

(2010) 04 CAL CK 0003
In the Calcutta High Court
Case No : C.R.A. No. 282 of 2005

Fulchand Sahish and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313

Evidence Act, 1872 — Section 11

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2010) 2 CALLT 414

Hon'ble Judges : S.P. Talukdar, J;Prabhat Kumar Dey, J

Bench : Division Bench

Advocate : Dipak Sengupta, Mr. Himangshu De, Mr. Navanil De, Mr. J. Adhikari and Mr. A. Bera, for the Appellant; Asimesh Goswami, Ranjit Kr. Ghoshal and Mr. Subir Ganguly for the State, for the Respondent

Judgement

S.P. Talukdar, J.

The Judgment of the Court was delivered by

1. More than a couple of decades back, one Kriti Mandi lodged a complaint addressed to the Officer-in-charge of the Barabazar Police Station. On the basis of the same, a case being No. 70 dated 25.11.1989 under sections 147/148/149/323/324/325/326/302 of Indian Penal Code was started. Police Authority after completion of investigation submitted charge sheet. The case was, thereafter, committed to the learned Court of Sessions and subsequently transferred to the learned Court of Additional Sessions Judge, Fast Track Court No. 3, Purulia.
2. Learned Transferee Court on the basis of the available materials framed charge under sections 148, 325/149, 302/149 and 326/149 of the Indian Penal Code against as many as 13 accused persons.
3. The said accused persons pleaded not guilty to the said charges.

4. Prosecution in order to establish the guilt of the accused persons examined as many as 19 witnesses in its support.

5. Of them, P.W. 1 is the defacto-complainant who in his elaborate evidence-in-chief sought to substantiate the allegations made in the written complaint. P.W. 1 deposed that the incident took place on 8th of Agrahayan 1396 B.S. at about 6-30 p.m. and it was the day of Lok Sabha election. Identifying himself as a supporter of Congress Party, he stated that even after casting of votes, he along with others were waiting over there under instruction of his party agent, Lambodar Mandi. While returning home at about 5-30/6 p.m., the accused persons stopped them in front of the party office of the CPI(M). Immediately thereafter, Phulchand Sahish, Gopal Mahato, Monohar Mahato, Paban Mahato, Mahindi Mandi, Gobinda Sahish, Brajaram Soren, Rashik Majhi, Kaliram Majhi, Jugal Majhi, Naren Majhi and Nakro Majhi started assaulting him and others. P.W. 1 stated that Lambodar Mandi was assaulted by Monorath Mahato. Gobinda Sahish assaulted him on his head with an axe. Other persons also started assaulting him, Lambodar and Bhivu, Bhajahari Mandi was driven away.

6. Of them, 3 (three) persons namely Binonda Mahato, Jagannath Mahato and Ganesh Sahish said that they should be killed since they belonged to Congress Party, Jharkhand Party etc. They directed their companions to finish them. P.W. 1 and others started running towards the North. They, however, found Bhajahari being assaulted by Phulchand Sahish, Monorath Mahato, Gopal Mahato, Mahindi Mandi, Rasik Majhi, Kaliram Majhi, Naren Majhi and Nekro Majhi. Being frightened, P.W. 1 took shelter in the house of Jaladhar Murmu of village Sonadah. Lambodhar and Bhivu also reached there. They discussed the matter amongst themselves and spent the night over there. Three (3) of their companions namely, Brojahari Mandi, Gahiram Soren and Ramjit Mandi were not traceable. Next morning, Jaladhar Murmu was sent to find them out. Ramjit Mandi and Gahiram Soren could be located but Bhajahari could not be found out.

7. Thereafter, they could find dead body of Bhojahari lying in the paddy field of Raju Mahato. On being informed by Lambodar Mandi police arrived at the spot. They were taken to hospital for treatment. P.W. 1 claimed that he narrated the incident to Lambodhar Mandi, who wrote the complaint as per his instruction, since he suffered injury on his head. Being identified by him, his signature in the written complaint was marked Exbt. 1/1. The said complaint was read over and explained to him. He along with other injured persons like Gahiram, Soren, Ramjit Mandi and Lambodhar Mandi were treated in the hospital. He was under treatment at Barabazar Primary Health Centre for three (3) days and then, they shifted to Purulia Sadar Hospital where he had been under treatment for a few more days. P.W.1 identified the accused persons in Court.

8. P.W.2 in his evidence-in-chief stated that 24th November, 1989 was the date for Parliamentary Election. He was the Polling Agent for the Congress Party. There were agents of other political parties as well.

