

(2011) 06 CAL CK 0013

Calcutta High Court

Case No: C.R.A. No. 102 of 1993

Sajai Mondal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: June 30, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 109, 120B, 302, 34

Citation: (2011) 5 CHN 608

Hon'ble Judges: Raghunath Ray, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Joymalya Bagchi, Soumyapriyo Chowdhury, for the Appellant; Kallol Mondal, for the Respondent

Final Decision: Allowed

Judgement

Girish Chandra Gupta, J.

This appeal is directed against a judgment and order dated 30th April, 1993 by which the learned Trial Court found all the three accused persons guilty of offence punishable u/s 302 read with section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for life. The case of the prosecution briefly stated is as follows :--

Sukur and Saked were two brothers residing at Chhatarbandi village at their ancestral house. Differences cropped up between them. Saked, it is alleged, misled by the accused Sajai Mondal, left the ancestral house and constructed a hut on a piece of land provided by the said Sajai Mondal. The said Sajai Mondal established an illicit relationship with Rosena, wife of the said Saked, which in course of time became public. Saked after having become aware about the same naturally protested but the same did not yield any result. Soon after further protest by the said Saked, on 16th July, 1990 at around 12.30 a.m. in the night, he was put to death

by strangulation by the said Sajai Mondal and his associate Sk. Lalan in collusion and conspiracy with Rosena, wife of the deceased. Sajai Mondal and Lalan were noticed escaping from the place of occurrence by Nasiruddin and Sk. Sakim who had rushed to the place of occurrence upon hearing a groaning sound. The villagers including the said Sukur after being informed about the incident rushed to the place of occurrence and found the victim dead in the Courtyard. A wound in the throat was also noticed. It is alleged that upon interrogation Rosena confessed the guilt. Police was informed. A written complaint was lodged at 8.55 a.m. on 17th July, 1990. Inquest was conducted at 10.55 a.m. The accused Rosena was arrested by the police on the spot. The accused Sajai and Lalan were not found. The irate mob put the house of the accused Sajai on fire before arrival of the police. Md. Burjahan, son of the accused Sajai Mondal, also lodged an FIR on the basis whereof PS Case No. 36 of 1990 dated 17th July, 1990 was started for rioting and assault. On 18th July, 1990 at about 5 p.m. both the accused Lalan and Sajai were arrested from a village near Ilambazar.

2. It is not in dispute that the accused Sajai was a widower. He had 8/9 children according to the evidence of the PW 5. The accused Lalan's house was situate at a distance of 15 cubits from the house of the accused Saked as would appear from the evidence of the PW 4. As regards the illicit relationship between the accused Sajai and the accused Rosena there is no dispute. It is also on the record that a salish was held to prevent the affair between the aforesaid accused persons. There is also evidence to show that the accused Sajai and Rosena continued to meet at the house of Lalan after the victim had taken exception to the affair as would appear from the evidence of the PW 5. There is evidence to suggest that the accused Lalan was promised by the accused Sajai 10 cotthas of land in lieu of facilitating the meeting of the lovers at his house. There is evidence to show that in the house of the accused Lalan there were three bedrooms where Lalan used to reside with his family members as would appear from the evidence of the PW 6. There is thus evidence to show illicit relationship between the accused Sajai and the accused Rosena. There is also evidence to show that the accused Lalan acted as the facilitator or in other words provided the place for meeting of the lovers at his house after the victim had taken exception to the affair. The Autopsy Surgeon (PW 8) found multiple scratches below the mid region of ("heck and fracture of the hyoid bone. According to him the death was caused by manual strangulation. Safiquddin (PW 4) and Nasiruddin (PW 5) had both noticed the accused Sajai and Lalan escaping from the place of occurrence. Besides these pieces of evidence and the other undisputed facts the only other piece of evidence available to the learned Trial Court was a confessional statement of the accused Rosena. The learned Trial Court expressed his views in that regard as follows :--

Mr. Mondal has drawn my attention by citing a ruling 1993 Cr. LJ SC 109 and 1993 Cr. LJ SC 408 that non-mentioning of the names of the accused making extra judicial confession to 10 during investigation and during inquest, the accused shall get the

benefit of doubt. But by scanning the evidence of PW 9, I find that PW 1 stated to him (IO) that accused Rosena Bibi made extra judicial confession before him and other villagers that they conjointly murdered Sk. Saked.

