

CRIMINAL APPEAL

Present : The Hon'ble Justice Debiprasad Sengupta

Judgment on: 26.03.2010

C.R.A. No. 141 of 2008

DILIP KUMAR DEY @ DILIP @ DILU

Versus

STATE OF WEST BENGAL

With

C.R.A. No. 214 of 2008

SRISTIDHAR ROY @ BHOMBAL @ HAMBUL

Versus

STATE OF WEST BENGAL

POINTS:

EXTRA-JUDICIAL CONFESSION, INQUEST-Preparation of Inquest over the dead body preceded the lodging of F.I.R.-Failure of eyewitnesses to disclose incident till two days-Veracity of witness in extra - judicial confession, when reliable- Indian Penal Code, 1860-Ss.302,376

FACTS:

The two appeals came up for hearing before the Division Bench and since there was difference of opinion between the two learned Judges, the same was referred to this Bench in terms of the provision of Section 392 of the Code of Criminal Procedure. Both the appeals are directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Burdwan , thereby convicting the accused appellants.

HELD:

Preparation of Inquest over the dead body preceded the lodging of F.I.R. F.I.R. was registered on 17.08.2006 at 00.15 hours, but the Inquest was held on 16.08.2006 at 22.25 hours, i.e. prior to registration of F.I.R. Particulars of the case was mentioned at the top of the Inquest report, although at that point of time there was no existence of such case.

Para-22

Prosecution mainly relied upon the evidence of P.Ws. 11 and 12 claiming to be eyewitnesses and none of the said witnesses disclosed the incident for the next two days and there was no satisfactory explanation for such non-disclosure, it was a serious infirmity, which destroyed the credibility of the evidence of these two witnesses. The conduct of these two witnesses was quite unnatural and their evidence does not inspire confidence. Para-40

Value of extra-judicial confession depends upon the veracity of the witness to whom such confession was made and the circumstances in which it was made. It is in the evidence on record that there was an enmity between P.W.18 and accused over the dispute of landed property and they belonged to two rival political parties. So it is clear that relation between P.W. 18 and accused was inimical. In such circumstances, there was no reason for accused to select P.W. 18 of all the persons to make such confession. The evidence of P.W. 18 also does not inspire confidence.

Para-41

There are serious contradictions in the evidence of P.W. 13, 14, 15 and 16, who claimed themselves as witnesses to the seizure. In view of the nature of evidence of the witnesses to the seizure of 'saree', it is difficult to accept the prosecution version that there was recovery of 'saree' pursuant to the confessional statement made by the accused. Prosecution failed to prove its case beyond reasonable doubt. Paras-42& 44

CASES CITED:

- 1) Ramesh Baburao Devaskar & Others Vs State of Maharashtra (2009) 1 SCC (Cri) 212
- 2) State of Orissa Vs Mr. Brahmananda Nanda AIR 1976 SC 2488
- 3) Alil Mollah & Another Vs State of West Bengal 1996 SCC (Cri) 1028

- 4) Kishore Chand Vs State of Himachal Pradesh AIR 1990 SC 2140
- 5) Heramba Brahma Vs State of Assam AIR 1982 SC 1595
- 6) Manzoor Vs State of U.P. AIR 1983 SC 295
- 7) Alope Nath Dutta Vs State of West Bengal (2007) 12 SCC 230

In C.R.A. No. 141 of 2008 &
C.R.A. No. 214 of 2008

For the Appellant : Mr. Sekhar Kumar Basu,
Mr. Prasun Kumar Dutta,
Mr. Souvik Mitra,
Mr. Subhasis Bandyopadhyay,
Mr. Debabrata Roy,

In C.R.A. No. 141 of 2008

For the State : Mr. S. K. Mahato,

In C.R.A. No. 214 of 2008

For the State : Mr. Asimesh Goswami, Ld. P.P.,
Mr. S. K. Mahato,
Mrs. Ratna Ghosh,

THE COURT:

1) The aforesaid two appeals came up for hearing before the Division Bench and since there was difference of opinion between the two learned Judges, the same was referred to this Bench in terms of the provision of Section 392 of the Code of Criminal Procedure.

