

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 449 of 2001

**Khokan Rajbangshi & Anr.
-Vs-
State of West Bengal**

For the Appellants : Mr. Aniruddha Bhattacharya
Ms. Ritwika Ghosh

For the State : Mr. Avishek Sinha

Heard on : 17.11.2023, 03.01.2024

Judgment on : 13.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against a judgment and order dated 26th September, 2001 passed by the Additional Sessions Judge, Berhampore, Murshidabad in connection with the Sessions Serial Case No. 62 of 1999 convicting the appellants under Sections 364/34 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 6 years each and to pay a fine of Rs.2,000/- each, in default, to suffer rigorous imprisonment for one year each.
2. The prosecution case precisely stated that the complainant had filed a complaint dated 5.9.90 before the Officer-in-Charge, Berhampur, Murshidabad, inter alia, stating that on 17.8.90 at about 4 p.m. Khokan

Rajbangshi of Rampara had visited their village after sometimes the said Khokan Rajbangshi and Swapan Rajbangshi called Ramprasad Rajbangshi from his house and strolled along with the bank of Ganges. Ramkanta Dey, Babu Pal and Sukhen Rajbangshi had seen them sitting at the bank of Ganges. At about 8 o'clock in the night Khokan Rajbangshi and Swapan Rajbangshi returned home while his brother Ramprasad Rajbangshi did not return. On being questioned, the aforesaid persons replied that the brother of the complainant had gone to the market at Satui. At 4 o'clock thereafter, Khokan Rajbangshi along with his wife returned to their house on a bicycle. The complainant and his brothers searched for the victim Ramprasad in the houses of relatives but could not find him till date. He thereafter, lodged a diary in the police station on 31.8.1990. The complainant suspected that Khokan and Swapan had murdered his brother and therefore sought for an investigation.

3. Based on the aforesaid complaint Berhampur Police Station Case No. 261/90 dated 5.9.1990 was initiated under Sections 364/34 of the Indian Penal Code. On completion of the investigation charge-sheet was submitted Charges were framed to which the present appellants pleaded not guilty and claimed to be tried.
4. The prosecution in order to prove its case cited 9 witnesses and exhibited certain documents.
5. Learned Advocate for the appellants submitted that:
 - i) The impugned order of conviction and sentence is against the materials on record and is, thus, liable to be set aside.

- ii) Impugned order of conviction and sentence, being based on inadmissible evidence, is liable to be set aside.
- iii) The Learned Judge illegally refused to consider the defence case in its proper perspective which has caused serious prejudice to the appellants and have resulted in complete failure of justice. Hence, the impugned order of conviction and sentence is liable to be set aside.
- iv) The framing of charge is wholly defective and not in accordance with law which has caused serious prejudice to the appellants and resulted in complete failure of justice. Hence, the impugned order of conviction and sentence is liable to be set aside.
- v) In a case rests on circumstantial evidence, it is essential that the circumstances, in question, must be satisfactorily established and the links in the chain of circumstances must be complete and the proved circumstances must bring home the offence to the accused persons beyond all reasonable doubts and the facts so established must be consistent only with the guilt of the accused and inconsistent with their innocence.
- vi) Inordinate and unusual delay of 20 days in reporting the police about the alleged incident of taking away of the brother of the PW-1 Sambhu Rajbangshi, the informant by the appellants without any explanation for such delay in absence of any other evidence makes the prosecution completely unworthy of credit and the impugned order of conviction and sentence is liable to be set aside.

- vii) Admittedly about 5 days before lodging of FIR, the PW-1, informant of the case, reported the incident to the police and made diary, withholding of the said Dairy during trial only suggest since the contents of the said diary was not in terms of the prosecution case the same has been withheld which makes the entire prosecution wholly unreliable and the impugned order of conviction and sentence is liable to be set aside.
- viii) The FIR was not a substantive evidence and no Court can legally act upon the content thereof independently without the same being duly proved by its maker. As such the Learned Trial Court illegally acted thereupon when the matter thereof admitted in his evidence that being an illiterate person, he could not say about the contents of the complaint.
- ix) The Trial Court illegally admitted into evidence the content of the FIR without the same being duly proved by the maker thereof.
- x) The Trial Court illegally acted on the evidence of the PW-1 Sambhu Rajbangshi that his brother was in an enmity terms with the appellant no. 1 being the alleged motive against the appellants inasmuch as the said witness admitted in his cross-examination that he heard about such enmity term which completely inadmissible in evidence and the impugned order of conviction and sentence being based thereupon is liable to be set aside.
- xi) In view of the evidence of the PW-1 Sambhu Rajbangshi that he was reported by one Ramkanta Dey and Babu Pal that they saw

his brother by the side of river at about 5 P.M. on the date of the incident, it could not be considered that the appellant was last seen alive in the company of the appellants and thereafter not traceable.

