

Setrak Vs. the State

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Court : Kolkata

Decided On : Jul-09-1993

Reported in : (1994)1CALLT206(HC)

Judge : Umesh Chandra Banerjee and ;Arun Kumar Dutta, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201 and 302; ;Evidence Act - Sections 3 and 114

Appeal No. : Criminal Appeal No. 117 of 1984

Appellant : Setrak

Respondent : The State

Advocate for Def. : R. Shiv Saroop, Adv.

Advocate for Pet/Ap. : A.S. Roy and ;C.S. Chauhan, Adv.

Disposition : Appeal allowed

Judgement :

Arun Kumar Dutta, J.

1. The instant two appeals are directed against the judgment and order of conviction and sentence dated 22nd October, 1983 passed by the learned Sessions Judge at Port Blair in Sessions Case No. 3 of 1982 before him.

2. The accused Setrak and Appolous had been tried by the learned Sessions Judge for having allegedly committed murder by causing the death of Hossain Koya in furtherance of their common intention and also trying to cause disappearance of evidence of murder in furtherance of their common intention, thereby committing offences punishable under Section 302/34 and 201/34 of the Indian Penal Code.

3. An UD FIR No. 1/81 dated 17.2.81 was lodged by one Alfred, Illrd Captain of Malacca bustee, reporting therein that one Smti Solamy of Malacca had informed him that when she had gone to the jungle for collection of pan leaves at about 9 A.M. on that day (17.2.81) she had seen a dead body lying near the cave in the jungle. She went near the dead body and found it to be that of Hassan Koya, a businessman; who was lying dead with a handkerchief tied around his neck. Upon receipt of the post mortem report on 18.2.81 at about 14.30 hrs. it transpired that it was a case of strangulation death with violent throttling which was homicidal in nature. The Crime case No. 22/81 under Section 302 IPC had thereupon been started by the Police. During the investigation, the Police had arrested the accused Appolous, Setrak and Moses having complicity with the alleged crime. It was revealed during the investigation that the aforesaid three accused in furtherance of their common intention had committed murder in between the night of 15th and 16th February, 1981 at Malacca jungle within P.S. Car Nicobar by causing the death of Hassan Koya for getting and distributing the money which he had with him. The accused Moses had subsequently offered himself to be an approver in the case; and he was tendered pardon by the local learned Chief Judicial Magistrate on 27.12.81. After completion of the investigation, the police had submitted charge-sheet in the case under Section 302/34, IPC, against the accused Appolous and Setrak. The learned Chief Judicial Magistrate had committed the case to the Court of Sessions as the offence alleged was exclusively triable by a court of sessions.

4. The learned Sessions Judge had framed charge against the aforesaid two accused on 20.4.81 for offences punishable under Sections 302/34 and 201/34 IPC, to which they both had pleaded not guilty and claimed to be tried.

5. The prosecution had examined 20 witnesses in all during the trial, including the Investigating officer, in support of the prosecution case. The learned Sessions Judge upon consideration of the evidence on record had found the aforesaid two accused Setrak and Appolous guilty to the charge under Section 302/34 IPC, and had found them not guilty to the charge under Section 201/34 IPC, for the reasons recorded at length in his judgment. He had accordingly convicted the aforesaid two accused for the offence punishable under Section 302/34 IPC and had sentenced them both to suffer imprisonment for life, and also to pay a fine of Rs. 10,000/- only each, in default to suffer rigorous imprisonment for two years each.

6. Being aggrieved by the judgment and order of conviction so passed by the learned Sessions Judge, the aforesaid two accused have preferred these two appeals separately, being Criminal Appeal Nos. 117 and 118 of 1984.

7. Since both the appeals are directed against the same very judgment and order of conviction and sentence passed by the learned Sessions Judge, they have been heard analogously with the consent of the learned Advocate for the appellants and the learned P.P. and for convenience of all concerned. The two appeals would be governed by a common judgment as such.

