

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 374 of 2014

Binoy Ghosh

-Vs-

State of West Bengal

with

C.R.A. 379 of 2014

+

CRAN 3 of 2017 (Old CRAN 1492 of 2017)

Bama Charan Ghosh

-Vs-

State of West Bengal

For the Appellant
(In CRA 374/2014)

: Mr. Pratip Kr. Chatterjee, Advocate.

For the Appellant
(In CRA 379/2014)

: Mr. Kusal Kumar Mukherjee, Advocate.

For the State
(In CRA 374/2014)

: Mr. Madhusudan Sur, Id. A.P.P.
Mr. Dipankar Pramanik, Advocate.

For the State
(In CRA 379/2014)

: Mr. Neelive Ahmmed, Id. A.P.P.,
Ms. Zareen N. Khan, Advocate,
Ms. Amita Gaur, Advocate.

Heard on

: 15.02.2022 & 04.03. 2022

Judgment on

: 4th March, 2022.

Joymalya Bagchi, J. :-

Lakkhan Pal used to drive a truck owned by one Asish Mondal. On 11.9.2011 at around 8.30 p.m., he had informed his brother Ram Prasad Pal (P.W. 1) over his mobile phone bearing No. 9734746541 that he would return home by Biswabharati bus if his truck was not loaded. Lakkhan did

not return that night. On the next day also he did not return. Accordingly, Ram Prasad (P.W. 1) started searching for his brother. His mobile phone was found switched off and his employer Asis Mondal informed P.W.1 that Lakkhan had returned the key of the truck and left for his residence the previous night. Susanta Pal (P.W. 5), cousin of Lakkhan was informed and he met the owner of the vehicle on 13.09.2011. Upon enquiring at the lorry stand at Sainthia Nanda Kesharitala, P.W. 5 came to know that Lakkhan had left with Binoy Ghosh (Appellant in CRA 374 of 2014). On enquiry Binoy stated to him that he and Lakkhan had drunk wine. Lakkhan had given Rs. 30/- while he collected Rs.120/- from his brother-in-law Bama Charan Ghosh (Appellant in CRA 379 of 2014). Lakkhan received a phone call and Binoy left the place. P.W. 5 made further inquiries in the matter. He talked to Bama Charan Ghosh but nothing could be revealed about the whereabouts of Lakkhan. On 14.09.2011 around 7/7.30 a.m. P.W. 1 received information that a dead body was found on the bank of Mayurakshi river. He along with other villagers including P.W. 5 went to the spot and found the body of Lakkhan partly buried inside the sand with a plastic rope tied around the neck. Body was decomposed and P.W. 1 noted signs of injury. He lodged written complaint at the police station resulting in registration of Sainthia P. S. Case No. 124 of 2011 dated 14.09.2011 under Section 302 of the Indian Penal Code against unknown persons. Police held inquest over the dead body. Body was sent for post mortem examination. P.W. 18 held post mortem over the body of the deceased and opined death was due to strangulation associated with injuries ante mortem and

homicidal in nature. About a month after the recovery of the dead body, P.Ws. 5 and his brother, P.W. 11 visited the residence of Bama Charan. Bama Charan lamented the death of Lakkhan and made an extra judicial confession before them. He stated that Lakkhan had developed an illicit relationship with his wife. Bama Charan objected to such relationship but the affair continued. As Bama Charan had objected to the affair, his wife committed suicide by hanging. Hence, he vowed to kill Lakkhan. He made rental arrangement for accommodation of Binoy at Taltala. In the night of 11.09.2011 Bama Charan followed Lakkhan to the river side of Taltala. After Lakkhan became drunk, Bama Charan strangled him with a rope and buried his body inside the sand of the bank of the river. P.W. 5 informed such fact to police and investigating officer arrested Bama Charan Ghosh. Pursuant to his statement, Binoy was also arrested and a SIM card purportedly belonging to deceased Lakkhan and a money bag were recovered on his leading statement. Charge-sheet was filed against the appellants and charges were framed under Sections 302/34 I.P.C., Sections 201/34 I.P.C. and Section 120B I.P.C. Appellants pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 21 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. In conclusion of trial, the trial Judge by the impugned judgment and order dated 5th March, 2014 and 6th March, 2014 convicted the appellants for commission of offence punishable under Sections 302 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each, in

default, to suffer rigorous imprisonment for six months more. Hence, the present appeal.

