(1986) 03 CAL CK 0028

Calcutta High Court

Case No: Criminal App. No. 309 of 1983

June Alias Arjun Mandi — APPELLANT

Vs

The State — RESPONDENT

Date of Decision: March 18, 1986

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 294, 294(1), 294(1), 294(3)
- Evidence Act, 1872 - Section 17, 18, 19, 20, 21
- Penal Code, 1860 (IPC) - Section 300, 302

Citation: 90 CWN 838

Hon'ble Judges: S.P. Das Ghosh, J; Lilamoy Ghosh, J

Bench: Division Bench

Advocate: H.P. Jaiswal, for the Appellant;Sasanko Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Sankari Prasad Das Ghosh, J.

An interesting question of law is involved in this appeal arising from an order of conviction and sentence passed by the learned Sessions Judge, Midnapore, u/s 302 I. P. C. The question is whether a post-mortem report, after examination of a dead body by a doctor, can be regarded as substantive evidence as regards all its contents, without examination of the doctor, who submitted the report. One Hiramoni Mandi, wife of the appellant, died at their hut at Jamidardaga under P.S. Jhargram in the District of Midnapore on 27/1/82, corresponding to 13th Magh, 1388 B.S. which was a Wednesday. The prosecution case was that the deceased had two sons and three daughters and used to stay at their hut along with her husband, the appellant. On 27/1/82 the two sons, three daughters and other members of the family of the appellant went out from their hut for going to Jhargram town to. see a fair known as Juba Mela and returned back home at about 10/10-30 P.M. The appellant was at home with his wife, Hiramoni, when they left home on 27/1/82 for

seeing the fair. After returning home the sons and daughters of the appellant found that their mother was" lying dead on the floor of the covered verandah of their hut in a pool of blood. Hiramoni had bleeding injuries on her person. The appellant stood changed u/s 302 I.P.C. for committing murder of Hiramoni.

2. The defence, as transpiring from the statements made by the appellant at the time of his examination u/s 313 Cr.P.C, was that the appellant left home at about 9/10 A.M. on 27/1/82 in. search of a cow-boy and went to, the house of suit relative. Thereafter he had gone to the hut of Sankar Saren. (P. W. 8) at village Chiapara under P. S. Binpur in the district of Midnapore and was arrested from that hut of Sankar Saren on 4/2/82.

3. Prosecution examined, fifteen witnesses including the two sons and three daughters of the appellant. P.Ws. 2 and 3 are the sons and P.Ws. 4, 6 and 7 are the daughters of the appellant. On finding that his mother was lying dead with bleeding injuries on her person after P.W. 3 (a son of the appellant) returned home at about 10-30 P.M. on 27/1/82 along with his brother and sisters, P.W. 3 had gone on that night to the hut of Nabin Mandi (P.W. 1) and informed him about the death of their mother. P. W. 1 lodged information about the death of Hiramoni Mandi at Jhargram P.S. at 10-35 A.M. on 28/1/82. On the basis of the statement made by P.W. 1 at that time, Ext. 1, Jhargram P.S. Case No. 20 dated 28/1/82 u/s 302 I.P.C. was started. The case was investigate by P.W. 15, who submitted charge-sheet in the case. P.W. 15 as well as P.Ws. 13 and 14 are police witnesses. According to the prosecution case, the appellant made an extra-judicial confession at the hut of Sankar Saren (P.W. 8) on 20th Magh, 1388 B.S., before his arrest from that hut by the investigating officer on the next date. P.Ws". 8 and 12 are the witnesses about the extrajudicial confession. The prosecution case is that P.W. 12 reported the extra-judicial confession by the appellant to a Chowkidar (P.W. 9), who had subsequently informed the investigating officer about it and had accompanied the investigating officer to Chiapara wherefrom the appellant was arrested on 4/2/82. P.Ws. 5 and 10 have been examined to speak about the inquest and seizure of a Sari, Ext. 1, in the wearing of the deceased Hiramoni and some blood-stained earth under a seizure list, Ext. 2. This P.Ws. 5 and. 10 are not in any way related to the appellant. P.W. 11 is another Chowkidar who has also spoken about the inquest. On a consideration of the evidences of these witnesses and the materials on record, the learned Sessions Judge found the appellant guilty u/s 302 I.P.C. and convicted him to suffer imprisonment for life. Being aggrieved by this order of conviction and sentence passed on the appellant, the present appeal has been filed.

