

**Md. Akram Vs. the State**

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**Court :** Kolkata

**Decided On :** Jun-22-1983

**Reported in :** 1984CriLJ520

**Judge :** B.C. Chakrabarti and ;Jitendra Nath Chaudhuri, JJ.

**Appellant :** Md. Akram

**Respondent :** The State

**Judgement :**

**B.C. Chakrabarti, J.**

1. These two appeals -: one at the instance of Md. Akram alias Akram and the other at the instance of Arun Kumar Dey alias China Bagha alias Sk. Bagha and Md. Akram arise out of an order of conviction and sentence passed by the learned Additional Sessions Judge 2nd Court, Alipore under Section 302/34, I. P. C.

2. This judgment shall govern both the appeals.

3. The appellants along with one Bojoy Singh were placed on trial to face charge under Section 302/34, I. P, C. for committing murder of one Uday Singh Roy on March 29, 1980 at the ' crossing of Vivekananda Road and Baldeopara Road. Bojoy Singh Roy was acquitted of the charge while the two appellants have been found guilty and sentenced to imprisonment for life.

4. The prosecution case, in brief, is as follows:

On 29-3-1980 at about 9/30 P.M. the complainant Sachin Kolay along with some of his friends were gossiping near the crossing of the two roads aforesaid. The victim Uday and Mahadeb were talking at a distance of about 7/8 cubits , in front of a shop known as 'Gopal Stores'. Suddenly the attention of the informant was drawn to the sound of an object falling in front of them. They noticed that the accused Akram clasped Uday while the accused China Bagha struck him with a knife on the neck. Immediately thereafter the accused persons crossed Vivekananda Road and ran towards Ward Institution Street. Two other boys were standing nearby also followed them. Dulal raised alarm and hurried to the place where Uday was assaulted. Uday stood with his hand at the throat and blood was trickling down through his hand. The elder brother of Uday namely, Dilip who was present at a nearby dispensary rushed out to the place of occurrence. He put off his Punjabi and placed it at the site of the wound. Dulal, Shibaji and Panchkari also came there after making a brief and futile chase of the accused. The victim, stated to the persons present that he was assaulted by China Bagha. A taxi was called and the victim was removed to the Medical College Hospital where he was declared dead. Sachin came back from the Hospital and went to the Police Station to lodge the information. F. I. R. was recorded on the basis of his statement and Manicktola P.'S. Case No. 38 dated 29-3-1980 was started. The police Officer took up the investigation and visited the place of occurrence. He examined witnesses and searched for the accused persons. Thereafter, he went to hospital held inquest on the dead body and arranged for postmortem examination. Subsequently accused persons were forwarded to the Court for recording confessional statement and China Bagha made a statement before the Magistrate which was duly recorded. On the prayer of the I. O. a T. I. parade was held in respect of the accused Bejoy. Finally. charge-sheet against the accused persons was submitted on 19-7 -1980.

5. The defence pleaded, not guilty to the charge. The positive defence was that the occurrence did not take place at the place alleged by the prosecution and that the case has been concocted at the instance of Shibaji who is a leader of the locality and inimically disposed towards the accused.

6. They also alleged that the suspect Bejoy was shown to the witnesses before T. I. parade and there was no possibility of recognition in view of power failure at the time of occurrence and the alleged place of occurrence.

7. As many as 23 witnesses were examined for the prosecution. One witness was examined for the defence. The case for the prosecution rested on the testimony of several eye-witnesses, the dying declaration made by the victim Uday and the confessional statement made by the accused China Bagha. Mr. Somraj Dutt argued the appeal on behalf of Md. Akram and Mr. Balai Roy argued the case on behalf of the other appellant China Bagha. Some of the points urged by them were common namely, that the eye-witnesses could not be believed, that there was load shedding at the place of occurrence at the relevant time and no blood marks were found at the place of occurrence indicating that the incident could not have taken place there and that the evidence that the victim was made to stand erect at the site was inherently improbable and concocted to explain the absence of any blood mark at the spot. Mr. Dutt appearing on behalf of Md. Akram further contended that the dying declaration does not implicate the accused Akram and Mr. Roy argued that the confessional statement which was subsequently retracted clearly makes out a case as if the assault was inflicted in exercise of the right of self defence. It was also complained that no investigation was directed in the line of the facts stated in the confessional statement.

