IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Joymalya Bagchi
And
The Hon'ble Justice Ravi Krishan Kapur

C.R.A. 693 of 2017
With
CRAN 1241 of 2018

Gopal Sarkar
Vs.
State of West Bengal

For the appellants : Mr. Ayan Bhattacharya, Adv.
Mr. A. Bose, Adv.

For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.,
Mr. M. Sur, Adv.
Ms. Z. N. Khan, Adv.

Heard on : 05.12.2018, 18.12.2018, 10.01.2019, 14.11.2019, 5.12.2019

Judgment on : 20.12.2019

Joymalya Bagchi, J. :

In the early hours of 14th March, 2015 a daring dacoity at a convent school in Ranaghat and brutal rape of one of the nuns in the convent sent shockwaves throughout the society. Principal of the convent P.W. 4, Sister P. Mary Santhi, lodged written complaint with the police alleging between 2 a.m. and 4 a.m. on 14/3/2015 some unknown miscreants had broken into the convent, committed dacoity and raped one of the nuns (P.W. 3). CCTV camera installed in the premises, had captured the faces of the intruders.

The miscreants were six in number. At first they broke into the room of P.W. 3, tied her up and took away valuables from her cupboard. Thereafter, they went to the room of the *de facto* complainant and took away gold rings, camera, laptop, mobile phones etc. After tying the sisters and the night guard the miscreants again entered the room of P.W. 3, raped her and locked her in the room. They ransacked the principal's office, computer lab, staff room and took away rupees six lakhs, gold chain and other valuables from the convent. On receiving information from Sister P. Mary Santhi (P.W. 4), police arrived. On written complaint of P.W. 4, Gangnapur P.S. case no. 38/15 dated 14.03.2015 under section 395/397/376/212/216A/120B IPC was registered for investigation. In the course of investigation the appellant and four other accused persons, namely, Md. Selim Sk., Khaledur Rahaman @ Mintu @ Farukh @ Khalek, Ohidul Islam @ Babu and Milan Kumar Sarkar were arrested. Accused persons other than the appellant were identified in the TI Parade and confessional statements of the appellant, Khaledur, Ohidul and Milan were recorded before Magistrate.

In conclusion of investigation, charge-sheet was filed against the accused persons including one Nazrul Islam @ Nazu, absconding accused. Subsequently, upon his arrest and identification in the course of further investigation, a supplementary charge-sheet was filed. Charges were framed against all the accused persons under sections 120B, 324/34, 354/34, 354A/34, 392/34, 395/34, 397/34 and 376D of Indian Penal Code and in addition separate charge was framed against Nazrul Islam under section

376D of Indian Penal Code and against the appellant Gopal Sarkar under section 212/216A of the Indian Penal Code.

The appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 42 witnesses including the victim, P.W.3. A number of documentary and material exhibits including confessional statements of the appellant (Ext. 48) and that of accused Ohidul Islam (Ext. 46), accused Milan (Ext. 47) and accused Khaledur (Ext. 49) were produced in Court.

In conclusion of trial, all the accused persons including the appellant were convicted for the offence punishable under section 120B and sentenced to suffer rigorous imprisonment for ten years each and to pay a fine of Rs.10,000/- each, in default, to suffer simple imprisonment for two and half years more. Appellant Gopal Sarkar was also convicted under section 216A of the IPC and was sentenced to suffer rigorous imprisonment for seven years and pay a fine of Rs.10,000/- in default to suffer simple imprisonment for one and half years. By the selfsame judgment, other accused persons, namely, Md. Selim Sk., Khaledur Rahaman, Ohidul Islam, Milan Kumar Sarkar and Nazrul Islam were convicted under section 395 of IPC and sentenced to suffer rigorous imprisonment for ten years each and to pay a fine of Rs. 20,000/- each, in default, to suffer simple imprisonment for another two and half years more. Accused Nazrul Islam was convicted separately under section 376 of IPC and sentenced to suffer life imprisonment and pay a fine of Rs.50,000/- on such count and for

commission of offences punishable under section 354 and 354A of IPC and sentenced to suffer simple imprisonment for five years and three years respectively with fine of Rs.5,000/- for each offence, in default, to suffer simple imprisonment for one year more for both offences. All the sentences were run concurrently.

Although other accused persons have not appealed against the aforesaid conviction and sentence imposed on them, appellant being aggrieved by his conviction and sentence has preferred this appeal.