9. It appears that in elaborate evidence-in-chief, P.W. 1 described the place of occurrence as the spot, which was in front of the CPI(M) party office. In cross-examination, P.W. 1 sought to describe the place of occurrence in further details. Referring to the three (3) witnesses, namely, Prallad Mahato, Ruksin Majhi and Baburam Murmu, he said that they were all residents of village Herbona. He admitted that Resin Majhi was a local MLA earlier. He further admitted that there were houses of Sahadeb Mahato, Dibakar Murmu, Laxmiram, Gokul, Baidyanath, Allhad, Dhukhu and many others in between the primary school and the temporary election office. He stated that the paddy field of Raju Mahato was situated a distance of 500/600 yards from the temporary election office of CPI(M) and it was at a distance of 40/50 yards from the relief road. The house of P.W. 1 was situated at Majhipara and that of Lambodhar was nearby. P.W. 1 admitted that little away from there, another Booth, being No. 123, was set up in a primary school. The house of Ramjih Mandi was adjacent to the said Booth No. 123. There had been evidence in cross-examination of P.W. 1 about tried location of the houses of various other persons. P.W. 1 declined to have stated in the FIR that except seven accused persons, there were 3/4 other persons whom he could not recognise since at that time, it was dark. P.W. 1 claimed that he sustained bleeding injuries and handed over the wearing apparels to the I.O. who seized the same and made a seizure list wherein he put his signature. P.W. 1 admitted that the deceased victim, Brojahari Mandi, was his brother-in-law as also the fact that he used to sell illicit liquor during the festivals. He mentioned that it had been stated in the FIR that Gobinda Sahish assaulted Brojahari Mandi and he witnessed the same.

10. P.W. 2 in his evidence-in-chief mentioned the names of the assailants. He claimed that he recognised them with the light of the torch as well as by their voice. One Monorath Mahato attacked him with lathi and Kiriti Mandi was assaulted by Gobinda Mahato with an axe on his head resulting in bleeding injury. P.W.2 specifically mentioned that the accused persons took away Brojahari Mandi, Gahiram Soren and Ramjit Mandi. He as well as all his associates somehow fled away. He took shelter in the house of Jaladhar Murmu of Chanditala. Victims Kiriti Mandi and Vivekananda were already there. They could not, however find Ranjit Mandi, Brojahari Mandi and Gahiram Soren. Jaladhar Murmu was sent to find them out. He could find Gahiram Soren and Ramjit Mandi. Gahiram Soren came to their place along with him. He was again sent for finding Brojahari Mandi out. After sometime he returned and informed that Brojahari Mandi was lying dead on the field of Raju Mahato.

11. Being requested by Kiriti Mandi, P.W.2 wrote down the FIR and it was read over and explained before Kiriti Mandi put his signature. P.W.2 identified the FIR, which was marked Exbt. 1.

12. Inquest was held in his presence and he identified his signature in the inquest report being marked Exbt.2/1. He as well as other injured persons were treated at Barabazar Primary Health Centre. Kiriti Mandi was, thereafter, referred

to Purulia Sadar Hospital. The accused persons were identified by P.W.2 who again stated that two (2) of the accused persons namely, Gobinda Sahish and Daru Maji @ Naren had expired.

13. In cross-examination, P.W-2 mentioned that he stated before the I.O. that while they reached near the Election Office of CPI(M), 14 (fourteen) persons stopped them. He identified the accused persons in the light of the torch which was handed over to the I.O.P.W.2 could not say as to whether the said torch was seized or not. P.W.2 in cross-examination stated that they could not send any one to the police station during the night. Police came to the house of Jaladhar Murmu next morning at about 9 a.m. and from there, they were taken to the place where the dead body of Brojahari Mandi was lying. They were then taken to the police station and from there to the Primary Health Centre. The only interaction that he had with the I.O. was on 25th and not any time thereafter.

14. P.W.3 is the father of one Vivekananda Mahato who on the date of the election acted as Polling Agent of J.M.M. a political party.

15. In his evidence-in-chief, he submitted that the incident took place on 8th of Agrahayan, 1396 B.S. which was a Friday. It was the date for Parliamentary Election. His son did not return home that night and on the following morning, P.W.3 went to the house of Jaladhar Murmu at about 8 a.m. He could meet his son and others there. Lambodhar Mandi, who deposed as P.W.2, reported about the incident to him. Kiriti Mandi (P.W. 1) also joined him. Police arrived there. Kiriti Mandi (P.W. 1) told him that Brojahari Mandi was not traceable. P.W.3 found them in injured condition. They were all taken by the police to the place where the dead body of the deceased victim was lying. It was in the paddy field of Raju Mahato. Inquest was held in his presence and he identified his signature being marked Ext.2/2 in the inquest report. The wearing apparels of the deceased victim were seized under seizure list. P.W.3 identified his signature in it, being Ext.3/1. He further identified the wearing apparels, which were marked Mat. Ext.1 collectively. Other articles including arrow, slippers etc. were also seized under seizure list being marked Mat. Exts.II & III respectively. Bloodstained earth was collected from the spot under seizure list and P.W.3 identified his signature therein, being marked Ext.4/1.

