

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

Present:

**The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi**

C.R.A. 299 OF 2020

Sk. Nasim & Anr.

VS.

The State of West Bengal

For the appellants: Mr. Mrityunjay Chatterjee, Advocate
Mr. Debapriya Majumder, Advocate
Mr. Samrat Paul, Advocate

For the State : Mr. Neguive Ahmed, Ld. APP
Ms. Zareen N. Khan, Advocate
Ms. Ayantika Ray, Advocate

Heard on : December 14, 2022

Judgment on : December 14, 2022

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated November 25, 2020 and the order of sentence dated November 26, 2020 passed by the learned Additional Sessions Judge, First Court, Howrah in Sessions Trial Case No.379 of 2012.

2. By the impugned judgment of conviction and the order of sentence, the appellants were convicted under Section 302 of

the Indian Penal Code, 1860 and sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/- each and in default of payment of fine they are to suffer further rigorous imprisonment for a period of six months.

3. On the basis of the written complaint of the father of the victim, lodged on July 16, 2012, the police registered a police case being Sankrail Police Station FIR No.438/2012 dated July 16, 2012 under Sections 302/201 of the Indian Penal Code, 1860. On completion of the investigation, the police submitted charge sheet against the appellants. The Court framed charges against the appellants on March 25, 2013 under Sections 302 read with Section 34 of the Indian Penal Code, 1860. The appellants were charged with the murder of the victim. It was alleged that on July 15, 2012 the appellants murdered the victim behind the bushes of C.W.C godown near the bank of river Ganges of village Podra Paschim Para under Sankrail Police Station, District Howrah in furtherance of common intention.

4. The appellants pleaded not guilty and claimed to be tried. At the trial, the prosecution examined 11 witnesses and

tendered both documentary and materials evidences. On conclusion of the evidence on the part of the prosecution, the appellants were examined under Section 313 of the Code of Criminal Procedure where they claimed to be innocent and falsely implicated.

5. Learned Advocate appearing for the appellants submits that the learned Trial Court erred in convicting the appellants. The prosecution could not establish the charge beyond reasonable doubt. It is not the case of the prosecution that, any person saw the appellants with the victim at the time of the murder or prior to the incident. No witness of the prosecution stated in their testimonies that the appellants were last seen together with the victim. The entire case of the prosecution was based upon hearsay evidence.

6. Learned Advocate appearing for the appellants submits that, there is no eye-witness to the incident. The prosecution did not bring forth any witness who saw the incident. The prosecution sought to prove the case on circumstantial evidence. All circumstances were not established beyond reasonable doubt. The chain of circumstances was not

established at the trial. Consequently, the prosecution could not establish the charge against the appellants beyond reasonable doubt.

7. Learned Advocate appearing for the appellants after taking us through the evidence of the prosecution witnesses, submits that, P.W.3 and P.W.6 are seizure list witnesses. P.W.3 in his evidence stated that, he signed the seizure list at the Police Station. He was declared hostile. P.W. 5 also stated that, he signed the seizure list at the police station. P.W.5 was not declared hostile. Therefore, the seizure list was prepared at the police station. Moreover, P.W.5 stated that, he signed the seizure list when the same was blank.

8. Referring to the evidence of P.W.4 who was the blacksmith, learned Advocate appearing for the appellants submits that, it is unbelievable that the P.W.4 could identify the hammer sold. The so-called murder weapon was readily available in the market. The murder weapon did not contain any distinguishing features for the P.W.4 to claim that such murder weapon was sold by him to the appellants. He refers to the evidence of P.W.4 so far as it relates to the identification

of the appellants. P.W. 4 never knew the appellants. He submits that, the evidence of P.W.4 should be disbelieved.

9. Learned Advocate appearing for the appellants submits that in the facts and circumstances of the present case, the appeal should be allowed and that the appellants be acquitted.

10. Learned Additional Public Prosecutor appearing on behalf of the State submits that the prosecution was able to establish the charge beyond reasonable doubt. He submits that there are various evidences on record which completes the chain of circumstances and involves the appellants in the murder of the victim.