8. We have carefully scanned and considered the entire evidence on record. Upon careful and cavalier consideration of the same, we are unable to uphold the judgment and order of conviction and sentenced passed by the learned Sessions Judge against the aforesaid two accused both on merits and on legal/technical grounds for the following reasons, amongst others, as we shall presently discuss.

9. Upon consideration of the materials on record, such as they are, we are clearly of the view that the prosecution has lamentably failed to establish the place of occurrence where the alleged offence had allegedly taken place. It would pretty clearly appear from the FIR that the place of occurrence of the alleged offence is West Malacca Jungle near cave, 2.5 Kms away from the police station in question. The postmortem report on record would as well clearly indicate that the place of occurrence was 2.5 Kms west Malacca jungle near cave. But it would oddly appear from the evidence of the P.W. 1 Moses that the alleged occurrence had taken place near the cave at Kakana village, contrary to what had been stated in

the FIR. There is no evidence by the prosecution on record to indicate the Malacca jungle and Kakanna village are the same place. The aforesaid discrepancy could not be reconciled by the prosecution.

10. The date of alleged occurrence could neither be established by the prosecution. It appears both from the FIR and the post mortem report that the occurrence had taken place in between the night of 15.2.81 and 16.2.81. But the P.W. 1 Moses had again stated to the contrary that the alleged occurrence had taken place on 15.2.81 or 16.2.81. He was not sure of the date; and he could neither remember the exact date when he was examined before the Court on 8.10.82. On the aforesaid evidence of P.W. 1, the occurrence in question had taken place either on 15.2.81 or on 16.2.81, but clearly not in between the night of 15.2.81 and 16.2.81, as indicated with more than usual clarity in both the FIR and the postmortem report.

11. The prosecution as well appears to have failed to establish the time when the alleged offence had been committed. According to the FIR, the alleged occurrence had taken place in between the night of 15.2.81 and 16.2.81, i.e. on the night between 15.2.81 and 16.2.81. But according to P.W. 1 Moses, the accused Appolous had come to the spot with Kaka alias Hossain Koya at about 4.30 P.M. He himself (P.W. 1), alongwith the accused Setrak, had reached their hotel at about 5.10 P.M. after the commission of the alleged offence. On his aforesaid evidence, the alleged offence must have been committed by them between 4.30 P.M. and 5.10 P.M. on the relevant day. We also note from the evidence of the P.W. 5 Dr. Nigam that the stomach of the deceased was found full of undigested food. The witness had further stated with conviction that the victim had taken the food 3 to 4 hours before his death. We have it from the evidence of P.W. 13 P. Varghese Perera that he, his daughter and the victim Hossain Koya had all taken meal at about 11.30 A.M. or 12 noon. On the aforesaid evidence of the P.Ws 5 and 13, read together, the victim must have been killed any time between 2.30 P.M. and 4 P.M. on the relevant day. There does not seem to be too much of difference as to the time of commission of the alleged offence in the evidence of the P.W. 1 and those of the P.Ws 5 and 13, if the alleged offence had been committed on 15.2.81. But the P.W. 1 Moses himself could not make sure as to

the date when the alleged offence had been committed. As stated by him, the alleged occurrence had taken place either on 15.2.81 or on 16.2.81. That being so, the prosecution case as to the time of commission of the alleged offence could not be said to be established. On the aforesaid evidence on record, the alleged occurrence, on no reckoning, could conceivably have taken place in between the night on 15.2.81 and 16.2.81 as indicated in the FIR. It would also be significant to note that the P.W. 5 Dr. Nigam is stated to have examined the dead body of the deceased Hossain Koya at 16.00 Hrs. (i.e. 4 P.M.) of 17.2.81. In terms of his report, death had occurred between 24 to 48 hours of his examination of the dead body, i.e. between 4 P.M. on 15.2.81 and 4 P.M. on 16.2.81. But if the evidence of the P.Ws 1, 13 and 5 as discussed above, are accepted, the alleged offence had been committed any time between 2.30 P.M. and 5.10 P.M. of 15.2.1981, t.d. between 50 to 46 hours of the examination of the dead body of the deceased, and not between 24 to 48 hours of the examination, as stated by the P.W. 5. The prosecution case as to the time of the alleged occurrence stands clearly disproved as such.

