

**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. 234 of 2013

Gopeshwar Majhi & Anr.

-Vs-

State of West Bengal

With

C.R.A. 268 of 2013

Nemai Mondal

-Vs-

State of West Bengal

For the Appellants
(CRA 234 of 2013)

: Mr. Moinak Bakshi, Adv.
Ms. Roma Roy, Adv.
Ms. Pramita Banerjee, Adv.

For the Appellants
(CRA 268 of 2013)

: Mr. Kusal Kumar Mukherjee, Adv.
Ms. Eshita Aich, Adv.

For the State

: Mr. Parthapratim Das, Adv.
Ms. Amita Gaur, Adv.

Heard on

: 06.07.2023, 13.07.2023

Judgment on

: 13.07.2023

Joymalya Bagchi, J.:-

1. Appeals have been filed assailing judgment and order dated 26.07.2013 and 27.07.2013 passed by the learned Additional District and Sessions Judge, Fast Track Court, Kalna in Sessions Trial No.01 of 2010 arising out of Sessions Case No.01 of 2009 convicting the appellants for commission of offence punishable under Sections 302/34 and under Sections 201/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/- each, in default, to suffer rigorous imprisonment for six months for the offence punishable under Section 302/34 of the Indian Penal Code and to suffer rigorous imprisonment for three years and to pay fine of Rs.1,000/- each, in default, to suffer rigorous imprisonment for three months more for the offence punishable under Sections 201/34 of the Indian Penal Code; both the sentences to run concurrently.

2. Prosecution case as alleged against the appellants is to the effect that one Sanjoy Mukherjee, the deceased intended to sell a CD Machine with boxes to one Becharam @ Becha @ Tapas Majhi. Accordingly, on 14.11.2008 at 8.00 P.M. Sanjoy along with Becha transported the CD Machine with a box in the rickshaw of one Kajal Biswas @ Kaju (P.W. 9) to the residence of Becharam. Sanjoy accompanied the CD machine on his bicycle with Becharam. Sanjoy did not return home till mid-night.

Guru Charan Mukherjee (P.W. 1), father of Sanjoy and his brother Ujjal Mukherjee @ Tutu went to the house of Kajal @ Kaju and the latter informed them there was an altercation between Sanjoy and Becharam over the price of the CD Machine and Becharam told Kajal to return to his residence assuring that he would escort Sanjoy to his home. Hearing this, P.W. 1 and others went to the house of Becharam. Gopeshwar Majhi, father of Becharam told them that Sanjoy had left for his residence. Believing him they returned. But Sanjoy remained untraceable. Guru Charan tried to ascertain the whereabouts of Sanjoy by telephoning his relations. But to no avail. In the morning he and other villagers again went to the house of Becharam and enquired from the latter and his father Gopeshwar regarding the whereabouts of Sanjoy. They gave contradictory and evasive replies. At that juncture, Guru Charan went to the police station to lodge written complaint against Becharam and Gopeshwar on the suspicion that they had abducted his son with the intention to murder him. In the meantime, other villagers remained at the residence of Becharam. Ujjal (P.W. 11) suddenly noticed the money bag of his brother Sanjoy lying in their house. Upon confrontation and on repeated queries Becharam and his father finally admitted that they had strangled Sanjoy and thrown his body into the river Ganges. They also stated that they had been aided and abetted by their neighbour Nemai Mondal. Soon thereafter

police came to the spot and arrested Becharam and his father, Gopeshwar. On interrogation they admitted their guilt. CD Machine with a box, money bag and other articles were recovered from their residence. On their showing the bicycle of the victim was recovered from the river. Napkin used to murder the victim was also recovered. On the next day, body of Sanjoy was found floating in the river and was recovered. Post mortem doctor (P.W. 13) opined that Sanjoy had been strangled to death. Charge-sheet was filed against Becharam and his father, Gopeshwar and Nema Mondal.

3. The case was committed to the Court of Sessions and charges were framed under Sections 364/34, 302/34 and 201/34 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. Prosecution examined 17 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

4. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid.

5. Mr. Bakshi, learned Counsel for the appellants Becha @ Tapas Majhi and Gopeshwar submits prosecution has not been able to prove its case beyond doubt. Last seen theory is founded on the sole testimony of Kajal @ Kaju (P.W. 9) which is not corroborated by other

witnesses. Becharam and his father were threatened and detained by local people. So-called extra-judicial confession is not a voluntary one. On 16.11.2008 dead body was found floating in the river Ganges and cannot be said to have been recovered pursuant to the leading statements of the appellants. Chain of circumstances is not complete and the appellants are entitled to an order of acquittal.

6. Mr. Mukherjee, learned Counsel for the appellant, Nemai Mondal submits apart from extra-judicial confession of co-accused, no other evidence was led against his client. Hence, he may be acquitted.