Mr. Bhattacharya, learned advocate appearing for the appellant submitted that there is no legally admissible evidence to connect the appellant with the crime. CCTV camera footage does not show the presence of the appellant at the spot. He was not identified by any of the witnesses i.e. P.W.s 3, 4 and 5 who were present at the spot including the rape victim. Fingerprint of the appellant did not match with the samples of fingerprints collected from the place of occurrence. These facts clearly show that the appellant was not present at the place of occurrence when the incident occurred. Evidences of P.W. 11 and 12 are sketchy and do not establish the ingredients of either the offence of conspiracy or of harbouring dacoits punishable under section 120B or 216A of IPC. P.W. 11 does not speak of presence of appellant at the spot when other accused persons allegedly discussed about a 'school in Ranaghat'. She failed to identify accused Khaledur Rahaman in Court – the sole accused who confessed about the presence of Gopal Sarkar during discussion relating to the dacoity at

Ranaghat. Accused persons including Khaledur retracted their confessional statement in Court. No FIR/charge-sheet with regard to dacoities committed by accused persons on earlier occasions while they were staying at the residence of the appellant has been exhibited by I.O., P.W. 42 during trial. In fact, trial court acquitted the appellant of the offence punishable under section 212 IPC. In the light of the scanty and unconvincing evidence on record, appellant is entitled to an order of acquittal.

Mr. Saswata Gopal Mukherjee, learned Public Prosecutor, submitted that the appellant was a relation of accused Milan Sarkar, one of the principal accused persons in the case. He and the other accused persons regularly visited the appellant's residence. The said accused persons had committed a number of daring dacoities while staying at the residence of the appellant and shared the spoils of such crimes with the appellant and his brother. Milan had given costly gifts during the marriage of the niece of the appellant. On the day of marriage, P.W. 11 found the appellant supplying meat to the other accused persons while they were discussing about a school in Ranaghat. P.W. 12 has corroborated P.W. 11. The aforesaid evidence on record is also corroborated by confessional statements of the appellant and other accused persons. Hence, the prosecution case is proved beyond doubt.

From the tenor of the submission made on behalf of the appellant it does not appear that the appellant had seriously assisted the involvement of the other accused persons in the dacoity committed at the convent and rape

of one of the nuns. Challenge is essentially thrown to the extent of his participation in the crime, that is, conspiracy to commit the aforesaid dacoity and harbouring of the accused persons with the knowledge or reasonable belief that they were about to commit the dacoity.

Evidence on record:-

Prosecution has essentially relied on evidence of P.W. 11 and 12 and the confessional statements of the appellant and other accused persons to prove such charge. P.W. 11, Reba Biswas, deposed she is a neighbour of the appellant and his brother Saktipada Sarkar. Accused Milan is the maternal uncle of the wife of the appellant. Marriage of Saktipada's daughter was fixed on 11th March, 2015. Accused persons came to the residence of appellant on 28th February/1st March, 2015 to attend the marriage. Milan arranged for the cost of meat and gave expensive gifts such as earring and finger-ring to the niece of the appellant. They used to drink and talk with each other in filthy languages. On the day of marriage, Milan and Nazrul slept in her verandah. On the day of marriage, that is, 11th March, 2015, in the morning she had gone to collect vegetables in the field. The accused persons were taking liquor and were conversing with one another about a school in Ranaghat. Appellant brought cooked meat for them. Next morning, the accused persons were arrested for causing nuisance in an inebriated condition. In the evening, wives of the appellant and his brother went to the police station and brought them back. On 13th March, 2015 they left the residence of the appellant. P.W. 11 identified the accused persons by name

except Khaledur. With regard to the said accused, she said he may have been present. She proved her statement before Magistrate under section 164 Cr.P.C.

P.W. 12, Dipak Das, the other witness deposed he had a betel leaf shop near the residence of the appellant. Some Bangladeshi persons used to stay in the residence of the appellant. Their behavior was not good and they used to consume liquor. Appellant told him one of them, namely, Milan Sarkar was a relation of his wife. They used to purchase expensive cigarettes from his shop. They used to drink in a sugarcane field belonging to him. He saw plastic bottles there. Appellant used to supply them water, liquor and meat. After the marriage, on the next day, the five accused persons were arrested. Wives of Gopal and his brother got them released from police custody. He proved his statement before Magistrate.

