

(2018) 07 CAL CK 0104
In the Calcutta High Court
Case No : C.R.A. 137 of 2015

Atahar Sk. & Ors

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 16-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 148, 149, 302, 307, 325, 326
Juvenile Justice (Care and Protection) Act, 2000 — Section 7A
Code of Criminal Procedure, 1973 — Section 161, 164, 313, 428, 437, 437A
Indian Evidence Act, 1872 — Section 32

Citation : (2018) 07 CAL CK 0104

Hon'ble Judges : JOYMALYA BAGCHI, J;RAVI KRISHAN KAPUR, J

Bench : Division Bench

Advocate : Debasish Roy, Saryati Datta, N. Ahmed, Madhusudan Sur

Final Decision : Partly Allowed

Judgement

Joymalya Bagchi, J

The appeal is directed against the judgment and order dated 14.1.2015 and 15.1.2015 passed by the learned Additional Sessions Judge, 5th Court,

Murshidabad in Sessions Case Sl. No. 485 of 2010 [Sessions Trial No. 5 of April, 2011] convicting the appellants for commission of offence

punishable under Section 302/149 of the Indian Penal Code (IPC) and sentencing them to suffer rigorous imprisonment for life and to pay fine of

Rs.5,000/- each, in default, to suffer simple imprisonment for six months more.

The prosecution case as alleged against the appellants is to the effect that on 28th August, 2007 in the afternoon there was an altercation between

Sahajamal Sk. son of late Nahiruddin Sk and his wife Fojila Bibi over domestic affairs. Subsequently, Fojila Bibi tried to commit suicide by consuming

poison. Ajit Rahaman @ Vojali, maternal uncle of Sahajamal intervened and snatched away the poison from Fojila. In the evening at around 6.00 P.M.

when Sahajamal was returning home from the field, the appellants along with Sattar Sk. (since deceased) attacked him with hensua, lathi and pashli.

When Sahajamal shouted for help, Ajit Rahaman came out from his house and intervened. Thereupon, the appellants mercilessly hit him with hensua,

lathi and pashli on his head, back, abdomen and thigh. Local people assembled at the place and the miscreants left the spot. Ajit Rahaman died at the

Spot while Sahajamal was shifted to Raninagar Hospital for treatment. Marjina Bibi, wife of Ajit Rahaman witnessed the incident and lodged first

information report resulting in registration of Domkal P.S. Case No.207 of 2007 dated 28.8.2007 under Sections 325/326/307/302/34 of the Indian

Penal Code. In conclusion of investigation, charge-sheet was filed against the appellants and Sattar Sk. The case being a sessions triable one was

committed to the Court of Sessions and transferred to the Court of the Additional Sessions Judge, 5th Court, Murshidabad for trial and disposal.

Charges were framed under Section 148 of the Indian Penal Code and Sections 307/149 of the Indian Penal Code and Sections 302/149 of the Indian

Penal Code. The appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 14 witnesses and exhibited a

number of documents. In the course of trial, Sattar Sk. died. In conclusion of trial, the trial Judge by the impugned judgement and order dated

14.1.2015 and 15.1.2015 convicted and sentenced the appellants, as aforesaid. Hence, the present appeal.

In the course of pendency of the appeal, prayer was made to hold enquiry under the provision of Section 7A of the Juvenile Justice (Care and

Protection) Act, 2000 to determine whether the appellant No.6 Azizul Sk. was a juvenile at the time of commission of the offence. Upon enquiry, trial

judge by order dated 13.2.2017 held that Azizul Sk. was born on 14.1.1991 and was a juvenile at the time of the incident.

Mr. Roy, learned Senior Advocate with Mr. Datta argued that most of the prosecution witnesses have not supported the prosecution case. Evidence

of P.W.1, the defacto complainant suffers from embellishment and/or contradictions. She has admitted in cross-examination that there was enmity

between the families and some of her family members (witnesses in the present case) were accused of the murder of the son of appellant no.4

Najimuddin Sk. It is submitted that the appellants did not have any intention to kill the victim and ought not to have been convicted for committing

murder of the victim. It is also submitted that there is no evidence whatsoever that appellant No.3 Sainul Sk. or appellant No.4 Najimuddin Sk.

assaulted the victim, hence it cannot be said that the said appellants shared a common object to murder the victim. From the report of the trial judge, it

appears that the appellant no.6 was a juvenile at the time of occurrence and, therefore ought not to have been tried as an adult along with the other

accused persons. He further submitted that the names of the appellants had not transpired in the medical records of treatment of Sahajamal.

Sahajamal had not been examined in the instant case. Accordingly, he prayed for acquittal of the appellants in the instant case.

