A ROOPSENA KHATUN

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1370 of 2007)

B APRIL 28, 2011.

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

Penal Code, 1860: s.302 – Murder – Conviction u/ss.302 and 379 – Allegation that accused committed murder of child C *by drowning her in a pond and thereafter removed silver chain from her person – Conviction based on circumstantial evidence – Circumstances were disclosure statement, extra-judicial confession, recovery of silver chain from the accused and that accused was last seen with the victim – On appeal,* D *held: Prosecution failed to prove the case of murder and theft of silver chain against the accused – The body of the victim was found floating in the pond a day after she went missing – In such case, it could be seen by anybody, therefore, pointing out the corupus delicti by the accused was not of much* E *significance – The exact words of the accused were not uttered by any of the witnesses – Therefore, the so called extra-judicial confession was of no consequence – There was no detail in seizure memo regarding the place from where silver chain was seized nor the chain was identified by the father of the* F *victim – This would put the seizure into extreme suspicion – Moreover, there was no proximity between the time when the victim and the accused were last seen together and the time of the death of the victim – Considering the short distance between the house of the victim and the pond, possibility of accidental drowning not ruled out – Accused was stated to be* G *a frock wearing mohamedan girl on the relevant date and it was not shown as to how such a small girl could have drowned the victim – Sessions judge should have used its discretion and sent the accused for medical examination to ascertain*

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her exact age, which he failed to do – High Court did not advert to this aspect – Conviction by courts below set aside.

The prosecution case was that the accused committed murder of a child by drowning her in a pond and thereafter removed the silver chain from her person. On the fateful day, the victim left her house for her grandmother house and thereafter she was missing. PW-3 told the father of the victim that he had seen the victim following the accused. The accused was apprehended by the villagers the next day and she confessed that she committed the murder of the victim by drowning her in the pond and that she had also removed the silver chain from her person. The accused pointed out the body of the deceased from the pond. The prosecution relied upon the disclosure statement, the extra-judicial confession allegedly made to the witnesses including the father PW1 and some other witnesses and the recovery of silver chain from the accused. The trial court convicted the accused under Section 302 IPC as also under Section 379 IPC for committing theft of a silver chain from the body of the victim. The High Court affirmed the order of conviction. Aggrieved, the accused filed the instant appeal.

Allowing the appeal, the Court

Held: 1. Insofar as the first circumstance relating to the disclosure of the accused having committed the murder and pointing out the corpus delicti is concerned, both the courts below held that circumstance as a proof against the accused on the basis of the evidence of the witnesses. It is a common knowledge that the body could not have remained under the water for 24 hours. At least from the post-mortem report, it is clear that the body was decomposed. Under such circumstances, the body could have ever remained underneath the water level for

A 24 hours. It was certainly expected to be floating. In that case, it could be seen by anybody. Therefore, such circumstance loses its significance. [Para 4] [987-B-D]

2. The second circumstance was about the extra-judicial confession. The evidence of the extra-judicial confession is of extremely weak kind. In this case, the exact words of the accused were not uttered by any of the witnesses. Again, if there was any suspicion against the accused, the whole village would have pounced upon her and cursed her of having committed the murder. Under such circumstances, the so called extra-judicial confession made to the witnesses even if they were more than three, would be of no consequence and would not be considered as an incriminating evidence against the accused. [Para 5] [987-E-G]

3. The circumstance of the recovery of the silver chain from the accused was extremely strange. The seizure memo did not suggest the place from where the silver chain from the accused was seized. Under such circumstances, it is very difficult to hold that the accused was carrying the silver chain on her person. The absence of any detail in the seizure memo regarding the place from where the silver chain was seized or also the oral evidence puts the seizure in extreme suspicion. This circumstance cannot be accepted particularly because the said silver chain was also not identified by the PW 1 - father of the deceased. There was no identification parade held regarding the said silver chain which was an extremely common ornament. Therefore, even that circumstance loses its significance. [Para 6] [987-H; 988-A-B]

4. The last circumstance "last seen", if at all can be used against the accused as a circumstance should have been connected with the time of death. Here is the

case when the deceased was seen following the accused at about 10 a.m. on the earlier day whereas the body was found on the next day at about 2.30 p.m. The prosecution did not fix the time of the death also. Therefore, there is no proximity between the time when the deceased and the accused were last seen together and the time of the death of the deceased. At least, the prosecution was not able to establish the same. Therefore, even if that circumstance is viewed as an incriminating evidence, it would be of no significance. [Para 7] [988-C-E]

5. The depth of the pond is not shown. In what manner could a small girl like accused have drowned the deceased is also not shown. Considering the short distance between the house of the deceased and the pond, the possibility of the death being accidental cannot be ruled out. [Para 8] [988-F]

6. The accused in her appeal had mentioned that she was 15 years of age on the date of incident. At least, three witnesses described the girl as frock wearing girl. If she was a frock wearing Mohamedan girl, then, obviously, she could not have been a major on the relevant date. The Sessions Judge should have used its discretion which he was supposed to exercise in law and should have sent the accused for medical examination to ascertain her exact age. The Sessions Judge failed in his duty. The High Court did not advert to this aspect. The judgments of courts below is set aside. [Para 10 and 11] [989-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1370 of 2007.

