
(2010) 04 CAL CK 0041
In the Calcutta High Court
Case No : C.R.A. No. 479 of 2006

Dalim Sekh and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 141, 149, 302, 307

Citation : 114 CWN 1190

Hon'ble Judges : Kishore Kumar Prasad, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Sudipto Moitra, Ashok Das, Trina Mitra and Ranjit Lal Moitra, for the Appellant; Asimesh Goswami and Usuf Ali Dewan, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.

INCIDENT:

1. The victim group belonged to Congress Party whereas the accused group belonged to C.P.I. (M) Party. As per the complaint, the victim Yeasin Mondal left the village Bagirapara in view of threatening given by the other group. On September 5, 1991 Yeasin went to the burial ground at Sahpara Village under the Police Station Nabagram with his nephew Abdul Bari to attend a funeral of one of his relatives. At about 5 p.m. the complainant Dost Mohammad went to the Bhagirapara Bus Stop. At about 5:30 p.m. Yeasin and Abdul were returning back to Bagirapara by bicycle. Abdul was accompanying Yeasin by walking and talking to him. Dost started following them in a close distance. Yeasin and Abdul, after crossing the bus stand, found someone from their village near the culvert. Some persons were hiding there including the appellants. They could identify Dalim Sekh, Atibur Sekh, Sadekul Sekh, Hafijuddin Sekh, Diyantulla, Amanulla Sekh and two or three others whom they could not identify. At that moment Yeasin and Abdul reached near them. Hafijuddin ordered his companions to

"finish them". All of them started striking Yeasin and Abdul with knife in different parts of their bodies. Yeasin fell down on the spot. Abdul ran up to the culvert when he fell down in the water of Nayanjuli (waste water ditch). At that time, on hearing the hue and cry from Abdul as well as Dost people started gathering there and the accused fled from the place of occurrence. Abdul received multiple injuries in his body whereas Yeasin died on the spot having several multiple injuries caused by knife. Abdul was taken to the Panchgram Health Centre where after giving first aid the doctor referred him to Berhampore Hospital. Dost made a written complaint in the Nabagram Police Station by giving a brief details of the incident with a rider that his father would give further more details if he survived. Ultimately, Abdul survived. Police arrested all the accused and charged them u/s 302 coupled with Section 149 of the Indian Penal Code for committing murder of Yeasin Mondal. The accused were also charged u/s 307/149 as against the accused for causing grievous hurt to Abdul.

EVIDENCE:

2. All the accused pleaded innocence and faced trial. The evidence reveals as follows:

Dost Mohammad (P.W.1):

3. Dost almost corroborated what he had stated in his written complaint. While elaborating the incident he deposed that in the north side of Kuli-Morgram road there was a bridge and to some distance away to the north of that bridge there was a culvert. Yeasin was murdered just little after the culvert. He saw Yeasin and Abdul coming towards the bridge. They got down from the cycle and were walking along the road. Dost was following them. As soon as they reached near the culvert the accused attacked them after Hafijuddin shouted. Yeasin collapsed on the ground. Abdul started shouting crying for help. He started running and fell down in the wayside ditch. Dost helped his father to stand up. He was taken to Panchgram Gram Health Centre for treatment wherefrom he was referred to Berhampur General Hospital.

4. During the cross-examination he could not be shaken. He gave a detailed description as to the situation of the culvert. He admitted to be supporter of Congress whereas Hafijuddin was the member of the local Panchayat.

Nehar Bibi (P.W.2):

5. She was the widow of Yeasin Mondal. She was a post occurrence witness. According to her, the murder took place near the culvert of the village Rasulpur. The incident occurred at 5/5:30 P.M. when Yeasin was returning from the relation's house along with Abdul. According to her, Hafijuddin and his associates murdered Yeasin at the place mentioned above. She also named the other accused being the appellants above along with one Amanulla who died during the trial. She also deposed that Yeasin was a member of Congress. The place of occurrence was about 7/8 minutes walking from her house.