On the other hand, Mr. Ahmed, learned Additional Public Prosecutor along with Mr. Sur, argued that P.W.1 is an eye witness and she has graphically

narrated the assault on her husband. The appellants had come in a body variously armed and had initially assaulted Sahajamal, son-in-law of appellant

no.1 and when the victim, maternal uncle of Sahajamal, intervened he was brutally assaulted on vital parts of the body resulting in his death. The

aforesaid evidence on record, therefore, established the charge against the appellants beyond doubt. He, however, did not dispute the fact that

appellant no.6 Azizul Sk. was a juvenile in conflict with law at the time of occurrence.

Let me examine the rival versions in the light of the evidence on record.

P.W.1, Marjina Bibi, wife of the victim and the informant is the star witness in the instant case. She deposed that the incident occurred 5 years ago

i.e. on 10th Bhadra around 6 P.M. in front of her house. At the time of the incident, she was in the house. Sahajamal is the nephew of her husband.

Sahajamal was returning to his house when Atahar Sk., Habol Sk., Sainul Sk., Tahasin Sk., Najimuddin and Sattar assaulted him on the left shoulder.

The accused persons apart from Sattar Sk. were identified on dock. Sattar Sk. had died. While Sahajamal was being assaulted, he shouted for help.

Her husband rushed to the spot. She also accompanied her husband and found Sahajamal was lying on the road. She saw blood oozing out from his

shoulder. Her husband requested the accused persons not to assault Sahajamal. Thereupon, accused Habol assaulted him with iron rod on his head.

Accused Tahasin assaulted him on his belly with a bhojali. Accused Atahar assaulted him on his right side of leg with hansua. Accused Azizul

assaulted him with pasli on the left side of the waist. Seeing this she shouted for help. Hearing her cries, Rajjak, P.W.5, Israil, P.W.7, Alauddin, P.W.3

and Bablu, P.W.2 came to the spot. Her husband died at the spot. Sahajamal did not lose his senses and was shifted to hospital. She came to Domkal

P.S. along with Bablu Sk. riding on his motor cycle. Bablu wrote F.I.R. as per her direction. She put her L.T.I. thereon. She identified the wearing

apparels and chappal of the victim.

In cross-examination, she stated that at the time of incident she did not perform Namaj. Her relations and other witnesses in this case are accused of

the murder of the son of the accused Najimuddin.

P. W.2, Bablu Sk. is the scribe of the first information report. He deposed that the incident took place on 28.08.2007 around 6/6.30 P.M. in front of the

house of Vojali. He was returning home from the play ground when he heard shouts â??Banchao, Banchaoâ?. He rushed to the place. He saw some

people were fleeing away, but he could not identify them. On reaching P.O. he found Vojali lying dead. Sahajamal was standing there with an injury

on his shoulder. He found the deceased had injuries on his right thigh, belly and on the thumb of his left hand. His intestine had come out from his

stomach. He found Marjina, Masadul Sk. Alauddin Sk. Israil and Rajjak Sk. standing there. Sahajamal told him that his father-in-law Atahar had

injured him on his shoulder and hand and when he cried out for help, his maternal uncle Vojali came there. Vojali was also assaulted. Sahajamal also

told him that Atahar had assaulted Vojali on his thigh, Habol assaulted Vojali on his head with iron rod, Azizul assaulted him in his stomach and the

others had also assaulted him with lathi. He identified the accused persons. He stated that Sattar had died. Sahajamal was taken to Raninagar Rural

Hospital where from he was referred to Berhampore Hospital. Rajjak and Israil are Behai of the accused Najimuddin. He proved the written

complaint. He signed on the inquest report as well as on the seizure list with regard to the seizure of blood stained blue coloured hawai chappal, blood

stained earth, an old mat, two blood stained bamboo sticks, a blood stained white lungi and a blood stained ganji. He identified the wearing apparels of

the victim.

P.W. 3 Alauddin Sk. deposed that the incident happened five years ago around 7.00-7.30p.m. Hearing hue and cry and he came out of his house and found Vojali lying dead on the moram made road. He heard from the people assembled over there that Atahar, Sattar, Tahasin had committed murder of Vojali. He signed the inquest report as Exhibit-3/2.

P.W. 4, Masadul Sk., is the son of the victim. He stated that the incident occurred five years ago at around 7.00-7.30p.m. On hearing hue and cry he rushed to the place of occurrence and found Vojali lying dead on the moram road and his elder brother Sahajamal was also present with an incised injury on his left shoulder. Sahajamal is now dead. He was declared hostile. He was cross-examined with regard to his previous statement to the police. He, however, denied that he was deposing falsely as the matter had been settled between the accused persons and themselves.

