

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

CRA (DB) 8 of 2022

With

CRAN 1 of 2022

Bapan Ghosh @ Choton

Vs.

The State of West Bengal

For the Appellant : Mr. Ayan Bhattacharjee, Adv.
Mr. Sagar Saha, Adv.
Mrs. Roma Roy, Adv.
Mr. Shounak Mondal, Adv.

For the State : Mr. Madhusudan Sur, Ld. APP
Mr. Manoranjan Mahata, Adv.

Hearing Concluded on : April 18, 2023
Judgement on : May 1, 2023

DEBANGSU BASAK, J.:-

1. The appellant has assailed the judgement of conviction dated December 8, 2021 and the order of sentence dated December 9, 2021 passed by the learned Additional District and Sessions Judge 5th Court Malda, in Sessions Trial No. 06/2020 arising out of Sessions Case No. 51 of 2020.
2. By the impugned judgement of conviction, the learned Judge has found the appellant guilty to the charges under Section 302/376/201 of the Indian Penal Code, 1860. By the

impugned order of sentence, the learned Judge has sentenced the appellant to life imprisonment and to pay a fine of Rs. 10,000 and in default to suffer further rigorous imprisonment for six months for the offence committed under Section 302 of the Indian Penal Code, 1860. Learned Judge has sentenced the appellant to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 10,000 and in default suffer further rigorous imprisonment for another six months for the offence committed under Section 376 of the Indian Penal Code, 1860. The learned Trial Judge has sentenced the appellant to suffer rigorous imprisonment for three years and to pay a fine of Rs. 5,000 and in default to suffer further rigorous imprisonment for another three months for the offence under Section 201 of the Indian Penal Code, 1860. All the sentences had been directed to run concurrently.

3. Learned advocate appearing for the appellant has submitted that, the prosecution did not produce any eyewitness to the incident. The prosecution has based its case on circumstantial evidence. According to him, various aspects of the chain of circumstance have not been established beyond reasonable doubt on behalf of the prosecution.

4. Learned advocate appearing for the appellant has submitted that, Prosecution Witness (PW) 7 and PW 8 claimed that they were aware that the victim had gone to Malda to meet the appellant. However, despite such information, they had not mentioned the same in the missing diary lodged by PW 7. Learned advocate appearing for the appellant had submitted that, the dead body of the victim had been recovered on December 5, 2019 at 11 A.M and the missing diary was lodged on December 5, 2019 at 4 P.M. The prosecution has failed to establish any motive to the murder. The appellant and the victim had been in a love relationship and there was no cause put forward by the prosecution over the appellant to commit murder.

5. Learned advocate appearing for the appellant has submitted, although, it has been claimed by PWs 12 and 13, that the appellant made the extra judicial confession to them, they did not speak about the same until they were apprehended by the police. According to him, PWs 12 and 13 had been planted by the prosecution and their testimonies are not worth consideration. He has relied upon **2011 Volume 11 Supreme Court Cases 140 (Rathinam @ Rathinam Vs.**

State of Tamil Nadu & Another) in support of his contention of unusual behaviour of the witness.

6. Relying upon **2010 Volume 3 Supreme Court Cases 675 (*Jiten Besra Vs. State of West Bengal*)** learned advocate appearing for the appellant has contended that, the place of occurrence is dubious, uncertain and contradictory to the statement made by the prosecution witnesses. He has referred to the deposition with regard to the recovery of the mobile. He has contended that, mere presence of the accused in the place of occurrence is not incriminating when the parties were on visiting terms.

7. Learned advocate appearing for the appellant has submitted that the last seen theory by itself is a piece of evidence. In the present case, the prosecution has not established that the appellant was last seen with the victim at the closest point of time of the death of the victim. Learned advocate appearing for the appellant has relied upon **2023 Volume 4 SCALE 128 (*Pawan Kumar Chourasia Vs. State of Bihar*)** and **2018 Volume 11 Supreme Court Cases 300 (*Satish and Another Vs. State of Haryana*)** and contended that extra judicial confession is a very weak piece of evidence. Normally it is only a corroborative piece of evidence. According

to him, the conviction based on extra judicial confession as against the appellant should not be sustained.

8. Learned advocate appearing for the State has submitted that, the prosecution was able to prove the charges against the appellant beyond reasonable doubt. He has drawn the attention of the Court to the deposition of the various witnesses. He has submitted that, PW 12 and 13 narrated about the extra judicial confession made by the appellant. According to him, such extra judicial confessions are reliable and trustworthy.

