

(2014) 04 CAL CK 0013
In the Calcutta High Court
Case No : C.R.A. No. 54 of 2007

Anil Rai

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 448

Citation : (2014) 3 CHN 615

Hon'ble Judges : Tapash Mookherjee, J; Nishita Mhatre, J

Bench : Division Bench

Advocate : Minoti Gomes and Koushik Biswas, Advocate for the Appellant; Manjit Singh, Ld. Public Prosecutor and Sibaji Kumar Das, Advocate for the Respondent

Judgement

Tapash Mookherjee, J.—The present appeal is against the order of conviction and sentence passed on 20.11.2006 and 21.11.2006 in Sessions Trial Case No. 9 of 2005 by the learned Additional Sessions Judge, 3rd Court, Darjeeling. The facts leading to the appeal, in short, are as follows:--

2. On 22.12.2001 one R.K. Subba submitted a written complaint to the Officer-in-Charge of Jorebungalow P.S., District Darjeeling and stated therein that at about 6.30 a.m. in that morning one Sunita Lepcha of his village came to him and reported that in the previous night at about 10 p.m. the present Appellants, i.e., the Appellants Anil Rai and Probin Subba alias Provin Subba along with one Kalu alias Kabi Rai entered their house while they were sleeping and thereafter assaulted her brother-in-law Sujit Lepcha with wooden sticks and dragged Sujit Lepcha out of their house and killed him. On the basis of such complaint Jorebungalow P.S. Case No. 55 of 2001, dated 22.12.2001 had been registered against the aforesaid three accused persons under section 448/ 302/ 34 IPC. The case had been thereafter made over to S.I. Kumar Chettri of the Police Station for investigation. Investigation started and after completion of investigation charge-sheet under section 448/ 302/ 34 IPC had been submitted against the

aforesaid three accused persons. Case had been committed to the Court of Sessions Judge, Darjeeling in due course and ultimately the case had been transferred to the Court of Additional District and Sessions Judge, 3rd Court at Darjeeling, for trial.

3. Considering the materials collected during investigation charges under section 448 and 302/ 34 IPC had been framed against the present Appellants, namely, Anil Rai and Provin Subba. The 3rd accused Kalu alias Kabi Rai absconded prior to the commitment of the case and as such the case stands filed against him.

4. To prove the charges prosecution examined as many as 18 witnesses. Prosecution also proved some documents and produced materials which were admitted in evidence and marked with different numbers.

5. The plea of innocence was the only defence case and the Appellants also examined one witness in support of their plea.

6. Considering the evidence thus brought on record by both the parties, learned Trial Court found the present Appellants guilty of the offence punishable under section 302 read with section 34 IPC and under section 448 read with section 34 IPC and convicted the present Appellants accordingly to the aforesaid charges and sentenced both the Appellants to suffer R.I. for life and also to pay fine of Rs. 2,000.00 (rupees two thousand only) each, I.D. to suffer R.I. for one year for the offence under section 302/ 34 IPC and to suffer R.I. for one year each, for the offence under section 448/ 34 IPC. Both the substantive sentences were to run concurrently. Being aggrieved by such judgment of conviction and order of sentence, the present appeal had been filed by the Appellants named earlier.

7. Learned Advocate for the Appellants argued, inter alia, that the identity of the deceased had not been proved. Place of the alleged occurrence had not also been proved, the witnesses claiming to be the eye-witnesses were not the real eye-witnesses and there were many other serious anomalies and contradictions, as well, in the statements of the prosecution witnesses and as such learned Trial Court was wrong to find the Appellants guilty of the charges brought against them.

8. On the other hand, learned Advocate for the Respondent/State of West Bengal argued that although there were some contradictions in the statements of the witnesses but those were not of any serious importance and the evidence adduced by the prosecution, considered together, in substance, proved the guilt of the Appellants. So, the learned Trial Court had rightly convicted the Appellants.

9. Rajbir Subba (P.W.-1) and Raju Subba (P.W.-2), were the witnesses of seizure of some blood stained earth as claimed by them and as such they were not direct witnesses of the incident in question. Similarly, Kiran Chhetri (P.W.-3) was also a witness of some alleged seizures after the incident and as such, he was not also a direct witness of the alleged incidents.

