District : South 24 Parganas.

Through :
Tapandeb Nandi.
Advocate.

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction.

In the matter of :
An application under Section 374 (2) of the Code of Criminal Procedure, 1973 for admission of an appeal.

And in the matter of :
The Judgement and Order dated 12th August, 1991 passed in Sessions Trial No.1(11) of 1990 by Sri R.N.Kali, Additional Sessions Judge, 2nd Court Alipore, South 24-Parganas convicting the accused/appellant under sections 302, 376 and 380 of the Indian Penal Code and sentencing him to be hanged by neck till death for the conviction under section 302 of the Indian Penal Code; to suffer imprisonment for life for the conviction under Section 376 of the Indian Penal Code, and to undergo rigorous imprisonment for 5 years for the conviction under Section 380 of the Indian Penal Code and further directing that the death sentence shall not be executed unless it is confirmed by the Hon'ble High Court while the other two sentences shall, however, run concurrently and they would cease effect in case the sentence for conviction under Section 302 of the Indian Penal Code is confirmed by the Hon'ble High Court and executed.

And in the matter of :
Sri Dhananjoy Chatterjee

---Accused/Appellant(in Ja 1)

-- Versus --

The State.

-- Respondent.

To

The Hon'ble Mr. N.P.Singh, the Chief Justice and his companion Justices of the said Hon'ble Court.

The humble petition of appeal of the accused/Appellant abovenamed most respectfully,

SHEWETH :

1. The appellant stood his sessions trial before the learned Additional Sessions Judge, 2nd Court, South 24 Parganas on the charges for committing offences punishable under Sections 302/376/380 of the Indian Penal Code. The Sessions Trial was registered as Sessions Trial No.1(ii)/90.

2. The prosecution case, in short, is as follows -

a) On 5th March, 1990 at about 9.15 P.M. Bhawanipore Police Station received a message from one Sri Nagardas Parekh of Flat No. 3A, of Anand Apartment at 57-A and B, Padmapukur Road intimating that his daughter had been murdered in his aforesaid flat in the afternoon.

b) Sri Gurupada Som, P.W. 28 a Sub-Inspector attached to Bhawanipore Police Station and who

who was acting as duty officer of the said Police Station at the relevant time recorded the said message in G.D. Entry No. 514 dated 5th March, 1990 at 9.15 P.M. at Bhawanipore Police Station and left for the spot with the Officer in Charge of the said Police Station and force.

~~Sri Gurupada Som, P.W. 28 a Sub-Inspector~~ attached to Bhawanipore Police Station and who was acting as duty officer of the said Police Station at the relevant time recorded the said message in G.D. Entry No. 514 dated 5th March, 1990 at 9.15 P.M. at Bhawanipore ~~Police Station~~

c) After reaching the place the police examined P.W.3 Smt. Yashomati Parekh, the mother of the deceased. P.W. 28 recorded the statement of Smt. Yashomati Parekh who admitted that her statement was correctly recorded and put her signature therein.

d) Treating the said statement of P.W.3 as the First Information Report the Police started investigation.

e) After returning to Bhawanipur Police Station at 2.45 A.M. at night P.W. 28 started

28 started Bhawanipore Police Station Case No.87 dated 6th March, 1990 under Section 302 of the Indian Penal Code against the appellant treating the said statement of P.W.3 Smt. Yashomati Parekh as the First Information Report.

f) In her said statement Smt. Yashomati Parekh stated the following :-

(i) She had been residing at flat No.3A, Anand Apartment, 57A & B, Padmapukur Road with her husband Nagardas Parekh, son Bhabesh Parekh aged about 19 years and daughter Hetal Parekh aged about 18 years since May, 1987.

(ii) Her husband was a businessman having his office at 71, Canning Street, Calcutta. Her son was studying at Bhawanipore Education Society and her daughter was studying at Welend Goldsmith School, Bowbazar.

