

**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. 454 of 2015
CRAN 1 of 2019 (Old No. CRAN 4524 of 2019)***

***Mithu Sarkar
-Vs-
The State of West Bengal***

For the Appellant : Mr. Kausik Biswas, Adv.
Mr. Partha Sarathi Das, Adv.

For the State : Mr. Saibal Bapuli .. Id. A.P.P.
Mr. Bibaswan Bhattacharya, Adv.

Heard on : 11.04.2023 & 13.04.2023

Judgment on : 13.04.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 19.06.2015 and 20.06.2015 passed by learned Additional Sessions Judge, 3rd Court (Special), Jalpaiguri in Sessions Case No.219 of 2008 convicting the appellant for commission of offence punishable under Sections 302/379/201 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs.1000/-, in default,

to suffer rigorous imprisonment for one month more for the offence punishable under Section 302 IPC, to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/-, in default, to suffer rigorous imprisonment for one month more for the offence punishable under Section 379 IPC and to suffer rigorous imprisonment for one year and to pay a fine of Rs.1000/-, in default, to suffer rigorous imprisonment for one month more for the offence punishable under Section 201 IPC; all the sentences to run concurrently.

2. Prosecution case as alleged against the appellant is as follows :-
Appellant is the son-in-law of one Ganesh Mondal, who is the neighbour of the de-facto complainant viz. Gobinda Chakraborty (PW1). On 02.11.2006, appellant came to his in-laws house; on 03.11.2006 at 8:00 A.M. he came to the residence of Gobinda and in presence of his wife viz. Ganga Chakraborty (PW2) took away their minor son Manab Chakraborty (aged 6½ years) on the pretext of taking him to the market; thereafter Manab was untraceable. His parents searched for the child. They came to know around 8/8:30 A.M. he was seen with the appellant at the tea stall of Sital Ch. Das at Takimari Bazar. At 9:00 A.M. they had purchased betel leaves from the shop of Mantu Bhakat at Khat Khatir more. One Sudhir Ghosh (PW5) had asked the child where he was going. Thereupon he stated they were going to the forest. It also transpired that the appellant had bought milk for the child from the shop of Bagha Roy at Mantadari Gate Bazar. In spite of intense search the child could not be

recovered. Appellant was also untraceable. Finally, on 05.11.2006 a missing diary was registered by Gobinda (PW1) at Ambari outpost. This was treated as FIR and Bhaktinagar Police Station Case No.426 of 2006 dated 05.10.2006 under Section 365 IPC was registered. Out of suspicion the appellant was arrested. It is alleged he made a disclosure statement to the Investigating Officer (PW24). To work out the statement, the appellant was taken to Batasivita jungle and on his showing dead body of the child was recovered. Inquest was prepared. On the showing of the appellant bangle of the child was also recovered from Karmakar jewellers. Accordingly, charge sheet was filed against the appellant and Sailesh Karmakar, owner of Karmakar Jewellers.

3. Charges were framed under Sections 302/379/201 of the Indian Penal Code against the appellant and under Section 411 against Sailesh Karmakar.

4. During trial, prosecution examined 24 witnesses and exhibited a number of documents to prove its case. Defence of the appellant was one of innocence and false implication.

5. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 19.06.2015 and 20.06.2015 convicted and sentenced the appellant, as aforesaid. By the selfsame judgment and order, Sailesh Karmakar was acquitted of the charge.

6. PW1 (Gobinda Chakraborty) is the father of the deceased. He deposed appellant was the son-in-law of his neighbour. He had come to

their residence in the morning and had taken away his son. He was performing puja. He searched for his son for three days. Finally, he lodged missing diary at Ambari outpost which was scribed by Ram Kanai Mondal. Police informed him that dead body of his son was found at Batasivita which is also knows as Khatkhatia jungle. He went to the spot. Police recovered the dead body at the instance of the appellant. He signed on the inquest report. A silver chain, a gold earring and silver bangle of the child were missing. Police recovered the bangle from a goldsmith. He identified it in court.

