

(1984) 04 CAL CK 0001

Calcutta High Court

Case No: None

Subhas Debnath

APPELLANT

Vs

State

RESPONDENT

Date of Decision: April 25, 1984**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302

Citation: (1985) CriLJ 1373**Hon'ble Judges:** Sankari Prasad Das Ghosh, J; B.C. Chakrabarti, J**Bench:** Division Bench

Judgement

B.C. Chakrabarti, J.

This is an appeal against an order of conviction passed by the learned Sessions Judge, Burdwan in Sessions Trial No. 16 of 1978 convicting the appellant u/s 302, I.P.C. and sentencing him to suffer imprisonment for life.

2. The appellant Subhas Debnath is the husband of the deceased Usha Debnath. Admittedly a little after they were married they separated and were living separately for about 7 1/2 years before the incident that took place on 4-3-1977. The prosecution case in brief is as follows. The accused with his parents lived at village Chakrahatpur within P. S. Purbasthali and the victim Usha after she was separated from her husband lived with her parents and brothers at a different place. P.W. 1 Shyamlal Nath is the husband of the elder sister of Usha. On 4-3-77 P.W.I along with Usha came to Chakrahatpur to meet his elder sister Suchitra Debnath. At about 3-15 P.M. P.W.I and Usha left the house of Suchitra with a view to go to Usha's father's place. P. W. 1 met Sudhir Debnath on the way. P.W.4. Sudhir was a rickshaw-puller. He was requested to carry P. W. 1 and the victim in his rickshaw. P.W.I and P.W.4 were going a little ahead being followed by Usha and Suchitra. While they were passing along the village path the accused Subhas suddenly appeared there and

assaulted Usha with a knife on different parts of her body. Being attracted by the alarm raised by Usha, P.W.1 rushed to the spot whereupon he too was attacked but he somehow resisted with the help of a bag which he was carrying. The accused Subhas fled away from the scene while Usha fell down on the road dead. Some local people assembled of whom P. W.5 Krishnagopal arranged to send a message to the police through one Suresh Debnath (P.W.3). The police arrived shortly thereafter and recorded the statement of P. W. 1 which has been treated as F.I.R. (Exhibit 1). On the basis of the F.I.R. Purbasthali P.S. Case No. 4 dated 4-3-1977 was started. The police seized some articles from the spot under a seizure list (Exhibit 2), searched for the accused and also searched his house, examined witnesses, and prepared a sketch map with index (Exhibit 8). On 5-3-77 the accused surrendered at Kalna P.S. He was produced in court on 6-3-77 and a statement made by him was recorded on the very same date (Exhibit 4). The police is also alleged to have recovered a knife and a bush-shirt from the house of the accused under the seizure list (Exhibit 6). The articles are said to have been produced by the accused himself. Postmortem examination of the dead body was held by P.W.9. He found as many as six incised wounds of which two were severe. Death in his opinion* was due to shock and internal haemorrhage as a result of injuries 5 and 6 which were ante mortem and homicidal in nature. After completion of investigation the police submitted a charge-sheet against the accused Subhas Debnath u/s 302 I.P.C.

3. The defence as far as could be ascertained from the trend of cross-examination, suggestions put to the witnesses and the statement made by the accused u/s 313, Cr. P.C. appears to be that P.W.I and Usha had developed an intimate relationship between them as a result of which she had conceived and that to avoid scandal and to maintain family peace she was got rid of and the accused has been falsely implicated.

4. In support of the prosecution case 13 witnesses were examined. The accused did not produce any evidence. The learned court below did not place any reliance on the oral testimony of P.Ws.1 and 5. P.W.4 turned hostile. The evidence of P.Ws.2 and 6 was relied upon by the court below. The confessional statement (Exhibit 4) was however excluded from consideration in view of the circumstances in which it was made and recorded. Apart from the oral testimony of P.Ws.2 and 6 the learned Judge in the court below also took into consideration the fact that the accused himself surrendered to the police as a circumstance pointing to his guilt. Relying mainly on the testimony of P.Ws. 2 and 6 and the circumstance stated above the accused was found guilty and was convicted u/s 302, I.P.C. and sentenced to imprisonment for life.

