Mohd. Azad @ Samin vs State Of West Bengal on 5 November, 2008

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Bench: P. Sathasivam, Arijit Pasayat

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1729 OF 2008
(Arising out of SLP (Crl.) No.4055 of 2006)

Mohd. Azad @ Samin .....Appellant

Versus

State of West Bengal .....Respondent

(With Criminal Appeal No. 1730 of 2008
@SLP(Crl.) No.5212/2006)

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. In these appeals challenge is to the judgment of a Division Bench of the Calcutta High Court dismissing the appeal filed by the appellants. Both the appellants were convicted for offence

punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code, 1860 (in short the `IPC'). Three persons were accused of the alleged offences. One of them, i.e. Md. Nayeen @ Raju did not face the trial. Learned Additional Sessions Judge, Ist Court, Alipore, in the district of 24 Parganas (South) in Sessions Trial No.1(1) of 1995 found the appellants guilty, and convicted and sentenced them.

3. Prosecution version as unfolded during trial is as follows:

> One Tarence Stanley Arland son of late Joseph William Arland serving as the Secretary of the Christian Cemetery located at 184, Acharya Jagadish Chandra Bose Road, Calcutta-17 was working in his office at the said premises on 10.2.1994. At about 3 P.M. on that day one Lakshman Singh a Gardner of the cemetery came to Mr. Arland in his office and informed him that a boy aged about 10/12 had come to him earlier and informed him that a dead body was lying on the south east corner of the said cemetery. On getting such information from Lakshman Singh, Mr. Arland asked Lakshman Singh to go and ascertain as to whether the information of the boy was at all correct. Lakshman Singh left the office and after sometime came back to Mr. Arland and reported that the dead body with a cut mark on the back was lying on its back in a half dug position at the south eastern corner of the cemetery. Having learnt this from Lakshman Singh, Mr. Arland and Lakshman Singh went to the place at which the dead body was lying and found that a person aged about 25/26 years, wearing a blue colored sweater and jeans pantaloon and having gaping wound on the neck was lying at the south east corner of the cemetery. Mr. Arland then called out to the man repeatedly so as to ascertain as to whether the man had any life. But, he did not get any response. Mr. Arland also noticed some quantity of blood on the ground at a distance of about 10 feet to the north of that person lying dead. He could not ascertain the identity of the dead body. Then Mr. Arland came back to his office and informed the Beniapukar police station over phone of the matter being sure that the man was murdered by some unknown persons and was left within the cemetery in a half buried condition. On getting such information from Mr. Arland on phone Beniapukar Police came to the Christian Cemetery within 10 to 15 minutes and Mr. Arland was examined by the police. Mr. Arland gave a statement to the police regarding the said incident and his statement was recorded by the police. Mr. Arland then went through the statement and signed the same. He then went to the spot alongwith two of his employees so as to help in the matter of lifting the dead body from the spot. Mr. Arland then called one Sheo Sagar and another employee so as to help the police. Police then lifted the dead body from the spot with the help of those employees. Police then prepared a report and Mr. Arland signed it. Police also prepared three seizure lists in his presence in regard to many articles like earth stained with blood, some burnt black and greenish plastics stained with blood, some quantity of control earth, one black shoe with one socks inside, one cement slab, one blue jeans and one blue sweater, which the dead body was wearing and another deep brown socks lying under the cement slab. Police found the dead body under the cement slab. The seizure lists as were prepared by the police were signed by Mr.

Arland along with other witnesses. Police also labelled the seized articles in presence of Mr. Arland and other witnesses and they also signed such labels. As police left the spot after doing their job, Mr. Arland came back to his office within the cemetery.

The statement of Mr. Arland as given to the police and recorded by the police was treated by the police as the F.I.R. of the case and Beniapukur police recorded the case No. 32 dated 10.2.1994 u/s 302/201 I.P.C. against unknown persons. S.I. Sahajamal Mondal who went to the spot along with other police personnel on getting the telephonic information of Mr. Arland as shown earlier, took up the investigation of the case under the orders of his superior officers. He also made entries in the General Diary of the police station while leaving for the spot and after coming back to the police station. He sent the original FIR formal F.I.R. and the seizure lists to the court of the Ld. A.C.J.M. Sealdah, along with prayer for keeping the seized articles in the police station malkhana. He also sent necessary requisitions to the Professor Forensic and State Medicine, N.R.S.. Medical College, Calcutta, for holding the post mortem examination of the dead body. He also had been to the said morgue on that day. On 12.2.1994 he sent a requisition to the Plan Making section of Detective Department, Lalbazar asking it to take appropriate steps by coming to the place of occurrence. Thereafter on 17.2.94 the then O/C of Beniapukar Police Station Sashanka Sekhar Dey arrested accused Md. Nadir, brought him to the police station and handed over the accused to S.I. Sahajamal Mondal. S.I. Sahajamal Mondal then interrogated Md. Nadir and pursuant to his statement he recovered some articles being led by Md. Nadir.

On 17.2.1994 the accused was taken up by the Detective Department of Calcutta Police for further investigation. After investigation charges were filed. Since the accused persons pleaded innocence they were tried. In order to prove accusations, prosecution examined 34 witnesses. The trial Court noticed that the witnesses could be categorized into six categories. Out of these, witnesses belonging to 2nd and 3rd category had last seen accused and the deceased together. So far as third category is concerned, they deposed to have seen the accused and the deceased at the point of entry. At the time of departure, The accused persons alone came out. The fourth category speaks about the presence of accused persons at the scene of occurrence and category five belongs to recovery.

