

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. 526 of 2015
(CRAN 8 of 2022)

Ashique Arafat @ Asiq Arafat & Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Moinak Bakshi, Adv.

For the State : Mr. Nguive Ahmed, Id. APP.
Ms. Trina Mitra, Adv.

Heard on : 18.01.2023

Judgment on : 18.01.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 22.06.2015 & 23.06.2015 passed by learned Additional District & Sessions Judge, 2nd Court, Tamluk, Purba Medinipur in Sessions Trial No.87(03) 2004 arising out Sessions Case No. 12(Feb) 2002 convicting the appellants for commission of offence punishable under Sections 396/412/201 read with Section 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- each, in default, to suffer simple imprisonment for two

years more for the offence punishable under Section 396 IPC; to suffer rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-, in default, to suffer simple imprisonment for one year more for the offence punishable under Section 412 IPC and to suffer imprisonment for three years and to pay a fine of Rs.1,000/- in default, to suffer simple imprisonment for four months more for the offence punishable under Section 201 IPC. All the sentences to run concurrently.

2. Prosecution case as alleged against the appellants is to the effect that on 08.09.2001, Ashique Arafat, Sanjay Sen and Bidyut Dhal @ Bera hired a TATA Sumo vehicle bearing registration No. WB34F-8262 owned by Uttam Pattanayak (PW7) to go to Digha. Susanta Adak (the deceased) was the driver of the vehicle. They proceeded to Digha. At Digha, they halted at Gouri Lodge.
3. On the next day i.e. 09.09.2001 at 04:15 P.M. dead body of Susanta Adak was seen lying in the Cassurina forest at adjoining Marine Aquarium at Digha. PW3 noticed the dead body and lodged written complaint at Digha Police Station resulting in registration of Digha Police Station Case No.34 of 2001 dated 09.09.2001 under Sections 302/201/34 of the Indian Penal Code.
4. In course of investigation, PWs.18 & 19, police officers attached to Belda police station apprehended the appellants in the aforesaid TATA Sumo vehicle. Driving licence of the deceased was recovered

from Ashique Arafat. Appellants were arrested. On the showing of Ashique, the ligature i.e. *gamcha* used to strangle the victim was recovered. During investigation, Bidyut Dhal @ Bera confessed his guilt before Magistrate. Witnesses also identified the appellants in Test Identification Parade.

5. In conclusion of investigation, charge-sheet was filed. Charges were framed under Sections 396/201/412/34 read with 120B of the Indian Penal Code. Appellants pleaded not guilty and claimed to be tried.
6. In course of trial, prosecution examined 22 witnesses and exhibited a number of documents.
7. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 22.06.2015 & 23.06.2015 convicted and sentenced the appellants, as aforesaid.
8. Mr. Moinak Bakshi, learned Advocate for the appellants submits most of the witnesses have turned hostile. Appellants were shown to them at the police station. Hence, their identification in court and during Test Identification Parade is of little substance. Confession of Bidyut Dhal @ Bera is an exculpatory one. Recovery of the vehicle and personal belongings of the deceased have not been proved. Accordingly, he prays for acquittal.
9. Mr. Neguive Ahmed, learned Additional Public Prosecutor submits Ashique Arafat, Sanjay Sen and Bidyut Dhal @ Bera were identified

by the owner of the vehicle (PW7). PW10 identified Ashique in court. Admission register of Gouri Lodge shows that the appellants and the deceased stayed together in the said lodge on the night prior to the incident. Soon after the incident appellants were found travelling in the stolen vehicle. Driving licence of the deceased was recovered from Ashique. Post-mortem doctor (PW21) opined death was due to strangulation by a rope. The ligature i.e. *gamcha* was recovered on the leading statement of Ashique. The aforesaid circumstances are corroborated by the confession of Bidyut. Hence, the appeal is liable to be dismissed.

10. I have considered the evidence on record in the light of the aforesaid submissions.
11. De-facto complainant viz. Sushil Prodhan (PW3) has turned hostile. PW1 (Kanai Prodhan @ Kanu) and PW2 (Arun Jana) are the shop owners near Marine Aquarium. None of these witnesses identified the appellants. They however, admitted a dead body was found in the adjoining Cassurina forest. The face of the body was burnt with acid. It is trite law evidence of hostile witnesses need not be rejected in toto. Distilling their evidence against the anvil of truth, it is established that the dead body of a male was found on 09.09.2001 around 04:15 P.M. in the Cassurina forest near Marine Aquarium.

