

**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. 343 of 2021

Bhim Hazra

-Vs-

The State of West Bengal

W I T H

C.R.A. 345 of 2019

Raju Tudu & Anr.

-Vs-

The State of West Bengal

For the Appellant : Mr. Jyoti Prakash Chatterjee, Adv.
[in CRA 343/2021] Mr. Kusal Kumar Mukherjee, Adv.

For the Appellants : Mr. Parthapratim Das, Adv.
[in CRA 345/2019]

For the State : Ms. Zareen N. Khan
Mrs. Manasi Roy

Heard on : 11.01.2023 & 16.01.2023

Judgment on : 16.01.2023

Joymalya Bagchi, J.:-

1. Appeals being CRA 343 of 2021 and CRA 345 of 2019 have been preferred against judgment and order dated 16.03.2019 & 18.03.2019 passed by learned Additional Sessions Judge, Kalna, Purba Bardhaman in Sessions Case No. 135 of 2006 (S.T. No. 07 of 2012) convicting the appellants viz. Raju Tudu and Bhim Hazra for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs.5,000/- each, in default, to suffer simple imprisonment for six months more.

2. CRA 345 of 2019 was preferred by both the appellants viz. Raju Tudu and Bhim Hazra. Subsequently, appellant viz. Bhim Hazra preferred another appeal being CRA 343 of 2021. Hence, appeal being CRA 343 of 2021 preferred by appellant viz. Bhim Hazra is dismissed as not maintainable.

Prosecution Case:-

3. Prosecution case as levelled against the appellants is as follows :-

Toton Chandra, the deceased, used to work as a mason under one Ganesh Khatua at Liluah. Appellants along with Palash Santra and Sanjay Das also worked under the same employer. A quarrel ensued amongst them with regard to financial matters. Toton left his employment and returned to the village. Thereafter, Palash threatened Toton with dire consequences. He even went to his house and tried to throttle Toton. On 26.05.2006 around 4:30 P.M. appellants along with

Palash Santra and Sanjay Das called Toton to accompany them to a fair held in connection with '*Siddheswari puja*' at Simlon village. Toton left with Palash, Sanjay and the appellants. Around 8:30-9:00 P.M., villagers saw them dancing near *Siddheswari* temple. On the next morning, dead body of Toton was recovered beside the PHE pump station at Simlon village. Police came to the spot. Appellants confessed their guilt before the villagers and police.

Proceedings leading to the appeal:-

4. On the written complaint of Pintu Chandra, brother of the deceased (PW1), Kalna Police Station Case No.83 of 2006 dated 27.05.2006 under Sections 120B/302/34 of the Indian Penal Code was registered. Pursuant to the disclosure statement of Palash, a belt used as ligature to strangle the deceased was recovered from a pond. Charge-sheet was filed. In the meantime, Sanjay absconded. Charges were framed against the appellants and Palash under Sections 302/34/120B of the Indian Penal Code. Accused persons pleaded not guilty and claimed to be tried.

5. In course of trial prosecution examined 14 witnesses and exhibited a number of documents. During trial, Palash absconded.

6. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 16.03.2019 & 18.03.2019 convicted and sentenced the appellants, as aforesaid.

Evidence on record:-

7. PW1 (Pintu Chandra) is the de-facto complainant and brother of the deceased. He deposed in the evening of the fateful day, Palash and Raju had taken his brother from the house to see '*Siddheswari puja*' at Simlon more. They consumed liquor and were dancing in the puja pandal. On the next morning, his brother's dead body was recovered near the pump house of PHE at Simlon village. He came to the spot. Police also arrived at the spot. On being interrogated by police, Bhim Hazra stated that they had murdered his brother. He was a signatory to the inquest. He proved the FIR.

8. PWs.8 & 9 are the parents of the deceased.

9. PW8 (Laxmi Chandra) is the mother of the deceased. She deposed appellants and Toton used to work under the same employer. They had financial problems. Toton returned to the village. Thereafter, appellants threatened to kill him. On occasion of '*Siddheswari puja*', they called Toton from his residence. Next day his dead body was recovered beside PHE pump station at Simlon. PW8 came to the spot. Appellants disclosed they had killed Toton. In cross-examination, she admitted police was present at the spot when she arrived.

10. PW9 (Uttam Chandra) is the father of the deceased. He deposed Palash had threatened the deceased and tried to throttle him. He had left his residence with Palash. On the next morning, he heard his son had been murdered. He came to the spot and saw the appellants were arrested. He is silent about extra-judicial confessions by the appellants.

