

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Ashim Kumar Roy
And
The Hon'ble Justice Malay Marut Banerjee

CRA No. 538 of 2007

Samir Sarkar @ Raka & Anr.
vs.
The State of West Bengal

With

CRA No. 116 of 2004

Amit Mahato @ Bapan
vs.
The State of West Bengal

For the Appellant
in CRA No. 538 of 2007 : Mr. Jayanta Narayan Chatterjee
Mr. Apalak Basu

For the Appellant
in CRA No. 116 of 2004 : Mr. Apurba Kumar Dutta

For State
in CRA No. 538 of 2007 : Mr. Rajdeep Majumder

For the State
in CRA No. 116 of 2004 : Mr. Sanjoy Banerjee

Heard on : 13.01.2016, 21.01.2016 and 28.01.2016

Judgment On : 29.02.2016

Ashim Kumar Roy, J.

Samir Sarkar @ Raka, Debashis Ojha @ Mithu and Amit Mahato @ Bapan, these three appellants were placed on trial before the learned Additional Sessions Judge, 13th Court, Alipore, 24-Parganas (South) to answer charges for having committed offences punishable under Sections 302/201/34 IPC.

The charges levelled against them based on the allegations that on February 6, 2001, at around 8.50 hrs., the Sub-Inspector of Police Jugal Kishore Dha (PW/3) at Entally Police Station received an anonymous telephonic call that a female dead body was found floating on the canal opposite to 8B, South Sealdah Road. Immediately, upon receipt of such information and diarizing the same, PW/3 rushed to the spot and with the help of local people the body was retrieved and was taken to the NRS Hospital, and was declared "brought dead". The PW/18 conducted the post mortem and found multiple external bruises and abrasions and marks of ligature. On dissection certain other internal injuries were found. According to the doctor the death was due to the effect of strangulation by ligature and smothering associated with head injuries and ante mortem and homicidal in nature. In the meantime, the PW/11, a taxi driver came to the police and at the morgue identified the dead body as the girl, whom he dropped near to the place of occurrence along with four other boys at around 11/11.30 pm at the fateful night, February 5, 2001. The police then found out two other witnesses, viz., PW/4 and PW/5, who informed the police that they saw the girl in a taxi with four other boys about half an hour before the PW/11 dropped her. They also

identified the appellants in T.I. Parade as the boys whom they found with the victim in the taxi.

After completion of investigation, the police submitted charge sheet against the appellants under section 302/201/34 IPC.

The prosecution based its case on circumstantial evidence and to prove the circumstances against the appellants examined total 21 witnesses. However, none of the appellants examined any witnesses in their defence and they pleaded not guilty and claimed to have been falsely implicated.

At the conclusion of the trial the learned trial Judge found all the circumstances relied upon by the prosecution against the appellants have been proved beyond all reasonable doubt and convicted them for the offences punishable under section 302/34 IPC and 201/34 IPC and sentenced them to suffer imprisonment for life and rigorous imprisonment for 5 years respectively and fine with default clause.

All three convicts together filed CRA 538 of 2007 from jail and the appellant Debashis Ojha @ Mithu and Amit Mahato @ Bapan filed two separate appeals through their respective lawyers being CRA 115 of 2004 and CRA 116 of 2004. However, during the pendency of the above appeals, the appellant no. 1 Debashis Ojha @ Mithu in CRA 538 of 2007 and the sole appellant in CRA 115 of 2004 expired on September 03, 2009 and such facts being reported to a co-ordinate bench of this court an order was recorded to the effect the appeals stood abated.

On perusal of the records, we find the following circumstances were relied on, against the appellants by the prosecution,

(a) The victim suffered a homicidal death caused by ante-mortem strangulation with ligature and smothering, associated with head injuries, was the outcome of the post-mortem held by the PW/18.

(b) Identification of the appellants by PW/5, PW/6 and PW/11 both in T.I. Parade and in court as the miscreants in whose company the victim was last found alive.

(c) The victim was found killed within a very short gap from the time she was last found alive in the company of the appellants.

(d) The recovery of mobile phone of the victim in terms of the provisions of section 27 of the Evidence Act at the behest of the appellant Amit Mahato @ Bapan.

(e) The place where the taxi driver dropped the victim with the appellants and the place from where on the next day her dead body was recovered, were in close proximity.