2) Since both the aforesaid criminal appeals are preferred against the common judgment and order of conviction and sentence, those are taken up for hearing analogously. Both the appeals are directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Burdwan in Sessions Trial No. 7 of 2007, thereby convicting

the accused appellants under Section 302 / 34 of the Indian Penal Code and sentencing each of them to suffer rigorous imprisonment for life and to pay a fine of Rs.6,000/- each, in default to suffer rigorous imprisonment for a further period of one year.

3) On the basis of a complaint lodged by one Bishnupada Dutta (P.W.2), father-in-law of the victim, a case was registered with Khandaghosh Police Station being P.S. Case No. 46 of 2006 dated 17.08.2006 under Section 376/302 of the Indian Penal Code. It was alleged in the FIR that on 16.08.2006 at about 6.00 P.M. the victim Chandra Dutta went to a nearby pond to wash herself. As the victim did not return even after a considerable period, the informant being the father-in-law of the victim along with some neighbouring people went out of his house in search of victim Chandra. They found the deadbody of Chandra in naked condition under a "Bel Tree" (wood apple tree) on the northern side of the pond with a mark of bleeding injury on her chin.

4) On completion of investigation charge sheet was submitted under Section 302 /201/34 of the Indian Penal Code. Charge was framed under Section 302/201/34 of the Indian Penal Code. To prove its case the prosecution examined as many as 26 witnesses including autopsy surgeon and police personnel. None was examined on behalf of the defence.

5) The defence was a plea of innocence and denial of allegation made against them and that they have been falsely implicated in this case due to enmity, political rivalry, family dispute and dispute over landed property.

6) P.W. 1, Kartick Chandra Roy was the father of the victim and he stated in his evidence that on 16.08.2006 after receiving the death news of his daughter, he came to the matrimonial home of his

daughter and found the deadbody of his daughter lying on the eastern side of the pond. He was a witness to the inquest and also to the seizure list.

7) P.W. 2 Bishnu Pada Dutta, father-in-law of the victim, corroborated his earlier statement in the FIR and he further stated that he was informed by P.W. 11 Jyotsna that accused Dilip and Bhombal were found jostling with Khuku (the victim) in the pond. This witness further stated that he was informed by Tarun Dutta (P.W. 12) that he saw the accused Dilip and Bhombal while they were placing a deadbody under a wood apple tree.

8) P.W. 3, Mayarani was the mother-in-law of the victim and she stated that she saw the deadbody of her daughter-in-law under a wood apple tree near the pukurghat in unclothed condition. P.W. 4, Moloy Dutta was the husband of the victim and he stated in his evidence that having received the death news of his wife he returned to his village in the midnight at about 1.30 A.M. from Memari and found the deadbody of his wife on the northern side of the pond known as "Lakhpukur". He further stated that his wife used to go to the house of accused Dilip to receive telephone calls and that he was told by his wife that accused Dilip used to look at her. He was also a witness to the seizure of "saree" of the victim.

9) P.W. 5, Provakar stated in his evidence that he rushed to spot and saw the deadbody of Chandra on the night at 16.08.2006. He was a witness to the seizure of petticoat of the victim. He further stated that on 21.08.2006 at about 10.00 / 10.30 A.M. police came to the village and on being pointed out by the accused persons recovered one "saree" from the pond in presence of witnesses and he was a witness to the seizure of "saree", which was identified by him.

10) P.W. 7, Smt. Suchandra Dutta stated that victim Chandra had been to the pond to wash herself, but she did not return and her deadbody was found under a "Bel Tree" on the northern side of the pond. She further stated that on 21.08.2006 police came to the village with the accused persons and recovered one "saree" from the said pond and she was a witness to the said seizure.

11) P.Ws. 8 and 10 were the witnesses to the inquest over the deadbody of victim Chandra. P.W. 9 was the scribe of the F.I.R.

