

(2012) 07 CAL CK 0227
In the Calcutta High Court
Case No : C.R.A. 48 of 2010

Biplab Mondal and Another

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 13-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 304, 325, 34, 341

Citation : (2012) 07 CAL CK 0227

Hon'ble Judges : Kanchan Chakraborty, J

Bench : Single Bench

Advocate : Madhusudan Sur, for the Appellant; Sabyasachi Banerjee for the State, for the Respondent

Judgement

Kanchan Chakraborty, J.—The challenge in this appeal is to the judgment and order of conviction and sentence passed by the learned Additional District & Sessions Judge, Fast Track, Court No.5, Malda in S.T.9(4) of 2009 corresponding to S.C. No.47 of 2009 dated 25.11.2009 thereby convicting the appellants Biplab Mondal and Netai Mondal for committing offence u/s 304 Part-II of the I.P.C. and sentencing them to suffer R.I. for seven years each and to pay a fine of Rs.5,000/- each. Succinctly, the case of the prosecution before the learned Trial Court was that on 5th March, 2007 at about 4.00 P.M., the appellants Biplab and Netai assaulted Dilip Mondal near his house mercilessly. Dilip lost his sense and was taken to Chanchal hospital in an unconscious condition where he was declared dead by the Doctor. Manik Mondal, his brother lodged the F.I.R. with Chanchal Police Station at about 6.45 hours and the same was registered as Chanchal Police Station case No.35 of 2007 dated 5.3.2007. The case was investigated into and ended in a charge sheet. The appellants were arrayed to face charges under Sections 341 and 304 read with Section 34 on the I.P.C. They pleaded their innocence and accordingly, the trial commenced.

2. In course of trial, prosecution examined as many as six witnesses. Some

documents were admitted into evidence and marked exhibits on behalf of the prosecution. No witness was examined on behalf of the defence. No document was also filed from the defence.

3. Upon consideration of the evidence on record, oral and documentary, the learned Trial Court came to a conclusion that the appellants committed offence u/s 304 (Part-II) of the I.P.C. and accordingly, recorded the impugned order of conviction and sentence. The appellants have assailed the judgement on the following grounds;

- a) that the learned Judge failed to appreciate the evidence on record in its true and proper perspective;
- b) that the learned Judge proceeded with an approach which was entirely erroneous;
- c) that the learned Judge was oblivious of the contradictions and discrepancies of the evidence on material points led by the prosecution;
- d) that the learned Judge failed to appreciate that there was no independent witness to support the prosecution case and overlooked the material evidence in favour of the appellants;
- e) that the judgment impugned, being bad in law, is liable to be set aside;

4. Mr. Sur, Learned Counsel appearing on behalf of the appellants contended that in the F.I.R., it has been mentioned that both the accused, i.e., Biplab and Netai assaulted Dilip Mandal. The F.I.R. was lodged by Manik Mandal who was examined as P.W. 1. He has stated that Netai, Biplab and their mother assaulted Dilip with fists, blows and kicks on his back, hand, chest and his testis. He contends that the mother has been added to Netai and Biplab subsequently at the time of recording evidence. This is according to Mr. Sur, exaggeration on the part of the prosecution.

5. Mr. Sur also has contended that there are discrepancies in the matter of time of occurrence. According to the F.I.R., it took place at 2.00 P.M. and reported to the police at 18.45 hours. The P.W. 1 has stated in his examination-in-chief that the incident took place at 4.00 P.M. and continued for one and one and half hours. He stated further that at about 4.45 P.M., he went to the police station. Again, the I.O. of the case, i.e., P.W. 6, in his cross-examination has stated that he reached the place of occurrence at 19.45 hours on 5.3.2007 but on the next line he stated that on 5.3.2007 at about 12.00 hours, he went to hospital and contacted the Doctor and Nurse. This is not possible.

6. Mr. Sur contended further that there was no independent witness excepting the P.W. 1 and P.W. 2. The persons examined and have claimed to be eye witnesses are not named by the P.W. 1. Therefore, their evidence cannot be considered as evidence of eye witnesses and the learned Trial Court could not have relied on their testimonies.

