

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 744 of 2009
With
CRAN 1 of 2009 (Old No. CRAN 3017 of 2009)

Dipjyoti Dhar @ Joy Dhar
-Versus-
The State of West Bengal & Ors.

For the appellant: **Mr.Navanil De, Amicus Curiae, Adv.,**
Ms. Monami Mukherjee, Adv.

For the State : **Mr. Prasun Kumar Dutta, learned APP,**
Mr. Santanu Deb Roy, Adv.,
Mr. Md. Kuttubuddin, Adv.

Last Heard on : 27.02.2024

Judgment on : 05.03.2024

PARTHA SARATHI SEN, J. : –

1. In this appeal the judgement of conviction dated 03.09.2009 and order sentence dated 05.09.2009 as passed in S.T 55(7) of 2007 arising out of S.C 11(5) of 2007 arising out of Khardah P.S Case No. 335 dated 22.12.2006 by the Learned Additional Sessions Judge, Fast Track Court No.III, Barrackpore, District North-24-Parganas has been assailed. By the impugned judgement learned trial court found the present appellant guilty under section 302 IPC and thus sentenced him to suffer R.I for life

and to pay fine of Rs.5,000/- i.d to suffer R.I for further two years. The convict felt aggrieved and thus preferred the instant appeal.

2. For effective adjudication of the instant appeal the facts leading to initiation of the aforesaid Sessions Trial is required to be dealt with in a nutshell. One Saroj Kumar Das of Ghoshpara, Tarapukur, Agarpara lodged a written compliant dated 22.02.2006 with the Officer-in-Charge, Khardah Police Station, District North-24-Parganas stating inter alia, that he and his daughter Papia Das, since deceased being an unmarried lady used to reside at a tenanted accommodation in the house of one Dipu Ghosh at Ghoshpara, Tarapukur and at that time his said daughter was carrying on business of mobile. It has further been disclosed in the said written complaint that one Dipjyoti Dhar @ Joy Dhar who happens to be his grandson visited his said tenanted accommodation on 21.12.2006 at about 7:30p.m and after taking his dinner he slept in the room of Papia Das, since deceased who happened to be his aunt (mother's sister). It has also been disclosed that on 22.12.2006 he went out of his house for morning walk and when he came back at 8 a.m he found that the said Joy Dhar in a perplexed condition and at that time he was wearing a 'gamcha' on which he noticed blood stained mark. Thereafter the said Dipjyoti Dhar, who is the appellant before us came out of the room of Papia and when the informant entered into the room of Papia he noticed that Papia was lying in a pool of blood and she was no more. In his written complaint the informant disclosed that he suspected that his said grandson committed the murder of his daughter.

3. On the basis of the said written complaint Khardah P.S Case No.335 of 2006 dated 22.12.2006 under Section 302 IPC was started. Investigation was taken up and on completion of the same charge sheet was submitted under Section 302 IPC against the present appellant. After commitment and transfer the case record of the aforesaid sessions trial was placed in the file of the learned trial court who on 23.07.2007 framed charges under Section 302 IPC against the present appellant after considering the materials before him.

4. Trial court record reveals that in order to bring home the charge as framed against the accused, the prosecution has examined 13 witnesses in all and several documents and some materials have been exhibited on their behalf. Before the learned trial court though no evidence was adduced on behalf of the defence but from the trend of cross-examination and the answers as given by the accused in course of his examination under Section 313 CrPC it reveals to us that the defence case is based on clear denial and false implication. As discussed above learned trial court after considering the prosecution evidence both oral and documentary found the appellant guilty under Section 302 IPC and thus convicted him under Section 235 (2) CrPC.

5. On perusal of the impugned judgement it reveals that the learned trial court while coming to the conclusion of the said sessions trial placed his reliance upon the following principles of Evidence Act namely;

- i. Last seen theory;
- ii. Extrajudicial confession of the accused;

- iii. Subsequent conduct of the accused under Section 8 of the Evidence Act;
- iv. Recovery of alleged offending weapon as per showing of the accused in course of investigation under Section 27 of the Evidence Act.

