

**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

***D. R. 6 of 2019
in
C.R.A. 723 of 2019***

***Sudhama Sharma
-Vs-
State of West Bengal***

For the Appellant	:	Mr. Sekhar Kumar Basu, Id. Sr. Adv., Mrs. Manasi Roy, Adv. Mr. Bibaswan Bhattacharyya, Adv.
For the State	:	Mr. Saswata Gopal Mukherji, Id. P.P., Mr. Partha Pratim Das, Adv. Ms. Eshita Dutta, Adv.
Heard on	:	21.2.2023, 23.2.2023 & 24.2.2023.
Judgment on	:	24.2.2023.

Joymalya Bagchi, J.:-

1. Criminal appeal as well as the death reference arise from the judgment and order dated 19.11.2019 and 20.11.2019 passed by the learned Special Judge under POCSO Act-cum-Additional District & Sessions Judge, 2nd Court, Darjeeling in Special Case No.16 of 2015 convicting the appellant for commission of offence

punishable under Sections 364/376(2)(i)/377/302 of the Indian Penal Code read with Section 6 of the POCSO Act and sentencing him to death for the offence punishable under Section 302 IPC; to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for six months more for the offence punishable under Section 377 IPC; to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for six months more for the offence punishable under Section 376(2)(i) IPC and to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for six months more for the offence punishable under Section 364 IPC; all the sentences except the death sentence would run concurrently.

Prosecution case:-

2. Prosecution case levelled against the appellant is to the effect that on 11.11.2014 minor victim aged around 11 years was taken away from her residence by the appellant who is her own brother. Her father (PW1) returned home and started searching for the minor. Upon query the appellant gave evasive and contradictory replies. Blood stains were found on his wearing apparel. Appellant was arrested. He was medically examined by PW3. He found two dry weeds in the pubic hair of the appellant.

Number of injuries were noted on his back. Appellant made disclosure statement before the Investigating Officer (PW18). Pursuant thereto, it is alleged dead body was identified. The identification was videographed by PW13. Vaginal smear and blood of the victim were sent for DNA examination but no report was received. Charge sheet was filed against the appellant.

Proceedings before the trial Court:-

3. Charges were framed under Sections 364/376(2)(i)/377/302 of the Indian Penal Code and under Section 6 of the POCSO Act. Appellant pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 20 witnesses and exhibited various documents including the compact disc and memory card. Defence of the appellant was one of innocence and false implication. During his examination under Section 313 of the Code of Criminal Procedure, he claimed he had gone to pay rent for his rickshaw. At that time he was apprehended and brutally assaulted and handed over to police. He also claimed he had animosity with his family members and had been falsely implicated.
4. Upon consideration of the evidence on record, trial judge by the impugned judgment and order dated 19.11.2019 and 20.11.2019 convicted the appellant on the aforesaid charges and

sentenced him to death for the offence of murder. Hence, the present appeal and reference for confirmation of death sentence.

Prosecution Evidence:-

5. PW1 is the father of the deceased. He deposed on 11.11.2014 he had gone to the temple at 7.00 AM. Around 10.00 AM his daughter used to come to collect Prasad. She did not return till 11.00 AM. He informed the Pandit that he would return to his residence to enquire about the whereabouts of his daughter. On his way, he found that the rickshaw of the appellant was standing. A towel of Namabali (printed scriptural writings) was there on the rickshaw. Other rickshaw pullers stated the appellant had not been seen for long. He went to his residence. His younger daughter said the victim i.e. the elder daughter had not returned. They started searching for the child. His son also joined the search. His son noticed appellant was coming from the jungle. On query he stated that he had kept the victim at the house of the owner of the rickshaw. Subsequently, he stated that she was at *Khal busty*. Thereafter, he tried to flee away. They suspected the appellant had committed the crime. He also saw blood stains on his wearing apparel. Appellant was handed over to police. On the following day around 8.00 PM he went to the police station. A phone call was received at the police station that a girl was found hanging inside the camp near the jungle.

Police went there and brought down the dead body. Body was sent for post mortem examination. After post mortem examination, the body was handed over. He proved his signature on the FIR which was scribed by PW7. He also handed over the birth certificate of the child to police.

