

(1986) 09 CAL CK 0017

Calcutta High Court

Case No: None

The State

APPELLANT

Vs

Dulal Hazra and Another

RESPONDENT

Date of Decision: Sept. 29, 1986

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313, 366
- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 300, 302, 34, 379, 411

Citation: (1987) CriLJ 857

Hon'ble Judges: Monoj Kumar Mukherjee, J; A.K. Chatterjee, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Monoj Kumar Mukherjee, J.

Mantu Mondal and Dulal Hazra, the two appellants herein, were placed on trial before the learned Sessions Judge, Howrah to answer the following charges:

First: - That you on or about the 5th day of April, 1984 at Kashipur, Dasnagar, under Police Station Jagachha, District Howrah, in furtherance of common intention of you both did commit murder by intentionally or knowingly causing the death of Sm. Prasad Rani Patra, and thereby committed an offence punishable u/s 302 read with Section 34 of the I.P.C.:

Secondly :♦ That you on the same day and at the same place committed the theft in the house of Sm. Dharitri Patra in respect of golden Tikli, golden chains, one pair golden ring, golden Bala, golden ear-rings, golden Nakchhabhi, bronze Churi, Sonali Churi, golden like Churi, silver Kazallata, medal, silver chain, large amount of cash money, torchlight, calculator, wrist watch, etc., by taking the said articles out of possession of Smt. Dharitri Patra and Sm. Prasad Rani Patra, and thereby committed

an offence punishable u/s 379 of the I.P.C.:

Thirdly :♦ That you on or about the 6th day of April, 1984 at Village Chaultakhali under Police Station Amta (in the house of one Bankim Chandra Koley) dishonestly received or retained stolen properties, such as one golden Tikli, three golden chain with four golden buttons, one golden right (ring?), two pcs. golden Bala, one pair golden ear top, one golden Nackchhabi, one pair golden ear-rings (Pansa), three pcs. bronze Churi, one Sonali Churi, three golden like churi, one medal, five pcs. gold, three pcs. silver Kazallata, three silver chains, four pcs. silver Bala, three pcs. silver Kazallata, three silver chains, four pcs. silver Bala, one silver Mol, one silver locket, one silver stone setting ring six pair silver ear-rings, one Tabiz, one key ring, one vermillion case, one locket with photograph of Sai Baba, one Medal with A.P.S. mark, one Pital Pacha, one broken Kazallata, one Zatti, two pcs. Banti, two silver glass, one ladies wrist watch, one Zennith watch, one pola, one steel Kazallata, one vermillion Kanta, one Pital candledani, one calculator, one Eveready torchlight, one shawal, eight pieces 100 rupee notes, 17 pcs. 50 rupee notes, 28 pcs. 20 rupee notes, 293 pcs. 10 rupee notes, 394 pcs. 5 rupee notes, 231 pcs. 2 rupee notes, one H.M.T. wrist watch, some coins, cloth bag etc., knowing or having reason to believe the same to be stolen properties, and that you thereby committed an offence punishable u/s 411 of the I.P.C.

2. On conclusion of the trial the learned Judge recorded an order of conviction against them in respect of the charges u/s 302 read with Section 34 and Section 379 of the I.P.C., while acquitting them of the other charge. For the conviction u/s 302/34 of the I.P.C. he sentenced each of them to death and for the other he sentenced them to suffer rigorous imprisonment for three years each. Aggrieved thereby the appellants have preferred the appeal which has been heard by us along with the reference made by the learned Judge u/s 366(1) of the Cr. P.C.

