

(2005) 08 CAL CK 0086

Calcutta High Court

Case No: C.R.A. No. 228 of 1992 with C.R.M. No. 5709 of 2004

Gautam Biswas

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Aug. 26, 2005**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 201, 302, 376, 379

Citation: (2006) 1 CHN 344**Hon'ble Judges:** Pranab Kumar Deb, J; Alok Kumar Basu, J**Bench:** Division Bench**Advocate:** Sekhar Basu, Jaymalya Bagchi and Amartya Ghosh, for the Appellant; Kazi Safiullah, Swapan Kr. Mallick and Madhuri Das, for the Respondent**Final Decision:** Dismissed

Judgement

Pranab Kumar Deb, J.

This instant appeal has been directed against the conviction and sentence dated 6.7.1992 passed by the learned Sessions Judge, Midnapore in connection with Sessions Trial No. V of December, 1989.

2. Following the shocking incident of rape and murder of a little girl called Putul Maity, the G.R. case being No. 422 of 1988 was registered. The prosecution case as narrated in the FIR and unfurled in course of the trial, was to the effect that on 18th December, 1988 round about 09-30 in the morning the girl called Putul Maity went out of her house for the purpose of visiting her uncle Nira Maity at the Lock Gate at Gangakhali. Since the girl did not return home by 1 p.m., her relations and neighbours went out searching for her. The girl was wearing a printed cotton frock with embroideries. She also wore ear rings and nose ring. As the neighbours and relations fanned out, the informant Dilip Kr. Biswas found the appellant Gautam Biswas standing on the northern courtyard of their newly built house. The appellant

Gautam Biswas was found flummoxed when he was asked as to what he was doing there. Meanwhile, vigorous search went on to find the whereabouts of the missing girl. Almost all the boys in the locality joined in the search for the girl. The appellant, however, did not show any inclination in searching out the girl. He even misled the villagers by asking them to make the search at Maniktala. His entire movement and behaviour thus evoked strong suspicion in the minds of the villagers.

3. As the process of the search had been going on, Gopal Biswas, elder brother of the appellant Gautam Biswas, went to their newly built house for keeping the water pumping machine there. Bikash Samanta and Manu Samanta of their locality were with him. As they were placing the machine inside the room, some water like substance dropped on his head. Gopal Biswas with a torchlight in his hand and with the help of his associates went up to the place which was covered with straw. The missing girl called Putul Maity was found lying on her back over the straw with her leg folded and blood oozing out of her ear and private parts. On hearing the alarming call of Gopal Biswas, the neighbours rushed to the spot. The appellant Gautam Biswas, however, was conspicuous by his absence. The body of Putul Maity was brought down and placed on the floor. Marks of scratches were found all over her mouth. The ear rings and the nose ring worn by her, however, were found missing. Suspicion was building up that Gautam Biswas was behind the rape and murder. His "loongi" was found scared with blood when he was eventually found coming back on a cycle. On interrogation, he confessed having raped and murdered the little girl called Putul Maity. He also confessed having removed ornaments worn by her.

4. With the registration of the case under Sections 302, 376, 379 & 201, IPC on the basis of the FIR lodged by Dilip Kr. Biswas, full fledged investigation was launched. The Investigating Officer prepared a report after holding the inquest. The body was also sent for post-mortem examination. The accused was also arrested after he had been brought before the police station by some of the inmates of the locality. The "loongi" stained with blood was seized. Some of the incriminating articles found at the place of occurrence were also seized. Pursuant to the statement of the accused Gautam Biswas, the ornaments worn by the deceased Putul Maity were recovered from a packet behind the photo frame of "Sarada Ma" inside the house of Netai Charan Biswas. The recovered ornaments were also seized by the Investigating Officer.

5. The Investigating Officer, in the meantime, examined the available witnesses, collected all the papers including the post-mortem report. The chargesheet was duly submitted on completion of investigation.

6. There being specific allegation of commission of rape and murder, the case was committed to the Court of Session. On perusal of the materials in the case diary and after hearing the submissions, the learned Sessions Judge framed charges under Sections 302/376/379, IPC. The appellant was charged with having committed rape

on Putul Maity. He was also charged with having committed murder of Putul Maity. Finally, he was also charged with having committed theft by removing the ear rings and nose ring of the deceased girl called Putul Maity. The prosecution side produced their witnesses in view of the specific denial of the appellant of all the charges levelled against him. The prosecution side examined as many as 22 witnesses including the informant, the close relations of the deceased, the neighbouring people who had the occasion to see the suspicion movement of the appellant, the neighbours before whom the appellant made extra-judicial confession, the doctor examining the appellant, the medical officer conducting the post-mortem report and the police officers who participated in the investigation.

