

(2023) 04 CAL CK 0044

In the Calcutta High Court

Case No : Criminal Appeal (DB) No. 76 Of 2022

Amrul Sk. @ Babua @ Anr.

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 19-04-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 437A

Citation : (2023) 04 CAL CK 0044

Hon'ble Judges : Debangsu Basak, J;Md. Shabbar Rashidi, J

Bench : Division Bench

Advocate : Shekhar Kumar Basu, Ramdulal Manna, Swapan Kumar Mallick, Manju Manna (Dey), Sudeshna Das, Sayan Mukherjee, Payel Khanra, Sanjoy Bardhan, Baishakhi Chatterjee

Final Decision : Disposed Of

Judgement

Debangsu Basak, J

1. The appellants have assailed the judgment of conviction dated March 23, 2022 and the order of sentence dated March 24, 2022 passed by the learned additional Sessions Judge, 1st court, in Sessions Trial No. 36/2021 arising out of Sessions Case No. 68/2021.

2. By the impugned judgment of conviction, the learned judge has held that the appellants were guilty of the offence under section 302/34 of the Indian Penal Code, 1860. The learned trial judge has acquitted 7 of the co-accused of the charge under section 302/34 of the Indian Penal Code, 1860.

3. By the impugned order of sentence, the learned trial judge has sentenced the appellants suffer rigorous imprisonment for life and to pay a fine of Rs. 20,000 each and in default to suffer rigorous imprisonment for one year.

4. The case of the prosecution was that, 9 persons including the 2 appellants before us had on May 18, 2020 at 7:30 PM on the way to the mosque, restrained

the victim and tried to strangle him by a gamcha (Indian towel) and assaulted him with fists, blows, kicks, bamboo stick, and iron rod. The appellant No. 1 had provided one sharp cutting weapon to appellant No. 2 by which appellant No. 2 assaulted the victim. The victim had been murdered. All 9 accused persons had participated in the assault of the victim with the common intention of murdering him.

5. Learned senior advocate appearing for the appellants has submitted that, the prosecution failed to prove the charges beyond reasonable doubt. He has referred to the deposition of the prosecution witnesses. He has contended that, none of the prosecution witnesses claim that they had been present at the place of occurrence during the incident. According to him none had seen any of the appellants to assault the victim.

6. Learned senior advocate appearing for the appellants has submitted that, PW 1 and PW 5 were claimed to be the eyewitnesses to the incident by the prosecution. However, both such witnesses during their deposition at the trial had stated that they arrived at the place of occurrence only to find the victim dead. PW 1 had stated in the written complaint being Exhibit 5 as well as in her deposition that she arrived at the spot and saw the victim in injured condition and thereafter came to the hospital where he died. PW 5 had 3 different versions of the fact; one before the police under section 161 of the Criminal Procedure Code, one before the magistrate under section 164 of the Criminal Procedure Code and one before the court. According to him, both PW 1 and PW 5 were post occurrence witnesses. PW 5 had been declared hostile by the prosecution. There were contradictions in the statements made by PW 5 with those that had been recorded under section 164 of the Criminal Procedure Code.

7. Learned senior advocate appearing for the appellant has relied upon 2016 volume 13 Supreme Court Cases 333 (Baby @ Sebastian and another versus Circle Inspector of Police, Adimaly) and submitted that, the statement of PW 5 recorded under section 161 of the Criminal Procedure Code was not tendered in evidence and should not be looked into.

8. Learned advocate appearing for the State has submitted that, the prosecution produced two eyewitnesses to the incident at the trial. According to him, PW 1 and PW 5 had witnessed the incident of the murder. He has contended that, although PW 5 was declared hostile at the trial, nonetheless, his statement recorded under section 164 of the Criminal Procedure Code had been tendered in evidence and marked as an exhibit. In his statement recorded under section 164 of the Criminal Procedure Code, PW 5 had named the assailants. Therefore, since the statement of PW 5 had been tendered in evidence in examination in chief and marked as an exhibit, the court should look into the contents of such exhibited document and arrive at a finding against the appellants.

