
(2007) 07 CAL CK 0022
In the Calcutta High Court
Case No : C.R.A. No. 487 of 2004

Budhadev Karmakar

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 25-07-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302

Citation : (2007) 4 CHN 305 : (2007) CriLJ 3677

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Pranati Goswami, for the Appellant; A. Goswami, Ld. P.P., U. Ali Dewan and J.N. Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Girish Chandra Gupta, J.—On the basis of a statement made by Shrimati Asha Khatun on 17th September, 1999 a formal FIR was recorded and on that basis GR No. 1520/99 was started against the accused Buddhadev Karmakar. He ultimately was charged u/s 302 of the Indian Penal Code which culminated in an order of conviction followed by an order of punishment dated 5th April, 2004 by which the accused/appellant was sentenced to suffer rigorous imprisonment for life as also to pay a fine of Rs. 2,000/- and in default to suffer rigorous imprisonment for further six months. The accused/convict has now come up in appeal.

2. The case of the prosecution briefly stated is that on 17th September, 1999 at about 9.15 p.m. Shrimati Chayay Rani Pal alias Buri, aged about 45 years, a resident of room No. 8 of premises No. 19, Jogen Dutta lane, a three storied building in the red-light area, was sleeping in front of her room near the staircase. The room No. 8 is in the second floor of the premises. The accused Buddhadev had his concubine by the name of Shirmati Mangala Singh, a resident of one of the rooms of the second floor of the said premises. At that fateful time

he came up to the second floor through the staircase and happened to trip upon Shrimati Chayay Rani Pal. An altercation followed. The accused in return kicked Shrimati Chayay Rani Pal with fists and legs. The victim fell down on the floor. The accused caught her by the hair and banged her head against the floor and the wall which left the victim bleeding from her ear, nose and head. Naturally a great hue and cry was raised. The informant Shrimati Asha Khatun, by occupation a maidservant, was already there in the second floor. She witnessed the entire incident from the first to the last and had also joined in shouting. The incident itself was a noisy one which coupled with the alarm raised by Asha attracted attention of the other inmates of the house and they had also collected at the place of occurrence. The prosecution story is that when a protest was raised the accused/appellant left the victim, pushed the onlookers and escaped from the second floor of the premises. He was ultimately arrested at about 2.15 a.m. from in front of 5, Jogen Dutta Lane. The victim was shifted to the hospital where she was-declared dead.

3. The defence Case is pure and simple denial.:

4. The only point which arises for our consideration is whether the prosecution has been able to bring home the charge laid against the accused/appellant.

5. P.W. 2 Abeda has deposed that after hearing the hue and cry she rushed to the second floor where Parvati and Asha were already there. The accused at that moment had caught the victim by her hair and was pushing her head against the wall. The victim was profusely bleeding through her nose and mouth. Abeda also started shouting. The accused/appellant pushed Abeda and went down and fled away. P.W. 8 Parvati saw the victim was being mercilessly beaten up by the accused/appellant. P.W. 7 Asha in her deposition has owned her statement made in the FIR recorded by the police which is exhibit "7". P.W. 1 Kalyani went to the place of occurrence after hearing hue and cry. She found Shrimati Ghayay Rani Pal lying benumbed. The accused fled away giving a push to PW 1. In her cross-examination it was suggested that the relationship between the accused and the deceased Chayay Rani Pal were not at all cordial. They used to pick up quarrel at intervals with each other. This suggestion has been accepted by the witness; Therefore an enmity between the accused and the deceased has been firmly established. As regards the evidence of Asha we shall have something more to say at a later stage.

6. It would appear that Abeda and Parvati were eyewitnesses besides Asha and they had Witnessed the accused in action. Kalyani, Abeda and Parvati have deposed that the accused fled away giving each one of them a push which only goes to show that they had collected at one place. The accused pushed these witnesses to make room for himself to escape from the place of occurrence.

7. The police was informed over telephone, as would appear from the evidence of P.W. 2 Abeda. After the police arrived at the locale, sample of the blood spilled from the body of the victim was collected by the police. P. Ws. 3 and 6 witnessed

the seizure of the sample of blood. P.W. 5 exposed photographs. P.W. 9 Narayan assisted the Sub-Inspector of Police in removing the body of the victim from the place of occurrence to the hospital. P.W. 11, the attending physician posted at the relevant time at the emergency section of Medical College Hospital deposed that the victim was brought by Asha Khatun and others. The patient was brought dead. Blood was oozing out from the patient's ear and nostril. There was swelling on the left eyeball and left eyebrow. He prepared the injury report which was proved by him and was marked as exhibit "3". The injury report contains the following history "as per party she was assaulted with the help of fist, leg and also pushed her head over wall and floor of the room by Buddhadev Karmakar." P.W. 10 Dr. A. Das who conducted the post-mortem found as many as eleven injuries on the body of the victim. Eight of them located on various parts of face and the forehead. He opined that the injuries might cause death in the ordinary course of nature. In cross-examination he has admitted that this type of injury might be suffered if a person falls from a staircase step by step. He however denied the suggestion that the injuries could not have been inflicted by dashing the victim against the floor and wall while caught by her hairs. P.W. 13 drew the sketch map. P.W. 14 carried out the investigation. From his deposition it is revealed that at about 2.15 a.m. immediately after the incident when the accused/appellant was apprehended there was a bruise injury on the left side of the eye of the accused. P.W. 14 got the accused, examined by Dr. P. Mukherjee who has granted a medical certificate which was marked exhibit "8". Exhibit "8" reads as follows:

no significant injury noted.