7. Mr. Das and Ms. Gaur, learned Counsels for the State submit prosecution has established the guilt of the appellants. Rickshaw puller (PW 9) deposed he accompanied the deceased to the residence of Becharam. He also stated there was an altercation between them over the price of the CD Machine. His deposition is corroborated by other witnesses viz. P.W.s 1, 7 and 11. Becharam and his father, Gopeshwar gave out contradictory and/or evasive answers regarding whereabouts of the deceased. Subsequently, they made extra-judicial confession admitting their guilt. On their showing the bicycle of the victim was recovered. Extra-judicial confession disclosed the role of Nemai Mondal in the crime. Aforesaid incriminating circumstances establish their guilt beyond doubt.

8. Prosecution case is based on circumstantial evidence which may be broadly categorized in the following manner :-

(i) Last seen theory:-

9. P.W 1 (Guru Charan Mukherjee) is the father of the deceased. He deposed on 14.11.2008 his son Sanjoy had accompanied Becharam to his residence along with a CD Machine and box. The CD Machine and box were carried in the rickshaw of Kajal @ Kaju. Thereafter, the victim went missing and could not be traced. His deposition is corroborated by rickshaw puller, Kajal @ Kaju (P.W. 9). P.W. 9 deposed he had carried the CD Machine and box to the residence of Becharam. Sanjoy and Becharam accompanied him on Sanjoy's bicycle. At Becharam's residence there was an altercation between Becharam and Sanjoy over the price of CD Machine. Becharam asked P.W. 9 to return home. Accordingly, he went home. At night when P.W. 1 came to his residence he informed him about the incident. Thereafter, they went to the residence of Becharam to enquire about Sanjoy.

10. PW 7 (Raju Biswas) brother of Kajal @ Kaju substantially corroborated the prosecution case that Kajal @ Kaju had carried the CD Machine with box on his rickshaw to the residence of Becharam. Sanjoy and Becharam accompanied Kajal @ Kaju. He also stated that Kajal @ Kaju (PW 9) told him that there was an altercation between Becharam and Sanjoy over the price of the CD Machine.

11. PW 11 (Ujjal Mukherjee @ Tutu Mukherjee), brother of the victim has also corroborated the aforesaid facts.

12. Learned Counsels for the appellants submit there are contradictions in the deposition of Raju and his brother Kajal with regard to the fact who had called Kajal from his residence. While Raju stated that Sanjoy had come to their residence and requested Kajal to carry the CD machine, Kajal claimed that Becharam had come to his residence and requested him to accompany him. Both witnesses, however, corroborated the prosecution case that on the fateful night Kajal had left for his residence and carried the CD Machine with box on the rickshaw along with Sanjoy and Becharam.

13. In light of the aforesaid corroboration, minor contradiction as to who requested Kajal to carry the CD Machine is of little consequence. On the other hand, other witnesses, that is, father and brother of the deceased and brother of Kajal (P.W. 7) have corroborated the prosecution case that Kajal carried the CD Machine with box on his rickshaw along with Sanjoy and Becharam. They also corroborated Kajal on the account that there was an altercation between Becharam and the deceased over the price of the CD Machine and Kajal had been told by Becharam to return home.

14. In the light of the aforesaid discussion, I am of the view that prosecution has been able to prove beyond doubt that Sanjoy had been

accompanied by Becharam to his residence with the CD machine and boxes with the intention to sell them. There was an altercation between them over the price of the CD Machine. Thereafter, the victim went missing. Hence, prosecution case that the victim was last seen quarreling with Becharam in the latter's residence in the night of 14.11.2008 is proved.

(ii) Evasive conduct of the appellants and their extra-judicial confession:-

15. When Sanjoy did not return home till midnight his father and his brother Ujjal Mukherjee @ Tutu (PW 11) went to the house of Kajal who informed that he had last seen Sanjoy at the residence of Becharam. Accordingly, they along with Raju (brother of Kajal) went to the house of Becharam. Gopeswar, father of Becharam told them that Sanjoy had left earlier. Believing him, PW1 returned home but Sanjoy did not return throughout the night. Telephonic calls to relations with regard to his whereabouts also did not yield any result. In the early morning of 15.11.2008 PW1 and other villagers went to the residence of Becharam. They asked Becharam and his father Gopeswar regarding the whereabouts of Sanjoy. Becharam and his father gave evasive replies. At that stage PW1 proceeded to the police station to lodge complaint. Ujjal @ Tutu (PW 11) suddenly noticed the money bag of the deceased lying in the house of Becharam. This raised further suspicion and the villagers repeatedly enquired from Becharam and his father

regarding the whereabouts of the victim. Finally, Becharam and his father admitted that they had strangled the victim with a napkin and drowned his body and bicycle in the river.