12) P.W. 11, Jyotsna Dutta stated in her evidence that on the date of incident at about 6.15 A.M. while she was going to 'Lakhpukur' for washing her hands and legs, she found that accused Dilip and Bhombal were jostling with khuku (victim) in the water and accused persons were dashing her head on the "jhama" and she left the place due to fear. She disclosed the incident to her husband on the next day in the night, when her husband (P.W. 17) asked her not to disclose it to others. On the following day her husband asked her to narrate the incident to Shyamal Dutta (P.W. 18). Accordingly she went to the house of Shyamal along with her husband. As Shyamal was not available at his house, she disclosed the incident to his brother Tarun Dutta (P.W. 12). This witness further stated in her evidence that Tarun Dutta also stated to her that he (P.W. 12) also found the accused persons to place the deadbody on the northern bank of Lakh-pukur. She further stated that she was told by Tarun Dutta (P.W. 12) that accused Dilip made a confession before him that he committed murder of Khuku.

13) P.W. 12, Tarun Dutta deposed that on 16.08.2006 before evening when he was proceeding towards the field along the northern side of Lakhpukur, he found that accused Dilip and Bhombal placing a deadbody under a wood apple tree. On seeing such incident he returned to his house and on the same night he again came out of his house and found the deadbody of Chandra under the

wood apple tree. He came back to his house and informed his brother Shyamal Dutta as also Khandaghosh Police Station over telephone. This witness further deposed that on 18.08.2006 at about 4.30 A.M. accused Dilip came to his house and confessed before his brother Shyamal (P.W. 18) that he along with Bhombal committed murder of Chandra. It was stated by this witness that on 18.08.2006 his sister Jyotsna (P.W. 11) and her husband Samar Dutta came to their house and searched for Shyamal and since Shyamal was not available P.W. 11, Jyotsna told her what she had seen on 16.08.2006 at 6 / 6.30 P.M.

14) P.W. 13, Guru Prasanna found Chandra's deadbody under wood apple tree and he further deposed that police came to the village and recovered one saree from the pond. He was declared hostile by the prosecution. P.W. 14 was also a witness to the seizure of saree and he was declared hostile. P.Ws. 15 and 16 are two fishermen by profession and with their help "saree" of the victim was recovered from the pond.

15) P.W. 17, Samar Dutta was the husband of P.W. 11, Jyotsna and he stated in his evidence that on 18.08.2006 his wife (P.W. 11) disclosed to him that on 16.08.2006 she found accused Dilip and Bhombal jostling with Khuku (victim) in the water and being afraid she returned to her house. P.W. 17 told his wife (P.W. 11) not to disclose this incident to others and on the following morning both of them had been to the house of Shyamal (P.W. 18). As Shyamal was not available at his house, Jyotsna (P.W. 11) stated about the incident to Tarun Dutta (P.W. 12 and brother of Shyamal).

16) P.W. 18, Shyamal Dutta deposed that on 16.08.2006 at about 7.30 / 8.00 P.M. he was at Burdwan and was informed by his elder brother (P.W. 12) that Chandra was murdered. Having received such information he came to his village and found the deadbody of Khuku under a wood apple tree. On the night of 17.08.2006, after cremation of the deadbody, he returned to the village with others and on the same night his elder brother (P.W. 12) disclosed to him that on 16.08.2006 he saw Dilip and Bhombal to place a deadbody under a tree on the northern side of Lakhpukur. This witness further stated that on 16.08.2006 in the early morning accused Dilip came to his house and confessed that he along with Bhombal committed murder of Chandra.

17) P.Ws. 19 and 20 were formal witnesses. P.W. 21 Haru Khara stated in his evidence that he along with others had been to a pond and recovered one 'saree' on being shown by accused persons. P.W. 22, Srikanta Santra also corroborated the evidence of P.W. 21.

18) P.W. 23 was the autopsy surgeon, who held post mortem over the deadbody of victim Chandra. He found 9 ante mortem injuries over the deadbody and he opined that death was due to the effect of manual strangulation ante mortem and homicidal in nature.