7. Banking on the statements of the witnesses who noted the suspicion movement of the appellant before or after the incident, the statements of the witnesses before whom the appellant made extra-judicial confession, the factum of recovery of ornaments in pursuance of his statements, the recovery of other incriminating articles and relying on the medical reports, the learned Sessions Judge convicted and sentenced the appellant of all the three charges. He was convicted and sentenced to rigorous imprisonment for ten years for commission of offence u/s 376, IPC. The appellant was also sentenced to suffer rigorous imprisonment for one year for commission of offence u/s 379, IPC and finally, he was convicted and sentenced to suffer imprisonment for life for commission of offence u/s 302, IPC.

8. Aggrieved by, and dissatisfied with, the conviction and sentence, the appellant has preferred the instant appeal.

9. Appearing on behalf of the appellant, Mr. Sekhar Basu, learned Senior Counsel, has submitted that the prosecution made a futile bid to build up its case on circumstantial evidence, in doing so, what they did was to present certain unconvincing and scattered circumstances to link up the chain. The evidence as to circumstances was misleading as well as unconvincing. Referring to the contention of P.W.12 Padmarani Biswas that the appellant was suspiciously moving around near Natunbari in between 10 a.m. to 4 p.m., it is submitted that it was not possible for P.W.12 to stay right in front of Natunbari for a long period of 6 hours to see the appellants roaming about near the place of occurrence.

10. Commenting on the statements of P.W.2, P.W.7 and P.W.8 that on finding the "loongi" of the appellant stained with fresh blood, they made queries and in answer to their query, the appellant confessed having murdered the girl called Putul Maity inside the room in Natunbari after committing rape on her, Mr. Basu has submitted that no wise person would accept such contention, as their conduct was contrary to normal human behaviour. It is submitted that despite having sufficient time and opportunity, it is not believable that the appellant continued to don the blood smeared "loongi" just for the purpose of creating evidence against himself. Mr. Basu has submitted that had the loongi been stained with blood, it would not have escaped the attention of P.W.2 who claimed to have seen the appellant moving

about near Natunbari in between 1 p.m. to 2 p.m. on the eventful day. If the loongi was really stained with blood, it ought to have been noticed by P.W.1, P.W.3 and P.W.5 as well. Since the fact of detection of blood on the loongi of the appellant which paved the way for his making extra-judicial confession was itself in doubt, there should not be any earthly reason for believing that the appellant made an extra-judicial confession in presence of P.W.2; P.W.3 and P.W.5. The witnesses were also not sure as to whether the blood stains were fresh or old. The report of the chemical examiner also negatived the contention that the "loongi" had been stained with blood. The whole episode as to the appellant making an extra-judicial confession following detection of blood on his "loongi" is, as such, not believable at all.

11. With reference to the claim of P.W.2, P.W.7 and P.W.8 that they had taken the appellant to a field near the Siva Temple to avoid the appellant being manhandled by the public who had been found agitated, it is submitted that the cross-examination of P.W.8 exposed the falsity of their claim. It was in cross-examination that P.W.8 revealed that they had to move by the side of Natunbari on the way to meadow from Purnobari. Passing by the side of Natunbari without being detected by the agitated mob was thus an absurdity.

12. Criticising the approach of the Trial Court, Mr. Basu has submitted that the Trial Court proceeded on the notion that the prior and subsequent conduct of the appellant were quite unnatural. The Trial Court accepted the contention of the prosecution that the conduct of the appellant in not coming to the place of occurrence after the discovery of the deadbody was quite unnatural. The Trial Court held that reluctance on the part of the accused not to join the other residents of the locality for searching out Putul Maity was rather unusual. It is submitted that from the statement of P.W.5 one can get a clear indication that the appellant also expressed his inclination to search for the missing girl called Putul Maity at Maniktala after coming back to his house round about 5-30 p.m. The statement of P.W.5 belies the contention of the prosecution that no efforts whatsoever had been made by the appellant to search for the missing girl.