Mr. Pratip Kumar Chatterjee and Mr. Kusal Kumar Mukherjee, learned Advocates appearing for the appellants submit the appellants have been convicted out of mere suspicion. There is no legally admissible evidence connecting them with the crime. Extra judicial confession made by Bama Charan to P.Ws. 5 and 11 is most unnatural and ought not to be relied upon. P.Ws. 5 and 11 are the relations of the deceased and there is no reason why Bama Charan would repose faith on them. It is most unnatural that the confession would be made about a month after recovery of the dead body. There is no corroborative evidence with regard to the motive as transpiring from the so called extra judicial confession. No report from the service provider was placed on record to prove SIM card allegedly recovered on the leading statement of Bama Charan belonged to Lakkhan. Thus two most vital circumstances relied upon by the prosecution have not been proved. There is hardly any evidence against Binoy. He is not even impleaded in the so-called extra-judicial confession made by co-accused. Hence, the appellants are entitled to an order of acquittal.

On the other hand, Mr. Neguive Ahmed and Madhusudan Sur, learned Additional Public Prosecutors submit the appellants are driver and cleaner of trucks and were known to the deceased Lakkhan who was also a driver of a truck owned by Asis Mondal. They had prior acquaintance with one another and on the night of the incident, Binoy was drinking with Lakkhan. Bama Charan, brother-in-law of Binoy, had given money to

purchase liquor. Thereafter, both of them conjointly murdered Lakkhan. Lakkhan had illicit relationship with the wife of Bama Charan. Bama Charan raised objection. As a result, his wife had committed suicide. Hence, there was motive to commit the crime. After the incident Binoy was untraceable and his mobile phone was switched off. On interrogation by P.W. 5, Bama Charan did not disclose whereabouts of Binoy. After the recovery of dead body of Lakkhan, Bama Charan out of remorse confessed before P.Ws. 5 and 11. On his leading statement, the SIM card of the deceased had been recovered. These circumstances establish the guilt of the appellants beyond doubt.

From the analysis of the evidence on record and the rival submissions made at the Bar, it appears that the sheet anchor of the prosecution case is an extra judicial confession made by Bama Charan to P.Ws. 5 and 11. It is submitted that the extra judicial confession was made about a month after the recovery of the dead body and that too before P.Ws. 5 and 11 who were relations of the deceased and the accused had no reason to confide in them. Hence, the extra judicial confession made to P.Ws. 5 and 11 ought not to be believed.

Confession of an accused is admissible under Section 24 of the Evidence Act. Confessions are of two types: (a) judicial confession and (b) extra judicial confession. A judicial confession is made by an accused before a Judicial/Metropolitan Magistrate under Section 164 of the Code of Criminal Procedure. Before recording such confession duty is cast upon the Magistrate to test the voluntariness of the accused making such confession

and to warn him that he is not under an obligation to make such confession and if he chooses to do so, the confession made be used against him. Upon being satisfied that the accused is making the confession voluntarily without being compelled to do so under threat, duress or undue influence, the Magistrate records the confession which is duly signed by the maker. After recording the confession, a Magistrate appends a certificate in terms of section 281 Cr.P.C. that the record contains a full and true account of the statement of the accused which has been read over and explained to the latter in a language understood by him. On the other hand, when a confession or acknowledgement of guilt is made before any person other than a Magistrate who has recorded the confession in the manner as aforesaid, such a confession is treated as an extra judicial confession. Unlike a judicial confession which is made before a judicial authority i.e. independent and impartial, extra judicial confession may be made before any individual. Furthermore, as an extra judicial confession may be oral or in writing, there is no requirement on the part of the person before whom such confession is made to reduce it into writing and have the document signed by the maker after having read over and explained the contents to him in a language understood by the latter. Maker is also not forewarned about the evidentiary impact of the confession in terms of section 281 Cr.P.C. Thus, when prosecution chooses to prove its case through an extra judicial confession in contradistinction to a judicial confession, an onerous duty is cast upon the Court to test whether the confession is made by the

accused is a reliable piece of evidence. To do so, the Court would, inter alia, satisfy itself on the following appeals:

