

State Vs. Bhola Pal Alias Salil Pal

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Court : Kolkata

Decided On : Jul-05-1995

Reported in : 1995CriLJ3717

Judge : R. Bhattacharyya and ;A.K. Chakravarty, JJ.

Acts : [Evidence Act, 1872](#) - Sections 60 and 74; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302 and 307; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 162, 164, 164(2), 298, 313 and 366

Appeal No. : Death Ref. No. 2 of 1994

Appellant : State

Respondent : Bhola Pal Alias Salil Pal

Advocate for Def. : Kazi Safiulla, ;Sasanka Ghosh and ;Madhuri Das, Advs.

Advocate for Pet/Ap. : Ahindra Addya, ;Thakurdas Roychowdhury, ;Alok Raichowdhury, ;Abhijit Addya and ;Sangita Chanda, Advs.

Disposition : Appeal allowed

Judgement :

A.K. Chakravarty, J.

1. This Death Reference No. 2 of 1994 as well as Criminal Appeal No. 173 of 1994 arises out of the orders of convictions and sentence passed by Learned Additional Sessions Judge, Raiganj Uttar Dinajpur dated 23-6-94.

2. The prosecution case is that one Sishir Sharja lodged a verbal complaint at 10.30 p.m. on 3-7-83 at the Raiganj Police Station to the effect that on date at about 7.30 p.m. he and victim Benu Sarkar were proceeding together towards Benu Sarkar's house. When they had reached the junction of 'Anami Sangha Club' near Mohanbati Bazar, two youths wearing shirts and trousers came along the northern side and moved ahead. After both of them had gone about 20 cubits, they stopped and called 'come here, Benu Da'. After talking for few minutes, Benu said that they will have further talk tomorrow. When Benu Sarkar was coming back one of the two youths had fired. After being hit by such firing Benu Sarkar had fallen down on the road. Then the complainant started running, shouting 'shots are being fired' and having reached the house of Benu Sarkar he fell down. The local gentlemen and the wife of Benu Sarkar came there. She became unconscious. Regaining her consciousness the wife of Benu Sarkar accompanied by other local gentlemen went to the hospital where they found that the victim Benu Sarkar had already died.

3. On the basis of the above information in the local police station Raiganj P. S. Case No. G. R. 608 of 1983 was started against two unknown young men. After the investigation police arrested the present appellant Bhola Paul along with another Bibhu Singh (since deceased) from Calcutta. The appellant confessed his guilt on 8-8-93. After the completion of the investigation police submitted charge-sheet against the appellant Bhola Paul under Section 302, I.P.C.

4. The defence case, as it appears from the evidence as well from as other materials on record, is that the convict Bhola Paul did not make any confessional statement and that the alleged confessional statement was recorded by the Magistrate as dictated by the police officer in which he had been compelled to sign under the pain of death.

5. The learned Sessions Judge upon examining the evidence on record and also upon consideration of the previous conviction against the appellant found him

guilty under Section 302, I.P.C. and passed the sentence of death.

6. Being aggrieved by the aforesaid order of conviction and sentence the appellant preferred this appeal and the matter was referred to this Court for confirmation of death sentence under the provisions of Section. 366, Cr. P.C.

7. The prosecution examined altogether 17 witnesses in this case. These witnesses can be categorised in 4 groups, namely, local police, doctor and the Magistrate. P.Ws. 1 to 6 and P.Ws. 8 to 13 are the local witnesses. It is no use discussing their evidence in details for the purpose of this case because most of them were declared hostile and none says anything implicating the appellant for the commission of the alleged offence. P.W. 7, P.W. 15 and P.W. 16 are the police witnesses. P.W. 7 is the seizure list witness, P.W. 15 is the Officer who filled up the formal portion of the F.I.R. P.W. 17 is the I.O. of this case. The medical evidence is furnished by P.W. 14, Dr. R. B. Ghosh. He proved the handwriting of Dr. K. Roy who held the post-mortem examination over the dead body of the victim Benu Sarkar and also deposed about the contents of the post-mortem report. P.W. 16 is Sri D. D. Sinha, the Magistrate who recorded the confessional statement at appellant Bhola Paul.

