State of West Bengal Vs Shyamal Saha and Prosanta alias Kabukabiraj

Court: Calcutta High Court

Date of Decision: March 22, 2008

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 313
Evidence Act, 1872 â€" Section 114, 145, 161
Penal Code, 1860 (IPC) â€" Section 302, 34, 364

Citation: 113 CWN 505

Hon'ble Judges: Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Swapan Kumar Mallick, for the Appellant;Milon Mukherjee and Mr. Sandipan Ganguly, for the Respondent

Final Decision: Allowed

Judgement

Girish Chandra Gupta, J.
This appeal arises out of a judgment and order dated 29th July 1998 passed by Shri A.K. Bhattacharyya,

learned Additional Sessions Judge, Hooghly, acquitting the accused-respondents of the charges u/s 364 and 302 of the Indian Penal Code read

with section 34 thereof in connection with Sessions Trial No. 21/97.

2. Briefly stated the case of the prosecution is that on 19th May 1995 in between 5-5.30 P.M. the deceased Paritosh Saha was abducted with the

object of murdering him by the accused Shyamal and Prasanta. The accused persons along with the victim were about to cross the river Ganges

(hereinafter referred to as the "river") when P.Ws.6 and 11 also boarded the boat for the purpose of crossing the river. The deceased was

thereafter taken by the accused persons in a lonely place and murdered. F.I.R. was lodged on 20th May 1995 at 7.05 P.M. On 21st May 1995 in

the morning dead body of the deceased was found from the opposite side of the river. The accused persons were charged under sections 364 and

302 of the Indian Penal Code read with section 34 thereof. As many as 18 witnesses including one Court Witness were examined. The learned

Trial Judge acquitted the accused persons on the basis of the following reasoning:-

The motive of accused is immaterial if the occurrence is proved (AIR 1976 SC 1932). Motiveless malignity militates against the natural human

conduct. In cases where only circumstantial evidence is available, at the outset one normally starts looking for the motive and opportunity to

commit the crime. If the evidence shows that the accused has a strong enough motive and had the opportunity of committing the crime and the

established circumstance of the record along with the explanation if any, of the accused exclude the reasonable possibility of any one-else being the

real culprit then the chain of evidence can be considered to be so complete as to show that within all probability the crime must have been

committed by the accused and he may safely be convicted on circumstantial evidence (AIR 1972 SC 54). In the case on hand, it is the evidence of

P.W.1 that both the accused used to mix with the victim, but they never came to his house earlier. The evidence of P.W.5 in this regard is that the

victim had not talking terms with the accused, but after theft of the motor pump they started talking with him which does not appear to be in

harmony with the above evidence of P.W.1. Nevertheless, there being no animus or motive of the accused against the victim Paritosh, the story of

committing crime by them does not appear to stand.

In the premises, in the light of the above discussion, in the absence of cogent and strong circumstantial evidence, the prosecution cannot be said to

have brought home the charges against the accused persons beyond all reasonable doubt and as such both the accused are entitled to the benefit of

doubt. Accordingly, they are found not guilty.

3. It would appear that the learned Trial Judge acquitted the accused/respondents on the ground (a) that the evidence of P.W.1, the elder brother

of the deceased, and P.W.5, the mother of the deceased, was inconsistent and (b) there was no motive for perpetrating the crime.

4. Mr. Mullick, learned Advocate appearing for the State/appellant, submitted that the learned Trial Judge fell into a grievous error in holding that

the evidence of P.W.1 was not in harmony with that of the P.W.5. He further submitted that the Trial Court ignored the evidence on record and

arrived at an erroneous finding of fact. He also submitted that the learned Trial Judge erred in law in holding that in the absence of evidence to

show motive for the crime the accused could not be found guilty.

5. Mr. Mukherjee, learned Advocate appearing for the respondents disputed the submissions made by Mr. Mullick. He submitted that the

evidence adduced by the prosecution is weak and full of contradictions and on the top of that there was no reason why the accused should have

resorted to murder the deceased Paritosh. He therefore invited this Court to dismiss the appeal.