Learned counsel for the appellants submitted that the case rests on circumstantial evidence. The medical evidence on which the prosecution relied falsified the prosecution case because the doctor found the presence of injuries and, therefore, the presence of body of deceased for three days rules out the prosecution version that the injuries were inflicted on 6.2.1994. It is pointed out that there are several persons working near the scene of occurrence. But for four days the body of the deceased could not be noticed. It is further submitted that scaling of the wall as stated by some witnesses is not probable. So far as the confessional statement by accused Md. Azad is concerned it is stated that no burning was coming. But plea is given that burning

was coming. It is submitted that during examination under Section 313 of the Code of Criminal Procedure, 1973 (in short the `Code') no question was put about PW-24. There would be no question of conspiracy and mere presence cannot lead to inference of guilt of conspiracy. It is pointed out that only one witness speaks out scaling while others did not.

With reference to the doctor's evidence it is pointed out that the doctor spoke that there was no alcohol in the lungs and the brain. Therefore, the identification of the accused is of no consequence.

4. In response, learned counsel for the State submitted that the High Court has analysed the evidence in great detail and nothing infirm is there to warrant interference.

5. So far as the freshness of the injuries is concerned, the doctor PW-29 in his opinion before the Investigating Officer on 9.3.1996 affirmed his view that death might have taken place 4/5 days prior to the post mortem examination of the dead body. From the First Information Report as well as the statement of Secretary of the cemetery who lodged the FIR it is clear that neither he nor any of the staff of the cemetery had noticed the dead body but only a child found a dead body and informed one of the staff of the cemetery who in turn informed the informant. It is on record that the child was in the cemetery for the purpose of flying kite and for playing in the open field and that is how he was moving hither and thither and noticed the dead body was lying in a corner which was a long area. That being so, the plea that the body could have been unnoticed by the appellants is unacceptable. It is to be noted that the date of occurrence was in the early part of February and the dead body was discovered with full wearing apparels including winter garments, shoes and socks. The dead body was lying in half dug manner and a cement slab was placed on the face of the dead body. According to the High Court, that being the situation, the dead body was not exposed to sun and wind and the chance of receiving dews throughout the whole night and upto certain parts of the morning cannot be ruled out. Therefore, the view of the doctor about the date of death being on or around 6.2.1994 is not rendered doubtful.

6. According to the prosecution version on the night of 6.2.1994, the appellants and the deceased purchased wine from a shop nearby and thereafter they entered into the cemetery not from the usual gate but after scaling the wall. The identification by the workers of the cemetery has also been established by cogent evidence. The witnesses stated that on a wintry night they were warming themselves by burning wood. The appellants appeared there and wanted water and there was altercation in between them and one of the appellants gave a slap on the face of one of the workers. In the Test Identification Parade, some of the workers identified appellant Nadir as the man who went to fetch water. Therefore, the prosecution version in that regard is cogent.

7. So far as the alleged confessional statement of Md. Azad is concerned Sankar Nath Das (PW-24) had categorically stated about the recording of confessional statement. The salesman of the wine shop (PW-18) spoke about appellant Md. Nadir. The said accused demanded wine on credit which was denied and thereafter he paid cash and purchased bottle of wine. PW-10 one of the workers spoke about the demand by one of the accused persons for water. He identified the person who had brought water in a mug. The witness identified the accused appellant Nadir to be the man. He also

identified accused in test identification parade. To the similar effect is the evidence of PW-12 who spoke about the supply of drinking water. So far as absence of alcohol in lungs and brain is concerned, the doctor categorically stated that the stomach contained 10 gms of fluid with strong smell of alcohol.

8. Regarding recording of confessional statement is concerned, learned Judicial Magistrate, 6th Court, Sealdah has categorically stated that the requirement of Section164(2) of Code was strictly followed. He has categorically stated that the confessional statement was given voluntarily and it was recorded after observing all statutory formalities.

9. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC

350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

10. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

11. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

> (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

12. In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

13. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

14. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence laid down by the this Court as far back as in 1952.

15. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

16. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna

in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned `must' or `should' and not `may be' established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

17. These aspects were highlighted in State of Rajasthan v. Rajaram (2003 (8) SCC 180), State of Haryana v. Jagbir Singh and Anr. (2003 (11) SCC 261) and Kusuma Ankama Rao v State of A.P. (Criminal Appeal No.185/2005 disposed of on 7.7.2008)

18. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:

> "22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

19. In Ramreddy Rajesh Khanna Reddy v. State of A.P. [2006 (10) SCC 172] it was noted as follows:

> "27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration".

(See also Bodhraj v. State of J&K (2002(8) SCC

45).)"

20. A similar view was also taken in Jaswant Gir v. State of Punjab [2005 (12) SCC 438] and Kusuma Ankama Rao's case (supra).

21. Confessions may be divided into two classes i.e. judicial and extra- judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the `Code') or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise:

> (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority.

It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short `Evidence Act'). The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the

factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See R. v. Warickshall) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's Evidence, 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

22. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness 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.

23. If the factual scenario is considered in the background of principles relating to circumstantial evidence and extra judicial confession, the inevitable conclusion is that appeals are without merit, deserve dismissal, which we direct.

.....J. (Dr. ARIJIT PASAYAT) .....J. (P. SATHASIVAM) New Delhi, November 5, 2008