The IO has stated in cross-examination that none of the witnesses in their 161, Cr. PC statement stated the actual verbatim language of Rosena's extra judicial confession. If we analyze this part of evidence of IO we can conclude that although there was no verbatim language of extra-judicial confession of Rosena Bibi made to the witnesses even then the (IO) stated that witnesses told him about the gist of extra judicial confession of Rosena Bibi so I find that IO has stated that witnesses stated to him during investigation that Rosena made extra judicial confession about the crime. The law is very clear and I should say it is a settled principle of law that recording of statement u/s 161, Cr. PC may be perfunctory or dishonest, but the Court shall always bank upon the original evidence on dock as it is a substantive evidence. In this case PWs. 3, 4, 5, 6 and 7 stated before me in the witness box that Rosena Bibi made extra judicial confession about the crime in collusion with other two accused persons so we can easily rely upon such extra judicial confession of Rosena Bibi where she included herself and other two accused to the said crime. Basing upon such extra judicial confession I can easily come to a conclusion that the three accused persons made the conspiracy and murdered Saked by throttling, Mr. Mondal has argued before me that suspicion however strong, cannot take the position of truth. But with due respect to Mr. Mondal I disagree with him because this dictum does not apply here. Because from the evidence on record have got no suspicion or any doubt about the crime committed by the accused persons. The evidence of PWs. 4, 5, the extra-judicial confession of Rosena Bibi and the post-mortem report conclusively prove that the accused persons committed the heinous crime. There is no question of any suspicion.

3. The learned Trial Court also relied on the theory of last seen together in order to nail the accused Rosena and his views in that regard are as follows:--

I get another strong circumstances in this case to prove the guilt of the accused persons. It is an admitted fact that on the date of occurrence, Saked and his wife Rosena were sleeping in the same room. Rosena stated to me in her 313, Cr. PC examination that after one hour, her husband went to the annexed verandah and started sleeping there. Thereafter at 2"O clock in the night she woke up from the sleep and found her husband has been murdered.

The law says that where the husband and wife were last seen together sleeping in the same room, after two hours if any of this spouse becomes dead, other spouse must explain the cause of death and reason of such death. But in this case other spouse Rosena Bibi has not explained how her husband was murdered at that night, when there were none present at the time of going to bed at 10 p.m. Even in 313, Cr. PC statement she could not explain how her husband died. She never suspected her deor (PW 3). So she must say who murdered her husband when she and her

husband were last seen together at the same bed upto 10 p.m. on the date of occurrence. Her silence is the concrete proof of one of the vital circumstances that she along with other two accused persons have committed the crime. Thus the chain of circumstance is completed. I fully rely on the principle of a case reported in [State U.P. Vs. Dr. Ravindra Prakash Mittal](#),

4. The extra-judicial confession appearing to have been made by the accused Rosena and deposed to by the P.Ws. 3, 4, 5, 6 and 7 may now be noticed in some detail.

5. PW3 Sukur is the de facto complainant. He is the full-blood brother of the victim. He had reached the place of occurrence after the other witnesses had already arrived. As regards the extra-judicial confession he deposed in his Examination-in-Chief as follows :--

I along with other villagers asked her about the incident. At that time accused Rosena Bibi cried out and confessed before me and other villagers that she along with other two accused persons murdered my elder brother Sk. Saked by throttling (objected to). I along with other local villagers searched out for accused Sajai and Sk. Lalan but they fled away from the village. I lodged complaint before the police station Parui as per my verbal submission and narration of the fact Abdul Owadut wrote a written complaint and it was explained and read over to me and I put signature thereon. This is my signature marked Ext. 1/1. The body of the written complaint was written by Abdul Owadut in my presence. I know his handwriting. He signed in my presence. This is the written complaint marked Ext.1. Abdul Owadut happens to.....of accused i.e. Abdul Owadut married the Sajai's sister's daughter."