12. According to the prosecution, the victim Hossain Koya had been carrying the sum of Rs. 435/- only, contained in the pocket of his underwear which he was wearing at the relevant point of time. The two accused Setrah and Appolous and the P.W. 1 Moses had shared the money amongst themselves after killing Hossain Koya. The prosecution appears to have made much about the recovery of the underwear of the deceased from the room of the accused Setrak under the Pillow in support of the case voiced by them. They had examined the son of the Victim Hossain Koya, Aboobakar, in support of the said contention. P.W. 16 Aboobakar, the son of Hossain Koya, had sought to state that his father had left for Car Nicobar with money on 7.2.81. He was then wearing a yellow shirt, a white checked lungi, besides Jangia, which he would be able to identify, if shown to him. He had, in fact, identified a striped underwear stating that his father was in the habit of keeping money in his underwear. He had identified the underwear stating that the same belonged to his father. But there is not the slightest whisper by him that it was the same very underwear which his father had been wearing at the time he had left for Car Nicobar with money of 7.2.81. Striped underwear and jangia seem to be two different articles. A jangia seldom contains a pocket. P.W. 16 had

further been constrained to admit during his cross examination that the underwear identified by him does not contain any special mark. The same could not be said to be identifiable as such. The alleged recovery of the striped underwear in question does not seem to add point to the case of the prosecution as such. It would again be significant to note that the witness had stated that his father had left for Car Nicobar on 7.2.81 with a sum of Rs. 5,000/- only. During his examination he had stated that his father gave the money to him on 7.2.81 which he had counted and handed over to his father. But during his cross examination he had stated to the contrary that on the evening of 6.2.81 his mother gave him Rs. 5,000/- only which he had counted and handed over to his father-His evidence on the point appears to be so glaringly inconsistent as could hardly be reconciled.

13. So far as the aforesaid underwear in question is concerned, the P.W. 1 Moses had sought to state that the accused Appolous had given Kaka's underwear to the accused Setrak, and the latter had returned back to the hotel, alongwith that underwear. The P.W. 1 had also been heard to say during his evidence that they had stayed at the place of occurrence for about an hour after the commission of the alleged offence. It would seem so unlikely as to be scarcely credible and our belief is less than total that the accused concerned would have preferred to stay back at the place of occurrence for about an hour after the commission of the alleged offence to allow them to be detected by somebody, in the meantime. It is also beyond belief that the accused Setrak would have returned back to the hotel alongwith the underwear of the deceased for keeping evidence of murder with him to his own peril, and to be apprehended by the police. The prosecution case on the point would indeed be a hard nut to swallow.

14. The prosecution had sought to rely upon the evidence of the P.W. 4 Brahmdeo Singh in support of the prosecution case. He sought to state in his evidence that on 15.2.81 at about 4.30 A.M. he was standing in front of his quarters and found Hossain Koya sitting on the rod of a cycle which was being cycled by a Nicobari youth. He had, however, subsequently stated that he had seen them at about 4.30 P.M. on 15.2.81. But according to the P.W. 1 Moses, the accused Appolous had come to the place of occurrence with the victim Hossain Koya at about 4.30 P.M. The P.W. 4 could not. conceivably have seen the accused Appolous carrying the

victim Hossain Koya on his cycle at about 4.30 P.M. in front of his quarters as such.

15. The P.W. 8 Chinniah sought to state that on 15.2.81 at about 3 P.M. when he was going to collect fuel wood from the Loop Road jungle, he found two Nicobar persons sitting in front of the cave of the jungle. On his way back he had again found them sitting in the same position. He had also seen a Nicobari Youth, alongwith Hossain Koya alias Kaka, coming from the opposite direction on a cycle. He had admitted in his examination in chief that he knew Setrak from before. But, as admitted by him during the cross-examination, he curiously did not name Setrak before the Police. The implication appears to be immediately apparent and obvious.

