Shri Adinath Chakraborty Vs The State

Court: Gauhati High Court (Agartala Bench)

Date of Decision: March 15, 1965

Acts Referred: Evidence Act, 1872 â€" Section 27
Penal Code, 1860 (IPC) â€" Section 302

Citation: (1967) CriLJ 125

Hon'ble Judges: Rajvi Roop Singh, J.C.

Bench: Single Bench

Judgement

Rajvi Roop Singh, J.C.

1. This is an appeal by one Adinath Chakraborty, aged 22 years, who has been convicted by the learned Additional Sessions Judge of Tripura u/s

302 I. P. C., for the murder of a 4 years old boy Ratau and sentenced to life imprisonment

2. The facts giving rise to this incident may be briefly stated as follows:

Shri Madhusudhan Saha who is a small shop-keeper at the Math Choumohani lived with his wife, 3 sons, 2 daughters and his mother-in-law at

Champamura. The accused Adinath Chakraborty was a private tutor for his two sons at Champamura. He did not get any salary for two months

and used to take his meals. But thereafter, he did not take his meals and got Rs. 18 per month. The accused Adinath Chakraborty was

metamorphosed well into the family of Madhusudhan Saha and the little boy Ratan who is dead had a great liking for the tutor. The deceased

Ratan usually did not go in anybody"s lap except that of his father, mother and the accused. He also refused to take meals or any food from any

other person except his father, mother or the accused. In February, 1963 the deceased Ratan had burns from boiling water therefore, he was

taken to the V.M. Hospital for treatment. It was the accused who brought him from Champamura to the town for treatment. On that very day in

the afternoon, the mother of Ratan came to Dhaleswar where the deceased was kept for treatment in a shed to the south of the shop of his father

Madhusudhan Saha. The burns were attended to and Ratan was thereafter treated from the shop.

The accused Adinath used to come occassionally to the shop. On the date of occurrence which was 8th March, 1963 the accused came to the

shop at about 3-30 p.m., and with Ratan went out. While going out he was seen by one Nibaran Chandra Dey who is the landlord of

Madhusudhan Saha. To the east of the house containing the shop of Madhusudhan Saha and other shops, there is a tank called Kamarpukur and

on the north-eastern corner of the tank there is a small shop conducted by one Jogesh Chandra Saha and his son Ashok Saha. From that shop the

accused purchased some biscuits and moa for Ratan and thereafter he came back to the house of Madhusudhan Saha with Ratan. After some time

he again came and took away Ratan and again purchased some muri, moa and biscuits from the shop of Jogesh Saha. In the evening Ratan was

found missing. But his mother, father and the landlord Nibaran Dey were under the impression that Ratan had gone out with the accused. At 7-30

p.m., the accused came back and on being asked by Madhusudhan Saha he told that he did not take away Ratan. On being told that Ratan was

seen for the last time with him and on being taken to task, the accused went out on search of Ratan and it appears that at 9-30 p.m., he lodged

information to the police Station that Ratan was missing from evening and that he had a gold chain in his neck.

Search for Ratan continued up to late at night by various persons and even search went on with microphone fitted in rickshaw. But Ratan was still

found missing. On the morning of 9-3-63 there were reports that the dead body of a young boy was found beneath the Jogendranagar bridge.

Police was informed and Police Officers and photographers went to that place. An inquest report of the dead body was made and the body was

identified to be that of Ratan. But the gold chain on the neck was found missing. The body was sent for postmortem examination and autopsv was

held on 9-3-63 at 1-20 p.m. An U. D. case was started on the recovery of the dead body. But after preliminary investigation, the I. O.

Manobikash Choudhury who was in charge of the U. D. case submitted the F. I. R. and a specific case was started u/s 302, I. P. C. After the

recording of the statement of some witnesses on 9-3-63 and 10-3-63, the accused Adinath Chakraborty was arrested at 1-40 a.m. on.11-3-63.

The accused was forwarded to the Court on 11-3-63 at 2-45 p.m. and police remand was allowed upto 14-3-63.

On 14-3-1963 the statement of the accused is alleged to have been recorded in the diary and on the basis of that information the gold chain of the

deceased Ratan was discovered at a certain place on the identification of the accused and the gold chain was seized in the presence of two

witnesses namely P.W. 2 Govind Lal Das and P.W. 11 Nepal Chakraborty by P.W. 32 Chunilal Bardhan Roy, S. I. The Rold chain was later on

identified at the police station to be that of the deceased Ratan by P. W. 1 Madhu Saha, P. W. 2 Ganga Bala Saha and P. W. 21 Makhan Deb

Nath. It was also discovered by the I. O. that it was the accused who submitted the missing information on the night of 8-3-63 as Madhab

Chakraborty. On 16-3-1963 the accused was produced in Court for recording confession, but the learned Magistrate remanded him to jail

custody upto 19-3-63. The confessional statement of the accused was recorded by the Magistrate on 19-3-1963 on production from Jail custody.