8. In order to appreciate the points raised it is necessary to refer to the evidence of the witnesses and the other materials on record. P. W. 1 is a plan maker who prepared a plan of the site. P. W. 2 took a photograph of the road at the crossing. P. W. 3 Sachin Bhow-mic is the person who lodged the F.I.R. (Ext. 2). He claims to have seen the actual assault. He removed the victim in a taxi to the Medical College Hospital. It was suggested that the occurrence did not take place at that place and it was argued that had it been so there would inevitably be some blood marks at the spot. It appears from his evidence that the incident took place on the road and not on the footpath. This has some bearing because the evidence of P. W. 1 indicates that there was vehicular traffic at the crossing suggesting thereby that even if any blood fell on the road it might have been obliterated by the passing vehicles. It was also taken from the witness in cross-examination that there are

several cases pending against him in some of which P. Ws. 5, 18 and 8 were also co-accused. The case in which this witness figured as an accused relates to an incident dated 22-10-1980 and 15-8-1978. The first case relates to a matter subsequent to the date of incident and could not obviously therefore supply a motive for false implication of the accused persons by this witness. At the most it shows that he too is a person who does not possess a good reputation and is suspected to be involved in some cases. P. W. 4 Dulal Sharma is also a witness to the occurrence. He says that he found the accused Akram holding the victim Uday and China stabbing him from the front. He chased China who was running with a blood-stained knife in his hand. Two other boys were also running along with the accused - one of whom had a bomb in his hand. Being threatened by them the witness retreated. On coming back to the place of occurrence he found Uday being kept standing with blood-stains on his shirt and hands. A punjabi was placed on the wound to prevent bleeding. This witness also says that Uday himself gave out that Bagha had stabbed him on the throat. This witness too went to the hospital and he admits that he is an accused in two criminal cases in one of which P. Ws. Shibaji Sachin and Dipuda figured as co-accused. P. W. 5 is Shibaji. He materially corroborates P. Ws. 3 and 4 and also speaks of the dying declaration made by Uday. He admits in cross-examination that he is an accused in a murder case relating to the murder of one Sankar Roy on 30-3-1980. He further admits that he belongs to a particular political party and several police cases have been filed against him. This witness is the elder brother of the victim. P. W. 6 Prantap Kumar alias Panchu says that when Uday and Maha-deb were gossiping on the Vivekananda Road then he saw Md Akram to catch hold of Uday from behind and China Bagha stabbing Uday from the front. Thereafter, the assailants ran towards Ward Institution Street. He also speaks of the dying declaration made by Uday. He is an accused in 3/4 criminal cases. He identified the trousers worn by Uday, the punjabi placed on the site of the wound and the shirt worn by the victim, all bearing stains of blood. It was suggested that the witnesses belonged to a particular faction of the political party and the accused and the witnesses belonged to different faction of the same party. P. W. 7 is Mahadeb Ghose. He also corroborates the previous witnesses to the occurrence. He denies that he is an accused in any case or that he belongs to any political party. P. W. 8 Dilip Singha