10. Suben Singh Lepcha (P.W. 4), happens to be a brother of the alleged

deceased. He stated that in the night of 21.12.2001 while he and his wife were sleeping in their room they heard the groaning sound of his younger brother Ran Singh Lepcha from his room and sound of beating also from the room of his aforesaid brother. The door was closed and when he pushed open the door, he found the accused persons including the present Appellants inside the room, the Appellant Provin Subba immediately closed the door, Suben's wife thereafter advised Suben to leave the place due to fear of being killed. P.W.-4 stated further that after such advice he left the place, went to the field of one Mansi, passed the night there and at about 3.00 a.m. he returned to his house and slept and, thereafter, at about 7.00 a.m. his wife also returned to their house and informed him that his brother Ran Singh was killed by the Appellants and the absconding accused Kalu. He further stated that after getting the information he along with his wife went to the field of Bukuney Limboo and they found the dead body of Ran Singh lying there. He added further that one R.K. Subba prepared a complaint as per the instruction of himself as well as his wife and thereafter they took the complaint at first to the A.C.P. Camp, and thereafter to Sonada T.O.P. He also stated that police came and removed the dead body of his brother Ran Singh and seized some articles from his house through a seizure list, on which he put his signature. He also stated that police had pasted labels on the seized articles on which he had put his signatures also.

11. Ranbir Subba (P.W.-5), was a witness to the inquest.

12. Sunita Lepcha (P.W.-6), was the wife of P.W.-4. Smt. Lepcha stated that on 22.12.2001 at about 10.30 p.m. while she was sleeping with her husband, they heard a groaning sound of her husband's brother from the next room after which she lighted a kerosene lamp and went to the spot where they found the Appellants and the absconding accused Kalu beating Ran Singh and taking Ran Singh out of the room. She further added that in her presence, the accused Kalu threatened to kill her husband and hence, she advised her husband to leave the place and thereafter she also left her house with her children and went to her parental home. She stated further that in the following morning the Appellant Provin came to him and reported that Ran Singh had been killed by some unknown persons. She also stated that after such information she found the dead body of Ran Singh lying in the land of Bukuney Limboo after which she went to R.K. Subba where a complaint was written down as per her instruction and they had submitted it at the A.S.P Camp. She added further that subsequently police came to his house and seized some articles through a seizure list and she had put her signatures on the seizure list as well as the labels pasted on the seized articles.

13. Ranjit Rai (P.W.-7), did not claim to have any direct knowledge about the murder in question and he stated about some enmity between the alleged deceased Ranjit and the Appellants.

14. R.K. Subba (P.W.-8), was a resident of the area of the occurrence. He was the president of "Bansghari Samaj" at the relevant time. He stated that on

22.12.2001 one Sunita Lepcha of his village came to him and reported that the Appellants and the absconding accused Kalu had killed her husband's brother and he prepared a written complaint as per the statement of the said Sunita. He had proved that the complaint was scribed by him. He added further that on the same day police came to their village, seized some articles and prepared a seizure list on which he had put his signature.

15. Teshening Dukpa (P.W.-9), was a police constable. He was a witness to some seizures made by the I.O. of the case.

16. Constable Mahendra Chetri (P.W.-10), had taken the dead body of Ran Singh Lepcha. He was also a witness of some seizures by the I.O. of the case.

17. Dilaram Rai (P.W.-11), was the father of P.W.-6. He stated that one day the Appellant Provin Subba came to his house and reported to his daughter that her brother-in-law was lying dead.

18. Shyamlal Rai (P.W.-12), was tendered by the prosecution for cross-examination only.

19. A.S.I. Dipak Rai (P.W.-13), registered the case in the P.S. as stated by him.

20. Ashok Rai (P.W.-14), was a co-villager of the alleged deceased and he was a witness to the inquest.

21. Constable K.B. Chetri (P.W.-15), was a witness to the seizure of a G.D. Book only.

22. S.I. Kumar Chetri (P.W.-16), was posted at the relevant time at Sonada T.O.P. under Jorebungalow P.S. He had investigated the case and he stated in detail as to what had he done during the course of his investigation of the case.

23. Constable Gautam Biswas (P.W.-17), was a witness to the seizure of the wearing apparels of the alleged deceased.

24. Dr. Asish Banerjee (P.W.-18), was a medical officer posted at District Hospital, Darjeeling. He performed post-mortem examination over the dead body of Ram Singh Lepcha as stated by him. Dr. Banerjee described in detail the injuries found on the dead body and according to him the injuries found on the dead body were all ante-mortem and homicidal in nature.

25. One Madan Banthoa was examined by the defence as D.W.1. He was a resident of Kurseong and a businessman by occupation. He stated that on 21.12.2001 the Appellants had stayed in his house and returned to their village in the evening of 22.12.2001. No other witness had been examined by the defence.

