
(2016) 02 CAL CK 0077
In the Calcutta High Court
Case No : C.R.A. No. 645 of 2007.

Ansar Mistry alias Kucho

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100(5)
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 300

Citation : (2016) 161 AIC 469 : (2016) 2 CalLJ 588 : (2016) CriLJ 1825 :
(2016) 3 Crimes 47

Hon'ble Judges : Aniruddha Bose;Sankar Acharyya, JJ.

Bench : Division Bench

Advocate : Mr. Sanjoy Ghosh, Advocate, Mr. Giasuddin Mulla, Advocate, for the Appellant; Mr. Subir Banerjee (APP), Mr. Jayanta Banerjee, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Sankar Acharyya, J. - This appeal has been preferred by sole appellant Ansar Mistry @ Kucho challenging the judgment of conviction and order of sentence dated 27.08.2007 and 28.08.2007 respectively passed by learned Additional Sessions Judge, 3rd Court, Alipore in Sessions Trial No. 1 (2) 2004 convicting the appellant under Section 302 of the Indian Penal Code (in short I.P.C.) and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.2000/- in default rigorous imprisonment for six months. The appellant remains in correctional home.

2. Contending inter alia the impugned judgment has been challenged by the appellant as bad in law and fact as the learned trial Court failed to consider the material evidence on record. According to petition of appeal, the material discrepancies in the evidence of prosecution have not been appreciated and defence case has not been taken into consideration. Seizure of incriminating weapon has been challenged and it has been claimed that absence of motive of

the appellant to commit the murder has not been considered in the impugned judgment. Appellant has prayed for setting aside the impugned judgment and for his acquittal of the charge.

3. Initially on a written complaint of Arabinda Halder a case under Section 326, I.P.C. was registered as FIR at Jaynagar Police Station against the appellant as sole accused for causing stab injury on the abdomen of the victim Ashok Halder on 01.06.2000. Thereafter, on the death of the victim on the following date Section 304, I.P.C. was added against the appellant. After investigation police submitted charge-sheet against the appellant and one Kader Mistry under Section 302/34 of the I.P.C. In the trial Court charge under Section 302/34, I.P.C. was framed against both the accused persons. After full trial, in the impugned judgment said Kader Mistry has been acquitted for want of evidence against him but the appellant has been convicted and sentenced of the charge under Section 302 of the Indian Penal Code.

4. The case made out in FIR is that the appellant used to stay elsewhere previously and coming to village ? Neempith he caused lots of trouble to which Ashok Halder (victim) protested and there was quarrel between them. On 01.06.2000 in the afternoon the victim went to Neempith for husking paddy in a husking machine from their house of Sher Hangampur. At about 4:30 p.m. the appellant called the victim out from the husking machine room and the victim came out when the appellant assaulted the victim stabbing with a dagger on his abdomen expressing his intention to kill the victim. Neighbouring people removed Ashok (victim) to Neempith hospital and therefrom he was removed to Bangur hospital where he was admitted. FIR was lodged by victim's uncle on 01.06.2000 at 7:50 p.m.

5. During trial state prosecution examined the informant Arabindra Halder (PW 1), Anil Mandal (PW 2), Gayatri Halder (PW 3), Shyamal Adhikary (PW 4), Alok Halder (PW 5), Tarulata Halder (PW 6), Biswanath Gayen (PW 7), Biswanath Halder (PW 8), A.S.I. Makhan Lal Sen (PW 9), S.I. Indranil Mukherjee (PW 10), Dr. Birendra Singh (PW 11), Amulya Dhan Mandal (PW 12), Dr. Arun Kumar Saha (PW 13), Dr. Kamal Chatterjee (PW 14), Dr. Mrityunjay Sarkar (PW 15) and S.I. Jaydeep Banerjee (PW 16). PW 1 claims to be an eye-witness of the occurrence. PW 2, PW 7 and PW 8 are witnesses of seizure of incriminating dagger. PW 4 is the owner of the husking machine where the victim went for husking paddy. PW 3 and PW 5 are eye-witnesses of the occurrence. PW 6 is the mother of the victim. PW 9 recorded the FIR at Jaynagar Police Station receiving complaint of PW 1. PW 10 held last part of investigation, PW 11 medically examined the victim first at Ram Krishna Rural Hospital at Neempith and referred him to any State hospital, PW 12 is the scribe of the FIR, PW 13 held post mortem examination over the dead body of the victim, PW 14 medically examined and treated the victim at Bangur hospital, PW 15 issued death certificate of the victim and PW 16 held first part of investigation. Prosecution adduced documentary evidence as exhibits and the incriminating weapon as material exhibit. Accused persons

including the appellant were examined under Section 313 of the Code of Criminal Procedure. They did not adduce any evidence.