5. Being aggrieved the accused has preferred the present appeal. Mr. Roy appearing on behalf of the appellant has contended that P. Ws. 1 and 5 were disbelieved on cogent grounds but he argued that the evidence of P.Ws.2 and 6 also should have been disbelieved. P.W.6 it was argued was a child witness. His capacity and

competence to depose was not even tested. The fact that the appellant surrendered before the police Mr. Roy argued, could not be a circumstance against the accused.

6. Mr. Mukherji, P. P. appearing on behalf of the State while conceding that the recording of the confession (Exhibit 4) was not properly made and could not therefore, be relied upon however, Laid stress on all the other circumstances and the oral testimony adduced in this case. He argued that the testimony of the witnesses sufficiently brings home the charge against the accused-appellant.

7. Besides the oral testimony the circumstances put forth and relied on by the prosecution in support of their case are:

1. The fact of surrender on 5-4-77.

2. Initial statement made by the accused namely, (Exhibit 5)

3. Recovery of incriminating articles namely, the shirt, and a knife allegedly produced by the accused, and

4. The confessional statement recorded by P.W.7.

Before coming to the oral evidence we would prefer to consider the circumstances first. As regards the fact that the accused himself surrendered to the police on 5-4-77 we do not think that much really depends on that when the accused is admittedly a resident of the village where the incident occurred. He must have known that he has been implicated in the case and when he comes to know of this, without losing time he surrenders himself to the police and to the process of law. Absconding for a long period without any apparent explanation (may go) against the person absconding but surrender to the police without least possible delay can never be a circumstance against the accused.

8. The initial statement allegedly made by the accused after surrender (Exhibit 5) is strictly not admissible in evidence having been made to the police. ♦

9. Regarding the recovery of the shirt and knife from the house of the accused the evidence practically comes from P.W. 13 the Investigating Officer alone. It does not appear from the evidence of P.W. 13 that they were recovered pursuant to any statement made by the accused. There is no record of what was stated, if anything was stated at all. The articles recovered are one bush-shirt and a knife. The bush-shirt was found from the bed-room and the knife from the kitchen. Even though there is nothing on the evidence to indicate that they were recovered pursuant to a statement of the accused Mr. Mukherji argued that the evidence clearly is that they were produced by the accused himself. We are however, unable to accept the contention of Mr. Mukherjee in this regard. Exhibit 6 is the seizure list in respect of the shirt and the knife. Two witnesses appear to have signed the seizure list of whom Brojo Gopal Debnath (P.W. 11) only was examined. Borjogopal in his evidence in cross-examination has stated that when he arrived at the house of

Subhas the knife and the shirt were already in the hand of the I.O. Obviously, therefore, he was not a witness to the actual production of the things. That apart, the contention that the articles were produced by the accused stands condemned by the statements recorded in the seizure list which shows that the said articles were seized from the house of the accused being produced by the accused with the help of his mother. Therefore, it is not clear from the statement contained in exhibit 6 itself that it was the accused alone who produced the articles. They must have been seized after search of the house conducted by the I.O. being assisted by the accused and his mother. It is significant to note that this seizure list was made on the third day of visit by the I.O. to the house-of the. accused. He had seriously conducted searches in the house but nothing incriminating was found. The articles namely, the shirt and the knife were not kept in any place of hiding. They were in the places where they were normally expected to be namely, the bed-room and the kitchen respectively. Finally, mere recovery of a shirt and a knife without more, proves nothing. There is no evidence to indicate how they could be called incriminating articles. The knife was not even sent for forensic examination to find out if it contained any stain of blood. Similar is the case with the shirt.

10. As regards the confessional statement Ext. 4 the evidence coming from P.W.7, the Judicial Magistrate who recorded the same is most unfortunate. The order sheet of the court of the learned Magistrate shows that the accused was produced on 6-3-77 with a forwarding report that he was going to make a confession. The learned Magistrate passed an order taking the accused into custody and remanding him to jail custody till 19-3-77. The latter part of the order shows that the accused Subhas was again produced before him at 3.05 P.M. He was warned and cautioned about the consequences of any confession that he might make and he was given time for election till 4-15 P.M. At 4-15 P.M. the learned Magistrate recorded the confessional statement marked Ext. 4. The learned Magistrate P.W.7 as stated in cross-examination that in the initial part of the order he intended the accused to be kept in segregation till Mar. 19, 1977 in jail custody. Yet, when the accused was again introduced before him at about 3 P.M. he after giving the accused routine caution gave him time for reflection for about an hour only. During this period again the accused was not kept segregated but was kept in the police lock-up. A confession made in such circumstances can hardly be relied upon. The learned Judge in the court below was right in ejecting the confessional statement from consideration and Mr. Mukherjee appearing for the State very fairly conceded that in view of the circumstances the confession cannot be relied upon.