- (a) Whether the witness who proves the confession is a reliable and credible one;
- (b) Whether the confession is proved by reproducing the words in which the confession was made;
- (c) Circumstances in which the confession made, that is whether in the given circumstances of the case the maker had adequate justification or motive to make the confession and could have reposed faith in the person to whom he made such confession. However, upon considering the aforesaid parameters, it is found that the extra judicial confession is truthful, voluntary and not vitiated by any circumstance like threat, duress or inducement upon its maker, the same can be the legal basis of conviction. However, as a matter of prudence or by way of abundant caution the Court may seek corroboration from other circumstances. [see ***Abdul Ghani vs. State of U.P.*¹, *Maghar Singh vs. State of Punjab*², *Gura Singh vs. State of Rajasthan*³**]

Keeping the aforesaid principle of law in mind I have sought to evaluate the evidence of P.Ws. 5 and 11 vis-à-vis the most vital circumstance relied upon by the prosecution, namely, extra-judicial confession made by Bama Charan.

¹ (1973) 4 SCC 17

² (1975) 4 SCC 234

³ (2001) 2 SCC 205

P.W. 5 (Susanta Pal) deposed he is a cousin of the deceased Lakkhan. Upon coming to know from P.W. 1 (Ram Prasad Pal) that his cousin Lakkhan, who was a truck driver, had not returned in the night of 11.09.2011 as well as on 12.09.2011, he joined the search. On 13.09.2011 he met the owner of the truck driven by Lakkhan. Truck owner informed him that Lakkhan had delivered key of the vehicle around 6:00 p.m. on 11.09.2011 and left for home. Upon further enquiries he came to know from one Prabir, another driver, that Lakkhan had left with Binoy. On enquiry, Binoy stated he and Lakkhan had drunk wine on that night. Lakkhan paid Rs. 30/- whereas Binoy collected Rs. 120/- from his brother-in-law Bama Charan to purchase wine. When Lakkhan received a phone call, Binoy had left the place. Out of suspicion P.W. 5 again tried to contact with Binoy. He collected his phone number from the lorry association. He also collected phone number of Bama Charan from the association. Mobile phone of Binoy was switched off. He contacted Bama Charan who stated that Binoy was missing. Bama Charan also informed that the residential address of Binoy was at Kantadihi, District- Murshidabad. P.W. 5 went there and he came to know that was his permanent residence. Father of Binoy told him Bama Charan resided at Jelibagan in Sainthia. But Bama Charan could not be found at his address. On 14.09.2011 P.W. 5 came to know dead body of Lakkhan was buried inside the sand on the bank of river Mayurakshi with a noose of rope tied around its neck. He went to the spot and was a signatory to the inquest report. It is his further deposition on 11.10.2011 receiving information from neighbours of Bama Charan he visited the latter's house.

Bama lamented about the death of Lakkhan. Thereafter he made the confession. He stated his wife had illicit relationship with Lakkhan and in spite of protest had continued the relationship. As Bama had objected to the affair, his wife committed suicide. As a result, he decided to kill Lakkhan. For that reason he arranged rental accommodation of Binoy at Taltala, Sainthia and in the night of 11.10.2011 Bama Charan followed Binoy and Lakkhan to the river side of Mayurakshi near Taltala and after Lakkhan became drunk Bama Charan strangled Lakkhan with a rope and then buried his body in the sand on the bank of the river. P.W. 5 informed the incident to the police.

Other witness to the extra-judicial confession is P.W. 11. He is the brother of P.W. 5. He deposed that he had accompanied his brother to Sainthia. On 11.10.2011 at around 4:15 p.m. they visited the house of Bama Charan at Anarpara, Sainthia and found him in the house. Bama Charan stated Lakkhan was responsible for the death of his wife. He further stated that he committed murder of Lakkhan. Susanta Pal (P.W. 5) informed the police of Sainthia Police Station. In cross-examination, he stated that they had visited Bama Charan on 11.09.2011 for the first time.