12. Though the face of the body was burnt with acid, brother of the deceased viz. Tarun Adak (PW6) identified the body as that of Susanta Adak. Uttam Pattanayak (PW7) proved that Susanta was the driver of the vehicle and had been hired on 08.09.2001 by 3 persons to go to Digha. He identified them as Ashique, Sanjay and Bidyut. PW10 corroborated PW7. He identified Ashique in Court.
13. Mr. Bakshi has challenged identification of the appellants on the ground that the witnesses had seen them in police lockup. Though most of the witnesses had turned hostile and even if identification of PWs.7 & 10 of some of the appellants have been seriously doubted on the score they had seen the accuseds in police lockup, their presence at Digha is established through the contemporaneous documentary evidence namely, hotel register of Gouri Lodge which was seized in the course of investigation.
14. PW5 (Ganga Rakshit) and PW8 (Tapas Karan) are the employees of the lodge. Though they failed to identify the appellants in court, PW8 produced the hotel register before the I.O. In the register names and addresses of the appellants have been recorded showing they had booked two rooms on 08.08.2001 at 8:00-8:30 P.M. and left the hotel on the next day at 12 noon. The register was seized by I.O. in the course of investigation. The witness proved his signature on the seizure list.

15. PW21 (Dr. Mafezal Hossain) conducted post-mortem over the body. He found the following injuries :-

“Rigor mortis passed off. Wounds-Superficial acid burn involving whole of face, upper part of chest, dorsum of left hand and dorsum of left foot. It is post mortem in nature because no inflammatory change was seen at the margin of the burn wound. Ligature marks are present. Two continuous deeply sheeted rope marks are found over throat and neck below thyroid cartilage. Thyroid cartilage was fractured.”

He opined death was due to asphyxia as a result of strangulation by rope ante mortem and homicidal in nature. Disfiguration of face by acid is post mortem in nature. He proved his report (Ext.16).

16. Soon after the registration of FIR notices were sent to neighbouring police stations to trace out the stolen vehicle. PW18 (SI Monimoy Singha Roy) was posted as Officer-in-charge, Belda Police Station. He along with ASI Raj Kumar Ghosh (PW19) apprehended the vehicle along with the appellants at Keshiary More while it was coming from Contai side. Driving licence of the deceased, two live bombs, knives and money were recovered.

17. PW22 (Sudhangshu Sekhar Roy) is the Investigating Officer of the case. He arrested the appellants. He seized the vehicle and other articles. On the disclosure statement of Ashique, ligature i.e. *gamcha* was recovered. He forwarded Bidyut Dhal @ Bera for recording confessional statement before Magistrate (PW20). He collected the statement. He put up the accused persons for Test Identification Parade. He submitted charge-sheet.

18. Mr. Bakshi contends that the statements of Bidyut Dhal @ Bera before Magistrate is an exculpatory one.
19. I have examined the said confession. Bidyut does not implicate himself in the murder. However, he admits his presence and participation in the theft of the vehicle which was subsequently recovered. PW20 recorded the confessional statement after giving necessary warnings to Bidyut Dhal @ Bera. He had also been sent to jail for reflection.
20. It must be borne in mind that Bidyut has not been charged with the offence of murder. His confession shows he was a member of the group of dacoits who committed dacoity and murder. Ingredients of the aforesaid offences are disclosed in the confessional statement and the same can be relied on against him.
21. With regard to the other appellants, the confession of Bidyut may be used to corroborate the other circumstances which establish their guilt. Presence of other appellants along with Bidyut has been proved through the hotel register where their names and addresses appear as occupants. Soon after the murder they were seen together in the stolen vehicle. Driving licence of the deceased was found in the possession of one of the appellants viz. Ashique. Ligature i.e. *gamcha* was also seized on the showing of the said appellant Bidyut Dhal @Bera.

22. These circumstances are bolstered by the confession of co-accused.
23. Hence, conviction and sentence of the appellants are upheld.
24. The appeal is accordingly, dismissed.
25. In view of dismissal of the appeal, connected application being CRAN 8 of 2022 is also disposed of.
26. Period of detention suffered by the appellants 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.
27. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.
28. 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.)