Abdul Basir (P.W. 3):

6. Abdul Basir was sitting on a culvert when the incident occurred. He was sitting with one Ajijul and Meherulla. He saw Yeasin and Abdul Bari coming towards them with one bicycle in hand. Dost Md. was following them keeping a distance. Just about one minute they passed him they heard a cry "Bachao Bachao". At once they found Yeasin lying on the ground and Abdul Bari running being chased by the accused. The accused were armed with sharp cutting weapons. While chasing the accused once or twice hit Abdul Bari. They raised alarm and people started coming to the spot. The accused fled away. He also stated that he told the Police that he found Yeasin lying dead on the ground and Bari lying in water.

Dr. S.B. Chakraborty (P.W. 4):

7. Dr. Chakraborty was attached to Berhampur General Hospital. On the fateful day he treated Abdul Bari admitted through emergency at about 8:30 P.M. He found multiple small abrasion on various sides of the body. He found no soakage and urination normal, patient had no neurological deficit or no fracture clinically found. He, however, found bleeding injury on the left side of the neck that was stitched. Abdul Bari was treated as an indoor patient and he was ultimately discharged from the Hospital on September 18, 1991.

Abdul Bari (P.W. 5):

8. He was the victim himself who survived. He almost corroborated what his son had stated as P.W.1. In addition he deposed that Hafijuddin had ordered his companions to kill them. Then accused Dalim Sk began to assault him and Yeasin with sharp cutting weapons like "Chaku, Chhuri" etc. then the rest accused also began to assault Yeasin as well as Bari. Yeasin fell on the ground, Bari sustained injury. While running away he fell into the nearby waste water ditch. Dost Md. helped him to stand, so was Abdul Basir and Ajijul. They arranged a rickshaw van for his escort to Health Centre. He was then taken to Berhampur Hospital.

Binoy Kumar Ghosh (P.W.6):

9. P.W. 6 was the Sub-Inspector of Police who was the Officer-in-Charge of Nabagram Police Station on September 5, 1991. He received the complaint from Dost Mahammad and started a case against the accused.

Dr. Gopal Chandra Sarkar (P.W.7):

10. He was the Superintendent of Berhampur Hospital, who signed the post mortem report.

Ashok Kumar Nandy (P.W.8):

11. He was the Medical Officer in Berhampur Sadar Hospital on the relevant day. He conducted the post mortem examination of the victim Yeasin Mondal. He found the stab injury on the left of face, chest, abdomen and lumber region. He also found wounds on the left palm and left ring finger. In his opinion the death

was due to hemorrhage and shock following the injuries mentioned above, ante mortem and homicidal in nature.

Ajijul Sk. (P.W.9):

12. He was sitting on the culvert along with Abdul Basir, P.W. 3. He almost corroborated Abdul Basir, Dost and Abdul Bari. He also identified the accused persons. After the incident he rushed to the house of Yeasin and informed the family. After coming back he found Police causing investigation. The Police prepared the inquest report. He was witness to the inquest report. In cross-examination he admitted to be a supporter of Congress. According to him, the house of Yeasin would be 1/2 kilometer from the place of occurrence. Police never interrogated him.

Paresh Chandra Roy (P.W.10):

13. He was the Sub-Inspector, attached to the Nabagram Police Station. In course of investigation he arrested Dalim Sk and others on September 10, 1992, after about one year of the incident.

Kamal Krishna Das (P.W.11):

14. He was the Assistant Sub-Inspector, attached to Nabagram Police Station. In course of investigation he held inquest. He sent the dead body through Constable Swapan Ray Chowdhuri for post mortem examination. He prepared a sketch map being exhibit 9. He seized the blood stained earth from the place of occurrence and prepared a seizure list in presence of the witnesses being Exhibit 10. Before the investigation could be completed he was transferred. In cross-examination he deposed that Basir did not state that he along with Ajijul, Meherulla witnessed the incident. He also examined Abdul Bari and recorded his statement. Bari did not tell him that Dost, Basir and Ajijul helped him to come out of the ditch.

Abdul (D.W.1):

15. He was the Prodhan of Rasulpur Gram Panchayat in 2006. He produced the resolution book of the Panchayat as on September 5, 1991 wherefrom it appeared that a meeting of the Gram Panchayat was held at 3 P.M. on September 5, 1991. Hafijuddin was present. He stated that he was elected with Congress ticket. He had no personal knowledge about the contents of the Resolution book. Since he found the signature of Hafijuddin he was identifying as such. He was not acquainted with the signatures appearing at the relevant resolution.