11. Learned Additional Public Prosecutor submits that, a seizure list was prepared on July 16, 2012 with regard to the murder weapons. He submits that such seizure list was tendered in evidence and marked as Exhibit 3. He draws the attention of the Court to the contents of Exhibit 3. He submits that Exhibit 3 contained a statement that, the recovery was being made on the basis of the leading statements made by the appellants.

12. The learned Additional Public Prosecutor submits that, the seizure of the murder weapons was made near the place of occurrence. The murder weapons were recovered from places which was known to the appellants. The murder weapons were recovered from such places which were hidden from normal human eye-sight and were known exclusively to the appellants.

13. Learned Additional Public Prosecutor appearing for the State submits that, copies of the documents which the prosecution relied upon at the trial, were made over in advance, in compliance with the provisions of Section 207 of the Code of Criminal Procedure, to the appellants. The appellants were represented by an Advocate at the trial. The appellants did not object to the marking of Exhibit 3 or the contents of Exhibit 3 at the trial. Therefore, Exhibit 3 should be construed to mean that the recoveries of the murder weapons were made on the leading statements made by the appellants.

14. Moreover, learned Additional Public Prosecutor submits that, the seizure list witnesses acknowledged their signatures

on Exhibit 3. He contends that, drawing the attention of the Court to the colour of Exhibit 3, the claim of P.W.5 that he was made to sign on a blank white paper is without any foundational basis. Exhibit 3 was prepared on a paper which is more yellowish than white.

15. Learned Additional Public Prosecutor draws the attention of the Court to the evidence recorded at the trial. He submits that, there was a motive for the murder. There was a monetary transaction between the appellants and the father of the victim.

16. Referring to the evidence recorded at the trial, learned Additional Public Prosecutor submits that, the appellants made extra-judicial confession in presence of the father of the deceased. The father of the deceased deposed as to the same at the trial. The father of the deceased was cross-examined at length. Therefore, there is no scope to disbelieve the extra-judicial confession made. In such circumstances, learned Additional Public Prosecutor submits that the impugned judgment of conviction and the order of the sentence should be upheld.

17. Eleven prosecution witnesses were examined at the trial. None of the prosecution witnesses claimed that the appellants were last seen with the deceased. Such is not the assertion of any of the prosecution witnesses at the trial.

18. P.W.1 is the younger brother of the deceased. He stated that, he last saw the deceased in front of Chunabhati near Food Corporation of Indian Garden. He did not say that, he saw the appellants and the deceased at such place. He identified the appellants in Court. He, however, stated, that Raja alias Rahim was the brother-in-law of the deceased and Nasim was the brother of Raja alias Rahim. He stated that, relationship with the appellants were not cordial as there were disputes with regard to money.

19. P.W. 2 is the seizure list witness. He identified his signature on the seizure list dated August 4, 2012 which was tendered in evidence and marked as Exhibit 3/1. He stated that, they called him to the Police Station, showed him a sharp cutting weapon and a hammer. He signed on the seizure list as per direction of the police. He did not know the contents of the paper. He did not know who murdered the deceased. He

was declared hostile by the prosecution. In cross-examination, P.W.2 stated that, he put his signature on a blank white paper in the police station as per direction of the police. He claimed that he did not see the sharp cutting weapon and the hammer in Court on the date of his deposition.

20. The wife of the deceased deposed as P.W.3. She stated that, she was present in her house at the time of the incident. On July 14, 2012 when the deceased did not return at about 11 p.m., she told her father-in-law to obtain information about the deceased. Her father-in-law told her that the deceased did not receive the phone call. During the night her father-in-law and her younger brother-in-law searched for the deceased but in vain. On the next day morning, she heard at about 8 a.m. that the dead body of the deceased was lying behind the Food Corporation of India garden on the bank of river Ganges.

21. She stated that, after about 15 days she heard that the appellants murdered the deceased. She stated that, on the date of the murder, the deceased went to his workplace at about 3 p.m. from their house. Appellants took her husband

from such place of work. This fact was informed to her by P.W.2. She was cross-examined at length by the defence.

22. Significantly, P.W.2 in his deposition did not aver stating anything to P.W.3 about any of the appellants taking the deceased from the work place.

23. P.W. 4 is a blacksmith by profession. He stated in his evidence that about two years back the appellants came to his shop and purchased an iron hammer. After 3 days of the sale of the iron hammer, he heard that one dead body was lying behind the Food Corporation of India godown. He went to the place of occurrence and found the dead body and became aware of the name of the deceased. He identified the appellants at the correctional home. He identified the iron hammer, which one of the appellants purchased from him.