After the completion of the investigation on 5-8-1963 the I O submitted charge-sheet against the accused Adinath Chakraborty u/s 302, 1. P. C.,

in the Court of S. D. M., Sadar, who after preliminary inquiry committed him to the Court, of Additional Sessions Judge, Tripura, to stanrl his trial

u/s 302, I. P. C. The prosecution in order to substantiate the charge of murder against the accused examined 32 witneses.

3. The accused was unrepresented in the Magistrate''s Court but he was defended by a counsel in Sessions Court. The accused when examined

pleaded not guilty to the charge and retracted the confession alleged to have been made by him. The defence case, so far it could be gathered from

the suggestions of the defence lawyer and the examination of the accused u/s 342 Cr. P. C., was that the accused was falsely implicated on

account of the personal grudge of the I. O. Chunilal Bardhan with whose brother the accused had quarrel and the Magistrate had identified himself

with the Police and was a party to their machinations. The accused admitted that he took away Ratan and purchased for him moa and biscuits but

before leaving for the town he left Ratan. with his mother and he does not know how the death occurred. It is also the case that therewas no

motive on the part of the accused to murder Ratan. The accused led no evidence in his defence. The learned Additional Sessions-Judge who held

the trial believed the prosecution story and convicted the appellant as noted above.

4. Heard the learned Counsel for the appellant and the Government Advocate and critically examined the evidence on the record.

5. The learned Counsel for the appellant at the very outset frankly conceded that in the face of the preponderate, direct and circumstantial

evidence, he does not contest the factum of murder of Ratan. I too feel that he has rightly conceded on this point.

6. From the evidence on the record it is clear that on the morining of 9-3-1963 the dead body of Ratan was found beneath the Jogen-dranagar

bridge. A large number of persons collected there and they identified the body to be of Ratan. The post-mortem examination disclosed that his

neck was slightly swollen, congested and unusually movable suggesting of fracture of cervical region of the spine. P. W. 19 Dr. Digendra Lal

Banerjee who held the postmortem examination was of the opinion that Ratan died due to shock as a result of the fracture, and dislocation of the

third cervical vertibra along with laceration of the spinal cord due to the injury on the neck, which was caused by an external violence. There can,

therefore, be no doubt that Ratan was murdered. It is equally clear that nobody saw who killed Ratan. But the evidence available against the

appellant can be classified into four heads, i.e. (1) His confessional statement made before P. W. 23 K.P. Chakraborty u/s 164 Cr.. P. C. and

marked as Ex. P/8; (2) The recovery of gold chain Ext. P.M. 4 on the information supplied by the appellant; (3) The deceased and the appellant

went together at 3-30 or 4-00 p.m., and the appellant returned alone at 7-30 p.m., on 8-3-1963; and (4) The lust for the gold chain.

7. In this case the confessional statement Ext. P. 8 is the most important piece of evidence. Before any reliance can be placed on it, the prosecution

must prove that it was voluntarily made and the Court must be satisfied that the facts stated therein are true.

8. The learned Government Advocate vehemently urged that in order to prove the confessional statement of the appellant the prosecution

examined P. W. 23 Shri K.P. Chakraborty S. D. M., Agartala. From his evidence it is crystal clear that he recorded the confession after giving the

necessary warning and satisfying himself that he was making the statement voluntarily. He is a responsible officer and he has discharged his duties

scrupulously and honestly, therefore, the confessional statement Ext. P.8 should be treated as voluntary. It was next urged that in law it is always

open to the Court to convict an accused on his confession itself though he has retracted at a later stage. In this case the accused retracted it at a

later stage therefore, the Additional Sessions Judge rightly convicted him on its basis. In support of his argument he placed reliance on Ihe following

two cases:

(i) Sarwan Singh Vs. The State of Punjab, and

(ii) Deveeramma Vs. State,

The learned Government Advocate further urged that in this case 3 days were given to the appellant to make up his mind whether to make a

confession or not. Further from 19-3-1963 till he was committed to the Court of Sessions Judge, no steps were taken by the appellant to resile

from his confession. There was ample time at his disposal to make an application to the Magistrate, or to the District Magistrate that the confession

had been extorted from him by threats and inducement. In these circumstances the confession should be treated as voluntary. In support of his

argument he placed reliance on the following two rulings:

(i) Hem Raj Vs. The State of Ajmer, Hemraj Devilal v. State of Ajmer, and

(ii) In Re: Jinnappa and Subbappa Gabannavar, In re; Jinnappa Subbappa Gabannavar.