Manik Chand (D.W.2):

16. He was a member of Rasulpur Gram Panchayat on September 5, 1991. He stated that on that day there was a meeting of the Panchayat Samity. He attended the meeting, so was Hafijuddin. The meeting started at 3 P.M. and continued upto 6 P.M. The resolution was reduced to writing. Hafijuddin also signed the resolution book, so was the witness. In cross-examination he stated

that he was elected with the C.P.I.M. ticket. He stated that he could not recollect how many meetings of the Panchayat Samity were held in 1991. He could not remember the decision taken in each meeting.

Hasmat Khan (D.W.3):

17. He was a post occurrence witness. He visited the spot when he found Yeasin lying there. He could not find any other person. He also did not see anyone named Bari on the spot. The place where the dead body was found would be one kilometer away from the Bus Stand. In cross-examination he admitted that he was accused in a murder case being Nabagram Police Case No. 86 of 1993 dated June 3, 1993. He never informed about what he had seen at the spot either to the Police station or to the members of the deceased family.

IMPUGNED JUDGMENT:

18. Considering the evidence on record as discussed above, the learned Judge held the accused guilty of the offence and sentenced them u/s 302 read with Section 149 of the Indian Penal Code for committing murder of Yeasin Mondal, to suffer imprisonment for life coupled with a fine of Rs. 2,000/- and in default to suffer rigorous imprisonment for one month.

19. The learned Judge also convicted them guilty of the offence for committing gravious hurt to Abdul Bari u/s 307 read with Section 149 of the Indian Penal Code and sentenced them to suffer imprisonment for five years coupled with a fine of Rs. 5,000/- each and in default to suffer rigorous imprisonment for six months.

20. The learned Judge directed both the sentences to run concurrently.

APPEAL:

21. Being aggrieved by the judgment and order of the learned Additional Sessions Judge, 1st Court, Berhampur dated June 29, 2006 the accused preferred the appeal which was heard by us on the above mentioned dates.

APPELLANTS' CONTENTION:

22. Mr. Sudipto Moitra, learned Counsel appearing for the appellants contended as follows:

i) The charge was not properly framed. Hence, the entire proceeding was vitiated by illegality.

ii) The wearing apparel was not produced. The blood stained earth and controlled earth were not examined.

iii) The incident occurred at 5.00/5.30 p.m. whereas the inquest was done at 9.30 a.m. The prosecution witnesses deposed that they saw Police coming to the spot immediately after the incident. Hence, four hours delay remained unexplained giving room for raising doubt in the mind of the Court.

iv) Ajijul was not examined by the Police or produced by the prosecution. He was called as Court witness which was thoroughly irregular.

v) The doctor did not find any soakage while examining Abdul Bari although, he deposed that he fell into water.

vi) There had been anomalies in the evidence of PW-3 and 16 contrary to PW-1 and 4.

vii) The injured victim did not disclose the names of the assailants before the doctor as would be apparent from the bed head ticket.

viii) The nature of injury of the injured victim did not support the ocular evidence of the prosecution witnesses.

ix) Similarly, the injuries found on the dead body of the victim Yeasin was not fatal. Yeasin died being left uncared for hours together as would appear from evidence. Hence, the provisions of Section 302 could not be made applicable.

x) The evidence of PW-1 that Hafizuddin had ordered his associates to "finish" the victims, did not find corroboration from any other witness.

23. To sum up, Mr. Moitra contended as follows:

i) Prosecution failed to prove the charges.

ii) In case of Abdul Bari, names were not disclosed to the doctor at the first available opportunity. The nature of injury did not support the requisites of Section 307. The alleged story was contradictory. Hence, the charge u/s 307 must fail.

iii) In respect of Yeasin, the nature of injury did not categorically suggest the cause of death. In any event, in case the Court found that there had been contradiction on the part of the prosecution evidence with regard to the injury of Abdul the Court should also disbelieve the rest part of it which included the ingredients of Section 302.