6. In the impugned judgment learned Additional Sessions Judge discussed the materials brought during trial.

7. In this appeal the determining question before us is whether the impugned judgment is liable to be set aside or not.

8. During trial, PW 2, PW 7 and PW 8 were brought to the witness box by prosecution though not specially summoned by Court under Section 100 (5) of the Code of Criminal Procedure, 1973. Ordinarily their examination as witnesses in Court was not required for the prosecution although the prosecution claimed that the incriminating weapon (Mat exhibit ? I) was recovered by search and seizure in their presence by the investigating police officer (in short I.O.). We like to mention here the provision of Sub-Section (5) of Section 100 of the Code as :-

"(5). The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this Section shall be required to attend the Court as a witness of the search unless specially summoned by it".

9. It is however, fact that said three witnesses have been examined by prosecution and their evidence has been recorded during trial. From their deposition in substance it is well established that said three witnesses are local persons of the place where from the seizure of incriminating weapon had taken place as claimed and all of them knew the appellant. It is also established that Mat. Exhibit-I is a dagger and it was recovered from a pond beside a mosque as brought by the appellant and identified it. Same weapon (Mat exhibit- 1) had been identified by each of the three witnesses. Their evidence was corroborated by the seizure list (exhibit- 2). Evidence of PW 2, PW 7 and PW 8 also is corroborative one another. We do not find any reason to hold any of those three witnesses to be incompetent to witness the seizure as argued by learned counsel for the appellant. We are, therefore, satisfied that prosecution (State) is successful in proving the seizure of Mat. Exhibit-1 in presence of PW 2, PW 7, PW 8 and also the appellant from the pond which cannot be considered as an open public place. Rather, it may be said that the dagger was kept hidden in a pond under water of the pond. As such, the arguments of learned counsel for the appellant referring to the decisions of the Hon"ble Apex Court reported in 1983 (1) CRIME 984 and AIR 2003 SC 801 does not impress upon us to suspect reasonably the genuineness of the seizure of Mat. exhibit-I in this case.

10. In the case of Kora Ghasi v. State of Orissa reported in 1983 CRIMES 984 a case on circumstantial evidence has been discussed. In that case accused was not named in FIR. The witnesses according to whom the deceased was last seen together with the accused were primarily suspected as authors of the crime. In that case there was retracted confession of the accused. In the trial Court, the

accused was acquitted of the charge under Section 302 of the Indian Penal Code but in an appeal against acquittal before High Court the accused was convicted of the charge under Sections 302/201 of the Indian Penal Code. The Hon''ble Supreme Court acquitted the accused appellant setting aside the conviction and sentence imposed on the appellant under Sections 302 and 201, Indian Penal Code. In the judgment it was observed by the Hon''ble Apex Court, "So far as the recovery is concerned we cannot attach much importance to this fact as it was from an open place accessible to all". In the case in our hand we find that this case is based on evidence of eye-witnesses and not on circumstantial evidence like the cited case. In this case we cannot say that the place in a pond under water wherefrom the Mat. exhibit-1 was recovered as pointed out by appellant is an open place accessible to all. Therefore, that cited decision does not help the appellant against the impugned judgment.

11. In the another judgment of the Hon''ble Supreme Court of India in the case of State of U.P. v. Arun Kumar Gupta reported in AIR 2003 SC 801 also the discussed case was based on circumstantial evidence. In that case the trial Court convicted and sentenced the accused but the High Court acquitted him in appeal for want of reliable and independent evidence. The Hon''ble Apex Court dismissed the appeal against the acquittal. In that case witnesses on whose evidence accused was convicted and sentenced in trial Court were found as interested witnesses in the High Court and in Supreme Court. Prosecution case regarding recovery of dead body, blood stained earth and incriminating knife from a family residence in a crowded locality in the absence of evidence of any neighbouring witness could not be believed by the Hon''ble High Court and the Hon''ble Apex Court. In the reported case discrepancy regarding time of recovery as per police witnesses has also been pointed out. In our case we find the PW 3 is an independent eye-witness of the occurrence and we also find PW 2, PW 7 and PW 8 as independent competent witnesses of recovery and seizure of Mat. exhibit-I at the instance of the appellant. Only similarity with that reported judgment which we find in this case is that recovered knife and blood stained earth of the place of occurrence were not sent to the serologist. It is however, the peculiarity of the instant case under our consideration is that even if there would not have been recovery of incriminating weapon the prosecution case could not be defeated due to strong ocular evidence of the occurrence adduced by prosecution. Said reported judgment AIR 2003 SC 801 (Supra) also does not fortify the denial of prosecution case made by appellant.