16. P.W.4 deposed that one Brojahari Mandi died about 12/13 years prior to his giving evidence and it was 8th Agrahayan, Friday. In evidence-in-chief, he did not lend any support to the prosecution case. He was then declared hostile but there is nothing worth mentioning in the statements made by him in cross-examination by the prosecution.

17. P.W.5 in his evidence-in-chief, stated that the incident took place on 8th Agrahayan at about 6/6-30 p.m. on the date of parliamentary election. While at home, he could hear an alarm raised by Anil Hansda at about 7-30/8 p.m. He along with a few others rushed to the house of Jaldhar Murmu. Reaching there, he found Kiriti Mandi (P.W. 1), Lambadhor Mandi (P.W.2) and Bibek Mahato and

all were in injured condition. Lambodhar Mandi narrated the incident to him. It was his evidence that some persons stopped them in front of the house of one Laxmiram Mahato where the election office of CPI(M) was opened for the purpose of election. He could identify the accused persons in the light of torch. P.W. 5 further reported that he was assaulted by Monorath Mahato with a lathi. Kiriti Mandi (P.W. 1) told him that while he was running away, he could hear the voice of Brojahari Mandi saying "MARLO, MARLO". P.W.5 identified accused persons on dock. There is nothing significant in his evidence in cross-examination.

18. P.W.6 identified his signature in the inquest report being marked Ext.2/3. P.W.7 apart from identifying his signature in the inquest report, being marked Ext.2/4, also stated that certain wearing apparels of the deceased victim were seized by police in his presence under seizure list. He identified his signature in the seizure list, being marked Exbt.3/2. Being identified by him, a wristwatch was marked Mat. Eixt. IV. P.W.7 further identified other seized articles being Mat. Exts. I. II and III collectively. The seized arrows were also identified by the said witness. P.W.8 did not claim to be an eyewitness. Being asked by Anil Hansda, he accompanied him and went to the house of Jaladhar Murmu where they found Lambodhar Mandi, Kiriti Mandi and Vivekananda Mahato. They were in injured condition. P.W.8, thereafter, referred to what was told by them.

19. P.W.9 seems to be a material witness since three (3) of the injured persons including P.W. 1 and P.W.2 claimed that they all took shelter in his house in injured condition. P.W.9 categorically deposed that he could not remember as to how such injuries were caused to them.

20. P.W. 10 is the Doctor who held post mortem examination over the dead body of the deceased victim Brojahari Mandi. The cause of death in his opinion was due to shock and haemorrhage associated with head injury. In his evidence-in-chief, he stated in details about the nature of the injuries found by him. Being proved by him, the carbon copy of post mortem report had been marked Ext.5.

21. P.W. 11 identified himself as the Polling Agent for J.M.M., a political party. He stated that the incident took place on 24th November, 1989 on the date of parliamentary election. While corroborating the evidence of other victims like P.W. 1 and P.W.2 on some of the material points, he stated then he was suddenly assaulted in his right leg with a lathi. He claimed that he met Kiriti Mandi and others in the house of Jaladhar Murmu. He was told that Kiriti Mandi could hear the voice of Brojahari Mandi that he was being killed by Mahindi Mandi and Jugal Mandi.

22. P.W. 12 is the police officer who was on election duty on 25th November, 1989. Like P.W. 12, evidence of P.W. 13, who is again a police personnel, is of formal nature. In his evidence-in-chief, he stated that on 26th November, 1989, he took the dead body of one Brojahari Mandi to Purulia Sadar Hospital and identified the same to the doctor. The wearing apparels of the deceased victim were handed over to him and he deposited the same in the police station. P.W.

14 is another retired police officer who received the written complaint made by Kiriti Mandi. He identified the endorsement given by him marked Ext. 1 /2. On the basis of the said complaint, he filled in the formal FIR. The same had been marked Ext. 7. P.W. 15 is another police officer when took up investigation of the case from Mr. K. Majhi after his transfer. He just went through the case diary and after consultation with his superior authority, he submitted charge sheet. He also proved the F.S.L. report marked Ext. 8 & 9. After completion of investigation he submitted charge sheet.