13. Mr. Basu has contended that the prosecution introduced the story of recovery of ear rings and nose ring just to make the story a presentable and acceptable one. In the absence of perforation in the ear and nose, it would be hard to believe that the girl wore rings on ear and nose. There was no mark of injury either. Absence of such important features, it is contended, is a clear indication that the girl never had the occasion to wear those ornaments.

14. Mr. Basu has argued in the absence of any receipt, no Court should accept the view of the so called jeweler that the recovered ornaments had been prepared and manufactured by him. Procurement of such ear and nose rings from the market and planting it in a house were not a difficult task for the police department. Finding the story to be too weak to be accepted, the prosecution in a last ditch effort sought to

introduce factum of recovery. The delayed seizure of the ornaments also casts a serious doubt as to the genuineness and authenticity of the factum of recovery of ornaments. The very fact that the seizure list witnesses namely, P.W.9 and P.W-10 had not supported the prosecution version, gives a fair indication that no such recovery was ever made. Furthermore, the room not having been in the exclusive possession of the appellant, he cannot be said to have total domain and control over the articles in question.

15. Drawing the attention of the Court to the location of the place of occurrence, it is submitted that since the place of occurrence was easily approachable, the alleged murder and rape might be the handiwork of some other inmates of the house as well. Mr. Basu has taken us through the statements of P.W.22 and P.W.8 in support of his contention that commission of rape on the attic was next to an impossibility. He contends that it was impossible for a young person to commit rape on the attic within the small space gap of just six and half inches. The claim of the prosecution witnesses that the appellant confessed having committed rape and murder of Putul Maity on the attic, as such, cannot be accepted.

16. The learned Public Prosecutor representing the State has submitted that the prosecution has not relied on stray isolated incident to link up the chains. With waves after waves of incriminating circumstances started pouring in, the prosecution arranged it to perfection to substantiate the charge of rape, murder and theft. The unusual conduct of the appellant in roaming about the place of occurrence was one such circumstance that was relied on by the prosecution. There was evidence to the effect that the appellant sought to mislead the inhabitants of the locality and put them on the wrong track by suggesting that search should be made at Maniktala, despite having precise knowledge that the shocking incident of rape and murder had been committed in their village. Unlike the sincere attempts being made by the other residents of the locality to search out Putul Maity, he remained a passive spectator. Coupled with that, was his disappearance for a while. When he eventually came back riding on a bicycle, marks of blood were seen on his "loongi". The suspicion of the inmates of the locality got further intensified. In view of detection of blood on his "loongi", he confessed having murdered and raped the little girl called Putul Maity. The extra-judicial confession made before the disinterested witnesses was also considered as a decisive evidence against the appellant. The doctor examining the appellant also found abrasion on his private part. There was thus every likelihood of continuous bleeding from his penis, resulting in loongi being smeared with blood.

17. Citing the case of State of Himachal Pradesh v. Jeet Singh, reported in 1999 SCC 539, it is submitted that test is to be applied to find out whether the place of recovery was ordinarily visible to others. The factum of recovery of the ornaments from hidden place itself is an indication that the appellant had special and direct knowledge about the ornaments being concealed therein. The factum of recovery of

the ornaments worn by the deceased just before the incident was thus considered a vital element in establishing the guilt of the accused on strong circumstantial evidence.

18. The case of the prosecution was built up on circumstantial evidence. It is the cardinal principle that the circumstance, taking cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the offence was committed by the accused and none else. The circumstances must be cogently and firmly established. One particular circumstance cannot form the basis of conviction, in the instant case, the prosecution has referred to series of circumstances to link up the chain. The fact that the appellant was hovering around the place of occurrence at the relevant point of time was established through P.W.2 and P.W. 12. Since P. W. 2 Rabindra Nath Biswas had his house near the place of occurrence, he had all the opportunity to see the movements near the place of occurrence at the relevant point of time on the eventful day. There was nothing absurdity in his watching the presence and movement of the appellant at the relevant point of time. We are afraid we cannot subscribe to the view that one has to be present right from 10 a.m. to 4 p.m. to see the suspicious movement of a person. Watching a person once or twice during the intervening period of six hours was quite possible. It was not unlikely for P.W. 12 Padmarani Biswas to watch the suspicious movement of the appellant near Natunbari in between 10 a.m. to 4 p.m.