6. In order to arrive at a logical conclusion of the instant appeal we propose to deal with the evidence of those prosecution witnesses which in our considered view are relevant for disposal of the instant appeal.

7. As discussed (supra) out of the 13 prosecution witnesses, PW1 is the father of the deceased and the informant. PW8 is the mother of the deceased, PW11 is the scribe of the written complaint and son-in-law of the informant. PW12 is the maternal uncle of the accused and cousin brother of the deceased. PW20 is a neighbour of PW1 and is a post occurrence witness, PW5 is another resident of the locality and he is also a post occurrence witness. PW6 and PW7 are two day labourers who according to the prosecution took the accused to Khardah P.S. PW 3 is the landlord of PW1 and is an inquest witness. PW4 is the autopsy surgeon. PW9 is an ASI of police. PW10 is the Recording Officer and PW13 is the Investigating Officer of the case.

8. In course of hearing Mr. De, learned Amicus Curiae duly assisted by Ms. Mukherjee, learned advocate strongly contended that the learned trial court while passing the impugned judgement wrongly applied the '*last seen theory*' in this case since according to Mr. De the time gap when

the accused and deceased was last seen together and recovery of the dead body is too long which the learned trial court has failed to appreciate. According to Mr. De, learned Amicus Curiae, learned trial court has also miserably failed to visualize the true implication of Section 27 of the Evidence Act in view of the fact that recovery of the alleged offending weapon has not been properly proved in course of the trial and further the alleged offending weapon cannot be connected with the alleged crime in absence of any positive FSL report. It is further submitted by Mr. De that the alleged subsequent conduct of the appellant no way attracts Section 8 of the Evidence Act as against the present appellant. It is further argued by Mr. De that recovery of the seized 'gamcha' which according to the prosecution was worn by the appellant has lost its significance since the prosecution has miserably failed to prove the presence of human blood in the said seized 'gamcha' and that in course of his cross-examination the Investigating Officer found two 'gamchas' instead of one. It is thus argued by Mr. De that since the instant case is based on circumstantial evidence and since there are several missing links in the chain of evidence learned trial court ought to have acquitted the accused from the charge as made against him. Mr. De thus submits that it is a fit case for allowing the instant appeal after setting aside the impugned judgement and order.

9. Per contra, Mr. Dutta, learned Additional Public Prosecutor for the State duly assisted by Mr. Deb Roy and Mr. Md. Kuttubuddin, learned advocates for the State contended that from the evidence of PW1 it would reveal that the deceased and the appellant slept in a single room in the

night immediately prior to the murder of the deceased and therefore in absence of proper explanation on the part of the present appellant as to how the homicidal death of the deceased occurred learned trial court correctly applied the “*last seen theory*” in the said sessions trial. Drawing attention to the evidence of PW13 vis-à-vis Exhibit No.11 it is contended on behalf of the State that the recovery of the offending weapon clearly attracts Section 27 of the Evidence Act as against the present appellant which unerringly points at the guilt of the accused. Mr. Dutta, Learned Additional Public Prosecutor further submits before this Court that in course of deposition PW1 has successfully proved the extrajudicial confession as made by the present appellant regarding the crime committed by the present appellant and thus the learned trial court is very much justified in using such extrajudicial confession as a basis of conviction. It is further argued by Mr. Dutta, Learned Additional Public Prosecutor that the subsequent conduct of the present appellant as would be evident from the evidence of PW1, PW7 and PW8 who are disinterested witnesses is a relevant fact within the meaning of Section 8 of the Indian Evidence Act. Mr. Dutta thus submits before this Court that it is a fit case for dismissal of the appeal.