16. Extra-judicial confession made by Becharam and his father Gopeswar has been proved by the local villagers namely Alok Kumar Roy (PW2), Nityananda Gain (PW3), Netai Roy (PW4), Rajashree Bhattacharjee (PW5), Arup Banerjee (PW8), Kajal Biswas @ Kaju (PW9) as well as the relations of the deceased i.e. Ujjal Mukherjee @ Tutu (PW 11), Biswanath Roy (PW10) and Debabrata Roy (PW6).

17. Mr. Bakshi has challenged the voluntariness of the extra-judicial confession. He contended Becharam and his father Gopeswar had been detained, pressurized and threatened by the said witnesses. Mr. Bakshi argued the witnesses have stated they 'pressurized', 'threatened' the appellants. He stressed on the aforesaid expressions to bring home his contention that the confession was not a voluntary one.

18. I have given anxious consideration to his submission. Evidence of a witness is to be read as a whole in the backdrop of normal human conduct and attending circumstances of the case. Factual matrix as narrated by the witnesses show the needle of suspicion pointing towards the involvement of Becharam and his father Gopeswar in the disappearance of Sanjoy. On the previous night Sanjoy had gone to the residence of Becharam to sell the CD machine with box. There was an

altercation between them over the price. Thereafter, he did not return home. When father of Sanjoy (P.W. 1) went to Becha's residence at midnight the latter was unavailable. His father Gopeswar told that Sanjoy had left their residence but Sanjoy was untraceable throughout the night. In the next morning when P.W. 1 and local villagers again went to the residence of Becharam, Becharam and his father gave evasive replies with regard to the whereabouts of Sanjoy. At that juncture, money bag of Sanjoy was found in their house. This raised further suspicion and the local villagers repeatedly questioned Becharam and his father with regard to the whereabouts of the missing person. Conduct of the villagers to repeatedly question Becharam and his father with regard to whereabouts of the missing person is most natural. It cannot by any stretch of imagination be termed as coercive or oppressive. It is nobody's case that the appellant had been mishandled. On the other hand, they were merely informed that P.W. 1 had gone to the police station and the matter would be taken over by police. Realizing that their game was over and the inevitable was nigh, Becha and his father made extra-judicial confession.

19. If the expressions "pressurized" or "threatened" used by the witnesses are read in the backdrop of the aforesaid state of affairs, they lose their sinister connotation and do not render the making of the extra-judicial confession involuntary or improbable. Reference may be

made to ***Chattar Singh and Anr. vs. State of Haryana***¹ wherein it was held:-

“17. ...It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused.”

20. It is trite law reliability of an extra judicial confession must be tested in the light of the attending facts and circumstances of the case. When and under what circumstances and to whom the accused makes the extra judicial confession is relevant to test its reliability. Becharam and his father Gopeswar made an extra judicial confession before local villagers. They are wholly uninterested witnesses and had no reason to falsely implicate the accused persons. Sanjoy had been last seen at the residence of Becharam. Thereafter, he was untraceable. Initially, questioning of Becharam and his father yielded no result. At that juncture, money bag of the victim was found at their residence. This prompted the villagers to again quiz Becharam and his father with regard to the whereabouts of Sanjoy. Conduct of the villagers in making repeated enquiries appear to be in consonance with normal human conduct. It cannot be said to be a coercion method to elicit false confession from the accused. None of the witnesses mishandled the

¹ 2009 Cri. L.J. 319

accused. They were merely informed that the matter would be reported to the police. Intimation to an accused that legal recourse is to be taken in a matter cannot be considered to be an act of coercion, threat or undue influence. Police had arrived after the extra judicial confession had been made to the villagers and other witnesses. It cannot be said that the confession was made in the presence of police officers or when the appellants were in their custody or surveillance.

21. On the other hand, the circumstances leading to the extra judicial confession gives an impression that Becharam and his father initially resorted to various subterfuges to hide their involvement in the murder. Ultimately being faced with the inevitable they voluntarily confessed their guilt.

22. Evidence of witnesses corroborate each other with regard to contents of the confession. This establishes its truthfulness beyond doubt.

23. For the aforesaid reasons, I am of the opinion, manner and circumstances in which the extra judicial confessions was made to uninterested witnesses lends credence both to their voluntariness and reliability.