9. In support of his contentions learned Advocate for the State he has relied upon 2010 volume 10 Supreme Court Cases 439 (Paramjeet Singh alias Pamma

versus State of Uttarakhand), 2007 volume 9 Supreme Court Cases 589 (Jakki alias Selvary versus State), 2012 Volume 5 Supreme Court Cases 724 (Kathi Bharat Vajsur versus State of Gujarat), 2016 volume 11 Supreme Court Cases to 65 (Sheikh Sintha Madhar versus State), 2015 volume 3 Supreme Court Cases 220 (Vinod Kumar versus State of Punjab), 2016 SAR (criminal) 946 Supreme Court (Devraj versus State of Chhattisgarh), 2007 Volume 13 Supreme Court Cases 31 (Ramappa Halappa Pujar and others versus State of Karnataka), 2017 volume 3 Supreme Court Cases 247 (Arjun and Ann Arbor versus State of Chhattisgarh), 2007 volume 13 Supreme Court Cases 525 (Ramkrushna versus State of Maharashtra) and 2012 volume 12 Supreme Court Cases 701 (Raju alia Balachandran and others versus State of Tamil Nadu).

10. Police had received a written complaint dated May 19, 2020 from the wife of the victim, prosecution witness (PW) No. 1 with regard to the murder of the victim naming 9 persons including the 2 appellants before us as being involved in the crime. On the basis of such written complaint, police had registered a first information report being FIR No. 71/2020 dated May 19, 2020 under section 302/34 of the Indian Penal Code, 1860 against 9 persons including the 2 appellants before us.

11. On the completion of the investigations, police had submitted a charge sheet dated July 29, 2020 under section 302/34 of the Indian Penal Code, 1860 against 9 persons including the 2 appellants before us. Court had framed charges against 9 persons including the 2 appellants before us on March 31, 2021.

12. At the trial, prosecution had examined 10 witnesses and relied upon various documentary and material evidences to bring home the charges against the accused persons.

13. The wife of the victim had deposed as PW 1. She had stated that the victim was assaulted and cut in the night. Hearing the hue and cry she had gone to the place of occurrence and saw her husband lying on the road. Public had taken him to the hospital. People had taken her to the police station. She had filed the first information report by putting her left thumb impression. She had identified the accused persons in court.

14. In cross-examination, PW 1 had stated that, the incident took place during the Ramzan month. She had been observing Roza. She had been taking rest after Iftar. When she had come outside, she had seen the victim lying on the ground. She had gone to the hospital with the victim. The victim had died at the hospital.

15. An acquaintance of the victim and PW 1 had deposed as PW 2. He had stated that, he heard an altercation taking place and the victim died due to the altercation. Police did not interrogate him. He was not at home. He did not know anything. He had identified the accused persons in court.

16. PW 2 had been declared hostile by the prosecution. On cross examination by

the prosecution, subsequent to PW 2 being declared hostile, he had denied the suggestions put by the prosecution. He had denied telling the police the facts as suggested by the prosecution.

17. Another acquaintance of the victim and PW 1 had deposed as PW 3. He has stated that, she heard about an altercation taking place between four of the accused and that the victim died due to such altercation. He had identified the accused persons in court. He had heard about the things from his house. He had stated that the police did not interrogate him.

18. PW 4 had stated that, the victim was murdered. He did not know anything as he was outside and that he had heard that the victim was murdered. He had been declared hostile by the prosecution.

19. On PW 4 being declared as hostile by the prosecution, he had been cross-examined by the prosecution. During such cross-examination, he had denied the suggestion that the police interrogated him and that he told the police the facts suggested to him. He had identified the appellants in court.

20. PW 5 had stated that, he went to the place of occurrence after seeing that the public was rushing towards the spot. He had seen the dead body of the victim. They had taken the victim to the hospital. He had seen that there was a wound on the chest of the victim and that there were bloodstains on his garments. The doctor had declared him dead. Police had taken him to the magistrate. He had told the magistrate what he knew. He had tendered his statement recorded under section 164 of the Criminal Procedure Code in evidence which was marked as Exhibit 1 series.

21. PW 5 had been declared hostile by the prosecution. On being cross-examined by the prosecution after PW 5 was declared as hostile, he had denied the suggestion that the police interrogated him and that he told the police the facts suggested to him. He had identified the accused persons in court.