Roy alias Dipu is another brother of the victim. At the relevant time he was sitting in a dispensary situated in front of their house. On hearing the shout he came out and saw Uday standing with his hand pressed against his throat. The street lights were burning. He rushed towards Uday and saw Sachin holding Uday and blood was trickling through the hands of Uday. The witness put off his punjabi and placed it at the site of the wound. This witness was told by Sachin that Akram of Rajabazar caught hold of Uday and China Bagha of Jogipara stabbed him. Uday gave out that he was stabbed by Ciiina Bagha. He admits that he is an accused in a case pending in the Sealdah Court relating to an incident dated 22-10-1980. As I have already indicated that the case relates to an incident subsequent to the incident under consideration by us. P. Ws. 9 and 10 are two police constables who have said nothing material. P. W. 11 Dr. Arunabho Roy Chowdhury is a member of the West Bengal Health Service. He hold postmortem examination on the dead body of Uday Singha Roy on 30-3-1980. On examination he found one incised injury 2'x 6' on the soft tissues of the neck placed over the left side of the root of neck and over the suprasternal notch below the left angle of mandible. On dissection and tracing the track of the wound it was found to be directed downwards and backwards and medially. The wound cut the jugular veina and the left common carotid artery and finally cut the upper pole of right lung at the apex through and through. Chest cavity was full of clotted blood. Death was due to the effects of the injury on the neck which was antemortem and homicidal in nature. He further says that it is possible for the subject to keep standing for a few minutes after receiving such injury and that it may be possible for him to speak a few words also, He did not find whether the vocal chord was injured or not. He agrees with the general view expressed by Modi that death may be caused if large blood vessels such as carotid artery and jugular veins are out subject to exception. He considers Modi as an authority and agrees with the view expressed in his treatise on jurisprudence that blood is likely to spurt out if a main artery is cut by a sharp cutting weapon. p. W. 12 Debasis Das was sitting in a Restaurant at the relevant time. He saw Shibaji, Panchakari, Sachin and Dulal near the crossing of Vivekananda Road and Baldeopara Road. While he was waiting in the restaurant he heard an alarm that China and Akram had stabbed Uday. He looked up and saw both the accused running towards Ward Institution Street. He came out of the

restaurant and saw the victim with the injury on the throat and also saw the victim being taken in a taxi to hospital. At that place he saw P. W. Kakali Bhattacharjee who enquired what the matter was about. She gave out that she saw China Bagha with a blood-stained knife in his hand and Akram running away. He denied having been involved in any case, P. W. 13 Dr. Prabir Narayan Sen was posted as Officer on duty at the Emergency Ward of Calcutta Medical College on 29-3-1980. He says that Uday Singba Roy was brought to the Emergency Ward on that day at about 10-20 P. M. and he was found dead. He issued a Death Certificate Ext. 3. P. Ws. 14, 15 and 16 are formal witnesses. P. W. 17 is the owner of a restaurant named 'Janata Cafeteria' situated near the place of occurrence. On the relevant night he heard a golmal and saw Uday standing with his hand on his throat and Sachin was standing behind Uday. He also says that electric lights were on. at that time. Out of fear he closed the shutter of his shop. P. W. 18 Swapan Kumar Dey sells wooden articles on the pavement at the crossing of the two roads. On hearing the shout he looked up and saw Akram catching hold of Uday and China Bagha stabbing him from the front. He denied that he belongs to the group of Shibaji. He also denies that on 21-10-1980 he along with others attacked a police party with pipe-guns etc. P. W. 19 is a Sub-Inspector of Police who held a part of the investigation. p. W. 20 Kakali Bhattacharjee says that on 29-3-1980 at about 9-30 P.M. while she was coming back from the house of a friend's house she saw China Bagha with a blood-stained knife in his hand and Akram entering into the Ward Institution Street. She went back to her friend's house and subsequently returned along different route. On the way she met Raja (P. W. 12) and told him what she had seen and she was told by Raja that Akram and China ' had stabbed Uday who was removed to hospital. She was sought to be discredited with reference to certain omission- in her statement to the police. It was suggested that she did not tell the police hat she saw Akram when she came to the crossing of Ward Institution Street and Vivekananda Road. The omission indicates as if she did not see the two accused persons when she came to the crossing of Ward Institution Street and Vivekananda Road. Her evidence is that she saw China Bagha and Akram entering into the Ward Institution Street. Mr. Dutt wanted to contend that Akram was not mentioned in this statement before the police. Such a conclusion however cannot be drawn from what has been taken from her by way