3. The prosecution case, briefly stated, is as under : Sm. Dharitri Patra (P.W. 1) is the adopted daughter of late Makhan Lai Patra and the deceased Prosad Rani Patra. At the material time Sm. Patra was holding the post of an Assistant Secretary in the Finance Department of the Government of West Bengal and was residing in their three storied house at Kashipur, Dasnagar, Howrah, along with the deceased. She had temporarily engaged the two appellants for construction of a kitchen in their house. On April 5, 1984 Sm. Patra left home for office at or about 9-40 a.m. leaving her mother Prosad Rani behind, as usual. Before leaving she instructed the appellants to finish the work and to wait till her return so that she could pay them off for the works they did the day before and to be done on that day. At or about 5 p.m. on that day, Sandhya Ojha (P.W. 5) a part-time maid servant of Sm. Patra came to perform her usual duties in the house. To her utter surprise she found no response even after knocking the front door of the house which was bolted from inside. She then went to the rear and found the rear door also closed. With the help of a khunti taken from a nearby house she succeeded in opening the rear door.

Entering the house she found the rooms in a ransacked condition but could not find Prosad Rani. Struck with fear and awe she came out of the house and fortunately found Arun Patra (P.W. 11), the natural brother of P.W. 1 going home. Along with him she again came to the house and searched for Prosad Rani. Ultimately they discovered her lying dead beneath the stair case on the ground floor. Her face and hands were found tied with a sari. Soon thereafter police officers came within a short time thereafter P.W. 1 came back from office. P.W. 1 was told of the incident by Arun and Sandhya and the former reported the matter to the police and gave details of articles missing from the house. On that report police registered a case and took up investigation.

4. The further case of the prosecution is that on that very night on receipt of a source information, Sub-Inspector Sri Asoke Roy (P.W. 27), who was the then Officer-in-Charge of Jagacha Police Station went to the house of Bankim Koley, father-in-law of the appellant Dulal at a place known as Chaltakhali. Both the appellants were found there and were arrested. On being interrogated by Sub-Inspector Roy they brought out two bags containing gold ornaments and other valuables which were seized by him in presence of witnesses. The articles so recovered were identified by P.W. 1 as belonging to her and missing at the time her mother was found dead. In usual course the two appellants were forwarded to the learned Sub-Divisional Judicial Magistrate, Howrah on April 7, 1984 and on April 9, 1984 both of them made confessions before Sri Panchkari Ghose (P.W. 3), a Judicial Magistrate of Howrah. On completion of investigation police submitted charge sheet against both of them.

5. The appellants pleaded not guilty to the charges levelled against them. Their defence, as can be gathered from the cross-examination as well as from their respective statements recorded u/s 313, Cr. P.C. was that they never worked in the house of P.W. 1. "While admitting that they were arrested from the house of Bankim Koley on the night between April 5 and 6, 1984, they (sic) consequences in the event of their refusal to confess before the Magistrate that they had committed the murder of Prosad Rani and removed valuables from her house, even though they, in fact, did not commit any of the offences.

6. In the absence of any eye-witness to prove its case, the prosecution relied upon certain circumstances and the confessions made by the prosecution let us ascertain whether the confessions made by the appellants (Exts. 3 and 4) can be safely relied upon.

7. It is trite law that before acceptance, a confession has to satisfy two tests, namely, it is voluntary and that it is true. From the order sheet of the Magistrate's Court (Ext. 29) we get that the two appellants were produced under arrest before the learned Sub-Divisional Judicial Magistrate, Howrah on 7th, April 1984 with a prayer of the Investigating Officer to record their statements u/s 164, Cr. P.C. The learned Magistrate forwarded the two appellants to Sri P.L. Ghose (P.W. 3), another Judicial

Magistrate of Howrah to record their statements. When produced before him on that very day, P.W. 3 warned them that in case they made any judicial confession that might be used against them. Thereafter he remanded them to judicial custody with a direction to keep them in segregation so that they could reflect on the question whether they would confess or not and directed their production on April 9, 1984. In terms of the said direction they produced on that day, when the learned Magistrate again warned them that if they made any confession the same might be used against them. He then recorded the confessions of the two appellants. The confessions (Exts. 3 and 4) show that before recording the learned Magistrate gave them sufficient warnings through various questions. After being satisfied that they were making the confessions voluntarily he recorded their confessions and appended the necessary certificates. The confessional statements and the evidence of Sri Ghose clearly prove that he took all precautions and complied with all formalities to satisfy himself that the confessions were being made voluntarily.