9. The learned Counsel for the appellant, in order to controvert the arguments raised by the learned Government Advocate, strongly urged that

there is no dispute regarding the principle laid down in the rulings cited by the Government Advocato. But the facts of this case and these cases are

not similar therefore, these rulings are not applicable in this case. Moreover, it is a retracted confession therefore, it cannot be acted upon without

independent corroboration. In this case the prosecution failed to show that it has been corroborated in material particulars, therefore it should be

rejected outright. The learned Counsel for the appellant took strong exception to the delay in producing the accused before the Magistrate for

recording his confessional statement. According to him, the accused is likely to have confessed to the Police on 14-3-1963 at 8-00 a.m., yet he

was not produced before the Magistrate till 16-3-1963. He contended that once an accused expresess desire to make a confession before a

Magistrate the police are duty bound to produce him immediately before a Magistrate for recording his confessional statement u/s 164 Cr. P. C. In

support of his contention he relies on the decision in Savlimiya Miyabhai v. Emperor AIR 1944 Bom 338, wherein a Bench of the Bombay High

Court observed:

Under Section 164 when an accused person desires to make a confession, he should be brought before the Magistrate and the confession should

be taken by him after taking care that no policeman was present in Court. Although the section does not say anything as to when the accused can

be brought before the Magistrate after he shows his willingness to confess, there is no doubt on general principles that the accused must be sent to

Magisterial custody as soon as he expresses such willingness. It may be that the police might not have at that time started any investigation or that

the investigation might be incomplete but there is no justifiable reason why the police should keep an accused person in their custody for several

days after they know that he wanted to confess, merely on the ground that his presence was necessary for further investigation. In all cases where

the investigation by the police is either conducted or continued after the accused expresses his desire to confess, and if ultimately after the

investigation is over the accused does make a confession, there would not be an unreasonable ground for apprehension that the confession was

made to fit in with the result of the investigation so that it may be regarded as having been corroborated, For that reason it is necessary that the

accused should be sent to the Magistrate as soon as he expresses his desire to confess and the Magistrate, at the time of recording the confession,

should ascertain when the accused first expressed his willingness to confess and to record ii in the confession."" (as summarised in the head-note).

Reliance is also placed on the decision of Mukerji J. of the Calcutta High Court in Emperor Vs. Panchkari Dutt and Others, in support of the same

proposition.

In the instant case from the testimony of the Investigating Officer P. W. 32, Chunilal Bardhan Roy it appears that on 14-3-1963 at 8-00 a.m., he

recorded the confessional statement of the accused in his diary. But there it no material on the record from which one can ascertain the day on

which the accused expressed his desire to make a confession before the Magistrate. It appears that due to lack of experience and knowledge of

Criminal Law the Additional Sessions Judge Shri S. C Mazumdar and the lawyer Shri J. Choudhun appearing on behalf of the accused failed to un

derstand the significance of this material question and hence they did not try to elicit from the Investigating Officer the day on which the accused

expressed his desire to make a confession before the Magistrate. The omission to put this material question to the Investigating Officer has harmed

the accused. Front the record one may infer that the accused expressed the desire to confess before the Magistrate on the 14th March, 1963. But

this is not enough to draw an adverse inference against the prosecution. In view of the lack of positive material on the record the argument raised

by the counsel for the appellant does not help the appellant.

10. It was further urged that the compliance with the requirements of Section 164 of Cr. P. C., should be undertaken by the Magistrate not as a

matter of form but as a matter of essence. But in this case the compliance of Section 164 Cr. P. C., was done in a routine form, therefore, no

weight be attached to thin confession. In support of his argument he placed reliance on AIR 1949 Ori 67 at p. 71.

11. The learned lawyer next urged that the learned Magistrate was a tool at the hands of the police as he allowed the remand of the appellant

without the production of the Police Diary. He also got the order sheets of this case written by the police staff. This learned Magistrate was the

only Magistrate who was authorised to receive all police chalans, therefore, he was interested in the conviction of the accused persons. On 13-3-

1963 he went to the police station and asked the I. O. to take the statement of the accused carefully as it was a sensational case. By this it is clear

that he was a stooge at the hands of police, therefore no reliance be placed on his testimony and the confessional statement recorded by him.

12. After having given my most careful and anxious consideration to the arguments raised on both sides and the statement of the Magistrate P. W.

