

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 12 of 2013

With

C.R.A.N. 2 of 2014
(Old C.R.A.N. 4102 of 2014)

Sadhin Pal @ Bablu Pal And Another

-Vs-

The State of West Bengal

For the Appellants	:	Mr. Dipak Kumar Sengupta, Sr. Adv. Mr. Monish Sen, Adv. Mr. Amitabha Ganguly, Adv. Ms. Oisani Mukherjee, Adv.
For the de-facto complainant:		Mr. Subir Ganguly, Adv. Mr. Sumanta Ganguly, Adv. Mr. Rabi Sankar Dutta, Adv.
For the State	:	Mr. Sudip Ghosh, Adv. Mr. Apurba Kumar Datta, Adv. Mr. Bitasok Banerjee, Adv.
Heard on	:	06.12.2022, 14.12.2022, 21.12.2022, 10.01.2023, 17.01.2023, 31.01.2023
Judgment on	:	17.02.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against the judgment and order of conviction and sentence dated 12.12.2012 and 13.12.2012 passed by the learned Additional District & Sessions Judge, Fast Track Court, Durgapur, Bardhaman in Sessions Trial No. 62 of 2008 arising out of Sessions Case No. 98 of 2008 convicting the appellants for commission of offence punishable under sections 302 and 394 of the Indian Penal Code and sentencing them to suffer imprisonment for life and pay a fine of Rs. 3,000/- each, in default, to suffer simple imprisonment for two years each for the offence punishable under section 302 I.P.C. and suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2,000/- each, in default, to suffer simple imprisonment for six months each for the offence punishable under section 394 I.P.C. Both the sentences to run concurrently.

Prosecution case:-

2. Prosecution case as alleged against the appellants is as follows:-

On 02.03.2008 around 9:00 a.m. one Dharmadasi Mondal (i.e. the deceased) went to her garden house adjoining her residence to collect flowers for *puja*. As she did not return till 9:30 a.m. Her nephew Dinabandhu (P.W. 1) went to the roof top and found her standing near a banana tree inside the garden house. She waived her hand and indicated to Dinabandhu that she would return shortly. But she did not return till 10:00 a.m. He went out to search for her. Parulbala Mondal (P.W. 10), sister-in-law of the deceased also

joined the search. Dinabandhu climbed the main gate of the garden house. While doing so, the key of the garden house fell down from the cornice. He unlocked the gate using the key. He entered the garden house around 12:30 p.m. and found Dharmadasi lying dead with bleeding injuries on her mouth and nose. There was a ligature mark around her neck. The miscreants had murdered Dharmadasi and fled. He also noticed the ear rings and necklace of Dharmadasi were missing. Police came to the spot. He handed over the written complaint which was registered as Pandabeswar Police Station Case No. 17/08 dated 20.03.2008 under sections 302/394/411 I.P.C.

3. P.W. 25 Nabin Gopal Chakraborty took over investigation. Inquest and post mortem were held over the dead body. P.W. 17, Dr. Debasis Sarkar post mortem doctor opined death was due to strangulation by ligature, ante mortem and homicidal in nature.

4. On 05.03.2008, Sadhin Pal was arrested. Subsequently, Aditya Pal was arrested. Sadhin made a disclosure statement (Exhibit – 18) that he had sold the gold chain to one Shyam Jewellers and ear tops to one New Mohini Jewellers. Subsequently, Aditya also made a statement that he could identify the ornaments sold to the jewellers (Exhibit – 18/1). On 05.03.2008, they were taken to Shyam Jewellers. P.W. 14 Dilip Kumar Burman owner of the shop deposed he had purchased the gold chain from Sadhin who executed a receipt [Material Exhibit – B(1)]. The gold chain had been melted into three gold finger rings. Police seized the receipt and the finger rings. On next day, appellants were taken to New Mohini Jewellers. P.W. 9 Dharmendra Kumar Verma owner

of New Mohini Jewellers identified Sadhin Pal as the person who sold the ear tops to him against receipt which was signed by Sadhin Pal [Material Exhibit – A(2)]. He produced gold ear tops which were identified by P.W. 3, Birup Kumar Mondal, son of the deceased and P.W. 8, Tarun Chowdhury, nephew of the deceased. Ear tops and the receipts signed by Sadhin were seized. Specimen signature was taken from Sadhin. Handwriting expert opined the signature on the seized receipt matched with the specimen signature of Sadhin.