8. These are all the witnesses examined by the prosecution in this case. Since none of the local witnesses deposed against the appellant implicating him for the commission of the alleged offence under Section 302, I.P.C., the only evidence which was available against the appellant for convicting him was his alleged confession dated 8-8-93. This confession, however, was subsequently retracted by the appellant at the time of trial. The sheet anchor of the prosecution case being therefore based solely upon the retracted confession of the appellant it is necessary to scrutinize the said confession carefully to find out how far the prosecution has succeeded in establishing the guilt of the appellant on the basis of the said confession.

9. Before, however, examining the evidenciary value of the aforesaid confessional statement it is also necessary to examine how far the prosecution has succeeded in proving the identity of the deceased in this case.

10. Heard, Mr. Gouranga Dey appearing for the appellant and Mr. Safiullah, Public Prosecutor appearing for the respondent.

11. Mr. Gouranga Dey, learned counsel for the defence seriously challenged the identity of the victim Benu Sarkar in this case. Accordingly, it is necessary to examine the inquest report to find out whether such identity had been proved before the police officer who held the inquest over the dead body alleged to be of the victim Benu Sarkar. It appears from the inquest report that the dead body was identified by the nurse, other staff of the hospital and their friends as that of Benu Sarkar. We find from the Inquest Report which was marked Ext. 11 in this case that several witnesses have been named as witnesses under the Inquest Report but none of them were examined in this case. It further appears that one A. Ahmed was the police officer who held the inquest. He too was not examined by the prosecution in this case. It also appears from this report that the dead body was sent to the Raiganj Hospital Morgue by Constable No. 1136, Dinesh Rabidul, but neither the doctor who held the post-mortem examination nor the constable who escorted the deadbody were examined in this case. It appears from the post-mortem report that Dr. K. Roy held the post-mortem examination on 4-7-83. The postmortem report was marked Ext. 5 in this case. Finding the difficulty in getting the document admitted in evidence, the prosecution after the argument was heard in this case, produced a certificate given by Dr. R. B. Ghosh dated 10-6-94 wherefrom it will appear that Dr. K. Roy who held the postmortem examination expired on 22-1-91. The learned Sessions Judge was of the opinion that the certificate was a public document and after the closure of the argument of both sides marked the same as exhibit without giving any chance to defence for cross-examination of the authenticity of the certificate. No death report having been produced or the source Of knowledge of such death having been disclosed in the report and the report itself having not been admitted properly by examination of the doctor who issued the same and the said report being not a public document it is clearly not admitted in evidence. The learned Sessions Judge clearly made a mistake in considering the certificate as a public document. Under Section 74 of the Evidence Act certain documents are stated to be public documents and neither the post-mortem report nor any certificate issued by any doctor about the date of death can be said to be a public document. It is also well settled law that post-

mortem report is not a public document (State v. Jian Singh). So neither the post-mortem report nor the death of the doctor who held the post-mortem report has been proved in this case.

12. In the aforesaid circumstances, we have no other alternative but to hold that the identity of the dead body as that of the victim Benu Sarkar has not been proved by any reliable evidence in this case and the prosecution case is liable to be dismissed on this ground alone.

13. Even assuming that the identity of the dead body as that belonging to the deceased Benu Sarkar the question that next comes up for consideration is how far the prosecution has succeeded in proving its case against the appellant on the basis of the confessional statement alleged to have been made by the appellant on 8-8-83. It was submitted by the learned Public Prosecutor that the confession having been retracted at a very belated stage, no importance should be placed on such retraction and the learned Sessions Judge was justified in convicting the appellant solely on the basis of that confession. We are not in a position to accept that proposition of the learned Public Prosecutor because no time limit has been set for the retraction of the confession and if such confession is retracted at any time before or during the trial the Court should generally seek for corroboration of such confession. In the decision of *Koraghasi v. State of Orissa*, reported in (1983) 3 SCC 231, it was held that the retracted confession made before Magistrate, even if voluntary, requires corroboration. It is accordingly necessary to see whether the confessional statement was voluntarily made and also whether the same has been corroborated by other evidence on record.

