

(2019) 06 CAL CK 0001
In the Calcutta High Court
Case No : Criminal Appeal (CRA) No. 752 Of 2008
Gabbar Sk. @ Gabba Sk Vs State Of West Bengal ?

Date of Decision : 10-06-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304, 341
Code Of Criminal Procedure, 1973 — Section 164, 313

Citation : (2019) 06 CAL CK 0001

Hon'ble Judges : Md. Mumtaz Khan, J; Jay Sengupta, J

Bench : Division Bench

Advocate : Tapan Datta Gupta, Parvej Anam, Sandip Dinda, N.P. Agarwala, Debabrata Dasgupta

Final Decision : Dismissed

Judgement

Jay Sengupta, J

1. This appeal is directed against the judgment and order of conviction dated 25.08.2008 and sentence dated 30.08.2008 passed by the Learned Additional Sessions Judge, 3rd Fast Track Court, Malda in Sessions Trial No. 1(7)/2007: Sessions Case No. 192/2007, thereby convicting the appellant under Section 302 read with Section 34 of the Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5000/-, in default to undergo rigorous imprisonment for one year while acquitting him from the charge under Section 341 read with Section 34 of the Penal Code.

2. On 27.01.2005 at about 20.30 hours, PW 9, the brother of the victim/deceased, lodged a First Information Report against the appellant and one Jahangir Sk. (since deceased) under Section 302 read with Section 34 of the Penal Code. He alleged that on 27.01.2005 at about 8.30 hours his elder brother Biyel Sk. and PW 7 went to their mango orchard. While returning, at about 15.00 hours when they arrived near the mango orchard of one Ashu Khan, the two accused restrained the victim. Out of previous grudge, they started to inflict the blows of 'hensua' on him. PW 7 fled away and reported the incident to them. When PW 9 and his family members rushed to the said mango orchard of Ashu

Khan, they found the victim lying dead with bleeding injuries on the whole body.

3. Investigation commenced. On 27.01.2015 at about 17.35 hours PW 13, a Sub-Inspector of Police, held inquest at the mango orchard of Ashu Khan over the deadbody of the victim in the presence of witnesses PWs 1, 4, 7, 9 and another. He found deep cut injuries on several parts of the deadbody, nearly from head to toe. On 28.01.2005 at about 12 noon, PW 8 held post-mortem examination over the deadbody of the victim. He too found several injuries on the deadbody. According to report, the death was caused due to the ante-mortem injuries. The injuries might have been caused by hard and sharp cutting instrument. After completion of investigation a charge-sheet was submitted. On 02.07.2007 charges were framed against the two accused under Sections 341 read with Section 34 and under Section 302 read with Section 34 of the Penal Code.

4. During trial the prosecution examined thirteen witnesses to establish its case. The defence case was primarily that of a denial of the prosecution case.

5. From a careful perusal of the evidence on record it appears that PW 1 was a co-villager of the victim and a post-occurrence witness. The victim was the husband of PW 2's sister. PW 2 was also a co-villager and a post-occurrence witness. He saw that the brain matters of the victim had come out. He was a seizure list witness for the seizure of a muffler, a sandal and blood stained earth. In his cross-examination PW 2 stated that he found fifteen injuries on the deadbody. PW 3 was a home guard who carried the written complaint from the place of occurrence to the police station. PW 4 was the victim's wife. She deposed that the accused had a dispute with the victim over business matters. She was proceeding in a taxi for availing of some medical treatment. Near Loton Masjid she got down and saw that the two accused were assaulting the victim with 'hensua'. The victim cried loudly. The accused fled away seeing her. The victim suffered serious injuries and blood was oozing out. PW 4 was also a witness to the inquest. In her cross-examination, she stated that she had gone to one Dr. Tripathi for treatment. She did not hand over any medical prescription to the police. After the treatment, she got down near the place of occurrence. Although PW 9, her brother-in-law, lodged the First Information Report, she too put a signature on it. PW 5 was a home guard who carried the deadbody for autopsy. PW 6 was a co-villager and an eye-witness. While returning in bicycle, he saw a gathering by the side of the Loton Masjid. He saw the two accused cutting the victim with a 'hensua'. The surrounding people came running. The victim died on the spot. He saw PWs 7, 9, 10 and 11 present there. Then he fled away out of fear. In his cross-examination, PW 6 admitted that he stated all these for the first time in Court. PW 7 was an eye-witness in part. He had accompanied the victim to their mango orchard and were coming back when the two accused accosted them. He deposed that initially the victim was talking to PWs 10 and 11. Then the two accused attacked the victim with 'hensua'. The appellant also assaulted PW 10 when he tried to restrain the assailant. Then the accused chased and assaulted the victim. After the two accused started

