

**(2008) 02 CAL CK 0001**

**Calcutta High Court**

**Case No:** C.R.A. No"s. 647 and 671 of 2006

Sudhir Mahato and Birbal  
Mahato and Prabir alias Bura  
Mahato

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Feb. 25, 2008

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 8
- Penal Code, 1860 (IPC) - Section 120B, 201, 302, 364

**Citation:** (2008) 4 CALLT 103

**Hon'ble Judges:** Kishore Kumar Prasad, J; Girish Chandra Gupta, J

**Bench:** Division Bench

**Advocate:** Himangshu De, Arunava Jana, Navanil De, Suman De and Soma Mukherjee, in CRA 647 of 2006 and Milon Mukherjee, Asit Nath, Pravas Bhattacharya, P.B. Mahato, Mangaljit Mukherjee, Ranadeb Sengupta and B.C. Mahato, in CRA 671 of 2006, for the Appellant; Asimes Goswami, U.A. Dewan and Minoti Gomes and Pronoti Goswami, for De facto in CRA 671 of 2006, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Girish Chandra Gupta, J.

This Death reference bearing No. 2 of 2006, Criminal Appeal bearing No. 647 of 2006 and Criminal Appeal bearing No. 671 of 2006 arose out of a common judgment and order dated 28th August, 2006 and 29th August, 2006 passed by Biswanath De, Additional District and Sessions Judge, Fast Track Court, Jhargram in Sessions Trial No. XVIII of May 2006 convincing the appellants under Sections 364, 302 and 201 of the Indian Penal Code by the order dated 29th August, 2006. All the appellants were punished with imprisonment for life for the offence punishable u/s 364. The appellants were inflicted death sentence for the offence punishable u/s 302 of the

Indian Penal Code and they were also sentenced to suffer rigorous imprisonment for seven years for the offence punishable u/s 201 of the Indian Penal Code. The death reference has naturally been made for confirmation of the death sentence. The Criminal Appeal No. 647 of 2006 is at the instance of the accused Sudhir Mahato and the Criminal Appeal No. 671 of 2006 is at the instance of Birbal Mahato and Prabir @ Buro Mahato. The facts and circumstances of the case briefly stated are as follows:

On 8th September, 2005 Tarapada Mahato son of Ajit Mahato allegedly went out of his house at 12.00 P.M. in the night for the purpose of irrigating the field. He did not come back. On 9th September 2005 at about 10.35 hours in the morning Ajit Mahato, P.W.I, father of Tarapada Mahato, lodged a missing diary bearing No. 240 (marked as Exhibit 7) which reads as follows:

10.35 240 Person missing

By this time one Ajit Mahato s/o Lt. Gobinda, Salboni P.S. Lalgah called at - the P.S. and reported that his son Tarapada Mahato, Age-30 years, Height 57", complexion-Black. Built-medium, wearing black half pant and vest, one mole in the left side nose, has found missing since 8/9/05 night from paddy-field i.e. his son Tarapada Mahato went to paddy-field on 8/9/05 about 12.00 hrs. but not returned till now. Noted the fact in G.D and sent R.T.M. to all I/c's/O/C's of Midnapore (West) District and O/C M.P.R. Mdp(w) for taking N/A.

2. On 10th September, 2005 at about 15.30 hours the aforesaid Ajit Mahato lodged an F.I.R., a translated version whereof reads as follows:

I, Sri Ajit Mahao, s/o Late Gobinda Mahato, village Salboni, P.S.. Lalgah, Dist. West Midnapore, am to inform you that around midnight (12 A.M.) on 08.9.05 my eldest son Tarapada went out to water the field. He did not return home thereafter. Regarding this, I lodged a missing diary No. 240 dt. 09.9.05 at your P.S.

Thereafter I along with my relatives and villagers carried out searches and made enquiries and came to know that my son Tarapada had served as a driver of the trekker of Birbal Mahato S/o. Bankim Mahato of our neighbouring Chhoto Salbani village for some 2-3 years. About 6 months ago he quit the job (of driving the trekker) over a quarrel regarding (his) salary. When Tarapada used to drive Birbal's trekker, almost everyday he would have his meal at the place of Birbal and would stay there for the night. This led to my son Birbal getting into a love affair with Birbal's wife Smt. Kalpana Mahato @ Nilima. For this Birbal used to threaten to kill my son Tarapada. About four months back, the abovenamed Birbal Mahato beat my son Tarapada black and blue and left him on the field. My son told me about this after he recovered. But I did not inform the P.S. about this as he resented.

