

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. 41 of 2009
With
CRA 723 of 2008
With
CRA 759 of 2008
With
CRA 802 of 2008
With
CRAN 1 of 2008 (Old CRAN 3248 of 2008)

Biswajit Pal
-Versus-
The State of West Bengal & Ors.
With
Santanu Maity
- Versus-
The State of West Bengal & Ors
With
Sukdev Paul @Sukdeb Pal
- Versus-
The State of West Bengal & Ors
Sisir Paul @ Sisir Pal
Versus
The State of West Bengal & Ors.

For the appellant in CRA 41 of 2009: Mr. Tarique Quasimuddin, Adv.
: Ms. Sanchita Chaudhury, Adv.

For the State
: Ms. Zareen N Khan, Adv.,
: Mr. Ashok Das, Adv.

For the appellant in CRA 723 of 2008: Mr. Himanshu De, Adv.,
Mr. Navanil De, Adv.,

:Mr. Rajeshwar Chakraborty, Adv.,
:Mr. Srijan Ghosh, Adv.,
:Mr. Subhrajit Dey, Adv.,
:Ms. Monami Mukherjee, Adv.

For the State

: Ms. Zareen N Khan, Adv.,
: Mr. Ashok Das, Adv.

For the appellant in CRA 802 of 2008: Mr. Somnath Banerjee, Amicus Curiae

For the State

: Ms. Zareen N Khan, Adv.,
: Mr. Ashok Das, Adv.

For the appellant in CRA 759 of 2008:Mr. Arindam Jana, Adv.,
:Mr. Partha Pratim Sinha, Adv.

For the State

: Ms. Zareen N Khan, Adv.,
: Mr. Ashok Das, Adv.

Last Heard on : 19.01.2024

Judgment on : 05.03.2024

PARTHA SARATHI SEN, J. : –

1. The instant four appeals are taken up for hearing together since these four appeals arise out of a common judgement of conviction and order of sentence. Accordingly, we also propose to dispose of the instant four appeals by passing a common judgement since identical questions of facts and of law are involved in these four appeals. In these four appeals the judgment of conviction dated 24.09.2008 and two separate orders of sentence dated 26.09.2008 and 18.11.2008 as passed by learned Additional Sessions Judge, Fast Track Purba Mednipur at Tamluk in S.T case no.108(3) of 2004 arising out of GR case no.649 of 1998 in

connection with Bhagwanpore P.S Case no.49 of 1998 dated 21.09.1998 has been impugned. By the impugned judgement learned trial court found the four charged accused persons guilty of the offence under Sections 302/34 and Sections 302/120B IPC and thus all the four accused persons are sentenced to suffer R.I for life each and to pay fine of Rs.10,000/- each i.d to suffer R.I for another one year each for the offence committed by them under Sections 302/34 IPC. Learned trial court has however not passed any separate order of sentence as against the four convicts for the offence committed by them under Sections 302/120B IPC. The aforesaid convicts thus felt aggrieved and preferred the captioned mentioned appeals.

2. For effective disposal of the instant four appeals the facts leading to the initiation of the aforesaid trial is required to be dealt with in a nutshell.

3. One Smt. Kanak Pal, wife of Sudhanshu Sekhar Pal of village Banudia, Bhagwanpore, District Mednipur lodged a written complaint dated 21.09.1998 with the Officer-in-charge, Bhagwanpore P.S stating inter alia, that on 20.09.1998 at about 6/6:30 p.m his son Sankar Prasad Pal went to the main road near to her house and even after lapse of several hours thereafter, he did not return. Vigorous search for the missing person was made and at that time two married women of the locality found an envelope in front of the house of the informant and on opening and reading the letter in the said envelope, the informant came to learn that his said son had been kidnapped and the miscreants

demanded a sum of Rs.70,000/- towards ransom. On the basis of such written complaint Bhagwanpore P.S Case no. 49 of 1998 dated 21.09.1998 under Sections 365/347/386/34 IPC was started. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 364/302/201/386/120B against all the four accused persons.

4. Trial court record reveals that the present appellants were explained of the charges under Sections 364/302/386/201/34/120B IPC against them which they denied and claimed to undergo trial. The prosecution before the learned trial court examined 24 witnesses in all and they have exhibited various documents. On behalf of the accused persons however, no evidence was adduced. However, from the trend of cross examination of the prosecution witnesses and the answers as given by the said four accused persons in their respective examinations under Section 313 Cr.P.C it reveals that the defence case is based on clear denial and false implication.