(iii) On 5th March, 1990 her husband left for his place of business at 9 A.M. and her son returned from the college at about 11.30 A.M. and after taking his meal left for his father's business place. Her daughter attended I.C.S.C. Examination at Welend Goldsmith School and came back to residence therefrom at about 1.00 P.M.

(iv) P.W.3 had a habit of visiting Lakshmi Narayan Mandir at Sarat Bose Road at 5/5-30 P.M. everyday. On 5th March, 1990 at about ...5.20 P.M.

she left for the aforesaid temple and her daughter Hetal was in the flat.

V) P.W.3 returned to her residence from the temple at about 5.05 P.M. and when she was about to enter the lift she was told by the liftman Ramdhani, P.W.8 that one of the security guards Dhananjoy Chatterjee (the appellant) attached to the particular house had gone to her flat for contacting the security agency over the telephone. She expressed her annoyance on hearing such information as her daughter Hetal had complained earlier on several occasions that the said security guard Dhananjoy teased her on her way to and back from School.

vi) She went upstairs by the lift and rang the bell at the entrance of the door. The door was not opened even though she rang up the door bell repeatedly. Thereafter she gave shouts and several people came to the place being attracted by her shouts.

vii) By breaking open the lock they entered the flat. She found the door of her bed-room open. Hetal was found in the particular bed-room lying on her back on the floor. Her midi-skirt and blouse were found to be pulled up and her private part and breasts were visible, patch of blood was found near her head. Blood drops were seen on the floor. Her both hands had blood-stains. Marks of blood were found on her face. Her panty was lying near

near the entrance door. The victim appeared to have lost consciousness and the complainant brought her down by the lift. A doctor came there being called by some of the neighbours. The doctor examined the victim and pronounced her dead.

viii) At about 7 P.M. Bhabesh returned from his place of business. In the meantime another doctor also was called and he examined the victim and declared her dead. Hetal was brought upstairs and laid on her bad in her room after Bhabesh returned from his place of business.

ix) The husband of P.W.3 returned around 8.30 P.M. and rang up police at Bhawanipore Police Station, and informed the incident.

3. After recording the case under section 302 of the Indian Penal Code against the appellant the police started investigation into the case and after completion of xinvestigation the police submitted charagesheet against the appellant for committing offences under Sections 302, 376 and 394 of the Indian Penal Code.

4. As the offences are exclusively triable by the Court of Sessions, the case was committed to the Court of learned Sessions Judge, Alipore.

Subsequently, the case was transferred to the 2nd Court of the Additional Sessions Judge, Alipore for disposal.

5. The charges were framed under sections 302 of the Indian Penal Code, 376 Indian Penal Code and 380 of the Indian Penal Code against the appellant to which the appellant pleaded not guilty and claimed to be tried.

6. The prosecution examined 29 witnesses while the defence examined none.

7. The defence of the appellant was denied of his involvement in the alleged incident in any manner. His further defence was that after his duty hours he had gone to see a picture and on his return from the Cinema hall he had gone to Monorama School and purchased some fruits in connection with the sacred Thread Ceremony of his younger brother at his native place and he had gone to his native place with the fruits purchased by him.

8. On conclusion of trial by Judgement and order dated 12th August, 1991 the learned Additional Sessions Judge, 2nd Court at Alipore, South 24 Parganas found the appellant guilty under sections 302, 376 and 380 of the Indian Penal Code, convicted him accordingly and sentenced him to be hanged by neck

neck till death under section 302 of the Indian Penal Code, to suffer imprisonment for life under section 376 of the Indian Penal Code and to undergo rigorous imprisonment for 5 years under section 380 of the Indian Penal Code and further directing that the sentence of death shall not be executed unless it is confirmed by the Hon'ble High Court while other two sentences shall run concurrently and they would cease to have any effect in case the sentence under section 302 of the Indian Penal Code is confirmed by the Hon'ble High Court and executed.

9. The appellant states that after the pronouncement of the said Order of Sentence of death the appellant has been kept in solitary confinement.