24. In cross-examination, P.W.4 stated that, the police told him to go to the police station and, therefore, he went there. He also went to the correctional home. He acknowledged in cross-examination that, he did not know the appellants before the incident.

25. P.W.5 is another seizure list witness. He identified his signature on the seizure list which was marked as Exhibit 3/2. He stated in his evidence that he signed on the seizure list at the police station. He was not declared hostile by the prosecution. In cross-examination, he stated that, he put his signature at the police station and at that time the seizure list was blank with no writing thereon. He also acknowledged the fact that any evidence given by him on that date was hearsay. He also acknowledged the fact that, he could identify the appellants as they were the relatives of the deceased who was his friend.

26. The learned Magistrate in presence of whom the T.I. Parade was conducted deposed as P.W.6. He tendered the T.I. Parade report which was marked as Exhibit 4.

27. The doctor who verified the post-mortem on the deceased deposed as P.W.7. He stated about the injuries that he found on the deceased. In his opinion, he said that the death was due to the effect of injuries noted in the post-mortem report, ante-mortem and homicidal in nature. The post-mortem report was tendered in evidence marked as

Exhibit 5. He also opined that the injuries on the deceased may be caused by moderately heavy or heavy sharp cutting weapon such as kathari/da. Lacerated injuries on the scalp may look like incised looking wound. The lacerated injuries caused by the weapon like hammer on the scalp may look as incised wound.

28. The father of the deceased deposed as P.W. 8. In cross-examination he stated that, he did not see the incident of the murder. He claimed that, he heard about the incident from the appellants at the police station in presence of the Officer-in-Charge of Sankrail Police Station and the Officer-in-Charge of Nagirganj Police Station. With regard to the monetary transaction between him and one of the appellants, he acknowledged in cross-examination that he was making such assertion for the first time in Court.

29. The Officer-in-Charge of the Sankrail police station deposed as P.W. 9. He stated that, on the basis of the written complaint, he lodged the formal FIR. He did not speak of any extrajudicial confession being made by the appellants or any of them to P.W. 8 at the Police Station or at any place. The

Sub-Inspector of Police, who held the inquest of the dead body of the deceased deposed as P.W. 10. The I.O. deposed as P.W. 11.

30. In his testimony, P.W. 11 stated that, he seized the hammer and sharp cutting weapon (katari) on the leading statement made by the appellants, from behind the bush of the place of occurrence by preparing a seizure list being Exhibit 3. He spoke of the conduct of the investigations.

31. In cross-examination, P.W. 11 acknowledged that, he did not send any of the two murder weapons to the Forensic Science Laboratory for chemical examination. He explained non-sending of the same by stating that, the recovery was made after some days and that there were possibilities of evidence being erased or washed off. He stated that, the murder weapons were seized twenty days after the incident.

32. In the examinations under Section 313 of the Code of Criminal Procedure, both the appellants claimed that they were not guilty and falsely implicated. They declined to adduce any evidence. They declined to say anything voluntarily.

33. That the deceased was murdered was established by the prosecution by the post mortem report of the deceased being Exhibit 5 and the deposition of the post mortem doctor being P.W. 7. On the body of the deceased, four injuries were found which were as follows:

“1) Incised chop wound, 8” X 3” X Vertebrae placed transversely over upper neck anteriorly, on detection seen to have cut, skin, muscles, important vessels and nerves, trachea, esophagus and cut fracture of 4th Cervical vertebra.

2) Incised chop wound over left temple 3” X 1” X brain;

3) Incised chop wound 3” X 1” X bone 1” above injury no. 2;

4) Incised chop wound 4” X 2” X brain over vertex mid-line vertically.”

The post mortem doctor being P.W. 7 stated in his evidence that the death was due to the effects of injuries noted in the post mortem report, ante mortem and homicidal in nature. He also stated that, such injuries may be caused by moderately heavy or heavy sharp cutting weapon such as

'katari', 'daa' etc. Lacerated injuries of the scalp may look like incised looking wound.