7. PW2 (Ganga Chakraborty) is the mother. She deposed at 8:00 A.M. appellant had come to her house and had taken her son to the market. Her son took Re.1/- from her before proceeding to the market with the appellant. Thereafter, her son did not return. She informed her husband who was performing puja. They searched for him but in vain. A missing diary was lodged. They were informed that police had recovered the body of the child from Batasivita jungle. She identified the bangle which was recovered by police.

8. PW3 (Santosh Mondal) is a relative of the appellant. He deposed he last saw the appellant with the child at the tea stall of Sital Ch. Das.

9. PW4 (Nil Kamal Biswas) was taking tea at the shop of Sital Ch. Das. He also saw the appellant with the child at the tea shop. Thereafter, they proceeded down the road towards the jungle.

10. PW7 (Pallabi Das) corroborated PWs. 3 & 4. She stated PW3 came to the tea stall first. Thereafter the appellant came with the child. Then they left the shop and moved towards the jungle.

11. PW6 (Dulu Bhagat) is the daughter of the betel leaf shop owner. She deposed her father had a betel leaf shop near the forest. At 9/9:30 A.M. the appellant came with the child to the betel leaf shop. They had betel leaves. Elder sister of the child came to the shop. She informed her she had seen the appellant and the child proceed towards the jungle.

12. PW5 (Sudhir Ghosh) had a tea stall beside the betel leaf shop. He deposed the shop is one furlong from the jungle. He saw the child with the appellant. He asked the child where he was going. The child stated he was going to the jungle with *jamaibabu*.

13. PW8 (Ratan Roy) is a customer at the tea stall. He also saw the child with the appellant proceeding towards the jungle.

14. PW14 (Subodh Sarkar) saw the child with the appellant together. When he queried, the appellant stated that they were going to the market.

15. Prosecution has relied on the aforesaid witnesses to establish that the child was last seen in the custody of the appellant and that they were moving towards the jungle.

16. Learned Advocate for the appellant argues that the witnesses have embellished their versions in court. PW3 did not tell the police that he has last seen the appellant with the child at the tea stall. PW4 also

stated for the first time in court that he had seen the appellant and the child proceeding down the road which led to the jungle. PW5 did not tell the police that he had queried from the child where he was going or that the child had replied that they were going to the jungle. PW2, mother of the child also did not tell the police that the appellant went to take her son to the market or that her son had taken Re.1/- from her.

17. I am of the view the aforesaid variations in the depositions of the witnesses in court vis-à-vis their earlier statements to police are minor and do not strike at the credibility of the witnesses. On the other hand, it appears fact that the appellant had taken the child from his residence and was thereafter seen by a number of persons at the tea stall and/or betel leaf shop is reflected in the FIR itself.

18. There is delay of two days in lodging FIR but in view of the fact that the distraught parents were searching for the child such delay may be ignored.

19. But to prove the guilt, prosecution has to overcome a more stiffer hurdle. Even if one accepts that the prosecution was able to establish that the appellant was seen with the child in the morning of 03.11.2006 at the market or near the jungle, to ascertain a livelink between the said circumstance and the homicidal death one must refer to the time of death as indicated by the post mortem doctor (PW16).

20. PW16 (Atindra Nath Majumder) conducted post mortem on the body of the deceased between 1:00 P.M. and 3:00 P.M. on 06.11.2006.

He opined the death was due to shock and asphyxia caused by ante mortem strangulation. In the post mortem report (Ext.4) he noted death occurred within 24 hours of post mortem examination i.e. the afternoon of 05.11.2006. In court, purportedly to support the prosecution, he changed his version and claimed that death occurred within 48 hours of post mortem examination. Even if one gives the maximum latitude to the evidence, of post mortem doctor death could not have occurred prior to 1:00 P.M. on 04.11.2006. The medical evidence, therefore, demolishes the prosecution case that the victim was murdered on 03.11.2006. If the time of death shifts to the afternoon of 04.11.2006, it becomes incumbent on the prosecution to establish the victim was in the control and custody of the appellant in the night of 3rd/4th November, 2011. Failure to do so would breach the livelink between the circumstance that the victim was last seen with the appellant in the morning of 03.11.2006 and his homicidal death in the afternoon of 04.11.2006.

