(2012) 01 CAL CK 0036

Calcutta High Court

Case No: C.R.A. No. 526 of 2011

State of West Bengal		APPELLANT
	Vs	
Amar Rai Amar Rai Vs State of West Bengal		RESPONDENT

Date of Decision: Jan. 31, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 294, 313
- Evidence Act, 1872 - Section 114(g), 26, 27, 8
- Penal Code, 1860 (IPC) - Section 302

Citation: (2012) 2 CALLT 226

Hon'ble Judges: Asim Kumar Ray, J; Ashim Kumar Roy, J

Bench: Division Bench

Advocate: Sandipan Ganguly and Ms. Sreyashee Biswas, for the Appellant;Debasish Roy and Mr. Ranadip Sengupta, for the Respondent

Final Decision: Allowed

Judgement

Asim Kumar Ray, J.

Convicting the accused A mar Rai u/s 302 of the Indian Penal Code and sentencing him, to death while the Trial Court submitted the proceedings before this Court for confirmation of sentence of death, an appeal has been preferred by the convict challenging both the order of conviction and sentence. Which give rise to Death Reference Case No. 2 of 2011 and Criminal Appeal No. 526 of 2011. The appellant Amar Rai preferred his appeal against the order of conviction and sentence directly from the Correctional Home with a prayer for engagement of a lawyer to pursue his appeal at the cost of the State. When this Court engaged advocates, Mr. Sandipan Ganguly and Ms. Sreyashee Biswas from the State Panel to appear on his behalf.

2. In the trial the convict Amar Rai was charged u/s 302 of the Indian Penal Code for intentionally killing his mother Prem Kumari Rai.

3. The prosecution case entirely rests on circumstantial evidence and in support of its case the prosecution examined total 18 witnesses but defence examined none.

4. It is the case of the prosecution that the victim Prem Kumari Rai was a Warden attached to the District Correctional Home, Darjeeling and used to reside in her official quarter situated within the Correctional Home Compound. On the date of the fateful incident around 7.30/8 a.m. in the morning the P.W. 4 Samrat Biswakarma and P.W. 5 Geeta Biswakarma, who were residing in a separate quarter adjacent to that of the victim was informed by one Poonam the domestic help of the deceased that while she went to the quarter of the victim she found her lying on the floor. The P.W.8 Chandan Chettri also claimed to have been informed by the said Poonam. Having received such information the P.W. 4 and P.W. 5 informed the P.W. 1 Sarala Rai, the daughter-in-law of the victim who was also staying in the same compound. Thereafter, the said witnesses with others had been to the quarter of the victim and found her lying on the floor wrapped in a bed sheet. They also noticed bloodstained on the bed sheet. Soon the doctor of the District Correctional Home Dr. N. K. Mishra was called who examined her and declared her dead. Thereafter Dr. Mishra informed the Superintendent of Correctional Home in writing about the said incident and the death was not natural and seemed to be a case of homicide. The Superintendent of Correctional Home in turn reported the incident to the local police station, whereupon a specific case for an offence punishable u/s 302 of the Indian Penal Code was registered and the investigation of the case was entrusted to the P.W. 18 Sub-Inspector Sukumar Ghosh. The said P. W. 18 while was proceeding to the spot, got a secret information that she was killed by her son the appellant Amar Rai and he was waiting at Doli Motor Stand for Funerary box. Immediately the P.W. 18 had been to the Doli Motor Stand and apprehended the appellant and he confessed his guilt. On the same day at about 6.30 in the early morning the P.W. 12 Mahesh Chettri, a taxi driver gave a lift to the accused while the witness was going towards the taxi stand and on enquiry came to learn from the accused that he was going to get a coffin for his mother who expired in the morning. The appellant under arrest was brought to the spot where he in presence of other witnesses again confessed his guilt and brought out the ''bamfok'', offending weapon stained with blood, which was concealed in the quarter. On forensic examination it was found that the said ''bamfok'' was stained with human blood and in post-mortem the victim was found to suffer a homicidal death. During trial the prosecution examined total 18 witnesses to prove its case.