6. We shall assess the evidence on the record in order to ascertain whether the evidence adduced by the prosecution establishes beyond any

reasonable doubt that the accused persons committed the crime taking into consideration the inconsistencies pointed out by Mr. Mukherjee. The

question as regards motive will be considered thereafter.

7. Amaresh (P.W.1), the elder brother of the deceased Paritosh deposed in cross-examination that he saw the victim for the last time at about

4.10 P.M. on 19th May 1995. His mother the P.W.5 deposed in examination-in-chief that she saw her deceased son Paritosh for the last time at

about 5.30 P.M. two days prior to recovery of his dead body. P.W.6 Dipak deposed as follows:-

At about 5 P.M. on that date I along with Panchu went to the opposite side of the ganges in a boat belonging to Asit Sarkar. Both the accused

along with the victim Paritosh were virtually proceeding towards the opposite side of the ganges in the said boat of Asit Sarkar, and at that time we

called them and went to the other side of the ganges in the same boat. As soon as the boat reached to the otherside of the ganges, both the

accused along with the victim went away towards the Char.

P.W.11 Panchu Sardar deposed as follows:-

One day about 3/31/2 years back at about 5.30 P.M. while both the accd. along with the victim Paritosh were about to proceed towards the

opposite side of the Ganges in a boat, P.W.6 asked them to wait and thereafter P.W.6 and myself got on the said boat to proceed to the other

side of the Ganges, while we reached the opposite side both the accused and the victim Paritosh went towards the Jungle to the east, and myself

and P.W.6 went towards camp.

P.W.1 deposed as follows:-

My co-villagers Dipak Saha and Panchu Sardar reported to me that on the previous day at about 5/5.30 p.m. they along with both the accused

and the victim crossed to the other side of the Ganges in a boat belonging to Asit Sarkar, that as soon as they reached to the other side of the

Ganges, the victim as also both the accused jumped from the boat and went towards the jungle on reporting by Shyamal not to take away the boat

as they would return in the said boat.

P.W.16 the I.O. in his cross-examination in answer to the questions of the learned cross-examining Counsel deposed as follows:Ã¯Â¿Â½

Animesh Saha has not been cited as witness in the CS. Fact that had it been known to me that Animesh is a material witness who saw the victim

together with the accused, during investigation, he would have been cited as a witness in the C.S.

P.W.16 was examined on 20th July 1998. On 20th July 1998 the prosecution prayed for leave to examine the witness Animesh Saha. On behalf

of the defence written objection was filed. After hearing the parties the learned Trial Judge passed the following order:-

In the case on hand, the name of the said witness Animesh Saha transpires in the testimony of P.Ws.1 & 5, but his name has not been reflected in

the CS as a witness though his evidence appears to be material. Accordingly, he being a material witness for just decision of the case, the above

prayer of the prosecution should be allowed. As such, the said witness Animesh Saha be examined as a Court Witness.

Accordingly Animesh Saha was examined as a Court Witness. The Court Witness Animesh deposed as follows:-

P.W.1 is my father. I am a student of class VIII. I am now 13 years old. The victim Paritosh, since deceased, was my uncle. On 19.5.95 he

expired. On that date at about 5/5.30 p.m. while I was walking with the victim along the bank of Ganges near our house and reached near the

house of Gopal Saha, the victim was talking with the said Gopal Saha. At that time both the accused who are on dock came there and called away

the victim to the opposite side of the Ganges for seeing the Char. While I expressed my willingness to go to the opposite side, accused Shyamal

asked me to go back my house. I still kept standing there. While both the accused along with the victim were about to start for the opposite side of

the Ganges in the boat belonging to Ashit Sarkar, P.W.6 and 11 appeared there and told that they would also go to the opposite side. All of them

went to the opposite side and after reaching there P.W.6 and 11 went towards the proposed plant of CESC while both the accused along with the

victim went towards the jungle. I could see clearly the above incident from the bank of Ganges of our side. The victim did not come back to house

since then. In the morning of 21.5.95 the dead body of the victim could be recovered on the opposite side of the Ganges.