From the evidence of the witnesses it appears that they were related to the deceased Lakkhan. In fact, P.W. 5 was actively involved in the search when Lakkhan was found missing. On 13.09.2011 he interviewed the owner of the truck which was driven by Lakkhan. He visited Sainthia truck stand and had also contacted with Binoy. Thereafter he collected mobile phones of Binoy and Bama Charan and it appears that he had also a talk

with Bama Charan. The latter stated that Binoy was missing. This conduct of P.W. 5 shows he had suspected Binoy and Bama Charan in the missing of his cousin, Lakkhan. Subsequently on 14.09.2011, dead body of Lakkhan was recovered buried in the sand on the bank of Mayurakshi river. About a month after the recovery of the dead body, P.W. 5 claimed upon information from neighbours of Bama Charan he went to the latter's residence. At this stage, Bama lamented death of Lakkhan and confessed he had murdered the latter. In order to test the reliability of the aforesaid extra-judicial confession, it is important to assess whether in the aforesaid factual background Bama Charan would repose confidence in P.W. 5 and confess to him. P.W. 5 was neither a relation nor a friend of Bama Charan. He was certainly not a person who would protect Bama Charan if he disclosed his involvement in the murder to him. On the contrary, he was related to the deceased and was suspicious about the role of Bama Charan in the incident. No man of ordinary prudence would confide his guilt to a relation of a deceased more so to one who by his prior conduct treats the confessor as a suspect. It is also relevant to note none of the neighbours of Bama Charan have been examined to corroborate the version of P.W. 5 that he had received information about whereabouts of Bama Charan from them and visited his house. On the other hand, prosecution has relied on P.W. 11, brother of P.W. 5, to corroborate his version. P.W. 11 is also a relation of the deceased and an interested witness who would naturally support his brother (P.W. 5) with regard to the extra-judicial confession made by Bama Charan. I am of the view it is improbable Bama Charan would repose

confidence on P.Ws. 5 and 11, close relations of the deceased, to make a confession to them, more particularly, when P.W. 5 by his prior conduct disclosed suspicion about the role of the appellants in the incident. The other aspect which renders the confession improbable is the inordinate delay in making the confession. The extra-judicial confession is said to have been made on 11.10.2011 i.e. 27 days after the recovery of the dead body. Evidence on record shows after the incident the appellants had evaded P.W. 5 and had not disclosed about the whereabouts of the missing Lakkhan on earlier occasions. What prompted Bama Charan to have a sudden change of heart after a month of the incident and confess to P.W. 5 is unclear. It is contended that Bama Charan lamented the death of Lakkhan and made the confession. Such behaviour of Bama Charan appears to run against the normal course of human conduct. He had no reason to repose confidence on the near relations of the deceased and confess his guilt to them. On the other hand, the witness (P.W. 5) and his brother (P.W. 11) before whom the confession was made entertained suspicion about the role of the appellants in the murder and had every reason to manufacture this piece of evidence to implicate them in the crime. Thus, I am unwilling to rely on P.Ws. 5 and 11 with regard to the so-called confession made to them about a month after the incident.

In ***Heramba Brahma & Ors. vs. State of Assam***⁴, Apex Court while dealing with the issue of reliability of extra-judicial confession, inter alia, observed as follows :

⁴ AIR 1982 SC 1595

“.....extra judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed.....”.

In ***Majenderan Langeswaran vs. State (NCT of Delhi)***⁵, the Court doubted the credibility of confession made to witnesses who were inimical to the accused.

In ***State of Punjab vs. Gurdeep Singh***⁶, Apex Court refused to rely on an extra-judicial confession made by an accused to a fellow driver and that too after delay of more than 20 days from recovery of the dead body of the deceased.

In the present case, the confession is not made to a friend or colleague but to persons who are related to the deceased and inimical to the maker. Moreover, it was made 27 days after the recovery of the dead body and no cogent or compelling evidence is placed on record to show why after such a protracted period of time, Bama Charan would repose faith on the relations of the deceased and implicate himself as the murderer of Lakkhan. There is also no evidence on record corroborating the motive of crime as coming out from the so-called confession. No evidence has been led on behalf of the prosecution to show that the wife of Bama Charan had illicit affair with the deceased or had committed suicide due to objections raised by him. Although Bama Charan claimed in the confession that he had arranged for the rental accommodation of the co-accused Binoy at Taltala, Sainthia, evidence of P.W. 10, landlord of Binoy at Taltala, Sainthia, does not

⁵ (2013) 7 SCC 192

⁶ (1999) 7 SCC 714

corroborate such fact. With regard to the manner in which Bama Charan killed Lakkhan by strangulating him and thereafter burying his body in the sand, I am constrained to observe that the recovery of the body of Lakkhan buried in the sand with a noose around his neck had been witnessed by P.W. 5 on 14.09.2011 and, therefore, there is every possibility that he tailored the extra-judicial confession to fit the aforesaid circumstance.