5. Whereas the defence case is one of complete innocence and false implications. The appellant during his examination u/s 313 Cr.PC not only denied all the allegations against him. a specific defence was taken that it was his mother who was although taking care of him and providing all helps, therefore question of killing her does not at all arise.

6. The learned Counsel appearing on behalf of the appellant vehemently urged that this is a case where the Trial Court most illegally and erroneously relied on an extra-judicial confession of the accused which was admittedly made by him while in police custody under arrest. He contended that the learned Trial Judge should be well advised to take note of the provisions of Section 26 of the Evidence Act that no confession made by an accused while in police custody, may be that in presence of trustworthy witnesses against whom no case of animosity even was suggested by the defence, shall be proved against him.

7. He further submitted that although Trial Court has not admitted into evidence the recovery of the offending weapon u/s 27 of the Evidence Act, still such recovery cannot also be admitted even u/s 8 of the Evidence Act. According to him the evidence of the prosecution witnesses as regards to the place from where the said offending weapon was recovered at the behest of the accused is contradictory.

8. He contended that no evidence was led under what circumstances the bloodstained wearing apparel of the appellant, viz. sweater was seized. According to him mere presence of human blood in the wearing apparel of the accused and in the alleged offending weapon does not prove his guilt.

9. He also contended that the non-examination of the domestic help of the victim Poonam is fatal to the prosecution case and trial Court should have drawn an adverse inference u/s 114 (g) of the Evidence Act against the prosecution.

10. Although the learned Counsel of the appellant has not disputed that the death of the victim was homicidal in nature but he contended that without examination of the postmortem doctor no Court should come to a conclusion as to the cause of death relying on the opinion of the doctor recorded in the postmortem report. He further contended that in this case the postmortem report has been admitted into evidence without following the requirement of Section 294 of the Code of Criminal Procedure. He further submitted that although the Trial Court held that the accused was apprehended from a place where he was waiting for a coffin for funeral of the deceased but no evidence was led to show that at that place coffins were available, far less no person was examined, dealing in coffin.

11. He vehemently contended that the approach of the learned Trial Court is totally wrong and the Trial Court completely ignored the cardinal principle of the criminal law that it is for the prosecution to prove its case and not for the defence to establish innocence. He contended that it is well settled that the prosecution has to stand on it''s own leg and it cannot take advantage of any wrong or weakness in the defence. He further submitted that the findings of the Trial Court that the motive behind the murder was that the appellant''s perhaps had a grudge against his mother because she got the job of his father at the correctional home instead of him.

12. He lastly submitted that the Trial Court most emotionally came to a conclusion that this is one of the rarest of rare case as the mother was killed by the son but the Trial Judge never bothered before coming to such conclusion to take note of the principle laid down by the Apex Court from time to time staring from the case of Bachan Singh Vs. State of Punjab, under what circumstances a case of murder be categorized as rarest of rare case.

13. However, on behalf of the State it is contended that there cannot be any iota of doubt that the victim Prem Kumari Rai suffered homicidal death which is evident from the post-mortem report and at this stage the admissibility of post-mortem report and acceptance of the same by the Trial Court cannot be challenged by the defence, when in the Trial Court without any objection from the defence the same was admitted into evidence. Even for the sake of argument if the opinion portion of the autopsy surgeon contained in the post-mortem report is excluded from consideration, still from the findings recorded during post-mortem clearly goes to show that injuries are homicidal in nature and due to such injury the victim died.

14. It is further contended that due to some unintentional laches on the part of the Investigating Officer, if not, the recovery of the offending weapon at the instance of the present appellant can be brought within the ambit of Section 27 of the Evidence Act but such recovery can very well be admitted u/s 8 of the Evidence Act as the conduct of the accused. According to the learned Public Prosecutor this is a very important circumstance which points out the appellant''s involvement in the commission of the alleged offence.

15. Next it is contended by the learned Public Prosecutor that having regard to the fact on examination of the chopper scrapping and sweater cuttings by the serologist it was found that the same contained human blood, it is one more circumstance pointing to the guilt of the appellant.