8. From the nature of questions put by Sri Ghose and the answers given by the appellants we are also satisfied that the learned Magistrate took all possible steps for satisfying himself that the confessions were made . voluntarily. The evidence on record and the own admission of the two appellants prove that they were apprehended from the house of Bankim Koley in the night between 5th and 6th April, 1984 and within the statutory period of 24 hours they were sent to Court and thereafter kept segregated in Jail for two days. That necessarily means that sufficient time was given to the appellants in disabuse their mind from any influence the police might have exerted upon them to make the confessions as alleged by them. We, therefore, find no hesitation in concluding that the confessions made by the two appellants are voluntary.

9. The next question is whether the confessions are true or not. In his confession (Ext. 3) the appellant Mantu Mondal stated that they were working in the house of the old woman and at noon they went out to take their tiffin. While they were taking their tiffin the old woman came there. He then tied her by the mouth from back and Dulal tied her hands. They then unlocked the door of the room, took the key from the woman and then opened the almirahs. When they were arranging to run away they found to their surprise that the old woman was dead.

10. In his confession (Ext. 4) appellant Dulal stated, inter alia, that as directed by Mantu he tied her hands and Mantu tied her mouth. At that time they found her alive and then entered her room. They then opened the almirah, took out all the money, gold etc., and placed them in a bag. They also got the key of the iron safe and after opening the safe with the key they brought out money, gold buttons and coins. They then entered another room but got nothing from there. Thereafter they found the woman dead. According to Dulal they thereafter left the house.

11. Both the appellants in their respective confessions thus admitted that they were in the house of Smt. Patra for working there as masons on the fateful day, that they

tied the lady, that they took away various ornaments and other articles from the house and that they later on found her dead. The statements so made fit in with the prosecution case as detailed earlier and as proved by the different witnesses examined during trial. The evidence of Sandhya Ojha (P.W. 5), Sri Arun Poddar (P. W. 11) and Smt. Dharitri Patra (P. W. 1) proves that in the afternoon of April 5, 1984 they found Prosad Rani lying dead, tied with a sari under the stair case of the ground floor and this part of the prosecution case also get support from the police officers who came there that evening.

12. The confessions to the extent they disclosed that the lady was tied with a sari and she was later found dead are therefore true. The other part of the confession that the appellants committed theft of various articles from the almirah and other receptacles in the house also get support from the evidence of P.W. 1. She stated that when she went upstairs she found all the articles lying in the two bed rooms of the first floor at sixes and sevens. Iron chest, almirah, boxes and the drawers of the ulna were found open and the articles scattered. According to P.W. 1 amongst the articles missing were ornaments, money, wrist watches, gold medal and other articles. The other witnesses who entered the house before and after P.W. 1's arrival have also stated that the house was found ransacked. The confessional statements of both the appellants that they committed theft of articles from the house in question are therefore also true.

13. It was however strongly contended before us on behalf of the appellants that even if the confessions made by the appellants were accepted as reliable still then it could not be said that the appellants committed "murder" of the deceased. In making this submission reliance was much placed upon the fact that both the appellants in their confessional statements stated that they did not intend to cause the death of the lady but they only wanted to commit theft of the goods. Even if we accept the above contention of the appellants that they did not intend to cause the death of the lady, still then the offence committed by them would be one punishable u/s 302 of the I.P.C. Apart from their confessional statements that they tied the lady, the evidence of P.Ws. 1, 5 and others, which we have already referred to, proves that the lady was found lying dead with a sari tied across her face and neck. From the evidence of Dr. B. K. Hazra (P.W. 6) who held post-mortem examination on the dead body we get that the hyoid bone of the lady was fractured and there was no other injury on her person. According to the P.W. 6 the death was due to asphyxia as a result of throttling and it was ante-mortem and homicidal in nature. In clause "fourthly" of Section 300 of the I.P.C. if a person committing an act knows that it is so imminently dangerous that it must in all probability cause death and commits such acts without any excuse for incurring the risk of causing death he will be liable for murder. The evidence on record shows that the lady was aged 70 years and when the appellants committed the act of tying the lady across her mouth and throat with a sari and also tied her hands so that she cannot untie herself, they certainly knew that their acts were so imminently dangerous that they must in all

probability cause the death of the lady. Since the appellants, cannot take recourse to any of the exceptions of Section 300 of the I.P.C. it must be held that the appellants committed the murder of the lady.