6. PW 4 Safiquddin deposed as regards the extra judicial confession as follows:--

I asked Rosena Bibi about the cause of death of Sk. Saked. She confessed before me that accused Sajai Mondal and Sk. Lalan murdered her husband Sk. Saked by throttling. We informed this matter to our local villagers who came to the spot. Abdul Sukur came to the spot. Other villagers also came to the spot. We also narrated the incident to them. The local villagers asked the cause of death of Sk. Saked to Rosena Bibi, his wife and she confessed before them that accused Lalan and Sk. Sajai murdered Sk. Saked by throttling. She also stated to us that accused Sajai Mondal has told her to marry her and that he will give 10 cotthas of land to her."

7. PW5 Nasiruddin deposed as regards the alleged extra-judicial confession as follows :--

We asked Rosena Bibi about the cause of death of Sk. Saked and then Rosena Bibi confessed before us that she along with accused. Sajai and accused Lalan murdered Sk. Saked by throttling. She also stated to me that she loved Sk. Sajai which her husband did not want so they jointly murdered her husband. She also stated to me

that Sk. Sajai had told her to marry. She also stated to me that Sk. Sajai shall give 10 cotta land to Sk. Lalan because Sk. Latan will also come to the party so as to kill Sk. Saked jointly. I also informed this matter to Saked's brother Sukur (PW 3). Many villagers came to the spot. I narrated the incident to them, Rosena Bibi also confessed before them that they jointly murdered Sk. Saked."

8. PW 6, it appears, had reached the place of occurrence before the PWs 4 and 5. He, as a matter of fact, had reached the place of occurrence hearing a groaning sound and his evidence in that regard is as follows :--

I live just by the side of Sk. Saked. On the date of occurrence I was sleeping at my house. I woke up from the sleeping hearing the groaning sound from the house of Sk. Saked. I became frightened. I rushed towards the house of Sk. Saked and called him by name at that night. At that time Rosena came out from the house and told "go away, go away". At that time I went to the house of my brother Sarifuddin being frightened, I wake him up from sleep."

9. As regards the extra judicial confession he deposed as follows :--

Local villagers asked Rosena how Saked was murdered. Then Rosena Bibi told us that she along with accused Sajai and Lalan murdered Sk. Saked by throttling. I narrated the incident to the villagers.

10. PW 7 Sher Ali deposed as regards the extra-judicial confession as follows:--

We asked Rosena Bibi about the cause of death of Saked at that time she confessed before us that she along with accused Lalan and Sajai murdered Sk. Saked by throttling.

11. PW 1 scribed the written complaint. He did not however support the case of the prosecution. He hinted at a different written complaint allegedly lodged by him on the basis of which a UD case was started. It is a fact that a UD case was started. The inquest report is, in fact, in connection with UD Case No. 7/1990 dated 17th July, 1990. The inquest was held at 10.15 a.m. whereas the written complaint appears to have been lodged at 8.35 a.m. on 17th July, 1990. Based on the written complaint PS Case No. 35 of 1990 dated 17th July, 1990 was started. The learned Trial Judge has held that the UD case was started for administrative convenience but no such explanation was given by the PW 9 who investigated the case. His evidence, as a matter of fact, in that regard is as follows :--

We usually start police case when cognizable offence reported to us. We usually start U.D. case whenever we get information for an unnatural death which does not disclose any cognizable offence. But in this case we got information about the alleged murder which is cognizable offence. I made inquest report in connection with UD Case No. 7/90 dated 17.7.90. There is GD number about the fact that at first I made UD case thereafter PS case. But I say I made a GD entry in our police station. Not a fact I have made no GD entry about UD case. Not a fact that I started UD case

as per complaint of Abdul Sukur. Not a fact I started a UD case after taking written complaint from Abdul Owadut (PW 1). I have not tagged the result of UD case in this PS case and the FIR there is no note in my CD that I started UD case and PS case simultaneously basing on the PS case. Abdul Owadut has not made any FIR before me for starting UD case. Not a fact Abdul Owadut made written FIR for UD case."

12. It is not the case of the PW 1 that he drafted two written complaints. He admits to have drafted the written complaint which is on the record and has duly been exhibited. It is therefore difficult to believe that on the basis of any written complaint other than the one on the record the UD case was started as deposed by the PW 1. But the difficulty arises from the fact that the inquest was held in connection with a UD case when the complaint was supposedly already on record.