8. From the evidence noticed above we cannot but hold that it has been firmly established that on 19th May 1995 at about 5/5.30 p.m. in the

evening the accused took away the victim Paritosh by a boat to the jungle in the other side of the Ganges and that P.W.6 and P.W.11 were the

co-passengers in the boat. Mr. Mukherjee, learned Advocate appearing for the respondent submitted that if the evidence of the Court Witness

No. 1 is to be believed that he kept watching his uncle entering into the jungle in the company of the accused persons on the other side of the river,

then P.Ws.6 and 11 could not have missed the fact that the child Animesh was watching them. P.Ws.6 and 11 did not speak a word about the

presence of the child Animesh. P.Ws.6 and 11 as already noticed were in a hurry to board the boat by which the accused were about to cross the

river accompanied by the victim. When the boat was about to sail away they had stopped them and boarded the boat and sailed away. Regard

being had to the common course of human conduct the willing passengers are expected to look forward to the destination rather than looking

back. It is therefore not unnatural that the P.Ws.6 and 11 did not talk a word about the child Animesh. We therefore are not in a position to give

any importance to this aspect of the matter. The opposite side of the river is a lonely place as would appear from the evidence of P.W.1. The

P.W.2 has also corroborated this. The defence declined to cross-examine the P.W.2. On 19th May 1995 a plant of CESC was inaugurated at

that place. No one has suggested that the other side of the river is a populated area. What lends further assurance to the Court is that when the

victim did not return home in the night of 19th May 1995, the following morning the P.W.1 started taking information from all his family members.

At that point of time the child Animesh had told his father as follows:-

My son Animesh Saha reported to me that the victim being accompanied by him went to the bank of the Ganges for a walk and both the accused

called away the victim to the opposite side of the Ganges to see the proposed plant of CESC.

9. The P.W.1 thereafter had rushed to the house of the accused Prashanta and enquired of him about the victim. The conversation between the

accused Prashanta and the P.W.1 deposed by him is as follows:-

I instantly rushed to the house of accused Prashanta and enquired as to the whereabouts of the victim, to which he replied that on the previous day

he found the victim moving on the opposite side of the Ganges with a number of boys.

10. The P.W.1 also enquired of the other accused Shyamal. The evidence of P.W.1 as regards his conversation with Shyamal is as follows:-

I went to the shop of accused Shyamal at Balagar Bazar and on my query as to the whereabouts of the victim he reported that he had seen the

victim on the previous day to move on the opposite side of the Ganges with a number of boys, and that he himself returned to his house at about

8/8.30 p.m.

11. Therefore the fact that on 19th May 1995 the victim and the accused were in the other side of the river in the evening is firmly established. The

evidence discussed above that the accused had taken away the victim in a boat to the other side of the river is equally firm.

12. We already have noticed that the accused Shyamal told the P.W.1 that he returned from the other side of the river at about 8/8.30 p.m. on

19th May 1995. This information was given by the accused Shyamal to the P.W.1 on 20th May 1995. On 19th May 1995 at about 8/8.30 p.m.

both the accused had come to the P.W.5, the mother of the victim. The evidence of the P.W.5 in this regard is as follows:-

On that date at about 8/8.30 p.m. both the accused Kalu and Shyamal (id.) came to our house and enquired about Probhas, Paritosh and ors.

followed by their leaving instantly.

13. The P.W.1 has also corroborated this fact in these words ""my mother intimated to me that at about 8/8.30 p.m. both the accused persons

came to our house and enquired about the whereabouts of me, my second brother etc.

14. Therefore the fact that the accused had come back from the other side of the river at 8/8.30 p.m. is firmly established. Reference in this regard

may also be made to the evidence of the P.W.16 the I.O. who deposed that ""P.W.7 told before me that on 19.5.95 at about 5.30/5.45 p.m.

accused Shyamal and Prosanta came to their house and asked for their boat to go to the opposite side of the Ganges, that as Shyamal is her co-

villagers she asked him to take the Baitha and thereafter both the accused on keeping their cycle at their house went away with Baitha, that at

about 8/8.30 p.m. both the accused came to her house against on pointing with said Baitha and after keeping the same hurriedly left with their

cycles.