I firmly believe that the above amid Birbal Mahato and his cousin Prabir Mahato @ Bura, s/o. Sri Banshi Mahato, Vill. Chhoto Salboni conspired to abduct my son

Tarapada in order to kill him.

Therefore, Sir, I request you to investigate the matter and take proper steps against the culprits.

It would appear that in the written complaint made by P.W. 1 the following allegations were made:

(a) On 8th September, 2005, Tarapada went to irrigate the paddy field in the night at about 12 P.M. He thereafter did not return.

(b) Upon enquiries the P.W. 1, the informant, came to know that his son Tarapada about 2/3 years prior to the date of the incident used to drive a trekker of the accused Birbal Mahato son of Bankim Mahato.

(c) Tarapada had left the job about six months prior to the date of the incident.

(d) While Tarapada was working with Birbal, he had developed an illicit relationship with the wife of Birbal known as Kalpana Mahato @ Nilima.

(e) The illicit relationship between Tarapada and the wife of Birbal had antagonized the master against servant. Birbal is alleged to have threatened Tarapada to kill him.

(f) About four months prior to the date of the incident. Tarapada was severely beaten up by Birbal.

(g) The informant, P.W. 1, came to know about the illicit relationship after Tarapada was released from the hospital.

(h) The informant entertained a serious belief that Birbal Mahato and his cousin Prabir Mahato alias Buro in execution of a conspiracy abducted his son, Tarapada, for the purpose of killing him.

The written complaint has been marked "Exhibit-1".

3. On 17th September, 2005 Nabakumar Mahato (PW 3), the younger of brother Tarapada, informed the police in writing that after thorough search, it had been ascertained that the headless body of Tarapada was lying on the bank of river Kasai in the junction of Chanapara and Durgapara. Based on the information they had been to the site and found a headless body which had on its loins a chequered burmuda and an amulet on his right hand. Based on the structural appearance, the body was identified by them to be that of Tarapada Mahato. This information given to the police in writing on 17th September, 2005 has been marked "Exhibit 3".

4. The body was thereafter picked up by the police and an inquest report was prepared which has been marked "Exhibit 4". From the inquest report it appears that the headless body had become decomposed and on its right hand an amulet was found tied with a red thread. On its loins there was a white and chocolate coloured bermuda. A few photographs were exposed by the PW 7. One of the

photographs goes to show that some kind of a bermuda was indeed there in between the legs of the dead body which otherwise was naked. The accused, Sudhir Mahato, was arrested on 29th October, 2005. There is evidence on the record to show that animals had preyed upon the dead body. Therefore, it is quite likely that the animals had displaced the bermuda. The accused Birbal Mahato and Prabir Mahato, it appears, had applied for anticipatory bail which was rejected, and thereafter they surrendered on 29th December, 2005. The accused persons were charged under Sections 364, 302, 201 and 120B of the Indian Penal Code. For better appreciation of the facts and circumstances of the case, it would be convenient to notice the charges in extenso which read as follows:

First - That you on or about the 8th day of September, 2005 at 12 P.M. caused abduction/kidnap of Tarapada with a view to cause his death etc. And thereby committed an offence punishable u/s 364 of the Indian Penal Code, and within cognizance of this Court.

Secondly - That you, on or about the 8th day of September, 2005 at 12 P.M. or onwards, caused death of Tarapada by cutting his limbs etc. and thereby committed an offence punishable u/s 302 of the Indian Penal Code, and within cognizance of the Court.

Thirdly - that you, on or about the 8th day of September, 2005 at (illegible) about, caused disappearance of evidence by remaining dead body (illegible) and thereby committed an offence punishable u/s 201 of the Indian Penal Code and within cognizance of Court.

Fourthly - That you, on or about the 8th September day of 05, you made (illegible) etc. to cause death of the deceased Tarapada, and thereby committed an offence punishable u/s 120B of the Indian Penal Code and I hereby direct that you be tried by the said Court on the said charge.

