
(2011) 01 CAL CK 0122

In the Calcutta High Court

Case No : Criminal Appellate Jurisdiction C.R.A. No. 101 of 1993

Ebadat Mondal and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 10-01-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 300, 302, 304

Citation : (2011) 1 CALLT 263

Hon'ble Judges : Raghunath Bhattacharya, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : J.N. Chatterjee, Yamin Ali, Julfi Kamal and Gourav Banerjee, for the Appellant; Subir Ganguly, for the Respondent

Judgement

Kalidas Mukherjee, J.—This appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, 3rd Court, Barasat, 24 Parganas (North) in Sessions Trial No. 2(11) 90 sentencing thereby the Appellants to suffer R.I. for life and to pay fine of Rs. 1,000/- each in default to suffer R.I. for six months u/s 302/149 IPC. The learned Judge also sentenced the Appellants to suffer R.I. for one year each u/s 323/149 IPC and to suffer R.I. for one year each u/s 148 IPC.

2. The prosecution case, in short, is that one Jinat Ali Mondal lodged complaint with the O.C. Habra P.S. alleging that on 01.01.1988 at about 1.30 P.M. he heard a hue and cry from the north-west corner of his house and after coming out, saw that his cousins Abu Shyam Mondal, Ebadat Mondal, Saheb Ali Mondal and Sahadat Mondal, all sons of Suklal Mondal and one Sahidul Mondal son of Abu Shyam Mondal were running with lathi, spear, chain, iron rod etc. At that time Majbur Rahaman and Mahbur Rahaman, Habibur Rahaman were coming with packs of paddy on their heads from the field. When they reached near Paschim Bagan graveyard, Sahadat suddenly pulled down the pack of paddy from the head of Majbur. On this, Habibur had altercation with Ebadat. The informant tried to stop them. Saheb Ali hit the informant on the head above the left ear. Sahadat

hit on the chest of the Majbur with a spear. Ebadat assaulted Habibur with "ballam". Saheb Ali hit Habibur on the head with an iron rod. Abu Shyam and Sahidul rushed towards Habibur and Mahabur with the iron chain and rod in their hands. Many persons assembled there. Majbur died on way to hospital.

3. It has also been alleged that the informant has 31 decimals in plot No. 623/1711. On the year of occurrence Matiur cultivated paddy in 2/3 portion of this land. Abu Shyam cultivated paddy in 1/3rd portion of the land and both of them reaped the paddy as per their shares and kept the same in the field 2/3 days ago. On the date of occurrence Abu Shyam and his brothers took away their own shares of paddy and the share of Matiur Rahaman. The incident took place when Majbur, Mahabur and Habibur were taking their own shares of paddy from the field.

4. After completion of investigation charge sheet was submitted. The learned Trial Judge framed charges u/s 148, 149/323, 302/149 of the IPC. The accused persons pleaded not guilty and claimed to be tried.

5. The learned Trial Judge upon consideration of the materials on record passed the impugned judgment holding that the P.Ws. particularly the eye witnesses deposed that Majbur @ Majbul died and succumbed to the injuries received on 01.01.1988 at the place of occurrence. The learned Judge has further held that the prosecution was able to cite P.Ws. who were the eye witnesses to the occurrence and also the other P.Ws. who had the occasion of seeing accused persons fleeing away from the place at or near the graveyard of Randhangacha. The learned Judge rejected the defence version that the prosecution witnesses including the deceased at the time of their return from the field were armed with ballam and, as a result, Majbul and Habibur Rahaman sustained such type of bleeding or spear injuries upon their persons. The learned Judge held that it was not a case of free fight between the two rival groups nor it was a case of private defence from the side of the accused persons. The learned Judge did not accept the contention of the defence that the place of occurrence was the field and not near the graveyard. The learned Judge held that so far as unlawful assembly was concerned, Abu Shyam had a cycle chain with him, but, there was absolutely no evidence whether he did an overt act by using the cycle chain inflicting assault upon any of the P.Ws. or upon the deceased Majbur. The learned Judge thus acquitted Abu shyam Mondal holding that his act in the unlawful assembly was not proved beyond reasonable doubt.

6. Mr. Jayanta Narayan Chatterjee, the learned Counsel appearing for the Appellants submits that five persons faced the trial and out of them Abu Shyam was acquitted by the learned Trial Judge. It is submitted that regarding the cutting of paddy, the dispute cropped up between the parties. As regards the charges under Sections 148, 149 IPC, Mr. Chatterjee submits that when Abu Shyam was acquitted by the learned Trial Judge, the remaining four accused persons could not be convicted u/s 148 and 302/149 IPC. On this point Mr. Chatterjee has referred to and cited the decision reported in 2002 SCC 1389

[Dhupa Chamar and Ors. v. State of Bihar].

