(2007) 10 CAL CK 0041

Calcutta High Court

Case No: Criminal Application No. 2 of 2007

Agnel Kujur		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Oct. 15, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164, 215, 228, 313
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 201, 302

Citation: (2008) 1 CHN 860

Hon'ble Judges: P.S. Datta, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: Shankar Rao, for the Appellant;S.K. Mandal, for the Respondent

Final Decision: Dismissed

Judgement

Kalyan Jyoti Sengupta, J.
This appeal assails judgment of conviction and sentence dated 21st May, 2007 passed by the learned Sessions Judge, A & N Islands. The appellant was arraigned with charges under Sections 302 and 201 of the Indian Penal Code, for committing murder of one Julia Barua, since deceased, and for causing disappearance of evidence. The learned Trial Judge convicted him u/s 302 IPC, however, there has been acquittal u/s 201 IPC.

2. The short facts for which the appellant stood for trial are stated hereunder:

One Nisdor Kindo, P.W.1, the then Up-Sarpanch of Kishori Nagar Gram Panchayat on receipt of an information at Kishori Nagar from one Neelratan Mondal, Up-Pradhan of the same Gram Panchayat about murder of Julia Barua, wife of Marshal Xalxo, returned to his village Parangara and met the husband of the deceased. He with said Marshal Xalxo and two or three other persons of his house

had been to a nallah (small canal) where they found the deadbody of Julia Barua and discovered cut injuries on her neck and also other parts of her body. Thereafter, he narrated the matter to police official (P.W.13), one Rameshwar Singh who recorded the statement of P.W. 1 and formally prepared and wrote out First Information Report. The body was recovered and sent for post-mortem examination. One Dr. Ashok Pal Govind, P.W.12, conducted the post-mortem examination and before that there has been inquest of the body and report thereof done and prepared by Shaukat Hussain (P.W.14). In the post-mortem report it was found that the said Julia Barua sustained severe injuries inflicted by sharp weapon. These are ante-mortem in nature and these had resulted death. The Investigating Officer, P.W.14, took statements of the relevant persons including P.W.7 and P.W.8 u/s 161 of the Code. The P.W.14 seized blood-stained soil and control soil, wearing apparel of the deceased. The appellant was arrested on 22nd April, 2003. While he was being interrogated, he is said to have made extra-judicial confession in presence of P.W.10, N.K. Talukdar, the Pradhan, and P.W.11, Nil Ratan Mandal that he had killed Julia with "Dau" which he could bring and produce from the house of his acquaintances. Being prompted with this statement the I.O. in presence of P.W.10 recovered with the help of the accused the offending weapon, the clothes he wore on the eventful day which were blood-stained. Those materials were seized and preserved by the I.O.

3. In order to substantiate the charges the prosecution examined as many as 14 witnesses and also produced material and documentary evidence. One of the witnesses namely Josphin Minj, P.W.7, was cited as eye-witness of the incident. One Augustin Lakra, P.W.8, one of the prosecution witnesses was declared hostile for trial, so he was cross-examined with the leave of the Court. Out of fourteen witnesses two (P.W.3 and P.W.11) were tendered for cross-examination.

4. The defence did not cite any witness nor any specific defence of alibi was taken. On reading the trend of cross-examination and answer to questions u/s 313 of the Criminal Procedure Code it appears that the appellant pleaded innocence.

5. In this appeal, the question is whether the learned Trial Judge has convicted and sentenced the appellant on receipt of evidence which proves the guilt of murder beyond reasonable doubt.

Learned Counsel for the appellant has taken a technical point that in the charge it has been mentioned that the incident occurred on 21st April, 2003, whereas in the evidences and the statements of all persons, namely prosecution witnesses, it will reveal that incident took place on 20th April, 2003. Therefore, the charge is not proved. On this point, Mr. Mandal, learned Public Prosecutor, submits before us that this point was never agitated nor suggested before the learned Trial Judge and for the first time such plea has been taken and this should not be allowed to be raised at this stage.