24. Mr. Moitra prayed for acquittal of the accused.

PROSECUTION VERSION:

25. Opposing the appeal, Mr. Ashimesh Goswami, learned Public Prosecutor contended that even if the charges were not properly framed the proceeding could not be held to be fatal per se when there was positive evidence to suggest commission of crime by the accused. He contended that disclosure of name to the doctor was not mandatory and simply because the injured victim did not disclose the names that would not, per se, lead to acquittal of the accused. Mr. Goswami contended that in evidence the name of Dalim Sekh and Hafizuddin were categorically taken and the overt act done by them were specifically proved. Mr. Goshwami further contended that there might be some discrepancy with regard to the place of occurrence that would, however, not vitiate the entire

process of the trial. The evidence of PW-5 supported by the evidence of PW-1 and 9, categorically lead to only one inference that the accused did commit the crime. He prayed for dismissal of the appeal.

CASES CITED:

26. The parties in support of their contentions cited the following decisions:

- i) Ram Lakhan Singh and Others Vs. State of Uttar Pradesh, Page- 268.
- ii) Ramawati Devi Vs. State of Bihar,) Page-221.
- iii) Sukhdev Singh Vs. State of Punjab, , Page-755
- iv) M/s. Formina Sebastian Azardeo and another Vs. State of Goa, Daman and Diu, Page-133.
- v) Satguru Singh Vs. State of Punjab, , Page-2449
- vi) Tanaji Govind Misal and Others Vs. State of Maharashtra, Page-340
- vii) Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and Another, Cases, Page-175.
- viii) Gangadhar Behera and Ors. v. State of Orissa reported in 2003 SCC (Cri) 32
- ix) Chowa Mandal and Another Vs. State of Bihar (Now Jharkhand), Page- 180.
- x) Sunil Kumar and Anr. v. State of Rajasthan reported in 2005 SCC (Cri) 1230.
- xi) Vikram and Ors. v. State of Maharashtra reported in 2008 1 SCC (Cri) 362.
- xii) Annareddy Sambasiva Reddy and Ors. v. State of Andhra Pradesh reported in 2010 1 SCC (Cri) 630.

LAW AS DECIDED IN PRECEDENT AND ITS APPLICABILITY IN THE PRESENT CONTEXT:

27. Before dealing with the controversy let us first discuss the law on the subject as appears from the precedents cited above.

UNLAWFUL ASSEMBLY:

28. Four Apex Court decisions were cited on this score.

29. In the case of Tanaji Govind Misal (Supra) in paragraph 11 and 13 the Apex Court considered the submissions made on behalf of the appellant/accused. The Apex Court found from the evidence that the accused were determined to remove "Babul Trees" from the place of occurrence and as such came armed with axes, spears, lathis etc. Their intention was common. They were determined to remove the tree by any means. By the process the victim sustained injuries. The Apex Court observed that all the accused shared the common object of causing grievous hurt to the members of the complainant party. The Apex Court rejected the contention of the appellants/accused that they were carrying the weapons for

removing the branches of the trees. Considering such evidence the Apex Court observed, "it is true that the mere fact that no overt act has been attributed to the accused persons except A-1 to A-6 in the two murders is not sufficient to exonerate them from the charge under Sections 302/149 IPC. But applicability of Section 149 IPC would depend on the facts of each case."

30. In the case of Gangadhar Behera and Ors. (Supra), the Apex Court interpreted Section 149 IPC in detail. While doing so, the Apex Court took the assistance of earlier Apex Court decision in the case Masalti Vs. State of U.P., Page-202. The Apex Court therein observed, "then it is argued that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded." The Apex Court further observed, "where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal Courts have to do their best in dealing with such cases and it is their duty to shift the evidence carefully and decide which part of it is true and which is not."

31. Paragraph 24 of the said decision in the case of Gangadhar Behera being relevant herein is quoted below:

Section 149 IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was a member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall u/s 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of "might have been known". Positive

knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first, offences committed in prosecution of the common object would be generally, if not always, within the second, namely, offences which the parties knew were likely to be committed in the prosecution of the common object.

32. In the case of Sunil Kumar and Anr. (Supra), the Apex Court again reiterated their interpretation of Section 149. While doing so, the Apex Court observed, "where a group of assailants who were members of an unlawful assembly proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe the actual part played by each one of them and when several persons armed with weapons assault the intended victim, all of them may not take part in the actual assault. Therefore, it was not necessary for the prosecution to establish as to the specific overt act done by each accused."