14. Regarding the voluntary nature of the confessional statement it is an established principle of law that such confession should be made voluntarily by the accused persons being totally freed from any inducement, coercion and the prospect of any gain of any temporal nature. For this purpose we may refer to the case of *Sivappa v. State of Karnataka*, reported in 1995 SCC (Cri) 323, where it was held in paragraphs 6 & 7 as follows:-

From the plain language of Section 164, Cr. P.C. and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an

accused under Section 164, Cr. P.C., it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164, Cr. P.C. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164, Cr. P.C. and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceedings to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of subsection (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

Para: 7 The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his

function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164, Cr.P.C. and the rules framed by the High Court for the guidance of the subordinate Courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the Court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.'

15. In the instant case, the defence case is that he was threatened and tortured by the police officer to make the confession and that as a matter of fact the confessional statement alleged to have been made by him was recorded by the learned Magistrate on the basis of the statement made by Police Officer. In the aforesaid circumstances, it is necessary to scrutinize the confessional statement and the evidence of the Magistrate given in this regard to test its voluntariness. It appears from his evidence that on 3-8-83 while he was posted as S.D.J.M. accused Bhola Paul was produced before him for recording his statement under Section 164, Cr. P.C. It further appears from the evidence that he gave time for reflection till 8-8-83 and he was directed to be detained in the sub-jail in the intervening period. He was again produced on 8-8-83 and on that date his confessional statement was recorded. It further appears from the evidence of the learned Magistrate that though he had administered the usual caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence and that on the first day only he disclosed to him that he was a Magistrate then it never became clear to the appellant that the confession was being recorded by him in the capacity of the Judicial Magistrate, and that he had no concern with the police. It further appears from the confessional statement that there is nothing on record to show where the statement of the appellant was recorded. It further appears from his evidence that the confessional statement of the appellant was recorded in the chamber of the learned S.D.J.M. We have already stated that the examination under Section 164,

Cr. P.C., should not be only in form but also in essence. The identity of the learned S.D.J.M. having not been disclosed properly nor was it explained to the appellant that he has got nothing to do with the police gets the value of confessional statement lessened.

16. It further gets lessened because we find that the supreme test of the absence of police interference during and after the confessional statement was recorded was not adhered to in this case. It appears from the evidence of P.W. 16 that he was produced before the Magistrate by the G.R.O. and that he had not enquired from the appellant who escorted him from jail to Court. Apart from that it appears from the evidence of the learned Magistrate that the door leaf between the ejlas and chamber was not existing and the police constable was sitting in the ejlas and that the G.R.O. office was adjoining to the ejlas. It also appears that G.R.O.'s office was within audible distance from his chamber and ejlas and whisper could be heard. It further appears that there is no note in the confessional statement that no police officer was present at the time of the recording of the statement of the appellant. These are very vital lacuna in the recording of the confessional statement. The visible and invisible presence of the police officers loomed large in the instant case and any confessional statement recorded in such circumstances losses all its voluntary character. It further appears from the confessional statement as also from the evidence of the learned Magistrate that he did not state to the appellant that in the event of his refusal to make any confessional statement he would not be sent back to the police custody. In the aforesaid circumstances, we have no other alternative but to hold that the confessional statement was not made voluntarily as required by law.

17. The prosecution thus having to prove that the confessional statement was made voluntarily, we shall now come to last point urged by the defence counsel that there is no corroborating evidence to prove the alleged confessional statement. We have already stated that there is absolutely no corroborata-tion in this matter from the oral evidence on record. We have also shown that the post-mortem report is inadmissible piece of evidence and that document accordingly cannot be looked into for the purpose of corroboration in respect of the injuries alleged to have been made by the appellant.

18. Let us, however, see how far the prosecution has succeeded in showing corroboration from the postmortem report assuming the same to be an admissible piece of evidence. It appears from the postmortem report that the doctor found as many as four bullet injuries and three Incised Injury on the abdomen of the assailant. It appears from the postmortem report that according to the doctor who held the post-mortem examination that the cause of death was due to gun shot injuries. It is no use going to the details of the gun shot injuries, as it is revealed from the post-mortem examination, because the alleged perpetrator of those gun shot injuries was Bidhu, who has since died. Regarding the incised injuries we find that the doctor found 3 Incised injuries over the left side lower abdomen upper one situated about 2' away from the under lines measuring about 1/4' x 1/2' x abdominal cavity deep, 2nd one situated about 1/2' below the 1st one measuring about 1/2' x 1/4' x abdominal cavity deep, and 3rd one situated about 2 1/2' medial to the anterior superior iliac spine measuring about 1/2' x 1/4' abdominal cavity deep. It therefore appears that there are as many as three distinct stab injuries on the abdomen of the victim. In the confessional statement, however, it appears that the appellant plunged his knife once into the abdomen of the victim. The medical evidence therefore, does not corroborate the confessional statement in respect of the number of injuries. The prosecution, therefore, has failed to show any corroboration of the confessional statement.