22. In his cross-examination by the defence, PW 5 had stated that, he went to the magistrate accompanied by the police. Police had tutored him.

23. A police constable had deposed as PW 6. He had signed the seizure list dated May 20, 2020. He had identified his signature on such seizure list which was marked as Exhibit 2. He had identified the articles seized which were marked as material exhibit I collectively.

24. A civic volunteer had deposed as PW 7. He had stated that, he witnessed the seizure of the sharp cutting weapon on May 22, 2020. He had identified his signature in the seizure list which was marked as Exhibit 3. The sharp cutting weapon had been marked as material exhibit II.

25. The Doctor who had conducted the post-mortem on the dead body of the victim had deposed as PW 8. He had described the injuries that he found on the body of the victim. He had stated that all the injuries were showing the evidence

of vital reaction. He had opined that the death was due to the effect of the injuries, ante-mortem and homicidal in nature. He had tendered the post-mortem report in evidence and the same was marked as Exhibit 4. During cross examination by the defence, the opinion of the Doctor as to homicidal death of the victim had not been challenged.

26. The scribe of the written complaint had deposed as PW 9. He had stated that he wrote the written complaint according to the instructions of PW 1. He had read over and explained to PW 1 as to the contents of the written complaint and that PW 1 put her left thumb impression in front of him. He had identified his signature on the written complaint. The written complaint had been tendered in evidence and marked as Exhibit 5.

27. The investigating officer had been examined as PW 10. He had narrated about the investigation that he conducted. He had prepared the inquest report which was tendered in evidence and marked as Exhibit 6. He had prepared the dead body challan which was tendered in evidence and marked as Exhibit 7. He had stated that he sent the dead body to the district hospital through a constable along with all the papers. He had tendered the formal first information report written by the officer in charge. The formal first information report had been tendered in evidence and marked as Exhibit 8.

28. PW 10 had stated that, he examined the PW 1. He had gone to the place of occurrence. PW 1 had shown him the place of occurrence. He had prepared the rough sketch map with index. He had tendered the same which was marked as Exhibit 9 and 9/1. He had stated that he examined for witnesses on May 19, 2020. He had seized the wearing apparels of the victim on May 20, 2020. He had spoken about the arrest of the accused persons. He had arrested 2 persons on May 20, 2020. One of the arrested persons namely Asraful had told him that he can produce the sharp cutting weapon. Asraful had produced the sharp cutting weapon from his house which he seized and prepared a seizure list dated May 22, 2020 which was marked as Exhibit 3/1. He had collected the post-mortem report. He had submitted the charge sheet against the 9 accused persons. He had examined PW 2, PW 4 and PW 5 when they had made the statements as recorded by him. He had stated that, 3 of the accused persons were absconders who subsequently surrendered before the court.

29. In cross-examination, PW 10 had stated that, the inquest was done before filing of the first information report. He had prepared the inquest at the hospital. He had obtained the signatures of the witnesses to the inquest at the hospital. Such witnesses did not utter the name of any assailant. The witness had stated at the time of the inquest that on May 18, 2020 in the evening regarding a family dispute the relatives of the victim assaulted the victim with sharp cutting weapon and the victim fell down on the ground in bleeding condition. The incident had occurred between the relatives and the victim but the witnesses did not utter the name of the relatives at the time of the inquest.

30. On the conclusion of the evidence of the prosecution, the appellants had been examined under section 313 of the Criminal Procedure Code where they had claimed to be innocent and falsely implicated. They had declined to adduce any defence witness.

31. Testimony of PW 8 read with Exhibit 4 being the post-mortem report of the victim had established that the victim was murdered. Victim had succumbed to the injuries that he suffered. Such injuries had been classified as antemortem and homicidal in nature by PW 8 in his post-mortem report being Exhibit 4.

32. Inquest over the dead body of the victim had been held on May 18, 2020. Inquest had been witnessed by 3 persons out of which one had testified during the trial. PW 4 had been present at the time of the inquest. Inquest report being Exhibit 6 had noted that, the relatives of the victim had attacked the victim with sharp weapons due to family dispute and as a result the victim fell on the ground.