11. Now comes the oral testimony. P. W, 1 as we have already indicated is the husband of elder sister of the victim Usha. He says that on 4-3-77 he left the house of his sister (P.W.2) at about 3.15 P.M. along with Usha. He and Sudhir Debnath were walking ahead while Usha and P. W.2 were following a little distance behind. It was a narrow village pathway so narrow that even carts could not pass. While passing along the road he heard an alarm raised by Usha, looked back and saw the accused

Subhas stabbing Usha with a knife. i He ran to the rescue of Usha but Subhas tried to assault him also. He somehow saved himself with the help of a bag which he was carrying. Usha died on the spot. Some local people assembled and information was sent to the police station and after the arrival of the police he made the statement Ext. 1 on the basis of which the case was started. It was suggested to him in cross-examination that he had an amorous relationship with Usha, that his wife was of dark complexion and sickly while Usha was fair and healthy and that Usha often used to live with him in his house. He denied the suggestion, but admitted that Usha was healthy and fair in complexion. He also denied the suggestion that as a result of the intimate relationship between them Usha had conceived and that he wanted to get rid of her for the sake of peace in his family. This witness has not been believed by the learned Court and [we think for cogent reasons. Admittedly, they " were passing along a very narrow village pathway. He was about two hundred yards ahead of the victim. From the topography of the place as appearing from the evidence and the sketch map it seems impossible that this witness could actually see the incident with his own eyes. That apart, he says that he came to the rescue of the victim but he was himself attacked by the accused and that he saved himself by his bag which he was carrying. No such bag has been exhibited in this case. If really he had used a bag to defend himself it would certainly have contained some external marks of violence. Had the bag been produced with such evidence of violence it might have afforded some corroboration to the evidence of the witness but the bag is not forthcoming. And what is more, P.W.2 in whose house P.W.I came and who was accompanying the victim says that P. W. 1 was not in fact carrying any bag. As regards the defence suggestion that the deceased conceived as a result of intimate relationship between P.W.1 and the victim there could not be any positive evidence one way or the other. But the fact remains that the victim was in fact carrying and this appears from the evidence of the autopsy surgeon. Who was responsible for this is anybody's guess.

12. P.W.2 Suchitra Debnath is the next witness of importance and in fact the only material witness upon whose testimony the conviction has been based. She is the elder sister of P.W.I. She says that P.W.I and Usha came to her house and while leaving she accompanied Usha along the village road. It is also her evidence that at that time the husband of Usha came running, fell her on the ground and began stabbing her with a knife. Hearing alarm P.W.I and Sudhir Debnath came while the accused ran away. It appears from the cross-examination that this witness is physically crippled being hard of hearing and short of eye sight. She is also financially not well off and has to maintain herself sometimes by begging. She admits that she has to take financial assistance from P.W. 1 occasionally. It is not unlikely therefore that she is obliged to P.W.I. In cross-examination the witness says that she does not know any Kamini Debnath. Kamini Debnath is none other than the father of the accused Subhas and they are neighbours. It does not stand to reason why she disowns acquaintance with Kamini Debnath. It is a small village and it is

unlikely that the neighbours would not know each other. This apart in Ext. 1 it is stated that while the party left the house of P.W.2, P.W.2 reported to him that Kamini Debnath saw the party going and shortly thereafter Subhas came and started assaulting the victim. The obvious indication is that it was Kamini Debnath who saw Usha in the village and that he informed his son where about Subhas appeared at the scene. This is a story which stands condemned by the evidence of P.W.2 who instead of supporting the version that she saw Kamini Debnath even disowns acquaintance with him.

13. Such being the calibre of the witness it is difficult to place unqualified reliance on the testimony given by her.

14. P.W.3 Suresh Chandra Debnath claimed to have rung up Puurbasthali Police Station from a Co-operative Society as requested by Krishna Chandra Debnath. P. W.5 is Krishna Debnath. He says that at about 3-30 P.M. on hearing shouts he came out of his house and saw a woman lying dead in a pool of blood. He at once went to Suresh Debnath and asked him to inform the police. He did not ask anybody as to how the woman was killed or what has happened. The information given by P.W.3 is recorded in general diary Ext. 7 which however shows that as if the information was sent by one Sushil and not Suresh Debnath. The conduct of P. W.5 again seems to us to be somewhat unusual. He says a woman was lying dead on the village road where he saw a crowd of people there but came back home without making any enquiry as to what has happened. This conduct is most unusual. He could not have behaved in the manner he did. He must have had heard something then and there but we do not know what it was. The information that was communicated to the police and as recorded in Ext. 7 is also very cryptic and does not contain any particular as to who is the victim or as to who was the assailant.