19. In this connection, the reason as given by the appellant for making the confession seems to be doubtful. We find from the impugned judgment that there is an observation of the learned Judge that the appellant is a hired murderer, presumably because of the previous conviction where he was sentenced to imprisonment for life on a charge under Section 302/34, I.P.C. for committing murder of Totan alias Nikhilesh Goswami. It is doubtful whether such a hardened criminal would make any confessional statement voluntarily on his own accord out of respect for truth.

20. Before parting with this case we are also to mention that the appellant has been charged under Section 302, I.P.C. in this case. We have already shown from the prosecution case that the victim received both gun shot injuries as well as stab injuries. So far as gun shot injuries are concerned its perpetrator Bibhu Singh

having already died, it is necessary for the prosecution to prove that the injuries alleged to have been inflicted by the appellant had caused the death of the victim Benu Sarkar to prove the charges of Section 302, I.P.C. It is not the prosecution case that the stab injuries along with other injuries caused the death of the victim. There is no medical evidence on record to prove that the stab injuries alone were likely to cause death of the victim. The appellant has not been convicted in this case on a charge under Section 302, read with Section 34 of the I.P.C. The conviction under Section 302, I.P.C. against the appellant, in the aforesaid circumstances, also cannot be sustained.

21. The prosecution thus having failed to prove the identity of the dead body as belonging to the victim Benu Sarkar, that the confession was made voluntarily by the appellant, that there was any corroboration of the retracted confession and that the reason of the confession given by the appellant is free from doubt and that no charge under Section 302, I.P.C. was sustainable against the appellant that we have no other alternative but to hold that the conviction and sentence of the appellant was not proper and justified.

22. The death reference in the circumstances as stated above cannot be confirmed and it accordingly stands rejected.

23. The appeal accordingly stands allowed.

24. The orders for conviction and sentence of the appellant under Section 302, I.P.C. are accordingly set aside. The appellant is found not guilty of the charge framed against him and he stands acquitted of the said charge.

25. The appellant be released from the jail custody at once, unless wanted in connection with any other case.

R. Bhattacharyya, J.

26. We are speaking through different judgments, but our voice is chorus, as we sing a song of full throated case through this judgment. My learned brother is delivering different, but not differing judgment. In substance, we are unanimous

and my judgment has earned the concurrence of my learned brother Sri Ashok Kumar Chakravarty, Justice. Now to the issue involve in the appeal.

27. This criminal appeal and the death reference are directed against the order of conviction and sentence passed by the learned Additional Sessions Judge, Uttar Dinajpur, Raigunge, who convicted the accused under Section 302 of the I.P.C. and sentenced him to death by hanging till death. He is also sentenced to pay a fine of Rs. 5,000/- in default, R.I. for 6 months more under Section 302 of the I.P.C.

28. The facts of the case under death reference and the appeal are tittle bit intricate as it involves the substantial question of law to be adjudged in relation to the factual exposure of the case.

29. In the background of the above, the outline of the prosecution case without any unnecessary detail requires to be reflected for appreciation of fact and law, in particular, in the light of the salubrious principle of law, fouler the crime-higher the proof.

30. Reverting to the factual premises of the case, it is glaring that Sisir Kumar Sarkar P.W. 1 laid an information with the P.S. Madhya Mohanbati Raigung on 3-7-1983 within the proximity of 20.50 hours about the macaber assault on Benu Sarkar in the night of the said date.

31. The law was set into motion and the investigation preceded in a meteoric speed to collect materials behind the heinous crime. In course of investigation, the accused Babu Nandi was arrested and produced before the learned SDJM Raigunge in connection with the P.S. Case No. 2 dated 3-7-83.