23 and the confession Ext. P. 8 I am constrained to remark that the learned Magistrate failed to understand the solemnness attached to the

recording of the confession u/s 164 Cr. P. C. It appears that the Magistrate complied with the requirements of Section 164 of Cr. P. C., as a mere

matter of form and not as a matter of essence as I shall point out just now. It is hardly necessary to emphasize that the act of recording confessions

u/s 164, Criminal P. C., is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the

requirements of Sub-section (3) of Section 164 are fully satisfied. It would of course be necesary in every case to put the questions prescribed by

the High Court circulars but the questions intended to be put under Sub-section (3) of Section 164 should not be allowed to become a matter of a

mere mechanical enquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional

statement which the accused wants to make is in fact and in substance voluntary.

It is also well settled that in order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such

Confession was free and voluntary and that it was not preceded by any inducement to the prisoner to make a statement held out by a person in

authority, or that it was not made until after such inducement had clearly been removed. But a mere bald assertion by the prisoner that he was

threatened, tortured or that inducement was offered to him, cannot be accepted as true without more. I realise that whether a confession is

voluntary or not is a question of fact and one should be reluctant to interfere with a finding on such a question of fact unless one is satisfied that the

impugned finding has been reached without applying the true and relevant legal tests in the matter.

13. 1 shall now examine the confessional statement of the appellant marked as Ex. P. 8 in the light of the above principles laid down by me and the

evidence on the record in order to know whether it is voluntary and true. In this case the appellant was arrested on 11-3-1963 at 1-40 a.m. He

was produced before P. W. 23 Shri Kulash Prosad Chakraborty on 11-3-1963 at 2-45 p.m. The learned Magistrate allowed 3 days police

remand. On 14-3-63 the Magistrate again allowed 3 days police remand. On 16-3-1963 the accused was produced before the Magistrate with a

prayer to record his statement u/s 164, Criminal Procedure Code, and pending which the appellant be kept in segregation in Police Court as well

as in Jail Custody. The learned Magistrate ordered to keep him in segregation in the Jail upto 18lh March. On 19-3-63 at 11-00 a.m. the appellant

was produced before the P.W. 23 K.P. Chakraborty and he after giving him 3 hours to reflect recorded the confessional statement Ext. P. 8. In

this case the main attack of the lawyer for the appellant was that this learned Magistrate was a Magistrate only in name and in reality he was a

stooge at the hands of the Police. I find great merit in this argument in view of the following facts. From the statement of this witness it is clear that

in this case he allowed Police remand without the Police Diaries produced before him.

This clearly shows that he never cared to apply his mind to the facts of the case but he did as directed by the Police. But the provisions of Section

167 (1) Cr. P. C., indicate that the policy of the law is to bring an independent judgment to bear on the matter for, it is provided in that section that

the Magistrate before whom an arrested person is produced is also to have before him ""a copy of the entries in the diary"". That means that the

Magistrate before whom the production has to be made has to scrutinize the act of others and to see whether the act was legal and proper and

further whether the formalities required by law had been complied with. In this case the Magistrate did not comply with the provisions of Section

167 (1) Cr. P. C. as he was never serious about his duty and responsibility but played in the hands of the police. In such cases it is the duty of a

Sessions Judge to be cautious in placing implicit reliance on his testimony.

14. In this case this is not all. Except the Order No. 6 dated 19-3-63 all other orders have been written by the Police Staff. The learned

Magistrate has not assigned any reason as to why he did not record the order sheets himself and entrusted this work to a Police Officer when it

was a case of murder and it was his duty to record the order sheets with his own hand. He was provided with a Reader and a Clerk to do this

work but he did not get the order sheets written by them. What led him to get the orders written by Police staff, who used to appear in his Court in

Police uniform. From his statement it is also clear that he was neither too busy in other work nor he had any trouble with his hand which

necessitated the delegation of the work to the Police Staff. The impression that I gather is that he was not fully mindful of the importance of his

duties and conscious of his responsibilities.

When the accused persons used to be produced before him by the Police staff attached to his Court and they (Police Staff) used to write the order

sheets namely in all cases, generally in these circumstances how can it be said that his court was free from Police atmosphere and influence. In this

case every time the accused was produced before him by this Police staff and he remanded him to Police custody without speaking a word to him

and seeing the Police diary, therefore how could the accused feel that he was a Magistrate and not a Police Officer, In these circumstances 1 am

constrained to feel that his conduct was not like that of a Magistrate. When the atmosphere of the Court was not free from Police influence, in

these circumstances how can it be said that the accused confessed his guilt voluntarily?

15. In this case this fact is also noteworthy that on 16-3-63 when the accused was produced before the Magistrate for recording his confession,

what led him not to record it on that date. The Magistrate has stated that he gave him three days time to reflect. The learned lawyer for the

appellant has urged that it was a farce. From the facts as they are, there appears force in this contention. If it was a fact, in that case, he should

have talked with the accused and informed him that he is allowing him 3 days time to reflect. Not to speak of talking with the accused he did not

call him inside the Court Room but allowed him to remain with the Police. This circumstance also goes against the voluntary nature of the

confession. The another circumstance which gives an impression that the learned Magistrate was playing a tool in the hands of the Police is that he

instead of recording the confession on the 16th March allowed him to remain in solitary confinement for 3 days as suggested by the Police vide

Police report Ext. D. 4.