5. Charges were framed against the appellants under sections 302/394/201/411/34 of I.P.C. Defence of the appellants was one of innocence and false implication. Prosecution examined 25 witnesses and exhibited a number of documents.

6. In conclusion of trial, the trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid. Appellants were however found not guilty of the offences punishable under sections 201/411/34 of I.P.C.

7. Mr. Sengupta, Senior Counsel for the appellants submits there is no direct evidence that the appellants had committed the murder. He submits the circumstances relied upon by the prosecution do not unerringly point to their guilt. Nobody saw the appellants inside the garden house where the incident occurred. Appellants are neighbours. Their presence in the neighbourhood or even talking to the deceased prior to the incident cannot be treated as an incriminating circumstance. Recovery of gold ornaments of the deceased on the disclosure statements of the appellants is also doubtful. Evidence has come on

record appellants were illegally detained prior to their arrest and assaulted in police custody. There are marks of injuries on Sadhin Pal. Disclosure statements cannot be said to be voluntary. There is overriding with regard to the date of the disclosure statement of Sadhin Pal. Identification of the ear tops at the shop at New Mohini Jewellers is doubtful. No test identification parade to identify the ear tops was undertaken. No specific identifying mark is noted on the ear tops. P.W. 14, owner of Shyam Jewellers stated gold chain had been converted into three gold finger rings. Hence, the chain could not be identified and lent corroboration to the so-called disclosure statement. P.W. 14 failed to identify the appellants in Court. Prosecution evidence with regard to recovery are not convincing. Appellants are entitled to benefit of doubt.

8. On the other hand, learned Counsels for the State and de-facto complainant submitted the evidence on record establishes beyond doubt that on 02.03.2008 in the morning P.W. 1 had seen Dharmadasi under a banana tree inside the garden house. She waived and indicated she would return shortly. She did not return. Upon search her dead body was found inside the garden house. Blood was coming out from her mouth and nose. There was a ligature around her neck. Her ear rings and necklace were missing. Post mortem doctor (P.W. 17) opined death was due to strangulation by ligature, homicidal in nature. Appellants were seen in and around the locality at the time of occurrence. On their disclosure statement the ornaments were recovered from nearby jewellery shops. Signature of Sadhin Pal on the said receipt seized from the shop matched with his specimen signature. The chain

of circumstances is therefore complete and the prosecution case is proved beyond doubt.

9. Prosecution case is based on circumstantial evidence. Prosecution examined 25 witnesses to prove the following circumstances:-

(a) Presence of the victim in the garden house and recovery of her dead body:-

10. P.W. 1, Dinabandhu Pal is the nephew and de-facto complainant. He deposed on 02.03.2008 around 9:00 a.m. Dharmadasi had gone to her garden house to collect flowers for *puja*. The garden house was adjoining her house. At 9:30 a.m., he went to the roof top and saw his aunt under a banana tree. She was waving her hand and indicated she would come back shortly. But she did not return till 10:00 a.m. He started searching for her. Parulbala (P.W. 10), elder sister-in-law of Dharmadasi also joined the search. The main gate of the garden house was locked. He climbed the gate of the house and the key fell down from the cornice. He opened the gate and went inside. He found his aunt with bleeding injuries on her mouth and nose. There was a ligature mark around her neck. Her necklace and ear rings were missing. He lodged written complaint. He identified the seized wearing apparels of the deceased. His deposition is corroborated by Parulbala (P.W. 10)

11. P.Ws. 3 and 24 are the sons of the deceased. P.Ws. 6 and P.W. 7 are her husband and brother respectively. They were not at the residence at the time of occurrence. They arrived at the spot subsequently and saw the body of the deceased with bleeding injuries. They also noted that her ear tops and gold necklace were missing. P.W. 3 signed on the seizure list prepared with regard

to the seizure of blood stained wearing apparels and *chappal* (slippers) of the deceased. P.Ws. 7 and 24 are the signatories to the inquest. These witnesses have proved that Dharmadasi was last seen alive inside the garden house at 9:30 a.m. Thereafter, her dead body was recovered inside her garden house.