The learned counsel appearing on behalf of the appellant Samir Sarkar @ Raka and Amit Mahato took a common stand that having regard to the facts there has been a delay of about 2 months in holding the T.I. Parade of the appellants from the date of occurrence and such identification never being preceded by any disclosure of the physical description of the miscreants, by the witnesses, whom they allegedly found with the victim girl, on the fateful night, February 5, 2001, the identification of the appellants both in court and in T.I. Parade lost its credence and cannot be a lawful basis of their conviction. It was further contended according to the PW/11, a taxi driver, he having come to know from newspaper that a female dead body was found floating in the canal, near to the place, where

he on the night of February 5, 2001, at around 11.30 p.m., dropped a girl with four boys, he went to the police station and reported the incident and identified the dead body at the morgue but no newspaper cutting was exhibited during the trial. No evidence was forthcoming, what prompted the PW/11 to guess, the dead body which was found floating in the canal was that of the girl whom he dropped at the fateful night. It was their further submissions, a driver of a car while driving car, was supposed to concentrate on driving and to remain alert to avoid any possible road accident and not to closely watch the features and the movement of the passengers, so much so, that they could be recognized in future. None of this witness disclosed what enabled them to recognize the appellants long after the incident. No papers viz., driving licence, garage register etc. were produced to the police by the PW/11 to support his claim that he was actually driving taxi. The owner of the taxi was not examined. The colour and the number of the taxi was not disclosed to the police. Although Ext.-5, the FIR was lodged after the dead body was allegedly identified by the PW/11 but in the FIR there is no reflection about such identification and the dead body was described as that of an unknown female. Before the T.I. Parade, the appellants were shown to the witnesses by the police and therefore, their identification in the T.I. Parade lost all its probative value and such facts was reported at the relevant time to the T.I. Parade Magistrate PW/14. It was further pointed out not only the sitting arrangement of the miscreants inside the taxi but also their movement was contradicted. Different appellants have been identified by different witnesses as the persons who alighted from the taxi and went to the cigarette shop. It was also their case at the time of the T.I. Parade the other suspects with whom the appellants were mixed up, were not similarly dressed and when PW/5 was questioned on that score, he cleverly took a plea "*not remember*". It was further pointed out admittedly the left hand

of the PW/6, was amputated and he could not prepare betel leaves, still according to the prosecution case at the relevant time it was he, who was running the betel leaf shop of his brother and the said witness failed to tell the prices of cigarettes of different brands and other articles stored in the shop for sale. They also contended that there was no reason why PW/5 chose the footpath opposite to his place of residence to attend nature's call where the taxi was allegedly parked. They also vehemently contended it is highly impossible for a police officer PW/21 immediately on taking the charge of investigation on a verbal order of his superior and without consulting the case diary, to arrest the accused by employing source. It was also added the photograph of the victim was never shown to the witnesses PW/5 and PW/6 during their examination in court to prove, that was the photograph of the girl whom they allegedly found in the company of the appellants. It was vehemently contended the theory of last seen together is not attracted in the facts situation of the present case, since the time gap, between the time when victim was last seen alive in the company of the appellants and her dead body was discovered was quite large. The counsel of the appellant Amit Mahato @ Bapan contended that the recovery of the mobile phone of the victim girl from the bed room of this appellant on being led by him lost all its force as according to the only seizure witness PW/15, he found the mobile in the hand of the police and as per the request, he signed the seizure list. Lastly, it was contended that all the three witnesses PW/5, PW/6 and PW/11 were the stock witnesses of the police and on the face of the above infirmities in their evidence none of them can be relied upon to connect the appellants in the commission of offence and they are entitled to acquittal.

In essence it was the case of the appellants that their identity, as the miscreants involved in the crime has not been established by the prosecution witnesses and their evidence was full of several discrepancies and shortcomings and thus, their credibility was considerably corroded.

On the other hand the learned counsels, who were appearing on behalf of the State contended this is a case where the victim before she was killed was found alive for the last time in the company of both these appellants and two others by as many as 3 witnesses PW/5, PW/6 and PW/11. They submitted all the three witnesses identified the appellants both in T.I. Parade soon after their arrest and in court. The said witnesses were cross-examined at length but nothing could be demonstrated from their such cross-examination, which may create doubt as to their credibility. It was further submitted that PW/11 was the taxi driver and in his taxi the miscreants together with the victim girl travelled for quite some time and he had sufficient opportunity to observe their features as also the two other witnesses, from whom cigarettes were purchased by the miscreants on their way and the another who being attracted by the cry of the victim girl being curious peeped inside the taxi and saw them. They claimed the prosecution has been able to prove the charge against the appellants and they were rightly convicted.