(iii) Extra judicial confession – corroborated:-

24. Extra judicial confession made by the appellants have been corroborated by other evidence.

25. PW13 post mortem doctor found the following injuries on the victim:-

- “(a) One ligature mark on the neck placed below the level of the thyroid cartilage running horizontally continuous and completely encircling the neck. The ligature mark was a dark brown groove with base dried and hardened. It measure 2” and ½” long as traced and was ½” wide. The mark could be traced as (i) 3” and ½” below right angle of jaw. (ii) 4” below chin centrally and 3 ½” below left angle of jaw and running along nape of neck to completely encircle the neck. On dissection, the subcutaneous tissue beneath the ligature mark appeared pale and whitened. Evidence of extravasations 1” x 1” on right side 3” below the level of jaw and 2” away from the mid line, 1” x ½” on left side over anterior border of stern mastoid, 3½” above its calvicular end, fracture of hyoid at junction of left corner and body with evidence of bleeding at site of fracture. Fracture of greater horn of thyroid cartilage on left side with extravasation over lateral aspect of the muscles attached to it;*
- (b) Bruised area 2” x 1” over mid region of chest 2 ½” below supra sternal notch;*
- (c) Bruised 1” x 1” on right side of chest just below midpoint of clavicle;*
- (d) Bruised 3” x 2” right forehead 2” above lateral end of the eyebrow;*
- (e) Bruised 3” x 1” obliquely placed on lateral aspect of right arm and Bruised 3” x 2” dorsal aspect of right forearm 3” below elbow;*
- (f) Bruised 1” x 1” left dorsem of hand.”*

He opined that the victim had died due to strangulation by ligature, ante mortem and homicidal in nature.

26. Hence, medical evidence has corroborated the extra-judicial confessions of Becharam and his father Gopeswar in material particulars.

(iv) Recovery of bicycle and other incriminating articles:-

27. After the arrival of the investigating officer (PW17) at the place of occurrence Becharam and his father Gopeswar again narrated the incident to him. On their showing CD machine with box, money bag were recovered. Pursuant to the statement of Becharam and his father Gopeswar, bicycle was recovered from the river ganges by P.W. 17. Recovery was witnessed by P.Ws. 3 and 6. They corroborated P.W. 17 that the recovery was made on the showing of the said accused. On 16.11.2008 dead body of Sanjoy was found floating in the river ganges. Inquest was held over the body and it was sent for post mortem examination. Subsequently, a napkin used to commit the murder was also recovered from the house of Becharam and Gopeswar in the presence of P.Ws. 4, 5 and 16. The aforesaid evidence on record shows that immediately after the incident on the showing of appellants the bicycle of the victim had been recovered from the river. Even if one discounts the recovery of the dead body on the showing of the appellants, the aforesaid incriminating circumstances cannot be washed away.

28. In the light of the aforesaid discussion, I am of the opinion prosecution has been able to prove the following incriminating circumstances against Becha and his father Gopeswar:-

- (a) On 14.11.2008 at 8 p.m Sanjoy accompanied Becha to his residence on his bicycle. Kajal @ Kaju, a rickshaw puller also

accompanied them with the CD set and box which were to be sold to Becha.

(b) Kajol saw Becha quarreling with Sanjoy over the price of the CD machine. Becha told Kajal to return home. Thereafter Sanjoy went missing.

(c) At 12 midnight PWs 1, 7, 9 and 11 went to the residence of Becha. His father Gopeswar stated Sanjoy had left his residence but Sanjoy was untraceable throughout the night.

(d) On the next morning P.W. 1 and others again went to the residence of Becha. Becha and his father Gopeswar gave contradictory and inconsistent explanation with regard to disappearance of Sanjoy.

(e) At this juncture money bag of Sanjoy was found at the residence of Becha. Upon questioning, Becha and his father made extra judicial confession admitting their guilt.

(f) On their showing bicycle of the victim was recovered from the river.

(g) In the morning of 16.11.2008 dead body of the victim was found floating in the river. PW13 opined death was due to strangulation by ligature, ante mortem and homicidal in nature. Medical evidence corroborates the contents of the extra judicial confession.

(h) Various incriminating materials like CD with box, money bag and napkin (weapon of offence) were recovered from the residence of Becha and his father Gopeshwar.

29. These circumstances have been proved beyond doubt and form a complete chain unerringly pointing to guilt of the appellants.

30. However, evidence against the appellant Nemai Mondal is most sketchy. Apart from the extra-judicial confession of Becha and his father Gopeshwar no other evidence was led by the prosecution to show that he had played a role in the murder. Confession of a co-accused is not substantive evidence. It can be used only to corroborate other incriminating evidence on record. In the absence of independent incriminating evidence showing involvement of Nemai Monal in the murder prosecution cannot rest on the uncorroborated confession of a co-accused to bring home the guilt.

31. Accordingly, we are inclined to acquit Nemai Mondal from the charges levelled against him.

32. Conviction and sentence of Gopeshwar Majhi and Becha @ Tapas Majhi are upheld.

33. Conviction and sentence of Nemai Mondal is set aside.

34. Period of detention suffered by the appellants-accused Gopeshwar Majhi and Becha @ Tapas Majhi during investigation, enquiry and trial shall be set off against the substantive sentence

imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

35. Appellant Nemai Mondal shall be discharged from bail bonds after six months in terms of section 437A Cr.P.C.

36. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

37. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

as/sdas/PA