10. The appellant states that there is no eye witness and the case is exclusively based on circumstantial evidence and purely on suspicion and there are missing links in the chain of circumstances. No fingerprint on the or almirah or lock or on any article in the room which were sought to be treated as circumstances against the appellant was taken for forensic examination. In the post mortem

examination report no finding about the alleged rape recorded by the Post-Mortem antopsy surgeon.

11. The appellant states that the evidence of the prosecution witnesses are contradictory, inconsistent and improbable and do not lead to the inescapable conclusion of the guilt of the appellant.

12. The appellant states that the alleged incident was reported to the Police Station over the telephone at 9.45 P.M. on 5th March, 1990 which was diarised in G.D. Entry No. 514 dated 5th March, 1990 and on the basis of the said information the Police went to investigate into the case. In such circumstances the statement of P.W.3 recorded by P.W. 28 cannot be admitted as First Information Report and the Judgement and order is vitiated for relying on inadmissible evidence.

13. The appellant states that the order of conviction and sentence has been passed not on consideration of extraneous circumstances.

14. The appellant states that the prosecution sought to prove that the motive of murder was that the appellant was transferred to another apartment on the basis of the complaint made by P.W.4, the father of the victim as the victim said to have complained to her mother P.W. 3 that the appellant used to tease the victim but no

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but no consideration of the entire circumstances of the case it clearly appears that the prosecution has failed to establish the motive beyond doubt.

15. Being aggrieved by the said Judgement and Order of conviction and sentence dated 12th August, 1991 passed by the learned Additional Sessions Judge, 2nd Court, Alipore, South 24-Parganas the appellant begs to move your Lordships on the following amongst other

G r o u n d s

I. For that the entire prosecution case being based solely on circumstantial evidence, the learned Additional Sessions Judge erred in convicting the accused overlocking the following infirmities in the prosecution case namely -

a) Each of the circumstances from which the conclusion of guilt of the accused is to be drawn has not been fully established by cogent and reliable evidence.

b) The circumstances which can be said to have been fully established, are consistent with the innocence of the accused. It cannot be held that the said circumstances are consistent only with the hypothesis of the guilt of the accused. In other words, the circumstances are explainable on any other

or any other p hypothesis consistent with the innocence of the accused.

c) Each of the circumstances relied on by the prosecution is not of conclusive nature or tendency.

d) The circumstances relied on by the prosecution do not exclude every possible hypothesis except the guilt of the accused. They certainly do not overrule the possibility of the accused being innocent.

e) There are various missing links in the purported chain of evidence and it cannot be said that the so-called chain of evidence is so complete as not to leave any reasonable ground for the conclusion that inconsistent with the innocent of the accused.

f) The circumstances relied on by the prosecution do not establish that the offence must have been committed by the accused and no one other than the accused could have committed the offence.

g) The prosecution case cannot be said to have been proved on the basis of certain and explicit evidence, sufficient and adequate to hold the accused guilty.

11. For that the learned Judge erred in not holding that the circumstantial evidence relied on by the prosecution does not entirely exclude the possibility of the accused being innocent.

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III. For that the learned Judge failed to appreciate that the circumstantial evidence relied on by the prosecution does not lead to the only conclusion that the accused had committed the offence as alleged.

IV. For that the evidence on record leaves enough room for reasonable doubt and it cannot be said that the prosecution has been able to prove the case against the accused beyond reasonable doubt.

V. For that on the totality of the evidence on record two views being possible, the one which is consistent with the innocence of the accused should have been preferred by the learned Judge and the accused was entitled to be acquitted on the of benefit of doubt.