6. Learned Advocate for the appellants further submitted that:-

- i. The incident as alleged or at all took place on 17th August, 1990, however, the de-facto complainant (PW-1) lodged the purported written complaint with the Officer-in-Charge, Berhampur Police Station as late as on 05.09.1990 i.e. after a delay of about 19 days which cast serious doubt about the sanctity and truthfulness of the prosecution case.
- ii. From the four corners of the written complaint, there was absolutely no whisper as to what warranted such inordinate delay in lodging the purported written complaint and it was submitted that such unexplained delay hit at the very root of the prosecution case and pinpointed towards the innocence of the appellants in the instant case.
- iii. Even if the occurrence as alleged was believed to have taken place on 17.08.1990 it was extremely doubtful, patently absurd and inherently improbable and against the normal human tendency or behavior that the family members of the missing person, particularly his brother who was the de-facto complainant in the instant case would choose to wait for another 19 days before going to the police station to lodge the written complaint instead of taken immediate

steps to register the complaint with the police station and such unnatural conduct on the part of the de-facto complainant/PW-1 render the entire prosecution case to be cryptic and inconceivable and lay threadbare the possible false implication of the appellants in the facts of the instant case.

- iv. The inherent discrepancy in the prosecution case would further be reflected from the fact that although the de-facto complainant/PW-1 claimed to have registered one General Diary Entry (GDE) with regard to the incident as alleged on 31.08.1990, however, the said GD Entry was never produced before the Court and it had also come in the evidence of the Investigating Officer (PW-9) (in Page-17 of the paper book) that he did not inquire about registration of any such GDE on 31.08.1990 and such contradictions in the prosecution version left no manner of doubt that the entire prosecution case had been attended with ulterior motive and *mala fide* with the sole objective to somehow frame the appellants in the instant case.
- v. Although the written complaint in the instant case was lodged with the police station on 05.19.1990, however, interestingly the same was “SEEN” by the Learned SDJM, Sadar after 4 long days i.e. on 09.09.1990 which was completely inconsistent with the legal mandate as encapsulated under Section 157 of the Code of Criminal Procedure and such inordinate delay in sending the FIR to Learned SDJM, Sadar smacked *mala fide* and indicated towards foul play at the instance of the prosecution.

- vi. The de-facto complainant/PW-1 lodged the written complaint which was subsequently treated as FIR after an unexplained delay of 19 days from the said incident which completely demolished his credibility as a witness and made him completely untrustworthy of credit and relying on such cryptic and manufactured version of such witness would result in travesty of justice.
- vii. The de-facto complainant/PW-1 during his examination stated that one Ramkanta Dey/PW-2 and one Babu Pal/PW-3 informed him they saw Ramprasad by the side of the river at about 5 p.m., but those witnesses turned hostile in course of their deposition before the Learned Trial Court and turning hostile of such key prosecution witnesses have demolished the entire foundation of the prosecution case and such stance of the said key prosecution witnesses before the Learned Trial Court ran completely contrary to the prosecution story and left no manner of doubt that the entire prosecution case had been attended by *mala fide* and ulterior motive and/or design.
- viii. It was well established principle of the criminal jurisprudence that in a case based on circumstantial evidence, all the circumstances against an accused need to be established by the prosecution beyond reasonable doubt and it was the bounden duty of the prosecution to prove and/or establish each and every link to form the chain of circumstances and if the chain was not complete the prosecution case will fall apart, which was exactly what had happened in the facts of the instant case and the entire investigation

had been shoddy, ineffective and perfunctory right from the very inception and basing conviction of the appellant on such cryptic and shoddy investigation had caused travesty of justice in the instant case.

- ix. The Investigating Agency had miserably failed to bring anything on record to justify the incorporation of the provision of Section 364 of the Indian Penal Code against the appellants as existence of *mens rea* and/or motive right from the very inception was a *sine qua non* to attract the provision of Section 364 of the Indian Penal Code and the prosecution had failed to bring anything on record to prove any wrongful intention on the part of the appellants either to abduct or kill the victim (missing) in the instant case and further the prosecuting agency had completely failed to trace the whereabouts of the victim (missing) and it was completely incomprehensible as to how the prosecution could link the appellants with the alleged crime where it had failed to bring on record any circumstance leave alone, any incriminating circumstance against the appellants in the facts of the instant case.
- x. The *mala fide*, concoction and the hollowness of the prosecution case would further be evident from the fact that the evidence of PW-9/Investigating Officer that the place of occurrence had not been marked by him on the rough sketch map which was quintessential in a criminal trial and it was a cardinal principle of law that the place of occurrence, date of occurrence and time of occurrence had

to be proved beyond reasonable doubts and if one of those three very essential factors shift then the entire edifice of the prosecution case was bound to fall which was exactly what had happened in the facts of the instant case and in view of such non-marking of the sketch map of the veracity of the entire prosecution case became doubtful and on that count itself the shoddy investigation and the evidences ought to be discarded and the benefit of acquittal should be accorded to the appellants in the instant case.