5. For the sake of brevity the prosecution witnesses before the learned trial court can be categorized in the following manner:-

Private Individuals	Government officials	Police Personnels
1.PW1- A person of the locality and an inquest witness.	1.PW16-An examiner of questioned documents.	1.PW24- R.O.
2. PW2- The mother of the deceased and the informant.	2.PW22- Headmaster of a local school.	2.PW25-I.O.
3.PW3- The sister of the deceased.	3. PW23- The judicial magistrate who	

	recorded the statement of the accused Sukdev Pal.	
4. PW4- Local photographer.		
5. PW5- A co-villager of the informant.		
6.PW6- A co-villager of the informant.		
7.PW7- Cousin brother of appellant Sukdev Pal.		
8.PW8- A co-villager of the informant.		
9. PW9- A co-villager of the informant.		
10.PW10- A co-villager of the informant.		
11. PW11- A co-villager of the informant.		
12. PW12- A co-villager of the informant.		
13.PW13- A co-villager of the informant.		
14. PW 14- A co-villager of the informant.		
15. PW15- Husband of PW3 and son-in-law of the informant.		
16. PW17- A co-villager of the informant and the wife of the cousin brother of the deceased.		

17. PW18- A co-villager of the informant.		
18. PW19- Uncle of the informant.		
19. PW20- A co-villager of the deceased.		
20. PW21- Father of the deceased.		

6. Mr. Himanshu De, learned advocate for the appellant in CRA no. 723 of 2008 in course of his argument at the very outset draws attention of this Court to the impugned judgement. It is contended by Mr. De that from the trial court record it would reveal that in course of investigation, PW25 being the I.O had seized five love letters alleged to have been written by the appellant Santanu Maity to PW3. However, from the evidence of the said I.O i.e. PW25 it would reveal that he made no prayer before the competent Magistrate for comparison of the handwriting and the signature of the appellant Santanu Maity with the writings as available in the said five love letters. It is thus argued by Mr. De, learned advocate for the appellant in CRA no. 723 of 2008 that the finding of the learned trial judge with regard to the alleged motive of the present appellants especially, the appellant Santanu Maity to take revenge on the family of PW3 and/or the deceased was not proved beyond reasonable doubt which is a *sine qua non* in a criminal trial based on circumstantial evidence. Drawing attention to the evidence of PW16 it is contended by Mr. De, learned advocate for the appellant in CRA no. 723 of 2008 that

from the evidence of PW16 i.e. examiner of questioned documents it would reveal again that on comparison of the handwriting as available in the alleged letter demanding ransom with the alleged love letters as alleged to have been written by appellant Santanu Maity he could not reach to a definite conclusion with regard to the author of the said handwritings. It is thus submitted that the finding of the learned trial court with regard to the motive of the appellants especially of the appellant Santanu Maity is based on conjectures and surmises.

7. It is further argued by Mr. De, Learned Senior advocate that learned trial court while passing the impugned judgement has also misdirected himself in coming to conclusion that the charge under section 120B IPC has been proved against four accused persons in absence of any evidence since none of the prosecution witnesses before the learned trial court had led any evidence with regard to the alleged conspiracy as made by the present appellants while committing the alleged murder of the victim.

8. Drawing attention of this Court to the evidence of PW25 vis-à-vis PW22, PW19, PW20 it is argued that the ingredients of Section 27 of the Evidence Act have also not been fulfilled properly in view of the contradictory evidence led by the aforesaid prosecution witnesses as well as in view of the material contradiction and/or omission which came out from their cross-examination. Drawing attention to the evidence of PW23 vis-à-vis Exhibit 9 i.e. the alleged confessional statement of appellant Sukdev Pal it is argued that PW23 being a judicial Magistrate has put no question to the said accused as to why he was making such confessional

statement and in not doing so the statutory mandates as enshrined in Section 164 Cr.P.C has been violated and therefore the conviction of the appellant Sukdev Pal as well as the other appellants cannot be sustained on the basis of such defective confessional statement. In course of his submission Mr. De further argued that the learned trial court in its impugned judgement has miserably failed to consider the time gap between the deceased when found to be in the alleged company of appellant Sukdev Pal and the recovery of the dead body.