10. Keeping in mind the materials as placed before us and the arguments as advanced by the learned advocates for the contending parties we propose to look to the relevant portion of evidence of PW4 who conducted autopsy over the dead body of the deceased. The relevant portion of the evidence of PW4 is quoted below in verbatim:-

“On examination I found the following:-

- 1. Multiple teeth marks in roundish fashion on the radial border of the back of the right forearm about 2” X1 ½” incised lying about 2 and ½” right elbow.*
- 2. One bruise over an area of about 2” X1 ½ “ one around the left eye one abrasion * ¼ X 1” on the inner side of the middle of the upper lip.*
- 3. One bruise 2”X1” transversely placed below...(torn condition).*
- 4. One sharp cutting would “ “ X (* 1 1/3 X 2 3 ¼ “ into cutless deep on the front of the leg over the phyroed cutless all most transversely placed ½ “ on the right and ! @ ½ “ in the left having a cut injury on the thyroid cutless.*
- 5. One sharp cutting would 3” X 1 and ½ “ into chest cavity on the right upper anterior chest all placed obliquely at the label of right nipple and ½” and 1” right lateral to the midline and 9 and ½ “ above the umbilicus.*

It perforates the second right intercostals space external end the wound track goes inward and backward by cutting the superior venacaba.

As per my opinion the death was due to the effect of shock and haemorrhage resulting from above noted antemortem injuries homicidal in nature.”

On perusal of the extensive cross-examination of PW4 we do not find any contrary material to hold that the deceased's death is natural. In view of such we find that the learned trial court is absolutely justified in coming to a conclusion that the death of the deceased is homicidal in nature.

11. At this juncture we propose to look to the evidence of PW1 who is the father of the deceased and the informant in the instant case. The major part of the examination-in-chief of PW1 seems to be the replica of the written complaint and therefore we propose not to discuss the same again to avoid repetition. In course of his examination-in-chief PW1 however stated the following:-

“On 22.12.2006 at about 8:30/9:00 hrs I returned to my house after my morning walk and entered my house.

And I saw the accd person to come out of the bed room of my daughter and he took me to that bed room by catching my hands and showed me the dead body of my daughter in the bed room and declared that he had killed by daughter.”

At this juncture if we look to the cross-examination of PW13 (I.O) we find that on being asked by the defence counsel the said I.O categorically stated that PW1 did not tell him that about 8:00 hours on 22.12.2006 the accused person took him inside the P.O and showed him the dead body of the deceased and the accused person declared that he had murdered the deceased and then the de facto complainant touched the dead body and started crying.

12. In considered view of this Court the omission as noticed by us and as referred to above tantamounts to contradiction within the meaning of the proviso of Section 162 CrPC read with Section 145 of the Evidence Act which the learned trial court has failed to visualize. In view of such discussion we thus hold that the prosecution before the learned trial

court has miserably failed to prove the alleged extrajudicial confession as made by the appellant regarding his alleged guilt before PW1 beyond reasonable doubt.

13. For the sake of argument even if we accept that PW1 has been able to prove the alleged extrajudicial confession as made by the convict it is settled principle of law that an extrajudicial confession is well known to be a weak piece of evidence although in a given situation reliance thereon can be placed; as held in the reported decision of ***State of U.P vs. M.K Anthony*** reported in ***(1985) 1 SCC 505***. In the reported decision of ***Samarchand vs. State of Rajasthan*** reported in ***(2011) 1 C CrLR (SC) 45*** the Hon'ble Apex Court expressed the following:-

“There is no absolute rule that an extrajudicial confession can never be the basis of a conviction, although an extrajudicial confession should be corroborated by some other materials.”