- xi. From the cross-examination of PW-9 (S.I. Kumaresh Chakraborty, the first Investigating Officer) it transpired that although he took over the charge of investigation on 05.09.1990, he specifically stated, *“since 17.08.90 till 05.09.90 what step was taken by the de-facto complainant side to trace out the victim I cannot say and during the investigation, I did not inquire into the matter. I did not inquire if any GD in respect of the incident was lodged on 31.08.1990 and further that he did not draw up any sketch map of the place of occurrence.”* Such admission of the Investigating Officer in the course of his cross-examination clearly show the dismal quality of investigation carried out by the Investigating Agency in the instant case and basing the conviction of the appellants on the basis of such faulty and shoddy investigation had resulted in travesty of justice and deserved to be set aside.
- xii. Although, PW-1 claimed to have lodged the purported GDE with regard to the incident as alleged on 31.08.1990 with the police

station but the very withholding of such diary, if any during the course of trial only suggested that either such GDE never existed or if at all existed, the contents of such General Diary was not in terms of the prosecution case and the same had been deliberately withheld by the prosecution thereby rendering the story wholly unreliable.

- xiii. The Learned Trial Court illegally acted on the evidence of PW-1, Khagen Rajbanshi, that his brother had an inimical relationship with the appellant no. 1 as the motive against the appellants however, the Learned Trial Court completely overlooked that PW-1 in his cross-examination said that he had heard about such enmity which rendered it hearsay i.e. PW-1 did not have any first-hand knowledge of such enmity (if any) and non-adducing of any other witness who could throw light “on such aspect of enmity” led to the unambiguous inference that the prosecution had completely failed to prove the motive as it attempted to establish and on that count itself the conviction and/or sentence was liable to be set aside.
- xiv. In order to convict a person under Section 364 of the Indian Penal Code it must be proved at first that the accused persons had by force compelled or by deceitful means induced any person to go from any place and in the present case there was absolutely no evidence that there was any use of force by the appellants, thereby compelling the brother of the de-facto complainant to go with them or by use of any deceitful means he was compelled to go with the

appellants and on that count itself the judgment of conviction and/or sentence deserved to be set aside.

- xv. The prosecution could never prove the whereabouts of the victim and whether he was dead or alive and the entire investigation was faulty, and manipulative right from the very inception, and no conviction and sentence can be justified based on such illegal, poor and shady investigation and on that count, the impugned judgment and/or order deserved to be set aside.

7. The Learned Advocate for the State submitted that apart from the evidence of PW-1 who suspected that the accused persons killed the victim, the prosecution failed to bring home the charges.

8. A circumspection of the prosecution witnesses revealed as follows:

- i. PW-1 in his examination-in-chief stated that Ramprasad Rajbangshi was his younger brother. About 11 years ago, the two accused persons standing on dock took away his brother Ramprasad and since then Ramprasad was not being traced out. At about 8 P.M. on that date of incident, he reported the matter to his neighbours. He searched for him but he was not found out. One Ramkanta Dey and Babu Pal reported him that they had seen Ramprasad by the side of river at about 5 P.M. on the date of the incident. On that date accused Khokan left their village along with his wife. On being asked Khokan reported him that Ramprasad went to Satui market. His brother used to work as mason with accused Khokan and subsequently there was an enmity term in

between Ramprasad and Khokan. He suspected that the accused persons killed Ramprasad. Those two accused persons were found present on dock (identified). Subsequently he lodged F.I.R. at P.S. Nanda DulalSaha accompanied him at P.S. in lodging the F.I.R. He put his L.T.I on the F.I.R written by Nanda DulalSaha. Nanda Dulal read over and explained the F.I.R to him.