assaulting the victim, PW 7 fled away from the scene. He was also a witness to the inquest and a witness to the seizure of a muffler, a sandal and blood stained earth. He also gave a statement under Section 164 of the Code before a Learned Magistrate. In his cross-examination, he stated that he did not know who had murdered Odul, the brother of the appellant. No one attempted to intimate the nearby police or BSF camp. He did not know whether PW 1 or Manirul were accused in the case started regarding the murder of the appellant's brother. PW 10 did not suffer any injury. The process of assault went on for about 5/10 minutes. The 'hensua' belonging to the victim was attached to his bicycle at that time. PW 8 held a post-mortem examination over the deadbody on 28.01.2005. Rigor mortis was present. The body had become pale. There were about twenty eight injuries, of sharp cutting nature, on various parts of the body. Death had probably taken place within 48 hours of the examination. According to PW 8, the death was due to effects of ante mortem injuries, homicidal in nature although the word homicidal was not mentioned in the post-mortem report due to inadvertence. In his cross, PW 8 stated that the infliction of 'hensua' blow would not be equally deep for each and every injury if the entire 'hensua' had caused the strikes, as the 'hensua' had a circular edge. Undigested rice was found in the stomach. PW 9, the younger brother of the victim, was a post-occurrence witness and the de facto complainant in this case. He got down from a taxi near Loton Masjid and saw a gathering. PW 7 told him that the accused had murdered the victim. He saw the accused flee away with 'hensua' in bicycle. In his cross-examination, he stated that he had gone to Malda town for shopping. He heard about the incident while he was in a grocery store. He did not find that seized articles in Court. PW 10 worked at the Hindustan Construction Company as a supplier of electrical goods. He was a local man and was an eye-witness to the incident. He was sitting with the victim and another man. The victim called the appellant. Then the accused Jahangir Sk (since deceased) asked why did he call him. The victim said that he did not. Then the said Jahangir Sk. started inflicting 'hensua' blows on the victim. PW 10 and one Rabiul tried to prevent them, but failed. Both the appellants chased and hacked the victim indiscriminately. In his cross-examination, PW 10 stated that the accused went away in bicycle. He thereafter went to the Police Station. PW 11 was a neighbour of the victim and an eye-witness to the occurrence. He was sitting in a 'mancha' with PW 10 and one Maimul. PW 11 corroborated the version given by PW 10. In his cross, PW 10 admitted that there was no wordy altercation between the accused and the victim. PW 12 was the Sub-Inspector of Police who recorded the formal First Information Report. PW 13 was the Investigating Officer of the case. He held inquest over the deadbody, examined witnesses, seized articles and sent Maruf for examined under Section 164 of the Code. But, he could not arrest the accused. He submitted a charge-sheet under Sections 341, 302 read with Section 34 of the Penal Code. In his cross-examination, he admitted that he had visited the place of occurrence only ones. PWs 2, 4, 6 and 11 did not say a few things during interrogation by him.

6. Mr. Tapan Datta Gupta, the Learned Advocate appearing on behalf of the appellant, vehemently opposed the judgment and order of conviction and sentence. He submitted as follows. Although PWs 4 and 6 were not believed by the Learned Trial Court to be eye-witnesses, strangely PWs 7, 10 and 11 were regarded by the Learned Trial Court eye-witnesses. There were serious contradictions between the depositions of PW 7 on one hand and PWs 10 and 11 on the other. PW 7 did not give any account of initial conversation between the victim and the accused. This makes the very presence of PW 7 at the place of occurrence during the relevant time doubtful. Neither the offending weapon nor the bicycle used were seized in this case. There was no premeditation in the alleged commission of crime. The PW 4's allusion to an enmity between the victims and the appellants was made for the first time in Court. If at all, at best Section 304 of the Penal Code could be attracted in this case.