6. PW2 is the brother of the deceased. He deposed appellant was his elder brother. Deceased was their sister. On 11.11.2014 around 10.30 AM, appellant had taken Pankaj Jha, pujari of kali mandir (PW 4) to the mandir. The deceased was also with him. Subsequently, appellant returned without the child. He gave different stories where he had kept the child. This raised their suspicion. They also saw blood stains on the wearing apparel of the appellant. Appellant was handed over to police. On 12.11.2014, as per version of the appellant, police came to know that the victim was hung from a tree near 'Mechi' khola at Lalji jungle. Body was recovered. Their house is situated 1 km. away from the temple.
7. PW10 is another brother of the appellant. He deposed he heard about the incident from his father (PW1).
8. PW4 (Pankaj Jha) deposed he is a neighbour of the victim. On 11.11.2014 he was resting after taking breakfast. The victim was playing in the courtyard with other children. Appellant came to his house and took away the victim. Around 4/5 PM, PW1 came

to his house and enquired about his daughter. Thereafter, they started searching for the child. They could not find her. Subsequently, appellant came to the spot. He gave irrational answers. Thereafter, he tried to flee away. He was apprehended and handed over to police. Following day, the deceased was recovered from 'Mechi' khola at Lalji jungle. He recorded his statement before Magistrate (PW20).

9. PW5 (Bijoy Singha), another witness deposed on 11.11.2014 at 10.30 AM he saw the appellant taking the victim to a jungle. On 12.11.2014 he went to the jungle with police. Dead body was recovered.
10. PW11 (Khokan Saibu) deposed he had seen a female hanging from the tree at 'Mechi nadi' at zero point at Nepal border. He informed the police. Police force came to the spot and took the dead body.
11. PW3 (Dr. Anurup Saha) is the Medical Officer who examined the appellant. During examination appellant was produced by the Investigating Officer viz., SI, Amalesh Singh of Naxalbari Police Station (PW18). Appellant confessed his guilt before PW3. Upon examination he found two dry weeds in the pubic hair. He also found the following injuries;

“Injuries present over the body are : 1) lacerated injury measuring 2” x 1¼” tissue deep, over the left side of the back 3” lateral to medial border of left scapula. 2) lacerated

*injury measuring 3½" x ¼" tissue deep over the right side of the back 2" lateral to midline and its lower and 1".
Age of injuries was within 24 hours from the date of examination."*

PW3 opined that appellant was capable of sexual intercourse. He proved the medical report. He stated injuries could be caused by hard blunt impact. He preserved the penial swab, urethral swab and wearing apparel of the appellant and handed them over to the investigating officer.

12. PW15 (Dr. Dibyakar Chettri) conducted post mortem examination. He opined death was due to axphyxia arising from smothering ante mortem and homicidal in nature with evidence of ante mortem penetration of genital and anal region with post mortem suspension of body by ligature around the neck. He proved the post mortem report, Ext.7. He handed over the vaginal swab, anal swab and wearing apparel of the deceased to the investigating officer.
13. PW18 (Amaresh Singh) is the Investigating Officer. He deposed investigation was endorsed to him by SI, Sourav Sen, the then Officer-in-charge of Naxalbari Police Station. He proved the formal FIR. He went to the place of occurrence, prepared rough sketch maps of the house of the appellant as well as the place wherefrom the victim was found dead. He proved the sketch maps, Ext.13 and 13/1. He held inquest over the body of the victim. He sent the body for post mortem examination. He

arrested the appellant. He seized the wearing apparel, vaginal swab and post mortem blood of the victim. He deposed the appellant made a disclosure statement, Ext.16. Pursuant to the statement, appellant took them to a place named Tarabari near river Mechi close to Nepal border. Dead body of the victim was hanging from a tree. The proceeding was videographed by PW13. Photographs were also taken. Compact disc, pen drive and photographs were seized under a seizure list, Ext.11/1. Compact disc and photographs were also produced in Court. Upon transfer, investigation was handed over to PW19 who submitted charge sheet.