9. Mr. De, in course of his argument places reliance upon the following reported decisions:-

- i. ***Gambhir vs. State of Maharashtra*** reported in **(1982) 2 SCC 351: 1982 SCC (Cri) 431;**
- ii. ***Kanhaiya Lal vs. State of Rajasthan*** reported in **(2014) 4 SCC 715: (2014) 2 SCC (Cri) 413: 2014 SCC Online SC 230;**
- iii. ***Rambraksh @ Jalim vs. State of Chattisgarh*** reported in **(2016) 12 SCC 251: (2017) 3 SCC (Cri) 716: 2016 SCC Online SC 508;**
- iv. ***Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh*** reported in **2022 SCC Online SC 1396;**
- v. ***Haricharan Kumri (in CRA no. 208 of 1963) and Jogia Hajram (in CRA no.208 of 1963) vs. State of Bihar*** reported in **(1964) 6 SCR 623: AIR 1964 SC 1184: (1964) 52 ITR 443: (1964) 2 Cri LJ 344;**
- vi. ***Babubhai Udesinh Parmer vs. State of Gujarat*** reported in **(2006) 12 SCC 268: (2007) 1 SCC (Cri) 702: 2006 SCC Online SC 1277;**

- vii. *Saravanan and Anr. vs. State of Pondicherry* reported in (2004) 13SCC 238: 2005 SCC (Cri) 161: 2004 SCC Online SC 1400;**
- viii. *Sherimon vs. State of Kerala* reported in (2011) 10 SCC 768: (2012) 1 SCC (Cri) 116: 2011 SCC Online SC 1463;**
- ix. *Ramesh Baburao Devaskar and Ors vs. State of Maharashtra* reported in (2007) 13 SCC 501: (2009) 1 SCC (Cri) 212: 2007 SCC Online SC 1285.**

10. Mr. Somnath Banerjee, learned advocate who has been appointed as Amicus Curiae on behalf of the appellant Sishir Pal in CRA 802 of 2008 while adopting the argument of Mr. De also contended that for the sake of argument even if it is accepted that PW2, PW3, PW7 and PW17 found the deceased in the company of appellant Sukdev Pal in CRA 759 of 2008 but such alleged '*last seen together theory*' cannot implicate his client as well as other appellants. It is further argued by Mr. Banerjee, learned Amicus Curiae that there is variance with regard to actual place of occurrence from the versions of the different prosecution witnesses which is very much detrimental in a case based on circumstantial evidence. It is further argued by Mr. Banerjee that the ingredients of a criminal conspiracy i.e.

- a. An object to be accomplished,*
- b. A plan or scheme embodying means to accomplish that object,*
- c. An agreement or understanding between two or more of the accused person, whereby, they become definitely committed to co-operate for the accompanishment of the object by the means embodied in the agreement or by any effectual means, and*
- d. In the jurisdiction where the statute required an over act.*

have not been proved in this case since the overt act as attributed in respect of Sukdeb Paul are distinctly missing from the evidence of the prosecution witnesses.

11. Mr. Banerjee, learned Amicus Curiae in course of his argument placed his reliance upon the following reported decisions namely:-

- i. **Anwar Ali vs. State of H.P** reported in **(2020) 10 SCC 166** ;
- ii. **State of U.P vs. Kishanpal** reported in **(2018) 16 SCC 73**;
- iii. **Shivaji Chintappa Patil Vs. State of Maharashtra** reported in **(2021) 5 SCC 626**.

12. Learned advocates for the appellants in the other two criminal appeals had adopted the arguments of Mr. De, learned advocate and Mr. Somnath Banerjee, learned Amicus Curiae as appointed by this Court. Ms. Sanchinta Chaudhury, learned advocate lead by Mr. Tarique Quasimuddin on behalf of appellant Biswajit Paul in CRA 41 of 2009 further added that in view of the provision of Section 30 of the Evidence Act learned trial court ought to have considered the probative value of the alleged confession as made by Sukdev Paul in its proper perspective. It is argued by Ms. Chaudhury, learned advocate for the appellant Biswajit Paul further that in absence of any substantive evidence as against her client learned trial court ought not to have passed a judgement of conviction against the appellant Biswajit Pal solely on the basis of the said confessional statement which is also defective as argued by Mr. De, learned Senior Advocate. Ms. Chaudhury, in course of her argument places her reliance upon the reported decisions of **Joggiya Hazam vs.**

State of Bihar reported in ***AIR (1964) SC 1184***. It is thus submitted on behalf of all the appellants that it is a fit case for allowing the instant appeal by setting aside the impugned judgement.