The standard of proof required to convict a person on circumstantial evidence is now well established by a series of decisions of the Supreme Court. According to this standard, the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances have not only to be fully established but also that all the circumstances so established

should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime.

The victim died a homicidal death due to strangulation by ligature associated with smothering and a head injury, which were all ante mortem in nature has not been disputed from the side of the defence either before the trial court or before us. We have carefully gone through the evidence of PW/18 Dr. Rabindra Bose, who held the post mortem and proved the post mortem report. Now, considering the sites and nature of injuries, we have no reason to disagree with the conclusion he arrived at.

The first circumstance that has been relied against the appellants is the circumstance of *last seen together*. In this regard the PW/11, a taxi driver is the key witness of the prosecution. According to the said witness on the fateful night (February 5, 2001) around 10.30/10.45 pm from a place called Phulbagan, near Children Hospital, one girl aged about 18 years hired his taxi for going to a place Nager Bazar and also offered to pay extra fare. At that time three other boys boarded the taxi with her, while two of them took their seats beside him, the girl and another boy sat on the rear seat. Those boys were wearing punjabies and lungies. On being asked by them, the PW/11 drove his car towards the Sales tax Office and at a place, viz., D.C. De Road, he was asked to stop his taxi and two of the boys, who were sitting by his side, got down and went to a cigarette shop. At that time the boy who was sitting on the rear seat with the girl touched her body and she started crying, which attracted one of the local people (PW/5). He then

came near the taxi and asked as to what happened and he was told by those boys that she was sick and on the way to the hospital. Thereafter, PW/11 was asked to take the taxi to canal south road but as the girl did not agree to go to that direction, he dropped them there. The PW/11 is the witness, who first identified the dead body of the victim at morgue as that of the girl whom he dropped near south canal road and then those two appellants, both in T.I. Parade and in court as the boys, who were with her when he dropped them from his taxi.

The prosecution next examined two more witnesses PW/5 and PW/6 not only to corroborate the evidence of PW/11 but also to establish the circumstance of last seen together by their evidence independently.

According to the evidence of PW/6 on the fateful night, when he was running the cigarette shop of his brother, at about 11.30 p.m. in a taxi five boys and one lady came in front of his shop that was parked for about 15 minutes and two of the boys got down from the taxi and purchased cigarettes from his shop. While according to the PW/5, he was out to attend nature's call and found a taxi came and stopped near the cigarette shop and two persons came out and went to the shop to purchase cigarette. In the meantime being attracted by a cry of a female coming from the said taxi, he came near the taxi and found one lady was crying and on inquiry he was told that she was sick and was being taken to the hospital. The PW/5 corroborated the PW/6 on the point while the taxi was remained parked in front of his shop a lady inside the taxi was found crying and beside her there were two other boys. Both the witnesses identified the appellants as the persons among those boys both in T.I. Parade and in court.

The principal point now we are required to determine in this appeal as to whether the identification of the appellant as the miscreants in whose company

the victim was last found alive before she was killed has been established by the evidence of the prosecution witnesses or not?

In our such endeavour we first propose to deal with the question of delay in holding the T.I. Parade. The date of occurrence was February 5, 2001 and investigation was started on and from February 6, 2001 after registration of the FIR. We find from the unchallenged evidence of the PW/21 the investigating officer of the case that the appellants were arrested on March 13, 2001 and the prayer for T.I. Parade was made before the court, on March 27, 2001, when they were produced from the police custody that is after 14 days. On that day such prayer of the Investigating Officer was allowed and the court fixed April 7, 2001 for T.I. Parade. It is true on March 14, 2001 the court granted police remand of the appellant till March 23, 2001 and on that day while the appellants were produced in court, the Investigating Officer made a prayer for further police remand but not for holding any T.I. Parade. Therefore, instead of making prayer for T.I. Parade on March 23, 2001 such prayer was made three days after i.e., on March 27, 2001. In our opinion the delay, if any, is neither unusual nor inordinate. The Investigating Officer was not confronted, during his cross-examination, with any question why he took three more days to make such prayer and defence was not able to bring out from him that the delay was deliberate and to gain time. We are, therefore, not inclined to put any importance to such delay and accept that there was no foul play on the part of the police in this regard.

