

Form No. J(1)

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. 723 of 2004

Swapan Molla
-vs-
The State of West Bengal

For the Appellant : Ms. Afreen Begum, Adv.

For the State : Mr. Arijit Ganguly, Adv.
Mr. Avik Ghatak, Adv.

Heard on : 29.11.2021, 27.01.2022 & 21.02.2022

Judgment on : 21.02.2022

Joymalya Bagchi, J. :-

This appeal is directed against the judgment and order dated 13th February, 2004 passed in Sessions Case No. 12(6) of 2002 (Sessions Trial No. 4(7) of 2002 convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.5,000/, in default, to suffer simple imprisonment for three months more.

The appellant has been charged as follows :

“ That, you on or about the 16.01.1998 after 1.00 P.M. within village Teliaberia under P.S. Onda, did commit murder knowingly causing the death of Minati Garai @ Phani and thereby committed an offence punishable under Section 302 of the Indian Penal Code.”

The prosecution case as alleged against the appellant is to the effect that on 16.01.1998 at 1:00 p.m., Subhas Chandra Garai (P.W. 1) had returned home from his sweetmeat shop. He found his younger brother, Jagabandhu (P.W. 3) had not returned after watering potato plants in the field. The younger sister Minati @ kali was sent to serve lunch to his younger brother who was still working in the field. After sometime, Jagabandhu returned home and informed others he had not met Minati but Minati did not return home. Haradhan Garai (P.W.2), another brother of Minati, went out to search for her. After sometime he returned and informed that Minati had been killed. Appellant had smeared vermilion on her forehead at the 'shivasthan' and had taken her into the jungle. There he slit her throat and fled away. Some of the villagers saw the appellant fleeing away after the murder and informed Haradhan. The latter found the body of Minati lying supine with her throat slit. Appellant was not found at his home. It is further alleged appellant had been disturbing Minati and had proposed to marry her. Minati refused. As a result, he took her to the jungle and killed her. F.I.R. being Onda P.S. Case No. 4/1998 dated 16.01.1998 under Section 302 IPC was registered against the appellant on the written complaint of P.W. 1. Police went to the place of occurrence and prepared

inquest report. Appellant was arrested and on his showing his bloodstained wearing apparels and weapon of offence, that is, razor recovered. Charge-sheet was filed and the appellant was charged, as aforesaid. In the course of trial, prosecution examined 13 witnesses and exhibited a number of documents.

Defence of the appellant was one of innocence and false implication. In conclusion of trial, trial Judge by impugned judgment and order dated 13th February, 2004 convicted and sentenced the appellant.

Learned Counsel appearing for the appellant submits that the prosecution case is based on circumstantial evidence. All the circumstances have not been duly proved. The chain of circumstances also does not unerringly point to the guilt of the appellant. More specifically, it is argued the place of occurrence has not to be established. No blood stained earth was recovered from the place of occurrence. In the rough sketch map, place of occurrence is noted in a Bansdanga jungle which is a wide area. P.Ws. 4, 8 and 10 are chance witnesses who rushed to the spot hearing cries of the victim. Victim had suffered a cut throat injury which improbabilises the fact that she could cry out after the attack. Hence, presence of the witnesses at the spot and their version is most unrealistic. Their depositions also suffer from various embellishments and inconsistencies. Place of arrest of the appellant has not been proved. No arrest memo was produced. Disclosure statement of the appellant had not been recorded in writing. Hence, recovery pursuant to the disclosure statement of the appellant is most doubtful. FSL report does not prove origin of blood on the wearing apparels

as well as weapon of offence. Hence, the appellant is entitled to an order of acquittal.

