

Kaju and anr. Vs. the State

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SooperKanoon Citation : sooperkanoon.com/881280

Court : Kolkata

Decided On : Jul-04-1984

Reported in : 1985CriLJ367

Judge : B.C. Chakrabarti and ;Sankari Prasad Das Ghosh, JJ.

Appellant : Kaju and anr.

Respondent : The State

Judgement :

B.C. Chakrabarti, J.

1. These two appeals - Criminal Appeal No. 301 of 1982 at the instance of Kaju alias Kajimuddin and Lalu alias Lulu alias Lola Sk. and Criminal Appeal No. 328 of 1982 at the instance of Najibar Sk. arise out of the order of conviction and sentence passed by the learned Sessions Judge. Birbhum in Sessions Case No. 22 of 1982. These two appeals have been heard together and this judgment shall govern both of them.

2. The three appellants along with one Nuru alias Nurul Sk. faced trial jointly before the Sessions Judge on charges under Sections 302/34, 364/34 and 201/34 I.P.C. Nuru alias Nurul Sk. has been acquitted of all the charges. The appellants of Criminal Appeal No. 301 of 1962, viz., Kaju and Lalu have been found guilty under Section 364/34 I.P.C while the appellant Najibar Sk. (Cr. Appeal No.328 of 1982)

has been found guilty under Section 364/34 and Section 201 I.P.C. Each of the appellants has been sentenced to suffer rigorous imprisonment for eight years under Section 364/34 I.P.C. Najibar has been further sentenced to suffer R. L for three years under Section 201 I.P.C. Both the sentences in the case of Najibar are to run concurrently.

3. The prosecution case in brief is as follows. The deceased Golam Rahaman who was a quack doctor and commonly known as Chaka Daktar was originally a resident of village Shergram. The accused Kaju seduced a daughter of Golam Rahaman resulting in a litigation with Kaju, Lalu and others. The villagers persuaded Golam Rahaman not to proceed with the matter but Golam Rahaman not having agreed to persuasions moved Village Madhura. While staying at Madhura he occasionally visited Shergram stealthily. On the 21st Kartick 1368 B.S. pursuant to some information received from a cowboy about Golam Rahaman, his son Abdul Halim (P.W. 1) set out in search of his father but could not find him. During the search he learnt from Mojaffar that the four accused persons had carried away his father along the east side of the bank of the canal. On the same afternoon the wife of Nakshed, viz., Johura Bibi (P.W. 7) came to the house of P.W. 1 and informed that three persons, viz., Kaju, Najibar and Lola had kidnapped Golam Rahaman from near the Gumti situated by the side of the canal. P.W. 1 continued the search for some time more but without any result. On the next morning, i.e., on 9-11-1979 P.W. 1 lodged a written complaint with the Officer-in-Charge of Nalhati P.S. at about 0915 hrs. On the basis of which Nalhati P.S., Case No. 2 dated 9-11-1979 under Section 364 I.P.C. was started. In this written complaint (Ext. 1/1) it is stated that the informant apprehended that his father had been kidnapped by the persons named therein with the intention to assault or murder him. As a motive for such apprehension it was further alleged that there was litigation between his father and the aforesaid persons.

4. On 9-11-1979 after the information was lodged the I.O. (P.W. 19) visited the spot, collected some blood stained earth from a field and prepared a seizure list in presence of witnesses (Ext. 2). On the 24th of Kartick while P.W. 1, Kader, Ajahar Sk. were going to Chatra to make further searches they met accused Najibar going ahead of them towards the north. They surrounded Najibar and

interrogated him and Najibar made an extra judicial confession to them. Thereupon Najibar was brought to the police station and produced before the I.O. The I.O. examined the witnesses and also Najibar independently in a separate room. Thereafter a police party consisting of the I.O., four police constables, Najibar and the witnesses came near the bank of a tank known as 'Jamda Pukur'. Najibar pointed out a place in the tank by throwing a stone and from that place a fertilizer gunny bag was brought out of the water. The bag contained the upper limb of the father of P.W. 1 along with a big stone put inside the bag. Najibar thereafter pointed out another place wherefrom another gunny bag was recovered which contained the lower limb of the body. The bag too contained a stone. P.W. 1 identified the dead body as that of his father Golam Rahaman. The police officer prepared a seizure list and thereafter held inquest on the dead body. The dead body was subsequently sent through constables P.Ws. 14 and 15 to the morgue for post-mortem examination which was held by P.W. 13. P.W. 13 upon examination of the dead body identified by the two constables as that of Golam Rahaman found the following injuries :

