

(2014) 09 CAL CK 0124
Calcutta High Court
Case No: C.R.A. 418 of 2012

Pankaj Biswas

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Sept. 18, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313, 437A
- Evidence Act, 1872 - Section 10, 30
- Medical Termination of Pregnancy Act, 1971 - Section 7(3)
- Penal Code, 1860 (IPC) - Section 109, 120B, 201, 302, 314

Citation: (2015) CriLJ 3467 : (2015) 4 RCR(Criminal) 602**Hon'ble Judges:** Joymalya Bagchi, J**Bench:** Single Bench**Advocate:** Rajdeep Majumder and Bandibrata Dutta, Advocate for the Appellant;
Rituparna Dey (Ghosh), Advocate for the Respondent**Final Decision:** Allowed

Judgement

Joymalya Bagchi, J.

The appeal is directed against judgment and order dated 14.06.2012 passed by the learned Additional Sessions Judge, 2nd Fast Track Court, Cooch behar, inter alia, convicting the appellant for commission of offence punishable u/s 314 of the Indian Penal Code read with section 7(3) of the Medical Termination of Pregnancy Act, 1971 and u/s 201 of the Indian Penal Code sentencing him to suffer rigorous imprisonment for five years and to pay fine of Rs. 10,000/- in default to suffer simple imprisonment for six months more for the offence punishable u/s 314 read with section 7(3) of the Medical Termination of Pregnancy Act, 1971 and also sentencing him to suffer simple imprisonment for two years and to pay fine of Rs. 5000/- in default to suffer simple imprisonment for two months more for the offence punishable u/s 201 of the Indian Penal Code, both the sentences shall run

concurrently.

2. The prosecution case as alleged against the appellant and other accused persons is that one Premananda Brojabashi of village Uchal Pukury was a Yogi. He had many disciples in the village. De facto-complainant, namely, Haro Kumar Roy, PW -1, and his family members were followers of Yagi Khudiram Brojabashi. Premananda Brojabashi was also a follower of Khudiram Brojabashi and was a "Gurubhai" to the de facto -complainant and his family members. When Khudiram Brojabashi left the village, de facto -complainant and his family developed close association with Premananda Brojabashi. Taking advantage of such association, Premananda Brojabashi developed illicit relation with Depali Roy, victim, the daughter of Haro kumar Roy and committed rape upon her at her house. The de facto -complainant came to know such incident when he threatened to inform the police, Premananda Brojabashi promised to marry Depali Roy, the victim. Depali Roy had become seven months" pregnant in the meantime. On 7.1.2006, Premananda Brojabashi along with his aunt, Jashomati Brojabashi took away Depali Roy on promise of marrying her. On 11.1.2006 around 7.30 p.m. Premananda Brojabashi along with Jashomati Brojabashi, Narkanta Roy and Manoranjan Barman brought the dead body of Depali Roy to the village and while they were proceeding to Asram, co-villagers restrained them. While being interrogated, they disclosed that Depali, the victim, had been taken to Dr. Pankaj Biswas, Medical Officer of Jamaladaha hospital for abortion. On 10.1.2006 around 12.30 a.m. Depali, the victim, was aborted in the house of Kundeswari Barman, Aya of the said hospital, by the appellant and expired as a consequence of such abortion on the said date. Pursuant to such written complaint lodged by PW -1, Haro Kumar Roy, Mekhliganj police station case No. 05/2006 dated 12.1.2006 u/s 302/314/34 of the I.P.C. was registered for investigation against Premananda Brojabashi, Jashomati Brajobashi and the appellant, Dr. Pankaj Biswas.

