

IN THE HIGH COURT AT CALCUTTA

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 265 of 2021

Amar Shee @ Ganga

Versus

The State of West Bengal

For the appellant : Mr. Sandipan Ganguly, Sr. Adv.

: Mr. Dipanjan Dutt, Adv.

: Mr. Surojit Saha, Adv.

For the State : Ms. Zareen Khan, Adv.

: Md. Kutubuddin, Adv.

Hearing concluded on : 12th December, 2022

Judgment on : 21st December, 2022

Md. Shabbar Rashidi, J.:

1. The appeal is directed against the judgment of conviction dated 29.01.2021 and order of sentence dated 30.01.2021 passed by learned First Additional Sessions Judge, Hooghly in connection with the Sessions Trial No. 06(02) of 2017 arising out of Sessions Case No. 202 of 2016 convicting the appellant under section 302 of the Indian Penal Code.

2. On 03.05.2016, one Arati Bag of Anandamath, Chinsurah, Hooghly lodged a written complaint with Chinsurah Police Station on an allegation that her son Bablu Bag aged about twenty-two years used to reside alone at the house. He used to drink extensively and beat her. In order to save herself, she took shelter at her daughter's house. In 03.05.2016, according to her, a foul smell was found emanating from her son's house. Local people went there and found her son strangled to death. The de facto complainant also stated that her son used to be accompanied by her son-in-law Amar Shee @ Ganga,

son of Shakti Shee of Kapasdanga. She also stated that on 30.04.2016, her son was drinking wine with her son-in-law and since the death of her son, he has been absconding. She stated that she believed that her son was killed by Amar Shee.

3. On the basis of such written complaint, Chinsurah P.S. Case No. 202 dated 03.05.2016 was started against Amar Shee @ Ganga under section 302 of the Indian Penal Code. A separate UD case being Chinsurah P.S., U.D. Case No. 226 dated 03.05.2016 was started and an inquest upon the dead body was conducted on 03.05.2016 itself.

4. The police took up investigation and on completion of investigation submitted charge-sheet under section 302 of the Indian Penal Code against the appellant. The appellant was brought before the Lower Court, and upon compliance of the provision under section 207 of the Code of Criminal Procedure, the case was committed to Court of Sessions. Accordingly, on the basis of materials in the CD, charge under section 302 of the Indian Penal Code was

framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge, prosecution examined fourteen witnesses. In addition, prosecution also produced documentary evidences in support of its case.

6. The de facto complainant also has deposed as PW1. She stated that one year ago, she came to know from one Kuber Thapa that her son Bablu Bag was killed by strangulating him with a Gamcha(Loin cloth) and also by a shoving cloth into his mouth. She further stated that her son used to reside with her husband. After getting such information from Kuber Thapa, PW1 went to her house at Anandmath and found the hands of her son tied with ropes of pandel and a gamcha wad tied around his neck. A piece of cloth was inside his mouth. She also stated that previously she used to reside in the said house. It was disliked by her daughter. PW1 also stated that her son was an wall-painter by profession and used to reside alone in the said house. She could not say as to her son was killed. The police took away the dead body which was not

returned to her. Thereafter, she lodged a complaint with Chinsurah Police Station which was scribed by the said Kuber Thapa. It was read over to her and she put her thumb impression there on. She was interrogated by police. In her cross-examination, PW1 again expressed her ignorance as to her son died.

7. A neighbor has deposed as PW2. He has stated that the deceased Bablu used to work as an wall-painter and resided alone in his house. He was a drunkard. PW2 stated that he came to know from his wife that Bablu died an unnatural death. He also stated that Bablu used to roam around with his brother-in-law as both of them were drunkards. He died being interrogated by police in connection with the case. PW3 was tendered by the prosecution for her cross-examination and the defense declined to cross-examine the witness.

8. Another neighbor has deposed as PW4. He has stated that he knew Bablu Bag and his mother Arati. He also identified the appellant as brother-in-law of the deceased. This witness also stated that he heard that

Bablu died in his house. At that time, his mother used to reside with her daughter. He did not see anybody coming to the house of Bablu.

9. PW5 is also hearsay witness. He has stated that after returning, he came to know that Bablu died of strangulation. PW5 however could not say if it was natural death or he was murdered. PW 6 is another neighbor. He has also not supported the case of the prosecution.