Circumstances relied upon by prosecution:-

14. Analysis of the aforesaid evidence would show that the prosecution case is based on the following incriminating circumstances:-

(a) Appellant was last seen with the victim proceeding towards the jungle;

(b) He gave contradictory explanation where he had kept the victim;

c) On his leading statement body of the victim was seen hanging from a tree at Tarabari near river Mechi close to Nepal border;

d) Medical Officer (PW3) who examined the appellant found two dry weeds in his pubic hair. He also found lacerated injuries on his back;

e) Post mortem doctor (PW15) opined victim suffered asphyxial death due to smothering which is ante mortem and homicidal in nature with evidence of ante mortem penetration of genital and anal region with post mortem suspension of body by ligature around the neck.

15. In a case based on circumstantial evidence, it is the duty of the prosecution to prove each incriminating circumstance beyond doubt and establish that the proved circumstances form a complete chain which unerringly points to the guilt of the appellant and rules out any reasonable hypothesis of innocence.
16. I have analysed the evidence on record to assess whether the prosecution has been able to discharge the aforesaid burden beyond reasonable doubt.

(i) Last seen together:-

17. Prosecution has relied on the circumstance that on 11.11.2014 around 10:30 A.M. appellant had taken away the victim from the village and had proceeded to the jungle. To prove the aforesaid circumstance prosecution primarily relies on the evidence of PWs.4 & 5.

18. PW4 claimed he is a neighbour of the victim. He stated in the morning he was taking rest after having breakfast. The victim had come to his house and was playing with the other children in the courtyard. At that time, appellant came and took away the victim. In the evening around 4/5 P.M., father of the victim came and enquired about the child. They started searching for the child.
19. Strangely, during the search PW4 did not tell anyone that appellant had taken away the child from his courtyard. This conduct of the witness is most unnatural and casts serious doubt with regard to his credibility.
20. The aforesaid version of the witness is at contradiction with the FIR as well as the deposition of the father (PW1) in court. In the FIR, PW1 alleged that the appellant had taken the victim from his residence. During his deposition, he did not state that PW4 told him appellant had taken away his daughter.
21. Reading the evidence of PW4 in the light of the aforesaid materials on record it appears there is a dichotomy in the prosecution case whether the appellant had taken the victim from her residence or from the house of PW4. It may not be out of place to note that the younger daughter of PW 1 was present in the house at the relevant time. PW1 came to his house and enquired from his younger daughter regarding the whereabouts

of the victim. As per PW1, she stated victim had not returned. She did not tell her father that appellant had taken her younger sister from the house. In this backdrop, examination of the younger daughter was most vital to unfold the prosecution case with regard to the circumstances in which the victim had left her residence. She is the sole witness who could have thrown light on the fact whether appellant had taken the victim from their residence as stated in the FIR. For reasons best known to the prosecution, she had been withheld.

22. Version of PW4 that he saw the appellant take away the victim from his residence is also at variance to PW2. PW2 claimed that the appellant and PW4 had gone to Kali mandir together. At that time, victim had accompanied the appellant. As per the witness the temple was 1 km. away from their residence. The narration of events as per PW2 shows presence of the appellant, victim and PW4 at a temple 1 km. away from their residence. This demolishes PW 4 who stated appellant had taken away the victim from his house.
23. In view of the contradictory and inconsistent versions emerging from various witnesses and his own conduct of not informing others during the search about this vital information, I find it difficult to rely on PW4 that he had seen the appellant take away the victim from his residence in the morning of 11.11.2014.

24. PW5 who claimed he saw the appellant taking the victim towards the jungle is a chance witness. His deposition is cryptic and most unconvincing.
25. Apart from making a bald assertion he saw the appellant and the victim going towards the jungle, PW 5 is completely silent with regard to the circumstances under which he was present near the jungle and had seen the appellant and the victim together. Prosecution argued that the witness remained uncontroverted during cross-examination. Credibility of a witness and the veracity of his deposition is to be arrived at by testing his evidence on the anvil of reasonableness and broad probabilities. Cross-examination may be a relevant test to assess the deposition of a witness but it is not the sole criteria to determine the intrinsic truth and credibility of a witness. Failure of the defence to effectively cross-examine a witness does not absolve the duty of the Court to shift the prosecution evidence and satisfy its conscience with regard to its reliability. Before relying on a witness, the Court must assess the intrinsic truth in his deposition. Intrinsic truth and reliability of a witness is to be tested by reading the entire evidence as a whole against the touchstone of reasonableness, common course of human events and broad probabilities of the case. The task becomes more onerous when the witness is a chance witness whose presence at

the spot is neither natural nor probabilsed through attending circumstances.