21. PW22 (Prasenjit Sarkar) is the owner of the hotel. He produced the hotel register (Ext.8).

22. PW20 (Goutam Mahato) is the Manager of the hotel. He proved an entry in the register wherein it is recorded that one Mithu Sarkar had stayed in the hotel in the night between 03.11.2006 and 04.11.2006. None of the witnesses identified the appellant as the person who had stayed in the hotel. No opinion of handwriting expert was also produced to prove the signature of the said guest as that of the appellant.

23. Under such circumstances, onus does not shift upon the appellant to explain how the child had suffered homicidal death in the afternoon of the next day.

24. Even the circumstance that the appellant had secreted himself alone at Nataraj Hotel in Siliguri in the night of 03.11.2006 is inconsistent with the time of death as per medical evidence. That apart, the said circumstance is based on shaky foundation. To prove this circumstance, prosecution relied on PWs. 20 and 22.

25. To plug these deficiencies Mr. Bibaswan Bhattacharya referred to the evidence of the investigating officer (PW24) who deposed that the appellant while in custody made a disclosure statement as follows:-

“tabe aamake Batasivita Jungle-a niye gele khun kora Manab Chakraborty-ke uddhar kore dite paribo. Karon aami jani oke khun kore kothaay jungle-er vitare rekhechhi” [“If I am taken to Batasivita jungle I would be able to show the place where I have kept the body of the victim Manab Chakraborty after committing murder.”]

26. PW24 (SI H. Barman) deposed he along with the force took the appellant to the jungle at 4:45 A.M. on 06.11.2006 and on the showing of the appellant recovered the dead body. Thereafter he informed the parents of the child. Father of the child viz. Gobinda Chakraborty (PW1) and Madhab Biswas (PW15) came to the spot and signed on the inquest. Apart from the *ipse dixit* of the investigating officer, no evidence was led by the prosecution to establish that the body of the child was recovered pursuant to his leading statement.

27. I am conscious even a single witness, if reliable, is sufficient to prove a fact. So I have made an endeavour to see whether the investigating officer is a reliable witness.

28. It may be pertinent to note immediately after the recovery of the dead body, investigating officer prepared an inquest report. Initially, in the inquest report there is no reflection that the recovery of the dead body was on the showing of the appellant. Subsequently, in the carbon copy such fact has been incorporated in different ink. If the recovery of the body had been on the showing of the appellant, investigating officer would have certainly recorded this vital circumstance in the inquest report. Subsequent introduction of this circumstance by tampering the carbon copy of the inquest report exposes the duplicity of the investigating officer and casts serious doubt on his credibility.

29. Under such circumstances, little credence can be given to the sole *ipse dixit* of the police officer who indulged in such devious methods.

30. It is also apposite to note that recovery of the body had not been made at that time when no other witness was present. It is the version of the investigating officer (PW24) that he was accompanied with force i.e. other police personnel. No other police personnel has been examined to corroborate the recovery of the dead body pursuant to the showing of the appellant. Other witnesses particularly PWs.1 & 2 came to the spot

after the recovery and their version with regard to the recovery at the instance of the appellant carries no weight.

31. Hence, I am of the opinion prosecution has failed to prove that the recovery of the dead body from Batasivita jungle was pursuant to the disclosure statement or the showing of the appellant.

32. Similarly, recovery of the bangle from Karmakar Jewellers on the showing of the appellant has also not been proved. PW10 (Kartick Bhowmik) & PW12 (Pradip Sharma) are the witnesses to the recovery. Both the witnesses turned hostile. Though they admitted their signatures on the seizure list, none of them stated that the alleged recovery was made in presence of the appellant or upon his showing.

33. In the aforesaid backdrop, I am of the opinion the vital circumstance relied upon by the prosecution has not been proved beyond doubt. Though there may be a needle of suspicion with regard to the involvement of the appellant but in absence of clear and convincing evidence of the incriminating circumstances, it cannot be said that a complete chain unerringly pointing to the guilt of the appellant has been proved beyond doubt.

34. Hence, I am inclined to extend the benefit of doubt to the appellant.

35. The appeal is accordingly, allowed.

36. In view of disposal of the appeal, the connected application being CRAN 1 of 2019 (*Old CRAN No. 4524 of 2019*) is also disposed of.

37. Appellant 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.

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

39. 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.)