A bruise is noted just below the left eye. Patient stated that he was assaulted by onlookers during his escape after commission of offence.

8. This document was exhibited by P.W. 14, the I. O. However in fairness to the accused the contents of this document cannot be read in evidence because the Doctor who made this injury report was not called in to give evidence.

9. Before we sum up the evidence we have to take notice of the fact that the P.W. 7 Asha was examined in chief on 30th August, 2000. Her cross-examination was deferred at the prayer of the learned Advocate for the accused. She subsequently could not be traced by the police and as a result she could not be cross-examined.

10. Mrs. P. Goswami, learned Advocate appearing for the appellant has submitted that Asha the informant was the only eyewitness. Since she did not turn up to face cross-examination, her evidence should be rejected and in the absence of Asha there is no other eyewitness. In support of her submission she relied on a Division Bench judgment of Uttaranchal High Court in the case of Raghuvir Singh v. State of Uttaranchal reported in 2007 (2) Crimes 102 (Uttaranchal) wherein it was held that a statement made u/s 164 of Cr. P.C. could not be pressed into service when the maker of the statement did not turn up to face cross-

examination. This judgment in our view does not really apply to the facts and circumstances of this case for the simple reason that we are not concerned here with any statement u/s 164, Cr. P.C. P.W. 7 did, in fact, appear in Court to give evidence. She was examined in chief. Her cross-examination was deferred at the instance of the accused. Thereafter, she could not be traced and accordingly could not be tendered for cross-examination. Now the question is of the value to be attached to her evidence given in examination-in-chief. This question cropped up for a decision in the case of W. Stewart Vs. The New Zealand Insurance Co., Ltd. wherein a learned Single Judge held that where a party to the suit deliberately omitted to avail himself of the opportunity of cross-examining the witness in the hope of getting his evidence rejected is, to blame himself alone and the Court was entitled to take the evidence into consideration. Although in the case in hand the cross-examination was deferred at the instance of the accused, it would not in our view be proper to conclude that the accused deliberately failed to avail himself of the opportunity of cross-examining the P.W. 7. This question also cropped up in the case of Mt. Horil Kuer and Another Vs. Rajab Ali and Others, wherein a learned Single Judge after considering various authorities on the point opined as follows:

The weight to be attached to the evidence depends on the circumstances and the Court should look at the evidence carefully to see whether there are indications that by a completed cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.

11. This appears to be a reasonable view to take in the facts of this case. It is not a fact that Asha was the only witness. Parvati and Abeda were also eyewitnesses. They have given a vivid description of the evidence. The injuries inflicted upon the person of the victim by the accused/appellant have also been corroborated by the attending physician the P.W. 11 which have further been corroborated by the evidence of P.W. 10 who conducted the post-mortem. We therefore have evidence apart from the deposition of Asha to fall back upon. We shall in the circumstances use the evidence of Asha only for the purpose of corroboration.

12. Mrs. Goswami submitted that P.W. 10 Dr. A. Das has admitted in his cross-examination that such an injury could have been suffered by the victim by falling from the staircase step by step. She, therefore, invited this Court to hold that the accused/ appellant had no part to play and the injuries were suffered by the victim as a matter of accident and not at the hands of the accused/appellant. This submission, we are unable to accept for various reasons a) no such case was suggested to by any of the witnesses examined on behalf of the prosecution; and b) when P.W. 11 the attending physician came to give evidence and deposed as to how was the injury, found on the body of the patient, was reported, to have been suffered, by the persons who had taken the patient to the hospital, was not even cross-examined. As a matter of fact, cross-examination of PW 11 was declined. Therefore the irresistible inference is that the accused/ appellant

proceeded on the basis that the evidence of PW 11 could not be contradicted.

13. Lastly it was submitted by Mrs. Goswami that no witness was called who at the relevant point of time was a resident of second floor of the premises. On this basis she wanted to cast a shadow of doubt on the entire story of the prosecution. We have not been impressed by this submission for the simple reason that it is on record that the building in question is situated in the red light area and the rooms are occupied- by the women of the town. The building is frequented by customers particularly in the night and it is quite possible that at 9.15 p.m. when the incident occurred the residents of the second floor were otherwise busy and did not venture out to the place of occurrence. There is therefore a reasonable hypothesis as to why no resident of the second floor came to give evidence. It was also submitted by Mrs. Goswami that some persons whose statements were recorded were not called to give evidence. That in our view does not in the least make the case weak.

14. We already have discussed the evidence on the record. We have impeccable evidence on the following facts.

- a) There was enmity between the accused and the deceased.
- b) The accused tripped over the person of the deceased which sparked off an altercation between the deceased and the accused;
- c) the accused gave violent blows to the deceased. He caught her by her hair and dashed her head against the wall of the floor. The post-mortem report indicates that eight out of the eleven injuries on the person of the deceased were located on the face and the forehead which were sufficient to cause death in the normal course of nature;
- d) the accused pushed the onlookers, who had assembled at the place of occurrence after hearing the hue and cry, and escaped;
- e) the accused at the time of his arrest within 5 hours from the time of occurrence was detected to have injury near his left eye for which no explanation was forthcoming.

15. The cumulative effect of this evidence points to guilt of the accused and there is no escape from that. We therefore are of the view that the case has been fully proved beyond any reasonable doubt.

16. In the circumstances no interference is possible. The appeal in the result fails and is therefore dismissed.

17. Lower Court Record with a copy of this judgment to go down forthwith to the learned trial Court for information and necessary action.

18. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Advocates for the parties on compliance of all formalities.

Kishore Kumar Prasad, J.

19. I agree.