32. The learned SDJM on being satisfied on the prayer of the investigation issued a warrant of arrest in respect of Babu Singh, since deceased, and Bhola Pal for their production before him. They were arrested in Calcutta who were produced before the learned SDJM. The prayer for confession of Bhola Pal was made by the investigation, which, however, stood allowed. The learned Magistrate, after due warning and caution, recorded the confession of the accused Bhola Pal in exercise of the power under Section 164 of the Cr. P.C. 1973. which the accused Bhola

subsequently retracted during the trial.

33. The police, in course of investigation, collected materials against the accused and submitted the report (CST) under Section 173 of the Code of Criminal Procedure 1973. The learned Magistrate in appreciation of the materials on record which included among others, the charge-sheet was of the view that the case is exclusively triable by a Court of Sessions, for which, he committed the case and the accused to the Court of Sessions to stand trial.

34. The learned Additional Session Judge framed charge under Section 302 of the I.P.C. against the accused persons which was read over and explained to the accused, who pleaded not guilty to the offence charged and claimed to be tried.

35. The prosecution, in this case, to substantiate the charge under Section 302 of the I.P.C. against the accused persons examined as many as 17 witnesses.

The accused persons did not examine any witness. The defence of the accused is of bare denial. The learned trial Judge in consideration of the materials passed the order of conviction and sentence where from a death reference arose and an appeal preferred.

36. Before we embark on an inquiry to adjudge the guilt or otherwise of the accused, it is manifest that the confession of the accused, though retracted, is the sheet anchor of the order of conviction and sentence.

37. It is needless to repeat that the *corpus delicti* has not been identified by the hospital staff. Doctors or the near relations about which a furore has been raised by the learned counsel for the defence that the death of Benu has not been proved to the hilt, although the death of Benu had not been challenged by the defence. There is unimpeachable evidence on record that the inquest report, exhibit 2, found its way in evidence in regard to which the defence did not raise any voice of protest. It is glaring from the inquest report that the body of Benu Sarkar was identified by the Nurse and the other staff on duty and their friends. The documents, exhibit 11, when admitted into evidence without least protest from the defence cannot be challenged at this stage. It is well established principle of law

that a document when admitted into evidence without any slightest demur, the contents of the said document cannot be excluded nor a portion of it can be considered in isolation. Document once admitted can hardly be challenged. Besides, the law laid down by the apex Court has completely set at rest the controversy. The apex Court admitting the inquest report held in *Rameshwar Dayal v. State of U. P.*, AIR 1978 SC 1558 : 1978 All LJ 1011 the following :-

'The statement made by the Investigating Officer in inquest report is not a statement made by any witness before the police during investigation but it is a record of what the Investigating Officer himself observed and found. Such an evidence is the direct or the primary evidence in the case and is in the eye of law best evidence. Unless the record is proved to be suspect and unreliable, perfunctory or dishonest, there is no reason to disbelieve such a statement in the inquest report.

Such a statement in inquest report does not fall within the four-corners of Section 162, Cr. P.C. In fact, documents like the inquest reports, seizure lists or the site plans consist of two parts-one of which is admissible and the other is inadmissible. That part of such documents which is based on the actual observation of the witness at the spot being direct evidence in the case is clearly admissible under Section 60 of the Evidence Act whereas the other part which is based on information given to the Investigating Officer or on the statement recorded by him in the course of investigation is inadmissible under Section 162, Cr. P.C. except for the limited purpose mentioned in that Section.'

38. Therefore, it is the faint attempt of the defence that the death of Benu has not been proved to the core. There is no evidence on record nor it is claimed that the post-mortem was held in respect of another body other than the body of Benu Sarkar. The Doctor who held the post-mortem exhibit 5, show that he borrowed 'information furnished by police as per challan Inquest Report'. In the background of the above, the Court would be too slow to hold that the death of Benu has not been proved. The post-mortem report is as follows:-

I. External Appearance :

1. Condition of subject-stout, emaciated decomposed etc. The body was of average height, stout, eyes partly open, mouth closed, Blood came out of the nostrils, chest and upper abdomen covered with clotted blood.

R/M - present.