26. The first point raised by the learned Advocate for the Appellants was that the identity of the deceased is not firmly proved in the case. She pointed out that in the F.I.R. the deceased is named "Sujit Lepcha" and in the charges framed by the Court, the deceased is named as "Ranjit Lepcha". In P.M. report (Exhibit-13)

the name of the deceased is mentioned as "Ram Singh Lepcha". P.W.-4 described the deceased as "Ran Singh Lepcha", P.W.-4, 5, 6, 7, & 8 also named the deceased as "Ran Singh Lepcha". Pointing out those contradictions learned Advocate for the Appellants submitted that because of the aforesaid anomalies in the evidence the exact identity of the deceased is questionable in the case. In reply, learned Advocate for the Respondent argued that most of the witnesses are Nepali speaking persons and hence the aforesaid difference resulted due to different pronunciations. He further submitted that the deceased happens to be the brother of P.W.-4 and the fact has not been challenged by the defence. So, the point thus raised by the Appellants should be ignored.

27. The Appellants have been accused of the murder of "Ranjit Lepcha" as the charge is framed and read over and explained to the Appellants by the Court. So, if the prosecution during trial alleges that "Ran Singh" had been killed by the Appellants then the question of prejudice of the defence cannot be thrown away. Similarly, P.M. report is a very important document in a case of murder. So, if the name of the deceased, on the dead body of which P.M. examination had been performed, is different, then confusion is supposed to arise in the prosecution case as a whole. It is, therefore, a big hole in the prosecution case.

28. Learned Advocate for the Appellants also argued that the place of occurrence has not been proved also in the case, because witnesses differed with each other regarding the place from where the dead body of the deceased was recovered. Learned Advocate for the Respondent opposed the view.

29. The prosecution has not described any particular place to be the place of the occurrence. According to the prosecution case, the deceased had been at first, assaulted in the residential room of the deceased, thereafter the deceased had been dragged to a place outside and ultimately the dead body of the deceased was recovered from the land of one Bukuney Limboo as stated by P.W. 4, 6 & 14. In the sketch map prepared by the I.O. (Exhibit-11) the P.O. has been described as the house of the deceased and the land of Bukuney Limboo. From the inquest report also (Exhibit-4/2), it is found that the dead body of the deceased had been recovered from the land of Bukuney Limboo. So, from the aforesaid evidence considered together, it is found that the places of the occurrence as alleged by the prosecution has been proved.

30. To prove the incidents alleged, prosecution mainly depends on the evidence of P.W.-4 & 6, who, according to the prosecution, are the eye-witnesses.

31. P.W. 4, in his evidence-in-chief stated that in the night of the incident while he and his wife were sleeping inside their room they heard a groaning sound coming from inside the room of his younger brother Ran Singh Lepcha after which his wife lighted a lamp and they went to the place and found the Appellants beating Ran Singh Lepcha. Immediately after saying so, he corrected himself by saying that the door of the room from where the sound had been coming out was found closed and when they had pushed open the door, they

found the present Appellants inside the room and out of fear they had immediately left the place. P.W.-6, stated that in the night of the occurrence having heard a groaning sound of her husband's brother coming from inside the room next to their bed room, she and her husband rushed to the place and found the Appellants beating her husband's brother and thereafter they had left the place out of fear. But during her cross-examination she resiled from her earlier statement in examination-in-chief, by saying that when they reached the room of Ran Singh they found the door closed and inside the room being dark, they did not enter the room and as such she could not see as to what was happening inside. It is, therefore, clear that she had not seen the Appellants or any of them assaulting Ran Singh. As discussed earlier P.W. 4 was all along with the P.W. 6, so when P.W. 6 had not seen any of the Appellants assaulting Ran Singh then P.W.-4 had also no occasion to see it. So, from the evidence discussed above it can be safely said that P.W. 4 or 6 had not seen the Appellants or any of them assault Ran Singh. No other witness, examined in the case, claimed to have seen any of the Appellants assaulting Ran Singh. It should be noted here that none of the witnesses claimed having seen the Appellants taking away Ran Singh from his house towards the land of Bukuney Limboo, where the dead body of Ran Singh was subsequently found lying.