19. When the villagers were making vigorous searches for the missing girl, the appellant remained nonplussed. When hectic searches for the missing girl had been going on in village Padumbasan, he asked Trilochan Maity to accompany him to Maniktala to search for Putul Maity. Making such intriguing statement, he left for Natunbari, as disclosed by P.W.5 Trilochan Maity. This unusual and unnatural act on the part of the appellant was also rightly taken note of by the Trial Court in coming to a finding as to the guilt of the appellant.

20. There were other circumstances that were relied on by the prosecution to substantiate its case against the appellant. With the discovery of the dead-body from the attic of the Natunbari, suspicion was brewing up in the minds of the villagers. It emerges from the statements of P.W.2, P.W.7 and P.W.8 that they had been to the house of the appellant round about 7-30/8 p.m. Surprisingly, the appellant was not found in his house. Eventually, when he came back riding on a bicycle, the witnesses found marks of blood on his "loongi". The doctor who examined the appellant nearly day after the incident found abrasion on his penis. Prominent finger nails were also found. P.W.17 Dr. Saroj Kr. Bhowmick opined that the abrasion found on the penis could have been caused due to forcible intercourse. He was accused of ravishing a girl often years. Injury in the penis, in such circumstances and as indicated by the doctor, was quite natural. Bleeding from the penis on the following day after drying up of the injury was not expected. However,

in view of abrasion and injury, bleeding from the penis at the initial stage was natural. There is nothing unusual in the witnesses finding stain of blood in the "loongi" worn by the appellant. The evidence-on-record does not in any way suggest he had sufficient time to change his wearing apparels. Furthermore, in view of continuous bleeding, changing of wearing apparel might not come as welcome relief for him either. The detection of stain of blood, coupled with the observation of the doctor, were rightly considered as an important circumstance to link up the chain.

21. It is on record that the appellant made extra-judicial confession before P.W.2, P.W.7 and P.W.8. It might be that there was dispute between Bankim Biswas, father of P.W.2 and P.W.3, and the members of the family of the appellant. It is hard to accept that P.W.2 would entangle the appellant simply because of the land dispute with his father. There is nothing on record to show that the appellant had bad blood with P.W.7 and P.W.8. There is no plausible explanation as to why those neighbours would level serious allegation against the person residing in their own village. It is on record that following the detection of stain of blood on the "loongi" and on being interrogated, the appellant made a clean breast of his guilt. The evidence-on-record does not in any way suggest that such extra-judicial confession was the outcome of threat, promise or inducement. What the appellant divulged before P.W.2, P.W.6 and P.W.7 was in consonance with the other facts and circumstances of the case. If found to be true and voluntary, conviction can rest on such extra-judicial confession. As underlined in *State of Rajasthan v. Raja Ram*, reported in 2003(4) All India Criminal Law Reporter 160, an extra-judicial confession, if voluntary and true, and made in fit state of mind, can be relied upon by the Court. It is not open to any Court to start with proposition that extra-judicial confession is a weak type of evidence. There was strong string of circumstances going against the appellant. All the circumstances led to the only inference that the accused, and none else, was responsible for the commission of rape and murder. Added to it, was his involvement in commission of theft. The strong circumstantial evidence is well backed up by the extra-judicial confession of the appellant.

22. It is claimed by the defence that the report of the doctor conducting the post-mortem is confusing. Mr. Basu submits that the doctor conducting the post-mortem examination could not enlighten the Court as to whether the death of the girl was the outcome of forcible intercourse on her by a healthy person or as a result of strangulation. We are afraid we cannot subscribe to the view that the report was confusing. P.W.16 Dr. Ajoy Kr. Roy observed that the death of the victim was caused due to the shock and haemorrhage, resulting from complete perineal tear in a sudden attempt of plausible intercourse. The doctor conducting the post-mortem also noticed the tongue being protruded and mouth half open with the eyes closed. There were scratch marks over the left shoulder, nail scratch marks over the lower lip, nail scratch mark over the mid of forehead and nail scratch mark over the left cheek." In addition to those injuries, there were abrasions on the left

knee joint and injury on the vagina. The doctor observed that the injuries on the face and the other parts of the body of the victim could have been caused due to resistance put by her at the time of attempt of rape on her. The appellant in his extra-judicial confession disclosed that he gagged the mouth of the girl called Putul Maity in trying to commit forcible intercourse on her. What he stated before the independent witnesses gets due corroboration from the doctor conducting the post-mortem examination of the girl.