13. Per contra, Ms. Zareen N Khan duly assisted by Mr. Ashok Das, learned advocate for the State contended that learned trial court is very much justified to pass the impugned judgement of conviction against the present four appellants since it has been duly proved that the dead body of the deceased was recovered on the basis of the statement of the appellant Sukdev Pal while he was in custody. It is further argued on behalf of the State that there cannot be any cogent reason to disbelieve the confessional statement of the appellant Sukdev Pal in view of the unchallenged testimony of PW23 (the judicial magistrate) vis-à-vis the confessional statement of the appellant Sukdev Paul being 'Exhibit 9'. It is further argued on behalf of the State that learned trial court has duly considered the effect of the confessional statement of accused Sukdev Paul (Exhibit 9) in respect of the remaining three appellants in the light of Section 30 of the Evidence Act. It is thus argued on behalf of the respondent/State that it is a fit case for dismissal of the instant appeal by affirming the impugned judgement.

14. The factual matrix in which the appellants came to be prosecuted and convicted has been set out in detail by the learned trial court in the impugned judgement. Therefore, we did not recapitulate the same all over again except to the extent it is necessary to do so for the disposal of the instant appeal.

15. In order to ascertain as to whether the death of the deceased Sankar Prasad Pal is homicidal or not, we propose to look to Exhibit 15 i.e. Post Mortem Report of the said deceased.

From column no.2 of the Post Mortem report we find that the autopsy surgeon found the following:- *“small wound mark over elbows and over chest but it was not confirmed due to decomposition of body.”*

From column no.3 we also find that the autopsy surgeon also found the following :-*“bruise mark over the neck.”*

So far as the cause of death is concerned, the autopsy surgeon has opined the following:- *“the death is due to cardio-respiratory failure in a case of throttling and partial drowning which is ante mortem and probably homicidal in nature to be compared by chemical examination.”* It is pertinent to mention herein that for some reason or other the autopsy surgeon has not been examined on behalf of the prosecution before the learned trial court and post mortem report has been exhibited at the instance of PW25 being the I.O when he tendered the carbon impression of the post mortem report of the deceased in his examination-in-chief. Though no argument was raised on behalf of the appellants with regard to the admissibility of the said post mortem report into evidence we consider it obligatory to answer such question in the perspective of Section 294(3) of the Code of Criminal Procedure. Section 294 of the Code of Criminal Procedure reads as under:-

“Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed; Provided that the Court may, in its discretion, require such signature to be proved.”

16. Keeping in mind the aforesaid statutory provision if we once again look to the evidence of PW25, we find that the genuineness of the said post mortem report has never been challenged either at the time of tendering the said document nor afterwards and therefore we find no predicament to treat the said post-mortem report being Exhibit 5 as an evidence in connection with the said trial vis-à-vis in these four appeals.

17. In a plethora of judgements the Hon’ble Supreme Court as well as the different High Courts of our country has considered the effect of non-examination of medical officers and in one such case namely; **Akhtar and Ors vs. State of Uttrakhand** reported in **(2009) 19 SCC 722** the Hon’ble Apex Court expressed the following view:-

“ 21. It has been argued that non-examination of the medical officers concerned is fatal for the prosecution. However, there is no denial of the fact that the defence admitted the genuineness of the injury reports and the post mortem reports before the trial court. So the genuineness and authenticity of the document stands proved and shall be treated as valid evidence under section 294 Cr.P.C. It is settled position of law that if the genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under section 294(3) Cr.P.C Accordingly, the post mortem report, if its genuineness is not disputed by the opposite party, the said post mortem report can be read as substantive evidence to prove the correctness of its contents without the doctor concerned being examined.”