19) P.W. 24 was S.I. of Police, who drew up the formal F.I.R. P.W. 25 was a formal witness, who seized wearing apparels of the victim.

20) P.W. 26 was the Investigating Officer of the case, who visited the place of occurrence, held inquest over the deadbody, interrogated and recorded the statements of witnesses and on completion of investigation submitted charge sheet against the accused persons.

21) The learned Trial Judge mainly relied upon the evidence of P.Ws. 11 and 12 and the extra-judicial confession made by accused Dilip before P.W. 18 Shyamal in convicting the accused appellants.

22) Mr. Sekhar Bose, learned Advocate appearing for the appellant in C.R.A. No. 141 of 2008 submitted that in the present case preparation of Inquest over the deadbody preceded the lodging of F.I.R. F.I.R. was registered on 17.08.2006 at 00.15 hours, but the Inquest was held on 16.08.2006 at 22.25 hours, i.e. prior to registration of F.I.R. It was pointed out by Mr. Bose, learned Advocate that particulars of the case was mentioned at the top of the Inquest report, although at that point of time there was no existence of such case. The Investigating Officer of the case did not claim to have received the particulars of the case from the police station nor did he say that he mentioned the particulars of the case after the case was registered. Mr. Bose further pointed out that after the deadbody of the victim was recovered, P.W. 12 Tarun Dutta informed the police over telephone about the incident. Although he claimed himself to be an eyewitness he did not disclose what he had seen to the police. It is also not understood what prevented him from being the first informant although the incident was within his knowledge. Mr. Bose, learned Advocate relied upon a judgment of the Hon'ble Apex Court reported in **(2009) 1 SCC (Cri) 212 (Ramesh Baburao Devaskar & Others Vs State of Maharashtra)**. In the said judgment it was held by the Hon'ble Apex Court that a first information report in a murder case cannot be lodged after the Inquest is held.

23) Mr. Bose next pointed out that although at the time of holding inquest the inmates of the house as also other villagers, including P.Ws. 11 and 12, were present, none of them disclosed the names

of the assailants. P.W. 11 claimed to have seen the incident of jostling between the accused persons and the victim and P.W. 12 also claimed to have seen the second part of the incident. But none of them came forward and stated the names of assailants before the Inquest Officer.

24) It was the contention of Mr. Bose that P.W. 11, although she claimed to have seen the incident that the victim Chandra was fighting with accused Dilip and Bhombal in the water, she did not raise any alarm. She just saw the incident of struggling between the accused and the victim and returned to her house and did not disclose it to anybody till 18.08.2006 before Shyamal Dutta P.W. 18 for the first time. It appears from the evidence on record that at the time when the deadbody of Chandra was recovered, both P.W. 11 Jyotsna and P.W. 12 Tarun Dutta were present amongst other villagers in the searching party. But even at that stage neither P.W. 11 nor P.W. 12 stated anything about the incident, which they had seen earlier. It was submitted by Mr. Bose learned Advocate that in a case of this nature, where the prosecution relied upon the evidence of P.Ws. 11 and 12 as eyewitnesses, who did not disclose the names of assailants for two days after the incident, such non-disclosure was a serious infirmity destroying the prosecution case. Mr. Bose relied upon a judgment of the Hon'ble Apex Court reported in **AIR 1976 SC 2488 (State of Orissa Vs Mr. Brahmananda Nanda)**. From a reading of the said judgment we find that in the said case prosecution depended upon the evidence of a person claiming to be an eyewitness, who for a day and a half after the incident, did not disclose the incident to others. It was held by the Hon'ble Apex Court that such non-disclosure was a serious infirmity, which destroyed the credibility of the entire evidence.

25) On the same point learned Advocate also relied upon a judgment of the Apex Court reported in **1996 SCC (Cri) 1028 (Alil Mollah & Another Vs State of West Bengal)**. In the said case it was held by the Apex Court that conviction can be based on the testimony of single eyewitness if he is wholly reliable and corroboration was required when he is partly reliable. It was held by the Apex Court that conduct of the witness in not telling anyone about the incident till next day, was unnatural creating an impression that he had not witnessed the incident and in such circumstances no conviction can be founded on his uncorroborated testimony.