12. PW 1 is uncle of the victim Ashok Halder. He lodged the complaint (FIR) at Jaynagar P.S. on the date of occurrence (01.06.2000) after about 3 hours and 20 minutes at 7:50 p.m. of the occurrence which took place at about 4:30 p.m. according to the FIR (exhibits 1 and 3). Distance of the police station (P.S.) from the place of occurrence (in short P.O.) is 4 k.m. According to PW 1, after the incident of assault on the victim they took Ashok (victim) to Neempith hospital for treatment and PW 1 remained present at the P.O. and hospital and from Neempith hospital Ashok was sent to Bangur hospital for better treatment.

Considering said aspects it cannot be said that there was inordinate delay in lodging the FIR. PW 1 proved the written complaint as exhibit- 1. According to PW 1, the victim and his brother PW 5 went to the paddy husking machine of PW 4 for husking their paddy and thereafter appellant called Ashok out of the machine room when an altercation between them took place near the machine room at the crossing of Neempith and appellant assaulted Ashok pushing dagger in his abdomen and fled away. Ashok became unconscious. During cross-examination PW 1 stated that he saw Ashok at 4:00-4:30 p.m. in injured condition near the paddy husking mill. This evidence cannot be interpreted as he did not see the incident of assault on Ashok by appellant. Evidence of PW 1 was stated to the appellant during his examination under Section 313 of the Cr.P.C. and he gave omnibus explanation about said evidence as false statement only. It is pertinent to mention that during cross-examination PW 1 was suggested that appellant was a labour of PW 1 and that the appellant did not agree to work under PW 1 for which PW 1 falsely implicated the appellant in the case. Surprisingly, such explanation was not given by appellant during his examination under Section 313 Cr.P.C. Totality of the evidence of PW 1 sufficiently proves him an eye-witness of the incident of assault on the victim by appellant with a dagger. Said fact is also corroborated by exhibit-1.

13. PW 3 is an eye-witness of the alleged occurrence. According to her deposition, on the fateful day in the afternoon at 4:00 ? 4:30 p.m. she went to husking machine of PW 4 for husking her paddy. At that time the victim Ashok @ Tapse and his brother Alok (PW 5) also went to that machine for husking their paddy at village ? Neempith. Tapse came outside from the machine room and PW 3 with others remained inside that room. Thereafter the accused Kucho (appellant herein) assaulted Tapse with a bhojali (dagger) in his abdomen and there was profuse bleeding from his abdomen. Tapse @ Ashok sat down keeping his hand on his abdomen. Witnessing the incident PW 3 became unconscious. During her cross-examination she stated that she was inside the shop of PW 4 and she saw the incident with her own eyes. She sufficiently proved that she is reliable disinterested eye-witness of the occurrence. She made no exaggeration. She did not say anything beyond her knowledge.

14. Corroborating PW 1 and PW 3 the PW 4 stated that he has one paddy husking machine at Neempith and in the fateful afternoon PW 3 and victim Ashok @ Tapse with his brother (PW 5) went to the machine of PW 4 for husking their paddy. Corroborating PW 1 the PW 4 stated about prior dispute between the appellant and the victim. PW 4 was operating his machine for husking paddy of PW 5. When PW 4 came out of his machine room he found that Ashok was taken by people for hospital and PW 4 came to know that Ashok was assaulted by knife (chhuri). PW 4 stated that the house of Kucho (appellant) is adjacent to machine room of PW 4. During cross-examination his aforesaid evidence remained unchallenged. As such, from his unchallenged evidence we find that there was prior dispute between appellant and victim though PW 4 had not exact knowledge about such dispute and that in the fateful afternoon PW 3, PW 5 and

the victim went to the husking machine of PW 4 and near the said machine room the victim received injury for which he was removed to hospital.