P.W. 42, Investigating Officer, in his deposition stated during investigation he had come to know that the accused persons were arrested in connection with a case registered at Habra P.S. with regard to an incident on 12/3/2015. These persons regularly assembled at the house of the appellant and prepared for commission of dacoity at different places. They had committed dacoity at Kharagpur and presented ornaments at the time of marriage of Gopal's niece.

I have also gone through the confessional statements of the appellant (Ext. 48) and the other accused persons, namely, of Ohidul (Ext.46), Milan Kumar Sarkar (Ext. 47), Khaledur (Ext.49). Ohidul in his confessional

statement has admitted to commission of prior dacoities in different places like Power Supply Centre at Kharagpur, Balurghat and Malda. He stated after completing such dacoities they had returned to Gopal's house. He also confessed with regard to the dacoity in the convent school. However, the accused is silent with regard to participation of Gopal in any meeting relating to the conspiracy to commit dacoity at the said school. Milan, relation of wife of Gopal, confessed that he had committed dacoities in Rajasthan and Uttar Pradesh and had been convicted. Thereafter, he went back to Bangladesh. Subsequently, upon returning to India he used to come to the residence of Gopal who was his son-in-law. He and his associates committed dacoity at Kharagpur. Thereafter, they returned to Gopal's house. They also committed dacoities at Balurghat and Malda. Subsequently, they committed dacoity in the convent school and one of them raped an aged lady. He is also silent with regard to any discussion relating to dacoity in the convent school in presence of Gopal. Gopal also confessed under section 164 Cr.P.C. (Ext.48). He admitted Milan was a relation of his wife and used to come to their house with his friends. Milan told him his friends had come with him to visit doctor or to travel to other places. Milan had been invited to the marriage of his niece. 10/12 days prior to the incident he came with his friends. One of them had an injury in his hand and another had a cut mark on the left heel. They claimed that they had sustained the injuries in an accident. On the day of marriage they danced and sang. On the next day while he was busy with the bridegroom leaving for her matrimonial home,

five of them were drinking in a sugarcane field. Police arrested them. At night, his wife and his sister-in-law (brother's wife) got them released from the police station. Next day they left his residence. Only Khaledur in his confessional statement spoke of discussion relating to 'work in Ranaghat' in the presence of the appellant. Relevant portion of his confessional statement is as follows:-

> *"On the next date of their return Shakti's daughter's reception was fixed. After having our lunch on the date of marriage in the afternoon we went to the sugarcane field beside Gopal's house. On the very morning Manik and Habib bought wine from Habra market. Then we all went to the sugarcane field. They were drinking. I do not drink. I smoked bidi/cigarette. I was having guava, apple, fried egg sitting beside them. Gopal was also sitting with us. He was bringing pulses. There talk was going on regarding works. Naju said that there is work at Ranaghat. Gopal then said if the work of Ranaghat would accomplish, they are supposed to give him Rs.50000/- and they should give him the money. Gopal will construct room with that money. I knew that Gopal works as mason. Milan they said, "Baba (Gopal), wait, let the work be finished, you will get the money. Are we not giving money, we gave it before also". There Manik and Habib were talking irrelevant as they drank a lot. Then Milan asked Gopal, "son-in-law, take them to home, they are talking irrelevant. Let us talk about the work". Then Gopal went back to home taking Milan and Habib along with him."*

Ingredients of the offences:-

Offence of conspiracy (under section 120B IPC):-

The ingredients of the offence are –

(1) that there must be an agreement between the persons who are alleged to conspire; and

(2) that the agreement should be

(i) for doing of an illegal act, or

(ii) for doing by illegal means an act which may not itself be illegal.

Hence, to do an illegal act or legal act by illegal means is the heart and soul of the offence.

In ***State Vs. Nalini***[1], the Apex Court held that mere association with one of the principal offenders or even knowledge about the conspiracy cannot make a person a conspirator. It is the agreement which is the sine qua non of the offence of conspiracy. Similarly, the court held mere knowledge of a dangerous mission without knowing the nature and purpose of such mission and harbouring the perpetrators of such mission for financial gain per se would not make the accused persons offenders.

Offence of harbouring robbers or dacoits (under section 216A):-

The ingredients of the offence are-

i) that the persons in question were about to commit or had recently committed robbery;
ii) that the accused knew this;
iii) that the accused harboured them or some of them;
iv) that the accused did so with the intention of –
(a) facilitating the commission of robbery or dacoity, or
(b) screening them or some of them from punishment.