26) Relying upon the aforesaid two judgments it was submitted by Mr. Bose, learned Advocate that the evidence of P.Ws. 11 and 12, who claimed themselves to be the eyewitnesses, was wholly unreliable. None of them disclosed about the incident to anybody for the next two days. When the villagers were searching for the victim, these two witnesses, although they were very much present there, did not disclose to others about the incident which they had seen earlier. Even before the Inquest Officer they did not disclose the incident which they had seen earlier. Their conduct in not telling anybody about the incident makes their evidence not worthy of acceptance.

27) Now comes the extra-judicial confession. It was argued by Mr. Bose that it should not be lost sight of that such extra-judicial confession was made before P.W. 18, Shyamal Dutta in presence of his brother Tarun Dutta (P.W. 12) and Shyamal was a practising lawyer of Burdwan Court and his brother Tarun (P.W. 12) was a clerk in the court of District Judge, Burdwan. It was argued by Mr. Bose that there was no reason for accused Dilip to choose Shyamal Dutta of all the villagers to make such confession, specially when it is in the evidence on record (evidence of P.W. 9) that Shyamal Dutta and accused Dilip belonged to two rival political parties. So it was very difficult to

believe that of all the persons in the village accused Dilip would select Shyamal, who belonged to a rival political party and was in inimical terms to make such confession. Mr. Bose also pointed out that although such extra-judicial confession was allegedly made before P.Ws. 18 and 12, none of them disclosed anything about such extra-judicial confession to any other witness and not even to the police.

28) Mr. Bose relied upon a judgment of the Hon'ble Apex Court reported in **AIR 1990 SC 2140 (Kishore Chand Vs State of Himachal Pradesh)**, wherein it was held by the Hon'ble Apex Court as follows :

“Therefore, the Court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose the Court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally the actual words used by the accused. Extra-judicial confession if found to be voluntary can be relied upon by the Court along with other evidence on record. Therefore, even the extra-judicial confession will also have to be proved like any other fact. The value of the evidence as to the confession depends upon the veracity of the witness to whom it is made and the circumstances in which it came to be made and the actual words used by the accused. Sometimes it may not be possible to the witness to reproduce the actual words in which the confession was made. For that reason the law insists on recording the statement by a Judicial Magistrate after administering all necessary warnings to the accused that it would be used as evidence against him.”

29) Mr. Bose also relied upon a judgment of the Hon'ble Apex Court reported in **AIR 1982 SC 1595 (Heramba Brahma Vs State of Assam)**. In paragraph 18 of the said judgment it was held by the Apex Court as follows :

“18. We are at a loss to understand how the High Court accepted the evidence on this extra-judicial confession without examining the credentials of P.W. 2 Bistiram ; without ascertaining the words used ; without referring to the decision of this Court to be presently mentioned wherein it is succinctly stated that extra-judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed.”

30) Next judgment relied upon by Mr. Bose was reported in **AIR 1983 SC 295 (Manzoor Vs State of U.P.)**. In the said judgment the Hon'ble Apex Court while dealing with the extra-judicial confession made by the appellants, found that there was nothing on record to show that the appellants had any reason to take a particular witness, before whom confessional statement was made, into confidence and to believe that he could save them from the trouble. Supreme Court refused to accept the evidence of the witness, before whom such confessional statement was made, that the appellants made any extra-judicial confession to him. The appeal was accordingly allowed.