Mr. Ghatak, appearing for the State submits appellant had motive to commit the murder. He had proposed to marry the victim which was spurned by the victim. Hence, he forcibly took the victim to the Shibasthan, put vermilion on her forehead and killed her in the jungle. Soon after the incident he was found running away from the jungle in bloodstained clothes and razor in hand by local cowherds namely P.Ws. 4, 8 and 10. Presence of the cowherds near the place of occurrence has been duly explained. The deposition cannot be brushed aside on the plea they are chance witnesses. On the showing of the appellant, bloodstained wearing apparels and razor was recovered. FSL report shows presence of human blood on the handle of the razor. Origin of blood could not be detected on the wearing of apparels due to disintegration owing to delay in examination. Hence, the prosecution case has been duly proved.

P.W. 1, Subhas Chandra Garai, P.W. 2, Haradhan Garai and P.W. 3, Jagabandhu Garai are the brothers of the deceased girl.

P.W. 1 is the informant also. He deposed on 16.01.98, he returned home from his sweetmeat shop around noon and found that his youngest brother namely, Jagabandhu had not returned from the field. He asked Minati to take lunch to Jagabandhu. Accordingly, Minati left their residence and proceeded towards the field. Soon thereafter Jagabandhu returned but Minati was untraceable. Jagabandhu stated he had not met Minati. Accordingly, Haradhan (P.W. 2) went out to search for Minati. Some persons

in the field reported they had seen the appellant flee away after murdering Minati at Bansdanga jungle. Haradhan went to Bansdanga jungle and found the body of Minati with cut-throat injury. Local people came to the spot. Thereafter, P.W. 1 along with others went to Onda police station and lodged complaint. He proved the written complaint. He stated the appellant used to pester Minati with immoral proposals but she refused. He had warned Minati to be careful. After the arrest of the appellant he was taken to the jungle and on his showing blood stained apparels along with a razor was seized under a Eucalyptus tree bush. He signed on the seizure list. He identified the seized articles.

P.W. 1 is corroborated by his brother Haradhan, P.W. 2 who stated Netai Garai (P.W. 8), Ananda Mohan Garai (P.W. 4) and others had seen Swapan Molla fleeing away after murdering Minati. They intimated the incident to him and thereafter he had gone and seen the body of Minati lying beside Kangsabati canal.

P.W. 3 Jagabandhu Garai also corroborated the evidence of his brothers. He deposed he had gone to work in the field and when he returned home he was told Minati had been sent to supply lunch to him. He, however, did not notice Minati. Subsequently, Haradhan went out and was informed by cowherds that they had seen Swapan Molla fleeing along the field after murdering Minati in Bansdanga jungle. Haradhan also saw the dead body of Minati with cut throat injury.

P.W. 9, Sunil Banerjee is a local villager who has corroborated P.Ws 1 and 2. He deposed P.W. 1 reported the incident to him. He accompanied P.W. 1 to the police station and had also signed on the inquest report.

P.W. 4, P.W. 8. and P.W. 10 are the cowherds who were herding cows near the Sibasthan situated beside Bansdanga jungle.

P.W. 4, Ananda Mohan Garai stated he and Netai (P.W. 8) were herding cows. Suddenly they heard sound coming from Bansdanga jungle. They rushed towards the jungle and found the appellant fleeing away. He was wearing a white shirt and brown pant. His wearing apparels were soaked with blood. He had a razor in his hand. In the jungle they found the body of Minati. They raised alarm. Some people came to the spot. As they were proceeding to the house of Minati, they met Haradhan and narrated the incident to him.

P.W. 8, Netai Garai has substantially corroborated the deposition of P.W. 4.

P.W. 10, Mrityunjoy Garai is another cowherd who upon hearing hue and cry followed Netai and Ananda and found the appellant fleeing away from the jungle. His wearing apparels were soaked with blood. He found the body of Minati lying beside the *khal* inside the jungle with cut throat injury.

P.W. 5, Kadan Soren is another cowherd who however did not support the prosecution case and was declared hostile. Nonetheless he admitted he was herding cows on the eastern side of Bansdanga jungle. Upon seeing many local villagers heading towards the northern side of the jungle he proceeded towards the jungle. He found a lady was lying inside the jungle

with cut throat injury. He also heard from the villagers that the appellant had murdered and fled away.