10. Another neighbor i.e. the scribe of the written complaint Kuber Thapa has deposed as PW 7. He has stated that Bablu Bag died and he had seen the dead body of Bablu, both hands tied with a row and rope around his neck. He identified the appellant as brother-in-law of the deceased. He has also stated that the appellant used to reside in the house where the dead body was found. He further stated that Bablu used to inflict crowbar upon his mother for which she has been residing with her daughter. Bablu used to paint houses and was a drunkard. He also stated that on the relevant day when he went to fetch water, he saw many persons assembled beside the house

of Bablu. There was a foul smell and entering into the room PW7, found the dead body in sitting condition. H also stated that Bablu used to consume liquor with brother-in-law Ganga. He also stated that on 30.04.2016 at about 7.30 p.m. He had seen both Bablu and his brother-in-law going towards their home by the side of the house of PW7 in an intoxicated condition. Thereafter, he did not see either Bablu or his brother-in-law. PW7 further stated that he scribed the written complaint as per the instruction of Arati Bag. He proved the written complaint (Exhibit 1) and his signature thereon (Exhibit 1/1). PW7 also stated that he made a statement before the learned Magistrate and proved his signature on the statement recorded under section 164 of the Code of Criminal Procedure (Exhibit 2/1 and 2/2). In his cross-examination, PW7 stated that he was a retired person. He used to work at Chinsurah Police Station prior to his retirement. He also deposed to the effect that he stated before police that he had had seen Bablu and his brother-in-law at 7.30 p.m. and that brother in-law of Bablu

namely Amar Shee @ Ganga used to reside in the house in which dead body of Bablu was found.

11. The wife of the appellant has deposed as PW8. She has stated that at the relevant time, her husband was rickshaw puller. Deceased Bablu Bag was her brother and used to reside alone at Anandamath. She also stated that Bablu was murdered but she could not say how he was murdered. Similarly, thereafter, PW8 has stated that on 30th April, on the day of election, her husband came to her house at 3/3.30 p.m. in a drunken condition and told her that he had killed the brother of PW8. He also requested PW8 to take him to the police station as he intended to surrender. She also stated that her husband had told her that after murdering her brother, he had tied his hands and hanged him. PW8 did not believe the statements of her husband and thereafter her husband went away. Since then, he went missing. Subsequently, PW8 came to know that her husband had killed her brother. Both of them enjoyed good relations and husband of PW8 used to go to the house of Bablu for consuming liquor. She stated

that she came to know about the death of her brother three days after she was informed by her husband. She got the information of death from one Biki, son of her sister Bulti. PW8 also made a statement before the police and learned magistrate. In her cross-examination, PW8 admitted that she used to work as maid-servant against the will of her husband due to which they were having strained relationship and husband used to beat her. In her cross-examination, PW8 also stated that after her marriage with the appellant, the appellant used to work in a godown of cement dealer named Amit Builder at Kapasdanga and at that time, they used to reside in a rented house at Kapasdanga owned by one Dipti Ranjan Dutta.

12. The wife of Dipti Ranjan Dutta deposed as PW9 and stated that about 5-6 months prior to 2016, the appellant Amar Shee alias Ganga and his wife were a tenant under her. Amar Shee used to pick quarrels with his wife under the influence of liquor. A police constable has deposed as PW10. He carried nail scraps, hars, two

gamchas and a sando ganji to S.I. Nirupam Mondal on Chinsurah P.S. on 03.05.2016 which he collected from the autopsy surgeon. The said articles were seized by the police officer under a seizure list. PW10 was consequently to that seizure list (Exhibit 3). He also carried the dead body of Bablu Bag to the morgue under a challan. He proved his signature on the dead body challan (Exhibit 4).

13. The next door neighbor of deceased Bablu Bag's house has been examined as PW11. He has stated that about 1 ½ /2 years (From 18.11.2017). He got foul smell from the side of Bablu Bag. Later on, he was informed by his wife that Bablu Bag was dead. Defense declined to cross-examine in the witness.

14. The autopsy surgeon has deposed as PW12. He stated that on 03.05.2016, he conducted the postmortem examination on the dead body of Bablu Bag alias Patla in connection with Chinsurah P.S. UD Case No. 226 dated 03.05.2016 corresponding to Chinsurah PS Case No. 302 of 16 dated 03.05.2016. On such examination, PW12 found injuries, that is to say:

- I. “Continuous ligature marked found around neck below thyroid cartilage.”**
- II. On dissection he found laceration of sub. Cute. Tissue, muscles underneath the ligature mark.**
- III. Ligature mark was 1” in breadth caused by gamcha found around neck. Both hands were found tied by black strap in front of the body.**
- IV. Abrasation found over left knee. Rigor mortise was not found at the time of examination by PW12.**
- V. PW 12 opined the case of death as due to the effects of strangulation as stated (injuries described) ante mortem and homicidal in nature.**
- VI. PW12 tendered the postmortem report which was admitted in evidence as (Exhibit 5). PW 12 further stated that apart from the injuries as stated in the**

postmortem report, he also found fracture and sub laxation of hyoid bone and it was opined that fracture of hyoid bone was mainly found in the case of homicidal strangulation.