7. Mr. N.P. Agarwala, the Learned Advocate appearing on behalf of the State strongly supported the conviction and sentence. He submitted as follows. There were five witnesses in this case who claimed to be eye-witnesses. That apart, three post-occurrence witnesses, the post-mortem doctor and other police personnel supported the prosecution case. PW 4, the wife of the victim was a chance eye-witness. But, the Learned Trial Judge did not believe her version due to the inconsistency with the Investigating Officer. So was the case of PW 6. But, PW 7 was the star eye-witness in this case. He initiated the complaint. He had accompanied the victim. His statement was consistent. The evidence adduced by PW 7 was substantially corroborated by PWs 10 and 11. Here what was of utmost significance was that PWs 7, 10 and 11 were only neighbours and not relations of the victim. The evidence of the eye-witnesses was fully corroborated by PW 8, the post-mortem doctor. He found as many as twenty eight injuries on the deadbody. Motive behind the murder came out from the evidence of PW 4 who deposed that there was an enmity between the accused and the victim over business matters. In his examination under Section 313 of the Code, the appellant gave no explanation about the circumstances appearing against him.

8. We heard the submissions of the Learned Advocates appearing on behalf of the appellant and the State and carefully went through the evidence and other materials on record to assess the correctness and legality of the impugned judgment and order of conviction and sentence.

Motive:

9. PW 4, the wife of the victim, stated in her examination in chief that there was a dispute between the victim and the accused over business. This gave out the motive behind the murder. This testimony was not challenged in clear terms by the defence by way of cross-examination. What was asked was whether this was stated to the Investigating Officer or not. It is not sufficient to cross the Investigating Officer thereafter and try to fish out any inconsistency. Moreover, at the very inception PW 9, the de facto complainant and brother of the victim stated in the First Information Report that the accused assaulted the victim due

to previous grudge.

Eye-witnesses:

10. We fully agree with the conclusion arrived at by the Learned Trial Judge that PWs 4 and 6 could not be regarded as eye-witnesses because of the inconsistencies their testimonies had with the evidence adduced by the Investigating Officer. PW 7, was a witness, in part, to the murderous assault by the accused. He did say that while returning from work from their own mango orchard, they were sitting in a 'mancha' and taking rest in the mango orchard of Ashu Khan, after which the accused came and assaulted the victim. The only ostensible difference between PW 7's deposition and the depositions of the other two eye-witnesses PWs 10 and 11 is that PW 7 did not say anything about the brief initial interaction the victim had with accused. We do not consider this to be a material contradiction. PW 7 fled away from the place and intimidated others. On the other hand, PWs stayed there and thus gave more complete details about the incident. In fact, PW 10 tried to prevent the accused from assaulting the victim, but failed. PWs 10 and 11 gave vivid details of the assault. The two accused chased the victim and hacked him with 'hensua'. The eye-witnesses PWs 7, 10 and 11 were not related to the victim and their evidence could not be shaken in the cross-examination.

Post-occurrence accounts:

11. PWs 1, 2 and 9 were the post-occurrence witness to the incident. Their depositions lend support to the prosecution case in good measure. The deadbody was indeed found at the place of occurrence with multiple injuries.

Medical evidence:

12. There were as many as 28 sharp cutting injuries found on the victim's body. This clearly supports the ocular evidence that accused chased the victim and hacked him mercilessly. PW 8, the post-mortem doctor, deposed that the death was due to ante-mortem injuries that were homicidal in nature. The nature of injuries matched with use of a 'hensua'. Therefore, the medical evidence fully corroborated the ocular version.

A murder or a mere culpable homicide:

13. It is true that the number of injuries may not always be the guiding factor in determining whether it is a case of murder or culpable homicide not amounting to murder. Nevertheless, here there were as many as 28 injuries inflicted by the accused with a sharp cutting weapon. Whether it was a pre-meditated murder or not, there was a previous dispute and grudge for providing a motive. Intention, as is well known, can be developed even immediately before the commission of a crime. What is of utmost importance here is that although PW 10 and another tried to prevent the accused from committing the crime, they thwarted such attempts and went on with their incessant assaults on the victim with an inexorable conviction. In view of these circumstances, we cannot treat this only

as a case of culpable homicide not amounting to murder.

14. The convincing evidence adduced by the independent eye-witnesses, the corroborative medical evidence and the other evidence and materials on record unerringly point to the guilt of the appellant.

15. In view of the above discussions, we hold that the prosecution case has been proved beyond any reasonable doubt as against the appellant and hence, the appeal is dismissed and the conviction and sentence are affirmed.

16. The judgment was made ready only on 24.05.2019, the last day before the intervening summer vacation. As such, the same is being delivered today on the first day after the reopening of the Court.

17. A copy of the judgment along with the Lower Court records may be sent down to the learned Trial Court forthwith for information and necessary action.

18. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.