The same view was taken in another reported decisions by the Full Bench of Allahabad High Court in the case of ***Saddiq and Ors. vs. State*** reported in **1981 Cr LJ 379**.

However, proof of a document must not be construed as a proof of its contents even if, a document is proved without any objection, the contents of the said document can very well be challenged in a legal proceeding.

The same view was taken by the Hon'ble Supreme Court in the decision of ***P. C. Purushothama Reddiar vs. S.Perumal*** reported in **AIR 1972 SC 608** where it has been held the following:-

“once the document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.”

18. At this juncture if we look to the post mortem report of the victim being 'Exhibit 15' we find from such report that the autopsy surgeon could not give any definite opinion as to the cause of death of the deceased since according to him the death of the deceased occurred on account of throttling and partial drowning. No opinion has also been given by the said autopsy surgeon as to whether such death is homicidal or otherwise. There is no observation of the autopsy surgeon in the said post mortem report with regard to the condition of hyoid bone of the deceased i.e. whether it remains intact or not. Considering the entire circumstances we are thus of considered view that from the post mortem report namely;

'Exhibit 15' it could not be proved conclusively that the death of the deceased was homicidal in nature.

19. At this juncture we propose to look to the relevant portion of the evidence of PW25 being the I.O of the said case since according to the prosecution evidence the entire prosecution case is based on statement of the appellant Sukdev Paul leading to discovery under Section 27 of the Evidence Act and the confessional statement of the appellant Sukdev Paul as recorded under Section 164 Cr.P.C which not only binds him but also affects the other appellants as and by way of retracted confession. The relevant portion of evidence of PW25 is reproduced hereunder in verbatim:-

"....this is the statement of accused Sukdev Pal recorded by me while in police custody. He stated 'if you take me near to the deep tube well I would show you where the dead body was lying'."

The said portion of the statement of accused Sukdev Paul has also been exhibited as 'Exhibit 16'.

20. On scrutiny of the evidence of the prosecution witnesses we find that the said alleged recovery of dead body at the instance of the appellant Sukdev Pal has been witnessed by PW3, the sister of the deceased, PW19, the uncle of the deceased, PW22, the head master of a local school and PW20, a co-villager and husband of the then 'Upa Pradhan' of Gram Panchayat where at the relevant time the deceased as well as four accused resided.

21. We have meticulously perused the entire evidence of PW3, PW19, PW20 and PW22 who admittedly in their respective examinations-in-chief categorically testified about the recovery of the dead body of the deceased at the instance of the appellant Sukdev Paul but when they were cross examined and/or when the relevant parts of their examination-in-chief have been confronted to PW25 (the I.O) we find either material contradiction and/ or omission in this regard namely; it is the version of the PW25 (I.O) that PW3, Seema Maity did not state before him that accused Sukdev Paul pointed towards the place where the dead body of her younger brother was covered with up-rooted shrubs. He also stated that the said PW3 did not state before him that while the four accused persons were taken to deep tube well, she rushed behind them. Similarly, PW19 in course of his cross-examination categorically testified that he did not give any statement to the I.O. From the cross-examination of PW20 we find that it is the version of the said witness that he never stated to the I.O that he and accused Sukdev Paul boarded the same police vehicle and Sukdev Paul brought out the dead body of the deceased. He further stated that he signed on the blank papers. Though in his examination-in-chief PW22 has claimed that he was a witness to the recovery of the dead body at the instance of the accused Sukdev Paul but in course of his cross examination he has testified that subsequent to the date of recovery of the dead body he never met I.O nor he was examined by the I.O in respect of the said occurrence. The omissions and/or contradictions as discussed (supra) in considered view of this Court definitely affects the case of the

prosecution in view of the proviso clause of Section 162 Cr.P.C read with Section 145 of the Evidence Act. As a result this Court finds that the case of the prosecution that the dead body of the deceased was recovered following the leading statement of the accused Sukdev Paul has really become doubtful and therefore the accused persons are entitled to get the benefit of doubt of the same.