23. P.W. 16 just stated that he could find the dead body of Brojahari Mardi lying at village Amrabera of Barabazar Police Station. P.W. 17 is the doctor who on 26th November, 1989, while attached to Sadar Hospital, Purulia and Medical Officer (Surgeon), examined Kiriti Mandi. He found stitched wound measuring 2" in length at the vault and another such wound 1" length on the nose. The said wounds were stitched at Basabazar Primary Health Centre. Subsequently, X-ray of the skull was done but no abnormality was detected Being proved by him, the injury report had been marked Ext. 10. He admitted that in the requisition slip it was mentioned that stitches were made on the said patient.

24. P.W.18 is the police officer who while attached to Barabazar Police Station, as Sub Inspector started P.S. Case No. 70/89 dated 25.11.1989. At about 8 a.m. he got an information that a dead body of Bhojahari Mandi was lying at Amrabera village. This information was recorded in the G.D. which being identified, had been marked Ext 11. He being accompanied by another Sub-Inspector. Subodh Chaki, rushed to the place where the village Chowkidar identified the place where the dead body was lying. He also, thereafter, went to the place where the other injured persons namely, Kiriti Mandi, Lambodhar Mandi, Ramjit Mandi and Vevakananda Mahato took shelter. Kiriti Mandi handed over a written complaint and P.W.18 sent the same to the concerned police station for starting a case. He made arrangement for medical treatment of the injured persons. On the basis of such written complaint, Barabazar P.S. Case No. 70/89 dated 25.11.1989 was started. P.W.18 held inquest in respect of the dead body of Vhojahari Mandi. Being proved by him, the same had been marked Ext.3. P.W. 18 visited the place of occurrence and prepared a sketch map with index and the same had been marked Ext. 14. He, thereafter, recorded the statements of some witnesses and victims under sections 161 of the Code of Criminal Procedure.

25. He seized certain articles under seizure list, which included, bloodstained wearing apparels of Kiriti Mandi and Lumbodhar Mandi. The wearing apparels of the deceased victim were also seized under seizure list and the same had been marked Ext.3. He thereafter seized bloodstained earth., hawai chappal, one pair leather slipper, five arrows etc. under the seizure list, which, being proved by him, had been marked Ext.4. He subsequently prayed for adding section 307 of Indian Penal Code. He arrested three (3) accused persons who were forwarded to Court. In his evidence, he referred to the injury report, which was collected by him and referred to the various steps taken by him during investigation. In view

of his transfer, the case was handed over to Mr. B.D. Mahato who submitted charge sheet.

26. P.W. 19 is another doctor who on 25.11.1989 while attached to Barabazar Primary Health Centre examined one Kiriti Mandi at about 10 a.m. He found bleeding lacerated injury on the left parietal occipital region of scalp measuring 4" x 2" x 1" as well as bleeding cut injury over the filtrum and external nose of right nostril measuring about 1" x 1/2" with bleeding from nose. The patient was found suffering from pain and had also swelling over various parts of the body. The said doctor also examined Lumbodhar Mandi and Ramjit Mandi. In his evidence, he referred to the nature of the injuries suffered by them as well. It was his further evidence that one Vevekananda Mahato was also treated in the hospital by him on that date.

27. Referring to injury No. 1 suffered by the victim Kiriti Mandi, P.W. 19 opined that such an injury could be caused by being struck with the blunt side of the axe. He further deposed that as far as the injuries sustained by Lumbodhar Mandi, Ramjit Mandi and Vivekananda Mahato are concerned, those could be caused by lathi and other hard substance.

28. This was, in brief, all about the prosecution evidence on record in this case.

29. The accused persons were examined and their statements were duly recorded u/s 313 of the Code of Criminal Procedure.

30. The learned Trial Court by the impugned judgment found the present appellants guilty of the offence u/s 302/149 as well as u/s 148 of Indian Penal Code. Appellants No. 1 & 3 were further held guilty of the offence u/s 323 of Indian Penal Code. The learned Trial Court further held that charges under sections 325/149 and 326/149 of Indian Penal Code could not be established.

31. While assailing the judgment and order of conviction and sentence, it was submitted by learned counsel that the learned Trial Court failed to appreciate the glaring inconsistencies in the evidence on record. It was urged that having regard to the fact that the alleged occurrence took place in November 1989 when the sun sets quite early, question of any identification of the assailants could not arise. Prosecution case refers to identification by respective voice and in the light of the torch. Such identification is a very weak piece of evidence and learned Trial Court should not have placed reliance on the same. The fact that the accused persons and the defacto complainant as well as the alleged victims belonged to rival political parties ought to have been borne in mind by the learned Trial Court. According to the learned counsel, the witnesses who could lend some support to the prosecution case are all interested. There is no evidence of any neutral or disinterested witness. Though claimed by the complainant that while running away, he could hear Bhojahari Mandi crying by saying "MARLO", he did not make such statement before the Investigating Officer.