31) Relying on the aforesaid judgments it was submitted by the learned Advocate of the appellant that it would not be safe to rely upon the evidence of P.W. 18 and P.W. 12 keeping in view the fact that they belonged to a rival political party, which was in the evidence of P.W. 9. It was pointed out by Mr. Bose that P.W. 18 Shyamal was a practising lawyer of Burdwan District Court and his brother Tarun (P.W. 12) was a clerk in the District Judge's Court. Accused Dilip was in inimical terms with P.W. 18 Shyamal as they belonged to rival political party. It was difficult to believe that

accused Dilip would make a confessional statement before P.W. 18, who belonged to a rival political party. P.W. 12 Tarun Dutta also cannot be accepted as a trustworthy witness. Although he claimed himself to be an eyewitness, he did not disclose anything to any of the villagers for next two days. He was with the villagers when they were searching for the victim. He was present when the deadbody was found. He was also present when police came to village and held inquest. At no point of time he disclosed the incident he had seen to anybody. Although it was claimed by P.W. 12 that confession was made by accused Dilip before P.W. 18 in his presence, he never disclosed anything about such extra-judicial confession to any of the villagers or to the police.

32) It was pointed out by Mr. Bose that P.W. 12 inspite of seeing a part of the incident did not inform the police on the first available opportunity although he informed the police over phone. During this period appellant was present at the spot and not only signed the inquest report, which was prepared on 16.08.2006, but had also accompanied the family members of the victim for cremation of the deadbody on the following day. What is strange here is that inspite of the fact that the appellant Dilip was all-along present with the villagers, including P.Ws. 11 and 12, they did not utter a single word against him. When police arrived at the village P.Ws. 11 and 12 had ample opportunity to make a disclosure of facts within their knowledge, but nothing was said against the appellants.

33) Next circumstance relied upon by the learned Trial Judge was recovery of "saree" from the pond known as "Lakhpukur". P.W. 13, who was a local person according to the prosecution, witnessed the seizure of 'saree' and he had signed the seizure list. However, when Material Ext. 1 (saree) was shown to him he failed to identify the same. P.W. 13 further gave out that after

recovery of the 'saree' the accused persons came to the spot. Such admission by P.W. 13 being unfavourable for the prosecution, he was declared hostile. Mr. Bose pointed out that P.W. 14 another witness to the seizure, was also declared hostile. This witness in his evidence-in-chief did not state that such recovery of saree was made pursuant to confessional statement of the accused and that accused persons were present at the spot at the time of such recovery. P.W. 15 was another seizure witness and he was a man of different village. It was his own evidence that he had good terms with the police and he used to help police in different work and used to work as per direction of the police. Mr. Bose further pointed out that P.W. 15 claimed to have recovered the 'saree'. Strangely enough P.W. 4 stated that P.Ws. 16 and 21 had recovered the 'saree', while P.W. 5 stated that it was P.W. 14, who recovered the 'saree'. So, as regards recovery of the saree there was serious contradiction in the evidence of those witnesses.

34) Lastly it was submitted by Mr. Bose that there was a glaring inconsistency between the ocular and medical evidence and it would be extremely unsafe to maintain the conviction of the appellants on such evidence. Referring to the evidence of P.W. 23, the autopsy surgeon it was submitted by Mr. Bose that opinion of P.W. 23 was that death was caused by manual strangulation and was ante mortem and homicidal in nature. In his cross-examination P.W. 23 stated that he found 9 ante mortem injuries on the body. The evidence of autopsy surgeon was an important piece of evidence to judge the veracity of the prosecution case. Mr. Bose pointed out that death was not the result of dashing the head of the victim against the bank of the pond as alleged by the prosecution. That apart, the nature of injuries as found by P.W. 23 does not conform to the manner of assault as purportedly stated in the extra-judicial confession made by the appellant before P.W. 18. The manner of assault as projected by the prosecution through the evidence of P.Ws. 11, 12 and 18 was

to the effect of dashing the head of the victim on the bank of the pond whereas according to the evidence of P.W. 23 death was due to manual strangulation.