1. Traumatic amputation at the level of umbilicus including the viscera, division of intestine, spinal chord with division of intra vertebral disk, between No. 2 and No. 3.
2. One incised wound of 6' X 1 1/2' bone deep at the level of C. 3 and C. 4 dividing muscles, vessels of both sides and larynx, pharynx, both vessels of cornu of the hyoid bone sipped off.
3. One incised wound of 1' x 1/3' muscle deep on the right side of the neck 1 inch behind the right end of the injury No. 1.
4. One incised wound of 4' x 2 1/2 bone deep dividing muscles, right knee exposing the condyles of the femur on the posterior aspect.
5. Nose cut off at its root.
5. In the opinion of the doctor death was due to shock and haemorrhage from the injuries described above which were ante mortem and homicidal in nature.

6. The other accused persons were subsequently arrested and after completion of investigation charge-sheet was submitted against all four of the accused persons under Section 364/34 I.P.C.

7. At the trial the learned Judge framed three counts of charges viz-, S. 364 read with Section 34, Section 302 read with Section 34 and Section 201 read with Section 34 of the Penal Code.

8. The accused pleaded not guilty to the charges. They alleged that they have been falsely implicated. In support of the prosecution 19 witnesses were examined and two others were examined as Court witnesses. The defence did not adduce any evidence.

9. P.W. 1 Abdul Halim is the informant on the basis of whose information the case was started. He has stated that he received some information from a cowboy about his father at about 1/1.30 p.m. and set out in search of his father. He met the grandson of Ebadat (Azizur) and one Kojaffar who gave out that four persons have taken away his father. It is also his evidence that on the 24th Kartick accused Najibar was apprehended whereupon he made a confession and he was produced at the police station. He further has stated that pursuant to the statement made by Najibar the dead body of his father was recovered in two parts from a tank known as ' Jamda Pukur'. P.W. 2 Rohima Khatun is the wife of Golam Rahaman and mother of P.W. 1. She speaks of the case against accused Kaju and Lola and others for abduction of her daughter and the consequent ill-feeling between her husband on the one side and the villagers on the other. She states that on the 21st Kartick at about 4/4.30 p.m. Johura Bibi, wife of Nakshed, came to her house and gave some information about her husband which she reported to her son P.W. 1. It is also her evidence that on the next morning accused Kaju came to her house and threatened her with dire consequences if the matter was reported to police. P.W. 3 Golam Kader is another son of the deceased Golam Rahaman. His evidence is that on the 24th Kartick while he along with others were proceeding towards Chaitra they apprehended Najibar and that Najibar made a confession to them. Najibar was taken to the police station and was separately interrogated by the I.O. Thereafter the whole party proceeded towards a tank being led by Najibar.

There on the asking of the I.O. Najibar pointed out two places from where two gunny bags containing the body of Golam Rahaman in two parts were recovered. P.W. 4 Lalka Sk. is the son-in-law of Golam Rahaman. He brought out the dead body contained in the gunny bags from underneath the water of the tank. P.W. 5 Abu Bakkar, P.W. 6 Nakshed Ali and P.W. 8 Mojaffar Hossain have all spoken about the actual taking away of Golam Rahaman by the accused persons. P.W. 5 has said that while Golam was proceeding towards Nalhati he was accosted by the accused persons, that Kaju hurled a stone at him which hit Golam in the head and he fell down. Thereafter the accused persons carried away Golam on their shoulders. P.W.6 came to Nalhati but did not inform the police station of what he had seen out of fear, P.W. 11 is a postal peon. He says that on the 21st Kartick while he was going to Nalhuti with mail he saw Chaka Oaktar being carried by two persons, viz. Lulu and Kaju followed by two others whose names he learnt from P.W. 5. After finishing his job at Nalhati he came back home and told his wife Johura Bibi of the incident and asked her to inform the inmates of the house of Golam Rahaman. P.W. 7 Johura Bibi claims to have visited the house of Golam Rahaman and to have reported the incident to P.W. 2 P.W. 8 Majaffar Hossain is another witness to the occurrence. He too corroborates P.Ws. 5 and 6 about the kidnapping of Golam by the accused persons. P.W. 9 Azizul Haque heard of it from P.W. 8 and later informed P.W. 1 of what he has heard. P.W. 10 Nazrul Islam is another witness to the discovery of the dead body pursuant to the statement of Najibar. He is a witness to the seizure list (Ext. .3) and he has proved the stones which were found in the bags viz., Ext.I. P.W. 11 Asimuddin Sarkar is a witness to the alleged extra-judicial confession. P.W. 12 was a Magistrate who recorded the statements P.Ws. 5 and 8 under Section 164. Cr.P.C. P.W. .1 is the autopsy Surgeon. P.Ws. 14 and 15 are two constables who carried the dead body to the morgue and identified it to P.W. 13. P.W. 11 is another constable who carried the sealed bag to the Forensic Science Laboratory. P.Ws. 17, 18 and 19 are three police officers who held investigation into the case at different stages, the major part, however, having been conducted by P.W. 19 Besides these witnesses two daughters -of Golam Rahaman viz., Farida Yasin and Hasina Bibi, were examined as Court witnesses. Both of them stated that their father was murdered and it was elicited in cross-examination of Court witness No. 1 that there was a litigation with