- ii. During cross-examination, PW-1 stated that Ganga was near to his house. There was no house in between the river Ganga and his house. Khudiram, Jagannath and others were residing at their village. He searched for his brother at their village. He went to P.S. after 15 days of the date of occurrence and lodged the complaint. He went to Meteri, Dainhat and other places and at Burdwan, the working place of his brother. He went to his father-in-law's house to search his brother. He, being illiterate, could not say the contents of the F.I.R. He could not say if the contents in relation to enmity term in between his younger brother and accused Khokan had been inserted in F.I.R., he heard about their enmity term only. He did not remember the date of incident when from his brother was not traced out. At about 4 P.M. on that date, Khokan took away Ramprasad from his house when he was staying in his house with fever. He did not know where, how long and with whom Ramprasad was staying. Besides lodging the F.I.R., he did not go to P.S. in connection with this case. Since the date of lodging of F.I.R., he was not examined by Darogababu.

- iii. PW-2 Ramkanta Dey in his examination-in-chief stated that he knew PW-1 and he also knew Ramprasad, the brother of PW-1. PW-2 did not see anything in relation to that incident. He knew the accused Swapan Rajbanshi. He himself did not look for the victim Ramprasad. He was not examined by the police. PW-2 was declared hostile by prosecution.
- iv. During cross-examination by prosecution, PW-2 stated that he did not state to I.O. that he found Khokan, Swapan and Ramprasad gossiping by the side of river on 17.08.90. He denied to have stated to I.O. that Khokan and Ramprasad were working together as mason. Not a fact he stated to I.O. that there was a quarrel in between Khokan and Ramprasad in relation to distribution of money and that Khokan married Swapan's sister.
- v. Cross-examination of PW-2 by defence was declined.
- vi. PW-3 in his examination-in-chief stated that he knew PW-1 and his brother Ramprasad. He knew the accused Swapan standing on dock. Ramprasad was not being traced out. The occurrence took place about 11/12 years ago. He did not search for Ramprasad. He was not examined by I.O. PW-3 was declared hostile by prosecution. During cross-examination by prosecution PW-3 stated that not a fact he stated to I.O. that on 17.08.90 while he was returning back from the field, he found Khokan, Swapan and Ramprasad gossiping by the side of river.
- vii. Cross-examination of PW-3 by defence was declined.

- viii. PW-4 in her examination-in-chief stated that she was a resident of Rampara. Accused Khokan was her husband and Swapan was her elder brother. She did not come to Swapan's house about 11/12 years ago. She stated that she was not examined by police. Prosecution declared PW-4 as hostile.
- ix. During cross-examination by prosecution, PW-4 stated that not a fact that she stated to I.O. that on 17.08.90 at about 9 a.m., she along with her husband came to her father's house at Poradanga to see her 'jyathamasai'. Not a fact that she stated to I.O. that thereafter she came back to her house with her husband. Not a fact the house of accused Swapan was at Poradanga.
- x. Cross-examination of PW-4 was declined by defence.
- xi. PW-5 Chhaya Rajbanshi in her examination-in-chief stated that she was a resident of Rampara. Her father's house was at Poradanga. She knew the accused persons who were present on dock (identified). They were her co-villagers. Khokan's father-in-law's house was at Rampara. She did not know what happened with Ramprasad. She did not know anything in between Khokan and Ramprasad. She did not know whether Khokan and his wife went to the house of Khokan's father-in-law. She was not examined by I.O. PW-5 was declared hostile by prosecution.
- xii. PW-6 stated in his examination-in-chief stated that he was then posted as C.I. Murarai. She was posted as I.C. on 21.08.93 at

Berhampore P.S. Before submission of the charge-sheet, I.O. of this case consulted with him.

- xiii. During cross-examination, PW-6 stated that there was no endorsement written by him in the C.D. in this report.
- xiv. PW-7 Sanat Kr. Konar in his examination-in-chief stated that he was posted at Berhampur P.S. as S.I. of Police on 17.02.93 he was attached to Berhampur P.S. The then O/C of Berhampur P.S. Sub Inspector Golam Mostafa recorded this case to him for further investigation. During investigation, he tried to trace out one Ramprasad Rajbanshi (victim) but in vain. Then owing to his transfer, he made as the C.D. to O.C. Berhampur P.S. on 15.07.93.
- xv. Cross-examination of PW-7 was declined by defence.
- xvi. PW-8 Nripendranath Roy Chowdhury stated in his evidence that he was R.O. of Berhampur Police Line. On 07.10.93, he was posted at Berhampur P.S. as Sub Inspector of Police. On that day, this case was endorsed to him by the I/C Berhampur P.S. for investigation. He received the C.D. of this case of present I.O. This case was bearing for recovery of victim Ramprasad Rajbanshi. He tried his level but to trace out the victim was in vain. During investigation, it was strongly established that victim Ramprasad Rajbanshi might have been murdered by the F.I.R. named accused persons. Thereafter he consulted with higher authority and he submitted charge-sheet no. 36/94 dated 29.01.94 for facing trial in open

Court. S.I. Kumarsh Chakraborty retd. police officer investigated the almost entire case previously.