3. In conclusion of investigation, charge sheet was filed against nine accused persons including the appellant u/s 493/376/314/201 of the I.P.C. and 7(3) of the Medical Termination of Pregnancy Act, 1971. The case, being a sessions triable one, was committed to the Court of Sessions, Mekhliganj and transferred to the Court of learned Additional Sessions Judge, Cooch behar, for trial and disposal. Charges were framed under sections 376 against Premananda Brojabashi, u/s 314 read with section 7(3) of the Medical Termination of Pregnancy Act, 1971 against the appellant, u/s 314/120B I.P.C. against Premananda Brajabashi, Jushomati. Brojobashi and Narakanta Barman, u/s 109/314 of the Indian Penal Code against all accused persons (except Purneswari Barman) namely, Premananda Brojabashi, Jashomati Brojabashi, appellant Dr. Pankaj Biswas, Narakanta Barman, Manoranjan Barman, Tinku @ Sudip Sarker, Paltu @ Prasanta Kumar Sarkar and Papan @ Udayan Ghosh u/s 201 of the Indian Penal Code. In the course of trial, the prosecution examined as many as 13 witnesses and exhibited a number of documents. In the course of trial, accused Premananda Brojabashi expired.

4. In conclusion of trial, the learned Trial Judge by judgment and order convicted the accused Premananda Brajobashi, for commission of offence punishable u/s 417 of the Indian Penal Code and sentenced him to suffer simple imprisonment for one year and for commission of offence punishable u/s 201 of the Indian Penal Code and sentenced him to suffer simple imprisonment for two years and to pay fine of Rs. 5000/- each in default to suffer simple imprisonment for two months more and for commission of offence punishable u/s 314 read with section 120B of the I.P.C. and sentenced him to suffer rigorous imprisonment for five years and to pay fine of Rs. 10,000/- in default to suffer simple imprisonment for six months more, convicted the accused Jashomati Brajobashi, for the offence punishable u/s 314 read with section 120B of the Indian Penal Code, and sentenced her to suffer simple imprisonment for two years and to pay fine of Rs. 5000/- in default to suffer simple imprisonment for one month more and also convicted the appellant herein Dr. Pankaj Biswas, for commission of offences punishable u/s 314 of the Indian Penal Code read with section 7(3) of the Medical Termination of Pregnancy Act, 1971 and u/s 201 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for five years and to pay fine of Rs. 10,000/- in default to suffer simple imprisonment for six months more for the offence punishable u/s 314 of the I.P.C. read with section 7(3) of the Medical Termination of Pregnancy Act, 1971 and also sentenced him to suffer simple imprisonment for two years and pay fine of Rs. 5000/- in default to suffer simple imprisonment for two months more for the offence punishable u/s 201 of the I.P.C., all the sentences to run concurrently.

5. Jashomati Brajobashi was found not guilty of the offence u/s 201 of the Indian penal Code and the other accused persons, namely, Narakanta Barman, Monoranjan Burman, Tinku @ Sudip Sarkar, Paltu @ Prasanta Kr. Sarkar and Papan @ Udayan Ghosh were acquitted of the charges levelled against them.

6. Being aggrieved by such order and judgment for conviction and sentence, the appellant has preferred the instant appeal.

7. Mr. Majumder, learned counsel appearing for the appellant submitted that the conviction of the appellant is not based on legally admissible evidence. He submitted that evidence of PW-1 to PW-8 is hearsay in nature and could not be formed the basis of conviction. He further submitted that the Trial Judge erred in law in treating the statement of PW-13 recorded u/s 164 Cr.P.C. as substantive evidence although such witness did not support his statement u/s 164 Cr.P.C. while deposing in Court. He further submitted that there was no evidence on record to establish that the appellant had entered into conspiracy with other accused persons or played any role in the treatment or alleged abortion of the victim. He submitted that judicial confession of Monoranjan Burman (since acquitted) in the instant case was not believed by the trial judge being exculpatory in nature. He further submitted the statement of other accused persons before the villagers is also inadmissible against the appellant. Accordingly, he prayed for acquittal of the

appellant.