7. Mr. Sur contended that the defence has taken a specific plea that it was date of "Holly" and the victim fell on the ground being intoxicated resulting in his death. The Doctor who has conducted the post mortem on the dead body of the Dilip also failed to rule out such a possibility. Therefore, taking everything into consideration, the learned Trial Court ought to have given the appellant benefit of doubt.

8. Mr. Banerjee, Learned Counsel appearing on behalf of the State contended that although there is some discrepancies in the matter of timing of occurrence of the alleged incident, it is having no impact at all inasmuch as that has not affected the sustenance of the prosecution case.

9. Again, it is found from the F.I.R., i.e., Ext.1 that the date and time of the incident have been mentioned clearly therein as 5.3.2007 at 4.00 P.M. and the same was reported to the police station on the same date at 18.45 hours. The Post Mortem report, i.e., Ext.2 clearly shows that it was done on 6.3.2007 at 1.40 P.M. and completed at 3.00 P.M.

10. The P.W. 1 in his cross-examination as stated that the incident started at 3.00 P.M. and continued for one or one and half hours. It is true that he stated that about 4.30 P.M. he went to the police station. It might be that he had been to the police station at 4.30 P.M. but nowhere within the fourcorners of his deposition, he has stated that he lodged the F.I.R. at 4.30 P.M. If we take his evidence into consideration, it can well be found that 3.45 P.M., Dilip was taken to hospital by a Rickshaw. Against, it is found that they went to the house of scribe for preparation of the written complaint. Therefore, it cannot taken for granted that at 4.30 P.M. the F.I.R. was lodged.

11. As far as the discrepancies relating to date and time of the incident in the testimony of P.W. 6, i.e., the Investigating Officer of the case is concerned, this Court is of the view that either the P.W. 6 or the Court made a mistake by stating or recording that "on 5.3.2007 at 12.00 hours, I went to the hospital and contacted with the Doctor and Nurse of the hospital." It is not possible and feasible. If the offence was reported even at 4.30 P.M. on 5.3.2007, the I.O. had no occasion or reason, whatsoever, to go to the hospital and contact the Doctor and Nurse for the purpose of this case. The statement of the I.O. that he left for the place of occurrence from Police Station at about 19.15 hours and reached the P.O. at 19.45 hours appears to be correct and matching with the F.I.R. as well as the statement of the P.Ws.1 and 5.

12. Therefore, this Court does not like to put any importance on this particular discrepancy as indicated by Mr. Sur.

13. It is true that the P.W. 1 added the name of the mother of the appellants and one of the assailants while he deposed in the Court. This is an exaggeration simplicitor which does not touch the root of the prosecution case that Dilip was beaten mercilessly by the appellants and that he was taken to hospital on the particular date.

14. Manik Mandal, lodger of the F.I.R. has stated that besides himself, Pranab Chandra Das, Bishnu Mondal, Krishna Mandal, Akalu Mandal witnessed the incident. Amongst them, Bishnu Mandal has examined as P.W. 2. P.W. 2 has stated that at the relevant time when he was coming out of his house, he found that a quarrel was going on in between Dilip on one side and Netai and Biplab on the other side in front of the house of Dilip and in course of quarrel, Netai and Biplab assaulted Dilip with fists, blows and kicks and as a result, Dilip fell on the ground and became unconscious. This part of the statement of P.W. 2, Bishnu Mandal remained, in fact, unchallenged. He, however, stated that Pranab Das, Rajen Das, Manik Mandal, Krishna Mondal, Kabita Mondal also witnessed the incident.

15. Amongst them Rajen Das has been examined as P.W. 4. He has stated that hearing the sound of assault, he came out of his house and found that Biplab and Netai were kicking on the chest and abdomen of Dilip. As a result, Dilip became senseless and was taken to hospital where he was declared dead. The name of Naru Gopal Mandal has not been mentioned by P.Ws.1 and 2 as a witness to the incident. But he claimed to be an eye witness to the incident and examined as P.W. 3 and supported the statement of P.Ws.1, 2 and 4.