34. The prosecution did not produce any witness who saw the murder. None of the witnesses claimed in their testimonies that, the deceased was last seen together with the appellants. The wife of the deceased being P.W. 3 stated that, on the date of the murder, the deceased went to his workplace at about 3 p.m. from her house. One of the appellants took the deceased from the workplace of the deceased which such fact was informed to her by P.W. 2. Even then also, the prosecution was unable to establish that one of the appellants was last seen with the deceased since, the evidence of P.W. 1 is based on hearsay. P.W. 2 in his evidence did not corroborate P.W. 3 when P.W. 3 claimed that P.W. 2 informed her that one of the appellants took the deceased from his workplace.

35. There is substance in the contention of the appellants that, the prosecution did not bring on record any direct or indirect evidence to connect the appellants or any of them to the offence. Chain of circumstances to establish

circumstantial evidence beyond reasonable doubt was not established at the trial by the prosecution.

36. During the hearing, the prosecution relied on Exhibit 3 heavily so as to bring home the charge against the appellants. Exhibit 3 is a seizure list dated August 4, 2012. It is witnessed by P.W. 2 and P.W. 5. Both P.Ws. 2 and 5 claimed in their examination-in-chief that, Exhibit 3 was signed by them at the police station. P.W. 2 stated in his deposition that, he put his signature on Exhibit 3 after he was called to the police station. Moreover, he put his signature on Exhibit 3 as he was directed to do so by the police. He did not know the contents of Exhibit 3. However, he identified his signature appearing in Exhibit 3.

37. In cross-examination, P.W. 2 stated that, he put his signature on Exhibit 3 when it was a blank white paper, at the police station, as per the direction of the police. In cross-examination, he acknowledged that he signed Exhibit 3.

38. P.W. 5 in his deposition stated that, he signed Exhibit 3 at the police station. He was not declared hostile. In cross-examination he stated that, when he put his signature in

Exhibit 3, at that time, Exhibit 3 was blank with no writing thereon. Evidence of prosecution witness which is damaging to the case of the prosecution is binding on the prosecution when such witness was not declared hostile.

39. It is urged on behalf of the prosecution that, Exhibit 3 contains a leading statement. At least the articles were seized pursuant to the leading statement made by the appellant. With respect, Exhibit 3 or any portion thereof was not tendered in evidence as a leading statement made by any of the appellants while in custody. Therefore, Exhibit 3 cannot be treated as a leading statement made by any of the appellants. Moreover, there are sufficient materials on record to doubt the veracity of Exhibit 3. Both the prosecution witnesses claimed in their testimonies that, they were made to sign Exhibit 3 at the police station, while, Exhibit 3 suggest that, the seizure was made near the place of occurrence, which is not the police station. That apart, both the seizure list witnesses being P.W. 2 and P.W. 5 claimed in their evidence that, they signed Exhibit 3 when the same was blank.

40. The alleged monetary transaction between the father-in-law of the deceased and one of the appellants was not established conclusively at the trial.

41. Extra-judicial confession that was claimed to be made by the appellants at the police station remain uncorroborated at the trial. Such extra-judicial confessions were allegedly made in presence of two other identified persons, both being police personnel. At the trial, one of those two identified persons being the Officer-in-Charge of the Sankrail police station deposed as P.W.9. In his deposition, P.W.9 did not corroborate the claim of P.W. 8 that the appellants made the extra-judicial confession at the police station. The other Officer-in-Charge of Najirganj Police Station was not produced at the trial as a witness to corroborate the claim of P.W. 8. In absence of any corroborating evidence with regard to the extra-judicial confessions allegedly made by the appellants, we are unable to rely upon the claim made by P.W. 8 in this regard.

42. In such circumstances, we allow the appeal.

43. We set aside the impugned judgment of conviction dated November 25, 2020 and the order of sentence dated November

26, 2020. The appellants are acquitted of the charges framed as against them.

44. The appellants are directed to be set at liberty forthwith, if not required in any other case. They shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

45. C.R.A. 299 of 2020 is disposed of accordingly.

46. All pending applications, including application for bail, if any, shall stand disposed of on the above terms.

47. Trial Court records along with a copy of this judgement be sent down at once to the learned trial Court for necessary action.

48. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

(Debangsu Basak, J.)

49. I agree.

(Md. Shabbar Rashidi, J.)