13. Mr. Bagchi, learned Advocate appearing for the appellant contended that the written complaint has been anti-timed. This submission has some force or at any rate is a factor which is to be taken into consideration.

14. As regards the extra-judicial confession, the witnesses deposed that the accused Rosena confessed to have killed the victim along with the accused Sajai and Lalan. If this was the substance of the extra-judicial confession why was the same not succinctly indicated in the written complaint? Sight cannot be lost of the fact that the de facto complainant (PW 3) deposed during his cross-examination that "I dictated the FIR to Owadut at 8 a.m. in the house of my elder brother. I, Sher Ali and Safique went to P.S. with the written FIR at 8 a.m. I handed over the written complaint to O.C.". The substance of the written complaint is that the victim was killed by a conspiracy hatched amongst the accused persons and the accused Roshna had admitted her guilt. When the case contained in the written complaint is compared with the evidence adduced in Court by the de facto complainant and the other witnesses, it can be said without any fear of contradiction that the evidence adduced in Court was definitely embellished.

15. The inquest report contains the following recital:-

On preliminary enquiry it comes to light that there was illicit connection between the wife of deceased Sk. Saked, Rosena Bibi and Sk. Sajai Mondal, s/o Late Abdullah of village Chhaterbandi for a long time. When he came to learn about the incident four months ago, he then told Sk. Sajai Mondal not to visit his house. But Sk. Sajai Mondal used to keep such illicit connection with the wife of deceased Sk. Saked secretly through Sk. Lalan, Sk. Firoz of village Chhaterbandi.

On the last night (i.e. on the night of 16.7.90) at about 12/12.30 a.m. Sabekuddin @ More, neighbour of deceased Sk. Saked suddenly heard a loud roaring sound or alarm and informed some villagers about it. Thereafter those villagers went to the house of Sk. Saked and found that someone had killed Sk. Saked. The villagers came to learn that on conspiracy of Rosena Bibi, Sk. Saked was murdered by throttling at about 12/12.30 a.m. in the night of 16/16.7.90 by Sk. Sajai Mondal and Sk. Lalan @

Sk. Firoz. The body of the deceased Sk. Saked was sent to the morgue at Suri with the help of Constable No. 47 Mritunjoy Patra for post-mortem examination.

16. At this stage evidence of the PW 9 who prepared the inquest report may be taken into consideration which reads as follows :--

I made the inquest in presence of Abdul Owadut, Abdus Sukur, Nasiruddin. Md. Ser Ali. Besides four above other villagers were also present. It is a fact nobody told me at the time of inquest that any witness heard groaning sound when they performing nature"s call. At the time of inquest no witness told me that they could recognise two accused Sajai and Lalan by the torch light that they were fleeing away. Even no witness told me at the time of inquest that Rosena Bibi shouted "palao palao". What I have stated in my inquest report are all correct.

17. If, the contents of the inquest report are all true and correct as deposed by the PW 9 the credibility of the alleged extra-judicial confession is further eroded because in the inquest report the case is "that some one had killed Sk. Saked".

18. The PW 9 admitted during his cross-examination that "None of the witnesses in their 161, Cr. PC statement stated the actual verbatim language of Rosena"s extra-judicial confession". He also admitted during his cross-examination that "I have not prayed before SDJM, Suri for recording confessional statement of accused Rosena Bibi", The embellishment made by the witnesses during their evidence at the trial would further be evident from the following deposition of the PW 9 :--

It is a fact that PW 4 has not stated to me that Rosena Bibi confessed before them that accused Lalan and Sajai, murdered her husband. He has not stated to me that he has not informed this matter to villagers who came along with Sukur. It is a fact that PW 5 Nasiruddin has not stated before me that he was making nature"s call by the side of Morol Pukur. PW 5 has not stated to me that Rosena Bibi told him that her love affairs with Sk. Sajai having been divulged to her husband and her husband warned Sk. not to come to her house. He did not tell me that he informed Sukur. PW 6 has not stated before me that he was sleeping at the time of occurrence. It is a fact that PW 7 Ser Ali has not stated to me that Saked has been murdered by accd. Sajai and Lalan. PW 7 has not stated to me that he saw throttling mark in the neck of deceased."