26. Admittedly, PW5 is a chance witness. In **Harbeer Singh vs. Sheeshpal and Others**¹ the Apex Court discussed the law governing the appreciation of evidence of a chance witness. Referring to the observations of Mahajan, J. in **Puran vs. State of Punjab**² the Court observed a chance witness is one who suddenly arrives at a spot and then disappears. His evidence should be assessed with due care and circumspection. The Court held as follows:-

“23. The defining attributes of a “chance witness” were explained by Mahajan, J., in Puran v. State of Punjab [Puran v. State of Punjab, (1952) 2 SCC 454] . It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

24. In Mousam Singha Roy v. State of W.B. [Mousam Singha Roy v. State of W.B., (2003) 12 SCC 377] , this Court discarded the evidence of chance witnesses while observing that certain glaring contradictions/omissions in the evidence of PW 2 and PW 3 and the absence of their names in the FIR has been very lightly discarded by the courts below. Similarly, Shankarlal v. State of Rajasthan [Shankarlal v. State of Rajasthan, (2004) 10 SCC 632] and Jarnail Singh v. State of Punjab [Jarnail Singh v. State of Punjab, (2009) 9 SCC 719] are authorities for the proposition that deposition of a chance witness, whose presence at the place of incident remains doubtful, ought to be discarded. Therefore, for the reasons recorded by the High Court we hold that PW 5 and PW 6 were chance witnesses and their statements have been rightly discarded.”

¹ (2016) 16 SCC 418

² AIR 1953 SC 459

27. PW5 is completely silent with regard to the circumstances which brought him near the jungle. Had he not been there, it would not have been possible for him to see the appellant and the victim proceeding towards the jungle. Failure of a chance witness to disclose the circumstances which brought him at the spot to enable him to depose in the manner he did during trial is an important factor to test his credibility. Reference in this regard may be made to **Suresh and Another vs. State of Haryana**³. The Court held as follows:-

“47. Generally, the chance witness, who reasonably explains his presence in the named location at the relevant time, may be taken into consideration and should be given due regard, if his version inspires confidence and the same is supported by surrounding circumstances. Nonetheless, the evidence of a chance witness requires a very cautious and close scrutiny. A chance witness must adequately explain his presence at the place of occurrence (refer to Satbir v. Surat Singh [Satbir v. Surat Singh, (1997) 4 SCC 192] and Harjinder Singh v. State of Punjab [Harjinder Singh v. State of Punjab, (2004) 11 SCC 253]. Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded (refer to Shankarlal v. State of Rajasthan [Shankarlal v. State of Rajasthan, (2004) 10 SCC 632]. The behaviour of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident (refer to Thangaiya v. State of T.N. [Thangaiya v. State of T.N., (2005) 9 SCC 650].”

28. Bald assertion by PW5 that he had seen the appellant proceeding towards the jungle without anything more does not inspire confidence of this court. The witness has not laid down

³ (2018) 18 SCC 654

the foundational facts which justify his presence near the jungle to enable him to depose with regard to this aspect.

29. Hence, I do not find it safe to rely on PW 5 to come to a definite conclusion that the appellant had been seen going towards the jungle with the victim.
30. Evidence with regard to the '*last seen*' circumstance is, therefore, based on shaky foundation. Both PWs.4 & 5 do not appear to be reliable witnesses. Version of PW4 with regard to the circumstance in which he saw the appellant take the victim from his residence is not corroborated by the FIR or the deposition of PW1 or PW2. As discussed earlier, PW5 is a chance witness who has failed to explain the circumstance in which he happened to see the appellant with the child going towards the jungle.
31. For these reasons, I am constrained to hold that prosecution has failed to prove the most vital circumstance i.e. the appellant was '*last seen*' with the victim on the fateful day beyond reasonable doubt.