35) Mr. Goswami, learned Public Prosecutor appearing for the respondent / State submitted that in the present case there were two eyewitnesses to the incident. P.W. 11 Jyotsna saw the first part of the incident when victim Chandra was found fighting with the accused appellants in the pond. She had given a description of what she had seen on the date of incident. The second part of the incident was seen by P.W. 12 Tarun Dutta. He found both the accused appellants to place a deadbody under a wood apple tree on the northern side of the pond. It was the submission of Mr. Goswami that these two witnesses were cross-examined at length, but nothing infirm could be elicited from their cross-examination to cast even a slightest doubt on the veracity of these two witnesses. There was no reason to disbelieve P.Ws. 11 and 12. Delay in disclosure of the incident to other witnesses might be for various reasons, but such non-disclosure cannot be a ground for demolishing the prosecution case. It was the contention of Mr. Goswami that where the witnesses deposed in court after a lapse of a considerable period, it was quite natural that there would be minor contradictions in their evidence.

36) Mr. Goswami next argued that there was disclosure statement made by the accused and pursuant to such statement recovery of "saree" of the victim was made from the pond and the same was seized by the police under proper seizure list. There was no reason to disbelieve the witnesses to the seizure only because of some minor discrepancies.

37) Referring to the evidence of the autopsy surgeon (P.W. 23), it was submitted by the learned Public Prosecutor that it was the definite opinion of the P.M. Doctor that death was caused by strangulation and the doctor also found as many as 9 injuries on the body of the victim and opined that such injuries could not be inflicted by one person. So, according to Mr. Goswami, it would not be correct to say that medical evidence was not in conformity with the ocular version of P.Ws. 11, 12 and 18.

38) Finally it was submitted by Mr. Goswami that in the present case there was extra-judicial confession made by accused Dilip before P.W. 18, Shyamal Dutta in presence of his brother, Tarun Dutta (P.W. 12). Such extra-judicial confession was made voluntarily by the accused person and there was no reason to disbelieve P.W. 18 before whom such extra-judicial confession was made. Mr. Goswami relied upon a judgment of the Hon'ble Apex Court reported in **(2007) 12 SCC 230 (Aloke Nath Dutta Vs State of West Bengal)**. Relying upon the aforesaid judgment, it was submitted by Mr. Goswami that after subjecting the evidence of a witness, before whom extra-judicial confession was made, to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility.

39) I have carefully gone through the judgment of the Hon'ble Apex Court referred to above. The principle laid down by the Hon'ble Apex Court is settled principle of law regarding acceptability of extra judicial confession and there cannot be any dispute regarding the said principle. But the facts and circumstances in the case of Alope Nath Dutta (supra) are totally different from that of the present case. In the case referred to above confession was made before a number of witnesses and no suggestion was given to any of the witnesses regarding enmity between the parties. But in the

present case definite suggestion was given to P.W. 18 regarding enmity between P.W. 18 and accused Dilip over a land dispute (page 70 of the paper book). That apart it appears from the evidence of P.W. 9 that he stated in his cross-examination that P.W. 18, Shyamal Dutta and accused Dilip belonged to rival political parties (page 36 of the paper book).

40) I have heard the learned Advocates of the respective parties. I have perused the Judgments of the Hon'ble Apex Court referred to above and I have also scrutinized the entire evidence on record. In the present case prosecution mainly relied upon the evidence of P.Ws. 11 and 12, recovery of 'saree' from the pond pursuant to the confessional statement made by the accused to the police and the extra-judicial confession made by accused Dilip before P.W. 18. P.W. 11, Jyotsna was a witness to the first part of the incident and P.W. 12 was a witness to the second part of the incident as I have already discussed above. But surprisingly none of these two witnesses disclosed such incident to any of the villagers for the next two days. When the villagers were searching for the victim, these two witnesses were present amongst the searching party. But they did not disclose anything to the other members of the searching party. Same thing happened when the deadbody of the victim was found and police arrived and held inquest over the deadbody. None of them came forward claiming to be an eyewitness. When the deadbody was taken to burning ghat for cremation, both P.W. 12 and 18 were present, but nothing was disclosed by P.W. 12 either to his elder brother Shyamal (P.W. 18) or to any family member of the victim. Where in a case of this nature, the entire prosecution depended upon the evidence of P.Ws. 11 and 12 claiming to be eyewitnesses and where none of the said witnesses disclosed the incident for the next two days and where there was no satisfactory explanation for such non-disclosure, it was a serious infirmity, which destroyed the credibility of the evidence of these two witnesses. The conduct of these two

witnesses was quite unnatural and their evidence, in my considered view, does not inspire confidence. In this regard, I find sufficient merit in the submission made by Mr. Bose, learned Advocate and I am of the view that the judgments of the Apex Court in the case of Brahmananda Nanda (supra) and in the case of Alil Mollah (supra) are very much applicable in the facts and circumstances of the present case.