VI. For that the story of the purported transfer order alleged to have been served on the accused on 4th March, 1990 is open to serious doubt, in view of the absence of any evidence that a corresponding transfer order was also served on Bijoy Thapa being the guard who was to replace the acoused at the Anand Apartment as alleged. It is also significant that as per the purported transfer order being Exbt. 23 the transfer of Bijoy Thapa from Paresh Apartment to Anand Apartment was sought to be effected verbally through the accused while in the case of the accused a formal order was considered to be necessary The very fact that Bijoy Thapa did not come to Anand Apartment for ~~prer~~ performing his duty shows

his duty shows that no arrangement was made to relieve the accused from his duty at Anand Apartment in the morning of 5th March, 1990 Another significant fact is that neither any copy of the transfer order was sent to the authorities of the Anand Apartment nor any intimation was given to P.W.6 at whose instance the transfer order was alleged to have been made. As a result, although an order of transfer has been made as alleged, the residents of Anand Apartment remained in the dark about it and the accused performed his duties in the morning shift at the Anand Apartment without any objection from any quarter. This is rather inconsistent with the story of a formal order of transfer. There is reason to suspect that the transfer order was subsequently created at the instance of the Police in order to strengthen the prosecution case and to suggest a possible motive.

VII. For that, in the absence of any evidence that P.W.21 Shyamal Kumar Karmakar before leaving for Bombay as alleged had instructed P.W. 6 to enforce the transfer order in respect of the accused or left any information in that behalf to be followed up by P.W.6, the evidence of P.W.6 that he had come to Anand Apartment for the purpose of ascertaining as to whether the transfer order had been enforced or not appears to be without any basis. Significantly enough P.W. 6 did not go to Paras Apartment to

to inform Bijoy Thapa about the transfer order.

VIII. For that, as to the alleged entry of the accused in the flat of the Parekh, there is no cogent and reliable evidence. According to the prosecution, P.W.3 had been informed by the P.W.8 that the accused had entered into her flat, but P.W.8 denied having made any such statement to P.W.3 and also denied having seen the accused entering into the flat of Parekhs.

IX. For that the alleged deposition of P.W.6 and P.W.7 as to having seen the accused in the flat of the Parekhs to be absurd and highly improbable. In the first place, if the accused had gone to the flat of the Parekhs with the intention of committing the alleged offences it would be contrary to normal human conduct that he would openly declare that he was going there, All the more absurd and improbable is the evidence of the said two witnesses that P.W.7 alleged to have shouted from downstairs for the accused by calling his name and thereupon the accused learned out of the balcony of the 3rd floor flat of the Parekhs and shouted out that he was coming down. It is contrary to be expected that the conduct of an offender who had just committed the offences of rape and murder, to answer the call by coming out on the open balcony to be seen by all and sundry that he was inside the said flat. He could have easily ignored the call and conceal his presence in the said flat. Secondly, there is no evidence at all that any of the other inmates of the

said ~~but~~ building

inmates of the said building or of the neighbouring buildings had either heard the said exchange of words between P.W.7 and the accused or had seen them.

X. For that the evidence of P.Ws 6 & 7 that the accused came down from the said flat and went out of the said building with P.W.6 is quite significant in the context of the prosecution case. None of these two witnesses had deposed that they had seen anything unusual or ~~incix~~ incriminating or suspicious in the appearance, conduct, mental state of the said accused who, according to the prosecution case, had just committed ghastly offences of rape and murder.

XI. For that if the evidence of P.W.6 and P.W. 7 is disbelieved, there is absolutely no reliable direct evidence as to the entry of the accused in the said flat or as to his presence in the said flat at the material time.

XII. For that the alleged discovery of Ricko Wrist Watch from the native place of the accused, pursuant to the alleged statement of the accused, in order to be regarded as clinching evidence as to the complicity of the accused must be based on cogent and reliable evidence as to the existence of the said wrist watch in the said flat of the Parekhs at the material time and as to the same being missing. In view of the facts inter alia (a) that there is no reliable evidence that the wrist watch has been kept in an

in an open almirah in the said flat, which is rather unusual for either the wrist watch must have been worn by P.W.3 while going out or the same must have been kept as a valuable under lock and key, (b) the best evidence as to the purchase of the wrist watch namely, the cash memo had not been produced - neither the original nor carbon copy, (c) the purported guarantee card being Exbt. 15 is a document which is capable of being manufactured subsequently and unlike a cash memo which bears a serial no. and date, a guarantee card, can always be created with the help of the seller and (d) the fact that the loss of wrist watch was reported to the Police on the next day, even though the Police had made extensive search and investigation on 5th March, upto the early morning of 6th, it has not been conclusively established that the said wrist watch was at all there in the said flat at the material time, or that the same was at all missing.