9. Learned advocate appearing for the State has submitted that, the post mortem doctor has confirmed about the sexual assault on the victim. The victim was murdered. The appellant was last seen with the victim. There was an affair between the victim and the appellant. All evidences taken together, implicates the appellant.

10. In such circumstances learned advocate appearing for the State has submitted that, no grounds exist to interfere in the impugned judgement of conviction and the order of sentence.

11. Police received a written complaint from prosecution witness (PW) 1 with regard to recovery of dead body of an

unknown woman in burnt condition seen beside a mango orchard near broken bridge at Chakla More on December 5, 2019.

12. On the basis of such written complaint, police registered English Bazar Police Station F.I.R No. 1221/19 dated December 5, 2019 under Section 302/201/34 of the Indian Penal Code, 1860 against unknown persons.

13. Police conducted investigations on the basis of the written complaint and the F.I.R police submitted charge sheet against the appellant under Section 302/201/34 of the India Penal Code, 1860 by an order dated February 19, 2020. Court framed additional charge under Section 376 of the Indian Penal Code 1860 on September 24, 2021. The appellant had pleaded not guilty and claimed to be tried.

14. At the trial, prosecution had examined 21 witnesses and relied upon various documentary and material exhibits to bring home the charges as against the appellant.

15. PW 1 had submitted a written complaint with the police on December 5, 2019. He had stated that, he was the panchayat Pradhan of the village. He had tendered the written complaint which was marked as Exhibit 1. PW 2 had stated that on December 5, 2019, he was on his way when he found

a number of persons gathering and found one woman lying on the garden in burnt condition and naked.

16. PW 3 had stated that, he knew PW 1. He had stated that in the year 2019 one dead body was found in the garden. He did not know whose dead body was there. He had been declared hostile by the prosecution. He had denied questions put to him on cross examination by the prosecution.

17. Similarly PW 4 had stated that he knew PW 1 and that in 2019 a dead body was found in the garden without knowledge of whose body it was. He had been declared hostile by the prosecution. He had denied the questions put up to him by the prosecution on cross-examination.

18. PW 5 was a witness to the seizure list made on December 13, 2019. He had tendered his signature on the seizure lists which were marked as Exhibit 2, 3 and 4. He had identified the material exhibits.

19. Another witness of the seizure list dated December 13, 2019 had deposed as PW 6. He had identified his signatures on such seizure lists. The mother of the victim had deposed as PW 7. She had stated that the victim was married. The victim had obtained divorce. The victim used to earn her own livelihood after divorce by working at a factory at Siliguri. The

appellant used to work in the same factory. She could not trace out the victim prior to her death and after that she lodged the missing diary at Jalpaiguri Police Station. She had tendered the missing diary which was marked as Exhibit 5. She had stated that she was asked by the English Bazar Police Station to come and on arriving there she came to learn that the victim came to Malda to meet the appellant. With help of the police she had gone to the morgue at Malda and identified the dead body of the victim. She had found a piece of cloth on the body of the victim. She has stated that the appellant was the cause of death of her daughter. She had identified the appellant at the dock.

20. A neighbour of the victim had deposed as PW 8. She had stated that her relationship with the victim was like a sister. She used to call the victim as her elder sister. She had stated that the victim used to work at popcorn factory next to her house. The victim had died in the month of December, 2019. She had heard that the victim came to Malda. Prior to coming to Malda the victim had met her and told her that the victim will go to Malda for collecting mobile phone owned by her from the appellant. At the time of going to Malda, the victim had taken one SIM owned by PW 8. After departure of

the victim, PW 8 called her repeatedly but did not get her response. PW 8 narrated all facts to PW 7 and after that PW 7 lodged the missing diary. PW 8 had stated that the SIM belonged to her and she had identified the appellant in Court.

21. The aunty of the victim had deposed as PW 9. She had stated that, she came to know from PW 7 that the victim was missing, she went to the police station along with PW 7 to lodge the complaint. After receiving phone call from the police regarding the dead body, she had come to Malda for identification along with her elder sister and her nephew. They had stayed one night at Malda and on the next morning were taken to the Malda morgue for identification of the dead body. They had identified the dead body of the victim. She had identified the appellant in Court. The younger brother of the victim had deposed as PW 10. He had deposed that, the victim was married but subsequently obtained divorce. The victim used to work at popcorn factory where she had grown a relationship with the appellant. The victim had gone missing. He came to know from PW 8 that the victim had gone to meet the appellant at Malda for collecting the mobile phone from the appellant. Missing diary in respect of the victim had been lodged. From various media sources, they had come to know

that the victim died. They had gone to Malda and to the morgue. He did not enter the morgue. He had identified the appellant in Court. A witness to the inquest report of the dead body of the victim had deposed as PW 11. He has identified his signature in the inquest report which was tendered in evidence and marked as Exhibit 6.