(b) Cause of death:-

12. P.W. 17, Dr. Debasis Sarkar held post mortem over the body of Dharmadasi. He found the following injuries:-

“1. One ligature mark over the neck – 12.5” X 0.5” transverse circular continuous low down at lower border of thyroid cartilage, knot marks were seen over the left side of neck with circumscribed patch of extravasation of blood underneath the ligature, specially under the knot mark.

2. Haematoma over the left ear;

3. 1” X 2” abrasion over the right chin;

4. 2” X 1½” abrasion over the right temporal scalp tissue;

5. 6” X 8” bruise in the left anterior neck muscles;

6. Fracture of 2 to 4 right ribs;

7. 1” X 1” abrasion over the right elbow.

The injuries showed the evidence of vital reaction. Internally fracture of the left cornu of hyoid bone and fracture of the grater corn of thyroid cartilage.”

13. He opined death was due to strangulation by ligature, ante mortem and homicidal in nature. He proved the post mortem report (Exhibit – 14). The medical evidence establishes that Dharmadasi was murdered inside the garden house between 9:30 a.m. to 12:30 p.m. on 02.03.2008.

(c) Presence of the appellants at the place of occurrence:-

14. P.W. 16 is the brother of the deceased. He deposed on 02.03.2008 he had visited the house of Dharmadasi to hand over an invitation card in connection with the marriage of her younger brother. Thereafter, he left the house and Dharmadasi followed him. He saw Aditya talking to Dharmadasi.

Sadhin was standing a few yards away near a club. The other witnesses, namely, P.W. 20 Sepai Barui and P.W. 21 Sunil Badyakar were declared hostile. They resiled from their earlier statements where they had also claimed seeing the appellants in the neighbourhood.

15. It is argued that the appellants are local residents. Their presence in the neighbourhood cannot be considered to be an incriminating circumstance. Nobody saw them go inside the garden house.

16. Analysis of the aforesaid evidence would show appellants were seen near the garden house at the time of occurrence. P.Ws. 1 and 10 proved key of the lock to the main gate was found on the cornice of the gate. The aforesaid fact along with the circumstance that the appellants were seen around the place of occurrence probabalises the prosecution case that the appellants had access to the lady while she was in the garden.

(d) Recovery of gold ornaments pursuant to disclosure statement of Sadhin Pal:-

(i) Disclosure Statement:-

17. P.W. 25 investigating officer deposed on 05.03.2008 at 15:45 hours he arrested Sadhin from Bazari Village Road while he was returning after having a bath. On interrogation Sadhin made a disclosure statement (Exhibit – 18). He stated as follows:-

“If I am taken to Pandabeswar Hattala, I can identify those shops, and if Aditya accompanies me, we together can assist you in identifying the gold necklace and ear tops of maternal aunt Dharmadasi Mondal and will deliver those.”

18. Learned Senior Counsel for the appellants submitted the disclosure statement of Sadhin is not voluntary. He referred to the cross-examination of P.Ws. 21 and investigating officer (P.W. 25) in support of his submission. P.W. 21 in cross-examination deposed on the night of the incident police had taken him in a vehicle and he remained at the police station. He had heard the cries of both the appellants at the police station. Police had made him put LTIs on some papers. Investigating officer (P.W. 25) in cross admitted during medical examination injuries were found on Sadhin Pal.

19. P.W. 21 is a hostile witness. He resiled from his earlier statement before police. He admitted appellants were his co-villagers and he did not want to have hostility with any of his co-villagers. He appears to be an unreliable witness who was hiding the truth. No question was put by the appellants to the investigating officer that he had illegally detained them in the police station. No such defence was also taken by them during their examination under section 313 Cr.P.C. In this backdrop, I am unwilling to rely on a stray sentence in the deposition of a hostile witness to come to a finding that the appellants had been illegally detained and tortured.