4. The case is based on circumstantial evidence and extrajudicial confession. The net-work of facts cast around the accused on the basis of the circumstances proved by the prosecution are enumerated below :

(1) Presence of the appellant along with his wife Hiramoni at their hut at Jamidardaga when the two sons and three daughters of the appellant left their hut

along with other members of their family for going to Jhargram to see the fair (vide the evidences of P.Ws. 2, 3, 6 and 7).

(2) Finding of the dead body of Hiramoni in a pool of blood with bleeding injuries on face and neck on the floor of the covered verandah of the hut of the appellant, when the sons and daughters of the appellant returned home at about 10/10-30 P.M. on 27/1/82 (vide the evidence of P.Ws 2, 3, 4, 6 and 7).

(3) Absence of the appellant at their hut at about 10/10-30 P.M. on 27/1/82 and failure of P.Ws. 2, 3, 4, 6 and 7 to find out their father on the night of 2 7/1/82 inspite of searches for him by them.

(4) Failure of the sons of the appellant and other persons to find out the appellant at Jamindardaga from the morning on 28/1/82 (vide the evidences of P.Ws. 1, 2, 3, 5 and 10) as well as the evidences of the investigating officer (P.W. 15).

(5) Arrest of the appellant from the hut of Sankar Saren (P.W. 8) at Chiapara by the investigating officer (P.W. 15) on 4/2/82, corresponding to 2 1st Magh, 1388 B.S.

5. Besides the aforesaid circumstances the prosecution has led evidence about the extra-judicial confession by the appellant to Sankar Saren (P.W. 8) and his son, Mangal Saren (P.W. 12) after the appellant had gone to the hut of Sankar Saren at Cniapara for the last time on 20th Magh, 1388 B.S., which was a Wednesday. The evidences of P.Ws. 8 and 12 are that the appellant used to come to the hut of Sankar Saren occasionally. It transpires from the evidences of P.Ws. 8 and 12 that P.W. 12 is a friend of a son of the appellant and that the appellant stayed in the hut of Sankar on 20th Magh, 13 88 B.S. According to these witnesses, after the night meal was served at the hut of Sankar on 20th Magh, B.S. P.Ws. 8 and 12 enquired of the appellant if there was any purpose for his coning to their hut. It is alleged by these witnesses that the appellant had then given out that he had quarrel with his wife Hiramoni and that he had cut Hiramoni and injured her. The evidences of P.Ws. 8 and 12 are that the appellant had then stated that cutting Hiramoni, he left his hut and was moving about for 4/5 days before coming to the hut of Sankar. P.W. 12 has stated that they did not assault the appellant or hold out any threat before he made the confession. According to the evidences of P.Ws. 8 and 12, Mangal Saren (P.W. 12) had gone on the night of 20th Magh, 1388 B.S. to Bankim Nayak (P.W. 9), a Chowkidar, at the request of his father and had informed the Chowkidar about the extra-judicial confession made by the appellant. At the time of his examination u/s 313 Cr.P.C. the appellant denied to have made any such statement to P.Ws. 8 and 12. The confession is recorded in a narrative form. The exact words uttered by the appellant at the time of his confession are not recorded in the evidences of P.ws. 8 and 12. This has led to the contention by Mr. Jaiswal, learned Advocate for the appellant, that the retracted extra-judicial confession should not be considered in this appeal. To lend assurance to his contention, Mr. Jaiswal has referred us to the case of Heramba Brahma and Another Vs. State of Assam, . The decision of the