6. We have considered the contention of both the learned Counsel on this preliminary issue. We find upon examining the records that the chargesheet was filed by the prosecution mentioning 20th April, 2003 being the date of occurrence, so it was the duty of the learned Trial Judge to frame the charge taking note of the date mentioned in the chargesheet and also examining the other materials filed with charge. According to us, the framing of charge is based upon the chargesheet filed by the prosecution with the materials supporting such charge and this is obvious in real purport of Section 228 of the Code. Mr. Mandal has rightly said that this point was never agitated nor even suggested by the appellant/accused at the time of framing charge when it was read over nor at the subsequent stage. In our view it is not done obviously by reason of the fact that the appellant was not misled. Before us this plea, in our view, is an afterthought. In any view of the matter by virtue of Section 215 of Criminal Procedure Code the aforesaid error in charge can be corrected reading 20th April, 2003 in lieu of 21st April, 2003. In order to appreciate the position in a better way we set out Section 215 of the Criminal Procedure Code:

215. Effect of errors.- No error in stating either the offence or the particulars required to be stated in the chargesheet and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

7. In this case, there could not and cannot be any occasion for failure of justice as the copy of the chargesheet was supplied along with the other accompanying documents, so accused was made aware of the incident as well as date. This defect in framing charge is of no consequence in view of the aforesaid provision. We thus reject this plea.

8. Learned Counsel for the appellant submits on merit that it is true that there has been an unnatural death of elderly lady, Julia Barua. But the prosecution has failed to prove that appellant was involved in this incident. He submits that none of the witnesses except P.W.7 has said that appellant has killed the deceased. The P.W.7 is alleged eye-witness who has stated about involvement of his client. He says that if her evidence is carefully read it will appear the same is totally unreliable because of serious contradiction by omission. It is surprising that after the alleged incident on her return to the house of her father she did not narrate this horrible incident and the same is contrary to normal human control. She only told about the alleged attempt of molestation.

9. In the cross-examination, she had said that she never saw the appellant. Then how it is possible to accept her testimony that the appellant inflicted injuries and consequently killed. She had further stated that even after having received the fatal blows the deceased raised alarm saying "Bachao Bachao". It is absolutely unnatural having regard to the opinion of the doctor expert, that anyone could speak any

word after having received such fatal blow on neck as she could not have any strength or ability to speak or to sound voice. This serious contradiction which gives rise serious doubts in reality of testimony has been overlooked by the learned Trial Judge.

Evidence regarding extra-judicial confession cannot be relied on under the law as such alleged confession was made before and/or under custody of the police and u/s 27 of the Evidence Act the same cannot be accepted nor relied on. Other alleged material evidence namely the blood stained clothes and the motive are wholly insufficient to record conviction of murder. When eye-witness is proved to be worthless other relevant persons who could narrate real fact were not cited or brought as witness.

10. Mr. support of his submission he has relied on the following decisions of the Supreme Court reported in AIR 1977 SC 1753 , Narsinbhai Haribhai Prajapati etc. v. Chhatrasinh and Ors. 1983 (7) ACR 222 (SC) State of Punjab Vs. Rakesh Kumar @ Painta, .

11. Mr. Mandal, learned Public Prosecutor, in support of the judgment submits that the fact finding of the learned Trial Judge is compact basing unerring appreciation of evidence, this Court in exercise of appellate jurisdiction should not interfere with the same as findings and appreciation of the evidence of the learned Trial Judge are neither perverse nor absurd. In this case the factum of unnatural death of Julia Barua has been established without any doubt. After arrest of the accused, incriminating materials and offending weapon were discovered and the same could be done on the basis of the statement made by the accused. Indeed, the accused himself brought out the incriminating materials namely his own wearing apparels with blood-stain which were worn by him on the eventful date and the offending weapon with blood stain used by him from hidden place. He himself handed over the same to the Investigating Officer in presence of independent witness P.W.10. The accused himself made extra-judicial confession in presence of the P.W.10. The wearing apparels of the deceased with blood-stain were examined by the chemical examiner. The wearing apparels of the accused and the offending weapons were also chemically examined and the blood found on those materials were of the same group of blood with that of the wearing apparels of the deceased. It has been proved by the testimony of P.W.2, P.W.3, P.W.4 and P.W.9 that the deceased went for bathing to the tank at about 9.30-10.00 a.m. in the morning. Therefore, the probability of the deceased being present at the place of occurrence is proved without any shadow of doubt. Her deadbody was recovered from a place at little distance of the tank and this has been proved by the evidence of P.W. 14, P.W.1 and P.W.10. He further submits that the evidence of the eye-witness P.W.7 has proved entire killing exercise of the appellant and her evidence except some insignificant contradiction remained unshaken in the cross-examination. Besides, unbroken chain of events constituting the circumstances leading to the occurrence of such

murder had been proved by independent witness namely P.W.4, P.W.5 and P.W.9. It is true that there are few relations of the deceased who have deposed but their testimony cannot be brushed aside because of relationship. In support of his submission he has relied on a number of decisions of the Supreme Court and the High Courts which are as follows:

(1) 1985 CrI. LJ 114 (Kerala) (Dillep Kumar and Ors. v. State of Kerala);

(2) Mangilal Vs. State of Rajasthan and Another, ;

(3) Shri Dnyaneshwar '' Deepak Vithal Khulpe Vs. State of Maharashtra, ;

(4) Amitsingh Bhikamsing Thakur Vs. State of Maharashtra, ;

(5) Syed Ibrahim Vs. State of Andhra Pradesh, ;

(6) Bijoy Singh and Another Vs. State of Bihar, ;

(7) 2001(2) SCC 205 (Guru Singh v. State of Rajasthan);

(8) Prithviraj Vs. State of Rajasthan, ;

(9) State of Karnataka Vs. Vedanayagam, ;

(10) State of Madhya Pradesh Vs. Dharkole @ Govind Singh and Others, ;

(11) Sandeep Vs. State of Haryana etc. etc., ;

(12) 1986 CrI. LJ 239 (Guj) (State of Gujarat v. Kathi Ramku Aligh Bahai);

(13) 2006 CrI. LJ 3984 (GUI) (Tapas Shil v. State of Tripura);

(14) Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, ;

(15) State of Maharashtra Vs. Damu Shinde and Others, .

12. We have gone through the records, read evidence and heard the contentions of the learned Counsel for both the parties. We have given our best consideration to the fact and circumstances of this case. While doing so, we are of the view that the judgment recording conviction of the learned Trial Judge does not call for any interference for the reasons stated hereunder.

13. In order to ascertain correctness of finding of the learned Trial Judge we read testimony of the witnesses cited by the prosecution and have examined other evidence both oral and documentary and also have gone through the answers given by the accused to the questions put by the learned Trial Judge u/s 313 of the Code. The P.W.I beyond any doubt had proved the fact that he had received the information of unnatural death of Julia Barua and informed the police thereafter. He had been to the house of Marshal Xalxo, the husband of the deceased at village Parangara. He along with two other persons including the husband of the deceased found the deadbody of Julia Barua and found injuries on the left side of her neck

and other places over the deadbody. The P.W.2, Smt. Sushila Kujur, though related to the victim had proved the fact that she had seen at about 9.30 a.m. Julia Barua (deceased) proceeding towards a ''dighi'' (tank) for bathing and at that time she was carrying bucket and wearing apparels. She had also proved that at about 10.00 a.m. her two daughters went for bathing to the same tank. She had proved also that appellant along with P.W.8, Augustin Lakra, at that point of time had been at her house when they were observing the Easter Festival from eight O'' clock in the morning till afternoon. She deposed that appellant and Augustin left the house for bringing water from the same tank. Her two daughters came back and younger one came earlier than elder one namely Josphin Minj, P.W.7, after sometime came back weeping and after some time after her return she told her that appellant teased and dragged her grabbing her hands. On that day Julia Barua was not traceable. P.W.4, Josphin Barua, who was one of the neighbour proved that she was invited in the celebration of Easter in the house of Gabriel Minj, the husband of Sushila Minj. She along with her husband and son Ajit had been to share celebration. She had proved that appellant despite her objection took away bucket and ''Sanga'' (balancing stick for carrying weighty material) and they did not return the same. Subsequently, at about 4.00 p.m. on the same day her son brought back ''Sanga'' and ''Balti'' from the side of the water tank. Her evidence appears to us quite natural and cross-examination hardly affected her evidence. Her son P.W.5, Ajit Kindo, had proved that he brought back at 4 p.m. ''Sanga'' and ''Balti'' from the same tank to corroborate her mother''s version. He also corroborated her mother''s version of attending Easter celebration at the house of Sushila and Gabriel.

14. P.W. 1, the sole eye-witness Josphin Minj had proved the fact that on 20th April, 2003 there was Easter eating arrangement in the house of her parents. At about 10 a.m. she along with her younger sister Jayamanthi had been to the said tank. At that time several guests amongst others Augustin Lakra (P.W.8), appellant were taking food in their house. After reaching the tank she found grand-mother Julia Barua (deceased), her younger sister finished bathing first, thereafter she started taking bath. At that time, appellant along with P.W.8 came to the said tank with ''Sanga'' and bucket. The appellant thereafter caught hold other hands and started dragging her. She raised alarm. P.W.8 came to save her and he was threatened by the appellant with dire consequences and he was asked to leave the place and he withdrew from the place. Having found herself helpless she asked for help of her grand-mother, Julia Barua (deceased). She immediately responded to the call of P.W.7. The deceased resisted the appellant. Having been resisted the appellant all of a sudden brought out a sharp weapon (dau) from inside his wearing apparels. She testified that appellant thereafter inflicted blow on the neck of the deceased, then again he inflicted blow on the left shoulder and there was a profuse bleeding and Julia immediately collapsed. Having received the first blow she had said Julia raised alarm for her rescue. After having seen this occurrence she left for home. She immediately could not tell this incident in fear for safety of the members of the