33. In a recent decision in the case of Annareddy Sambasiva Reddy and Ors. (Supra), the Apex Court, in a case of the like nature observed that Section 149 creates constructive liability and makes a person liable, although, he may have had no intention to commit that offence or had not done overt act except his presence in the assembly and sharing the common object of that assembly. He comes with the mischief of Section 149.

34. Thus, on a combined reading we find that in a case u/s 149 coupled with the offence committed u/s 307 or 302 it is not always necessary for the prosecution to demonstrate and prove each one's participation in the crime. Once they shared the common object having an intention to commit such crime their presence was enough to roap in having constructive responsibility and liability. They were equally responsible for commission of the crime despite not committing any overt act.

SPUR OF THE MOMENT:

35. The decision in the case of Chowa Mandal and Anr. (Supra), the Apex Court considered the fact that the incident, in question, occurred on the spur of the moment without there being any intention of causing death. The Apex Court took a lenient view on that score. In our case from the evidence it is clear that they were hiding behind the culvert only to cause injury to the victims. PW-1

categorically stated that Hafijuddin ordered to "finish" them. PW-5 corroborated such evidence. The evidence of both PW-1 and 5 found corroboration from the actual occurrence when Yeasin died in the incident and Bari could save himself even after sustaining injury.

36. Hence, this decision would of no help to us.

UNNATURALITY:

37. Three Apex Court decisions were cited by Mr. Moitra to suggest that it was quite unnatural for Dost to arrange for medical treatment of his father Abdul Bari by keeping Yeasin Mondal uncared for although Yeasin was also a close relative.

38. In the case of M/s. Formina Sebastio Azardeo and Anr. (Supra), the appellants tied the victim with the post and watched injury being caused to them. No attempt was made by them to save the victim when the people started beating the victim. We are unable to find out any resemblance in the instant case.

39. In the case of Satguru Singh (Supra), the Apex Court considered the evidence. While doing so, it made observation with regard to the conduct of the eyewitness who did not take the injured to the hospital.

40. Similarly, in the case of Ram Lakhan Singh and Ors. (Supra), the Apex Court raised doubt when the complainant gave minute details of the articles robbed from the house leaving the victims lying dead in the house. The present case, in our view, has no resemblance with either of the facts.

ANOMALY:

41. The decision in the case of Vimal Suresh Kamble (Supra), was cited to support the contention that the appellant was prejudiced as PW-9 was called as Court witness. Had there been any Police examination u/s 161 the defence could have confronted the witness if there was any anomaly. The Police in their wisdom did not examine PW-1. Ajijul was also not produced at the trial. The Court thought it fit to call him to get unfolding of narrative. We do not find any illegality being committed by the Court on that score.

OUR VIEW:

42. The incident was reported to the Police by PW-1. During trial he corroborated his written complaint. His father corroborated him being PW5, PW3 and 4 also corroborated him. The post occurrence part was corroborated by the widow of the deceased victim being PW-2.

43. The accused had the common intention to attack the victims, might be the cause of political rivalry. Each one was present as deposed by the prosecution witnesses who could not be shaken in cross-examination. Hence, they could not avoid their responsibility.

44. Lot was said on the issue of framing of charge. We find that the recent decision of the Apex Court in the Case of Annareddy Sambasiva Reddy (Supra),

the Apex Court was of the view that a finding or sentence of a Court could not be set aside merely on the ground that the charge was not properly framed unless it had occasioned any prejudice. In the instant case, no prejudice was caused because of mistake in framing the charge. The accused understood the charge. They pleaded innocence and faced trial. The Court below by a detailed judgment held them guilty of the offence and convicted them accordingly. We do not find any scope of interference on that score.

RESULT:

45. The appeal, thus, fails and is hereby dismissed.

DIRECTION:

46. The appellants are now in jail. They are directed to serve out the remainder part of their sentence as awarded by the learned Trial Judge.

47. Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

48. Urgent xerox certified copy will be given to the parties, if applied for.

Kishore Kumar Prasad, J.

49. I agree.