The following decisions would be quite relevant to refer at this stage,

In the case of *Pramod Mandal vs. State of Bihar* reported in (2004) 13 SCC 150 at Para - 20 in the Apex Court held as follows,

Para-20. " It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

In another case viz, *Sheo Shankar Singh vs. State of Jharkhand and Anr.* reported in *(2011) 2 SCC (Cri) 25*, the Supreme Court heavily relied on the said two decisions and followed the same line of reasoning and observed the following in paragraphs 46 and 47,

Para-46. "It is fairly well settled that identification of the accused in the court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear

to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation."

Para-47. " The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration".

The next question arises for our consideration, as to whether the appellants were properly identified by the witnesses as the persons in whose company the victim was last found alive before she was killed.

We have already noted that PW/11 the taxi driver was the key witness of the prosecution, who identified the appellants both in T.I. Parade and in court as also the victim at the morgue. However, much has been argued from the side of the appellant that it was completely impossible for any person, more particularly for a taxi driver to hold in his mind features of any passenger, who had an occasion to take him in his taxi from one place to another and that too while driving. It was also canvassed from the side of the appellants that the witnesses never disclosed

to the police the physical description of the person whom they subsequently identified as the persons found in the taxi with the victim girl.

On a careful scrutiny of the evidence of the prosecution witnesses, we find that the PW/11 picked up the appellants and the victim in his taxi, around 10.30/10.45 p.m. from a place near to children hospital at Phoolbagan a place in Kolkata and thereafter on being asked moved through different areas for considerable period, in and around the place, wherefrom the dead body of the victim was subsequently recovered. The PW/11 was corroborated by PW/5 and PW/6. According to the PW/6 on the date of occurrence at about 11.30 p.m. one taxi came and parked in front of his shop and two of the miscreants got down from the taxi and came to his shop to purchase cigarettes. The defence during the cross-examination of the PW/6 brought it out from him that the said taxi was waiting there for about 15 minutes. The evidence of PW/6 was corroborated by the PW/5 and according to him he found the taxi there at around 11.30/11.45 p.m. Therefore, the PW/11, the taxi driver and the appellants were together inside the taxi nearly for about an hour and thus the PW/11 had every opportunity to notice their features from a close proximity. We find throughout the journey instead of actual destination for which the taxi was hired by the victim, it was passed through different routes on being asked by the passengers and it was parked for about 15 minutes before a cigarette shop. All these factors were sufficient to create a long lasting impression in the memory of the PW/11 about the passengers whom he on that day took in his taxi. Furthermore, within an interval of one day, the victim was identified by the PW/11 at the morgue and he became aware that she was killed. This case was initially investigated by the PW/20 and then by the PW/21. They were cross-examined at length but they were not confronted with the

question whether the physical description of the appellants was disclosed to him or not by the witnesses during investigation. In cross-examination PW/21 disclosed that before T.I. Parade, he did not meet any witnesses. We find from the cross-examination of the PW/11, taxi driver that during T.I. Parade he disclosed to the T.I. Parade Magistrate about the position occupied by the boys and the girl inside the taxi. He claimed to have told the T.I. Parade Magistrate how he could recognise the appellants. On this score, no contradiction was taken from the learned Magistrate. From the evidence of the T.I. Parade Magistrate (PW/14), we find all necessary precautions were taken during T.I. Parade to conceal the identity of the suspects. We, therefore, have no iota of doubt on the question of identification of the appellants as the persons, in whose company the victim was last found alive. It was true the appellants complained to the T.I. Parade Magistrate (PW/14) that they were shown to the witnesses by the police but not before holding of T.I. Parade and only after they were identified.

Now, considering the evidence of the other two witnesses viz., PW/5 and PW/6, we find while PW/5 identified both the appellants the PW/6 identified the appellant Samir Sarkar as the persons, who were found in the taxi on the fateful night with a lady. They identified the appellants both in T.I. Parade and in court. The T.I. Parade was held by the PW/14 and he supported such identification. PW/5, PW/6 and PW/14 were cross-examined at length but nothing could be elicited to discredit them on the point of identification of the appellants. It is true during the examination of PW/5 and PW/6, the photograph of the dead body of the victim was not exhibited and proved as that of the girl, whom those two witnesses found at the fateful night in the taxi of the PW/11 but beyond any shadow of doubt it was very much established that there was a girl in the company of the

appellants at that material point of time. Now, taking the evidence of the PW/11 together with the evidence of PW/5 and PW/6 as above, it can be well concluded that the prosecution has been able to prove that it was the victim girl, who was found in the company of the appellants at the fateful night in the taxi of the PW/11 and a few hours thereafter she was found killed.