33. No assailant had been named in the inquest report being Exhibit 6. The written complaint being Exhibit 5 had been lodged by PW 1. In the written complaint, PW 1 had stated that on hearing the news about the victim and seeing the victim in serious condition, she took the victim to the rural hospital with the help of the villager for his medical treatment but the victim died. Although PW 1 had described the nature of the assault on the victim, she did not claim to have seen the incident in the written complaint being Exhibit 5. The tenor of Exhibit 5 suggest that PW 1 had reached the spot after hearing the news of the assault.

34. Sheikh Sintha Madhar (supra) has observed that, inquest report relates to cause of death and not witness account of incident. In the facts of that case, the fact that one prosecution witness was not named in the inquest report had been found to be of no consequence.

35. In her testimony, PW 1 did not state that she had seen the incident of assault on the victim. Rather, she had stated that after hearing the hue and cry she had gone to the place of occurrence and saw the victim lying on the road. She had stated that the public took the victim to the hospital. People had taken the victim to the police station where she filed the written complaint.

36. PW 5 in his testimony had stated that he went to the place of occurrence after seeing the public rushing there to. He had seen the dead body of the victim. In his examination in chief, PW 5 did not claim that he had seen the incident of assault. His statement under section 164 of the Criminal Procedure Code had been tendered in evidence and marked as Exhibit 1 series. He had been declared hostile by the prosecution. In his cross-examination by the prosecution, he had denied the suggestion that police interrogated him and he told the police of the fact suggested to him. The investigating officer who had deposed as PW 10 stated in his testimony that, he examined PW 5 when PW 5 had stated to him that the 9 accused persons surrounded the victim and that appellant No. 1 had brought a sharp cutting weapon from the house and

appellant No. 2 assaulted the victim on the right chest when the victim fell down on the ground.

37. Apparently, PW 10 as the investigating officer had recorded a statement under section 161 of the Criminal Procedure Code made by the PW 5. However, such statement of PW 5 was not tendered in evidence by the prosecution while examining PW 5 or PW 10 or through any other witness.

38. Baby @ Sebastian (supra) has observed that, when prosecution witnesses are not confronted with their statements given to the police and recorded under section 161 of the Criminal Procedure Code and marked as exhibit and the investigating officer in his deposition did not refer to those statements, conviction on the basis of such statements was improper.

39. In the facts of the present case, although the investigating officer as PW 10 had spoken about the statements made by the prosecution witnesses and recorded under section 161 of the Criminal Procedure Code, such statements however were not tendered in evidence and marked as exhibit.

40. PW 5 had tendered his statement recorded under section 164 of the Criminal Procedure Code in evidence as Exhibit 1 series. In his statement recorded under section 164 of the Criminal Procedure Code, PW 5 had given the names of the accused as assailants and

41. Described the manner of the assault on the victim. However, PW 5 did not allude to such aspects during his examination in chief. Rather, in his examination in chief he had stated that, he went to the spot after seeing the public rushing towards the spot.

42. In his examination in chief, PW 5 did not claim himself to be an eyewitness although in his statement recorded under section 164 of the Criminal Procedure Code, being Exhibit 1 series he had claimed himself to be an eyewitness. In his cross-examination by the defence, he had stated that he went to the learned Magistrate accompanied by the police and that the police had tutored him.

43. PW 4 had been present at the time of the inquest and did not give out the names of the assailants to PW 10 who had held the inquest over the dead body of the victim.

44. None of the prosecution witnesses had identified any of the accused as the assailants in their examination in chief. They did not identify any of the accused as the assailants in their cross-examination also. The names of the accused had transpired from Exhibit 1 series being the statement recorded under section 164 of the Criminal Procedure Code of PW 5.

45. Ramkrushna (supra) in the facts of that case has held that, prosecution was able to establish common intention to murder although exact role played by each accused could not be established.

46. Raju alias Balachandran (supra) has observed that, evidence of a related,

interested and inimical witness has to be scrutinised with great care and caution. If such evidence is found credible notwithstanding the witness being related, interested and inimical, conviction can be based thereon.