Whether the evidence on record establishes the offences beyond doubt:-

It appears from the evidence on record that the accused persons assembled at the residence of Gopal to attend his niece's marriage. Evidence has also come on record that the co-accused, Milan is a relation of Gopal's wife and used to come to his residence off and on with his associates. P.W.11 and 12 deposed while visiting the residence of Gopal they used to behave in a raucous manner and had expensive habits. P.W. 11 stated Milan had agreed to bear the expenses for serving meat in the marriage and

[1] (1999) 5 SCC 253 [Paras 602 to 605]

gave costly gifts to the bridegroom. These pieces of evidence at their height show a close family relationship between the appellant and Milan, a co-accused. Owing to such relationship Milan and his associates appear to have regularly visited the house of Gopal. Immediately prior to the incident, all of them had been at the house of Gopal to attend the marriage ceremony of his niece. They indulged in singing, dancing and drinking liquor during the course of the marriage. Their unbridled revelry resulted in their arrest on the day after the marriage, that is, 12th March, 2015. In the evening Gopal's wife and his sister-in-law got them released from police station. Next day in the morning they left the residence and at night they committed the dacoity and rape in the convent. Mere association with the accused persons owing to family connection, in my opinion, cannot give rise to an inference of meeting of minds between the appellant on the one hand and other accused persons on the other hand to commit the dacoity. Learned Public Prosecutor has strongly relied on the evidence of P.W. 11 and 12 to establish that Gopal was present in the meeting with other accused persons over drinks in a sugarcane field where they discussed regarding a dacoity in a school in Ranaghat. It has been argued that such evidence is corroborated by the confessional statement of the accused persons including the appellant. No doubt, P.W. 11 deposed she saw the accused persons drinking in a sugarcane field. She also stated Gopal was supplying meat to them. They discussed about a school at Ranaghat. However, the said witness did not state that the accused persons were discussing about committing dacoity in

the school or that the appellant was present during such discussion. She merely stated Gopal supplied meat to them. It does not appear that the other witness, P.W. 12, had seen the accused persons drinking on the day of marriage in the sugarcane field. He generalized that the accused persons used to take liquor there and Gopal used to supply water, liquor and meat to them. Hence, P.W. 12 does not appear to have corroborated P.W. 11 with regard to discussion about 'school in Ranaghat' by accused persons over drinks on the day of marriage. None of the accused persons except Khaledur had spoken about such discussion in sugarcane field over drinks on the day of marriage in their confessional statements. Hence, confessional statement of Khaledur in this regard does not find corroboration from that of other accused persons including Milan whom Khaledur claimed was present during such discussion. The accused persons including Khaledur had retracted their statements during trial. Confessional statement of the appellant is exculpatory in nature. In ***Kashmira Singh Vs. State of M.P.***[2], the Supreme Court held retracted confession of an accused is not substantive evidence against a co-accused and can only lend assurance to corroborate other evidence on record against the latter. The Court held:-

> ***"10. The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to***

[2] AIR 1952 SC 159

> ***sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."***[3]

Applying the aforesaid ratio to the facts of the case, one may at best use the confession of Khaledur as corroborative evidence provided the other evidence on record, if believed, is sufficient to sustain a conviction. Intrinsic quality of the evidence of P.W. 11 with regard to presence of appellant at the time of discussion over drinks amongst other accused persons about a school in Ranaghat is poor. On a comprehensive reading of the entire evidence of P.W. 11, it cannot be said with certainty that the appellant was present when such discussion took place even if it is accepted that he supplied meat to them while they were drinking. P.W. 11 is also not sure with regard to the presence of Khaledur at the spot. P.W. 12 does not appear to have witnessed such incident on the day of marriage at all. The aforesaid evidence on record, even if believed, is not sufficient to come to a conclusive finding that the appellant entered into an agreement with other accused persons to commit dacoity in the convent. Although other accused persons may have enjoyed the hospitality of the appellant immediately prior to the incident, it cannot be said that there was a meeting of minds between the appellant and other accused persons to plan the said dacoity. As the substantive evidence on record is too flimsy and unconvincing, conviction of the appellant cannot be founded on the retracted confession of a co-accused. Accordingly, I am of the opinion that the appellant was not a party

[3] Ibid para 10

to the conspiracy to commit dacoity at the convent and his conviction under section 120B IPC is liable to set aside.

