

(2005) 01 CAL CK 0025
In the Calcutta High Court
Case No : C.R.A. No. 199 of 2001

Abul Hossain @ Baga

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 19-01-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164
Penal Code, 1860 (IPC) — Section 279, 302, 304A

Citation : (2005) 4 CHN 211

Hon'ble Judges : Pranab Kumar Deb, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Sekhar Basu, Phiroza Edulji and S. Dutta, for the
Appellant;Ashimesh Goswami and Subhasish Pachhal, for the Respondent

Final Decision : Allowed

Judgement

Alok Kumar Basu, J.—Convict appellant Abul Hossain @ Baga has preferred this appeal from jail, challenging his order of conviction and sentence u/s 302 of the Indian Penal Code recorded by the learned Additional Sessions Judge, Jangipur in the district of Murshidabad in connection with Sessions Trial Case No. 12 of 1998.

2. The prosecution case arose out of an FIR lodged by one Raisuddin Ahmed on 12th February, 1996 alleging death of his daughter Mabrura Khatun. It was the case of Raisuddin Ahmed that on 12th February, 1996 when his said daughter was returning from her college riding on a bicycle and reached near the house of one Mustakin Sk. near Suti Link Road of Raghunathpur, the appellant driving a matador van bearing No. W.B.-57-0515 in a most rash and negligent manner knocked down said Mabrura Khatun resulting her instantaneous death on the spot.

3. On the basis of said FIR of Raisuddin Ahmed, Suti Police Station started a case u/s 279/304A of the IPC and S.I.B. Ghosh of that police station took up the investigation. During the course of investigation on 3rd March, 1996 O.C. of that police station Mr. S. K. Paul himself took up the investigation on the basis of a

G.D. entry and thereafter on the basis of statement given by some of the witnesses u/s 164 of the Cr. PC and with the permission of the Court, the case was changed u/s 302 of the IPC and on completion of investigation, chargesheet was submitted accordingly against the appellant.

4. During the trial before the learned Additional Sessions Judge after framing of charge u/s 302, IPC, prosecution was asked to lead its evidence and thereafter prosecution examined as many as 14 witnesses including the doctor who conducted the post-mortem examination.

5. Prosecution through its evidence both oral and documentary presented a case that the appellant had previous enmity with the victim since his proposal for marriage with the victim was turned down by her parents and out of previous enmity the appellant on the date of occurrence was waiting with his matador van arid as soon as the appellant found the victim along with her sister to come along the road riding on two separate bicycles, the appellant intentionally with high speed drove the matador van and knocked down the victim who was on the side of the road and the body of the victim after being knocked down was dragged 8 or 10 cubits away from the place of accident and the victim died instantaneously on the spot.

6. In order to substantiate the above case, the prosecution has mainly relied on the statement of sister of the victim Mafruzha Khatun (P.W.2), statement of witness Mustakin Sk. (P.W.3), statement of witness Maniquezzaman (P.W.4), statement of father of the victim P.W.1, statement of mother of the victim P.W.5, 2nd I.O. of the case P.W.14 and also the statements given by P.Ws. 2 to 4 u/s 164 of the Cr. PC.

7. It appears from record that P.W.2 to P.W.4 stated before the Court during their examination that appellant on the date of occurrence was waiting with his matador van and as soon as he saw the victim coming on bicycle, he started his matador van and proceed towards the victim with unusual high speed and after taking the victim by the side of the road knocked her down and dragged her body about 8 or 10 cubits away and thus, from the conduct of the appellant it was clearly established that he had the clear intention of causing the death of victim by knocking down her with the matador van.

8. The prosecution has examined parents of the victim as well as sister of the victim, P.W.1, P.W.5 and P.W.2 respectively to show that previously there was enmity between the appellant and the victim as parents of the victim turned down the proposal of the appellant for marriage with the victim and that apart, the parents of the victim also turned down the proposal of the appellant for marriage of the victim with his employer who was owner of the matador van and thus prosecution made attempt to prove that out of grudge and previous enmity appellant knocked down the victim and caused her death.

9. The defence plea as it is available from cross-examination of the material witnesses and particularly from the cross-examination of the doctor who

conducted post-mortem examination on the deadbody of the victim was that the victim was knocked down without any intention and it was a sheer act of accident and there is nothing on record to indicate that appellant was guilty of alleged act of rash and negligence. The appellant through his Counsel tried to show before the learned Trial Court that there is no evidence to support the prosecution case that after accident the body of the victim was dragged at all as alleged. The Counsel of the appellant argued before the learned Trial Court from evidence on record that the head of the victim was simply smashed under wheel of the matador van as soon as the victim fell down from the bicycle seeing the matador van and as a result of this fall, the body of the victim came under wheel of the matador van and per chance an accident the victim met unfortunate death.