5. We already have noticed that the accused persons have been punished under Sections 364, 302 and 201 of the Indian Penal Code. No punishment was inflicted u/s 120B of the Indian Penal Code. At the very outset, we would like to point out that there is no evidence on the record to show that the accused persons abducted or kidnapped Tarapada Mahato with a view to cause his death or for any other purpose which is the first charge against the accused.

6. There is no evidence on the record to show that the accused persons caused death of Tarapada by cutting his limbs or otherwise. The medical opinion is that the death was caused by strangulation and the beheading was done subsequently. The autopsy surgeon was also of the view as would appear from ext.5 that the injuries found on the body of the deceased were caused by animals that had preyed upon it.

7. There is no evidence on the record to show that the accused persons caused disappearance of the dead body or any evidence. It is therefore clear that the

charges under Sections 364, 302 and 201 of Indian Penal Code were not at all proved by the prosecution. From the evidence appearing on the record, the prosecution appears to have succeeded in proving -

(a) that Tarapada Mahato used to drive the vehicle of Birbal Mahato.

(b) On 8th September, 2005 Tarapada Mahato was no longer in the service of Birbal Mahato.

(c) About 4 months prior to 8th September 2005 Tarapada was hospitalized consequent to assault by the accused Birbal and Prabir.

8. Illicit relationship between Kalpana Mahato @ Nilima wife of Birbal Mahato and Tarapada, was sought to be proved by twelve or thirteen letters allegedly written by Kalpana. It appears that six of them were seized by the police. In order to prove the handwriting of Kalpana. PW 2 was called. She deposed that she at the relevant point of time was a member of the Mahila Samiti and Kalpana was also a member of the Mahila Samiti. She further deposed that she was acquainted with the handwriting of Kalpana. She further deposed that "three letters have been written by Kalpana." Those three letters were not exhibited by the learned Trial Judge. The learned Trial Judge, while PW 2 was in the box, marked them for identification. Subsequently, the Investigating Officer, PW 12, came to the box. Upon his identification all the twelve or thirteen letters were marked exhibits. Now, it is difficult to follow as to which three letters were proved by PW 2 to have been written by Kalpana. There is no certainty. However, considering the fact that each of the letters contained some indication of emotional relationship, we shall proceed on the basis somewhat reluctantly that there may have been some extra-marital relationship between Kalpana and Tarapada.

The next piece of evidence sought to be let in by the prosecution through PW 6, Pramatha Mahato is as follows:

Birbal, Probir, Sudhir came to tea stall of Sachin before two days of the incident, at 7 P.M. I went to the shop of Sachin to take tea. Then Sudhir told "Tarapadar Khub Bar Bareche. Ok Khatam Korey Kasai Nodite Fele De. Ager moto Jano Beche Na Uthte Pare. (Tarapada has become too big for his boots. He should be put to death and his body should be thrown in the river Kasai lest he survives as before) I told that words to the family members of Ajit and other of our villagers.

9. The aforesaid evidence of PW 6 (the words in vernacular have been translated by us) would indicate that the conversation amongst the accused was duly reported by him to the father of the deceased. The father of the deceased, however, did not give any indication of any such information received by him from PW 6 two days prior to the date of incident in the missing diary lodged by him on 9th September, 2005 nor in the written complaint lodged on 10th September, 2005 which we already have set out in extenso. On the top of that, if such an information had been received by the

de facto complainant, the PW 1, the father of the deceased, two days prior to the incident, then it is difficult to believe that he would allow his son Tarapada to venture out of the house at 12.00 in the mid-night.

10. Therefore, the evidence of the PW 6 can hardly be viewed with any amount of credibility. Even assuming that the evidence of PW 6 is credible and even assuming further that the PW 1 did not give any importance to the conversation allegedly had between the accused and heard by the PW 6, that alone would not prove that the accused abducted the victim or that they killed the victim or that they took any step to cause disappearance of the dead body of the victim. The learned Trial Judge proceeded on the basis that the accused persons had conspired to kill and this conspiracy had been hatched in the tea stall of Sachin. Sachin was not even called as a witness. During examination u/s 313, each of the accused persons stated that Sachin had no tea stall.