As a rule of prudence an accused person should at least be given 24 hours time to reflect. But in no case an accused person should be sent to

solitary confinement for reflection. The G. A. contended that he was kept in segregation to reflect. But in this territory a man is kept in segregation

as a measure of punishment.. If the learned Magistrate had realised, his responsibility he would have sent him to Jail like other prisoners. But it

appears that the Police was afraid that after getting a free atmosphere he may resile, so they requested the Magistrate to keep him in solitary

confinement. In case the appellant had agreed to confess the guilt due to remorse in that case there was no question for him to resile and the Police

to fear.

16. The other circumstance which makes this confession unworthy of credit is that he was not allowed a free atmosphere in the Court on 19-3-63.

17. The accused was produced in the Court on 19-3-63 at 11-00 a.m. The Magistrate has stated that after giving him a warning he allowed him 3

hours time to reflect and thereafter he recorded his confession. But from the facts this fact does not appear correct. The learned Magistrate has

admitted that after warning he put the accused in the dock being guarded by the Police till his confession was recorded. He has also admitted that

during this period he took up Police cases. At that time also these very policemen were present in the Court who used to write his order sheets. In

these circumstances how can it be said that he was put in congenial circumstances of free thinking. In this case the Magistrate has stated that he

gave him 3 hours to reflect. He has mentioned the time of giving him first warning as 11-00 a.m. According to him he wrote the confessional

statement at 2-00 p.m. But there is nothing on the record to show as to when he took down the confessional statement.

When he mentioned the time of first warning as 11-00 a.m. the same way he should have mentioned the time of recording the confession. The

absence of time of recording the confession gives rise to suspicion as to the exact time of recording it. The learned Magistrate has admitted that at

1-00 p.m. ha went to his house for lunch which was half a mile away from the Court. According to him one hour was permissible for lunch.

According to that he should have come by 2-00 p.m. But he has stated that he does not know at what time he returned from his house after lunch.

This appears to be the reason for not mentioning the time of recording the confession. From this it is clear that the story of giving 3 hours time to

reflect is not correct.

18. The other most important circumstance which makes this confession unreliable is that during this period of reflection he was not allowed to be

free from Police control. After warning he put him in dock under Police guard Thereafter he left for his house at 1-00 p.m for lunch and returned

after 1 hour or 2 hours. There is no material on the record to infer as to in whose custody the accused remained during this period. The Magistrate

has stated that he does not remember in whose custody he kept the accused when he went for lunch. The silence on the part of the Magistrate

clearly indicates that he must have kept him under the Police guard. When he was under the Police guard in that case how this period can be

treated as a period free from Police influence?

19. From the scrutiny of Ext. P/8 and after careful consideration of the evidence of P. W. 23, 1 am satisfied that there has not been a proper

compliance with the requirements of Section 164 of the Cri P. C. in regard to the recording of the confessional statement. I, therefore, hold that the

confession is not voluntary,

20. In view of the above finding that the confession is not voluntary it is not necessary to judge whether it is true or not. But in view of the

arguments advanced by the lawyers it is better to discuss this point. The only reason the learned Additional Sessions Judge has given for accepting

the confession as true is that it contained a wealth of detail which could not have been invented. But the point overlooked is that none of this detail

has been tested. The confession is a long and rambling one which could have been invented by any agile mind or pieced together after tutoring.

What would have been difficult is to have set out a true set of facts in that manner. But unless the main features of the story are shown to be true, it

is, in my opinion, unsafe to regard mere wealth of uncorrborated detail as a safe guard of truth. In support of this I may cite the case in

Muthuswami Vs. State of Madras, In this case Bose J. observed as follows:

A confession should not be accepted merely because it contains a wealth of detail which could have been invented. Unless the main features of the

story are shown to be true, it is unsafe to regard mere wealth of uncorroborated detail as a safeguard of truth.

21. The learned Government Advocate contended that the confession gets corroboration from the medical evidence therefore it should be treated

as true. Now it has to be seen whether it gets corroboration from medical evidence or not.