16. Lastly, it is submitted that the fact, in the early morning the appellant went out to purchase coffin for cremation of his mother when news of her death was not known to anyone and his apprehension by the police from the place where he was waiting for coffin clearly links his involvement in the commission of the offence.

17. According to the learned Public Prosecutor in a case where a son is found guilty for cold-blooded murder of his mother certainly same is a rarest of rare cases and thus the Trial Court was fully justified by sentencing him to death.

Now, having gone through the evidence on record and the impugned judgement we find the following circumstances have been relied upon by the prosecution to prove its case and acted upon by the Trial Court to conclude the guilt of the accused.

(a) The extra-judicial confession of the accused in which he confessed his guilt that he killed his mother in presence of the independent witnesses, who has no animosity against him,

(b) Recovery of the offending weapon at the instance of the accused from the official quarter of the victim where she was found lying murdered.

(c) The offending weapon ''bamfok'' and the wearing apparel of the appellant, a sweater were stained with blood and in forensic examination the same was found to be human blood.

(d) On the fateful day early in the morning the accused went out to purchase funerary box and was arrested by the police while he was waiting for the same.

(e) The accused used to torture his mother frequently for extracting money from her.

18. It needs no repetition in a case based entirely on circumstantial evidence, the circumstances relied upon by the prosecution must be fully established and the chain of evidence furnished by those circumstances in their totality must unerringly lead to the only conclusion that the offence was committed by the accused, and none else. In other words, the chain of the evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances have not only to be fully established beyond all reasonable ground but it must be of conclusive nature and be consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis.

19. So far as the extra-judicial confession of the accused admitting his guilt of killing his mother, we find the evidence of witnesses goes like this:-

According to P.W. 1 Smt. Sarala Rai, the police came at the spot along with the accused and the accused confessed in presence of all that he murdered his mother.

20. Two other witnesses, viz. P.W.4 Samrat Biswakarma and his wife P.W. 5 Geeta Biswakarma also deposed to the effect that the police arrived at the spot with the accused and in their presence he confessed his guilt. Only difference we find that while according to P.W. 4, the accused first confessed his guilt and then took out the offending weapon, whereas according to P.W. 5 after bringing out the offending weapon he admitted his guilt. The P.W.5 further disclosed that accused was brought under arrest.

21. Similar is the evidence of P.W.7 Dhan Bahadur Biswakarma that police came with the accused and accused disclosed that he killed his mother. In his examination the P.W.7 further admitted that police brought the accused tied with rope.

22. The P.W.9 Raju Biswakarma also deposed in the same tune. In this regard another vital witness is P.W. 18 Sub-Inspector Sukumar Ghosh. According to him while he was proceeding to the spot after taking charge of the investigation, acting on a source information he had been to Doli Motor Stand and detained the accused and from there he went to the place of occurrence with him. The said witness in his

cross-examination admitted that he went to the spot at 10.15 hours, with the accused under arrest.

23. Therefore, from the evidence of the aforesaid witnesses it is evident that at the time when accused confessed his guilt that he killed his mother he was in police custody and under arrest. The Trial Court has however acted on the said extra-judicial confession and convicted the accused on a finding that there was nothing on record to presume that the accused person has/had enmity with the said witnesses and accordingly there was no reason to disbelieve their evidence. The question of believing or disbelieving a witness does not at all arises unless such evidence is admissible in law. Having regard to the provisions of Section 26 of the Evidence Act, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person, thus in view of the statutory ban as aforesaid, we are unable to sustain the findings of the Trial Court and the extra-judicial confession in question be kept out of the zone of consideration in determining the guilt of the appellant.

24. The recovery of the offending weapon at the behest of the appellant, is the next circumstance relied upon by the prosecution. The Trial Court very rightly refused to admit the same with the aid of Section 27 of the Evidence Act. We do not find any fault in the finding of the Trial Court when the same was admitted u/s 8 of the Evidence Act as the conduct of the accused. There is no dispute when an accused led the police party and pointed out the place where the subject of offence or the articles of crime or weapon was found concealed would be admissible as conduct u/s 8 of the Evidence Act irrespective of the fact that disclosure statement made by such accused is not admissible u/s 27 of the Evidence Act.