XIII. For that there being no independent search witness other than P.W. 19 who was admittedly closely associated with the Police, it is not possible to overrule the possibility of the Ricko Wrist Watch having been planted by the Police at the residence of the accused at the time of the search.

XIV. For that in view of the evidence of P.W.18 that a register is maintained for recording the

recording the transaction on a particular day and that the cash memo is granted for sale of the wrist watch, the non-production of the said document gives rise to an adverse inference against the prosecution and the fact that the guarantee card does not contain the cash memo No. makes it a suspicious document and leads to the inference that the said guarantee card was manufactured subsequently at the instance of the Police to suit the requirement of the prosecution case.

XV. For that P.W. 3 has not given any explanation in her evidence as to why she had not put on ladies wrist watch belonging to her while going out and as to why she had kept it in a steel almirah without locking the same.

XVI. For that the alleged letter of complaint written by P.W.5 at the instance of P.W.4 is clearly inadmissible in evidence and the same was undoubtedly the product of an after-thought, introduced for the purpose of framing the accused on a false charge.

XVII. For that the alleged statement of the accused as recorded by the Police while he was in ~~fx~~ custody being Exbt. 34 and the purported deposition of P.W.29 as to the statement made by the accused is inadmissible in evidence as the same are outside the scope and ~~xdm~~ ambit of Section 27 of the Evidence Act.

XVIII. For that the learned Judge failed to appreciate the ratio of the decision of the Supreme Court in Jaffar Hussain Dastagir vs. State of Maharashtra reported in 1970 Cr. L.J. 1659- A.I.R. 1970 S.C. 1934 as to the scope and effect of Section 27 of the Evidence Act.

XIX. For that the evidentiary value of the alleged recovery of the button from the flat of the Parekhs and the attempt to link up the same with the alleged recovery of a shirt from the residence of the accused is xxkx vulnerable because of the inherent flaws, namely (a) having regard to the evidence that the blood sprouted all around the place where the dead body of the victim was found including the cradle which was nearby, the wearing apparel of the offender could not have remained without any blood stain, there is no evidence that any blood-stain was found from the wearing apparels of the accused alleged to have been recovered from the house of the accused (b) the only evidence as to the wearing apparels of the accused alleged to have been put on xxx by him at the material time on the date of the incident has come from P.W.7 but neither he nor P.W. 6 had seen any tell-tale mark on the wearing apparels including the missing of a button when, according to them, the accused came down from

down from the flat of the Parekhs, (c) it is absurd and highly improbable to suggest that an offender who, accordingly to the Police, had been absconding since the date of the incident for more than two months would be carrying and preserving the wearing apparels, dressed in which he committed the offence as alleged by the prosecution knowing that the same would incriminate him if discovered ; (d) the evidence as to the recovery of a cream coloured shirt from the house of the accused is itself open to doubt in view of the absence of any independent search witness and (e) there being no evidence as to the result of the chemical analysis of the said shirt alleged to have been recovered from the house of the accused, adverse inference should be drawn against the prosecution.

XX. For that the alleged recovery of a broken chain in the flat of the Parekhs cannot be connected with the accused as sufficient evidence is lacking to establish that the accused was wearing the said chain at the material time on the date of the occurrence.

