P. Adak (P.A.)