15. P. W.4 Sudhir Debnath is a rickshaw puller. He was walking along with P.W.I. He says that he had heard an alarm and coming to the spot saw P.W.2 crying while the other woman lay in a pool of blood. He did not see anybody to assault her. The witness was allowed to be cross-examined by the prosecution and it was elicited that he made different statements to the Investigating Officer.

16. Mr. Mukherjee appearing on behalf of the State argues that because this witness was allowed to be cross-examined, there is no reason why his entire testimony should be discarded. In support of this contention reliance was placed in the case of [Bhagwan Singh Vs. The State of Haryana](#) . There it has been held that where the court gives permission to the prosecutor to cross-examine his own witness, thus characterising him as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. A similar view was taken in the case of [Sat Paul Vs. Delhi Administration](#) . There it has been observed that it is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly

discredited or can still be believed in regard to a part of his testimony. If in the process the credit of the witness has not been completely shaken, the Judge may after reading and considering the evidence of the witness as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. In the case of [Shri Rabindra Kumar Dey Vs. State of Orissa,](#) the Supreme Court observed that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. It is clear upon the law as explained by the Supreme Court in the cases referred to above that the mere fact that P.W.4 turned hostile cannot be a sufficient reason for discrediting his testimony altogether. That part of it which fits in with other evidence may, however, be considered. But that part of his testimony which may be considered practically leads us nowhere except that he was going to bring his rickshaw when he heard a cry and later saw the victim lying on the village road in a pool of blood. His evidence, therefore, at the most corroborates the fact that the victim met with her death on the village road at about the time alleged by the prosecution. Nothing beyond that can be spelt out from the testimony. The next witness of importance is P.W.6 Pradip Kumar Debnath. He is a boy aged about 12 years. He says in chief that on the particular day he was playing with one or two other boys in the village when he noticed two men to pass along the village pathway followed by two women one of whom was P.W.2. In chief he goes on to say that at that time Subhas came and assaulted the other woman with a knife and that he left with the other boys and ran away to their respective houses. He has also named who the other two boys were. Those two boys however have not been examined. From his cross-examination it appears that he possibly could not have seen anything at all. He says in cross-examination that he heard shouts when they were playing but that he did not go to the place where the woman was assaulted and that after hearing the shouts they left the place without looking to the direction from which the shouts came. Therefore, if this part of his testimony be true he could not have seen who was the assailant who inflicted the injuries. His evidence in chief that the accused inflicted the injuries must be untrue and must have to be discarded. It is significant that this witness is aged only about 12 years and the learned Judge does not appear to have satisfied himself by asking preliminary questions as to his capacity to understand the sanctity of the oath and as to his competence to depose under oath. Mr. Mukherji argued upon a reference to certain decisions that failure to put such preliminary questions to witness who is apparently a child witness and the administration of oath without being satisfied that the witness was capable of understanding the significance of oath does not really affect the testimony if the testimony otherwise shows that the witness was capable of understanding the questions and gives rational answers thereto. In the instant case the learned Judge, we feel, ought to have put some preliminary questions to satisfy himself as to the capacity of the witness. Record does not disclose that he did so. But, even assuming that he was a witness competent to depose and capable of

giving a rational answers his evidence, as we have indicated already, practically comes to nothing.

17. The other witnesses examined in the case are formal witnesses who have not spoken about the incident or anything connecting the accused with the incident. We have stated already that the conviction was founded mainly upon the testimony of P.Ws.2 and 6. We feel for reasons already discussed that It. is unsafe and risky to base a conviction on the testimony of P. Ws.2 and 6 alone. That being our view, we are unable to sustain the order of conviction.

18. The appeal accordingly succeeds and is hereby allowed.

19. The order of conviction and sentence are set aside.

20. The accused-appellant who is on bail be discharged from his bail-bond.

Sankari Prasad Das Ghosh, J.

21. I agree.