8. Mrs. Dey Ghosh, learned counsel appearing for the State submitted that there is sufficient evidence on record to bring home the prosecution case of the appellant. She submitted that other accused persons admitted before PW-1 to PW-8 that they had brought the victim, Depali Roy to Jamaladaha hospital for abortion by the appellant. It is on record that the said accused took the victim in the house of Purneswari Barman, Aya attached to the hospital, for abortion which was conducted by the appellant and as a consequence thereof the victim had died. She further submitted that the co-accused persons were in conspiracy with the appellant and such statement is admissible u/s 10/30 of the Evidence Act. She submitted that cross-examination of the hostile witnesses clearly show that they had supported the prosecution case in their statements recorded during investigation. The appellant had made false statement that he was not a medical officer attached to the said hospital u/s 313 examination is an added link to the circumstances which brings him home his guilt. She prayed for dismissal of the instant appeal.

9. The prosecution case against the appellant is to the effect that the victim, Depalil Roy, was brought to the hospital by Premananda Brajobashi, Jashomati Brajobashi, Narakanta Barman and Monoranjan Barman for the purpose of abortion. The appellant had referred her to the house of Aya, Purneswari Burman, and himself performed abortion on the victim in the said house on 10.01.2006 and as a consequence thereof the victim died. It appears from the evidence of postmortem Doctor, namely PW -17 that the following injuries were found upon the victim is as follows:

"On P.M. Examination I found one small injury, 1/6" tear at mid-line on perineum. The chambers of the heart were also empty. Uterus was slightly bulky with few bits of clots into the uterine cavity. The death took place about 24 to 48 hours back from the time of P.M. examination. My opinion was that the death was due to shock due to Uterine bleeding."

10. It is also deposed that such injury may be caused due to abortion. He has proved postmortem report as exhibit 14 and his reply to the questions by C.I.D. as exhibit 15. PW-26 stated that he was acting as superintendent and A.C.M.O.(H) of Mathabhanga S.D. Hospital at the material point of time. He stated that the appellant was a qualified Doctor and was attached as Medical Officer In-Charge of Jamaladaha P.H.C. from 7.1.2006 to 12.01.2006 and was not allowed to do private practice. PW-2 to PW-8 is relations and neighbours of PW-, brother of the victim, Depali Roy. PW-1 is also the de facto -complainant in the instant case. He has submitted that accused Premananada Brajobashi is a disciple of Yagi Khudiram Brojabashi. He also their "Guru". Premananda Brajobashi had developed an illicit relationship with Depali Roy, victim herein, and as a consequence thereof she had become pregnant. He deposed that on 7.1.2006 Premananda, Joshomoti had taken Depali on the pretext of marrying her. She was taken to Uchalpukuri Kalirhat Asram.

On 11.01.2006 at about 7.30 p.m. Premananda Brojabashi and Joshomoti Brojabashi brought dead body of the victim in an ambulance from Jamaldaha and after taking down the dead body of the victim from the ambulance near Bhotepatti hotel, they were taking the body to Asram in a rickshaw van when the local villagers accosted them. The witnesses were informed and they reached the place. Premananda Brojabashi told that his sister died because of heart attack. The local people pressurized that the victim could not have been died of heart attack. Then he narrated that Manoranjan Barman had fixed a doctor for abortion and they had taken Depali for abortion and as the abortion could not be done in the hospital, Depali was brought to the house of Kundewari Burman, Aya where Depali died. After hearing such information First Information Report was lodged which was scribed by one Anarul Md. PW -1 has proved the First Information Report as exhibit 1. He has also proved his signature on the inquest report as exhibit 2. PW -2 is the neighbour who corroborated the evidence of PW -1. He had stated that Premananda Brajobashi narrated while trying to abort the pregnancy the victim died at Jamaldaha hospital. PW -3 is also a neighbour who was also corroborated the evidence of PW -1. PW -4 is another neighbour. He also corroborates the evidence of PW -1. He stated that they became suspicious as they found blood on the legs of the deceased. Therefore the Premananda and Joshomoti narrated that Dipali had died while being aborted by the appellant in the house of Kundeswari Burman. PW -5 has supported the case of PW -1 and PW -4. His statement was corroborated before the learned Magistrate u/s 164 Cr.P.C. He has proved the signature on such statement. 11. PW -6 and PW -7 are also neighbours who corroborated PW -4 and state that they had made statements before the Magistrate.

12. PW-8 is the mother of Depali. She corroborated the prosecution case and stated that she had made the statement before Magistrate u/s 164 of the Code of Criminal Procedure.