22. In the confessional statement it has been mentioned that the accused threw the boy in the river when he was alive, while the Doctor has stated

that the boy had been thrown after causing his death. Besides that the boy is said to have been thrown from a height of 24 feet and the body fell on

the sand in the bed of the river. By falling head-long from a height of 24 feet a small pit would have been caused when the head fell on the sand,

but from the photo it is clear that there was no such pit. In the confessional statement the reason to throw the baby from the bridge has been given

that the body will be washed away. But the accused was knowing it fully well that there was no water in the river at that time, therefore, there was

no question of its being washed away. Besides that near this bridge there is a tea stall and the hut of the forest guard and over the bridge people

walk at all times, therefore how could be dare to throw him from there at 6-39 p.m.? If he had thrown him from there people would have come

there on hearing the loud sound caused by the falling of the body from such a height.

23. The following other facts mentioned in the confession also show that it is not true. In the confession it is mentioned ""I came back to town from

Champamura and I searched more on coming to town. On the following morning I went out to search Ratan. I proceeded towards Jogendranagar

Arba and there I came to know from women folk of washerman''s house that there was a talk that something had been found under the bridge. I

then went there.

If the accused had thrown him after murdering, in that case he would not have gone to search him in the night and again in the morning. According

to the confessional statement he was the person who had thrown Ratan from the bridge. In that case there was no reason for him to say that he

came to know about the recovery of the dead body under the bridge after hearing from the women folk. Thereafter he went to see it. This fact

shows that he had no knowledge about the death of Ratan. If he had the knowledge in that case on the recovery of the dead body he might have

tried to"" run away.

24. In this case the learned Additional Sessions Judge has treated the confession as genuine on the basis of recovery of the gold chain. About the

recovery of gold chain I shall discuss while discussing the evidence pertaining to its recovery.

25. In this case the learned Additional Sessions Judge has observed that the accused gave the report at the Police Station in a wrong name so it

should be presumed that he is the murderer. This reasoning of learned Sessions Judge does not appear correct. In the report the accused has given

his name as Madhan Chakraborty, s/o Chandrakumar Chakraborty, He has given the correct name of his father. Besides that the Police in its

report Ext. D/4 has given the name of the accused as Adinath Chakraborty alias Madhab Chakraborty, s/o Chandra Kumar Chakraborty. By this

it is clear that he was known by both the names, therefore it cannot be said that he has given a wrong name.

26. From a scrutiny of Ext. P/8 and after a careful consideration of the evidence of P. W. 23, I am satisfied that there has not been a proper

compliance with the requirements of Section 164 Cr. P. C. in regard to the recording of the confessional statement and that there are very grave

doubts both in regard to its truth and its voluntariness. I am satisfied that it would be most unsafe to place any reliance on this confessional

statement which has been subsequently retracted by the petitioner.

27. Now I shall advert to the circumstantial evidence referred to above on which the learned Additional Sessions Judge has placed reliance while

convicting the appellant.

28. The learned Government Advocate contended that in this case the gold chain PM/4 belonging to the deceased was recovered as a result of a

confession made u/s 27, Evidence Act, by the appellant to the P.W. 32 Chunilal Bardhan Roy, Investigating Officer on 14-3-63 at 8 a.m. It was

further pointed out that the witnesses to this recovery Memo Ex. P/l viz. P. W. 2 Govindlal, P.W. 11 Nepal Chakraborty and P. W. 32 Chunilal

Bardhan Roy have deposed in an unequivocal term that this chain was recovered at the instance of the appellant. As regards its ownership he

urged that by the testimony of P. W. 1 Madhusudhan Saha, P. W. 12 Gangabala, P.W. 21 Makhanlal Deb Nath, P. W. 5 Nayantara Saha and P.

W. 3 Nibaran Chandra Dey, it is clear that it belonged to the deceased. In view of these facts the learned Additional Sessions Judge was justified

in convicting him.

29. The learned Counsel for the appellant strenuously urged that the investigation Officer P. W. 23, who is an expert in fabricating false evidence

planted it there in order to implicate the appellant who had enmity with his brother. In order to substantiate his argument he urged that in order to

implicate the appellant by any means this Investigating Officer tutored P. W. 7 Putul Saha and P.W. 28 Ajit Chandra Ghose to depose against the

appellant, and they gave a false statement against the appellant as directed by him.

30. He next urged that the witnesses to the recovery are the stooges of the Police, therefore it was easy for P. W. 22 to show a false recovery.

The learned Advocate criticised P.W. 11 Nepal Chakraborty as a stock witness who always was at the beck and call of the Police and helped

them in various raids and searches carried out by them. He characterised P. W. 2 Govinda Chandra Das as the henchman of the Police, who was

readily available to them for all searches and raids which they carried out in his locality. In these circumstances no reliance be placed on the

testimony of these 3 witnesses as regards the recovery of the chain.