11. PWs.2, 3, 4, 5 & 7 are local villagers.
12. PW2 (Bikash Modak) deposed he is a sweetmeat seller. He heard about the incident and came to the spot. Sanjay, Palash and Bhim were called and they admitted their guilt. Bhim disclosed the manner in which they had murdered the deceased.
13. PW3 (Sukanta Roy) deposed he had seen Toton with the appellants and other accuseds dancing at '*Siddheswari puja*'. On the next day, he heard Toton was murdered. He came to the place of occurrence. At the place of occurrence, Bhim admitted his guilt in presence of police and villagers.
14. PW4 (Rabi Das) is a fisherman. He deposed Sanjay had made confession before police. On his disclosure statement, a belt was recovered.
15. PW5 (Madan Singh), another villager deposed that the appellants had made confession before police and other villagers.
16. PW7 (Sunil Sarkar) deposed with regard to the recovery of a belt from a tank on the showing of co-accused viz. Palash Santra. He is a signatory to the seizure list.
17. PW12 (Gurupada Mitra) is a police officer who held inquest over the body of the deceased. He proved the inquest report.
18. PW11 (Sudipto Roy) is a signatory to the inquest.
19. PW10 (Sankar Murmu) carried the dead body for post-mortem examination. Post-mortem report was exhibited on admission.

20. PW13 (Papiya Das) is the Magistrate who recorded statements of witnesses under Section 164 of the Code of Criminal Procedure.

21. PW14 (Balaram Mondal) is the Investigating Officer. He deposed he came to the place of occurrence and saw the dead body. He prepared rough sketch map. He arrested the accused persons. The accused persons made confessional statement before him in presence of the public. He proved the confessional statement. On the disclosure statement of co-accused viz. Palash, offending weapon i.e. belt was recovered on 30.05.2006. He prepared the seizure list.

22. From the evidence on record it appears that the case is based on circumstantial evidence.

23. The five golden principles in a case based on circumstantial evidence as laid down by the Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra**¹ are as follows:-

“The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence:

(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely ‘may be’ fully established,

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

¹ (1984) 4 SCC 116

24. Let me examine whether the prosecution has been able to prove the case in the light of the aforesaid well-settled legal principles.

Motive to commit the crime:-

25. In the FIR lodged by PW1 it is alleged there was dispute between Toton and co-accused viz. Palash over financial matters. Palash had threatened Toton and even tried to throttle him. In court, father of the deceased (PW9) deposed there was dispute between Toton and accused persons over financial matters. Only Palash had threatened and even tried to throttle Toton. Unlike Palash, neither in the FIR nor in the deposition of PW1 or PW9 it is alleged appellants had previously threatened or attacked the victim. Mother of the deceased (PW8) appears to have embellished the prosecution case and sought to implicate the appellants in the threat. Though there may be some evidence with regard to dispute over financial matters, in absence of clear and consistent evidence that the appellants had threatened or attacked the victim prior to the incident, I am unable to come to a definite conclusion that they had shared motive with Palash to commit the crime.

Last seen theory:-

26. Prosecution has strongly relied on the 'last seen' theory. Referring to the evidence of PWs.1, 8 and 9, learned Advocates for the State argued appellants had called the victim from the residence. An analysis of the evidence on record, however, discloses a different state of affairs. From the First Information Report lodged by PW1, it is not clear whether both the appellants had called Toton from his house. This is

further clarified from the deposition of the defacto-complainant (PW1) in Court. PW1 deposed Palash and Bhim had called his brother from the house. This version also has to be taken with a pinch of salt. His mother (PW8) stated that her elder son i.e. PW1 was not present when Toton was called from his residence. PW8 claimed all the accused including the appellants had called Toton from the house. But her deposition is not corroborated by her husband (PW9) who stated only Palash had called Toton from the residence. Evidence on record is not consistent with regard to the role of the appellants in accompanying Palash to the residence of Toton and asking the latter to accompany them to the '*Siddheswari* puja' at Simlon village.

27. Further, it is the prosecution case, Toton was seen dancing with the accused persons including the appellants at *Siddheswari* temple in Simlon village. PW3 is the only witness who claimed to have seen them dancing. He, however, admits there were other persons who were also dancing around the temple. Thereafter, on the next morning the dead body of Toton was recovered beside the pump of PHE at Simlon village. Post mortem report shows that he had died due to throttling.