Supreme Court in the case of Heramba Brahma is that an extra-judicial confession to be 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. Mr. Jaiswal has contended that as the exact words uttered by the appellant at the time of this alleged extra-judicial confession are not recorded in the evidences of P.Ws. 8 and 12, the extra-judicial confession should be rejected. We are unable to accept this contention of Mr. Jaiswal. In the case of Mulk Raj vs. State of U. P. (AIR 1959 SC 902) it has been decided that though the court requires a witness to give the actual words used by the accused as nearly as possible at the time of an extra-judicial confession by him, it is not an invariable rule that the court should not accept the evidence, if not the actual words but the substance were given. It has been held by the Supreme Court that in such a case it is for the court, having regard to the credibility of the witness and his capacity to understand the language in which the accused made the confession, to accept the evidence of extra-judicial confession or not to accept it. It was pointed out by the Supreme Court in the case of Mulk Raj (supra) that if the rule is inflexible that the court should insist only on the exact words, more often than not, this kind of evidence, sometimes most reliable and useful, will have to be excluded, for, except, perhaps in the case of a person of a good memory, many witnesses cannot repeat the exact words to the accused. It is accordingly for the court, having regard to the credibility of the witness and his capacity to understand the language in which the accused made the confession, to accept the evidence or not. In the present case, there is no suggestion that any of the P.Ws. 8 and 12 had not the capacity to understand the language in which the appellant made the alleged extra-judicial confession to them. We have carefully considered the evidences, and we find nothing to suspect the credibility of P.Ws. 8 and 12 as witnesses about this extrajudicial confession. In the case of Heramba Brahma (1983 Cr.L.J. 149) the Supreme Court decided that the reason or motive for confession should be scrutinised and it should be been if the person in whom the confession is reposed is properly selected. In the present case, the reason for confession lay in the query made by the P.Ws. 8 and 12 as to whether the appellant had any purpose for coming to their hut. The persons selected by the appellant for making the confession, viz., P.Ws. 8 and 12 are proper persons as P.W. 12 is the friend of a son of the appellant and as the appellant used to go at times to the hut of Sankar Saren (P.W. 8). At the time of his examination u/s 313 Cr.P.C. these facts are not denied by the appellant. In these circumstances we find nothing to interfere with the finding of the learned Judge that the confession was voluntary and has received corroboration from the testimony of other witnesses, who have spoken about the circumstances proved by the prosecution in this case against the appellant.

6. A retracted extra-judicial confession can form the basis of a conviction though, as a matter of prudence, the courts try to look for corroboration from some independent source so as to satisfy their conscience that the confession is true. The

extra-judicial confession is corroborated from the aforesaid circumstances, -proved by the prosecution in the case. It is to be stated, in this connection, that though at the time of his examination u/s 313 Cr.P.C. the appellant made out a case that he left his hut at about 9/10 A.M. on 27.1.82 and went o the house of a relative in search of a cow-boy and that thereafter he had gone to Chiapara, there is no suggestion by the defence to any of the P.Ws. 2, 3, 4, 6 and. 7, who were permitted to be cross-examined by the prosecution u/s 154 Cr.P.C., that the appellant had left his hut at about 9 A.M. or 10 A.M. on 27/1/82 and before they had left that hut for going to the ''Juba Mela'' at Jhargram town. The appellant did not examine any witness for the purpose of showing that he had gone to the house of any of his relatives at Chinyapara in search of a cow-boy before going to the hut of Sankar Saren (P.W. 8) from Chinyapara. The appellant stated at the time of his examination u/s 313 Cr.P.C. that after going out from his hut at 10 A.M. on 27/ 1/82, he heard on the next day, which was a Thursday, that his wife was murdered. If actually the appellant had come to know about the murder of his wife on 28/1/82 after leaving home at 10 A.M. on 27/1/82, it is not at all probable that the appellant would not thereafter return back home even if he had gone out in search of a cow-boy. This very conduct on the part of the appellant forms an additional link in the chain of circumstances, enumerated above, showing beyond any shadow of doubt that it was the appellant who had caused the death of Hiramoni after his sons and daughters left his hut on 27/1/82 and returned home at about 10/10-30 P.M. on 27/1/82.

7. The most question in this appeal is thus whether, in the aforesaid facts and circumstances, the conviction of the appellant u/s 302 I.P.C. is to be affirmed or not. Mr. Jaiswal has contended that the court below erred in relying on a Full Bench decision of the Allahabad High Court in the case of Saddiq vs. State (1981 Cr.L.J. 379) to the effect that a post-mortem report may be read a substantive evidence when the genuineness of the post-mortem report is not disputed. by an accused, even though the doctor who held the post-mortem examination was not examined Mr. Jaiswal has, in this connection referred us to a Division Bench decision of this Court in the case of Gafur Sheik vs. State (1984 Cr.L.J. 559) to the effect that the post-mortem report cannot be used a substantive evidence in the absence of examination of the doctor who submitted the report. Mr. Ghosh, learned Advocate for the State, has tried to distinguish this Division Bench decision of this Court in the case Gafur Sheik by submitting that, where in the case of Gafur Sheik there was no explanation as to why the doctor was not examined, explanation has been given by the prosecution in the present case for the non-examination of the doctor. Mr. Ghosh, in this connection, drawn our attention to Order No. 8 dated 25/6/83 passed by the learned Sessions Judge, the relevant portion of which reads as follows :