Kaju and others regarding an affair relating to her sister Monjura.

10. Upon a consideration of the evidence on record, the learned Judge felt disinclined to act on the extra-judicial confession alone uncorroborated by any other material evidence so far as the charge under Section 102/34 was concerned and accordingly acquitted all of them of the said charge. But he found nonetheless that the other three accused persons had in fact abducted Golam Rahaman in order that he may be murdered or may be so disposed of as to be put in danger of being murdered and further that in fact it was proved that he had been murdered. Upon such a finding the learned Judge held all the three appellants guilty under Section 364/34 I.P.C. He, however, acquitted the other accused Nuru alias Nurul principally on the ground that his name did not transpire at the initial stage when the F.I.R. was lodged. As regards Najibar, relying upon the evidence of discovery of the dead body pursuant to the statement of the accused the learned Judge found him guilty under Section 201 I.P.C.

11. Being aggrieved the three appellants have preferred the present two appeals.

12. Mr. Bag appearing on behalf of the appellants in both the cases contended that the F.I.R. and the evidence of Halim (P.W. 1) are not exactly identical and that the F.I.R. is wanting in particulars which according to the evidence of Halim was already known to him at the time when the F.I.R. was lodged. He also made a grievance that the statements of P.Ws. 5 and 8 were recorded under Section 164 Cr.P.C. without any explanation as to why it was thought necessary to do so. He contends that the police was initially sceptical about what they stated and in order to bind them their statements were recorded under Section 164 Cr.P.C. Mr. Bag further contends that some important witnesses, viz., Mushahaque and the cowboy from whom P.W. 1 had received the first information were not examined without any explanation. It was then contended by Mr. Bag that the statement leading to the alleged discovery of the dead body of Golam Rahaman not having been proved, the evidence relating to the discovery under Section 27 of the Evidence Act was not admissible. It was also contended that the prosecution has failed to prove the corpus delicti insofar as no photograph of the dead body was taken and proved at the trial. Finally it was contended that there was no evidence

of animosity or ill-motive and that being so, the accused having been acquitted of the charge under Section 302 I.P.C. their conviction under Section 364 could not be sustained.

13. Regarding the F.I.R. it may be mentioned that it is rather cryptic insofar as it does not contain full details of what P.W. 1 had learnt by the time he lodged the information. But it cannot be said that any material information was withheld or that something new was sought to be introduced at the trial. The substance of the information received by him is there in the F.I.R. viz., that Kaju, Najibar and Lola had taken away his father, that this information was given to them by Johura Bibi and that there was ill-feeling between the parties over a litigation ending at the time. It was also stated that searches for Golam Rahaman proved futile. Therefore, even if the F.I.R. could be more lengthy and could contain further details, yet it cannot be said that any material information was withheld with a view to embellishment at the trial stage. P.W. 7 has materially corroborated the fact that she communicated to P.W. 2 as to what she had heard from her husband. P.Ws 5, 6 and 8 are three witnesses who had seen the accused persons actually carrying away Golam Rahaman on their shoulders. The grievance that one other witness, viz., Mushahaqua who according to P.W. 1 also was a witness has not been examined does not seem to us to be a matter of much significance. P.W. 5 has made it clear that Mushahaque was seen just after the victim was taken away. Therefore, Mushahaque even if examined could not possibly say that he had seen the actual taking away. At the most he could say that he had heard something from P.W. 5. Non-examination of such a witness does not seem to us to be very material. Non-examination of a witness may be said to be prejudicial to the accused when the non-examination is motivated. But here no such purpose can be attributed to the prosecution. That apart, it is not necessary for the prosecution to examine each and every witness who might have been interrogated by the I.O. during the stage of investigation.