13. PW -9 is the uncle of Depali who also corroborates the prosecution case. PW -9 to PW -14 are witnesses of Jamaldaha. They have not supported the prosecution case and have been declared hostile. In cross-examination they were confronted with their previous statements made to the Police Officer. They denied having made such statements.

14. PW -15 is the wife of rickshaw van puller whose rickshaw van was utilized to bring the dead body of Depali to the Ashram.

15. PW -16 is the scribe of the First Information Report.

16. PW -18 has proved the date of birth of the victim Depali.

17. PW -25 was the Magistrate who had recorded the statements u/s 164 of the Code of Criminal Procedure of various witnesses. He also recorded the confessional statement of accused Monoranjan Barman (since acquitted).

18. PW -27 is the Police Officer attached to Mekhliganj Police Station who held the inquest over the dead body of the victim and prepared the inquest report. He also seized the wearing apparels of the victim containing blood stains.
19. PW -28, PW -29 and PW -30 are the Investigating Officers of the case. It appears from the aforesaid evidence that the prosecution case suffer vital blow due to the fact that PW -10 to PW -14 did not support the same and were declared hostile.
20. Let me analyse the evidence of the witnesses from Jamaldaha who have turned hostile.
21. PW -10 stated she was residing within the compound of Jamaldaha Hospital. She claimed to know Purneswari Barman. She however did not support her earlier statement to the Police that a delivery patient had been brought to the Doctor and that abortion was sought to be conducted by the Doctor in the house of Purneswari Barman. In cross-examination by the defence, she denied any acquaintance with Purneswari Barman and stated that her house is far away from the residence of Purneswari Barman.
22. PW -11 Dilip Mitra is also a resident of Jamaldaha Hospital Para. He has admitted his signature on seizure list. However, he did not support the prosecution case and was declared hostile. He denied having made statement to the Police that the appellant had hired the ambulance of Jamaldaha Club for carrying a patient and that the patient was taken to the house of Purneswari Barman. In cross-examination by the defence, he stated that he had signed on blank papers.
23. PW -12 has a furniture shop at Jamaldaha Bazar. He also admitted his signature on the seizure list. However, he did not support the prosecution case that the appellant was involved in the business of illegal abortion.
24. PW -13 is the driver of the ambulance which is said to have carried the victim. He admitted his signature on the seizure list but did not support the remainder of the prosecution case. He admitted his statement before the Magistrate which was exhibited as Exbt. 18/1. In cross-examination, he stated that as per direction of the Police he made statement before the Magistrate.
25. PW -14 is the owner of a Medicine shop at Jamaldaha. He stated that the ambulance belonged to Jamaldaha Club and Pathagar and was let out to carry patients.
26. From the conspectus of the aforesaid evidence of PW -10 to PW -14 it is clear that the role of the appellant as the Doctor who was approached to conduct abortion of the victim and who in fact performed such abortion on her at the house of Purneswari Barman resulting in her death has not been established. I am in agreement with the submission of learned counsel for the appellant that statement recorded u/s 164 of the Code of Criminal Procedure cannot be treated as substantive evidence when the maker does not depose of such facts on oath during

trial. Hence, there is no direct evidence on record connecting the appellant with the alleged crime.

27. Faced with such a situation, Mrs. Ghosh strenuously relied on the evidence of PW-1 to PW-8 wherein co-accused persons, namely, Premananda Brajobashi and Jashomati Brajobashi had stated that they have taken the victim to the appellant and the appellant performed abortion on her resulting in her death. The co-accused persons have not admitted making such statement to the witnesses during their examination u/s 313 of the Code of Criminal Procedure. The version of such witnesses are therefore hearsay in nature.