From the Judgment & Order dated 07.09.2004 of the High Court of Calcutta in Criminal Appeal No. 388 of 2000.

Vibhu Tiwari (for Ravi Prakash Mehrotra) for the Appellant.

A Tara Chandra Sharma for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. This appeal is filed by an unfortunate orphan girl against the concurrent judgments of the Sessions B Court as also the High Court whereby she stands convicted for the offence punishable under Section 302 IPC as also under Section 379 IPC for committing theft of a silver chain from the body of deceased.

C 2. The prosecution case is that accused Roopsena Khatun committed murder of a child called Baby Khatun by drowning her in a pond and also removed the silver chain from her person. It is alleged that on 29.7.1999, Baby Khatun left her house for her grand-mother house and thereafter, there was no D trace of the girl. PW3 Abdul Quddus told the father of the deceased that he had seen Baby Khatun following the accused on the previous day at 10 a.m. A search was started for her and ultimately, the accused was apprehended by the villagers on the next day at about 12 noon in the jute field. On being E asked, the accused is supposed to have confessed that she committed the murder of Baby Khatun by drowning her in the pond and had also removed the silver chain from her person. The matter was reported to the police. At about 4.45/5 p.m., the police arrived at the scene of occurrence and is stated to have seized the silver chain from the accused.

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3. The prosecution relied on the following circumstances.

i) The disclosure made by the accused that she had committed the murder and pointed out the body of the G deceased from the pond;

ii) The extra-judicial confession allegedly made to the witnesses including the father PW1 and some other witnesses;

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iii) The recovery of silver chain from the accused. A

iv) Baby Khatun was seen following the accused at 10 A.M. on the earlier day.

4. Insofar as the first circumstance relating to the disclosure of the accused having committed the murder and pointing out the corpus delicti is concerned, both the courts below have held that circumstance as a proof against the accused on the basis of the evidence of the witnesses. It is a common knowledge that the body could not have remained under the water for 24 hours. The body was bound to be floating. At least from the post-mortem report, it is clear that the body was decomposed. Under such circumstances, we do not think that the body could have ever remained underneath the water level for 24 hours. It was certainly expected to be floating. In that case, it could be seen by anybody. Therefore, such circumstance loses its significance. B C D

5. The second circumstance is about the extra-judicial confession. We can imagine the plight of a poor orphan girl who is described as a frock wearing girl by some of the witnesses and was at the mercy of her grand-mother with whom she was living. The evidence of the extra-judicial confession is of extremely week kind. In this case, the exact words of the accused have not been uttered by any of the witnesses. Again, if there was any suspicion against the accused, the whole village would have pounced upon her and cursed her of having committed the murder. Under such circumstances, the so called extra-judicial confession made to the witnesses even if they were more than three, would be of no consequence and we would not consider that as an incriminating evidence against the accused. E F G

6. The circumstance of the recovery of the silver chain from the accused is extremely strange. We have seen the seizure memo which does not suggest the place from where the silver chain from the accused was seized. Under such circumstances, H

A it is very difficult for us to hold that the accused was carrying the silver chain on her person. The absence of any detail in the seizure memo regarding the place from where the silver chain was seized or also the oral evidence puts the seizure in extreme suspicion. At any rate, we are not prepared to accept this B circumstance particularly because the said silver chain has also not been identified by the PW 1 - father of the deceased . There was no identification parade held regarding the aforesaid silver chain which was an extremely common ornament. Therefore, even that circumstance loses its significance.

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7. The last circumstance "last seen" if at all can be used against the accused as a circumstance should have been connected with the time of death. Here is the case when the deceased was seen following the accused at about 10 a.m. on the earlier day whereas the body was found on the next day at D about 2.30 p.m.. The prosecution has not fixed the time of the death also. Therefore, there is no proximity between the time when the deceased and the accused were last seen together and the time of the death of the deceased. At least, the prosecution has not been able to establish the same. E Therefore, even if that circumstance is viewed as an incriminating evidence, it would be of no significance.

8. The depth of the pond is not shown. In what manner could a small girl like accused have drowned the deceased is F also not shown. Considering the short distance between the house of the deceased and the pond, the possibility of the death being accidental cannot be ruled out.

9. The least we feel is that the prosecution has not been able to prove the case of murder against the accused or even G for the theft of the silver chain from the person of the deceased.

10. Before we part with this case, we must observe that the accused in her appeal before us has mentioned that she was 15 years of age on the date of incident. At least, three H witnesses have described the girl as frock wearing girl. If she

was a frock wearing Mohamedan girl, then, obviously, she could not have been a major on the relevant date. In our opinion, the Sessions Judge should have used its discretion which he was supposed to exercise in law and should have sent the accused for medical examination to ascertain her exact age. The Sessions Judge has failed in his duty. The High Court has not adverted to this aspect. A B

11. Under the circumstances, we do not affirm the judgments of the courts below. We, accordingly, set-aside the judgments of the courts below and allow this appeal. The accused be released from the jail forthwith if she is not required in any other case. C

D.G. Appeal allowed.