15. PW 5 is brother of the victim and eye-witness of the alleged incident. According to him the incident took place on the road in front of husking machine room of PW 4, and on the date of occurrence PW 3, PW 5 and the victim and some others went to that husking machine for husking paddy. The appellant called the victim from outside and the victim went on call. An altercation took place between them on the road in front of the husking machine room. Then the appellant assaulted the victim with a knife/dagger in his abdomen causing profuse bleeding and the appellant fled away. In respect of his evidence recorded during his examination-in-chief he stood with credibility during cross-examination. Nothing has come out from his evidence in totality to disbelieve the fact that in the fateful afternoon the appellant assaulted the victim with knife/dagger in his abdomen causing profuse bleeding of the victim.

16. Undisputedly, in the fateful afternoon the victim was taken to Neempith hospital first and subsequent thereto he was taken to Bangur hospital and was admitted there and on the following date he succumbed to his injury in Bangur hospital. It is unchallenged evidence of PW 4 that the victim was taken to hospital from the place outside his husking machine room. It is well proved beyond shadow of doubt from the evidence of PW 1, PW 3 and PW 5 that the victim Ashok @ Tapse received injury in his abdomen due to assault with knife/dagger by the appellant in the fateful afternoon on the road in front of paddy husking machine room of PW 4. It is unchallenged evidence of PW 1 that before assaulting Ashok by bhojali (dagger) Kucho (appellant) threatened him to kill by bhojali.

17. PW 11 examined the victim medically first at Sri Ram Krishna Rural Hospital, Neempith. He found stab wound over the abdomen of Tapse (victim), who was brought to the hospital at 5:10 p.m. on 1.6.2000. PW 11 gave the first aid to the patient and considering the serious condition of the patient referred to any State hospital. PW 11 reported that fact to O.C. Jaynagar P.S. sending exhibit- 4 which corroborates PW 11. During his cross-examination nothing came out to disbelieve him.

18. At Bangur hospital on 01.06.2000 the PW 14 medically examined the patient Tapse (victim) for his penetrating wound over abdomen as the patient was referred from R.K. Hospital, Neempith. According to PW 14, surgical operation of the patient was done at Bangur hospital. Internal injuries of the patient which were found and repaired on operation of the penetrating wound of the patient have been described by PW 14. The patient had died on 02.06.2000 at 12:10 a.m. as stated by PW 14. This PW 14 has been corroborated by exhibit- 6 series medical papers. The PW 14 and PW 15 proved the death certificate of the victim as exhibit- 7 and exhibit- 8 on same paper. Corroborating the PW 14 exhibit- 8 discloses the cause of death as cardio-respiratory failure in case of post operative patient in penetrating injury abdomen cum multiple viscera injury to be

confirmed by post mortem examination. During cross-examination PW 14 opined that such type of injury might be caused by falling on a sharp substance from upper level. From the side of appellant no case was made out during trial that there was any possibility of the victim's fall on sharp substance from any upper level.

19. PW 12 proved his writing of the complaint (FIR) lodged at Jaynagar P.S. by PW 1.

20. PW 13 held post mortem examination over the dead body of the victim and proved the post mortem report as exhibit- 5. He confirmed surgical operation of the deceased and repairing of the internal injuries due to incised penetrating wound over abdomen of the deceased. It substantially corroborates PW 14. The PW 13 opined that the death was due to the effects of injuries found during post mortem examination and the injuries were ante mortem and homicidal in nature. Exhibit- 5 fully corroborates the PW 13.

21. Learned counsel for the appellant pointed out that neither the attending doctor PW 14 nor the autopsy surgeon PW 13 was asked in witness box by the prosecution as to whether the injury of the victim is merely likely to cause death or sufficient in the ordinary course of nature to cause death. According to him it is sufficient to extend the benefit of doubt in favour of the appellant. In order to fortify his arguments he relied upon a decision of the Madras High Court in the case of Thangaswami reported in AIR 1963 Madras 476. From the discussions made in paragraph 7 of that judgment it appears to us that the victim of that case suffered from multiple injuries. In the said judgment Hon'ble Division Bench of Madras High Court observed, "Injury No. 2 was the cause of death, according to the doctor. But it is highly regrettable that the medical witness PW 9 was not asked anything about the character of the injury, and whether it was an injury merely likely to cause death, or sufficient in the ordinary course of nature to cause death. We need not emphasise that it is of the greatest importance that, in murder cases, such facts should be carefully elicited by the prosecution from the medical officer who has held the autopsy. But considering the nature and location of the injury, we are assuming that it was ordinarily sufficient to cause death". In the instant case also during examination of PW 13 and PW 14 the prosecution omitted to put such question to those witnesses. But considering the facts that there was single external stab injury on abdomen of the deceased causing several fatal internal injuries described by PW 13 and PW 14 and considering the fact that promptly after the occurrence the injured was removed to Neempith hospital where PW 11 treated him giving first aid and there was no inordinate delay in his treatment by PW 14 in Bangur hospital for the stab wound of the victim but the victim succumbed to his said stab injury we find reason to believe and we believe that the only stab injury over the abdomen of Ashok @ Tapse is sufficient to cause his death in ordinary course of nature. As such, the lapse on the part of prosecution during trial does not cast any doubt over the prosecution case for which benefit in favour of the appellant can be given.