2. Wounds-position, size, character:-

i) 3 Incised Injury over the left side of the lower abdomen upper one situates about 2' away from the under lines measuring about $\frac{3}{4}$ ' x $\frac{1}{2}$ ' x Abdominal cavity deep. 2nd one situated just below the 1 st one measuring about $\frac{1}{2}$ ' x $\frac{1}{4}$ ' x abdominal cavity deep. 3rd one situated about $2\frac{1}{2}$ ' medial to the anterior Superior III ac spine measuring about $\frac{1}{2}$ ' x $\frac{1}{4}$ ' x abdominal cavity deep.

ii) One perforating injury over the Rt. side of abdomen near the Kidney Region, circular in size about $\frac{1}{4}$ ' in diameter the surrounding skin of the injury was scratched.

iii) One perforating injury over the Right side of the abdomen circular in size measuring about $\frac{1}{4}$ ' in diameter, the about 3' below Right nipple.

iv) One perforating circular injury measuring $\frac{1}{4}$ ' in diameter situated over the lower end of sternum. The injuries surrounding skin of the injuries stated above were scratched.

v) One perforating circular injury near the medial border of left scapula measuring about $\frac{1}{2}$ ' in diameter (Exist). Clotted blood found in subcutaneous tissues, fat and muscles in the injuries mentioned. Huge amount of blood in the chest abdominal cavity detected 2 Bullets recovered from the body of the deceased. One from the abdominal and other from the chest cavity. Handed over the escorting Constable, a sample of blood preserved also handed to the constable.

3. Bruise-position, size and nature : (Blank).

4. Marks of ligature on neck, dissection etc. Nil.

II Cranium and Spinal Canal:

1. Scalp skull and vertebrae : Healthy.
2. Membrane: Conjested.
3. Brain and spinal Cord (The spinal canal need not be examined unless any indication of disease or injury exists): Conjested.

III Thorax

1. Walla, ribs and Cartilages: Stated.
2. Pleurae : Rt plura-perforated.
3. Larynx and Tracheea: Healthy. Right Lung: Middle lobe perforated. Left Lung : Congested. Pericardium : Perforated. Heart: Base of the heart perforated one bullet recovered from this area behind the heart.

IV - Abdomen

1. Walls: Stated.
2. Peritoneum : Perforated at various sites.
3. Mouth, Phanyx and Oe sophagus: Healthy.
4. Stomach and its contents: perforated,
Empty, one bullet recovered from behind the stomach near the spinal column.
5. Small intestine and its contents : Healthy.
6. Large intestine and its content: Healthy.
7. Liber: Lower surface of the liver - Lacerated.
8. Spleen : Healthy.
9. Kidney : Healthy.
10. Bladder: Healthy, Empty.

11. Organs of generation, external and internal: Healthy.

Muscles Bones and Joints.

1. Injury - (Blank)

2. Disease or deformity : (Blank)

3. Fracture : (Blank).

4. Dislocation : (Blank).

More Detailed Description of Injury or Disease: (Blank).

N.B. - In the case of wounds note whether is any indication of the wounds being homicidal, suicidal The cause of death in my opinion was due to shock and haemorrhage as the result of the injuries stated

above which were antemortem, Homicidal caused by Gun shot injuries.

39. The evidence extracted above, if weighed with the evidence of the Doctor proves that the boot is on the other leg. To evaluate or appraise the evidence of the Doctor, we take our journey through that evidence of his, as it will be immensely necessary to consider the spontaneity voluntariness of the confessional statement, exhibit 7 by which the accused has been fixed by the prosecution.

40. P.W. 14 Doctor R.B. Ghosh is candid in his evidence, when he said, 'the three injuries clubbed under number 1 may be caused by sharp cutting weapon.'

41. If we take a glimpse of the confessional statement, the atmosphere is charged with suspicion, we will discuss this aspect of matter, as we proceed. P.W. 14 has proved the post-mortem herein before mentioned where death according to the Post-mortem was due to shock and haemorrhage and that the result of injuries stated above, which were antemortem, homicidal caused by Gun shot injuries (under scored by me). The above evidence unmistakably proves that knife assault did not attribute to the death of Benu as the Gun Shot injuries, according to the

post-mortem, were the result of the death of his.