The circumstance of *last seen together* comes into play, where two or more persons are "seen together" alive and after an interval of time, while one of them is found alive, other is dead. It assumes great importance in proving the guilt of an accused in a case of murder, in absence of eye witness and tangible evidence. Once the prosecution is able to prove that victim was *last seen alive together* with the accused and the time gap is too short, between the time, "*found alive*" and "*dead*", the provisions of Section 106 of the Evidence Act, at once attracted and the onus automatically shifts on the accuseds to explain as to how and under what circumstances the victim suffered a homicidal death and to prove their innocence, since such fact is especially within their knowledge. In absence thereof, it is the accused who should own the liability of murder.

Both the appellants when were questioned with reference to the above facts during their examination under section 313 CrPC, they claimed allegations were false and they were innocent. However, no explanation was forthcoming from them as to how and in what circumstances the victim suffered a homicidal death. This failure of the appellants to satisfactorily account for the above facts is a strong incriminating circumstance against them pointing their guilt to the commission of the offence. In this regard, the ratio of the decisions of the Apex Court be well referred, *Amit vs. State* reported in (2004) 2 AI Cr LR 232 (SC), *Sahadevan vs. State* reported in (2003) 1 SCC 534, *Mohibur Rahman vs. State*

of Assam reported in *AIR 2002 SC 3064*, *Bodhraj vs. State* reported in *(2002) 8 SCC 45*, *State vs. Sanjay* reported in *(2007) 3 SCC 755*.

The only question now left for our consideration is a piece of evidence hinges against the appellant Amit Mahato @ Bapan. According to the prosecution case during his police custody he made a statement to the investigating officer of the case as regards to the concealment of the mobile phone belonging to the victim and following such statement he led the police to his house and from his bed-room the said mobile phone was discovered. The relevant portion of the statement was exhibited during the trial, marked Ext.-26 and the mobile phone was recovered vide recovery memo/seizure list Ext.-20. We find on the very day the statement was recorded, the mobile was also recovered. We further find in the recovery memo the appellant Amit Mahato also subscribed his signature. On the question of discovery we do not find any infirmity in the evidence of the investigating officer of the case PW/21 Jayanta Chakraborty, which was also supported by PW/16 Anup Kumar Ghosh, a Sub-Inspector of police, who was then posted at Baliaghata police station within whose local limit the place of seizure was situated. The defence cross-examined both the witnesses at length but could not able to elicit anything from their testimonies that may adversely affect the prosecution case. However, out of two seizure witnesses, only one, Sibendu Debnath was examined during the trial as PW/15. According to this witness, when he found the mobile phone, it was in the hand of the investigating officer of the case PW/21 and at that place he was asked to sign on the seizure list. Even assuming on the face of such evidence of the PW/15 Sibendu Debnath, the recovery of the mobile phone does not come within the purview of the section 27 of the Evidence Act, still when there is acceptable evidence of the investigating

officer of the case PW/21 corroborated by PW/16, a Sub-Inspector of police, attached to Baliaghata police station that the accused Amit Mahato @ Bapan had taken them to his house and pointed out the place where the mobile of the victim was concealed not being touched by the mischief of section 162 (2) CrPC is very much admissible under section 8 of the Evidence Act as his conduct. (*H.P. Administration vs. Om Prakash - AIR 1972 SC 975; Prakash Chand vs. State - AIR 1979 SC 400*). This is an additional link in the chain of circumstances against the sole appellant in CRA No. 116 of 2004.

Although it is all through contended by the counsel of the appellants that all the witnesses viz., PW/5, PW/6 and PW/11 are the stock witnesses of the police but besides bare claiming no iota of materials was brought on record by the defence to establish such facts. We are, therefore, unable to accept such contention.

Having regard to above, the conviction of the appellants passed by the trial court is fully justified and deserves no interference.

In the result, both the appeals fail and stand dismissed.

Office is directed to send down the LCR together with the copy of the judgment to the court below at once.

Urgent Xerox certified copy of this judgment be given to the parties, if applied for, as early as possible.

(Ashim Kumar Roy, J.)

I agree

(Malay Marut Banerjee, J.)