- xvii. During cross-examination, PW-8 stated that during investigation he tried his level best to recover victim. The complainant of this case orally but he recovered no statement of complaint under Section 161 of the Code of Criminal Procedure.
- xviii. PW-9 Kumaresh Chakraborty stated in his examination-in-chief that he was retired police officer. On 17.08.90 he was posted as S.I. of Police at Berhampore P.S. On that date Sambhunath Roy was the then O.C. of that P.S. He identified the F.I.R. on which O.C. put his endorsement. The endorsement was marked as Exhibit 1. He stated that after having that F.I.R the then O.C. filled up the formal F.I.R whose handwriting and signature was known to him. The formal F.I.R was marked as Exhibit 2. This case was endorsed to him for investigation. In course of investigation, he visited the place of occurrence, examined the witnesses and arrested the accused Swapan Rajbangshi and forwarded him to Court. He stated that due to his transfer, he handed over the case docket to the then Officer-in-Charge on 25.09.91. He examined PW-2 Ramkanta Dey who stated to him that he found Khokan, Swapan and Ramprasad gossiping by the side of river on 17.08.90 and that Khokan, Ramprasad were working together as masons. He also stated to him that there was a quarrel in between Khokan and Ramprasad in relation to distribution of money. He stated to

him that Khokan married Swapan's sister. He further stated that he examined PW-3 who had stated to him that on 17.08.90 while he was returning back from field he found Khokan, Swapan and Ramprasad gossiping by the side of river. He also stated to PW-9 that on being asked Khokan stated to PW-3 that on that day he came to village. He examined PW-4 Gita Rajbangshi. She stated to him that on 17.08.90 at about 9 a.m. she along with her husband came to her father's house at Poradanga to see her 'jyathamasai'. She also stated to him that thereafter she came back to her house with her husband. He examined PW-5 Chhya Rajbangshi. She stated to him that Ramprasad sometimes used to visit the house of Khokan of Rampara as Ramprasad was working as mason with Khokan. She also stated to him that she was informed by Ramprasad to the effect that he had come to collect some arrear amount from Khokan. She also stated to him that as Khokan's wife sometimes used to visit her 'jyathamasai' for seeing him and that Khokan and his wife came to Poradanga.

- xix. During cross-examination PW-9 stated that on 05.09.90 at 18:45 hrs, he took charge of this case for investigation. The date of occurrence was 17.08.90. Since 17.08.90 till 05.09.90 what step was taken by the de facto complainant's side to trace out the victim. He could not say and during that period he did not enquire into the matter. He did not enquire if any G.D. on 31.08.90 was lodged in this respect.

9. The Hon'ble Supreme Court in ***Badshah v. State of U.P***¹ held the following:

“13. Ingredients of the said offence are (1) kidnapping by the accused must be proved; (2) it must also be proved that he was kidnapped in order to; (a) that such person may be murdered; or (b) that such person might be disposed of as to be put in danger of being murdered. The intention for which a person is kidnapped must be gathered from the circumstances attending prior to, at the time of and subsequent to the commission of the offence. A kidnapping per say may not lead to any inference and to for what purpose or with what intent he has been kidnapped.”

10. The delay to lodge the complaint on 5.9.90 was not explained. The complainant PW-1, the brother of the victim stated to have lodged a diary on 31.8.90. A copy of the diary was not produced. The police did not take adequate steps for registering the case based on the General Diary Entry if at all the same was filed. The complaint did not reveal the ulterior motive on the part of the appellants to have committed the crime. PW-1, the complainant stated to have heard of an enmity between victim and the appellants, however, did not mention the nature of the same. The prosecution failed to create a chain of circumstances so that the evidence of the witnesses could be wholly reliable or even partly reliable. Mere assertions to have been seen together without corroboration, mens rea and consequences to that effect cannot render objectivity of criminality based on vague suspicion.

11. PW-2, PW-3, PW-4, PW-5 were declared hostile by the prosecution. Moreover, the cross-examination of the hostile witnesses did not reveal any element to constitute the offence under Section 364 of the Indian Penal Code.

¹(2008) 3 SCC 681

12. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.
13. Accordingly, the criminal appeal being CRA 449 of 2001 stands disposed of.
14. There is no order as to costs.
15. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
16. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities

(Ananya Bandyopadhyay, J.