14. Keeping in mind the proposition of law as discussed hereinabove we now propose to see as to whether in a case based on circumstantial evidence the prosecution before the learned trial court is successful in proving the guilt of the accused on the basis of any other materials or not. Since in the impugned judgement the learned trial court has placed his reliance upon the “*last seen theory*” we again propose to see the evidence as adduced by PW1. From the examination-in-chief of PW1 it appears that the present appellant arrived at the house of PW1 on 21.12.2006 at about 7:30 p.m / 8 p.m and after taking dinner he slept in the bed room of his aunt Papia, since deceased. It is the version of PW1 that on 22.12.2006 at

about 8:30/9 a.m. he found the dead body of his deceased daughter at her bed room. It is found from the evidence on record that the Medical Officer who conducted post-mortem examination has testified that undigested food was there in the stomach of the deceased. Such a fact would reveal that the murder has been committed within 2 to 2 ½ hours of taking food by the deceased. There is no evidence to justify the motive on the part of the appellant to cause the murder. Admittedly in the night of the occurrence the appellant and P.W.1 both were present in the spot house. The door of the spot room was not closed from inside. When two persons were present in the spot house and P.W.1 is a person living separately with his daughter being estranged from his wife, may be having also the motive to kill the deceased especially when the cause of separation is neither disclosed by P.W.1 nor his wife who has also been examined as a witness. The conduct of the appellant being present at the spot immediately after the occurrence is a factor negating any motive on his part. It might have so happened that when the appellant was in deep sleep, who was sleeping separately from the deceased though in the same room, the deceased might have been murdered by P.W.1 or any other person. So this circumstance cannot be taken as a circumstance of last seen or as a circumstance to suggest that it is only the appellant who had the opportunity to kill the deceased.

15. So far as the alleged subsequent conduct of the appellant immediately after recovery of the dead body of the deceased in considered view of this Court has also not been proved beyond reasonable doubt

since in course of his deposition PW1 stated that immediately after the discovery of the dead body of the deceased the accused left his house by wearing a 'gamcha' which has been noticed by PW6 and PW7 since in course of their testimony they testified that the accused was roaming in the platform of Khardah railway station by wearing a 'gamcha' over which they have noticed stain of blood. However, on perusal of the FSL report being Exhibit 13 we noticed that the presence of human blood upon the said 'gamcha' cannot be proved as the remarks of Assistant Serologist and Chemical Examiner clearly opined the following:-

“unstained control not available.”

16. In view of the discussion made hereinabove we thus find that the learned trial court was not justified in applying the principle of Section 8 of the Evidence Act as against the present appellant in the said trial.

17. So far as recovery of the alleged offending weapon on the basis of a leading statement of the present appellant within the meaning of Section 27 of the Evidence Act lost its force since from the serological examination report, the serologist clearly opined that the alleged blood group over the blade of knife (item no.7) is not sufficient for test. We have also noticed that the learned trial court considered a portion of the statement of the accused as recorded under Section 161 as has been exhibited as Exhibit 11 as a recovery statement though on close scrutiny of such statement we do not find any iota of evidence relating to statement of the accused leading to discovery. In view of the discussion made (supra) we thus find complete break of chain of evidence in order to tag the present appellant

with the offence charged with. We thus find sufficient merit in the instant appeal and thus the instant appeal succeeds.

18. As a result the impugned judgement and order of sentence as passed in S.T 55(7) of 2007 arising out of S.C 11(5) of 2007 arising out of Khardah P.S Case No. 335 dated 22.12.2006 by the Learned Additional Sessions Judge, Fast Track Court No.III, Barrackpore, District North-24-Parganas is hereby set aside. The appellant Dipjyoti Dhar @ Joy Dhar is thus acquitted from the charge under Section 302 IPC as framed against him in the said Sessions trial. The present appellant is thus discharged from his bail bond and be set at liberty at once if, not wanted in connection with any other case.

19. Department is hereby directed to forward a copy of this judgement along with the LCR to the learned trial court at once.

20. Department is further directed to forward a copy of this judgement to the Secretary, Calcutta High Court Legal Services Committee who shall on receipt of the same disburse the admissible amount of Honourarium to Mr. Navanil, De, Ld. Amicus Curiae as appointed by us.

20. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)