15. P.W.7 is none other than the wife of Ashit Sarkar whose boat was pressed into service for the purpose of crossing the river. P.W.7 was

declared hostile. She denied in Court to have made this statement to the I.O. the P.W.16. As regards the value to be attached to the statement

made by P.W.7 to the P.W.16 reference may be made to the judgment in the case of Balram Prasad Agrawal Vs. State of Bihar and others,

wherein Their Lordships applied the following law laid down by the Privy Council.

The Privy Council in the case of Subramaniam vs. Public Prosecutor, observed:

Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when

the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to

establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from its truth, is

frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements

are made.

16. We however do not have to depend upon the statement of P.W.7 made to the P.W.16 for the purpose of holding that the accused came back

to this side of the river at 8/8.30 P.M.

17. The dead body of the victim was found by the P.W.2 on the opposite side bank of the river. He also deposed that there are bushes on the

opposite side of the river and there are some cultivable land. Cross-examination of the P.W.2 was declined. On 21st May 1995 the inquest was

held in the morning. The state of the dead body appearing from the inquest report was as follows:-

I see that the neck of the dead body is knotted with a ''gamcha'' (cotton towel) attached with two iron folding chairs. The dead body is swollen and

decomposed. The two eyes and the tongue is protruded out, as a result the face is distorted. The upper part of the body is uncovered and he is

wearing a blue-checked ''lungi'' and an old yellow ''jangia'' (brief). The hands are lying on two sides of the body. Both the legs are away from each

other and swollen in a distorted condition. The skin of the different parts of the body are swollen and black in colour and the skin is detached. The

palm of the hand and feet is bloodless and colorless. The ''jangia'' (brief) is opened by the ''dome'' (crematory assistant) and it is seen that stool is

present. The skin on different places from the neck to the chest are seen in a bruised condition. The age my be from 20 to 25 years.

18. The written complaint ext.1 goes to suggest that the wearing apparel of the victim was only a lungi and gamcha. On 22nd May 1995 the

postmortem was held. We already have noticed from the inquest report that the neck of the dead body was found knotted with a ''gamcha''

(cotton towel) attached with two folding iron chairs. The Autopsy Surgeon (P.W.15) deposed that ""injuries No. 1 and 2 may be caused on

account of assault with the still rod or chairs"". The cause of death, according to the Autopsy Surgeon (P.W.15) was as follows:-

The death, in my opinion, was due to the effects of strangulation by ligature and head injuries stated above, ante-mortem and homicidal in nature.

Drowning of postmortem one. This is the P.M. report which was written and signed by me (Ext.5).

19. The time of death, according to the Autopsy Surgeon, in his own words is as follows:-

In the present case, the death, in my opinion took place about 65 to 70 hours before my conducing the P.M. examination.

20. Significantly the cross-examination of the Autopsy Surgeon was declined. The postmortem, it appears, was held at 12 a.m. on 22nd May

1995. Therefore 12 hours of 22nd May 1995; add to that 48 hrs. of 20th and 21st May 1995 which would work out to 60 hrs. At about 5.30

p.m. in the evening on 19th May 1995 the victim was taken to the other side of the river. Therefore, the total hours work out to 661/2 hours

between the time the victim was taken away and the holding of postmortem examination. The medical evidence therefore goes to establish that

soon after 5.30 p.m. on 19th May 1995 the victim was put to death.

21. From the evidence discussed above we have no manner of doubt that at about 5.30 P.M. on 19th May 1995 the accused were last seen

together with the victim crossing the river. We have evidence to show that they indeed crossed the river. We have seen from the evidence of

P.W.2 that the other side of the river contains bushes and some cultivable land. Evidence of P.W.1 is that it is a lonely place. Even the accused

persons have told the P.W.1 that at about that time they were on the other side of the river and they had seen the victim there. From the evidence

discussed earlier it has been firmly established that the accused persons took away the victim from this side of the river. It is therefore for them to

explain as to how did the victim come by death. Reference in this regard may be made to the following judgment in the case of State of West

Bengal Vs. Mir Mohammad Omar and Others etc., .

Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is

disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When

inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the

most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It

empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the

common course of natural events, human conduct etc. in relation to the facts of the case.

When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone

knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning

process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused

would tell the court what else happened to Mahesh at least until he was in their custody.

During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from

the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if

the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above

facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the

inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.

22. It is on record that the accused persons did not offer any explanation during their examination u/s 313 Cr. P.C. We therefore are of the view

that there is no escape from the conclusion that the accused persons murdered the victim. The charge u/s 364 may not have been established

because there is nothing on the record to show except for an allegation in the FIR that the accused took away the victim with the object of killing

him and the evidence of the child Animesh(C.W.1) that he had wanted to accompany his uncle but the accused Shyamal forbade. The charge u/s

302 is however firmly established. We shall now deal with the submission made by Mr. Mukherjee and shall thereafter consider the question as

regards the motive.

23. Mr. Mukherjee, learned Advocate appearing for the respondents, drew our attention to the following portion of the evidence of P.W.1.

My son Animesh Saha reported to me that the victim being accompanied by him went to the bank of the Ganges for a walk and both the accused

called away the victim to the opposite side of the Ganges to see the proposed plant of CESC.

24. He then drew our attention to the following portion of the evidence of P.W.1.

Both Dipak and Panchu further reported that after seeing the proposed plant of CESC they returned in the boat of CESC. The other side of the

Ganges is lonely and there is no residential house. In the evening I went to the P.S. and lodged an F.I.R.

25. He also drew our attention to the following portion of the evidence of P.W.1.

At that time my mother reported that both the accused visited our house at about 8/8-31/2 p.m. to enquire the whereabouts of us.

26. He also drew our attention to that part of the evidence of P.W.1 where he deposed that both Dipak Saha and Panchu Sardar, the P.Ws.6 and

11 had reported to him that as soon as the boat reached the other side of the river the victim and the accused jumped from the boat; and went

away telling that they would return by this boat and the boat should not be taken away.

27. He submitted that these pieces of evidence are conspicuous by their absence from the FIR. He submitted that this goes to show that a lot of

improvement was made after the F.I.R was lodged and during the trial. We however are unable to accept this submission. There was no scope to

make the improvement during the trial because the witness was already examined u/s 161. It is not his case that no such thing was disclosed by the

P.W.1 during such examination u/s 161 Cr. P.C. As regards his point that these pieces of evidences are conspicuous by their absence in the

F.I.R., it can at once be pointed out that it has been repeatedly held by the Apex Court that an F.I.R. is not intended to be a detailed document.

An F.I.R. is meant to give only the substance of the allegations made. Reference in this regard may be made to the judgment reported in the case

of Baldev Singh and another Vs. State of Punjab, .

28. In the case of Ravi Kumar Vs. State of Punjab, in paragraph 15 the following views are expressed.

The first information report is a report giving information of the commission of a cognizable crime which may be made by the complainant or by any

other person knowing about the commission of such an offence. It is intended to set the criminal law in motion. Any information relating to the

commission of a cognizable offence is required to be reduced to writing by the officer in charge of the police station which has to be signed by the

person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may

prescribe in that behalf. The registration of the FIR empowers the officer in charge of the police station to commence investigation with respect to

the crime reported to him. A copy of the FIR is required to be sent forthwith to the Magistrate empowered to take cognizance of such offence.

After recording the FIR, the officer in charge of the police station is obliged to proceed in person or depute one of his subordinate officers not

below such rank as the State Government may, by general or special order, prescribe in that behalf to proceed to the spot to investigate the facts

and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. It has been held time and again that

the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker u/s 161 of the Evidence Act, 1872 (

in short ""the Evidence Act"") or to contradict him u/s 145 of that Act. It can neither be used as evidence against the maker at the trial if he himself

becomes an accused nor to corroborate or contradict other witnesses. It is not the requirement of law that the minute details be recorded in the

FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim

himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be

kept in mind. The object of insisting upon lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was

committed.