10. The learned Additional Sessions Judge on perusal of fact and evidence on record and after considering submissions of both the prosecution and the defence held that prosecution fully succeeded in proving its point that appellant had previous enmity regarding refusal of his proposal for marrying the victim and for this enmity he wanted to take a revenge against the victim and on the date of occurrence he took the chance. The learned Additional Sessions Judge further held from evidence on record that it was proved beyond any shadow of doubt that the appellant intentionally knocked down the victim after driving the matador van at an unusual speed and thereby bringing the victim on the side of road and further the intention of the appellant was clear when he dragged the body of the victim 8 or 10 cubits away from the place of occurrence. Thus, the learned Additional Sessions Judge after analyzing the fact and evidence on record concluded that the appellant with intention of causing death of the victim knocked down the victim with his matador van and as such the appellant was guilty of the offence of murder and accordingly, the appellant was convicted u/s 302 of the IPC and he was sentenced to suffer R.I. for life.

11. Challenging the verdict of the learned Additional Sessions Judge, the learned Advocate appearing for the appellant contends that initially the FIR presented a case of rash and negligent driving and accordingly, a case was started under Sections 279 and 304A of the IPC and the first Investigating Officer P.W.13 proceeded with the investigation and he completed all the formalities of making inquests, collecting P.M. report and examining available witnesses on the spot and those investigations continued up to 2nd March, 1996. The learned Advocate submits that for an unknown reason and not explained at the time during trial, the investigation was thereafter taken up by the Officer-in-Charge of the police station P.W.14 on the basis of an alleged G.D. entry and surprisingly enough that G.D. entry never saw light of the day. The learned Advocate contends that P.W.14 in course of his investigation for the first time brought sister of the victim and P.W.3 and P.W. 4 on the scene and got their statement recorded u/s 164 of the Cr. PC, but, surprisingly enough those statements were not produced during trial and those statements were not marked as exhibited document. The learned Advocate contends that in order to satisfy conscience of the Court regarding veracity of the statement recorded u/s 164, Cr. PC, the prosecution should have

examined the learned Magistrate who recorded their statement and that is the requirement of the law, but, in this case the learned Magistrate has not been examined by the prosecution and for this reason alone, no importance can be placed on the statements of those witnesses recorded u/s 164 of the Cr. PC.

12. The learned Advocate for the appellant submits that in the FIR there was no indication regarding presence of sister of the victim on the spot and even the bicycle allegedly used by the said sister was never seized as it is available from the seizure list prepared by the first I.O. soon after the occurrence. The learned Advocate contends that both from the FIR and from the seizure list it can be emphatically stated that sister of the victim was never present on the spot and only P.W. 14 for the purpose of perfunctory investigation brought that sister of the victim "along with P.W.3 and P.W.4 to frame a false and concocted charge against the appellant and this point was totally ignored by the learned Additional Sessions Judge.

13. The learned Advocate for the appellant contends that P.W.1 father of the victim who lodged the FIR has admitted in his examination before the Court that occurrence was purely an accident and even in FIR it was not alleged that with intention of causing death of the victim, the appellant knocked down the victim with his matador van.

14. The learned Advocate contends that the statement of P.W.2 and P.W.4 that the appellant was waiting with his matador van and only noticing the victim he started the van with high speed has not been supported by P.W.3 and the statements of P.W.2 to P.W.4 that the body of the victim was dragged by the appellant from the place of occurrence has not been corroborated by the P.M. report or by the statement of the doctor who did not notice any other injury on the person of the victim except smashing of her head under wheel of the matador van.

15. The learned Advocate contends that the statement of parents of the victim and also sister of the victim that the appellant earlier gave a proposal for marriage of the victim first with the owner of the vehicle and second with himself is totally false and concocted and brainchild of P.W. 14 as it is evident from the statement of the owner of the vehicle.

16. The learned Advocate for the appellant, therefore, concludes that the learned Additional Sessions Judge without considering the fact and evidence, merely, on the basis of conjecture and surmise held the appellant guilty of the offence u/s 302 of the IPC and in fact, there is not an iota of evidence even to support the case of rash and negligence driving and since there is no evidence to prove the allegation of previous enmity, the entire prosecution story of causing intentional death of the victim by the appellant appears to be totally baseless and without any foundation. The learned Advocate, therefore, prayed for setting aside the order of conviction and sentence against the appellant.

17. The learned Advocate representing the State respondent, on the other hand,

submits that the present case is an unfortunate one where the appellant out of his lust and indecent desire knocked down a young girl by driving his matador van. The learned Advocate with reference to the evidence of P.W.1 to P.W.4 contends that all those witnesses in one voice have supported the prosecution case that the appellant on that unfortunate date knocked down the victim with his matador van with the sole intention of causing her death and the motive behind this dastardly act had been of taking of revenge since the parents of the victim turned down the proposal of the appellant for marrying the victim. The learned Advocate, therefore, concludes that the learned Additional Sessions Judge after proper appreciation of fact and evidence rightly found the appellant guilty of the offence and rightly recorded his order of conviction and sentence and the said order needs no interference from this Court.

18. We have carefully examined the fact and evidence on record and we have also considered submissions of both the learned Advocates for the convict appellant as well as the State respondent. There is no denying of the fact that at the initial stage the case was started u/s 279/304A, IPC as a vehicle was involved and the death resulted from the vehicle. The investigation at the initial stage proceeded with the presumption that the appellant was guilty of an alleged offence of rash and negligent driving.