7. It is contended that there was no evidence as to the alleged intention/common object to commit murder of Majbur. Mr. Chatterjee while taking us through the evidence of P.Ws. submits that the paddy was pulled down from the head of Majbur and from this it would be evident that there was an attempt to grab the paddy only and not to inflict assault upon anyone. Mr. Chatterjee further submits that when the altercation followed, there was sudden provocation as it would appear from the evidence of P.W. 5 and P.W. 6. Mr. Chatterjee submits that the alleged incident cannot come within the purview of Section 302 IPC. In this connection Mr. Chatterjee has referred to the provision contained in exception 3 to Section 300 IPC. It is submitted that the spear (ballam) was not seized at all. Mr. Chatterjee submits that so far as Appellant Sahidul is concerned, there is no evidence regarding his involvement in the alleged offence. Mr. Chatterjee submits that from the evidence of the Doctor it would appear that accused Abu Shyam was admitted in the hospital sustaining injuries and this fact of injury on the person of Abu Shyam clearly shows that there was a free fight between the parties. Mr. Chatterjee submits that there was no evidence that Sahadat intended to kill Majbur and in view of the evidence on record the sentence recorded by the learned Trial Judge u/s 302 IPC may be converted into Section 304 Part II. Mr. Chatterjee has referred to and cited the decisions reported in 2002 SCC 1389 [Dhupa Chamar and Ors. v. State of Bihar] Ram Milan and others Vs. State of Uttar Pradesh, 1994 SC 1452 [Lala Ram and Ors. v. State of Madhya Pradesh 2002 SCC 1564 [Bhima alias Bhimrao Sida Horrible and Ors. v. State of Maharashtra] paragraph 9 : Ram Swarup and Others Vs. State of Haryana, Paragraphs 9, 10 and 11 Mehtab Singh and Others Vs. The State of Madhya Pradesh, paragraph 3 Surendra and Another Vs. State of Maharashtra, Noyel Barla Vs. The State of West Bengal, .

8. Mr. Ganguly, learned Counsel appearing on behalf of the State submits that there were eight eye witnesses from whose evidence it would appear that all the Appellants were pre-armed with pierce, iron rod and lathi. It is contended that if assault is inflicted with these weapons on the vital part of the body it would cause death. Mr. Ganguly submits that there is no evidence that any of the eye-witnesses was armed with weapons. Mr. Ganguly submits that single blow with spear dealt by Sahadat caused the death of Majbur. It is contended that the evidence of the P.Ws. remained unshaken after undergoing the test of cross-examination. Mr. Ganguly submits that there is no evidence to show that it was a case of free fight and there is no evidence of scuffle. Mr. Ganguly submits that ocular version has been corroborated by the medical evidence. Mr. Ganguly submits that non seizure of the offending weapon would not cast any shadow of doubt upon the veracity of the prosecution case. It is contended that there is clinching evidence regarding the commission of the alleged offence. Mr. Ganguly submits that the accused persons were the aggressors and they were armed. Mr. Ganguly submits that there was only one blow of spear which caused the death of Majbur and in view of cogent evidence adduced by the prosecution there is no

scope to convert the charge from Section 302 to 304 Part-I or Part Part-II.

9. It is the contention of Mr. Chatterjee that five accused persons faced the trial before the learned Trial Judge and out of them accused Abu Shyam Mondal was acquitted. It is contended that when one accused out of five was acquitted by the learned Trial Judge, the charges under Section, 148, 149 Indian Penal Code against the rest of the accused persons are not maintainable. On this point Mr. Chatterjee has referred to and cited the decision reported in 2002 SCC 1389 [Dhupa Chamar and Ors. v. State of Bihar] (supra). The observation of the Hon"ble Apex Court in paragraph 17 of the aforesaid decision is quoted hereunder:

We are of the opinion that in view of the fact that three accused under Sections 302/149 out of seven accused persons and no other person is said to have participated in the occurrence as mentioned in the prosecution case and evidence, and as the number of accused persons becomes less than five, there cannot be said to be any unlawful assembly, as such conviction of Appellants 2 to 4 under Sections 302/149 becomes unwarranted.

10. In the instant case five accused persons faced trial and out of them one was acquitted by the learned Trial Judge. Relying on the aforesaid decision we are of the considered view that the charges under Sections 148, 302/149 Indian Penal Code are not attracted against the present Appellants.

11. Since the charge under Sections 302/149 IPC is not attracted, it is clear from the evidence on record that it would be the individual act of each of the accused persons. It is in evidence of P.W. 3, P.W. 4, P.W. 8, P.W. 12 and P.W. 15 that Sahadat pierced ballam in the chest of Majbur causing bleeding injury.

12. The Doctor P.W. 7 held postmortem examination over the dead body of Majbur @ Majbul Rahaman in connection with U.D. case No. 1 dated 01.01.1988 of Barasat P.S. and noted the following injury:

One penetrating injury present over the sternum of the said deceased - 2 1/2" X above the xiphoid process - 2" length X 1/2" breadth and enters into the cavity of thorax. In my opinion the cause of death of deceased was due to the effects of injury noted above and injury to lung, heart which was ante mortem and homicidal in nature.