XXI. For that the attempt of the prosecution to connect the accused with the recovery of the broken chain in the flat of the Parekhs has failed in view of the following flaws in the evidence, namely, (a) as P.W.11 Gora has claimed the ownership of the said chain, his explanation that he had given it to the accused should not have been [illegible]

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have been accepted without corroboration as obviously he would try to save himself by shifting the responsibility on another person, (b) there is no explanation as to why the Police did not arrest Gora (P.W.11) whose chain was recovered at the spot, but the Police accepted the version of the said P.W.11 Gora that he had made over the chain to the accused about which there is no corroboration, (c) there is no explanation as to how the Police came to know right at the beginning of investigation on 5th March, 1990 that the said chain belonged to Gora (P.W.11), so as to send for Gora to identify the said chain as alleged ;(d) P.W.11 (Gora) is silent as to the seizure of the said chain or as to his being called upon to identify the said chain on 5th March, 1990 at the flat of the Parekhs ; (e) there is no evidence that P.W.11(Gora) whose chain was recovered from the said flat was not present at the material time, on the date of the incident at Ananda Apartment except his own uncorroborated statement that he was not prdsent; and (f) no other witness has deposed that any such chain was on the person of xh the accused at any time.

XXII. For that k in view of the evidence of P.W. 20 that he did not write anything in the Post-mortem examination report about the alleged rape and his subsequent correspondence with the Police being inadmissible in evidence coupled with the fact that

fact that the results of chemical examination are inconclusive in nature as to the question whether the victim had been subjected to rape, the prosecution has failed to establish beyond reasonable doubt that the victim had been subjected to rape.

XXIII. For that the learned Judge erred in holding that the plea of alibi taken by the accused in his examination under Section 313 of the Code of Criminal Procedure was false and treating the thing as one of the circumstances against the accused. In the absence of any evidence disproving the plea of alibi taken by the accused in his examination under Section 313 of the Code of Criminal Procedure, the mere fact that the accused did not adduce any evidence in support of the said plea render the same to be false, even though the same may remain not true.

XXIV. For that the prosecution has not been able to establish that the offence could have been committed only by the accused and no one other than the accused, on the other hand, in view of the evidence that the servants and employees had free access to the flat without being screened by the security arrangement anyone should have been responsible for the offence, in particular there is no reason to exclude P.W.11 whose chain was admittedly found in the said flat and who having easy access to the said flat could have committed the said offence.

XXV. For that it is highly improbable and absurd and against the normal human conduct to allege that the accused would declare to P.W.7 and P.W.8 that he was going to the flat of the Parekhs at a time when the victim was alone in the said flat and would thereby expose him to the risk of being apprehended and implicated.

XXVI. For that in the absence of any evidence asto how the accused could get access in the said flat which was locked from inside and having regard to the prosecution story of the accused teasing the victim girl, it being highly improbable that she would allow him to enter into the flat and there being no evidence as to the accused having forcefully entered into the said flat by over-powering the victim girl at the door-step, the entire prosecution case is liable to be disbelieved.

XXVII? For that the examination of the accused under Section 313 of the Code of Criminal Procedure was not held in accordance with law.

XXVIII. For that the circumstances which had not been put to the accused during his purported examination under Section 313 of the Code of Criminal Procedure must be excluded from consideration while considering the prosecution case against the accused.

XXIX. For that in any event the learned Additional Sessions Judge erred in holding that this was a case which was " rarest of the rare cases" which would come within the ratio of the 1989 Criminal Law Journal page 1 and in imposing capital punishment on the accused.

XXX. For that in any event the sentence imposed by the learned Judge is grossly disproportionate and unduly severe having regard to the facts and circumstances of the prosecution case.

XXI. For that in any event there is no special reason for imposing capital punishment in the instant case.

In the circumstances the appellant humbly prays that your Lordships will be pleased to admit the appeal, issue usual notice, call for the records of the case and after hearing the parties and on perusing the records allow the appeal by setting aside the order of conviction and sentence dated 12th August, 1991 passed in Sessions Trial No.1(11)90 by Sri R.N.Kali, Additional Sessions Judge, 2nd Court, Alipore, 24-Parganas-South and/or will be pleased to make such other order or orders as may be deemed fit and proper.

And

Pending the hearing of the appeal your Lordships will be pleased to direct the State and the Jail Authorities to keep the petitioner in ordinary jail custody and not to keep him in solitary confinement or in the condemned cell.

And the appellant, as in duty bound, shall ever pray.