family. She identified wearing apparels worn by the appellant on the fateful day. She also identified the offending weapon used for killing the victim. The statement of P.W.7 had also been recorded u/s 164 Cr.PC before the learned Judicial Magistrate. We have carefully perused cross-examination of this witness and we find that there are little contradictions but reading the whole of it these are not relevant and do not affect the prosecution case in any manner. Her cardinal version of witnessing slaughtering exercise of appellant remain unshaken and do not lead to incredibility. We are unable to accept the submission of the learned Counsel that her evidence should not have been believed as she did not mention the fact to her mother immediately. She had explained way she did not narrate immediately the fact of murder. It is too much to expect in ordinary course of event that a helpless woman in a lonely village could mar shall courage to tell the horrifying incident of ruthless killing to anyone else. It is quite natural for her being panic stricken not to divulge when she found that a man namely Augustin could have helped her on the spot but he even with fear refused to help her and weak saviour being slaughtered, as she had reasonable belief that in the event this incident is told to anyone else their lives could be at risk. It is true that Julia was related to P.W.7 but this relationship in a matter of this nature does not affect in law the true version of the P.W.7. Relationship does not always lead to establish that she is a partisan witness. In the case of Amitsingh Bhikamsing Thakur Vs. State of Maharashtra, , the Supreme Court in para 21 has observed that merely because the witness is related to the deceased his evidence cannot be rejected. We, while respectfully following this statement of law would like to add that whole object of the Court is to find the truth. If the truth is revealed by any witness otherwise competent truthful version cannot be brushed aside because of the relationship. Only consideration for acceptance is care and caution. It is also settled legally that an interested person cannot be easily accepted as witness unless he or she is corroborated. Here we taking care and caution find that corroboration of the evidence by the circumstances is so solid and consistent that no one can ignore nor can raise any doubt to reject it.

15. P.W.8, Augustin Lakra, though cited witness but he turned hostile. Before he came to Court for a testimony he made a statement u/s 164 of the Criminal Procedure Code before the learned Magistrate at Mayabunder. Initially he denied having put any signature on the statement recorded by the learned Magistrate and on the subsequent date his signature was examined and compared by the expert. On subsequent date of his deposition this hostile witness accepted that what he stated before the learned Magistrate was true. In his evidence he had said that on the eventful date namely 24th April, 2003 he was present at the house of Gabriel and he had taken meal at the house of Gabriel. He had also seen Bipin, Pradeep and other persons. But he did not say about the occurrence of murder where he was stated to have been present. He did not say in the Court about the fact of teasing and dragging of P.W.7 by the appellant. The learned Counsel for the appellant says that testimony of the hostile witness should not be accepted. Actually nothing had