22. As discussed (supra) in course of his argument Mr. Himanshu De, learned advocate for the appellant in CRA no. 723 of 2008 strongly contended that the learned trial court is not at all justified to place its reliance upon the alleged confessional statement of accused Sukdev Paul as recorded under Section 164 Cr.P.C since he was not asked by PW23 (the judicial magistrate who recorded such confessional statement) as to why he was making such confessional statement. Admittedly, learned trial court in its impugned judgement relied upon the confessional statement of the accused Sukdev Paul not only against him but also against the other three charged accused persons. In view of such we consider that a duty is cast upon us to examine as to whether such confessional statement has been recorded in accordance with law and if the answer is in affirmative, whether learned trial court is at all justified in using such statement as against the maker of the confessional statement as well as against the other co-accused persons.

23. In order to arrive at a logical conclusion of the questions as raised (supra), we think it expedient to have a look to the provision of Section 164 Cr.P.C and the same is reproduced hereinbelow in verbatim:-

“Section 164 in The Code of Criminal Procedure, 1973

164. Recording of confessions and statements.

(1)Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial :[Provided that any confession or statement made under this sub-Section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence :Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.] [Substituted by the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009), Section 13, for the Proviso. Prior to its substitution, the proviso read as under :- [Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force].]

(2)The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3)If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4)Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect :“I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make, may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.(Signed)A.B.Magistrate.”

(5)Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have

power to administer oath to the person whose statement is so recorded.

(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, [section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB,] [Inserted by Criminal Law (Amendment) Act, 2013] section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police: Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement: Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video-graphed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.]

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.”

24. At this juncture we propose to look to the reported decisions of

Sivappa vs. State of Karnataka reported in **(1995) 2 SCC 76** wherein

the Hon'ble Apex Court while dealing with the provision Section 164

Cr.P.C expressed the following view:-

“5. The only piece of evidence relied upon against the appellant is the confessional statement recorded by PW 17 on 22-7-1986. A confession, if voluntary and truthfully made is an “efficacious proof of guilt”. It is an important piece of evidence and therefore it would be necessary to examine whether or not the confession made by the appellant was voluntary, true and trustworthy. The statutory provisions dealing with the recording of confessions and statements by the Metropolitan Magistrate and Judicial Magistrates are contained in Section 164 CrPC and the rules framed by the High Court

containing guidelines for recording of confessions. Unless the Court is satisfied that the confession is voluntary in nature, it cannot be acted upon and no further enquiry as to whether it is true and trustworthy need be made.

6. From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. **An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession.** Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as

the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.”

25. The principles to be followed by a Metropolitan Magistrate while recording a confessions statement under section 164 Cr.P.C has also been scrutinized by the Hon’ble Apex Court in the reported decision of ***Rabindra Kumar Pal @ Dara Singh vs. Republic of India*** in the reported decision of **(2011) 2 SCC 490** wherein the Hon’ble Apex Court laid down the principles on recording of confessional statements under Section 164 Cr.P.C in the manner as under:-

“64. *The following principles emerge with regard to Section 164 CrPC:*

(i) The provisions of Section 164 CrPC must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance with Section 164 CrPC goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is

entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the court requires some corroboration from the confessional statement before convicting the accused person on such a statement.”

26. On perusal of the evidence of PW23 vis-à-vis Exhibit 9 (the confessional statement of the accused Sukdev Paul) though we find that he had administered due caution to the appellant Sukdev Paul that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence and that he had also ascertained that such is being made voluntary and not at the influence of the others but no question was put to the accused Sukdev Paul as to why he is making such statement which would surely go against his self interest in course of the trial as expressed by the Hon’ble Apex Court in reported decision of **Shivappa (supra)**. In view of such infraction of mandatory requirement while recording the confessional statement of an accused it appears to us that it would neither be prudent nor safe to act upon the confessional statement of the appellant Sukdev Paul.

27. For the sake of argument, even if we hold that the confessional statement of the appellant Sukdev Paul is acceptable and can be used against him the next question arises as to whether such confessional statement binds the other three co-accused persons who have been tried with him.