20. It is true investigating officer (P.W. 25) admitted there were injuries on Sadhin Pal but he denied the suggestion that Sadhin was inhumanly treated and assaulted in custody. In fact, arrest memo of Sadhin shows marks of old injuries on his body. After arrest he was produced before a medical officer at Khandra (Ukhra), BPHC, Burdwan. In the medical report (which is a part of the records) it is recorded Sadhin admitted he suffered injuries on the

hand from boiling water on 1st March at 6:00 a.m. He kept silent with regard to the scratch and bruise marks on the neck presumably because he had suffered those injuries in the course of the incident. Materials on record particularly the arrest memo show the injuries on Sadhin were prior to his arrest and not a product of custodial torture.

(ii) Recovery of gold ornaments:-

21. P.W. 14 is the owner of Shyam Jewellery. He deposed Sadhin Pal had come to his shop on 02.03.2008 in the afternoon and sold him a gold chain for Rs. 10,500/-. He demanded papers from Sadhin. He was unable to provide any paper but stated he was making a distress sale in order to arrange funds for his son's medical treatment. He was identified by one Pankaj Rakshit (P.W. 19), a sweetmeat shop owner. P.W. 14 further deposed he had melted the gold chain and had converted it into three gold rings. Sadhin executed a receipt for the said sale. He signed on the receipt (Material Exhibit – B/1). P.W. 14 produced three gold rings and the receipt to police which were seized under a seizure list.

22. His evidence is corroborated by P.W. 19 who stated Sadhin Pal used to come to his shop. He identified Sadhin in Court. P.Ws. 12 and 13 are the independent witnesses to the aforesaid seizure. They have proved their signatures on the seizure list.

23. On the next day i.e. 06.03.2008 the appellants were taken to New Mohini Jewellers. P.W. 9, D. K. Verma is the owner of New Mohini Jewellers. He deposed on 02.03.2008 around 4:00 p.m. Sadhin came to his shop and offered

to sell a pair of gold tops. He did not have valid papers. Sadhin assured he would produce the papers on the next day. Accordingly, he purchased the tops and executed a receipt. Sadhin signed on the receipt (Material Exhibit – A/2). On the next day, Sadhin did not produce any paper. He kept the gold tops along with other gold ear rings in a vault. On 06.03.2008 police came to his shop. He produced the gold tops with other gold ear rings. He identified Sadhin Pal. Two persons being the son and nephew of the deceased identified gold tops. Police seized gold tops as well as the receipt (Material Exhibit – A/2) under a seizure list.

24. P.W. 22, Amar Sen is the owner of a local sweetmeat shop. He corroborated P.W. 9. He signed on the seizure list.

25. P.W. 3 (son of the deceased) and P.W. 8 (nephew of the deceased) deposed police called them to New Mohini Jewellers. Both of them identified the gold ear tops belonging to the deceased. Other relations of the deceased i.e. P.Ws. 1 and 6 also identified the ear tops during trial as that of the deceased.

26. Learned Senior Counsel for the appellants strongly disputed the identification. He contended no T.I. parade was held. He also submitted there was no special identifiable mark on the ear tops which were ordinarily available in market. P.W. 3 was her son and was acquainted with the ornament worn by her mother. He is the most natural witness. He came to New Mohini Jewellers with his cousin Tarun Choudhury (P.W. 8). P.W. 9 had produced the ear tops with other ear tops kept by him. Amongst all the ear tops they identified the ear tops of the deceased. In Court, P.W. 3 clarified that his mother used to wear

gold tops fitted with stones. The seized tops were devoid of stones but there was a place for putting stones on the gold tops. In all likelihood the precious stones in the ear tops had been removed. P.W. 3's description of the ear tops and the manner and circumstances which enabled him to identify them shows he is a truthful witness. His identification is not only corroborated by P.W. 8 but an independent witness, namely, P.W. 22. When the witnesses had already identified the stolen articles amongst other articles at the place of seizure, subsequent T.I. parade becomes irrelevant. The evidence on record leaves no doubt in my mind that the ear tops of the deceased were correctly identified by his son (P.W. 3) and other witnesses.