P.W. 5 and P.W. 7 Rajjak Sk and Israil Sk. respectively are the relations of accused Najimuddin and they have also not supported the prosecution case.

P.W. 6, Sukma Bewa, has also been declared hostile. She deposed that she is the sister of the deceased. She stated that her brother had been murdered five years ago.

P.W. 8, Julfikaruddin Kayal, was a constable posted at Domkal Police Station on that date. He deposed that he carried the dead body of the victim to morgue for post mortem examination.

P.W. 9 and P.W. 10 viz. Surajit Singha Roy and Badal Pal respectively were the signatories to the seizure list. They proved their signatures on the seizure list.

P.W. 11, Dr. Obaidur Rahaman and P.W. 12, Dr. Utpal Chowdhury, were medical officers who were attached to Beharampore N.G. Hospital and Godhanpara BPHC under Raninagar Police Station respectively. P.W. 12 treated Sahajamal at BPHC and referred him to Berhampore N.G.

Hospital. He found penetrative sharp cutting injury on the left scapula. He proved the injury report as Exhibit-3. P.W. 11 treated Sahajamal at

Berhampore N.G. Hospital. On examination he found injuries measuring about 11" x 2" x bone deep with bleeding. They were grievous in

nature. Injuries were caused by sharp cutting weapons like pasli and haso etc. He proved the injury report as

Exhibit-6.

P.W. 14, Dr. S. Sen, was the medical officer attached to Berhampore Sadar Hospital. He held post mortem over the dead body of the Ajit

Rahaman and found the following injuries:

On dissection, he found one penetrating wound on the upper part of abdomen having area 15" x 2½".

2. One wound having area 3"x 1½" being penetrative traverse at the midclavicular (just behind the ribs of left chest).

3. One wound having area 2½" x 1" on right side of thigh which was 3" deep.

He deposed the injuries were ante mortem and homicidal in nature. The injuries could be caused by bhojali and henso like sharp cutting weapon.

Injury on the back side of scalp could have been caused by shabal or lathi like blunt object. He proved the post mortem report as Exhibit-9.

P.W. 13, Dr. D. P. Majumder is the Investigating Officer in the instant case. He proved the formal F.I.R. (Exhibit-9) written by B.K. Biswas.

He went to the place of occurrence, held inquest over the dead body of the victim, prepared inquest report in the presence of witnesses marked as

Exhibit-2. He seized one pair of blue coloured sandal belonging to the deceased. He seized blood stained mat made of date leaves and two blood

stained bamboo sticks under a seizure list dated 28.08.2007. He sent the dead body for post mortem examination. He drew sketch map of the

post of occurrence with index marked as Exhibit-8 and 8/1. He recorded the statements of the witnesses under Section 161 of the Code of

Criminal Procedure. He collected post mortem report. He seized blood stained genji, lungi and blood stained printed saree under a seizure list

dated 29.08.2007 marked as Exhibit-5. He examined the injured person under Section 161 of the Code of Criminal Procedure. On 14.09.2007 he

collected the injury report. He recorded the statements of injured persons under Section 164 of the Code of Criminal Procedure. He submitted

charge-sheet.

From the evidence on record it appears that P.W. 1, wife of the deceased, had witnessed the incident which was occurred in front of her residence in

the evening of 28.08.2007. She has graphically described the incident and had specifically stated about the roles of the appellant no. 1, 2, 5 and 6 in

assaulting the victim with sharp cutting weapons on various parts of the body including head, back, abdomen and thigh. Her narration with regard

to the assault on the victim is corroborated by the injuries found by post mortem doctor, P.W. 14. I am, however, unwilling to rely on the evidence

of P.Ws. 2 and 3. P.W. 3 is a post occurrence witness and stated that he heard that Atahar, Sattar, Tahasin had committed murder of Vojali. The

said witness did not state from whom he received such information. Hence, I am unwilling to rely on his version which appears to be hearsay.

Similarly injured witness,

Sahajamal, had not been examined in the instant case. It is nobody's case that Sahajamal had died due to the injuries suffered by him in the

course of the incident. Hence, the evidence of P.W. 2 that he had heard of the incident from

Sahajamal also suffers from the vice of hearsay as Sahajamal had not deposed in the course of the trial as he had expired. Since Sahajamal had not

died due to the assault upon him in the course of the incident, his reported version as deposed by P.W. 2 cannot be treated as admissible under Section

32 of the Evidence Act. Nonetheless, I find that the presence of P.W. 1 at the place of occurrence to be most natural and her evidence is

convincing and has not been shaken in cross-examination. It is also relevant to note that the manner and course of assault as narrated by her finds

corroboration from the medical evidence of P.W. 14. Hence I am inclined to rely on the evidence of P.W. 1, eyewitness to the incident, to hold that

the appellant nos. 1, 2, 5 and 6 had mercilessly assaulted the victim resulting in his death. From the evidence of P.W. 1 I do not find any overt act

attributed to the appellants no. 3 and 4 in the assault of the victim. I am not unmindful of the fact that the appellants had been called upon to answer

a charge that they were members of the unlawful assembly who caused the death of the victim. Mere presence as a member of an unlawful

assembly is sufficient to bring home the charge against them.