42. The defence has raised a hue and cry about the admissibility of the post-mortem report on the foot that Doctor, who held the post-mortem was not examined by the Court nor the prosecution took any steps in accordance with law to admit the postmortem into evidence. But, admittedly, the Doctor Kamalendu, who held the post-mortem passed away on 22-1-91, as evident by exhibit 1. This document did not meet any resistance when it was admitted into evidence by the prosecution. It is glaring that the document was admitted into evidence unopposed.

43. It is quite apposite to mention that the charge was framed against the accused under Section 302, IPC on 19th of December, 1992, during when Kamalendu who held the post-mortem, already left the world on 22-1-91, though it was late in the day but on law it bore no dent. In the back drop of the above, it is a far cry in wilderness that the death of Benu had not been proved and the Doctor should have been examined to prove the post-mortem in this case whose non-availability has not been explained by the prosecution. On perusal of the evidence, I am of the view that the admissibility of the post-mortem report is beyond controversy. Doctor R.B. Ghosh is vocal in his evidence that he found 'three injuries clubbed under number I may be caused by sharp cutting weapon.' There is no evidence on record as to who actually inflicted the other two injuries on him barring the knife injury alleged to have been inflicted by Bhola, the accused in his confessional statement, exhibit 7.

44. Further, there cannot be any bone of contention that revolver is a fire arm, but not a sharp cutting weapon. Therefore, the Gun shot injuries if were the result of death of Benu, the injury inflicted on Benu by sharp cutting weapon cannot come to the aid of the prosecution to fix the appellant, although grave doubt generated in this case about the truthfulness and voluntary character of the confessional statement, which is sought to have been exploited and explored by the prosecution to fix the accused with the guilt. But, we are well aware in adjudging the guilt of an accused of a crime of this nature that there is a long distance to travel between 'may be' or 'may not be'.

Moral conviction must be replaced by legal conviction.

45. It is significant to note that the exhibit 7 holds the field which has been disputed by the defence throughout for being tainted and the value of the same being impaired as the same was recorded by the learned Magistrate extraneous to the provision of law. However, to adjudge the viability of the confessional statement under the law, if we walk through the bosom of the confessional statement, exhibit 7, it will unfold that the confessional statement of the accused Bhola is paled into insignificance, since stricken with infirmity and illegality. In the context to appreciate the confessional statement, in the background of the law laid down by the Courts of our country. I quote a portion of it:-

'We met Benu Sarkar on the way. Bibhu called Benu Sarkar. An altercation between two of them continued for about 5 minutes. Both of them became very much agitated. At this time having brought out a revolver from his waist Bibhu fired four shots at Benu Sarkar. Being hit by the shots fired at him Benu Sarkar fell down on the ground and said 'Bhola save me'. Then having taken out a knife from the waist I plunged it in Benu Sarkar's belly. Thereafter both of us ran away and spent the night in a room resembling a cowshed of a dwelling house of a locality beside the High Road. In the next evening, we two went to Malda via Kaliagunj by catchinng a lorry and from that place went to Calcutta by catching a train. Later the police caught me. I have nothing else to say.'

46. The above confession, if taken into consideration, glossed two very important facts. The first of which is that he did not fire 4 shots at Bhola who immediately fell down on the ground and said 'Bhola save me', before the knife blow. The accused, according to his confession, took out the knife of the waist and plunged it into Benu Sarkar's belly. If the same is taken into consideration, it is significant that Bhola was the author of a single knife assault after Benu fell down on the ground for the 4 shots fired at him by Bibhu. Therefore who was the author of the two other injuries caused by sharp cutting weapon? The evidence is void.

47. In the context, the claim of the prosecution that the accused appellant could be convicted under Section 307 of the IPC is an endeavour which verges on futility. The Gun shot injuries could not be equated with the sharp cutting injuries 1 say no

more, since I have copiously dealt with the same.

48. Now, about the confession as the prosecution and the defence have crossed their swords about the authenticity of it, exhibit 7. In considering the confession, there could not be any shred of doubt that the confession suffered a retraction during the trial. To add weight and credibility, corroboration of it is absolutely essential.