15. Learned magistrate recording the statement of witnesses under section 164 of the Code of Criminal Procedure deposed as PW 13. He stated that on 29.06.2016, he recorded the statement of the witnesses Kuber Thapa and Manjushee under section 164 of the Code of Criminal Procedure. The statements were tendered by learned magistrate and admitted in evidence as Exhibit 2/3 (Kuber Thapa) and Exhibit 7 (Manjushee).

16. The investigating officer deposed as PW14. He has proved the endorsement of receipt of the written complaint made by SI Animesh Hazari (Exhibit ½) and formal FIR (Exhibit 8). Being entrusted with the investigation of Chinsurah Police Station Case No. 202 of 2016 dated

03.05.2016 under section 302 of the Indian Penal Code, PW14 perused the written complaint, visited the aforesaid place of occurrence and prepared rough sketch map with index of it (Exhibit 9) collectively. He also examined available witness and recorded their statement under section 161 of the Cr. PC. He conducted inquest over the dead body and prepared a report in this regard (Exhibit 10). He sent the dead body for postmortem examination under a dead body challan (Exhibit 4/1). He also received and seized the nails, har etc. of the deceased under a seizure list (Exhibit 3/1) and collected the photocopies of the place of occurrence (MAT Exhibit I series). PW14 also arrested the appellant. PW14 also tendered the offending gamcha (Lion cloth), Napkins, (MAT Exhibit II, II/I, and III respectively). On completion of investigation, PW14 submitted charge sheet against the accused Amar Shee alias Ganga under section 302 of the Indian Penal Code being charge sheet no. 298/16 dated 29.07.2016. In his cross-examination, PW14 stated that on his arrival at the place of occurrence, he discovered the dead body in half

lying condition on the bed having back side support on the adjacent walls.

17. On completion of the evidence adduced on behalf of the prosecution, the appellant was examined under section 313 of the Code of Criminal Procedure. The appellant, in such examination, pleaded his innocence and he declined to adduce any defense witness.

18. The circumstances which has been sought to implicate the appellant are based on the last seen together theory and the extra judicial confession said to be made by the appellant. Besides that, the conduct of the appellant in concealing himself since after the incident has also been sought to be proved as circumstances going against the appellant.

19. PW7, in his deposition, has stated that on 30.04.2016 at about 7.30 p.m., he had seen the appellant and the victim going towards their house. PW7 saw them so going in a drunken condition, standing by the side of his own house. Thereafter, he did not see either of them at that place. Thereafter, on 03.05.2016, the dead body of

the victim was recovered from his own house. The post mortem report discloses that the postmortem examination on the dead body of the victim was conducted on 03.05.2016 and the cause of death was opined to be the effect of his strangulation. However, probable time since death was not ascertained. The appellant was seen together with the deceased last on 30.04.2016. A considerable period i.e. three days had lapsed between the last seen together and the recovery of the dead body. PW8, in her statement, has stated that the appellant made a confession before her in the night of 30th April. If that be so, the victim must have been dead in the evening or night of 30.04.2016 followed by recovery of the dead body on 03.05.2016. Nevertheless, time elapsed since death was not ascertained in the Exhibit 5. The aforesaid gap of three days between 30.04.2016 and 03.05.2016 leaves ample scope for intervention of other persons in the incident. In the facts and circumstances of the case, the ratio laid down in the case of Bodhraj @ Bodh (supra), Ram Reddy @ Rajeshkhanna Reddy (supra) and Arjun Marick (supra)

becomes very much relevant. In the aforesaid cases, the time gap between the point of time 'when the appellant and the deceased were last seen alive' and 'the deceased is found' is so small so as to exclude the possibility of any person other than the appellant being the doer of the crime becomes impossible. In the instant case, the aforesaid time gap is so large that it cannot be safely held that the offence must have been committed by none other than the appellant.