22. A friend of the appellant had deposed as PW 12. He had stated that he was in the business of milk and he used to give the appellant milk. He had found the appellant talking over phone all the time. The appellant disclosed to him that the appellant loved the victim, resident of Siliguri. After some days he had disclosed that the victim has been growing relationship with another person and the victim would put pressure on him for getting married. He had disclosed that he was thinking to kill the victim by throttling her neck. In reply, he had requested the appellant not to involve in the case as he was doing his business. He had also asked the appellant not to bring that idea in his mind. He had thereafter left the place for distributing milk. After some days, the appellant had disclosed to him that the appellant killed that girl by throttling at side of garden of Chakla Pukur.

23. PW 12 stated that the appellant took him to the place of occurrence riding on the motorcycle. The incident had occurred in the month of December, 2019. Police had interrogated him. He had stated all facts before the learned Magistrate and before the village people. He had tendered his statement recorded under Section 164 of the Code of Criminal Procedure which was marked as Exhibit 7. He had identified the appellant in Court.

24. Another friend of the appellant had deposed as PW 13. He had stated that he used to work under PW 12. Appellant used to take milk from PW 12. Appellant used to love the victim. Appellant had disclosed such affair to him. One day at 9 P.M, the appellant had asked him to bring a cycle to Jhurjuria Kalistan. He had found the appellant with the victim at Jhurujuria Khalistan. He had handed over the cycle to the appellant. PW 13 had gone to his house after handing over the motorcycle to the house of the appellant. On the next date, appellant had told him that he caused the death of the victim. The appellant had told him that the appellant after throttling the victim by her neck set her on ablaze by pouring petrol. Police had interrogated him and he stated all facts to the police. He had also stated all facts to the learned Magistrate.

He had tendered his statement recorded under Section 164 of the Criminal Procedure Code which was marked as Exhibit 8. He had identified the appellant in Court. He had identified both the motorcycle and the cycle which were marked as material exhibits.

25. On cross-examination by the defence, PW 13 had stated that he did not have deep relation with the appellant. He used to have a number of talks with the appellant. In spite of the knowledge, he did not inform the police. Police had apprehended him along with PW 12.

26. The assistant sub- inspector of police who had responded to the information of discovery of the dead body of the victim had deposed as PW 14. He had stated that on December 5, 2019 after getting the information, he along with police force went to Bhangasako Chaklamore near Tipajani Ambagan where he found one half burnt naked female dead body. He had gone to the dead body and found one piece of jacket at left hand. He had performed the inquest on the dead body of the victim. He attended the inquest report which was marked as Exhibit 6. He prepared the dead body challan which was tendered in evidence and marked as Exhibit 9. He

had identified the seizure list dated December 5, 2019, which was tendered in evidence and marked as Exhibit 10.

27. The Home guard who had accompanied PW 14 deposed as PW 15. He had stated that, he accompanied PW 14. They had found one half burnt naked body of the victim. PW 14 had performed the inquest on the dead body and prepared the dead body challan. He had identified his signature on the dead body challan which was marked as Exhibit 9/1.

28. The police personnel who had collected the forensic science laboratory report and the chemical examination report had deposed as PW 16. He attended the forensic examination report which was marked as Exhibit 11 and the chemical examination report which was tendered in evidence and marked as Exhibit 12.

29. An employee of the Mobile service provider had deposed as PW 17. He had tendered his authorisation letter which was marked as Exhibit 13. He attended the call details pursuant to the requisition of the police. The call details and the certificate bearing No. 454-C dated December 23, 2019 had been tendered in evidence and marked as Exhibit 14. He had tendered another certificate bearing No. 453-C dated

December 23, 2019 which was marked as Exhibit 15. He had identified the mobile phone of PW 8 and the victim.

30. A seizure list witness had deposed as PW 18. He had identified his signatures on the seizure list. He had identified the Material Exhibits also.

31. The doctor who had performed the post-mortem on the dead body of the victim deposed as PW 19. He had prescribed the external injuries he found on the dead body of the victim. He had opined that the death of the victim was due to the effects of manual strangulation, ante mortem homicidal in nature. He had tendered the post-mortem report which was marked as Exhibit 16. On the basis of the forensic science laboratory report, he had opined that the presence of inflammable fire boiling fraction of blue dyed kerosene could be detected.