23. As per statement of P.W.22 Md. Abdul Rashid, the then Officer-in-Charge of Tamluk Police Station in pursuance of the statement of the appellant and as identified by him, he recovered a packet behind a photo of "Sarada Ma" inside the house of Netai Charan Biswas. On opening the packet, he found gold ear rings and one nose ring. The ornaments were seized by him and thereafter a seizure list had been prepared in presence of the witnesses. The seizure list (Ext. 4) bears out the factum of recovery of ornaments from the house of Netai Charan Biswas. The seized ornaments were also duly identified by the relations of the victim, as the one worn by her before her death. The ornaments no doubt, were kept in a hidden place under the cover of photo. It thus suggests that the appellant was well aware of the ornaments being kept hidden behind a photo. Recovery of the ornaments of the victim girl by the appellant was also considered as an important link to substantiate the charges. Some delay in the matter of recovery in any way would not cast a serious doubt as to the genuineness and authenticity of the seizure. The seizure list was prepared in presence of the available witnesses, as borne out by the contents of the seizure list (Ext. 4). It is true that the signatories of the seizure list namely, P.W.9 Haripada Pal and P.W.10 Sricharan Jana were declared hostile. They denied having made statement before the Investigating Officer that recovery had been effected in pursuance of the statement of the appellant. However, they did identify their signatures on the seizure list. There was, as such, no justification for viewing the factum of seizure with suspicion. The fact of recovery of ornaments had a direct bearing and was well linked with the commission of theft, rape and murder.

24. The shocking incident of rape and murder had occurred well inside the "Natunbari" which was owned by the appellant and his family. The deadbody of Putul Maity was recovered from the attic in the "Natunbari". The attic was at a certain height from the floor. It was well nigh impossible for a rank outsider to hustle a little girl into the room and then commit rape on her. Dumping of the body on the attic could not be the handiwork of an outsider. Someone having thorough knowledge of the inns and outs of the room and having right of access to it certainly did such nefarious act. True, there were other inmates of the house. The evidence-on-record does not indicate that the other members of the family had any role in the commission of offences. It is on record that the appellant was seen hovering around the place of occurrence at the relevant point of time. He was also not found after the detection of the deadbody. He tried to put the villagers on the wrong track by making misleading statements. His "loongi" was smeared with blood

when he eventually came back. Abrasion was detected on his private part. He also went on making extra-judicial confession before the independent natural witnesses. There was recovery of ornaments of victim in pursuance of his statement. He called the girl on false pretext. All these facts taken together do firmly indicate that the act of theft, rape and murder had been perpetrated by the appellant alone. All the circumstances point only to the involvement the appellant in commission of offence of theft, rape and murder and none else and the only hypothesis would be that he did commit the offence of theft, rape and murder.

25. Before concluding, we like to mention that the learned Sessions Judge made elaborate examination of the appellant in terms of the provision of Section 313 of the Code, putting all the incriminating facts and circumstances as well as evidence going against him for the purpose of affording him an opportunity to explain those circumstances. It cannot be said that the appellant in any way was prejudiced for non-mentioning of incriminating circumstances. The defence is right in its view, as expressed in the case of Kanaiya Midar v. State of Bihar, reported in 2001 SCC 537, that circumstance not put to accused in examination u/s 313, Cr. PC cannot be used against him. Here as many as 87 questions were put to him explaining the circumstances going against him. The appellant was given all opportunity to explain the circumstances and evidence going against him. All the points have been covered by the Trial Court. There was no illegality or irregularity in the judgment passed by the Trial Court. The judgment was based on sound reason and accordingly, we do not find any merit in the appeal.

26. In the result, the criminal appeal being C. R. A. No. 228 of 1992 is dismissed with the affirmation of the conviction and sentence dated 6.7.1992 passed by the learned Sessions Judge, Midnapore in connection with Sessions Trial No. V of December, 1989.

27. The appellant Gautam Biswas, who is on bail, is hereby directed to surrender before the Trial Court within 15 days of this order to serve out the sentence, failing which the learned Sessions Judge, East Midnapore shall issue warrant to secure the arrest and detention of the appellant for serving out the sentence.

28. Send the L C R to the Court below with a copy of the judgment for due compliance and necessary follow up action through a special messenger at once.

29. With the judgment the C.R.M. No. 5709/04 is also disposed of.

Alok Kumar Basu, J.

I agree.