happened as narrated by the prosecution, otherwise this person would have told the fact before the Court. We are of the view that the entire evidence of the hostile witness P.W.8 should not be discarded as by this time it has been settled law that evidence of the hostile witness which is otherwise acceptable can be accepted and can be taken note of it. This proposition of law which was settled long time back and has again been repeated in the case of Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, . In his evidence he had said that whatever he had stated before the learned Magistrate u/s 164 Cr.PC is true though he had not admitted having signed the statement but he did not deny at the same time. The statement made by accused u/s 164 Cr.PC cannot be accepted at all if the same is denied by him. But a statement made by witness before the learned Magistrate u/s 164 Cr.PC if denied later on cannot be thrown away as a matter of course, as this statement unlike in case of accused will not lead to his conviction. When he admits that he has made a correct statement before a Magistrate such statement has to be accepted as an evidence irrespective of non-acceptance of signature. The contents of the statement had been noted by us and it has not only proved the fact what prosecution has narrated but the same also corroborates the version of P.W.7. Smt. Bernadith Xalxo, P.W.9 has proved that her mother-in-law (deceased) at about 10 a.m. went to the tank for bathing but she did not return till 2 O'' clock. She went to search for her, she could not find her. She found soap, ''baiti'' (bucket) and clothes lying there. She reported this incident to her husband and her father-in-law who thereafter went for searching her on the same date. She could not be traced on 20th itself. On the following day the body of her mother-in-law could be recovered from a dry small canal. She came back collecting bucket, soap and clothing from the tank, which were taken away by her mother-in-law. It is commented by the learned Counsel for the appellant that her testimony should be disbelieved as she could not find any blood at the spot. It appears from the evidence that she was not killed at the place of bathing wherefrom the materials were collected by P.W.9. The murder took place at a some distance from bathing place. Therefore, it is unlikely that she will find blood or mark of blood at the bathing place. At that time one could not reasonably conclude that she had been killed or she died with bleeding injury. P.W.10, N.K. Talukdar, the then Pradhan of Kishori Nagar Gram Panchayat has testified that having heard the news of murder he had been to the spot and at the dry canal he found the female deadbody lying. He said P.W.8 (hostile witness) led I.O. and him to reach the spot. He also found cut injuries over the said deadbody. On 22nd April, 2003 he had been to the police station and found that the appellant was in police custody. At the police station appellant confessed in his presence that he had killed Julia. He had also confessed that the offending weapon by which he murdered and the wearing apparels which were worn by him at the relevant time were kept in the house of Bipin Dung Dung and those wearing apparels and the offending weapon were kept inside a room in the house of Bipin. He has testified that the appellant thereafter left with SHO to the house of Bipin and then appellant himself brought out the said wearing apparel and the offending weapon from the house of Bipin. He

has said that at that time he found the said offending weapon was stained with blood and wearing apparel namely banian and ash colour shirt and one jeans pant were also stained with blood. The police seized those materials.

16. P.W.12, the Medical Officer, who conducted post-mortem examination has testified that the injuries were ante-mortem in nature.

17. The Investigating Officer, P.W.14 has stated that he did everything. He collected all the material evidence namely wearing apparels of the accused as well as the victim and the offending weapon having blood-stain and he sent for the chemical examination of the blood found on the wearing apparels of both the persons and also the earth. He collected this report from the Central Forensic Laboratory. While summing up recorded evidence as above it emerges without any doubt or possibility that appellant while remaining present at the house of the parents of P.W.7 at about 10 a.m. on the date of occurrence noticed P.W.7 was going to tank for bathing, he went out with his evil object of fulfilling his carnal desire with pretext to fetch water to reach the pond. In order to demonstrate semblance of bona fide for going to pond, he procured bucket and Sanga from another by force. The victim lady went for bathing at the same very tank. The appellant with P.W.8 reached the pond and grabbed the hands of P.W.7 and started dragging her with an intention to fulfill his evil design in presence of P.W.8 who fled away on threat and in fear. Then the victim came for rescue and the accused releasing P.W.7 started assaulting victim fatally. No second person apart from appellant was suggested to be present. P.W.8 helped I.O. & P.W.10 to identify the spot where the victim was killed. After arrest the statement of accused helped recovery of offending weapon with bloodstain and his own blood-stained wearing apparels. It thus clear this sequence of event leads to conclude none but accused had done away with innocent aged lady by way of retribution for her lawful prevention against attempted rape or outraging of women modesty.

18. In the premises the decisions of Supreme Court reported in 1983 (7) ACR 222 (SC) cited by the learned Counsel for the appellant are not applicable. The principle laid down is to be applicable if the facts mentioned in judgments are found to be similar and identical, unfortunately for the appellants we do not find so.

19. In view of the aforesaid evidence we are of the view that the Trial Judge has correctly appreciated evidence and reached just conclusion.

20. It is true that there is only one eye-witness but her evidence is good enough. The evidence of the witness has been corroborated by the statement of the hostile witness and other witnesses and particularly, the report of the chemical examination made by Central Forensic Science Laboratory. Taking together it is sufficient to prove the case of prosecution. The reports say that nature and group of the blood found on wearing apparels of the deceased and those of appellant seized, and offending weapon are identically same and there is no suggestion contrary to

what was in the report.

21. Therefore, we do not find any substance in the appeal and we dismiss the same and affirm the judgment and conviction of the learned Trial Court.

22. Send down the LCR with copy of this order to the learned Sessions Judge, A & N Islands, Port Blair for information.

23. Let another copy of the judgment be sent down to the Superintendent of Jail/Correctional Home, Port Blair for information.

P.S. Datta, J.

24. I agree.