16. The P.W. 9 Manickam appears to be a witness to the recovery of seizure of underwear, cycle and danda on being shown by the aforesaid two accused and the P.W. 1 Moses. On his evidence, Arguman was also a witness to the recovery and seizure of the same. But the said Arguman has not been tendered and/or examined by the prosecution. No explanation either appears to have been issued for his non-examination.

17. The P.W. 10 T.K. Pravakaran had sought to state during examination that the accused persons had confessed before him that they had killed Kaka, and he had recorded their statement. The confessional statement so recorded by him could not clearly be said to be according to law on his own evidence; and he was neither competent under the law to record the same. His evidence would be of no avail to the prosecution as such.

18. The P.W. 11 T. Jagmayah and the P.W. 12 K.T. Pillai, the two police Constables, had sought to state that they had arrested the accused Appolous on being pointed out by Jackleen, daughter of Vergish Perera. Curiously and dubiously the said Jackleen had not been examined by the prosecution.

19. The P.W. 13 P. Varghese Perera had also sought to state that his daughter Jackleen had reported to him that Hossain Koya had gone out with one Nicobar youth at about 3 or 3.30 P.M. She is stated to have further reported to him that

before Hossain Koya's departure with 2/3 Nicobar young men he told her that he was going to purchase articles for selling the same at Port Blair. Her alleged reporting to her father that Hossain Koya had gone out with one Nicobar youth or that he had gone out with 2/3 Nicobar young men clearly appear to be widely discrepant. The P.W. 1 Moses, however, had stated that the victim Hossain Koya had left alongwith the accused Appolous (an not with 2/3 Nicobar Young men, as stated to have been reported by Jackleen to her father). That apart, the aforesaid alleged reporting by Jackleen to her father, P.W. 13, being Hear-say could clearly have no evidentiary value, and cannot be accepted. On the evidence of the P.W. 13 himself, Jackleen has been living in Trivendrum where she is studying. Strangely, however, Jackleen has not been examined by the prosecution. No explanation has either been issued therefor.

20. We find from the records that the prosecution case is entirely based on circumstantial evidence. It is for the prosecution to establish all the links of the chain of circumstances to establish the guilt of the accused beyond all reasonable shade of doubt. The prosecution cannot afford to allow a single link to be missing. The prosecution sought to contend through the P.W. 13 that the victim Hossain Koya alias Kaka used to stay with him at his quarters. On the relevant day, which was a Sunday, Hossain Koya told him that he wanted to take meal as he would be going out. They had all taken meal around 11.30 A.M. or 12 noon. The witness had taken nap, in the meantime; and when he woke up at about 5-30 P.M. he did not find Hossain Koya in his house. His daughter Jackleen is stated to have reported to him that Hossain Koya had gone out with one Nicobari youth at about 3 or 3-30 P.M. She had further reported to him that before his departure with 2/3 Nicobari young men, Hossain Koya had told her that he was going to purchase articles for selling the same at Port Blair. That was indeed the first link in the chain of circumstances to connect the accused concerned with the alleged crime. But the very first link of the chain of circustances to connect the accused concerned with the crime could not be established by the prosecution. The daughter of the P.W. 13, Jackleen, had not been examined by the prosecution. Nor, had any explanation been issued therefor. Adverse presumption under Section 114(g) of the Evidence Act would, therefore, quite naturally arise against the prosecution case on the point. The evidence of the P.W. 13 about his daughter's reporting the

aforesaid facts to him being Hear-say could clearly have no evidentiary value, and can hardly be accepted. The prosecution clearly, therefore, appears to have pointedly failed to establish the first link in the chain of circumstances to connect the accused concerned with the alleged crime, which is fatal for them.