of omission. It was taken from the I. O. that she stated that when she came near the crossing of Ward Institution Road and Vivekananda Road she saw China Bagha. Therefore it was sought to be argued that her evidence that she saw China Bagha and Akram must be an embellishment. Such an argument could have been made had it been taken from her that she did not mention the name of Akram to the I. O. Omission in that form was not taken. Mr. Dutt however was fair enough to give up this point upon a reference to the statement recorded under Section 161, Cr. P. C. P. W. 21 is a Police Officer who recorded the F. I. R. and took up the investigation. He did not find any bloodstains on Vivekananda Road. He did not find the-hard substance mentioned in the F. I. R. and stated by some of the witnesses to have fallen near them immediately before the occurrence. P. W. 22 is a Judicial Magistrate who recorded the confessional statement of China Bagha. The accused, was produced before him on 5-5-1930. He gave him the usual caution and warning and directed him to be kept segregated for further reflection. The accused was again produced before him from jail custody on 7-5-1930. Again he warned and cautioned the accused in the manner he did previously and being satisfied with that the witness voluntarily made a statement recorded the same in his chamber (Ext. 4). The statement was recorded at 3-30 P.M. The accused was kept in the chamber of the Magistrate from 10-30 A.M. so that he might have further time for reflection whether or not to make any statement. It was suggested that the Magistrate had not taken proper steps to ensure that the accused made a voluntary statement. It is significant that it was not suggested in cross-examination that the accused made the statement under compulsion or threat by the police. P. W. 23 is another Sub-Inspector of Police.

9. The witness examined for the accused is a Doctor. He was an Assistant Professor of Forensic Medicine and was also Adviser to the Government of India in Medico Legal Medicine for 5 years. Presently he is working as Vice-Principal of a Law College. In view of the nature of injuries found on post-mortem examination this witness gave out that there would have been spurting of blood with profuse haemorrhage on the wearing apparels and on the spot. In answer to another question he said that in view of the massive cut of both common carotid artery and jugular veins the subject was likely to collapse at the spot within one or one and half minutes. He also stated that he was likely to lose consciousness within half to

one minute of his falling down. This is all the evidence in the case.

10. We have already indicated the points urged on behalf of the appellants. As regards the point that there was load shedding so that it was not possible to recognise the assailants, it may be sufficient to point out that almost all the witnesses have stated that there was no power failure at the relevant time and that the place was well lighted.

11. Another point which was seriously pressed on behalf of the defence is the absence of any blood mark at the spot. D. W. 1 has undoubtedly said that in case of such an injury blood is likely to spurt out and one may expect stains of blood at the site. The I. O. has said that he did not find any, Therefore, it; was argued that the occurrence could not have taken place at the place mentioned by the prosecution. It was found on the evidence that the incident occurred on the road and not on the pavement. There is evidence that there is heavy vehicular traffic on the road. There is further evidence that the victim after receiving the injury placed his hand at the site of the injury and almost immediately thereafter the elder brother placed his wearing punjabi on the wound. This might have accounted for the absence of any blood. mark at this spot. This spurting was prevented by the reflex action of the victim in placing his hands on the neck and the subsequent placing of a punjabi at, the site of the wound. Even if a little blood fell on the spot the stain might have been removed by the passing vehicles. The position might have been different, had, the victim fallen on the ground after receiving the injury. Here, again the learned Advocate contended that the victim could not have remained standing after receiving such an injury and the story that he was made to stand erect was concocted only to explain the absence of blood marks. From the evidence of D. W. 1 it is clear that it is possible for the subject to keep standing for one and one and half minutes even after receiving such an injury. Therefore, the medical evidence does not indicate that the victim in such a case must invariably collapse to the ground at once. We have it in evidence that immediately after the injury Sachin and others at once came to the spot and caught hold of the victim. It may be that under ordinary circumstances the victim would be made to lie down but considering the place namely, that it was a road with a heavy traffic it was perhaps thought unsafe to do so, particularly when the witnesses were looking for

a taxi with a view to rush the victim to the hospital at once. It is in evidence that a taxi was immediately available and therefore there was no occasion for the victim to lie down at the spot. The positive evidence of so many witnesses cannot be undone on a mere probability that he might have collapsed to the ground.