Section 216A of IPC renders prior and post harbouring of dacoits culpable. Not only is a person who harbours dacoits after commission of the offence guilty, anyone who knowingly or with reasonable belief and in order to facilitate the crime harbours dacoits would be liable under the aforesaid section as an "accessory before the fact".

Pre-conditions for imposing penal liability on an accessory before the crime has received attention in various legal treatises.

Russel on Crime[4] describes this principle as a 'legal conception of great antiquity' and held that the conduct of an alleged accessory must satisfy following requirements:-

> ***"...(a) that he knew that the particular deed was contemplated, and (b) that he approved of or assented to it, and (c) that his attitude in respect of it in fact encouraged the principal offender to perform the deed."***

Halsbury Laws of England[5], also enunciated the similar principle as follows:-

> ***"558. ...A person is not an accessory before the fact unless there is some sort of active proceeding on his part; he must incite or procure or encourage the felony committed or assist or enable it to be done, or engage or counsel or command the principal to do it. Mere knowledge that the principal intends to commit a crime is not enough."***

Similar view has also been expressed in ***Kenny's Outlines of Criminal Law***[6]:-

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[4] 12th Edition, Vol. (1), p.151
[5] 3rd Edition, Vol. (10), pp. 300-301
[6] 19th Edition, p.116

> ***"69. ...(a) that he must have known the particular deed contemplated; (b) that he assented to or approved of it; (c) that his view of it was expressed in some form which operated to encourage the principal to perform the deed; and (d) that those first three elements came into existence before the time when the offence was being committed."***

The aforesaid sound legal principle appears to have found favour with the courts in the Indian sub-continent. In ***Emperor Vs. Sunderdas and Anr.***[7], the Judicial Commissioner, Sind while interpreting the offence held as follows:-

> ***"5. ...The section requires that no one should harbour any persons who are about to commit a dacoity with the intention of facilitating the commission of such dacoity. It would appear, therefore, it is not enough to attract the penalty of the section that a person should be harbouring dacoits in general; that the section renders it penal to harbor persons who intend to commit a particular dacoity."***

In ***Maung Thin Vs. The King***[8], Rangoon High Court acquitted the accused of the aforesaid charge on the ground that he had no reason to believe that the police were chasing the dacoits nor to suppose that he was protecting them from the police in any way at the time when he harboured them.

In the present case there is no evidence with regard to knowledge of the appellant about the prior crimes allegedly committed by the other accused persons. One of the accused persons Milan is a relation of the appellant. The latter in his confessional statement has clearly explained that the appellant permitted Milan and his associates to stay at his residence in

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[7] AIR 1925 Sind 295
[8] (1947) Rang LR 38

deference to such family tie. Milan told the appellant that his associates had come for medical treatment or were going to other places in India. Under such circumstances the conduct of the appellant in extending hospitality to Milan and his friends was neither unnatural nor opposed to normal human behavior. Finally, Milan and his associates had come to his residence to participate in the marriage ceremony of his niece. There is no evidence on record that the appellant was aware that they were planning to commit dacoity in the convent. Raucous and unbridled behaviour of the accused persons during marriage or their expensive habits without anything more would not create an irresistible inference in the mind of a reasonable man of ordinary prudence that they were planning to commit dacoity in the convent.

It is apposite to note that in ***Emperor***[9] the Court held penal liability would not be attracted if a person harbours dacoits in general and it must be proved that he had harboured such dacoits who intended to commit a 'particular dacoity'. Knowledge of the appellant with regard to dacoity conducted at the convent does not appear to be proved beyond doubt as evidence of P.W. 11 is too vague to be convincing and the other evidence on record do not inspire confidence to come to such conclusion.

In the light of the aforesaid discussion, I am of the opinion, that the prosecution case has not been proved beyond reasonable doubt and the appellant is entitled to get an order of acquittal.

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[9] *Supra* note 7

Accordingly, I set aside the conviction and sentence imposed on the appellants.

Appeal is, accordingly, allowed. Application for suspension of sentence being CRAN No.1241 of 2018 is disposed of as infructuous.

Appellants shall be released forthwith from custody upon execution of a bond to the satisfaction of the trial court which shall continue for six months in terms of Section 437A of the Code of Criminal Procedure, if not wanted in any other cases.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Ravi Krishan Kapur, J.) **(Joymalya Bagchi, J.)**