(ii) Recovery of dead body on the disclosure statement of the appellant:-

32. Investigating Officer (PW18) stated that the appellant during the investigation made a disclosure statement. Pursuant thereto, he took the police to Tarabari near Mechi river. He pointed to the dead body of the victim hanging from a sishu tree. PW18 also

deposed that the recovery had been videographed. Compact disc was also produced in Court.

33. Apparently, the aforesaid evidence backed with the disclosure statement (Ext.16) and the compact disc would lead to the conclusion that the body was recovered on the showing of the appellant. Unfortunately, evidence on record is otherwise. PW1 deposed on 12.11.2014 at 8.00 PM he went to the police station. A phone call was received at the police station stating that a girl was found hanging inside the defence camp near the jungle. Police went and brought down the dead body.
34. In this regard, PW1 is corroborated by PW11. He deposed he had seen the body of one female hanging from a tree near Mechi nadi at zero point at Nepal border. Matter was informed to the police. Police force of Naxalbari came to the spot and took the dead body of Fulkumari.
35. The aforesaid prosecution witnesses demolish the case of recovery of the dead body pursuant to the disclosure statement made by the appellant. In fact, dead body was noticed by local people and the police received a phone call. Thereafter, they went to the place of occurrence and recovered the body. This court has viewed the compact disc. Video clippings in the compact disc show that the appellant was taken by the police personnel to the spot. People assembled at the spot. Appellant is seen pointing at

the dead body. But this conduct of the appellant cannot be said to have led to the discovery of body of the victim. The body had already been discovered by local people. When a fact is already in the knowledge of local people it cannot be said to have been discovered on the disclosure statement or the showing of the appellant.

36. For these reasons, I hold the evidence on record does not give rise to the inference that the dead body of the victim was discovered either on the leading statement or the showing of the appellant. Neither his disclosure statement nor his conduct can be said to be admissible under Section 27 or Section 8 of the Evidence Act respectively.

(iii) Other circumstances:-

37. In the absence of proof regarding the most incriminating circumstances viz., 'last seen together' and 'discovery of the dead body on the disclosure statement of the appellant', other circumstances would not form a complete chain to establish guilt of the appellant.
38. For example, if the '*last seen*' theory is not established, conduct of the appellant that he gave contradictory versions with regard to where the victim was would be of little or no consequence.
39. Presence of blood on his wearing apparel has not been established through forensic report. That apart, the said

circumstance may be explained through an alternate hypothesis. Appellant during his examination under Section 313 of the Code of Criminal Procedure stated he had been brutally assaulted by local people. This probabilises presence of blood stain, if any, on his wearing apparel.

40. PW3 found lacerated injuries on the back of the appellant. He opined it was due to blunt and heavy impact. Nature of the injuries and their situs i.e. on the back of the appellant improbabilises the fact that he may have suffered the injuries while committing rape on the victim, a 11-year old child. If the child had resisted during the incident, injury marks would have been on the face and the frontal portion of the body. He may have also suffered injuries in his private parts. On other hand, injuries on the back probabilise torture and assault on the appellant.
41. Appellant had been apprehended by local people in the evening of 11.11.2014. It appears he had been physically assaulted and was handed over to police. Thereafter, he was detained in police station throughout the night. On 12.11.2014 he was taken to the place of occurrence where the body was recovered. Around 5:00 pm, he was examined by PW3. PW3 noted two dry weeds in his pubic hair. Medical examination had been conducted more than 24 hours after his arrest. Under such circumstances, mere

presence of two dry weeds in the pubic hair by itself cannot invariably lead to the inference that the appellant had raped and murdered the victim.

42. In this backdrop, I am of the opinion none of the aforesaid circumstances are convincing enough to transcend the prosecution case from one of mere suspicion to that of proof beyond doubt.

Conclusion:-

43. Under such circumstances, I am inclined to extend the benefit of doubt to the appellant.
44. Conviction and sentence of the appellant are set aside.
45. Appellant shall be forthwith released from custody, if not wanted 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.
46. The appeal is accordingly allowed.
47. The death reference is accordingly answered.
48. This Court records appreciation for the able assistance rendered by Mr. Sekhar Kumar Basu, Senior Advocate with Mrs. Manasi Roy and Mr. Bibaswan Bhattacharyya who represented the appellant upon instructions from the High Court Legal Services Authority.

49. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.
50. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

as/akd/PA