29. Next point urged by Mr. Mukherjee was that the P.W.1 in his cross-examination deposed that during the inquest he had disclosed the names

of the accused persons but the names of the accused persons do not really appear in the inquest report. We fail to see any substance in the

submission for the simple reason that the inquest report is preceded by the F.I.R in which the complicity of the accused had been clearly and

unambiguously spelt out.

30. Third submission of Mr. Mukherjee was that the omission on the part of the P.W.5 to disclose the following fact to the I.O. is very material.

The relevant evidence of P.W.5 in this regard is as follows:-

Fact that I did not tell before the I.O. that on the following morning at about 6 a.m. I called P.W.1 and reported him the matter, that I found the

food of the victim was as it was in his room, that my grandson Animesh reported to her at the time that both the accused called away the victim to

the opposite side of the Ganges in a boat, that the victim had no talking terms with accused persons, that after the theft of motor pump, both the

accused started talking with the victim.

31. We are unable to see any substance in the submission because the P.W.1 has disclosed this aspect of the matter in his evidence in great detail

and it is quite likely that when the P.W.1 has said all these things to the I.O. they were not repeated by the mother.

32. The fourth submission made by Mr. Mukherjee was that the P.W.6 deposed that the accused, the victim and the P.Ws.6 and 11 had crossed

the river by a boat belonging to Ashit Sarkar. But Ashit Sarkar has not been examined. We already have noticed above that the wife of Ashit

Sarkar was examined as P.W.7. The statement made by the P.W.7 to the I.O. has also been noticed hereinabove. During the trial she turned

hostile.

33. Fifth submission made by Mr. Mukherjee was based on the following portion of the evidence of the P.W.6.

Panchu went there for bringing his bull-ox and I went there to see my jute-field. The direction to which both the accused and the victim proceeded

was infested with bush which is opposite to the proposed plant of CESC. I along with Panchu returned to our side at about 5.30 p.m. While we

were proceeding towards the opposite side of the ganges, the victim was wearing a lungi and had a napkin with him. We returned but since then I

never saw Paritosh.

34. Mr. Mukherjee contended that P.W.6 in his cross-examination admitted that most of the aforesaid part of the evidence he had not disclosed to

the I.O. This part of the evidence of the P.W.6 which according to Mr. Mukherjee was not disclosed to the I.O. has been proved by other pieces

of evidence. P.W.2 has deposed that the other side of the river where the Char is situate there are bushes and there are some cultivable land.

P.W.1 has deposed that jungle start from the bank on the opposite of the river. He further has deposed that the body was found on the other side

of the river at a place which is at a distance of half kilometer from the place where the plant of CESC was inaugurated on 19th May 1995. P.W.5

has deposed that while the victim was leaving the house ""he was wearing a lungi and he had a napkin"". Therefore the omission if any on the part of

P.W.6 to disclose his entire evidence to the I.O. is not fatal.

35. Sixth submission made by Mr. Mukherjee was that the P.W.11 in cross-examination admitted that he had not told the I.O. that after arrival at

the opposite side of the river he went to bring back his bull-ox and P.W.6 had gone to see his jute-field. We do not think that this omission is really

material or can affect a decision to be made in this case.

36. In his seventh submission Mr. Mukherjee next drew our attention to the following portion of the evidence of P.W.16:-

Fact that P.W.11 Panchu did not tell before me that he grazes cows of Gopal Saha at Bhabanipur char on the opposite side of the Ganges, or that

both the accused with Paritosh went towards the jungle to the east and he himself and P.W.6 went towards the camp, or that after arrival on the

opposite side and before leaving them accused Shayamal prohibited them to take the boat and that the victim was wearing a lungi and he had a

napkin with him at the time.

37. Mr. Mukherjee contended that it would appear from this part of evidence of P.W.16 that the entire evidence was withheld by the P.W.11. We

are unable to see any such thing from the paragraph to which our attention was drawn and which we have set out hereinabove. The fact that the

accused took the victim to the other side of the river is not deposed to have not been told. In other words it does not appear from the paragraph

extracted above that the I.O. was not told that the victim was taken by the accused persons to the other side of the river. This, as a matter of fact,

has been firmly established and we need not dilate on that.