12. It was then contended that before taking the victim to the hospital it would have been more natural for the witnesses to seek assistance of some local Doctor. Considering the time of the incident namely about 10 P.M. in the night it is perhaps futile to expect a Doctor to be readily available. It was pointed out that there was a dispensary close by. Indeed, it is in evidence that Uday's brother came running from the dispensary which obviously suggests that the dispensary was open at the time. Assuming that it was open it does not necessarily mean that a Doctor was also available too. In the circumstances the steps taken by the witnesses in removing the victim immediately to the hospital does not appear to us to be improbable or unnatural.

13. It was argued on behalf of both the appellants that most of the witnesses belonged to a different faction of a political party and that they are partisan witnesses. Assuming that the witnesses and the accused belong to different groups and faction of a political party, it does not necessarily mean that the witnesses must be telling lies. When the witnesses are partisan and when there is no other witnesses available the Court has to come to its conclusion upon a consideration of the evidence as it is, although it may be necessary to examine the evidence with greater care and caution than usual. A partisan witness is not necessarily an untruthful witness. In this case there is at least one witness namely, Smt. Kakali Bhattacharjee who could not be said to have any bias for the prosecution or any animus against the accused. She had seen the two accused running along the Ward Institution Street, The accused China Bagha had a bloodstained knife in his hand. Her evidence fully corroborates the evidence of the other eye-witnesses and there is no reason to disbelieve her testimony. This apart, P. W. 7, P. W. 12 and P. W. 17 are not shown to belong to any faction. They appear to be independent.

14. Besides the direct evidence of infliction of injury there is evidence of a dying declaration orally made by the victim. The victim stated that China Bagha stabbed him. Mr. Dutt argued that the dying declaration does not implicate the appellant Md. Akram. We do not find any improbability in that. The evidence is that Akram held the victim from behind, while China Bagha stabbed him from the front. In such a situation it may not be possible for the victim to have noticed Akram and that may account for the omission of his name in the dying declaration. If the dying declaration allegedly made by the victim be the result of concoction it would not have been in the least difficult to introduce the name of Akram as well in the declaration. The fact that it was not so done indicates the truth of the declaration made by the victim. In view of the direct testimony however it is evident that Akram took an active part and that made it possible for China Bagha to inflict a sure blow on a vital organ of the body. The medical evidence does not indicate that the vocal chord was cut. Therefore it was not impossible for the victim to have uttered those few words.

15. Besides the oral testimony and the dying declaration there is further material to show the complicity of the accused persons, namely, the confessional statement made by China Bagha Ext. 4. In the confessional statement it is stated: that the parties were known to each other for a long time that the confessing accused previously resided in the same locality that he latter moved away to a different locality, that on the relevant night at about 9-30/9-45 P.M. China Bagha along with Akram, Bejoy and others were standing at the mouth of Baldeopara Road when suddenly Uday, Shibaji and others attacked them. Each of them had knives in their hands. The accused also had a knife with him. They caught hold of each other and during the scuffle China Bagha struck a blow on the neck of Uday with a knife in his hand. Uday fell down. The accused persons without looking back ran away from the place while some boys chased them. Finally, he stated that he still believed that he did not do any wrong. This confessional statement was retracted at a very late stage of the trial. In fact, it was retracted after the close of the trial at the stage of examination under Section 313, Cr. P. C. It was not even suggested to the Magistrate or to the Police Officers that he was made to make the statement under compulsion or threat of assault. It was argued on behalf of the appellants that the confessional statement makes out a case as if the fatal blow was struck by