13. P.W. 13 is the Police Officer who held inquest. He has stated that the deceased had a bleeding injury in the chest measuring about 1" X 1/2" approximately and there was no other external injury in his body.

14. From the evidence on record it is clear that only one injury was found on the chest of the deceased. Mr. Chatterjee contends that there was no intention on the part of the Appellants to cause the death of Majbur and due to sudden provocation preceded by an altercation, the alleged incident might have happened. On this point it would appear from the evidence of P.W. 3 Motiur Rahaman that they went to the field in village Randhangacha with a view to

fetching paddy cultivated by his father Motiur Rahaman and they were carrying the same on their heads. It is in his evidence that when they came to the threshold of the village pathway of their village, he noticed that accused Ebadat, Sahadat had two ballams and Saheb Ali had an iron rod. He has stated further that accused Sahadat snatched away the bundle of paddies from the head of Majbur; Jinat appeared there and wanted to persuade them; Jinat told Sahadat and Ebadat that they had cut the paddies not belonging to them; Saheb Ali attempted to assault Jinat upon his head by an iron rod and when he shifted his head the iron rod fell upon his left ear causing bleeding injuries therefrom; Majbur went a step forward when Sahadat pierced a ballam in the chest of Majbur causing bleeding injury. The other P.Ws. also stated that there was altercation over taking the bundles of paddy.

15. In the case of Lachman Singh v. State of Haryana (2007) 1 SCC 123 (supra) the occurrence took place in course of a sudden quarrel and the conviction of the Appellant was altered from Section 302 to 304 Part-I.

16. In the case of Kailash Vs. State of M.P., it was held that the entire attending circumstances must be taken into consideration for the purpose of finding out the nature of the actual offence committed. In the said case the accused inflicted a single blow with the help of axe on the head of victim on a sudden provocation and without any premeditation which resulted in the death of the victim; the injury received by the co-accused was not explained by the prosecution and under such circumstances the sentence u/s 302 Indian Penal Code was altered to Section 304 Part II Indian Penal Code.

17. In the case of Pappu Vs. State of Madhya Pradesh, there was a single blow on the head given by the Appellant by picking up a lathi in course of sudden quarrel without any premeditation and without taking advantage or acting in a cruel manner. It was held that the Appellant was liable to be convicted u/s 304 Part-II and not u/s 302 Indian Penal Code.

18. From the evidence on record it is clear that at the genesis of the alleged occurrence there was altercation over taking the bundles of paddy. From the evidence on record it would appear that there was no intention or premeditation to cause the death of Majbur. While deciding the question of intention the attending circumstances, nature of injury, nature of the weapon used are to be taken into consideration. From the evidence on record and also relying on the principles of law as discussed above, we are of the considered view that the conviction and sentence of Appellant Sahadat u/s 302 should be altered from Section 302 to 304 Part II Indian Penal Code.

19. As regards Appellant Sahidul Mondal there is no evidence that he assaulted anyone. We are, therefore, of the considered view that Appellant Sahidul is not guilty of the charges levelled against him. It would appear from the evidence of P.W. 3, P.W. 4, P.W. 6, P.W. 12 that Saheb Ali assaulted Jinat in the left ear and Ebadat pierced ballam on the chest of Habibur. It would also appear from the

evidence of P.W. 16 and P.W. 17 that Jinat had lacerated injury in the left ear and Habibur Rahaman had lacerated and penetrated injury on the head.

20. The learned Trial Judge sentenced the Appellants to suffer R.I. For one year under Sections 323/149 IPC. We have already held that Section 148 and 149 IPC are not attracted in this case. We therefore, set aside the conviction and sentence u/s 148 IPC.

21. We alter the conviction u/s 302 and sentence Sahadat Mondal to suffer R.I. for eight years u/s 304 Part-II Indian Penal Code. The other Appellants, namely, Ebadat Mondal, Saheb Ali Mondal are acquitted of the charge u/s 302/149 Indian Penal Code. But, we sentence them to suffer R.I. for one year each u/s 323 Indian Penal Code. Appellant Sahidul Mondal is acquitted of all the charges levelled against him and be set at liberty, if not wanted in any other case. The period of detention in custody be set off. The impugned judgment passed by the learned Trial Court is hereby modified to the extent stated above.

22. Appeal is allowed in part. The learned Trial Judge will issue modified jail warrant. The Appellants Sahadat, Ebadat and Saheb Ali Mondal are directed to surrender before the learned Trial Court immediately.

23. Let a copy of this judgment along with the lower Court records be sent down to the learned Court below immediately.

Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

Raghunath Bhattacharya, J.

I agree.