38. Eight submission of Mr. Mukherjee was that the prosecution has relied on the evidence of P.Ws.1,5,6,11 and the C.W.1. He submitted that all

of them are near relations and therefore conviction cannot be recorded on the basis of partisan witnesses. We are unable to accept this submission.

P.W.6 is not a relation of the victim nor is the P.W.11 nor is the P.W.2 nor is the P.W.15 nor is the P.W.16. It is also not correct to say that the

prosecution is relying only on the evidence of P.Ws.1,5,6,11 and the C.W. No. 1. Prosecution is relying on the evidence adduced as a whole and

we are convinced that the evidence viewed as a whole has a ring of truth which goes to establish, with the help of the law discussed above, beyond

any reasonable doubt that the accused persons murdered the victim.

39. Ninth submission of Mr. Mukherjee was that according to C.W.1 the victim before he was taken away by the accused persons was talking to

Gopal Saha but Gopal Saha has not been examined nor was any of the labourers working in the project of CESC was examined. Absence of

Gopal Saha from the box is not material because the fact that the accused persons took away the victim to the other side of the river has been

firmly established. The non-examination of the labourers of the project is also not material in our view because the dead body was found at a place

which is half kilometer away from the place where the project of CESC was inaugurated on 19th May 1995. Moreover, it is also not true that no

attempt was made by the prosecution to bring someone from the project. As a matter of fact, General Manager of Indian Roadways Corporation

Limited was examined as P.W.12. He deposed that all the articles were supplied by them to the CESC Limited during the inaugural function. He

however could not remember after such a long time whether two steel chairs which were used for the purpose of killing the victim had been

supplied by them.

40. Tenth submission of Mr. Mukherjee was that except for the fact that the victim and the accused were last seen together there is no other

reliable evidence. It can be pointed out that last seen together in a lonely place where the victim was put to death shortly or immediately after the

accused were seen together with the victim coupled with no explanation by the accused whatsoever goes all the way to prove the case of the

prosecution. The possibility of the victim having been killed by any other is simply not there.

41. Mr. Mukherjee relied on a judgment in the case of State of U.P. vs. Satish reported in 2005 SCC (Cri) 642. He drew our attention to

paragraphs 21 and 22. Paragraph 21 of the said judgment has no manner of application because in this case it has been firmly established that the

accused and the deceased were last seen together immediately before the victim was killed. Paragraph 22 of the judgment far from helping the

accused helps the prosecution. Paragraph 22 of the judgment reads as follows:-

The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and

when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes

impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and

possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased

were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the

deceased and the accused were seen together by witnesses PWs 3 and 5, in addition to the evidence of P.W.2.

42. Another judgment cited by Mr. Mukherjee in this regard is Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, which

is also reported in the SCC(Cri). This judgment has reiterated the view of the Apex Court noted earlier.

43. Next judgment cited on this point is the judgment in the case of Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, . In this

case also the law as regards last seen together noticed above by us was reiterated.

44. As regards admissibility of the evidence of a child witness Mr. Mukherjee relied on the judgment in the case of State of U.P. Vs. Ashok Dixit

and Another, . In paragraph 9 of the judgment the following view was expressed.

Law is well settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy

prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on. [see Panchhi and others

Vs. State of UP,]

45. It may be pointed out that the CW 1 Animesh has corroborated the evidence of P.Ws.1,6 and 11. Conversely evidence of the C.W.1 has

been corroborated by the P.Ws.1,6 and 11. On the top of that, considering that Animesh was a child he was not cited as a witness by the

prosecution. He was called to give evidence only when the I.O. was suggested that Animesh was a material witness. The prosecution then took the

permission of the Court and the Court chose to examine the child as a court witness. Therefore the criticism now sought to be advanced is not well

founded. Moreover, the evidence of C.W.1 does not go to show that the child was not capable of following the question and giving a rational

answer nor does his evidence appear to be tutored.