way of self defence and it was complained that no investigation was directed in that behalf. In our view it is futile to make a grievance that investigation was not directed to ascertain whether there arose a situation justifying the use of force by way of self defence. Nothing had transpired during investigation that there was such a situation. Nothing was suggested to the witnesses that they had attacked the accused persons or that the latter inflicted the injury in exercise of their right of self defence. This part of the story, in the confessional statement is apparently an afterthought. Mr. Mukherjee. contended that the statement being exculpatory in nature is not strictly a confessional statement at all and no reliance can be placed on it. This argument was based presumably upon the accepted theory that a confession must be either accepted as a whole or rejected as a whole. In the case of *Palvinder Kaur v. State of Punjab* reported in : 1953 CriLJ154 it has been held that confession must either be accepted as a whole or rejected as a whole and the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible, In holding so the oft quoted decision in the case of *Emperor v. Balmakund.* reported in ILR 52 All 1011 : (1931) 32 Cri LJ 362(FB) was approved. In a latter decision however *Nishikant v. State of Bihar* : 1969 CriLJ671 after considering the cases of *Emperor v. Balmakund* and *Palvinder Kaur v. State of Punjab*, it was observed that inculpatory portion of a confessional statement can be accepted if the exculpatory portion is found to be inherently improbable. In that case exculpatory portion of the statement was found to be not only improbable but contradicted by the statement of the accused under Section 342, Cr. P. C. In such a situation acceptance of inculpatory portion and conviction based thereon was held valid,

16. In the case before us the exculpatory portion of the statement appears to us to be improbable and not borne out by any of the circumstances elucidated in the evidence. The exculpatory portion suggests as if the informant party attacked the accused. This is clearly contradicted by *China Bagha* in his statement under Section 313, Cr. P. C. when he says that the dying declaration of the victim to the effect that *Bagha* had struck him with a knife was a lie. He has also stated that he knows nothing about the incident relating to the death of *Uday*. Therefore, the accused *China Bagha* gives a lie direct to the exculpatory portion of his own statement made voluntarily before a Magistrate after sufficient caution and

warning. The exculpatory portion is inherently improbable because if really the accused had to use force after being attacked by the informant party one would expect at least some marks of injury on their persons however insignificant they may be. There was none. In such a situation the inculpatory part of the statement namely, that the accused China Bagha, Akram and some others who were residents of a different locality came near the crossing of Baldeopara Road and Vivekananda Road at that hour of the night and that the accused China Bagha inflicted the fatal knife injury on Uday and thereafter ran away along Ward Institution Street can perhaps be accepted. We however make it clear that we are not basing the conviction on the confessional statement alone. There is enough direct evidence to prove the complicity of the accused. The confessional statement is considered only as a piece of corroboration.

17. Mr. Dutt argued that the confession again cannot be used against his client Md. Akram. We have no dispute with the proposition that although a retracted confession is admissible against a co-accused by virtue of Section 30 of the Evidence Act, yet as a matter of prudence and practice the Court would not ordinarily act upon it to convict a co-accused without the strongest and fullest corroboration of material particulars. The corroboration must be not only with regard, to the factum of the crime but also as regards the criminal Ramparkash v. State of Punjab : [1950]1SCR75 . Consequently we are in agreement with Mr. Dutt that the confession Exhibit 4 simpliciter cannot bind the co-accused Md. Akram. That we have already indicated that there is sufficient direct testimony to implicate Md. Akram. The confessional statement to some extent corroborates the participation of Md. Akram in the incident but leaving that apart the other evidence, in our view, is sufficient to base a conviction as against Akram.

18. It is true, that the fatal injury was struck by China Bagha and not by Akram. Both of them have been found guilty under Section 302/34, I. P. C. The fact that the accused persons came to the area at that hour of the night from a different locality, being armed with knife clearly suggests that their intention was not innocent. They came with a particular purpose and the subsequent incident clearly shows what that purpose was. China Bagha could not possibly inflict the fatal injury with such certainty and precision had he not been assisted by Md. Akram

who caught hold of the victim from behind. The community of intention when they acted in that manner can safely be inferred. We, therefore, think that the conviction of both the appellants with the aid of Section 34 I. P. C. was clearly justified.

19. In that view of the matter, both the appeals fail. The order of conviction and sentence are affirmed and the appeals are dismissed.

**Jitendra Nath Chaudhuri, J.**

20. I agree.

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