32. PW 19 had been further examined pursuant to the order dated September 24, 2021 of the learned Trial Court. In such further examination in chief, PW 19 had stated that injuries noted in No. 4, 5 and 6 of the post-mortem report may be caused by forceful penetration of the vagina. Such injuries were consistent with sexual assault but further opinion could

be given had there been chemical examiner's report on the preserved vaginal swap.

33. The investigating officer had deposed as PW 20. He had narrated about the investigations undertaken by him. He had tendered the formal the first information report which was marked as Exhibit 17. He had identified his signatures on the seizure list. He had arrested the appellant on December 11, 2019. He had prayed for police custody of the appellant for 14 days and obtained demands. The appellant had confessed that he committed the murder of the victim by throttling and thereafter put the victim ablaze. He had recorded the statement of the appellant on December 12, 2019 to the effect that the appellant will help to bring the wine bottle and the water bottle from the Mango Garden and will bring the motorcycle, mobile and bicycle from his house. Such portion of the statement of the appellant had been tendered in evidence and marked as Exhibit 19. He had stated that on December 13, 2019, he had gone to the Mango Garden as per identification of the appellant along with the appellant. As per identification of the appellant, one wine bottle and one plastic water bottle had been seized by Exhibit 3. He had identified the seized items in Court. He had stated that he went to the

house of the appellant along with the appellant and on his identification, one mobile, one motorcycle and one cycle had been seized by Exhibit 4. He had recorded the statement of the appellant of the recovery. Relevant portion of the statement had been marked as Exhibit 20. He had seized a DVD which was marked as Exhibit 21. He had collected one CCTV footage near railway which was marked as Exhibit 22. He had examined PW 12 and PW 13 and recorded their statement and forwarded them to Court for recording their statement under Section 164 of the Criminal Procedure Code. He had made a query to a doctor who replied there to. He attached such report which was marked as Exhibit 23. He had collected the certificate of the call details. He had identified the appellant in Court. He had submitted the charge sheet against the appellant in Court.

34. The Judicial Magistrate before whom PW 12 and PW 13 had recorded their statement under Section 164 of the Criminal Procedure Code deposed as PW 21. She had identified the certificates she had issued which were attached in evidence and marked as Exhibit 7/4 and Exhibit 8/4.

35. On completion of the evidence of the prosecution, the appellant had been examined under Section 313 of the

Criminal Procedure Code where the appellant claimed to be innocent and falsely implicated. He had declined to adduce any defence witness.

36. Post-mortem report of the victim being Exhibit 16 and the deposition of the doctor conducting the post-mortem on the dead body of the victim, being PW 19 read together has established that the victim died due to the effects of manual strangulation, ante mortem and homicidal in nature. Moreover, the victim had suffered forceful penetration in her vagina. These opinions of PW 19 had not been assailed in cross examination by the defence. Even during the arguments in the present appeal, this finding of the post-mortem doctor had remained unchallenged. The prosecution had therefore established that, the victim was raped and murdered.

37. PW 12 and 13 had stated that the appellant made extrajudicial confession to them individually as to the appellant murdering the victim and setting her ablaze. It has come out in the evidence that, appellant and PW 12 and 13 were apprehended on December 11, 2019. PW 12 and 13 had been interrogated by the police where they had disclosed about the extrajudicial confession of the appellant. PW 12 and 13 had been sent to the Judicial Magistrate for recording their

statement under Section 164 of the Criminal Procedure Code which they did on December 12, 2019. The defence has not been able to establish any contradiction or embellishment between the statement of PW 12 and 13 recorded under Section 164 of the Criminal Procedure Code and their deposition in Court at the time of the trial.

38. Dead body of the victim had been discovered on December 5, 2019. As has been noted above, PW 12 and 13 were interrogated on December 11, 2019 and they recorded their statement under Section 164 of the Criminal Procedure Code on December 12, 2019.

39. The extrajudicial confessions made by the appellant to PW 12 and 13 as has been spoken of by PW 12 and 13 are consistent with each other. According to such extrajudicial confession, the appellant had murdered the victim by throttling her neck. Post-mortem report of the victim being Exhibit 16 has corroborated such statement.

40. ***Satish and another (supra)*** has observed that extrajudicial confession is a weak piece of evidence. Normally by itself it can be corroborative only. In the facts of that case, the confession had been found to be composite in nature with regard to a conspiracy hatched with another person to do

away with the deceased. Such other person had been admitted.

41. *Pawan Kumar Chourasia (supra)* has observed that, extrajudicial confession is a weak piece of evidence. However, a conviction can be sustained on the basis of extrajudicial confession provided that the confession is proved to be voluntary and truthful. It should be free from any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human contact, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it was made. As a matter of rule, corroboration is not required. However, if an extrajudicial confession is corroborated by other evidence on record that acquires more credibility.