11. Mr. Goswami, the learned Public Prosecutor, submitted that a conspiracy may be hatched openly and would have been hatched in a tea stall. We are not prepared to accept this submission. A conspiracy to kill somebody can hardly be hatched openly. If people are found contemplating openly to kill somebody, that is bound to be an idle talk. Because it is an idle talk, they themselves did not take any precaution to maintain secrecy. Even assuming that the PW 6 heard the accused persons in the tea stall talking about their intention to kill the deceased that alone is not enough. It has to be followed by preparation and execution. The prosecution has miserably failed to prove that the accused persons took any step to prepare themselves for the crime or that they actually executed the plan. Mere fact that the accused persons had any such intention would not go to show that the deceased was killed by them. This may provide a very good ground for raising suspicion for viewing the accused persons with suspicion but that can never be a substitute of proof.

12. On 17th September, 2005, the police was informed in writing by Nabakumar, the PW 3, that the deadbody of his elder brother Tarapada had been located. A few photographs were exposed as has already been indicated. The photographs go to show that it is a headless body. The evidence, which has been adduced, goes to suggest that the body was under the water for more than seven days. The Post Mortem Report goes to show that death took place one week to two weeks prior to Post Mortem which was held on 18th September, 2005. On 8th September 2005 the victim disappeared from his house at 12.00 in the midnight. Therefore, the death must have taken place between 8th and 18th September, 2005. During this period, the body was supposed to be under water. The PW 1, the father of the deceased, deposed that he identified the body of the deceased on the basis of structure and appearance. PW 3, Nabakumar Mahato, during the inquest appears to have identified the deceased on the following basis.

The brother of the deceased (Nabakumar Mahato) identified the corpse from its clothing and the amulet on his right hand.

13. In cross-examination PW 3 admitted that the red thread, which is supposed to have been found on the right arm of the dead body, was not even enough for the purpose of circumferencing the arm of PW 3 who, in his cross-examination, also deposed that his elder brother structurally was like him. PW 4 deposed that he identified the body of the deceased, Tarapada, on the basis of the construction or built of the body. The PW 9 deposed that he had conducted the inquest and during the inquest Nabakumar, PW 3, had identified the body. PW 10 deposed that it is on the basis of the identification made by PW 3 that they proceeded on the basis that the body was that of Tarapada. Now, besides build and construction of the body, reliance appears to have been placed on the amulet, red thread and bermuda.

14. The fact that the red thread was not enough to circumference the arm of PW 3 can possibly be explained on the basis that the thread may have shrunk over the time. In so far as the bermuda is concerned, both Mr. De, the learned Senior Advocate, appearing in support of CRA No. 647 of 2006 and Mr. Mukherjee, the learned Counsel, appearing in support of the connected appeal, submitted that in the missing report, which is the earliest document, the victim is alleged to have left the house in a black half pant. Both of them questioned the value of the bermuda as an insignia for identification. They submitted that there is no definite evidence to establish that the dead body recovered and examined by the Police and the autopsy surgeon was the body of the deceased. Each of the witnesses admitted that the type of amulet is commonly available in the market meaning thereby that there was no special mark of identification. It was also contended that the amulet might have been implanted. Mr. Mukherjee added that the amulet, bermuda and the red thread were seized almost fifty days after the date of recovery of the dead body.

15. Based on the evidence discussed above, there is no escape from the conclusion that there is some amount of uncertainty as to whether the body identified by the prosecution witnesses was actually the body of the deceased Tarapada. The body so identified had various injuries like one of the palms was missing, left buttock was injured and feet was missing. From the Post Mortem Report it appears that this was done by the animals. As a matter of fact, the following observations appear from the Post Mortem Report:

Evidence of gnawing by animal predators" were found left buttock and adjoining back of left side of trunk, over left wrist, left elbow, over right hand and tibia and fibula of right forearm, over right leg from below knee, right foot from right ankle and over left foot from left ankle.

16. In this state of evidence, the learned Trial Judge had real difficulty before him in convicting the accused persons which he realised and expressed in these words:

But the fact remains that nobody has seen those accused to abduct or to murder Tarapada, since deceased.