32. P.W.-4, during his examinations-in-chief stated that after hearing the sound of beating coming from inside the room of his brother Ran Singh, he along with his wife left the place out of fear and he went to the field of one Manshi, spent the night there and in the following morning at about 3 a.m. he came to his room and slept and thereafter his wife returned to their house at 7.00 a.m. and informed him that Ran Singh had been murdered. If such statement of P.W.-4 is believed then it looks to be very surprising as to why P.W. 4 had not sought for help from anybody to rescue his brother Ran Singh from the danger. It is not also understandable as to how could he sleep in an open field and thereafter in his own house without being bothered about what happened to his brother Ran Singh. Similarly, the wife of P.W.-4, i.e., P.W. 6 also stated during her examination-in-chief that when they had reached the room of Ran Singh the accused Kalu threatened to kill her husband due to which she advised her husband to leave the place and she herself with her children went to her parental home. She further added that subsequently the accused Kalu and in the following morning accused Provin came to her parental home and asked the whereabouts of Ran Singh and that after seeing the dead body of Ran Singh in a field she and her husband went to one R.K. Subba. The point to be noted is why P.W.-6 had not also done anything to know the fate of Ran Singh in the night of the incident, although, in the very night she had gone to a safe place, i.e., her parental home.

33. The aforesaid conduct of P.W.-4 & 6 is unusual and against the human behaviour for which prosecution had no explanation. P.W.-6 stated that after she had gone to her parental home out of fear in the night of the occurrence the accused Kalu met her there and enquired about her husband. She further stated that in the following morning accused Provin also met her in her parental home

and reported that her husband's brother had been killed by some local boys. In such circumstances the question arises, if P.W. 6 suspected the accused Kalu or Provin to be the culprits then why had not she done anything for the apprehension of the accused Kalu or Provin.

34. Both P.W.-4 & 6 stated that after seeing the dead body of Ran Singh in the land of Bukuney Limboo, they went to R.K. Subba for advice and scribing of the complaint and according to P.W.-6 they had gone to the local A.S.P. Camp thereafter, both of them went to R.K. Subba who had scribed the complaint as per their dictation. But R.K. Subba (P.W.-8) in his cross-examination stated that before Sunita came to him, she had gone to police Camp. He stated further that he signed on a Blank Paper and police asked him to prepare "this type of complaint". It is needed to mention here that in the complaint the name of the deceased was mentioned as "Ranjit Lepcha", although P.W.-4, 6 and Ran Singh were well known to P.W.-8. So, the situations leading to the preparation and submission of the F.I.R. in the case is questionable. The fact that no specific suggestion on the point has been given to P.W.-4, 6 and 8 by the defence, makes no difference.

35. Learned Advocate for the Respondents argued that the deceased was seen with the Appellants for the last time in the room of the deceased after which the dead body of the deceased was found lying in a field. So, the defence had the onus to explain as to what happened after the meeting between the deceased and the Appellants and such "last seen together" circumstances alone prove the prosecution case as the defence failed to discharge the onus on them. The decision reported in Mohd. Azad @ Samin Vs. State of West Bengal, , has been relied on by the learned Advocate for the Respondent on the point. In reply, learned Advocate for the Appellants argued that it has never been proved that the deceased was seen with the Appellants immediately before the death of the deceased and she also cited the decision reported in (2009) 1 SCC (C.R.I.) 212, on the point.

36. As discussed earlier P.W.-4 stated that he had not seen as to what was going on inside the room of his brother as the door was closed and that he had heard only some sound of beatings. P.W.-6 also stated in her cross-examination that they heard only some groaning sound coming from inside the room of Ran Singh and as the door was closed and the room was dark, they did not enter the room and see as to what was going on there. In fact, none of the witnesses stated that he had seen the deceased and the Appellants together inside the bed room of the deceased or at any place outside the bed room in the night of the occurrence. So, when the aforesaid fact is not proved at all, then the question of application of the "last seen together theory" does not arise in the case. Hence, the decision cited by the learned Advocate for the Respondent is of no use for them.

37. It has been discussed earlier that there is no other evidence on record to link the present Appellants or any of them with the murder of the deceased.

38. So, in view of the facts and circumstances and all the evidence on record discussed above, we are of the view that the prosecution totally failed to prove any of the charges framed against the present two Appellants.

39. Learned Trial Court had, therefore, committed error in law to find the present two Appellants guilty of the charges under section 302 read with section 34 of IPC and under section 448 read with section 34 IPC. The order of sentence was, therefore, also wrong in law. The present Appellants are, therefore, found not guilty of the charges under section 302 read with section 34 IPC and under section 448 read with section 34 IPC and they are accordingly acquitted. The appeal is accordingly allowed on contest. The judgment of conviction and order of sentence passed in the case are set aside. The Appellants be released from jail immediately if they are not liable to be detained in connection with any other case.

40. L. C. R. be sent back to the Trial Court, along with a copy of this order. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Advocates for the parties upon compliance of all formalities.

Nishita Mhatre, J.

I agree.