46. Mr. Mukherjee cited a judgment in the case of Joseph @ Jose vs. State of Kerala reported in 2004 SCC (Cri) 93. He drew our attention to

paragraph 16 wherein Their Lordship upheld the submission of the Counsel that an eyewitness who kept silent for a very long period and did not

disclose the fact that he was an eyewitness to the brother of the deceased for a very long time is likely to be viewed with suspicion. We fail to

understand the applicability of this judgment to the facts of this case nor did Mr. Mukherjee make any attempt to show that this judgment has any

applicability to the facts and circumstances of this case. This would certainly not apply to C.W.1 who was called after the defence insisted that he

was a material witness.

47. All the points urged by Mr. Mukherjee have thus been disposed of. We are firmly of the view that the prosecution has been able to prove

beyond any reasonable doubt that the victim was murdered by the accused persons. The lack of harmony between the evidence of P.Ws.1 and 5

opined by the learned Trial Judge is without substance for he failed to see that both the witnesses suggested that on the date of incident the victim

and the accused persons were on talking terms.

48. What remains is the question of motive which weighed with the learned Trial Judge. It is now well settled that motive need not be proved.

Reference in this regard may be made to the judgment in the case of The State of Madhya Pradesh Vs. Digvijay Singh, . In paragraph 18 Their

Lordship expressed the following view.

It may be that the prosecution was not able to prove the motive for the crime, but that could not possibly matter when the circumstantial evidence

on the record was sufficient to prove, beyond any doubt, that it was the respondent and no one else who intentionally caused the death of Smt.

Tulsa Bai.

49. Reference may also be made to the judgment in the case of Mulakh Raj, etc. Vs. Satish Kumar and others, . In paragraph 17 Their Lordship

expressed the following view.

The question then is, who is the author of the murder? The contention of Sri Lalit is that the respondent had no motive and the High Court found as

a fact that the evidence is not sufficient to establish motive. The case is based on circumstantial evidence and motive being absent, the prosecution

failed to establish this important link in the chain of circumstances to connect the accused. We find no force in the contention. Undoubtedly in cases

of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to

unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to

prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no

motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with

the crime, nor militates against the prosecution case.

50. We are therefore of the opinion that the learned Trial Judge fell into a grievous error in holding that in the absence of any evidence as regards

motive the accused persons could not be held guilty.

51. Mr. Mukherjee, learned Advocate for the respondents relied on a judgment in the case of Tanviben Pankaj Kumar Divetia Vs. State of

Gujarat, . Our attention was drawn to the paragraph 37 of the judgment. Even in that paragraph Their Lordship held that conviction can be based

even if the motive is not established provided the evidence of murder is reliable. We already have assessed the evidence applying the law laid

down by the Apex Court and are fortified in our view that failure on the part of the prosecution to establish motive on the part of the accused could

not have thrown over board the case of the prosecution.

52. All the points are thus answered. The appeal is allowed. The respondents are convicted u/s 302 read with section 34 IPC. They are however

acquitted of the charge u/s 364. We have enquired of Mr. Mukherjee as to his submission on the question of punishment to which he submitted

that the accused person could not be held guilty u/s 302 IPC. Should this Court hold them guilty u/s 364, a lenient punishment should be inflicted.

Since we have held them guilty u/s 302 IPC read with Section 34 of IPC, the minimum punishment which can be inflicted is imprisonment for life as

also to pay fine of Rs. 5000/- each. The respondents are therefore sentenced to undergo imprisonment for life as also to pay fine of Rs. 5000/-

each in default to undergo rigorous imprisonment of one year each. The respondents are directed to forthwith surrender before the Trial Court to

serve out the rest of the sentences.

53. Lower Court Records with a copy of this judgment be sent to the learned Trial Court as soon as possible for necessary information and action.

Compliance report be submitted within one month.

54. Urgent Xerox certified copy of this judgment be supplied to the learned advocates for the parties, if applied for, on compliance of all

formalities.

Kishore Kumar Prasad, J.

55. I agree.