47. Paramjeet Singh (supra) has observed that, testimony of a hostile witness does not become effaced from record merely because he turned hostile. Evidence of a hostile witness has to be read and considered as a whole to find out whether any weight should be attached to it. The court should be slow to act on testimony of such witness. Normally it should look for corroboration of his testimony. His deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution and can be relied upon at least to that extent.

48. Kathi Bharat Vajsur (supra) has observed that testimony of hostile witnesses corroborating prosecution story in material particulars can be relied upon.

49. Vinod Kumar (supra) has observed that the way a prosecution witness supported the prosecution story in its entirety in examination in chief and in cross-examination he turned hostile, his evidence is not completely effaced. His evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence.

50. Devraj (supra) has observed that, the evidence of a witness who has been declared hostile can be relied if there are some other material on the basis of which such evidence can be corroborated. More so, that part of evidence of a witness as contained in examination in chief, which has remained unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile.

51. Ramappa Halappa Pujar (supra) has observed that, the fact that witnesses turned hostile by itself did not negate the case of the prosecution. It has also observed that, the very fact that villagers turned hostile, on the other hand, show that there was a ring of truth in the prosecution's case.

52. Arjun (supra) has held that, merely because witnesses have turned hostile in part, their evidence cannot be rejected in toto. Evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.

53. In a criminal trial, a prosecution witness may turn hostile. In the event a prosecution witness turns hostile, evidence of such witness does not axiomatically turn out to be a nugatory. Evidence of such witness is not effaced. Evidence of such witness is still required to be evaluated for its probative value. However, once a witness turns hostile, court is required to exercise caution in evaluating such evidence. Evidence of a hostile witness can be relied upon if there are other materials on record corroborating such evidence. Essentially, a

more cautious evaluation of the evidence of a hostile witness is required to be undertaken and that, such evidence should be corroborated by other materials on record.

54. In the facts of the present case, PW 5 had recorded a statement under section 164 of the Criminal Procedure Code being Exhibit 1 series where he had described the incident of assault on the victim and implicated all the accused therein. PW 5 during his deposition at the trial did not allude to the incident as narrated by him in Exhibit 1 series. He had deviated from the version recorded in Exhibit 1 series in material particulars. In Exhibit 1 series he had described himself to be an eyewitness and present at the place of occurrence while in his deposition at the trial he had stated that he arrived at the place of occurrence after seeing the public rushing there to. On the basis of the version of his oral testimony in court, he can be said to be at best a post occurrence witness while on the basis of Exhibit 1 series he has to be classified as an eyewitness.

55. None of the other prosecution witnesses had supported the case of the prosecution as contained in Exhibit 1 series. PW 5 had stated that PW 1 had accompanied him to the place of occurrence. PW 1 had fallen on the body of the victim and started crying. PW 1 in her testimony did not state that she had accompanied PW 5 to the place of occurrence when the incident was developing as narrated by PW 5 in Exhibit 1 series.

56. The wearing apparel of PW 1 should therefore have bloodstains. Such wearing apparel of PW 1 apparently was not seized by the police and at least not produced in evidence at the trial.

57. Exhibit 1 series had been recorded on June 14, 2020 while the date of the incident was May 18, 2020. Prosecution had failed to explain the delay in the recording of the statement under section 164 of the Criminal Procedure Code being Exhibit 1 series.

58. Contents of Exhibit 1 series have remained uncorroborated on material aspects. It would therefore be incautious to rely upon Exhibit 1 series so as to return a finding of guilt against the appellants.

59. In view of the discussions above we find that the prosecution had failed to prove the charges against the appellants beyond reasonable doubt. The appellants have to be given the benefit of doubt and acquitted of the charges.

60. Consequently, we set aside the impugned judgment of conviction and impugned order of sentence.

61. The appellants are discharged of the charges they were charged with. They are directed to be set at liberty forthwith, if not required in any other case. They shall, however, furnish a bail bond to the satisfaction of the Trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

62. In view of the discussion above, CRA (DB) 76 of 2022 is disposed of.
63. Trial Court records along with a copy of this judgment and order be sent down at once to the appropriate Court for necessary action.
64. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.
65. I agree.