However, if one visualises the genesis of the incident which arose out of a dispute between Sahajamal and his wife Fojila in the afternoon and the

fact that the appellant nos. 3 and 4 are the relations of Fojila, it is possible that

they rushed to the place of occurrence hearing the commotion between Sahajamal and his father-in-law, Atahar in the evening but did not share the common object of causing murder of the victim, who is the maternal uncle of Sahajamal. It is also relevant to note that there was enmity between the two families and some of the relations of the victim were accused of the murder of the son of appellant no.4. Hence, I am of the view as P.W 1 did not speak of any role played by appellant nos.3 and 4 in the assault on the victim and there is every possibility that the said appellants had come to the place of occurrence hearing the commotion between Sahajamal and his father-in-law, Atahar it cannot be said with certainty that they shared the common object to kill the victim with the other appellants. However, in view of the clear and cogent evidence establishing the specific roles of the other appellants, namely, appellant nos. 1, 2, 5 and 6 in assaulting the victim on the vital parts of his body causing in severe injuries on his abdomen, chest, head and thigh resulting in his death, I am of the opinion that the said appellants shared the common intention to murder the victim.

I am unable to accede to the submission of the learned counsel appearing for the appellants that they did not have intention to kill the victim, who is the maternal uncle of Sahajamal. It has been argued that the appellants were aggrieved by the conduct of Sahajamal towards his wife and were assaulting him when Ajit Rahaman alias Vojali intervened. Thereupon, the appellant nos. 1, 2, 5 and 6 assaulted Ajit Rahaman who succumbed to his injuries although the appellants had not intended to kill him. I am unable to accept such contention on behalf of the appellants. The appellant nos. 1, 2, 5 and 6 were armed with deadly weapons like pasli, hasua, vojali etc. They had used the said weapons to cause severe injuries on the abdomen, head, back and thigh of the victim. The injury on the abdomen was so severe that the entire intestine of the victim had come out resulting in his death.

From the aforesaid facts and circumstances particularly the facts that the appellant nos. 1, 2, 5 and 6 came to the spot with deadly weapons, the nature and number of injuries inflicted by them on the vital parts of the body resulting in instantaneous death of the victim, I have no doubt in my mind that the said appellants shared a common intention to kill the victim.

However, for the reasons as discussed above, I am inclined to hold that that appellant nos. 3 and 4 did not share the common object of committing

murder of the victim as there is no evidence that they were armed or they had participated in the assault on the victim resulting in his death. Hence the appellant nos. 3 and 4 are entitled to be acquitted of the charges levelled against them.

In view of the aforesaid discussion, I alter the conviction of appellant nos. 1, 2, 5 and 6 and I hold that they are guilty for commission of offence punishable under section 302/34 IPC.

In view of the fact that the said appellants had participated in the assault of the victim resulting in his death and were fully aware of the said facts and circumstances against them as transpiring from the evidence on record and their examination under section 313 of Criminal Procedure Code, I am of the opinion that no prejudice is caused to them in altering the conviction to the aforesaid provision of law instead of section 302/149 IPC for which they had been charged.

I, however, extend the benefit of doubt of appellant nos. 3 and 4 acquit them of the charges levelled against them.

Coming to the issue of sentence while upholding the sentences awarded to appellant nos. 1, 2 and 5 for the commission of the aforesaid offence, I

note that appellant no. 6 was a juvenile in conflict with law. He has already suffered imprisonment for more than three years. Hence, the sentence

imposed on the appellant no. 6 is converted to the period already undergone and he is directed to be forthwith released from jail upon executing a bond

to the satisfaction of the trial court for a period of six months in terms of section 437 Criminal Procedure Code.

Appellant nos. 3 and 4 shall be discharged from their bail bonds after expiry of six months in terms of 437A of the Code of Criminal Procedure.

The period of detention suffered by appellant nos. 1, 2 and 5 during investigation, enquiry or trial shall be set off against their substantive sentences

imposed on them in terms of Section 428 of the Code of Criminal Procedure.

The appeal is, accordingly, partly allowed.

Â Copy of the judgment along with LCR be sent down to the trial court at once for necessary compliance.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.