31. He next urged that in this case the prosecution has not proved as to what was the confessional statement that was made by the appellant

before the Investigating Officer which led to this recovery. In order to make the confessional statement admissible u/s 27 Evidence Act, the

prosecution should have proved as to what were the actual wordings Used by the appellant. The prosecution has neither produced the copy of the

diary containing such statement nor the Investigating Officer P. W. 32 proved the actual wordings used by the appellant, therefore in the absence

of this link no reliance be placed on this recovery. In support of his contention he placed reliance on the case Public Prosecutor v. Venkata Reddi,

reported in AIR 1945 Mad 202. In this case Mockett J. observed as follows:

In the case of a confessional statement admissible u/s 27, the correct procedure for the police officer is to record in the first person the statement of

the accused, and when be gives evidence, to say that the accused made a confessional statement, that he took it down, and then, for the purpose

of refreshing his memory, to refer to the actual statement, which is of course in the police diary, and prove before the Court by that method what

the accused had said.

32. I shall now examine the evidence leading to the recovery of the gold chain in the light of the arguments raised by the lawyers.

33. In this case the gold chain is alleged to have been recovered at the instance of the appellant on 14-3-62 at 2-00 p.m. in the presence of two

witnesses viz. Govinda Chandra Das and Nepal Chakraborty. But in the recovery memo the full description as to how it was recovered has not

been given. Moreover, the information given by the appellant leading to this information (recovery sic) has not been produced. The P. W. 32 has

stated in his statement that the appellant stated that he had killed Ratan and thrown him down from the bridge and had kept concealed the necklace

after snatching it. In this statement except this much portion that he had concealed the necklace, rest is inadmissible in evidence. The statement

regarding the concealment of the chain is vague as he has not mentioned the place where he had concealed. Besides that this statement is at

variance to the confessional statement. In this case the place from where it is recovered is accessible to every one; so any one else too can conceal

it there. Moreover, in view of the conduct of the Investigating Officer as pointed out by the learned Counsel for the appellant I feel that one should

be cautious to accept his statement without corroboration. The Investigating Officer in order to make this recovery to be believed by the Court

should have recorded the information leading to the recovery in the presence of two mothirs and thereafter he should have got the incriminating

article recovered in their presence.

34. I also find that after the recovery of the chain neither he sealed it nor produced it before the Magistrate for identification by the witnesses. The

process of identification of the chain adopted by the P. W. 32 was not proper. This gold chain is of a common pattern, therefore how can it be

said definitely, that it was the same chain? As I have pointed out above that the confessional statement is neither voluntary nor true therefore it is

not safe to convict any one on this evidence alone.

35. Besides that it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion

of guilt is to be drawn should, in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis

of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every

hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable

ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must

have been done by the accused, But this is not so in this case.

36. In this case the appellant had absoluly no motive to kill Ratan in view of his love for him. From the confessional statement it appears that the

appellant is alleged to have killed the boy as he was afraid of being abused by Ratan''s father as he took away the boy without his knowledge. But

this can in no case be a reason for the appellant to kill Ratan. Therefore from the mere recovery of the gold chain which is also doubtful one cannot

come to the conclusion that the appellant committed the murder. It can be said that the fact of recovery of chain is consistent only with the guilt of

the appellant and inconsistent with his innocence. I am therefore of the opinion that the chain of circumstantial evidence is not complete in this case

and the prosecution has unfortunately left missing links, because the prosecution adopted the short-cut of ascribing certain statements to the

appellant which were clearly inadmissible.

The next circumstantial evidence on which considerable reliance has been placed is that Ratan was last seen with the appellant. The learned

Additional Sessions Judge has also believed this circumstantial evidence. Now shall examine the evidence which has been produced to prove this

fact.

The prosecution in order to prove this fact examined P. W. 3 Nibaran Chandra Dey P. W. 4 Rajkumar Sana, P.W. 8 Ashoka Saha P.W. 9,

Jogesh Chandra Saha, P. W. 7 Putul. P.W. 12 Ganga Bala, P. W. 14 Krishnadhar Deb and P.W. 28 Ajit Chandra Ghosh. The testimony of all

these witnesses is that they saw the appellant and deceased together upto 4-30 p.m. The accused too has not denied this fact. His version is that at

3-30 p.m. he went to fetch medicine for the sister of Ratan from the Doctor at the request of Ratan''s mother with Ratan. After coming back from

the Doctor he went to the shop of Ashoka Saha and purchased moa, muri for Ratan and went to Ratan''s house and left Ratan with his mother at

the gate of the house and went away. There is no evidence on the record to show that any one saw Ratan going with the appellant after 4-30 p.m.

on that date. P. W. 12 Ganga Bala the mother of Ratan has now deposed that the appellant came second time to her house and took away Ratan.