14. Now that we have found the confessions acceptable we proceed to consider whether they have been materially corroborated or not. It is of course true that a retracted confession may form the legal basis of a conviction if the Court is satisfied that it is true and voluntary and the view that the Court shall not pass a conviction on such a confession without corroboration is not a rule of law but is only a rule of prudence. We hasten to add that in the instant case the circumstances appearing on the record not only fully corroborate the confessions made by the two appellants but independent of the confessions the circumstances by themselves even prove the case of the prosecution to the hilt.

15. That the two appellants were working in the house of P.W. 1 on that fateful day has been proved by the unimpeachable evidence of P.W. 1. She stated that she engaged the two appellants, who were residents of Bharatmata Colony behind her house to work as masons for construction of a kitchen. According to P. W. 1, on April 4, 1984 both of them worked in the house and on April 5, 1984 they also came to work in her house and she told them to wait till she came back as she was to pay their wages for both days. In cross-examination it was suggested to her that she was in the habit of taking the appellants to task for their neglect of duty, which suggestion however was denied. This suggestion however belies the statements of the appellants made in their examination u/s 313, Cr.P.C. that they never worked in the house of P.W. 1. Apart from the evidence of P.W. 1 there is the testimony of Smt, Jamuna Das (P.W. 16), a neighbour of P.W. 1, to the effect that the two masons worked in the house in question on April 5, 1984. She stated that she saw some construction work in progress in the house of P.W. 1 and that on April 5, 1984 she found the two masons to work there at 11/11-30 a.m. She however could not identify the two appellants as those two masons; but this failure is of no moment when read in the context of the evidence of P.W. 1 that the appellants were the two masons working in the house. The next circumstance which incriminates the appellants is that at the material time there was nobody in the house except the deceased and the two appellants and that in the afternoon Sandhya Ojha (P.W. 5) found all the doors of the house closed from inside. Incidentally it may be mentioned that the controverted evidence on record is that the house is surrounded by boundary walls which are "8 to 9" in height and there are three gates one of which is on the west, one is on the east through the courtyard and the other is through the bedroom of the deceased. The next circumstance against the appellants is that even though they were asked by P.W. 1 to stay back to collect their wages they left the house without receiving their remuneration, as is the evidence of P.W. 1 in this regard. We next get that a pair of white chappals were found in the house in the evening of April 5, 1984 and P.W. 1 identified those chappals as that of the appellant Mantu.

16. The most incriminating circumstance however is the recovery of gold ornaments and other articles stolen from the house of P.W. 1 from the possession of both the appellants on the very night of the commission of the offences. From the evidence of Sub-Inspector Ashoke Roy (P.W. 27) we get that in course of investigation he along with another Sub-Inspector and force went to Chaltakhali within the police station of Anita on the night of April 5, 1984. Reaching there they went to the house of one Bankim Koley at or about 12-30 a.m. and found the two appellants in a room on the first floor of that house. On being interrogated they brought out two bags. He (P.W. 27) seized the two bags which contained gold ornaments and other valuable materials in presence of some witnesses. He then sent for a goldsmith named Asoke Rang (P.W. 24) and got those ornaments weighed. In his examination he identified the various articles found in the two bags. Nothing could be elicited in his cross-examination to discredit him. On the contrary, his evidence stands corroborated by the evidence of Nemai Mullick (P.W. 14) and Prosanta Kumar Manna (P.W. 15), the two local search witnesses, and Ashoke Rang (P.W. 24), the goldsmith. That the goods recovered from the joint possession of the appellants were the goods stolen has been proved by P.W. 1 and her evidence regarding identification was not at all challenged. Besides we find that in her evidence and in the F.I.R. P.W. 1 gave the details of the goods stolen and the list includes a gold medal marked "Mokhadasundari Gold Medal, Calcutta University" which, according to P.W. 1, was awarded to her by the Calcutta University in connection with an essay competition and contained her name. This gold medal was recovered along with other stolen articles from the possession of the appellants. There cannot be any escape from the conclusion therefore that the appellants were found in possession of goods stolen from the house of P.W. 1.