22. Considering the totality of medical evidence we do not find any iota of evidence contradictory to the ocular evidence. In our view if the ocular evidence and medical evidence are read simultaneously there will be no alternative but to believe that on 01.06.2000 in the broad day light at afternoon the appellant expressing his intention to kill Ashok @ Tapse assaulted the victim with knife/dagger piercing/penetrating/pushing in the abdomen of the victim and only that ante mortem homicidal injury caused the death of the victim.

23. PW 10 and PW 16 are the investigating police officers. In our view, the investigation work done by PW 16 first and then by PW 10 is not satisfactory. We are of the opinion that there is lapse on the part of investigating police officer in their not drawing any sketch map of the place of occurrence, not collecting blood stained wearing apparels of the victim, not collecting any inquest report over the dead body of the victim and not sending the Mat. exhibit-I with wearing apparels of the deceased to Forensic Science Laboratory. Still we are not in a position to give priority to such flaws of investigation to ignore the strong ocular as well as medical evidence which stands against the appellant in this case. We like to follow the principle that only due to defective investigation of police a wrong-doer should not be left unpunished. In this connection, it will not be out of place to mention that after completion of investigation the PW 10 submitted charge-sheet under Section 302/34 I.P.C. against the appellant and also against one Kader Mistry and learned Judge in the trial Court after full trial rightly acquitted said Kader Mistry in the absence of evidence against him. The appellant was found guilty under Section 302 I.P.C. and in the impugned judgment Section 34 I.P.C. was excluded lawfully and rightly in the findings of the learned Additional Sessions Judge.

24. Before concluding our discussions we like to mention that at the time of hearing this appeal learned counsel for the appellant cited a decision of Hon"ble Delhi High Court in the case of Harish Chander and Billa v. State reported in 1995 Cri LJ 3036. In our view, the case under our consideration is dissimilar to the case discussed in 1995 Cri LJ 3036 (supra) and said citation is not applicable in this case. Learned counsel for the appellant also cited a decision of the Hon"ble Supreme Court of India in the case of Madan Lal v. State of Haryana reported in (2006) 1 Supreme Court Cases (Cri) 357 and has argued that in the case under appeal in this Court conviction of the appellant should not be maintained despite acquittal of another accused Kader Mistry under Section 302/34 of the Indian Penal Code in the trial Court. We have gone through the decision of the Hon"ble Apex Court reported in (2006) 1 SCC (Cri) 357 (supra). In the reported case the appellant and his co-accused were convicted and sentenced in the trial Court for the offence under Section 302 of the Indian Penal Code read with Section 34, I.P.C. and on appeal against such conviction and sentence the High Court upheld the conviction and sentence of the appellant but acquitted the another accused who was also an appellant in the High Court. Hon"ble Supreme Court was pleased to observe in paragraph 4 that "In the wake of aforesaid view and factum of Section 34, I.P.C. being also involved, the High

Court convicted the accused under Section 302, I.P.C. read with Section 34, I.P.C. In our view, there is a manifest error in maintaining the conviction and sentence. In the absence of any other accused person, question of applicability of Section 34, I.P.C. would not arise". With such observation the order of the High Court was set aside and appellant was acquitted. In the present case in our hand although trial commenced against two accused persons under Section 302 read with Section 34 of the Indian Penal Code but in the trial Court the case was proved to be a case of 302, I.P.C. only against the sole accused who is appellant herein. As such, the decision of the said reported case also does not improve the claim of the appellant.

25. In summing up our discussions made above we are not satisfied to allow this appeal and to set aside the impugned judgment.

26. As a result, this appeal stands dismissed.

27. The impugned judgment with orders of conviction and sentence is left as it is.

28. Urgent Photostat certified copy of this judgment, if applied for be supplied promptly to the parties or their engaged lawyers observing requisite legal formalities.

29. Return the L.C.R. together with a copy of this judgment to the Trial Court immediately.

Aniruddha Bose, J. - I agree.