28. Evidentiary value of retracted confession of a co-accused has been well discussed in a reported decision of **Pancho vs. State of Haryana** reported in **(2011) 3 C CrLR (SC 654) : (11) 10 SCC 165** wherein the Hon'ble Apex Court expressed the following:-

*“24. The law on this point is well settled by a catena of judgments of this Court. We may, however, refer to only two judgments to which our attention is drawn by Mr Lalit, learned Senior Counsel. In *Kashmira Singh v. State of M.P.* [(1952) 1 SCC 275 : AIR 1952 SC 159 : 1952 Cri LJ 839] , referring to the judgment of the Privy Council in *Bhuboni Sahu v. R.* [(1948-49) 76 IA 147 : (1949) 50 Cri LJ 872] and observations of Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerbutty* [ILR (1911) 38 Cal 559] , this Court observed that the proper way to approach a case involving confession of a co-accused is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid.*

25. This Court further noted that: (*Kashmira Singh case* [(1952) 1 SCC 275 : AIR 1952 SC 159 : 1952 Cri LJ 839] , AIR p. 160, para 10)

“10. ... cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession, he would not be prepared to accept.”

(emphasis in original)

26. In *Haricharan Kurmi v. State of Bihar* [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] the Constitution Bench of this Court was again considering the same question. The Constitution Bench referred to Section 3 of the Evidence Act, 1872 and observed that confession of a co-accused is not evidence within the meaning of Section 3 of the Evidence Act. It is neither oral statement which the court permits or requires to be made before it as per Section 3(1) of the Evidence Act nor does it fall in the category of evidence referred to in Section 3(2) of

the Evidence Act which covers all documents produced for the inspection of the court. This Court observed that even then Section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused. Thus, though such a confession may not be evidence as strictly defined by Section 3 of the Evidence 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". (Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] , AIR p. 1188, para 11a.)

27. *This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] further observed that Section 30 merely enables the court to take the confession into account. It is not obligatory on the court to take the confession into account. This Court reiterated that a confession cannot be treated as substantive evidence against a co-accused. Where the prosecution relies upon the confession of one accused against another, the proper approach is to consider the other evidence against such an accused and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused, the court turns to the confession with a view to assuring itself that the conclusion which it is inclined to draw from the other evidence is right.*

28. *This Court in Haricharan case [AIR 1964 SC 1184 : (1964) 2 Cri LJ 344] clarified that though confession may be regarded as evidence in generic sense because of the provisions of Section 30 of the Evidence Act, the fact remains that it is not evidence as defined in Section 3 of the Evidence Act. Therefore, in dealing with a case against an accused, the court cannot start with the confession of a co-accused; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence."*

29. Keeping in mind the above proposition of law if we again look to the evidence of the prosecution witnesses; more specifically the evidence of

PW3, PW19, PW20 and PW22 as well as PW25 we find that the presence of the other three charged accused persons at the P.O at the time of the alleged recovery of the dead body of the deceased was not specifically proved. The alleged previous love affairs between PW3 and the accused Santanu Maity has also not been proved beyond reasonable doubt since PW16 being the examiner of the questioned documents failed to come to an opinion as to whether the handwriting available in the said alleged love letters matches with the handwriting of the said accused Santuanu Maity.

30. In view of the discussion made (supra) we thus find complete break of chain of evidence in order to tag the present appellants with the offences charged with.

31. As a result the instant appeal succeeds. Consequently the impugned judgement dated 24.09.2008 and the orders sentence dated 26.09.2008 and 18.11.2008 as passed by learned Additional Sessions Judge, Fast Track Purba Mednipur at Tamluk in S.T case no.108(3) of 2004 arising out of GR case no. 649 of 1998 in connection with Bhagwanpore P.S Case no.49 of 1998 dated 21.09.1998 is hereby set aside.

32. Consequently, the appellants namely; Sisir Pal, Biswajit Pal, Santanu Maity and Sukdev Paul in CRA no. 41 of 2008, CRA no. 723 of 2008, CRA 759 of 2008 and CRA 802 of 2008 respectively are found not guilty of the offence under Sections 302/34 IPC and under Section 302/120B IPC.

33. Consequently, all the four appellants namely; Sisir Pal, Biswajit Pal, Santanu Maity and Sukdeb Paul @ Sukdeb Paul are acquitted in connection with ST case no. 108(3) of 2004 as disposed of by Learned Additional Sessions Judge, Fast Track Purba Mednipur at Tamluk.

34. The present appellants are discharged from their respective bail bonds and be set at liberty at once if not, wanted in connection with any other case.

35. Department is directed to forward a copy of this judgement along with Trial Court Record to the learned trial court at once.

36. 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 Shri Somnath Banerjee, Ld. Amicus Curiae as appointed by us.

37. 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.)