14. In regard to the plea that the corpus delicti has not been proved also we do not find much substance. It is true that in a criminal prosecution one of the essential factors to be proved to a moral certainty is the corpus delicti. In this case a dead body severed into two parts was found contained in two bags and kept drowned

with the aid of heavy stones inside a tank. The dead body was identified by P.W.1, the son of the deceased as that of Golam Rahaman. The fact of identification was not challenged in cross-examination. P.W.4 was one of the witnesses who actually brought out one of the bags from under the water and he too has identified the dead body as that of his father-in-law Golam Rahaman. That part of his evidence again has not been challenged. In the evidence, of the autopsy Surgeon (P.W.13), even though the doctor has said that the body was in a high state of decomposition, but it was not taken from him that the decomposition was such as to render identification impossible or difficult. Such being the evidence, there is no difficulty in finding that the dead body that was recovered was of Golam Rahaman and that is sufficient proof of corpus delicti. The contention of Mr. Bag that the prosecution ought to have taken photographs of the dead body and that the photographs should have been identified in Court does not seem to be at all necessary in the facts of the case and the state of evidence coming from P.Ws. 1, 4 and P.W. 13.

15. Mr. Bag also made a grievance that the police with an ulterior motive had the statements of P.Ws.5 and 8 recorded under Section 164 Cr.P.C. because they were themselves doubtful as to the truth of the statements. Ordinarily the police in course of the investigation sends witnesses for having their statement recorded by a Magistrate under Section 164 Cr.P.C. when they feel that there might be some uncertainty about the evidence or such a witness may at some distant time prevaricate. But there cannot be any hard and fast rule of law for treating a witness as suspect from the mere fact of his statement being recorded under Section 164. If the court finds that the evidence of the witness has been consistent throughout and there was no reason whatsoever for the police to have taken the step for his statement being recorded under Section 164 Cr.P.C., the fact of such recording would be of no moment in appraising the testimony of such a witness. In the instant case, the evidence of P.Ws.5 and 8 has been consistent throughout and there is no reason to have any suspicion about the truth of what they have stated merely from the fact that their statements were recorded under Section 164 Cr.P.C.

16.As regards the discovery of the dead body pursuant to the statement of the accused Najibar, Mr. Bag was very critical of the evidence. Even though it appears from the record that a portion of the statement allegedly made by Najibar to P.W. 19 has been marked as Ext. 10, but we do not really see from the record as to how that recorded statement could come into evidence and be marked as Ext. 10. P.W. 19 who recorded the statement has nowhere in his evidence proved it. Therefore, strictly Ext. 10 ought not to be treated as evidence in the case. But even then we feel that apart from Ext 10 there is evidence of the accused having made a statement leading to the discovery of the dead body. Such evidence comes from P.W. 19 himself who has said 'Accused Najibar only told me that he could show me the place in the tank where the dead body can be found-but did not tell me the name of the tank or the mouja in which it is situated.' The evidence is that even though the name of the mouja was not stated it was the accused Najibar who led the party to the tank viz., Jamda Pukur. The fact that Najibar made such a statement to P.W.19 was not seriously disputed as would appear from the suggestion put to P.W.19. The suggestion was to the effect that the statement was recorded after the recovery of the dead body and not that no such statement was made. The suggestion of post-recovery recording of the statement was denied The fact that a statement was made stands amply proved and indirectly admitted.

17. Mr. Bag in support of his contention that the evidence of recovery pursuant to the statement of the accused under Section 27 of the Evidence Act was not admissible in evidence, referred to several decisions. The first in the series is the case of Bhagirath v. State of Madhya Pradesh reported in AIR 1959 Madh Pra 17 : 1959 Cri LJ 48. The ratio of the decision in this case is that whatever statement is attributed to an accused person in police custody giving information leading to the discovery must be proved by witnesses like any other fact. There can be no quarrel with the proposition. That there was a statement 'made by the accused has certainly to be proved and that has been proved in the instant case. The next case referred Panchu Gopal Das v. State : AIR1968 Cal38 also is of no assistance to Mr. Bag's contention. This decision is no authority for the proposition that the written statement must invariably have to be proved in order to take advantage of Section 27 of the Evidence Act. All that this decision lays down is that the oral statement of witness without corroboration by any written record of any such

statement contemporaneously made, even if admissible is unsafe to rely on, because of the very nature of the evidence. Therefore, this decision also does not lay down the proposition that the statement must have to be proved to have been reduced into writing or that the written record must invariably have to be proved. Finally, Mr. Bag referred to a Supreme Court case *Bahadul v. State of Orissa* : 1979 CriLJ1075 , The facts of that case were entirely different in so far as there the accused was proved to have merely taken out a weapon from beneath his cot and handed over to the police without any statement. In the case before us the recovery was pursuant to a statement and that distinguishes the case from the case referred to by Mr. Bag.