28. The aforesaid evidence on record does not lead me to come to an irresistible conclusion that the appellants were present along with Palash when the victim was called from his residence. They were merely seen dancing with the victim in the night at *Siddheswari* temple. A large number of people were also dancing. Nobody saw them leave the fair together. There must be a close nexus between the 'last seen'

circumstance and the homicidal death of a victim. The two events require to be juxtaposed in such a manner that it would rule out any other human intervention in the murder. In **Kanhaiya Lal Vs. State of Rajasthan**² the Hon'ble Apex Court held mere 'last seen' circumstance without anything more cannot be the foundation of guilt. It held as follows:-

"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot be proof of guilt against the appellant. "

29. As discussed earlier, though evidence on record shows Palash had threatened the victim and even tried to throttle him earlier, no evidence is forthcoming in that regard against the appellants. Presence of the appellants with Palash when Toton was called from his residence is also unclear.

30. Hence, 'last seen' circumstance in the present case so far as the appellants are concerned is based on shaky foundation and by itself cannot form the substratum of guilt.

Extra judicial confession by the appellants:-

31. Prosecution has also relied on the extra judicial confessions of the appellants. Evidence with regard to extra judicial confession is also inconsistent and contradictory to one another. PW1 claimed only Bhim Hazra made confession to police. PW2 stated Sanjoy, Bhim and Palash

² (2014) 4 SCC 715

made confessions before the public. Bhim specifically disclosed how the incident occurred. PW3 stated only Bhim made confession before the public and police.

32. But, PW9 (father of the victim) is silent with regard to the confession. PWs 4 and 7 also did not support the prosecution case that Bhim or Raju Tudu made confessions before public. PW4 stated Sanjoy had confessed while PW7 claimed confession was made by Palash. PW7 specifically stated no confession was made by Bhim.

33. PW5 stated all the accuseds made confessions before police and villagers. PW8 (mother of the victim) corroborated PW5. She claimed police was present at the spot.

34. Evidence of witnesses, therefore, are at variance to one another with regard to the persons who made the confessions and the circumstances in which such confessions were made. Apart from PW2, none of the witnesses stated that extra judicial confessions had been made before public prior to arrival of police. In fact, PW2's version is improbabilised by other witnesses & attending circumstances. During cross-examination, PW2 admitted Uttam Chandra, father of the deceased (PW9) had arrived at the place of occurrence before him. Uttam is completely silent with regard to any extra judicial confession made before public. Even the First Information Report lodged by PW1 is silent with regard to extra judicial confession made by any of the accuseds prior to the arrival of police.

35. Hence, I am not inclined to accept PW2's version that extra judicial confession had been made by the appellants particularly Bhim prior to the arrival of police.

36. Prosecution argued confession was made by the appellants before the public. Mere presence of police at the spot will not make the confession inadmissible. In this regard, reliance was placed on **Mihir Adhikary Vs. The State**³. In the said report, a Bench of this Court, inter alia, held as follows:-

"17. In regard to the extra-judicial confession made at the residence it is true that S.I.A. Chakraborty was present at the time when the alleged confession was made. The question is whether that alone is sufficient to attract S. 25, Evidence Act, and thus exclude the statement as inadmissible. Section 25, Evidence Act, provides that no confession made to a police officer shall be proved as against a person accused of any offence. The evidence on record shows that the statement made by the accused was not a statement made to a police officer. There was a large number of people present there including some outsiders. The statement was made generally to the crowd who had assembled at the place. There mere fact that the policeman was there cannot be construed to mean that it was a statement made to a police officer. What S. 25 contemplates is a statement to a police officer, but the section does not exclude all statements made in the presence of a police officer unless it comes within the meaning of S. 26, Evidence Act. Learned Public Prosecutor in this case contended that the confessional statement made by the accused appellant in the house was not meant for the police or for anybody in particular and that it was more in the nature of a soliloquy. We think, in the circumstances of the case, we should interpret the evidence as such. The statement cannot be said to be a statement made to the police.