49. The Courts of our country has blown trumpet without any note of discordance about the law to be applied for adjudging and accepting the confession of an accused and a co-accused. The law is simple that the confession of an accused, and co-accused which is subsequently retracted during the trial will stand corroborated by particulars, materials and general. The Apex Court in *Shankaria v. State of Rajasthan* in 1978 Cri LJ 1251 : AIR 1978 SC 1248 endorsed the above. In accepting or rejecting the retracted confession, corroboration need not necessarily be corroborated of each and every fact mentioned in the retracted confessional statement. It would be sufficient, if there is any corroboration of material particulars. The generic question was answered by the Apex Court again in *Shankar v. State of Tamil Nadu* : 1994 CriLJ3071 holding :-

'The judicial confessions are those which are made before a Magistrate or in court in due course of legal proceedings and when such a confession is retracted, the courts have held that apart from the statement being voluntary it should be true and should receive sufficient corroboration in material particulars by independent evidence. The rule of prudence namely requiring corroboration does not mean that each and every circumstance mentioned in the confession with regard to the participation of the accused in the crime must be separately and independently corroborated. It is sufficient if there is general corroboration of the important incidents, just like in the case of an approver's evidence and it is not necessary that the corroborative evidence itself should be sufficient for conviction. It is not illegal to base a conviction on an uncorroborated confession of an accused person but as a rule of prudence which has sanctified itself to the rule of law, the courts do look for corroboration before acting upon and accepting the retracted confession and what amount of corroboration would be necessary in a case would be a

question Of fact to be determined in the light of the circumstances of the case.' The Apex Court in M.O. Sham Suddin v. State of Kerala 1995 SCC (Cri) 509 expressed an identical view.

50. In the advent of the confessional statement, we cannot but hold that there is no corroboration in material particulars. There is no material erupting from the confessional statement as to whether, apart from the present accused Bibhu, if there was any other associate or associates with them. This matter is very important in the background of three injuries being sustained by the deceased as vouched by the Doctor PW 14 and one of which had been acknowledged under strain circumstances by the appellant accused.

51. Besides, the post-mortem runs counter and harbours hostility to the confessional statement. In the confessional statement, there is factual exposure of knife assault but, the medical evidence proves that the death was due to Gun shot injuries suggesting thereby that the confessional statement ipso facto could not be relied on. The altercation continued for five minutes as spoken to by Bhola does not gather any assurance from the evidence of PW 1 who maintains a silence about the altercation. There is no evidence that PW 1 left the place in the midst of altercation.

52. Regarding the confessional statement, I do not like to burden my judgment as my learned brother has fully discussed it with great detail. I cannot but share his view. The confessional statement as claimed to be involuntary and recorded at the behest of the accused is bereft of truthfulness, authenticity and credibility because of the deliberate and dishonest investigation on the part of the investigating agency as is apparent from various circumstances from the record. The evidence of PW 16 rang hollow regarding confessional statement.

53. There is sufficient evidence on record that the the explanation furnished by the accused while examined under Section 313 of the Cr.P.C. There is no further examination of the accused after the Court came to the conclusion that the accused was previously convicted in respect of session case being session case number 21 of 1980, exhibit 14. The Court in acknowledging the previous conviction cannot depart from the solemn law as provided by Section 298 of the

Code of Criminal Procedure.

54. However, I cannot resist my temptation that the evidence of PW 16 has caused enough shipwreck to the case of the prosecution. He by his evidence has launched the prosecution into disadvantage, where the prospect of recovery of the prosecution case has been degenerated into decay.

55. In the background of the above, there could be no scope to discuss the evidence of the other witnesses.

56. Upon going through the judgment, it is less said the better about the order of conviction and sentence. The conclusion reached by the learned Additional Sessions Judge to say the least simply shows that he had no conception about the evidence within the realm of the Evidence Act. There was total non-application of mind and law by the learned Court below, while arriving at a conclusion to which I cannot agree. The approach made by the learned Court below is basically foreign to the principle of justice and that the learned Court below was guided possibly more by indignation and wrath than law, evidence and reasons.

57. In the result, I cannot but reject the death reference and the appeal stands allowed. In view of the aforesaid discussion, the conviction of Bhola Pal under Section 302 of the IPC is also set aside. He is acquitted of the charge framed against him. The appellant shall be set free at once unless wanted in connection with any other case.

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