16. It is cardinal principle of rule of evidence that quality of evidence is to be counted not the quantity. In the instant case, besides two eye witnesses, two other witnesses came forward and supported the prosecution case and given description of the incident and each of them supported the prosecution case. There is no reason, whatsoever, to disbelieve their testimonies. At least, there is nothing in their evidence to establish that they had any inimical relation with the appellants and for that reason they have taken side of the P.W. 1. So, I do not find substance also in the contention of Mr. Sur. The learned Trial Court has rightly relied on their testimonies and in doing so, has made no mistake or illegality.

17. In the instant case, the defence has taken a specific plea that the victim Dilip was intoxicated and fell on a hard and blunt substance and thereby sustained injuries resulted in his death. This plea has been taken in course of examination as well as at the time of examination of the appellants u/s 313 of the Cr. P. C. They wanted to adduce evidence but reasons best known to them, desisted from doing so. Therefore, their specific plea remained unsupported. The evidence of P.W. 5, in fact and in substance, has made it clear that the death of the victim was due to the injuries sustained by him. The P.W. 5 has denied the fact that there was presence of alcohol in the stomach of the deceased. Therefore, there was no such possibilities. He has categorically stated that the injuries were all ante-mortem in nature and abdominal injuries were sufficient enough to cause death. The external injuries detected were abrasions with hemorrhage over back of chest, waist, elbows, left shoulder, front of both knees, right wrist ventrally and the abdomen peritoneal laceration with bruish (clotted), pale and peritoneal cavity contains large amount of blood. In the abdomen peritoneal laceration with

bruish (clotted), pale and peritoneal cavity contains large amount of blood was also detected. In view of P.W. 5 that abdomen injuries were sufficient enough to cause death. It is established by the prosecution witnesses that the deceased was kicked on his abdomen repeatedly and as a result, he lost his sense. This statement of the P.W. 5 rather supports the prosecution case in stead of the specific plea taken by the defence.

18. On careful perusal of the judgment impugned, I find that the learned Trial Court has taken all these factors into consideration and came to a findings which is based on reasons and evidence. Therefore, this Court is not at all inclined to upset the judgment of conviction.

19. As regards sentence, I find that the learned Trial Court sentenced the appellants to suffer R.I. for 7 years for committing the offence u/s 304 Part-II of the I.P.C. On careful perusal of the evidence, oral and documentary, it would reveal that the incident was cropped up over a very trivial issue and on the spar of the moment and excitement, the appellants assaulted Dilip. It is really doubtful that they wanted to eliminate him or had any knowledge that because of simple blow of fists and kicks would cause his death. There is nothing on record to show that either they had any such intention or knowledge.

20. Mr. Sur, Learned Counsel appearing on behalf of the appellants contended that at best the offence alleged can be described as an offence punishable u/s 325 of the I.P.C.

21. Mr. Banerjee, Learned Counsel appearing on behalf of the opposite party/ State of West Bengal fairly conceded to such submissions of Mr. Sur and contended that it would be proper for this Court to reduce the sentence as the incident had taken place all on a sudden over a trivial issue. He also doubted that the appellants had any knowledge that because of such action on their part, Dilip would die.

22. I have considered the submissions of Mr. Sur and Mr. Banerjee and I found myself in agreement with them over the issue. To be stated precisely, the appellants neither intended to cause death of Dilip nor had any knowledge that the action they had taken might take the life of Dilip. Therefore, while upholding the order of conviction, this Court reduces the sentence of R.I. from 7 years to 3 years each with a find of Rs.5,000/- each.

23. Accordingly, the appeal fails. The judgment and conviction is affirmed. However, the sentence of R.I. is reduced to (3) three years from 7 years.

24. There will be, however, no order as to costs. Let urgent photostat certified copy of this order, if applied for, be given to the learned advocates of the parties upon compliance of necessary formalities.