P.W. 6, Dr. Jnanendranath Dey is the post mortem doctor. He noticed the following injuries :

“One incised wound 5” x 2” x into vertebra over upper part of front of neck, out of 5” x 3” of right side and two inch of left side, 3” below chin and 3” above sternal notch 1” below the tip of right mastoid process and two inch below the left angle of lower jaw on dissection it was seen to have cut across the skin, fossa, muscles vessels (right external jugular vein and common carotid artery) then cut through and through larynx and trachea then slightly cut the body of fourth cervical vertebrae.”

He opined death was due to effect of cut throat injury, ante mortem and homicidal in nature. He proved the post-mortem report, Exhibit 3. In cross-examination, he stated if the throat is cut by razor with pressure, such injury would disable the victim from crying or raising alarm.

P.W. 12 and P.W. 13 are the Investigating officers of the case.

P.W. 13, Pranab Kumar Chatterjee is the first investigating officer. He deposed he went to the place of occurrence and found a girl lying with cut throat injury in a pool of blood. He held inquest over the dead body. He proved inquest report, Exhibit 7. He sent the body for post mortem examination and collected the post mortem report. He made rough sketch map of the place of occurrence. He seized blood controlled earth from the place of occurrence. He examined witnesses. On 16.01.1998 at around

21.45 hours, he arrested the appellant from Purusottam jungle and on interrogation he admitted that he had hidden some articles and offending weapon in the jungle. He took them to the spot and brought out blood soaked white shirt, brown trouser from a culvert and the weapon of offence i.e. *razor* under an Eucalyptus bush. He seized the articles under seizure lists, Exhibits 10 and 10(a) respectively. He sealed the seized articles and sent them for FSL examination. In cross-examination, he admitted that he had not prepared arrest memo but the accused was informed about the cause of arrest.

P.W. 12, Promod Ranjan Barman is the second investigating officer of the case. He collected FSL reports, Exhibits 5 and 5(a) as well as post mortem report and submitted charge sheet.

Seizure of the wearing apparels and other articles as well as weapon of offence was made in presence of P.W. 1. P.W. 7, Debaprasad Mukherjee and P.W. 11, Goutam Khan were the independent witnesses to the seizure. Though P.W. 7 did not support the prosecution case and was declared hostile, he admitted his signature on the seizure list which he claimed he had put at the police station. He was extensively cross-examined with regard to his previous statement in court. P.W. 11, the other independent witness to the seizure, however, supported the prosecution case and proved his signature on the seizure list.

From the aforesaid evidence on record it appears appellant was known to the deceased. He was pestering her with indecent proposals which she resisted. She was also warned by her brother, P.W. 1 to be careful. On

the day of the incident Minati had gone out of her house in the afternoon to supply lunch to her brother Jagabandhu, P.W. 3 but she did not return home. Another brother namely, Haradhan went out to search for her and was informed by local cowherds that the appellant was seen fleeing away from the jungle area after having murdered his sister. Haradhan found her sister lying beside Kangshabati canal in the jungle with a cut throat injury. His deposition is corroborated by all the witnesses including the hostile witnesses namely P.Ws. 5 and 7. Hence, the place of occurrence with regard to the attack on the victim resulting in her death due to cut throat injury beside Kangshabati canal inside Bansdanga jungle is proved beyond doubt. Judged from this backdrop, contention of the appellant that the place of occurrence has not been proved is of little substance.

The vital circumstance the appellant was seen fleeing away from the place of occurrence with blood stained clothes and the weapon of offence i.e. razor is proved through the depositions of P.Ws. 4, 8 and 10. These witnesses are local villagers who were herding cows in the field adjoining the Sibasthan. Sibasthan is situated beside the jungle. While herding cows P.Ws. 4 and 8 heard a cry. They proceeded towards the jungle and saw the appellant running away with blood stained clothes and razor. They went into the jungle and discovered the dead body of the victim with cut throat injury. P.W. 10 followed them and also saw the appellant run away from the jungle after murdering the victim.