32. Much emphasis was laid on the fact that there had been no seizure of any

torch. It was further submitted that there had been some delay in sending the FIR, which creates suspicion. Significantly enough, the FIR does not specifically mention the names or the witnesses, which according to the learned counsel should have raised doubt in the mind of the learned Trial Court. It was submitted that the evidence of P.W.4 that while returning home, it was totally dark should have been considered in its proper perspective.

33. Learned senior counsel, Mr. Dipak Sengupta, inviting attention of the Court to the evidence of P.W. 1 that he along with Lumbodhar Mandi and Vivekananda Mahato took shelter in the house of Jaladhar Murmu and discussed the incident amongst themselves, submitted that there had been prior discussion in the evening before filing of FIR. He submitted that the allegations were, thus, tailored and cooked up. Inviting attention of the Court to the evidence that there were many houses between the Primary School and the Temporary Election Office, Mr. Sengupta expressed wonder as to why none of the persons of the said houses was taken into confidence. Mr. Sengupta categorically asserted that there had been failure on the part of the learned Trial Court in appreciation of evidence. Referring to the evidence of P.W.9. he submitted that such evidence does not show as to how the injuries were caused.

34. Significantly enough, Mr. Ranjit Kr. Ghoshal, appearing as learned counsel for the State frankly submitted that the evidence on record suffers from inherent hollowness and latent weakness. According to him, the names of the assailants were disclosed by the victim. Kalipada, though admittedly minor, does not appear to have been properly dealt with. He referred to the evidence of P.W.8 and P.W. 11. He further submitted that the learned Trial Court did not examine the accused persons properly while recording their statements u/s 313 of Cr PC. He, in fact, echoed the voice of Mr. Sengupta while submitting that some material evidence is hit by section 162 of Code of Criminal Procedure.

35. It cannot be disputed that recognition of the assailants by voice is a matter to be dealt with extreme caution. Inviting attention of the Court to the decision of the Apex Court in the case between Musakhan and Ors. v. State of Maharashtra, as reported in AIR 1976 SC 2563, Mr. Himangshu De, joining learned counsel Mr. Sengupta, submitted that it is not enough that an accused is a member of an unlawful assembly at some stage but it is required to be established that he was there at the crucial stage and he shared the common object of the said assembly during all these stages. Reference was made to the decision in the case between Ram Kumar Pandey Vs. State of Madhya Pradesh, while submitting that an FIR which is a previous statement can be used to corroborate or contradict the maker of it. But omissions of impossible facts, affecting the probabilities of the case are relevant u/s 11 of the Evidence Act in judging the veracity of the prosecution case.

36. True, it is the quality of the evidence which is important in order to arrive at a conclusion. The number of witnesses examined does not by itself effect change the complexion of the said quality. In the present case, as mentioned earlier, the

number of witnesses did not lend any effective support to the prosecution case.

37. In order to establish the guilt of the accused persons, the prosecution is required to establish that the incident happened on the date and at the time and place and in the manner, as claimed by it.

38. It is well settled that credibility of testimony depends on judicial evaluation of the totality and not isolated scrutiny. Marginal mistakes and minor discrepancies do not necessarily demolish the prosecution case. No doubt, proof beyond reasonable doubt is a guideline and not a fetish. It cannot be disputed that truth some time suffers from infirmity when projected through human process. But keeping all these factors in mind, it is necessary for the Court to satisfy itself as to whether the charges could be established beyond the shadow of reasonable doubt.

39. It follows from the discussion, as made hereinbefore, that the prosecution in this case failed to discharge the said burden.

40. In the considered opinion of this Court, the learned Trial Court in this case was not justified in holding the present appellants/accused persons guilty. Accordingly the judgment dated 3rd March, 2005 and the order dated 4th March, 2005 passed by learned Additional Sessions Judge, Fast Track Court No. 3. Purulia in S.C. No. 4 of 1999 (S.T. No. 49 of 2003) be set aside.

41. The appellants/convicts be accordingly set free and if on bail, they be released from their respective bail bonds at once.

42. Send a copy of this judgment along with L.C.R. back to the learned Trial Court for information and necessary action.

Criminal Department is directed to supply certified copy of this judgment, if applied for, as expeditiously as possible.

Prabhat Kumar Dey, J.

43. I agree.