27. Evidence has come on record that the seized articles were kept in the police malkhana. They were produced in the course of trial which was held about a year later. Label put on the seized article may have been misplaced due to lapse of time.

28. In view of the consistent and reliable evidence on record this minor lapse does not adversely affect the prosecution case.

29. Recovery of the stolen articles which were sold to P.Ws. 9 and 14 respectively by Sadhin Pal is fortified through the sale receipts (Material Exhibits – B/1 and A/2) respectively. Both the sale receipts were seized under a seizure list prepared by P.W. 25 (Exhibit - 10). They have been signed by the witnesses. During investigation, specimen signatures and the writing on the seized documents were sent for verification by handwriting expert (P.W. 18).

P.W. 18 opined that the disputed signatures matched with specimen signature of Sadhin Pal. He proved his report (Exhibit – 15).

Presumptive evidence of murder:-

30. It is argued that recovery of stolen articles pursuant to the disclosure statement of the appellants cannot be a presumptive evidence of murder.

31. In ***Tulsiram Kanu vs. The State***¹ the Apex Court, inter alia, held:-

“7. ... If ornaments or things of the deceased are found in the possession of a person soon after the murder, a presumption of guilt may be permitted. ...”

The Court further elucidated the presumption could only be drawn when murder and robbery appears to have been committed in the course of the same transaction.

32. Similar view was taken in ***Wasim Khan vs. The State of Uttar Pradesh***². The Court held when recovery of stolen articles were made from the possession of the convict, acquittal of co-accused would not affect the legality of his conviction.

33. In ***Sanwat Khan vs. Kaloo Khan***³ the Court refused to draw the presumption as the stolen articles were recovered after a fortnight and there was no evidence, direct or circumstantial, that robbery and murder formed a part of one transaction.

¹ AIR 1954 SC 1

² AIR 1956 SC 400

³ AIR 1956 SC 54

34. In ***Mohan Lal And Another vs. Ajit Singh And Another***⁴ relying on a number of decisions the Apex Court held that the presumption may be drawn on the facts and circumstances of each case. The relevant factors were enumerated as follows:-

“49. ... The nature of the recovered articles, the manner of their acquisition by the owner, the nature of the evidence about their identification, the manner in which the articles were dealt with by the accused, the place and the circumstances of their recovery, the length of the intervening period and the ability or otherwise of the accused to explain the recovery, are some of those circumstances.”

35. In the present case the victim Dharmadasi was seen alive at 9:30 a.m. inside the garden house. At 12:30 p.m. she was found dead. Post mortem doctor opined she was strangulated to death. Her ear rings and necklace were found missing. Around 9:30 a.m. Sadhin Pal was seen at the place of occurrence. On the same day Sadhin had sold the ear tops and the necklace of the victim to two jewellers, namely, P.Ws. 9 and 14. He had also signed on the receipts which were seized during investigation. Contemporaneity between the homicidal death of the deceased and the possession of her stolen jewellery in the hands of Sadhin is established beyond doubt. No explanation is offered by Sadhin with regard to the circumstances in which he came into the possession of the jewellery.

36. Prosecution has been able to prove that the murder of Dharmadasi and theft of her jewellery were a part of the same transaction. It is also proved on the same day Sadhin Pal was in possession of the stolen jewellery and had

⁴ AIR 1978 SC 1183

sold the articles to P.Ws. 9 and 14. This creates a presumptive inference of theft and murder against the appellant.

37. The authorities relied on behalf of the appellant are distinguishable. In **Hatti Singh vs. State of Haryana**⁵ victim had gone missing on 11.7.1995. Dead body was recovered on 24.7.1995. On 29.7.1995 the appellant was arrested and a silver ring of the deceased was recovered. Contemporaneity between the death and the recovery of the stolen article was not established. The observation at para 32 of the said report that presumption of murder may not be drawn under section 114 of Evidence Act cannot be treated as a proposition of universal application in view of the ratios in the earlier decisions as discussed above particularly **Mohan Lal** (supra). It has to be read in the aforesaid factual matrix which is distinguishable from the present case.