It is contended presence of the witnesses at the spot is unlikely and they are chance witnesses. I am unable to accept such contention.

Witnesses have clearly explained the circumstances in which they were present near the field beside Sibasthan adjoining the jungle. They were herding their cows as a part of their daily activities. P.W. 8 has succinctly explained the situation. He deposed after cultivation they let their cows free to herd in the field near Sibasthan adjoining the jungle. Thus their presence at the place of occurrence cannot be said to be a matter of chance but on the other hand it appears their presence at the spot was in the course of daily activities. Even in the case of chance witnesses, their depositions cannot be thrown out on such premise alone until and unless the same suffers from inherent improbabilities.

In this regard the prosecution has aptly referred to ***Chanakya Dhibar vs. State of West Bengal and Ors.***¹

Learned Counsel for the appellant submits depositions of the witnesses suffer from gross embellishment when compared to their earlier statement to police. I have analyzed the evidence of the witnesses on that score. Omission with regard to minute details would not amount to material contradictions which would improbabilise the deposition of a witness. In the present case nature of contradictions as appearing from the cross examination of investigating officer (P.W. 13) vis-a-vis evidence of P.Ws. 4, 8 and 10 in Court do not appear to be substantial. They did not state about the blood soaked wearing apparels of the appellant to police. However, P.W. 4 in his statement to police stated there were blood stains on the body of the appellant. In this backdrop, variations in the depositions of

¹(2004) 12 SCC 398 (See para 17)

the witnesses vis-a-vis their earlier statement to police are minor and do not amount to material contradiction which would shake the very foundation and intrinsic truth of their versions in Court. Referring to the deposition of PM doctor (PW 6), it is contended in view of the nature of injury suffered by the victim, she could not have cried out loudly. Hence, version of PWs. 4 and 8 that they heard loud cries and rushed towards the jungle is improbable. Evidence has come on record victim was being pestered by the appellant with immoral proposals. She had been warned about the appellant earlier. Hence, she would be circumspect and wary of the appellant. Under such circumstances, when the appellant dragged her to the jungle and was about to strike her, she would naturally cry for help. Medical evidence does not rule out the possibility of the victim crying for help immediately prior to her being attacked. This alerted the witnesses who rushed towards the jungle and saw the appellant run away from the spot after the murder. On the other hand, the said witnesses reported the incident to the brother of the deceased (P.W. 2) and others immediately after the incident. Even P.W. 5, a hostile witness, stated that he heard from the villagers that the appellant had been seen running away from the spot after murdering the victim. These pieces of evidence clearly corroborate the depositions of P.Ws. 4, 8 and 10 that they were present in the field adjoining the jungle and had seen the appellant run away from the place of occurrence with blood stained wearing apparels and razor in hand.

It is argued that the recovery of the wearing apparels as well as razor is doubtful. Arrest memo had not been prepared nor was the disclosure

statement reduced in writing by the investigating officer. Failure to prepare arrest memo in the present case, in my considered view, is a remissness in investigation. However, investigating officer (P.W. 13) has categorically stated in Court the time and place where he had arrested the appellant. Arrest of the appellant by investigating officer is supported by other prosecution witnesses. During interrogation, appellant stated to the investigating officer that he had hidden his wearing apparels and the weapon of offence and could show him the place where he had secreted those articles. Thereupon, investigating officer took the appellant to the jungle and in presence of witnesses on the showing of the appellant recovered blood stained wearing apparels under a culvert and the razor from a nearby Eucalyptus bush.

P.Ws. 1 and 9 were present at the time of recovery and stated on the showing of the appellant the aforesaid recoveries were made. P.W. 11, an independent witness, has also corroborated the prosecution case and stated police had brought the appellant to the jungle and he accompanied the police on the latter's request. On the showing of the appellant blood stained wearing apparels and razor were recovered. He was also a signatory to the seizure list prepared in connection with the aforesaid seizures. P.W. 7, another seizure list witness, however, was declared hostile. Nonetheless he admitted his signature on the seizure list, though he claimed to have signed at the police station.