The learned Trial Judge, it appears, overcame the difficulty on the basis of the following reasoning:

Now, the circumstantial evidence comes to play. Those letters and evidence of the parties are all in chain. There is direct allegation in F.I.R. against the two accused persons namely Prabir and Birbal. Another name of Prabir is Bura. The evidence on letters and talking or conspiracy made by accused Sudhir, Birbal and Prabir in the tea stall of Sachin, and heard by PW 6, tied the accused by same rope pointing guilt of the accused persons and in consisting of innocence of the accused persons.

17. We are unable to agree with the learned Trial Judge that the letters claimed to have been written by Kalpana or the conversation between the accused in the tea stall of Sachin, heard by PW 6, can be said to be a pointer of the guilt of the accused persons or that these pieces of evidence are inconsistent with the innocence of the accused persons. The finding we are sorry to say is perverse.

18. Mrs. Goswami, the learned Advocate, appearing for the defacto complainant, supplemented the submissions made by Mr. Goswami, the learned Public Prosecutor. She submitted that the accused persons had a motive to kill the deceased Tarapada.

19. We already have held with some amount of reluctance that there might have been some extra-marital relationship between Kalpana and the deceased Tarapada. On this basis, no motive can be attributed to Sudhir. Prabir @ Buro is a nephew of Birbal. What motive he could possibly have to perpetrate the crime is not easy to follow.

20. Her next submission is that the conduct of the accused Birbal and Prabir @ Buro goes to show their guilty minds. They had absconded. She relied on a judgment in the case of [Thimma and Thimma Raju Vs. State of Mysore](#). It can, however, be pointed out that even in that judgment the Apex Court has held that the mere fact that the accused absconded is not conclusive proof of guilt. Reference in this regard may be made to paragraph 11 of the judgment which reads as follows:

The trial Court and the High Court have also been influenced by the fact that the appellant had absconded after September 1, 1967 when the police got suspicious of his complicity in this offence. It is true that the appellant did make himself scarce with effect from September 1, 1967 till he was arrested on September 5, 1967 and this conduct is relevant u/s 8 of the Indian Evidence Act and might well be indicative to some extent of guilty mind. But this is not the only conclusion to which it must lead the Court. Even innocent persons may, when suspected of grave crimes, be tempted to evade arrest: such is the instinct of self-preservation in an average human being. We are, therefore, not inclined to attach much significance to this conduct on the peculiar facts and circumstances of this case.



21. Lastly, she submitted that identification of the deceased has been made on the basis of bermuda, amulet and the construction of the deceased. We have already dealt with this point and need not repeat the same.

22. It has been pointed out by the Apex Court time and again that in those cases where the guilt of the accused is sought to be proved by circumstantial evidence, the incriminating circumstances have to be proved in such a manner that they do not leave any scone of doubt as to the complicity of the accused in the crime. If any authority is needed, reference may be made to a judgment in the case of [Govinda Reddy and Krishna and Another Vs. State of Mysore](#), .

The mode of evaluating circumstantial evidence has been stated by this Court in [Hanumant Vs. The State of Madhya Pradesh](#), . and it is as follows:

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.

23. In the present case, there is neither any direct evidence nor any circumstantial evidence to show that the accused persons abducted the deceased or that they killed the deceased or that they took any step to cause disappearance of the dead body. Mere suspicion is no substitute of proof. It is not permissible to presume the accused to be guilty and then try to justify it. Initial presumption has to be that the accused is innocent which has to be rebutted by clear and cogent evidence. In the case of [Ashish Batham Vs. State of Madhya Pradesh](#), the following view was expressed by the Apex Court in paragraph No. 8 of the judgment.

Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and

golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate Judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record.

24. We are, in the circumstance, unable to concur with the views expressed by the learned Trial Judge. Accordingly, the conviction and the sentence recorded against the appellants by the Trial Court are set aside. The death reference is accordingly answered. Both the appeals are allowed. The appellants shall be released at once, if they are not required in any other case.

25. Lower Court Records with a copy of this judgment to go down forthwith to the Trial Court for information and necessary action.

26. Send a copy of this judgment to the Superintendent, Correctional Home, where the appellants are now under detention for information and necessary action.

27. Urgent xerox certified copy of this judgment, if applied for, be supplied to learned Counsel for the parties on compliance of all formalities.