Ld. Panel Pleader files a petition stating that the attendance of Medical Officer, who held post-mortem examination could not be secured and he prays for marking the post-mortem report as exhibit. Copy of the petition served upon the ld. Advocate for

the accused. Heard both sides. Sri Nalini Mazumdar, ld. Advocate for the accused is called upon to admit or deny the genuineness of the post-mortem report, which is sought to be exhibited by the prosecution. The ld. Advocate does not dispute the genuineness of the document, namely, the post-mortem report and has no objection to the document being admitted in evidence. Hence the post-mortem report is received in evidence and it is marked Ext. No. 4 u/s. 294 Cr.P.C.

8. Mr. Ghosh has submitted that when sufficient explanation is given in the Court''s order dated 25/6/8 3 for non-examination of the doctor, the post-mortem report. Ext. 4, should be treated as substantive evidence on the basis of the decision in the case of Saddiq (Supra). It appears that in the course of the trial in the court below there was a petition by the prosecution on 24/6/8 3 for an adjournment on the ground that Dr. B. K. Khastagir, the Sub-Divisional Medical Officer, Jhargram, did not attend court on that day, though he. was till then posted at Jhargram. By an order passed on 24/6/83 the learned Sessions Judge fixed the case on 25/6/83 for further hearing, after considering this petition filed for the prosecution Thereafter,. on 25/6/83 another petition was filed for the prosecution in the court below wherein it was stated that Dr. B. K. Khastagir, who was on medical leave, was to join on 27/6/83 and could extend his leave on medical ground. A prayer was made in that petition filed on 25/6/83 for treating the post-mortem report as evidence u/s 294 Cr.P.C. on alleging that the whereabouts of Dr. B. K. Khastagir were not yet intimated to the prosecution. The learned Sessions Judge allowed this prayer made in the, petition dated 25/6/83 and passed the aforesaid order. After considering the petitions filed for the prosecution on 24/6/8 3 and 25/6/8 3, we are unable to accept the contention of Mr. Ghosh that prosecution has given sufficient explanation in this case for non-examination of the doctor. When the doctor was to join his duties on 27/6/83, prosecution could well have prayed for adjournment for some more days for examination of the doctor instead of straightway filing a petition for treating the post-mortem report as evidence u/s 294 Cr.P.C. The provisions of section 294 Cr.P.C. relate to formal proof of certain documents. The marginal note to that section is, "no formal proof of certain documents". This marginal note suggests that section 294 Cr.P.C. is intended to avoid wastage of time for proof of certain documents, formal proof of which can be dispensed with in the circumstances mentioned in section 294(1) Cr.P.C. These circumstances are filing of a list of documents by either the prosecution or the accused and calling upon either the prosecution or the accused to admit or delay the genuineness of each such document mentioned in this list of documents. There is nothing in the record of the court below to show that any such list of documents was filed for the prosecution in the court below or that, prior to 25/6/83, the learned Advocate for the appellant in the court below was called upon by the prosecution to admit or deny the genuineness of the post-mortem report. We are, accordingly, of the opinion that the provisions of section 294(1) Cr.P.C. have not been properly complied with in this case. Even assuming that the provisions of section 294(1) Cr.P.C. have been complied with in

this case, in view of the aforesaid order no. 8 dated. 25/6/83 passed by the learned Sessions Judge, opinion evidence like a post-mortem report cannot but be hearsay evidence. [Rahim Khan Vs. Khurshid Ahmed and Others,). Section 60 of the Evidence Act is to the effect that oral evidence must, in all. cases whatever, be direct and that if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. There is a proviso to this provision regarding reception of opinion evidence alike the provision in section 32 of the Evidence Act. Though the term "hearsay" has nowhere been used in the Indian Evidence Act, the term "hearsay" means statements, oral or written, reported to have been made by persons not called as witnesses. Such statements are not admissible in evidence subject to certain exceptions mentioned in section 17 to 39 of the Evidence Act. These sections 17 to 39 find place in Chapter II of the Evidence Act. In the case of Gafur Sheik (1984 Cr.L.J. 559), it was observed that no evidence was led to show that the post-mortem report was being tendered in evidence under any of the provisions in Chapter II of the Evidence Act and hence the post-mortem report could be used as substantive evidence. What Their Lordships presumably meant by referring to Chapter II of the Evidence Act, which were exceptions to the hearsay rule. The post-mortem report cannot fall within any such exceptions in sections 17 to 39 of the Evidence Act.

