

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(Circuit Bench at Jalpaiguri)**

PRESENT: THE HON'BLE JUSTICE SUGATO MAJUMDAR

**CRA 15 of 2019
Madhab Das & Ors.
Vs.
The State of West Bengal & Anr.**

**With
CRA 17 of 2019
Nagori Das
Vs.
The State of West Bengal & Anr.**

For the Appellant : Mr. Hillol Saha Podder

For the State : Mr. Aditi Shankar Chakraborty
Mr. Abhijit Sarkar
Mr. Nilay Chakraborty

Hearing concluded on : 18/08/2023

Judgment on : 22/08/2023

Sugato Majumdar, J.:-

These two criminal appeals arise from the same judgment of conviction and order of sentence. These two appeals are heard together and taken up for delivering common judgment.

All the appeals are preferred against the Judgment dated 29/06/2019 and the Order of sentence dated 01/07/2019 passed by the Learned Additional Sessions Judge, Tufangunj, District – Cooch Behar in Sessions Case No.324 of 2012 corresponding to Sessions Trial No.01 (06) of 2014 whereby the Appellants were found guilty under Section 201/34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for a term of six years and also to pay fine of Rs. 25,000/- each in default to suffer simple imprisonment for six months.

Bablu Chandra Saha, the deceased, son of the de-fact complainant Nagendra Mohan Saha went to the residence of his neighbour Haran Saha for charging his mobile hand-set on 08/07/2010. From about 10:00 p.m. he was missing. He could not be traced out even after thorough search. On the next morning his mobile was found near the toilet of the de-facto complainant. In the evening a missing diary was lodged bearing number G.D.E 301/10 dated 09/07/2010 in Boxirhat Police Station. Bablu Saha, the deceased, used to go to the residence of one of the accused Madhab Das. The said accused fled away from the locality when the deceased was missing. On surmise, the de-facto complainant along with local people interrogated another accused Naguri Das who confessed before all that all the accused persons, belonging to the same family, murdered the deceased and buried the dead body under a banana bush.

Written complaint was lodged before Boxirhat Police Station on 10/07/2010. The case was registered as Boxirhat P.S. Case No.80/2010 dated 10/07/2010 under Sections 302/201/34 of the Indian Penal Code. Dead body of the deceased was exhumed, inquest report was prepared, post-mortem examination was conducted. The Investigating Officer conducted investigation after completion of which he filed charge sheet under Sections 302/201/34 of the Indian Penal Code.

After commitment to the Sessions Court and taking cognizance of the offences, charges were framed under Sections 302/201/34 of the Indian Penal Code. Charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. Hence trial began.

In course of trial, the prosecution produced thirty one witnesses and various documentary evidences which were exhibited and marked.

Defense of the accused persons, as appears from the trend of cross-examination and answer to the questions asked in course of examination under Section 313 of the Code of Criminal Procedure was false implication.

The Learned Trial Judge, in the impugned judgment exonerated the accused persons from the charge of Section 302 of the Indian Penal Code but convicted and sentenced them under Section 201/34 of the Indian Penal Code.

The convicts preferred different appeals. Some of them are the present Appellants.

It is argued by the Learned Counsel for the Appellants that the whole prosecution case hinged on extra judicial confession of one of the convict Naguri Das and discovery of the dead body at her instance. The Learned Trial Judge did not rely on the extra judicial confession as the same was made under pressure by the said Naguri Das, as it was observed in the impugned judgment. This observation led the trial court to exonerate the charge under Section 302 of the Indian Penal Code. In the same breath and on the basis of the same piece of evidence conviction under Section 201 of the Indian Penal Code is not sustainable. Same evidence cannot be rejected and accepted at the same time, according to the Learned Counsel for the Appellant.

According to him, the appeal should be allowed and the Appellants should be acquitted.

Per contra, the Learned Counsel appearing for the State argued that number of prosecution witnesses testified in tandem that Naguri Das made extra judicial confession before them that all of them murdered Bablu Chandra Saha and buried the dead body under a banana tree. The dead body was exhumed at the instance of Naguri Das which leads credence to such confession. Therefore, even though the Learned Trial Judges did not convict the Appellants under Section 302 of the Indian Penal Code, conviction under Section 201 of the Code is justified as the same is based on uncontroverted testimony of number of witnesses.

I have heard rival submissions.

The whole evidence revolves round the extra judicial confession of Naguri Das. There is no evidence on motive; there is no evidence indicating that the deceased was last seen in or around the residence of the Appellants; no offensive weapon was recovered. The trial judge surmised that there was “prior and vicious concert of mind by the accused persons”.

Section 30 of the Indian Evidence Act, 1872 is relevant in the context of the present case:

“Section. 30: When more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such

other person as well as against the person who makes such confession."

Explanation- "Offence" as used in this section, includes the abetment of, or attempt to commit, the offence."

This provision was elaborately considered and explained by Five Judges' Bench of the Supreme Court of India in ***Haricharan Kurmi v. State of Bihar*, AIR 1964 SC 1184**. It was observed in this case that the basis on which this provision is found is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so Section 30 provides that such a confession may be taken into consideration even against a co-accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accused person can be used against the maker of the confession, though as a matter of prudence criminal courts generally require some corroboration to the said confession. It was further explained that Section 30 provides that a confession may not be evidence as strictly defined by Section 3 of the Act, it is an element which may be taken into consideration by the criminal court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the court, it is not obligatory on the court to take the confession into account. When evidence as defined by the Act is produced before the court, it is the duty of the court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the court. But a court cannot say in respect of such evidence that it will just not take that evidence into

account. Such an approach can, however, be adopted by the court in dealing with a confession, because Section 30 merely enables the court to take the confession into account.

Coming to the case in hand, as stated above, there is no corroboration. The Trial Judge observed that Naguri Das made extra judicial confession under duress. In fact, P.W.25 stated in examination-in-chief that local people put pressure on Naguri Das before her extra judicial confession. For this reason, the Trial Judge did not rely on such confession. But contradictory reasonings were put forth by the Trial Judge. Some of the Appellants might have fled away from home after the incidence giving rise to suspicions but suspicions cannot be substitute of proof. This conduct does not carry much weight.

Ext.4/2 is the Investigating Report under Section 174 of Code of Criminal Procedure, 1973 prepared by P.W.26, Block Development Officer, posted at that material point of time in Boxirhat. The report shows that the spot from where the body was exhumed was shown by the villagers not by Naguri Das. There was no recovery at the instance of Naguri Das. A spade was recovered at the instance of another accused, but that itself proves nothing. The spot where the dead body was buried was indicated by Naguri Das in that very extra judicial confession which was disbelieved by the Trial Judge. For P.W.26, recovery was made at the instance of the villagers and not Naguri Das. Analogy drawn by the Trial Judge with Section 27 of the Indian Evidence Act, 1872 is legally as well as factually incorrect. In the same breath, extra-judicial confession cannot be rejected and accepted. Once extra judicial confession is discarded nothing remains except some suspicious conduct of some of the Appellants which fall far short to establish charges under Section 201/34 of the Indian Penal Code. Finding of the Learned Trial Court cannot be accepted and invites

interference of this Court. Therefore, the impugned judgment of conviction and the order of sentence are hereby set aside.

The Appellants are acquitted of all the charges levelled against them. They are set free and liberated from the bail bonds.

A copy of this judgment along with the lower court record may be sent back.

All the two appeals are disposed of along with pending petitions, if any.

(Sugato Majumdar, J.)