

(2016) 06 CAL CK 0059

CALCUTTA HIGH COURT

Case No: C.R.R. 1260 of 2001.

Ganesh Ch. Sau - Petitioner
@HASH The State

APPELLANT

Vs

RESPONDENT

Date of Decision: June 6, 2016

Acts Referred:

- Evidence Act, 1872 - Section 24
- Penal Code, 1860 (IPC) - Section 364, Section 365

Citation: (2016) 3 AICLR 727 : (2016) 4 CalCriLR 342

Hon'ble Judges: Joymalya Bagchi, J.

Bench: Single Bench

Advocate: Mr. Pratik Kr. Bhattacharyya, Id. Advocate, for the Petitioners; Mr. Anand Keshari, Id. Advocate, for the State

Final Decision: Allowed

Judgement

Joymalya Bagchi, J. - Judgment and order dated 12.03.2001 passed by the learned Additional Sessions Judge, 1st Court, Midnapore in Criminal Appeal No.1 of 1999 affirming the judgment and order dated 21.12.1998 passed by the learned Assistant Sessions Judge in ST Case No.XXXIII of Jan, 1998 and thereby modifying the judgment and order of conviction of the petitioner from Section 364 of the Indian Penal Code to Section 365 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay fine of Rs.1,000/-, in default to suffer simple imprisonment for six months has been assailed.

2. Prosecution case, as alleged, against the petitioner is to the effect that on 21.06.1988 the petitioner had taken the victim, namely, Jogeswar Das, being the father of the de facto complainant, from his residence to Calcutta. Thereafter, the victim did not return and a missing diary was lodged. Subsequently, the de facto complainant came to know from one Bijoy Kumar Das (PW.4) that the victim along

with the petitioner had been seen travelling in a bus towards Contai. It was further alleged that one Brajendra Pal (PW.2) told the de facto complainant that the petitioner had confessed to him that he had killed the victim by hired goons as he had misused his money.

3. Pursuant to investigation, charge-sheet was filed in the instant case under Section 364 of the Indian Penal Code and charge was, accordingly, framed.

4. In the course of the trial, prosecution examined as many as 12 witnesses. In conclusion of trial, the trial Court convicted the petitioner for commission of offence under Section 364 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment, as aforesaid.

5. In appeal the aforesaid conviction was altered to Section 365 I.P.C. but the sentence was kept undisturbed.

6. Mr. Bhattacharyya, learned Advocate appearing for the petitioner submitted that there is no evidence on record that the victim had been taken away by force or by deceitful means. Evidence of PW.4 does not establish such fact. He further submitted that the relationship between the victim and PW.1 was inimical. Criminal case had been registered against PW.1 at the behest of the victim. It is further submitted that the purported extra-judicial confession as transpiring from the evidence of PW.2 is highly unnatural and unworthy of credence. He, accordingly, prayed for setting aside of the impugned conviction and sentence.

7. On the other hand, Mr. Keshari, learned Advocate appearing for the State submitted that PW.2 to whom extra-judicial confession was made by the petitioner is a reliable witness and conviction can be based on his evidence alone. That apart, the victim was last seen with the petitioner and thereafter he was untraceable. Hence, conviction and sentence ought not to be interfered with.

8. PW.1 deposed that the victim left for Calcutta on 21.6.1988 along with petitioner although the victim was unwilling to go. I do not find corroboration of such factum of unwillingness of the victim from the factual matrix of the case inasmuch as it transpires from the evidence of PW.4 that the victim and the petitioner were found travelling together in a crowded bus. It is absurd to conclude that an unwilling victim would be taken in a crowded bus and such victim would obligingly travel together with the accused in a crowded bus without raising protest or otherwise. An act of abduction can be said to be committed under Section 362 of the Indian Penal Code if the victim was taken from one place to another by force or deceitful means. There is no evidence on record of any force or deceit was practised on the victim so as to persuade him to accompany the petitioner in the instant case. In fact, evidence of PW.4 in this regard improbabilises any case of coercion or deceit in the movement of the victim. This aspect of the prosecution case was not considered at all by the Courts below while coming to a finding of guilt to the appellant. Merely because the victim had left his residence and was travelling in a bus together with

the petitioner prior to his disappearance it cannot be said that the petitioner had abducted the victim and wrongfully confined him. The Courts below, however, have relied on a purported extra-judicial confession of the petitioner made before PW.2. PW.2 deposed that he had been informed of the incident on 25.6.1988 by PW.1 that the latter's father had left with the petitioner and since then was untraceable. It is his further evidence that 2/3 days later, the petitioner came to the said witness and told him that he had killed the victim by striking him with boulder as the victim had misused his money and begged to save him. It is true that an extra-judicial confession, which is otherwise unblemished, can form the basis of conviction. It is, therefore, important for me to assess as to whether the extra-judicial confession is voluntary and a reliable one. In **Sahadevan and Anr. v. State of Tamil Nadu, (2012) 6 SCC 403**, the Apex Court laid down the following parameters to determine whether an extra-judicial confession ought to be relied or not:-

"(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

9. It is true that a revisional Court cannot re-appreciate evidence. However, it is within the domain of the revisional Court to examine whether correct legal parameters were applied to the evidence on record particularly the extrajudicial confession in the instant case by the Courts below while coming to a finding of guilt.

10. Upon examining the findings of the Courts below in this perspective, I find that there is no discussion by the Courts below as to why petitioner would make an extra-judicial confession of murdering the victim to PW.2 who is not a person of confidence vis-à-vis the petitioner. There is nothing on record to show that PW.2 enjoyed a position of authority, trust or confidence with the petitioner so as to prompt him to seek his help and confide his innermost secret with him. It is also relevant to note that the version of the extra-judicial confession as narrated by PW.2 is inconsistent with the version stated in the first information by PW.1. While it is the evidence of PW.2 that the petitioner told him that he himself killed the victim by hitting him with a boulder. PW.1 had alleged in the FIR that the petitioner had confessed to PW.2 that he had killed his father by hired goons. Although actual

words of a confession may not be proved, if the contents of the so-called confession as narrated by PW.2 in Court and its reproduction in the FIR is not consistent with each other, such discrepancy strikes at the root of such weak piece of evidence rendering it unreliable in law. Furthermore, there is no corroborative evidence on record that there was any enmity between the petitioner and the victim or the latter had misused the moneys of the petitioner. Hence, reliance on such purported extra-judicial confessional was wholly unwarranted and contrary to law. The Courts below also lost sight of the fact that the relation between PW.1 and the victim was strained and a criminal case had been instituted against the said witness at the behest of the victim. The Courts below came to a finding of guilt ignoring such relevant facts and illegally relied on pieces of evidence which were untested by time honoured legal parameters. Hence, I am of the opinion that impugned order of conviction suffers from various legal infirmities and is liable to be set aside. Accordingly, the impugned judgment and order of conviction and sentence is set aside.

11. The petition is, thus, allowed.

12. Urgent Photostat certified copy of this order, if applied for, be delivered to the learned Advocates for the parties, upon compliance of all formalities.