19. Even the evidence of the PW 6 Sabekuddin that Rosena came out from the house and told him to go away losses its weight when it is compared with the evidence of the PW 9 who admitted during his cross-examination that the PW 6 did not tell him at the time of investigation that Rosena Bibi shouted "Palao Palao".

20. Therefore it is difficult to accept the alleged extra-judicial confession at its face value. Apart from the extra-judicial confession there are materials pointing at the accused Sajai and the accused Lalan but the same is not also true about the accused Rosena. The learned Trial Judge was aware of this difficulty and he sought to get

over the same by relying on the theory of last seen together as indicated above. But that does not in our view hold good in the facts and circumstances of this case. If the evidence of PWs.4 and 5 that they saw the accused Sajai and Lalan to escape from the place of occurrence, is believed the victim cannot longer be said to have been last seen together with the accused Rosena. It is not also a fact that the accused Rosena did not offer any explanation. The explanation offered by her reads as follows:

On the date of occurrence at about 10.00 p.m. I and my husband Saked along with my children took our bed in a room for sleeping. Sometimes thereafter my husband went out of the room and took his bed on the Courtyard.

Thereafter, at about 2.00 a.m. my sleep suddenly broke out and I went to the Courtyard and found that my husband Saked was lying dead there. I began to raise alarm and began to cry. Then I call one Kubera Bibi my next door neighbour and thereafter called my husband's brother Adur Sukur. About 200 villagers were gathered on hearing my crying. Then all the villagers and the said brother of my husband began to assault me and told, "You confess that you, accused Sk. Sajai and Sk. Lalan together killed your husband on a conspiracy". But I decline to make such confession. Because none of us committed such murder. Is there any quarrel or mis-understanding between you and your husband Saked?

Ans. No. 6 : No.

Q. No. 7 : Do you like to say anything else?

Ans. No. 7 : No. I am innocent.

Q. No. 8 : Do you suspect your husband's brother?

Ans. : No.

No. 8

21. The theory of last seen together is therefore not applicable. The accused Sajai and Lalan may have killed the victim but whether they, in fact, did so is not required to be gone into at this stage because the appeal preferred by them has abated by reason of their death.

22. The case of the prosecution to be found from the written complaint is that the three accused persons conspired together to kill the victim and the accused Rosena had confessed her guilt. The learned Trial Judge did not frame any charge for any conspiracy or for any abetment. The learned Trial Judge has convicted all the three accused persons u/s 302, IPC with the aid of section 34, IPC. If the alleged extra-judicial confession is discarded we shall be left with no material to support the conviction of the appellant Rosena. In the case of [Noor Mohammad Mohd. Yusuf](#)

[Momin Vs. The State of Maharashtra](#), distinction between the provision of sections 120B, 109 and 34, IPC was discussed and opined as follows :--

So far as section 34, IPC is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109, IPC on the other hand may be attracted even if the abettor is not present when the offence abetted is committed, provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal act or illegal omission. Turning to the charge u/s 120B, IPC criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means, it differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by section 107, IPC. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts, Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto.

23. We are unfortunately unable to find a reasonable ground for believing that the accused Sajai and Lalan and the accused Rosena conspired to commit murder of the victim Saked. There is absolutely no evidence in support of the alleged conspiracy. As a matter of fact the case as regards conspiracy to be found in the written complaint was substituted by extra-judicial confession. Had there been any such confession why was the same not clearly indicated in the written complaint? Moreover the alleged extra-judicial confession "to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed, [see [Heramba Brahma and Another Vs. State of Assam](#),

24. It is therefore not possible to uphold the view that Rosena shared any common intention of killing her husband. The case at any rate is not altogether free from doubt. We therefore have no option but to release the appellant Rosena on benefit of doubt.

25. In the result, this criminal appeal so far it relates to appellants No.1) Sajai Mondal and 2) Sk. Lalan @ Sk. Firoz stands abated in view of their death during pendency of this appeal. However, this criminal appeal in respect of the appellant No. 3 Rosena Bibi stands allowed. Lower Court Records together with a copy of this judgment by sent down to the learned Trial Court forthwith.