But from her statement given before the Police which has been proved in this case it appears that now she has suppressed the real facts and has

given a false statement in order to implicate the appellant. Her statement before the Police fully corroborates the version of the appellant. In that

statement she has stated that

I sent the appellant to Shanker Doctor for bringing medicine for my daughter. He went out with Ratan and came back with medicine. He again

went out with Ratan and returned with Ratan with moa and muri and went away leaving Ratan near me at the gate. I went inside the house with

Ratan. Ratan after eating moa and muri again went out.

By this statement the statements of other prosecution witnesses that Ratan went away with the appellant are falsified. From this it is clear that the

appellant went away leaving Ratan.with his mother. In view of these facts, the prosecution story that Ratan was last seen with the appellant falls to

the ground.

The learned Counsel for the appellant contended that the Investigating Officer in order to implicate falsely the appellant tutored the witnesses P. W.

7 Patal Saha and P. W. 28 Ajit Chandra Ghose to depose against the appellant. The learned Additional Sessions Judge too without going deep

into the matter erroneously relied on their testimony.

There is great merit in this argument. Both these witnesses in their statements have admitted that P. W. 32 Chunilal Bardhan the Investigating

Officer and their parents tutored them to give statement against the appellant by giving them sweets etc. From this it can be rightly inferred that an

Investigating Officer who can go to such a length can also force the accused to confess a thing by torturing. I, therefore, find that the learned

Additional Sessions Judge wrongly relied on this part of the prosecution story.

Another circumstantial evidence on which eliance was placed by the prosecution is that the accused was under financial strain at the relevant time

therefore, he murdered Ratan to take away the gold chain. It appears that this circumstance has weighed heavily with the Additional Sessions

Judge in coming to this conclusion. But on the scrutiny of the evidence on the record I find that there is no evidence on the record to infer like that.

In this case the prosecution examined P. W. 16 Jamini Kamla Debnath, P. W. 12 Panchanan Saha, P. W. 24 Janaka Roy and P. W. 1

Madhusudan Saha to prove this fact. From their testimony it is found that he worked as a tutor of their children. They have not deposed that he

was badly in need of money. From the evidence on the record it is clear that Ratan was very much fond of the appellant. The appellant was also

very much fond of him. Therefore in these circumstances how can he murder Ratan? Moreover he stayed in the house of the parents of Ratan for

two months and he often used to come to their house to help them. If he had been under financial strain he would have borrowed money from them

or would have stolen it as he had opportunity to do so. It is also clear from the evidence that the appellant used to spend money for Ratan. He

purchased a milk pot costing Rs. 10/- for Ratan''s sister. He looked after Ratan for many days when he was burnt with boiling water.

Besides that there is no evidence on the record to presume that the parents of the appellant were very poor. If he had been in need of money he

would have taken out the chain and left the boy near house as none had seen him taking away Ratan. Moreover, from the confessional statement

on which the prosecution has placed reliance it is clear that he was neither under financial strain nor he had any love for the chain. In this statement

it is mentioned. ""I came with a desire to go to see picture. After coming to the shop at Dhaleswar I met with the mother of Ratan on the bank of a

pond. I went to fetch medicine on her request for her daughter. I purchased cake and biscuit for Ratan and left Ratan with her mother and went

away. Ratan came after me near motor stand, therefore I took him to the Cinema house to see picture, but tickets were not available. It was 6-30

p.m. when I reached the motor stand. At that time it struck me that Ratan''s father is a man of abusive nature therefore he would rebuke him if he

would take Ratan to the shop, therefore I decided to take him to his house. When I reached Gandi School then I thought that if I shall take him to

his house it will create more trouble. I, therefore went on thinking of the abusive nature of Ratan''s father. When I reached on the Howrah bridge I

took out the gold chain and threw Ratan in the river bed.

From this statement it is clear that he had no lust for the gold chain. Morever, mere fear of abuses by Ratan''s father cannot be a ground for the

appellant to kill Ratan whom he loved like his own brother. On a close scrutiny of this statement it appears that the accused has been forced to say

so. I, therefore, find that the appellant had absolutely no motive to murder Ratan for the lust of gold chain.

It is no doubt a matter of regret that a foul cold-blooded and cruel murder like the present should go unpunished. It may be as Government

Advocate Shri Hemnath strenu ously urged before me that there is an element of truth in the prosecution story against the appellant. On considering

as a whole, the prosecution story may be true; but between ''may be true'' and "must be true" there is inevitably a long distance to travel and the

whole of this distance must be covered by legal, reliable and unimpeachable evidence.

On a careful consideration of the entire evidence and all the aspects of the case, I am satisfied that this appeal should be allowed. Therefore, I

allow this appeal and set aside the conviction and sentence awarded by the learned Additional Sessions Judge. It is ordered that the appellant be

set at liberty.