42. In the facts of the present case, appellant had made extrajudicial confessions to two persons namely PW 12 and 13. PW 12 had claimed that he was a friend of the appellant.

During cross examination of PW 12, the defence did not question the claim of friendship made out by PW 12 with the appellant. On the other hand, the claim of friendship of PW 13 with the appellant had been questioned by the defence in cross examination of PW 13. PW 13 in cross examination had stated that he did not have deep relation with the appellant and that he used to have number of talks with the appellant. Again, friendship between PW 13 and the appellant had not been dislodged by the defence. PW 12 and PW 13 cannot be said to be strangers to the appellant. Appellant confiding in PW 12 and PW 13 about the crime cannot be said to be unnatural.

43. The manner of causing death to the victim as described by the appellant to PW 12 and 13 had been corroborated by the post-mortem report of the victim being Exhibit 16. PW 12 had been taken to the place of occurrence by the appellant. Nothing has been placed before us to suggest that the extrajudicial confession made by the appellant to PW 12 and 13 were not made voluntarily or were vitiated.

44. It has been contended on behalf of the appellant that, despite having knowledge of the murder committed by the appellant, PW 12 and 13 did not divulge the same to any

person. This according to the appellant was unusual human conduct.

45. In ***Rathinam (supra)*** the Supreme Court in the facts of that case has observed that, the conduct of PW 4 and PW 5 therein in not coming forward as witness for about 4 years was unacceptable measured by any yardstick.

46. In the facts of the present case, the dead body had been discovered on December 5, 2019. Appellant had made the extrajudicial confession to PW 12 after some days of the discovery of the dead body of the victim. PW 13 had stated that, he was told by the appellant about the murder on the following the day when he took the cycle to the appellant. It has come out in evidence that PW 12 and 13 were detained by the police, interrogated and sent for recording their statement under Section 164 of the Criminal Procedure Code which they did. At best, PW 12 and 13 had kept silent about the crime for 6 days. We have not found anything unusual about their conduct as suggested on behalf of the appellant. On receipt of the information from the appellant they had kept quiet for 6 days only. They had divulged the information to the police on December 11, 2019 at the first available opportunity on their trust with the law enforcement agency. This silence for a

period of at best of 6 days should not be equated with unusual behaviour, in the facts and circumstances of the present case.

47. In *Jiten Besra (supra)*, the accused was alleged to have murdered his parents-in-law on account of strained relation with them and his wife. In the facts of that case, the presence of the accused in the village by itself has been held not to amount to incriminating circumstance, particularly when the accused was on visiting terms with his parents-in-law.

48. In the facts and circumstances of the present case, there was an affair between the victim and the appellant. The victim had gone to the place of the appellant in order to obtain a mobile phone. Moreover, the dead body of the victim had been recovered from a place which was not the place of residence of the appellant.

49. A mobile phone had been seized by the police as Exhibit 4 on December 13, 2019. This mobile phone had been marked as Material Exhibit II. The mobile phone being Material Exhibit II had been recovered on the leading statement made by the appellant while in custody marked as Exhibit 19. Two sim cards had been used with regard to the

mobile phone being Material Exhibit II. The two SIM cards had been identified to be belonging to PW 8 and the victim as has been established by Exhibit 14 and 15 when the certificates issued by the nodal officer of the mobile service provider. Therefore, the mobile being Material Exhibit II belonged either to the victim or to PW 8. PW 8 had stated that Material Exhibit II belonged to the victim. Therefore, the Material Exhibit II which was the mobile phone of the victim had been recovered from the possession of the appellant after his leading statement made to the police while in custody. Appellant in his examination under Section 313 of the Criminal Procedure Code did not offer any explanation as to how the mobile phone belonging to the victim came to be found from the place of seizure thereof.

50. In view of the discussions above we have not found any ground to interfere with the impugned judgement of conviction and the order of sentence. We hereby affirm the same.

51. CRA (DB) 8 of 2022 is dismissed. With the dismissal of the appeal, nothing survives in the interim application being CRAN 1 of 2022. The same is also dismissed.

52. The sentences awarded shall run concurrently. The period of detention suffered by the appellant prior to the trial,

during the trial and post-trial shall be set off from the substantive sentences awarded.

53. A copy of this judgement and order along with the trial Court records be remitted to the appropriate Court forthwith for necessary action.

54. Urgent Photostat certified copy of this judgement and order if applied for be made available to the parties expeditiously.

[DEBANGSU BASAK, J.]

55. I agree.

[MD. SHABBAR RASHIDI, J]