21. The judgment of the learned Sessions Judge and the order of conviction and sentence of the accused concerned further appear to be mainly and inevitably based upon the confessional statement and evidence of the P.W. 1 Moses, who eventually had become an approver in the relevant case, read with the other evidence on record, as discussed by him. But he himself appears to have clearly observed therein that the order sheets of the record do not indicate that the accused Moses was allowed any time for reflection by the learned Magistrate while recording his confessional statement. The endorsement on the statement does neither indicate that the deponent Moses was allowed any time for reflection, even though a caution had been given to him. The learned Sessions Judge has, accordingly, rightly observed that the confessional statement has practically no evidentiary value. But it is curious to note that even thereafter he has subsequently observed in his impugned judgment that there is nothing to disbelieve the evidence of the P.W. 1 Moses, the approver. The aforesaid contradictory observations made by the learned Sessions Judge in his judgment could hardly be reconciled. It would also be pertinent to note in this context that the accused Moses had been produced under arrest before the Court as far back as 7.8.81. He was released on bail on 13.10.81. But he appears to have made his confessional statement on 4.12.81, after a lapse of about nine months from the date of his production before the Court under arrest. No explanation has either been offered by the prosecution for such inordinate delay in obtaining the confessional statement of the aforesaid accused. The confessional statement so made by him clearly, therefore, must be received with a pinch of salt.

22. As regards the evidence of the approver, the learned Public Prosecutor had referred us to the decision in *Ranjeet Singh and Anr. v. State of Rajasthan*, : 1988 CriLJ845 . We are fully alive to the principles of law propounded by Their Lordships in the aforesaid decision. But unhappily for the prosecution, the evidence of the approver Moses does not seem to be corroborated by the other

witnesses presented by the prosecution on material particulars. The evidence of the prosecution witnesses presented during the trial, as already indicated above, per contra, appear to us to be so widely discrepant and so notoriously incoherent and inconsistent as could scarcely be reconciled and relied upon. The evidence of the approver could not clearly be relied upon, in the aforesaid circumstances.

23. The learned Sessions Judge further appears to have observed in his impugned judgment that the circumstances discussed therein clearly point out that the two accused persons Setrak and Appolous have some connection with the death of Hossain Koya, Kaka. He went on to add that the same is not a surmise or conjecture, but is an inference based on facts as could be gathered from the witnesses. But it is a settled principle of criminal jurisprudence that no conviction could be based upon inference and it is for the prosecution to prove the guilt of an accused beyond all reasonable shade of doubt. The impugned judgment passed by the learned Sessions Judge, on his own observation, could neither be sustained as such.

24. Upon the discussions above, we are of the confirmed view that the prosecution has remarkably failed to bring home the charge against any of the two accused-appellants before us beyond all reasonable shade of doubt. The judgment and order of conviction and sentence passed by the learned Sessions Judge could, therefore, scarcely be sustained on merits.

25. On technical and legal ground too, the judgment can neither be sustained. It appears from the record that the learned Sessions Judge had framed charge against the two accused-appellants on 12.4.82 that on or about the 15th or 16th February, 1981 at Malacca jungle, P.S. Car Nicobar, they had committed the offence punishable under Sections 302/34 and 201/34 IPC in terms thereof. The charge so framed, as it is, cannot be said to be specific, but is clearly as vague, as it could be. The charges, as framed, do not indicate that the alleged offences had been committed by the accused concerned in between the night of 15.2.81 and 16.2.81, as stated in the FIR and the post mortem report, but that the offences had been committed either on 15.2.81 or on 16.2.81, as stated by the P.W. 1 Moses in his evidence, who had further stated that he could not remember the exact date of

incident. No trial could conceivably have proceeded on the basis of such a vague charge. We wonder how the learned Sessions Judge, Shri, R.N. Ray could have framed such a vague charge, he did, vitiating the entire proceedings.

26. In the result, both the appeals should clearly succeed, as they must. Both the appeals be accordingly allowed. The impugned judgment and order of conviction and sentence passed by the learned Sessions Judge on 22.10.83 be and is hereby set aside. Both the accused-appellants Setrak and Appolous be held not guilty to the charge under Section 302/34 IPC. They both be acquitted from the said charge, and be set at liberty at once.

This judgment governs both the Criminal Appeal Nos. 117 and 118 of 1984.

U.C. Banerjee, J.

I agree.

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