17. The evidence so far discussed therefore conclusively prove the following circumstances : (i) that on April 5, 1984 when Dharitri Patra left for her office at 9-40 a.m. there was none in the house excepting her adoptive mother Prosad Rani Patra and the two appellants, who were engaged to construct a Kitchen; (ii) that though the two appellants were expected to be in the house, particularly for receiving their remunerations as promised by Dharitri, they were absent but a pair of chappals belonging to one of them were found lying there; (iii) that in that afternoon Prosad Rani Patra was found lying dead with her mouth and throat tied with sari below the stair case in the ground floor of the house and a substantial amount of gold ornaments, cash and other articles were found missing at that time and (iv) that on that very night the two appellants were arrested along with those stolen goods. The question next is what inference can be drawn from the above circumstances even if the confessions are left out of consideration for the present. In answering this question we may profitably refer to the case of Earabhadrapa v. State of Karnataka, reported in : AIR 1983 SC 446 : 1983 Cri LJ 846 as the facts thereof are similar except to the extent that the employee of the housewife in that case who was found dead was apprehended with the goods stolen almost one year after the commission of

the crime. In upholding the order of conviction of murder in that case the Supreme Court observed that where murder and robbery were to be proved to have been integral parts of one and the same transaction the presumption arising under Illustration (a) to Section 114 of the Evidence Act was that not only the appellants committed the murder of the deceased but also committed the robbery of her gold ornamental which formed part of the same transaction. In making that observation the Supreme Court negated the contention of the appellant that looking to the long lapse of time between the commission of murder and robbery and the discovery of the stolen articles, there could not be any presumption of murder. The principle laid down therein applies with larger force in the instant case as the recovery here was within a period of 24 hours.

18. For the foregoing discussions we uphold the conviction of the two appellants for the charges Under Sections 302/34 and 379 of the I.P.C.

19. That brings us to the question of sentence. In the case of Earabhadrapa : (1983 Cri U 846) (SC) (supra) the Supreme Court set aside the sentence of death passed therein with the following observations:

...It was cruel hand of destiny that the deceased Smt. Bachamma met a violent end by being strangled to death by the appellant who betrayed the trust of his master P.W. 3 and committed her preplanned coldblooded murder for greed in achieving his object of committing robbery of the gold ornaments on her person and in ransacking the iron safe and the almirah kept in her bed room on the fateful night. The appellant was guilty of a heinous crime and deserves the extreme penalty. But we are bound by the rule laid down in [Bachan Singh Vs. State of Punjab](#), where the Court moved by compassionate sentiments of human feelings has ruled that sentence of death should not be passed except in the "rarest of the rare" cases. The result now is that capital punishment is seldom employed even though it may be crime against the society and the brutality of the crime shocks the judicial conscience. A sentence or pattern of sentence which fails to take due account of the gravity of the offence can seriously undermine respect for law. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders. Failure to impose death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the I.P.C. The test laid down in [Bachan Singh Vs. State of Punjab](#), is unfortunately not fulfilled in the instant case. Left with no other alternative, we are constrained to commute the sentence of death passed on the appellant into one for imprisonment for life.

For the self same reason, particularly when the facts of this case are almost similar, we are also left with no other alternative but to commute the sentences of death imposed upon the two appellants for their conviction u/s 302/34 of the I.P.C. to one

for imprisonment for life. The sentences imposed upon the appellants for the conviction u/s 379/34 of the I.P.C. will however stand, but both the sentences will run concurrently. Subject to the above modification regarding sentence, the appeal fails and is dismissed. The reference is also rejected.

Amal Kumar Chatterjee, J.

20. I agree.