19. On and from 3rd March, 1996, however, the entire scenario took a new turn when suddenly the Officer-in-Charge of the police station took the charge of investigation and produced sister of the victim and two local witnesses before the learned Magistrate for recording their statements u/s 164, Cr. PC and thereafter submitted a prayer for changing the investigation from the case of rash and negligent driving to one u/s 302 of the IPC.

20. From examination of the evidence of P.W.2 to P.W. 4 on the basis of which the case was taken up subsequently u/s 302 of the IPC, it appears that all those witnesses brought a story of motive and intentionally knocking down the victim and causing her death.

21. It is available from the FIR as well as from the evidence of P.W. 13 who took up the investigation at the initial stage of investigation and examined some of the witnesses on the spot that sister of the victim was not present on the spot. The father who gave the statement before the police officer did not mention the presence of her second daughter on the place of occurrence. It is pertinent to mention in this context that father of the victim while giving his deposition as P.W.1 stated before the Court that the occurrence was purely accidental one.

22. We have carefully perused the P.M. report and we have also examined the statement of doctor who conducted the P.M. examination after examination of the deadbody of the victim and from report and statement of the doctor we gather that there was no other external injury on the person of the victim and only her head was smashed under the wheel of the matador van. This impartial statement of the doctor demolishes the statements of P.W.2 and P.W.4 that the

body of the victim was dragged 8 or 10 cubits away from the place of occurrence and this demolishes the allegation of intention of the appellant to kill the victim.

23. P.W.2 to P.W.4 except P.W.3 stated before the Court that appellant was waiting with the matador van and after watching the victim he started the matador van, but, this statement of the witnesses has not been supported by P.W.3 and even from other witnesses we do not get any corroboration regarding this part of the statement of the prosecution witnesses and from the FIR and other material witnesses we find that coming from opposite direction the victim was knocked down by the matador van and there is no acceptable evidence that at that point of time the matador van was at high speed. It is very pertinent to mention that the entire basis of the investigation was the statements of P.W.2 to P.W.4 recorded u/s 164, Cr. PC, but, those statements have not been marked exhibit on examination of the learned Magistrate who record those statements and naturally, in the eye of law and under the Evidence Act those statements cannot have any importance and those statements can be treated as statement recorded by a police officer during investigation u/s 161 of the Cr. PC whose acceptance is subject to cross-examination by the defence. We find from record that there was no confrontation on this point when P.W.14 was examined, naturally, the statements reported u/s 164 of the Cr. PC cannot be taken into consideration at all. Once we discard the statement recorded u/s 164 of the Cr. PC, the entire prosecution case against the appellant u/s 302 of the IPC falls on the ground and this would take up to the original FIR which was started u/s 279/304A of the IPC.

24. We have already stated that there is no satisfactory evidence to indicate that sister of the victim was present on the spot and further the seizure list prepared by the first I.O. P.W.13 also does not lend any support to the story of presence of sister of the victim on the spot or the presence of P.W.3 and P.W.4 on the spot and if we do not accept presence of those three witnesses on the spot, practically speaking, there is no evidence at all to support that appellant with intention of causing death of the victim knocked down the victim, rather, we get usual case of driving of the vehicle and the resultant death of the victim as an accident.

25. The learned Additional Sessions Judge has wasted much of his time and energy in dealing with the case of motive of the appellant and it will be sufficient on our part to record that the observation of the learned Trial Judge regarding motive of the appellant is totally unfounded and based on mere conjecture and surmise and has not been supported by any iota of evidence. The owner of the vehicle has given a total good-bye to the prosecution case in this regard and that owner was examined as a prosecution witness and he was not declared hostile to the prosecution and hence, his evidence cannot be brushed aside while discarding the alleged story of the prosecution regarding motive of the appellant.

26. Thus, having regard to the submissions of both the appellant as well as the State respondents and on careful analysis of fact and evidence on record, we are totally unable to persuade ourselves to accept the verdict of the learned Trial

Judge in the matter of holding the appellant guilty of the alleged offence u/s 302 of the IPC and we are of further opinion that there is no evidence at all in the fore-corner of the record to substantiate the prosecution charge that on that unfortunate date the appellant drove his matador van in a rash and negligent manner with the intention of causing death of the victim. Accordingly, we hold that the appellant is not guilty of the offence u/s 302 of the IPC and he deserves an order of acquittal in the interest of justice and fair trial.

27. In view of our above discussion, this criminal appeal succeeds. The order of conviction and sentence passed by the learned Additional Sessions Judge, Jangipur in connection with Sessions Trial No. 12 of 1998 is hereby set aside.

28. The appellant be released from the jail if he is not wanted in connection with any other case. Let the Superintendent of Jail where the appellant is lodged be informed accordingly with a direction to release the appellant forthwith.

29. Send a copy of this judgment and order along with the L.C.R. to the learned Trial Court at once.

Pranab Kumar Deb, J.

30. I agree.