41) As regards the extra-judicial confession made by accused Dilip to P.W. 18, I find sufficient merit in the submission made by Mr. Bose. The value of such type of evidence depends upon the veracity of the witness to whom such confession was made and the circumstances in which it was made. Such confession was allegedly made to P.W. 18, Shyamal by accused Dilip. It is in the evidence on record that there was an enmity between P.W. 18 Shyamal and accused Dilip over the dispute of landed property and it is also in the evidence on record (evidence of P.W. 9) that P.W. 18 and accused Dilip belonged to two rival political parties. So it is clear that relation between P.W. 18 and accused Dilip was inimical. In such circumstances, there was no reason for accused Dilip to select P.W. 18 of all the persons to make such confession. The evidence of P.W. 18 also does not inspire confidence. Although such confession was made to P.W. 18, he never disclosed such fact of extra-judicial confession to any of the villagers and not even to the police. In view of the judgment of the Hon'ble Apex Court, relied upon by the learned Advocate of the appellant, in the case of Kishore Chand (supra) and Heramba Brahma (supra) I am unable to accept such evidence of extra-judicial confession made by accused Dilip to P.W. 18.

42) As regards the recovery of saree from the pond pursuant to the confessional statement of accused, I find that there are serious contradictions in the evidence of P.Ws. 13, 14, 15 and 16, who

claimed themselves as witnesses to the seizure. P.W. 13 stated in his evidence that after recovery of saree the accused persons came to the spot. P.W. 14 did not say anything about such recovery and in his evidence-in-chief did not state that pursuant to the information given by the accused persons recovery of saree was made. In his cross- examination P.W. 14 further deposed that the accused persons were not even present at the spot during such recovery. P.W. 15, another seizure witness, stated in his evidence that he had good relation with the police and used to help the police in various work and used to act as per direction of the police. P.W. 15 also did not find any mark of mud in the 'saree' when it was shown to him. P.W. 16 in his cross- examination stated that the 'saree' was recovered from inside the pond and it was stained with mud. However, when the 'saree' was produced in court he did not find any marks of mud on it. P.W. 16 also stated that he did not put his signature on the said 'saree' nor was any label pasted on it. In view of the nature of evidence of the witnesses to the seizure of 'saree', it is difficult for this court to accept the prosecution version that there was recovery of 'saree' pursuant to the confessional statement made by the accused.

44) In view of the discussion made above I find sufficient merit in the submission made by the learned Advocate of the appellant. In my considered view prosecution failed to prove its case beyond reasonable doubt.

45) The matter was referred to this Bench by the Hon'ble Chief Justice in terms of Section 392 of the Code of Criminal Procedure as the two learned Judges of this court divided in opinion in disposing of the appeals. After hearing the parties and scrutinizing evidence on record, I agree with the view of my learned brother, Justice Amit Talukdar and allow the present two appeals.

46) The appeals are accordingly allowed. Judgment and order of conviction and sentence are set aside and the accused appellants are acquitted of the charge framed against them.

47) The accused appellant, Dilip Kumar Dey @ Dilip @ Dilu, who is now in judicial custody, shall be released forthwith, if he is not wanted in any other case. The appellant, Sristidhar Roy @ Bhombal @ Hambul, who is now on bail, shall be discharged from his bail bond.

48) A copy of this judgment along with LCR may be sent down to the court below immediately.

49) Urgent Xerox certified copy of this judgment and order may be supplied to the learned Advocates of the respective parties, if the same is applied for.

(DEBIPRASAD SENGUPTA, J.)