18. This apart, there is evidence that the accused besides having made a statement to P.W. 19 had actually led the police party to the tank and pointed out the place by throwing brickbats from where two gunny bags were recovered. The question is whether leading the police party to the tank and pointing out the place by throwing brickbats amounts to a statement being made by the accused. At one stage there was controversy as to the question whether this amounts to a statement or not which appears to have been resolved by the decision in the case of *Ramkishan Mithanlal Sharma v. State of Bombay* : 1955 CriLJ196 . Though the observations were in connection with statements made in the process of identification parade, it was held that the statement may be expressed or implied. The identifier may point out his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which are tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements including the signs and gestures would amount to a communication of the fact of identification. Therefore, it is clear that a statement need not necessarily be a statement made orally but it may be by gestures and indication as well. In the case of *Bakshish Singh v. State of Punjab* : 1971 CriLJ1452 the prosecution tried to establish a case against the accused on the basis of circumstantial evidence. One of the circumstances put forward was discovery of some portions of the body of the deceased on the information given by the appellant when he was in police custody. And it appears upon a perusal of the judgment that the discovery was

made pursuant to pointing out by the appellant of the place where the dead body of the deceased had been thrown. The Supreme Court did not rule out the evidence as inadmissible but held that in the facts of the case it was not a conclusive circumstance though undoubtedly it raises a strong suspicion against the appellant. It follows, therefore, that pointing out of the place is itself admissible in evidence. Therefore, the contention of Mr. Bag that Section 27 of the Evidence Act is not attracted to the facts of this case because the written record of the statement has not been proved does not hold good. We find that the dead body was recovered from a tank where the police party was taken by the accused Najibar Sk. himself. We further find that pursuant to his statement made to P.W. 19 and also pursuant to the gestures by him in pointing out the place where the bags lay the case comes squarely within the meaning of Section 27 of the Evidence Act. And the facts thus proved are admissible in evidence as against the appellant Najibar Sk.

19. Finally, Mr. Bag contended that in a case where an accused person has been charged under Sections 302 and 364 I.P.C. and is acquitted of the charge under Section 302 I.P.C. the conviction under Section 364 I.P.C. cannot be sustained in the absence of any animosity or ill-feeling between the parties. The decision referred to by Mr. Bag in support of such contention, *Vadla Kistiah v. State of Hyderabad* AIR 1954 Hyd 88 : 1954 Cri LJ 641 does not really support the contention. It lays down where an accused is charged under Sections 302 and 364 of the Penal Code and has been acquitted of the charge of murder, he can be convicted under Section 364. For this purpose the motive, previous relations of the parties and the circumstance showing clearly that the deceased was abducted with the object of being murdered should be taken into consideration. In the case before us there are such facts on record. It is in evidence of P.W.1 that the accused Kaju seduced his sister resulting in a litigation against Kaju, Lola and others and that Golam Rahman not being able to sustain the pressure put upon him had to leave the village. It is also in the evidence of P.W.2 that her husband instituted a case against Kaju, Lola and others for abducting her daughter. In the examination of the accused persons under Section 313 Cr.P.C. even though the appellants have prevented either ignorance or falsity in respect of all the circumstances placed, each one of them, however, has admitted the fact that there

was such a case. Therefore, the fact that there was ill-feeling and animosity between the parties stands amply proved by the materials on record. In the background of such relations we find no reason to disbelieve the evidence given by P.Ws.5, 6 and 8 that the appellants had forcibly abducted Golam Rahaman with the motive that he may be murdered or may be so disposed of as to be put in danger of being murdered. The fact that he has actually been murdered is further corroboration of such motive. In such state of evidence we find no merit in the appeal preferred by the three appellants. Najibar Sk. in addition to his conviction under Section 364/34 IPC was rightly convicted under Section 201 I.P.C. as well.

20. Mr. Bag pleaded finally for reduction of the sentence. Having considered the nature of the offence and the gruesome manner in which the person was killed and sought to be disposed of we find no reason to interfere with the sentence. Both the appeals, therefore, fail and are hereby dismissed.

Sankariprasad Das Ghosh, J.

21. I agree.