25. However, the very fact on the point of admissibility of a particular piece of evidence there is nothing wrong that would not by itself vouchsafe its reliability. The question of reliability has to be determined independent of the facts, the evidence is admissible. The reliability of the evidence has to be assessed on the well-known cardinal principle of criminal jurisprudence. The real approach would be not to attach any importance to minor discrepancies on trivial matters not touching the core of the case and to some technical errors committed by the Investigating Officer not going to the root of the matter. However when there is apparent variance in the evidence of the witnesses as regards to any particular fact which clinches the issue, in such a contingency it is the duty of the Court to see whether such variance has any telling effect on the prosecution case affecting his credibility and if the answer is in affirmative then in that case such evidence ought to be discarded.

26. Oh the point of recovery of the offending weapon at the behest of the appellant, which has been admitted u/s 8 of the Evidence Act, the most vital thing is the place from where the same was found or the place of recovery. In this regard the prosecution relied on the evidence of P.W.1 Sarala Rai, P.W. 4 Samrat Biswakarma,

P.W. 5 Geeta Biswakarma, P.W. 7 Dhan Bahadur Biswakarma, P.W. 8 Chandan Chettri and P.W.9 Raju Biswakarma.

27. According to P.W. 1 the place wherefrom the offending weapon was recovered was under a table standing on a verandah. Whereas according to P. W.4 the same was found from inside the kitchen and P.W.5 from below a table kept near the kitchen. So far as the P. W. 7 is concerned the recovery was from a small room situated outside verandah and P.W. 8 from a place near the verandah. The P.W.9 was completely silent on this point.

28. Now, reading as a whole the evidence of the aforesaid witnesses. who spoke about the recovery of the offending weapon at the behest of the appellant, we find the place of recovery is not consistent. This discrepancy on a vital issue cannot be overlooked and accordingly we are not inclined to. act thereupon.,

29. The next circumstance pitted against the appellant is this that on chopper scraping and sweater cuttings human blood was found on serological examination. Although it was found that the same were smeared with the human blood but blood grouping was not done. Therefore, the prosecution led only evidence that the substance stick on the same was human blood without matching such blood with the blood group of the victim. This lacuna in the prosecution case creates reasonable doubt as to whether the blood found therein was that of the deceased and accordingly we are also not inclined to put any reliance on this evidence.

30. The evidence of the P. W. 12 that on the date of the occurrence in the early morning at 6.30 a.m. the appellant took a lift in his taxi and on being asked by him he disclosed that he was going to bring a coffin for her mother, who expired little before and then dropped at Doli Motor Stand wherefrom he was arrested by the police at around 10.30 a.m., is another circumstance relied upon by the prosecution against the appellant. In this regard we find sufficient force in the submissions of the learned Counsel for the appellant that it is quite unnatural for an accused. To us it is quite unnatural for an accused who allegedly in cold blood killed his mother of any witness to prove at the place wherefrom the accused was picked up by the police funerary boxes were marketed and the appellant had actually had been to there for collecting the same, is also a serious lacuna in the prosecution case which is based on circumstantial evidence.

31. Lastly, we find that in this case the domestic help of the deceased is a most vital witness who for the first time discovered the dead body and intimated other witnesses. Her non-examination is certainly fatal to the prosecution case and cannot be left unnoticed.

32. For the reasons stated above, we are of the opinion, the prosecution has miserably failed to establish the guilt of the accused on the evidence on record and accordingly the impugned order of conviction, cannot be sustained.

33. Since we find that order of conviction Is not sustainable it would be futile to enter into the question of sentence.

34. In the result this appeal stands allowed and the order of conviction and sentence imposed against the appellant stands quashed.

35. The Death Reference in question accordingly stands rejected. The appellant who is in custody forthwith be released therefrom, if not-wanted in connection with any other case.

The office is directed to communicate this order to the Court below as well as to the Correctional Home.

The Lower Court Records also to be sent down to the Trial Court.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

Asim Kumar Ray, J.

I agree.