28. The condition precedent to attract Section 10 of the evidence Act is succinctly laid down in [State through Superintendent of Police, CBI/SIT Vs. Nalini and Others](#), . Thomas, J. in the said report observed--

"The first condition which is almost the opening lock of Section 10 of the Evidence Act is the existence of "reasonable ground to believe" that the conspirators have conspired together. This condition will be satisfied even when there is some prima facie evidence to show that there was such a criminal conspiracy. If the aforesaid preliminary condition is fulfilled then anything said by one of the conspirators becomes substantive evidence against the other, provided that should have been a statement "in reference to their common intention". Under the corresponding provision in the English law the expression used is "in furtherance of the common object". No doubt, the words "in reference to their common intention" are wider than the words used in English Law."

"The basic principle which underlies in Section 10 of the Evidence Act is the theory of agency. Every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10, which is an exception to the general rule, while permitting the statement made by one conspirator to be admissible as against another conspirator restricts it to the statement made during the period when the agency subsisted. Once it is shown that a person became snapped out of the conspiracy, any statement made subsequent thereto cannot be used as against the other conspirators u/s 10."

29. It is therefore clear that there must be prima facie evidence to give rise to reasonable believe that conspiracy existed between the accused persons in the first place before any act done or said by a conspirator would bind the other. Secondly, such act must be done or words spoken by the conspirator in the course of conspiracy and not after the same had been snapped, e.g., a conspirator having been caught and is in the custody of the police.

30. No charge of conspiracy has been framed against the appellant. Even if such charge is presumed (as he is charged with the substantive offence while others having been charged with conspiracy to commit such offence) there is absolutely no independent evidence on record (except the purported aforesaid statement of the

other accused persons) to show that the appellant had met the other accused persons or there was any agreement halted amongst them and the appellant to commit the crime. In the absence of such evidence it cannot be said that the first condition, namely, there are reasons to believe that there was a conspiracy between the appellant and other accused persons is established. Secondly, it is doubtful whether after Premananda & Joshomati were detained by local people and were interrogated the conspiracy had continued so as to attract the theory of urgency so as to attract Section 10 of the Evidence Act. Hence, I hold that in the instant case as prosecution had failed to establish prima facie existence of conspiracy between the appellant and the other accused persons, namely, Premananda & Jashomati, the statement of such accused persons before villagers after being caught cannot be admissible u/s 10 of the Evidence Act against the appellant.

31. It has been argued that such statements were made by the co-conspirators is admissible u/s 10 of the Evidence Act. Section 10 of the Evidence Act reads as follows:

"10. Things said or done by conspirator in reference to common design. - Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

32. It is also argued that such statement of Premananda & Jashomati before the villagers be treated as extra judicial confession of co-accused and be used against the appellant. Firstly, co-accused Premananda & Jashomati have not supported making of such confession to villagers in their examination u/s 313 of the Code of Criminal Procedure.

33. It is settled law that confessions of a co-accused is a corroborative piece of evidence and cannot be the sole basis of conviction (See: [Kashmira Singh Vs. State of Madhya Pradesh](#), There is no evidence on record connecting the appellant to the abortion of the victim resulting in her death. Hence, he cannot be convicted on the basis of statement of a co-accused which has been retracted by them during trial.

34. Accordingly, I am of the opinion that the evidence of PW-1 to PW-8 with regard to complicity of the appellant in the alleged incident as transpiring from the mouth of the co-accused person cannot solely form the foundation of a finding of guilt against the appellant. The confessional statement of co-accused (Monoranjan Barman since acquitted) has not been believed by the Trial Judge being exculpatory in nature. Accordingly, such confessional statement is also of no help to the prosecution.

35. The prosecution case with regard to the role and participation of the appellant in the alleged crime, I am of the opinion that the prosecution case has not been proved at all on the basis of legally admissible evidence. No doubt there exists a strong suspicion against the appellant but suspicion howsoever strong cannot take the place of proof.

36. Accordingly, I am constrained to acquit the appellant of the charges levelled against him due to lack of cogent evidence. The judgment of conviction and sentence of the appellant is accordingly set aside.

37. The appellant shall be discharged from his bail bonds after six months from date in terms of Section 437A of the Code of Criminal Procedure, 1973.

38. The appeal is allowed.

39. Let a copy of the judgment along with the Lower Court Record be sent down to the trial Court at once.

40. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.