9. Mr. Ghosh wanted to rely on the provisions of section 58 of the Evidence Act and contended that when the learned Advocate for the accused in the court below did not object to the post-morten report, being admitted in evidence, the postmortem report would go as admission. This contention cannot be accepted. A distinction is always maintained by the courts between judicial admission and evidentiary admission. Section 58 of the Evidence Act is confined to judicial admission such as admission by the pleadings. The expression, "read in evidence" in section 294(3) Cr.P.C. cannot be judicial admission within the meaning of section 58 of the Evidence Act. With due respect to Their Lordships, we are unable to accept the view expressed in the case of Saddiq (1981 Cr.L.J. 379) that this expression "read in evidence" in section 294(3) Cr.P.C. means "read as substantive evidence". The expression "read in evidence" in section 294(3) Cr.P.C. cannot mean "read as substantive evidence" in view of the bar. under the aforesaid section 60 of the Evidence Act under which if a document refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on these grounds. This provision in section 60 of the Evidence Act, if considered with the provisions in section 45of the Evidence Act, go to show that the opinion given by the doctor, who held the postmortem examination, can never be substantive evidence in the absence of examination of the doctor who held that opinion. We are of the opinion that in a case covered by section 294 (1) Cr.P.C. the matters which could be "read in evidence" u/s 294(3) Cr.P.C. are factum of holding of the post-mortem examination of the dead body by the doctor on the date mentioned in the post-mortem report, the identification of the dead body before the

doctor by the person claiming to have identified the dead body before the doctor as well as the existence of the injuries found by the doctor on an examination of that dead body and that the opinion given by the doctor in the post-mortem report about the cause of the injuries or the effect of the injuries or the dimension of the injuries found by him cannot be substantive evidence in view of the bar u/s 60 of the Evidence Act. It is to be stated in this connection that a distinction is also drawn by the courts between the factum of a statement and the truth, of a statement. The aforesaid matters, viz., holding of post-mortem examination on a certain date by a doctor, identification of dead body by a person before a doctor and the existence of the injuries in the person of the dead body found by the doctor are matters of fact as contrasted with the truth of the other statements made in a post-mortem report, such as giving opinion abou the cause of the injuries or dimension of the injuries or the result of the injuries. We are, accordingly, of the opinion that the post-mortem report. Ext. 4, may be read as evidence about the factum of holding of post-mortem examination by the doctor, identification of the dead body of Hiramoni before the doctor and the existence of the injuries without their dimensions, mentioned in the post-mortem report and in the judgment of the learned Judge, when no objection was raised in the court below about the reception of the report as Exhibit. The learned Sessions Judge mentioned four injuries, as transpiring from the post-mortem report, on the dead body of Hiramoni. These were sharp but lacerated injury over the right side of neck, lacerated and sharp injury over the right side of chest, lacerated multiple cut injury over the right side of the face fracturing mandible and maxilla (right side) and cut injuries over the forehead. As the effect of these injuries, as opined by the doctor, cannot be evidence, we are to judge, apart from the post-mortem report, as to whether these injuries were inflicted by the appellant with the intention mentioned in the clause "Secondly" to section 300 I.P.C. The situs of the injuries, the ferocity of the attack and the nature of the injuries show that the injuries were inflicted with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of the person to whom the harm was caused. This is evident from the fact that Hiramoni was already dead when P.Ws. 2, 3, 4, 6 and 7 returned to their hut at about 10/10-30 P.M. on 27.1.82. The injuries endangered life. They were inflicted with the interaction that death would be the likely result. In these circumstances, even leaving aside the postmortem report about the effect of the injuries, we are of the opinion that the case falls within clause "Secondly" to section 300 I.P.C. The appeal is, accordingly, to be dismissed, though on different grounds.

The appeal is dismissed. The order of conviction and sentence of the appellant u/s 302 I.P.C. are affirmed. Let the lower court records be sent down at once.

Lilamoy Ghosh, J.

I agree.