38. In **Madhu vs. State of Kerala**⁶ the theft of articles from the body of the deceased was doubted. Confessional statement leading to recovery was also suspected as the recovery witnesses claimed they were aware that gold ornaments would be recovered even before the statement was made. In the present case, the disclosure statement of Sadhin Pal (Exhibit -18) is proved beyond doubt. P.Ws. 9 and 14 have also corroborated the disclosure statement. Ear tops recovered from the shop of P.W. 9 were identified by the relations of the deceased. Sale receipts relating to the transaction bearing signature of Sadhin Pal have also been proved.

⁵ 2007 Cr. L.J. 2726

⁶ (2012) 2 SCC 399

39. In ***Mustkeem @ Sirajuddin vs. State of Rajasthan***⁷ vital witnesses including the recovery witness had turned hostile. FSL report also did not show the presence of blood on the weapon of offence or clothes recovered. Close nexus between the recovered articles and the murder had not been established. In the present case, ample evidence has come on record to show gold ear tops belonged to the deceased and were found in the possession of Sadhin Pal within couple of hours of her death.

Role of Aditya Pal:-

40. As per prosecution case, Aditya also made a disclosure statement (Exhibit – 18/1) as follows:-

“If I am taken to the shop with him, I can assist you to recover the necklace and ear top by identifying those.”

41. I am unwilling to treat the statement as one under section 27 of the Evidence Act. In order to qualify as a statement under the aforesaid provision of law it has to lead to the discovery of a new fact. Sadhin had already made a statement disclosing the identity of the jewellery shops where he had sold the jewellery. It is contended Aditya made a subsequent statement. A subsequent statement does not lead to the discovery of a new fact. It is not the prosecution case that Aditya had gone to the jewellery shops to sell the ornaments. He had no personal knowledge of such fact. Hence, though the disclosure statement of Sadhin clearly leads to the discovery of the jewellery shops where the ornaments were sold by him, subsequent statement of Aditya does not satisfy

⁷ (2011) 11 SCC 724

the essential ingredients of section 27 of the Evidence Act and cannot be said to be admissible in the eye of law.

42. From the aforesaid evidence it is clear that the circumstances relied upon by the prosecution unerringly point to the guilt of Sadhin. Evidence against Aditya stand on a much weaker footing. Apart from seen talking to the deceased prior to the incident, there is no reliable evidence to connect him with the murder.

43. This Court is conscious that the appellants were convicted under sections 302/394 with the aid of section 34 I.P.C. As discussed above, evidence against Aditya Pal is scanty and he is entitled to benefit of doubt. However, his acquittal does not amount to disbelieving the substratum of the prosecution case against Sadhin Pal which is proved beyond doubt. In this regard reference may be made to **Wasim Khan** (supra), wherein the Apex Court held in a case based on circumstantial evidence acquittal of the co-accused does not affect the conviction of the appellant against whom incriminating circumstances have established his guilt beyond doubt.

Conclusion:-

44. In the light of the aforesaid discussion, conviction and sentence of appellant Sadhin Pal @ Bablu Pal under section 302/394 IPC are upheld and conviction and sentence of Aditya Pal under section 302/394 IPC are set aside.

45. Bail bonds of appellant Sadhin Pal @ Bablu Pal are cancelled. The appellant is directed to surrender forthwith and serve out the remainder of his sentence in accordance with law.

46. In the event he fails to do so, trial Court shall take appropriate steps to apprehend him and execute the sentence in accordance with law.

47. Appellant viz. Aditya Pal shall be discharged from his bail bond 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.

48. Period of detention suffered by the appellant viz. Sadhin Pal @ Bablu Pal during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

49. With the aforesaid modification as to sentence, CRA 12 of 2013 is disposed of. Connected application, if any, stands disposed of.

50. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)