Section 27 of the Evidence Act makes an exception to the general rule of inadmissibility of confession made by an accused before police officer. It

provides where information received by a police officer from an accused in custody relates to discovery of a fact, such information to the extent relates to subsequent discovery may be proved. Nothing in aforesaid section makes it imperative that the information must be reduced into writing in order to make it admissible in law. Hence, oral information made by the appellant to the investigating officer which lead to the subsequent recovery of the place where he had hidden the blood stained wearing apparels and the razor cannot be said to be inadmissible in law. Moreover, conduct of an accused in pointing out the place where he had hidden the articles leading to the discovery is relevant under section 8 of the Evidence Act. Recovery of incriminating articles including the weapon of offence is not only been supported by the relations of the deceased but independent witnesses, P.Ws. 9 and 11. Thus, I am of the opinion recovery of the blood stained articles and weapon of offence on the showing of the appellant has been duly proved in the instant case.

It has finally been argued that origin and group of blood found in the apparels and weapon of offence has not been established. Exhibits 5 and 5(a) are the FSL reports. Perusal of the reports would show though human blood was detected on the trouser and handle of the razor, origin of blood found on the shirt could not be noted. In this regard Mr. Ghatak has argued failure to trace the origin of blood in the serologist's report is due to lapse of time resulting in disintegration of the sample and cannot be a ground to disbelieve the prosecution case. He refers to ***State of Rajasthan vs. Teja***

Ram & Ors.² and **Gura Singh vs. State of Rajasthan**³ in support of his contention.

I find much substance in his argument. Firstly, serologist report noted presence of human blood on the handle of the weapon of offence i.e. razor and trouser. Failure to trace the origin of blood on the other articles including shirt is due to disintegration of the sample. The incident occurred in January, 1998 whereas the chemical examination had been conducted in June and August, 1999, i.e., about one and half years later. Under such circumstances, disintegration of blood on some of the articles is most natural and cannot cast any doubt far less reasonable doubt on the prosecution case, more so when the most vital evidence i.e. weapon of offence was found to be stained with human blood.

In view of the aforesaid discussion, I am of the opinion that prosecution has been able to prove its case beyond doubt on the basis of the following circumstances:-

(a) Appellant had motive to commit the crime. He had been pestering the victim lady with indecent proposals which the victim resisted. Victim had been warned about the appellant by her brother (P.W. 1);

(b) On the date of occurrence victim had left her house carrying lunch for her youngest brother (P.W. 3) who was working in the field;

(c) Her youngest brother (P.W. 3) returned home and informed the inmates that he had not met the victim;

(d) Victim did not return home and was untraceable;

² (1999) 3 SCC 507 (See para 24-27)

³ (2001) 2 SCC 205 (See para 20)

(e) P.W. 2 went out to search for the victim and was informed by local cowherds that they had seen the appellant run away from the jungle after murdering the victim;

(f) Cowherds found her dead body with cut-throat injury beside the canal in Bansdanga jungle. P.W. 2 and others also found the dead body at the aforesaid spot;

(g) Police held inquest over the body and post mortem doctor (P.W. 6) established cause of death of the victim;

(h) Appellant was missing from his residence and the village till he was arrested in the night of the incident;

(i) Blood stained wearing apparels of the appellant were recovered from the nearby culvert and weapon of offence was also recovered from a nearby eucalyptus bush;

(j) FSL report (Exhibit-5 and 5(a)) showed presence human blood on the trouser as well as handle of razor recovered on the showing of the appellant.

Accordingly, I am of the view that conviction and sentence imposed on the appellant is liable to be upheld.

The appeal is, accordingly, dismissed.

We are informed that the appellant is in parole. His parole stands cancelled and he shall forthwith surrender and serve out the remainder of his sentence.

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

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

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

cm/tkm/akd/sdas/PA (Sohel)