Thus, I am of the opinion the prosecution has hopelessly failed to establish that the appellant Bama Charan had reasonable justification to make the confession about a month after the incident and that too before the relations of the deceased namely P.Ws. 5 and 11, one of whom was already suspicious of his activities.

The other vital circumstance relied upon by the prosecution is recovery of SIM Card and other articles pursuant to the statement of Bama Charan.

P.W. 20, (S.I. Brajendranath Maity) Investigating Officer, deposed he arrested Bama Charan on 11.10.2011 and upon interrogation Bama stated that if he is given a couple of days he would be able to identify the mobile set of Lakkhan and also help police arrest Binoy. P.W. 20 further stated on 14.10.2011 a black money bag and a Vodafone SIM Card were recovered from the residence of the appellants. This was witnessed by P.W. 16 (Md. Mansur Sk.), a member of National Volunteers Force attached to the police station. P.W. 20 prepared a seizure list in connection with the aforesaid seizure marked as Exhibit-6/1. Subsequent statement made by the appellant was exhibited and marked as Exhibit-12. The aforesaid seizures are extremely doubtful. While in the leading statement Bama Charan stated

if given time he would show the place where mobile set is hidden, what was recovered is a SIM Card and not a mobile set.

I am also unable to appreciate the contents of the statement (Exhibit-11) made by Bama Charan to police. Bama Charan was arrested on 11.10.2011 and he made the statement on 12.10.2011. After 2 days, on 14.10.2011, the SIM Card and money bag were recovered from his residence purportedly on the basis of such statement. I am unable to appreciate why Bama Charan (who was already in custody) sought time to lead the police to the place where the SIM Card was kept. On the other hand, the time lag between the leading statement and the alleged recovery gives rise to the suspicion that the seized articles may have been planted in the interregnum. Suspicion is further raised as the recovery is not witnessed by any one other than a member of National Volunteers Force attached to the police station. Hence, recovery of the SIM Card on the leading statement of Bama Charan does not appear to have been established on reliable and convincing evidence. That apart, no report is obtained from the service provider namely Vodafone to show that the recovered SIM Card relates to the mobile phone of the deceased. It is true mobile phone number of the deceased is endorsed on the seizure list but such endorsement simpliciter does not absolve the prosecution from producing the best evidence with regard to the fact that the SIM Card recovered from the house of Bama Charan related to the mobile phone of the deceased. Thus, I am of the opinion the aforesaid circumstance of recovery of SIM card of the deceased from Bama Charan is

not proved and does not establish a live link between the appellants and the crime.

If the aforesaid two vital circumstances are left out what remains of the prosecution case is mere suspicions arising out of the statement of Binoy that he and the deceased Lakkhan were consuming liquor on the fateful night. Binoy further stated money had been provided to him by Bama Charan to purchase liquor. This statement of Binoy is an exculpatory one as he stated that he left the spot prior to the incident. Prosecution has also referred to the conduct of the appellants in not co-operating with the search and not disclosing the whereabouts of Lakkhan. Binoy was found missing and his mobile phone was switched off. These circumstances by themselves do not form a complete chain far less irresistibly point to the guilt of the appellants. They may create some suspicion but such suspicion would not transcend to legal proof. On the other hand, suspicion arising out of these circumstances may have prompted an overzealous relative like P.W. 5 to create a fiction of extra-judicial confession to breach the gap and implicate the appellants in the crime. Hence, in this backdrop, I find the so-called extra-judicial confession to be highly artificial and unworthy of evidence.

Hence, I am of the opinion prosecution has been unable to prove its case beyond reasonable doubt. Conviction and sentence of the appellants are set aside.

The appeal is, accordingly, allowed.

In view of disposal of the appeals, connected application being CRAN 3 of 2017 (Old No. CRAN 1492 of 2017) is also disposed of.

Appellant Bama Charan Ghosh, shall be released from custody, if 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.

Appellant Binoy Ghosh, shall be discharged from his bail bonds after expiry of six months in terms of section 437A Cr.P.C.

Copy of this judgment along with the lower court records be sent down to the trial court at once for necessary compliance.

Urgent photostat certified copy of this judgment, if applied for, be furnished to the parties expeditiously.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)