18. At the time when the statement was made there was no extraneous influence or extortion which might induce the accused to make the statement. The object behind exclusion of statements made to the police is obvious. The police are suspect and often extort confessions by inducements, undue influence, torture and oppression. It is with a view to prevent the abuse of their power that Ss. 25 and 26 have been enacted, not that confessions to police is not relevant. In this case the statement

³ 1983 CrL. L. J. 1559

was made at a time when there was no question of the police exerting any extraneous influence by their mere presence amongst the crowd. The statement was not made to them though they might have heard it among the crowd. Therefore, in our view, such a statement cannot be said to be hit by S. 25, Evidence Act. The view so taken by us finds support from the decisions in the cases of Ghunnai vs. Emperor, AIR 1934 All 132 : (1934-35 Cri LJ 448), Emperor v. Shankar, AIR 1934 Oudh 222 : (1934-35 Cri LJ 894). Sridevi v. State, 1974 Cri LJ 126 (All). We think, therefore, the statement made at the house is admissible and the objections relating thereto cannot be sustained.”

37. After referring to the aforesaid report, another Bench of this Court in **Naren Mahato Vs. State of West Bengal**⁴ held the extra judicial confession made before a police officer in presence of public is inadmissible. The Bench observed as follows:-

“12. As regard extra-judicial confession made by the accused in presence of the witnesses that he committed murder of Madhabi with ‘Dasha’ (bolt) of the door, as deposed by P.Ws. 1, 2, 5, 6, 9 and 11, though the same appears to be voluntary, it is inadmissible in evidence as it was made in presence of a police officer and as such is hit under section 25 of the Evidence Act. The phrase ‘accused of any offence’ as occurring in Article 20(3) of the Constitution has been held to mean a person against whom a formal accusation relating to the commission of an offence has been levelled, as was held in the case of Sharma vs. Satish, reported in AIR 1954 SC 300. The expressions ‘accused person’ in section 24 and ‘a person accused of an offence’ in section 25 have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding. No formal accusation is predicted. The case of State of U.P. vs. D. Upadhyay, reported in AIR 1960 SC 1125, may be referred to. Under section 25 a confession made to a police officer is absolutely inadmissible in evidence without any limitation or qualification. A confession made to a person in the presence of a police officer or where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the accused, it is in substance a confession to a police officer. In this context, the case of Z. Ariel vs. State of M.P., reported in AIR 1954 SC 15, may be relied on. It is the evidence of P.W. 11 that on receipt of a telephonic message from one Rubi Dey that a tenant Madhabi Mahato of Apurba Sen was murdered by her

⁴ 2005 SCC OnLine Cal 473

husband he had been thereafter recording a G.D. and when Naren Mahato after several calls came out after opening the door, he detained him and at that time he confessed his guilt in presence of him and the public that he assaulted Madhabi with a wooden bolt of the room after an altercation with her. A man may be in custody without having been formally arrested. Custody includes a state of affairs in which the accused can be said to have come into the hands of the police or have been under some form of police surveillance or restrictions on his movements by the police, as was held in the case of Mihir Adhikry vs. State of West Bengal, reported in 1983 Cr. LJ 1559 at 1563 (Cal)." (emphasis supplied)

38. An analysis of the two authorities would show there is a subtle factual difference which had weighed with the subsequent Bench to take a contrary view. In the earlier case, the confession was made to the public when the police officer was incidentally present. While in the subsequent report, the police officer had detained the suspect when the confession was made. An analysis of the evidence of I.O. (PW14) would be a good guide to determine whether in this case the confessions made by the appellants are hit by Section 25 of the Evidence Act or not.

39. PW14 deposed as follows:

"I conducted raid at the PO and arrested accd Palash Santra, Raju Tudu, Bhim Hazra & Sanjoy Das on 27/5/06 i.e. on the date of the incident.

The 4 accd persons before the public and witnesses made their respective confessional statements before me. Here are the same (identified)."

40. A reading of the aforesaid evidence would show that the police officer was not merely present at the place of occurrence. He had come to the spot and had apprehended the appellant when the confessions were made before him in presence of public. The aforesaid circumstance

leaves no doubt in one's mind that the appellants were under the ominous influence of the police when the confession was made to the latter which renders it inadmissible in law.

41. Hence, I am not inclined to rely on the extra judicial confession of the appellants.

Conclusion:-

42. In the light of the aforesaid discussion, I hold the circumstances relied upon by the prosecution so far as the appellants are concerned have not been proved beyond doubt. Accordingly, the appellants are entitled to the benefit of doubt.

43. Appellants shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

44. The appeal is accordingly, allowed.

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

46. Photostat certified copy of this order, 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.)