20. As evident, the prosecution seeks to rely upon the extra judicial confession made by the appellant before PW8, an estranged wife. In her deposition, PW8 stated that in the month of April on 30th on the day of election, her husband came to the house at about 03.30 a.m. in drunken condition and stated to her that he killed the brother of PW8. He also wanted her to take him to police and that he intended to surrender. It was also confessed by the appellant that after murdering the brother of PW8, he had tied his hands and hanged him. From the inquest report and exhibit 9 and the deposition of PW14 as well as

other witnesses, it transpires that when the dead body of the victim was recovered on 03.05.2016, the hands of the deceased were tied. But it also transpires that the dead body was not found in hanging condition, rather it was found in sitting condition. In her cross-examination, PW8 stated that she was residing in her rented accommodation with her children and she was informed about the death of her brother by the son of her sister. She admitted in her cross-examination that she did not state anything about the occurrence to her landlord or other tenants in the next morning or even to any other person in the locality. She even did not inform her mother. She also stated that she went to the house of her brother after three days of his death and even then she did not inform anybody in the village. She admittedly did not go to the police station in the following morning to report what her husband had stated in the night. There appears to be no explanation on the part of PW8 or the prosecution as to what made PW8 to withhold such information given by her husband regarding commission of cognizable offences by him. It is

evident from the deposition of PW8 that she had strained relations with her husband and both of them were living separate. She has also stated to be beaten up by her husband. PW8 has also stated that she has been residing in the house habited by the appellant prior to his arrest. It also transpires from the materials on record that when the husband of PW8 confessed before her with regard to killing of her brother, she withheld such information from everyone including co-villagers, her landlord, co-tenants and even from her mother. She even did not care to report the matter to the police. She also did not care to make an enquiry herself over the statement of her husband where the victim was her own brother for a considerable period of time. It is after about two months of the recovery of the dead body i.e. on 29.06.2016, PW8 made a statement under section 164 of the Code of Criminal Procedure (Exhibit 6) before the learned magistrate stating, inter alia, the alleged confession made by her appellant husband. Such conduct on the part of PW8 and inordinate delay in disclosing the aforesaid confession by the appellant

renders the testimony of PW8 highly untrustworthy, not inspiring enough confidence to base a conviction on its basis.

21. Moreover, it is the statement of PW8 herself that when the confession was made by the appellant in the late night on 30.04.2016, the appellant was in a drunken condition and by which she did not believe his statement. In terms of the ratio laid down in the case of **State of Rajasthan versus Rajaram (supra)** the confession , if at all, made by the appellant, was not made in a fittest state of mind and therefore not a reliable one.

22. As has been held in the case of **State of Rajasthan versus Kistoora Ram (supra)** the extra judicial confession is a weak piece of evidence and unless there was some corroboration, the conviction solely on the basis of extra judicial confession could not be sustained. In the instant case also, not only the story of confession brought forth by PW8 has not been corroborated by any other evidence but we have also concluded that the testimony of PW8 herself is not at all trustworthy for her irreprehensible conduct.

23. We have already discussed hereinbefore in reference to the ratio laid down in the case of **Matru @ Girish Chandra (supra)** that mere absconding by itself does not necessarily lead to affirm a conclusion of guilty mind. In fact, in the instant case, no evidence has been led on the part of the prosecution that the appellant was actually absconding or fled away or trying to conceal himself after the commission of the offence. The only evidence forgoing in this regard is that the appellant was not found or not seen between 30.04.2016 and 03.05.2016. In the aforesaid case, the Hon'ble Supreme Court also held the tendency to conceal oneself or avoid the police after the commission of an offence as a natural human conduct which cannot be taken as an evidence of guilty.

24. There are evidences forgoing that the appellant and the victim used to stay together and drink in the company of each other. They enjoyed a good relationship amongst themselves. In the facts and circumstances, motive behind the commission of the offence becomes very much relevant. The prosecution has not advanced or tried to

prove the motive behind the killing of the victim by the appellant.

25. In the light of discussions made hereinbefore, we are of the opinion that the prosecution has not been able to bring home the charge leveled against the appellant with the help of convincing evidence. For the aforesaid reasons, the said judgment is liable to be set aside.

26. Accordingly, the present appeal being **CRA 265 of 2021** is allowed. The judgment and order of conviction dated 29.01.2021 & 30.01.2021 passed by the Learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No. 06(02)/2017 is hereby set aside.

27. The appellant be set at liberty forthwith, if not wanted in any other case subject to furnishing a bond to the satisfaction of learned 1st Additional and Sessions Judge, Hooghly, which shall remain in force for a period of six months in terms of the provision under section 437A of the Code of Criminal Procedure.

28. Copy of the judgment along with Trial Court Records be sent down to the appropriate court at once for necessary compliance.

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

[MD. SHABBAR RASHIDI, J.]

30. I agree.

[DEBANGSU BASAK, J.]