

(2010) 12 CAL CK 0075
In the Calcutta High Court
Case No : C.R.A. No. 55 of 1998

Gama alias Md. Anwar and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 07-12-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2010) 12 CAL CK 0075

Hon'ble Judges : Raghunath Ray, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Kallol Mondal, Nos 4 and 7 and Ashis Bhattacharya, No 3, for the Appellant; Sushil Kr. Mahata and Ratna Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee.J.

1. THIS APPEAL :

Vide judgment and order dated January 22 , 1998 passed by the learned third Additional Session Judge, Howrah altogether seven Appellants were convicted u/s 302 of the Indian Penal Code read with Section 34 thereof inter alia for committing murder of a local Councillor at Bally. Being aggrieved by and dissatisfied with the said judgment and order of the learned Additional Session Judge, the seven Appellants filed the instant appeal and obtained release on bail by way of suspension of sentence. After the appeal was made ready and started appearing in the list all the Appellants absconded and nobody represented them before the court. As a result, the court could not take up the hearing subsequently the Appellants numbers three, four and seven could be apprehended as per the report of the Police. Appellant number five died during the pendency of the appeal. The Appellants numbers one, two and six are still at large. We gave adjournments from time to time to enable the Superintendent of Police, Howrah to find out the absconded Appellants and arrest them. Despite

several opportunity being given the Police could not apprehend them. In such circumstance, we were compelled to proceed with the hearing of the appeal only in respect of Appellants number three, four and seven who were represented before us through learned advocates mentioned above.

2. INCIDENT :

On May 23, 1996 the Police received a complaint from Shankarlal Agarwal (PW-1) at about 13.40 hrs. to the effect that at about 12.30 p.m. Md. Samim, the local councillor came to the Public Call Booth belonging to Shankarlal at 105/1, Joy Bibi Road under Police Station Bally. Samim asked for a glass of water. When Shankarlal was about to bring water for Samim, a young man aged about twenty five / twenty seven years came with a double edged sword in hand and assaulted Samim with the said sword. Samim caught hold of the sword with his two hands and forcibly pushed the assailants towards the road. Samim started running along with Joy Bibi Road towards the gate of Victoria Cotton Mill having bleeding injury in his hand. The assailants chased him with bombs, bhojalis and other weapons in hand. Chintu aged about four years, nephew of Shankarlal suddenly came in front of the shop. Assailants hurled bombs when Chintu sustained injury in his leg by a bomb splinter. Samim fell down on Joy Bibi Road when Shankarlal getting scared, closed the shutter. After some time he came out and found Samim lying dead in front of premises number 106, Joy Bibi Road having severe bleeding injuries. The entire incident took place within five / six minutes when the assailants fled away. The Police carried on investigation and arrested eight accused including seven Appellants. All of them pleaded not guilty and opted to be tried. The learned Sessions Judge acquitted Md. Kurban of the charges brought against him and convicted rest seven accused holding guilty of the offence committed u/s 302 read with Section 34 of the Indian Penal Code. They were sentenced for life coupled with a fine of rupees five thousand and in default to suffer rigorous imprisonment for a period of two years each.

3. EVIDENCE :

PW-1 (Sankarlal Agarwal) :

Sankarlal Agarwal had a Telephone booth at premises No. 105, Joy Bibi Road. The victim Dr. Shamim Khan was the councillor of Bally Municipality. He was a popular political leader. At about 12.30 p.m. Shamim came to the shop and asked for a glass of water. When Shankarlal came out of the shop to collect water he heard abusive language being addressed to Shamim. Once he turned around he found a person came running and assaulted Shamim on the head by a sword. The person was known as Gama (Appellant No. 1). Witness misidentified Gama on dock. He did not know Gama. Local people identified Gama to him. Dr. Shamim could hold the person who assaulted him with the sword and pushed him out. His four and half years old nephew got severe injury. He saw three / four others with sword and bombs in hand. He put down his shutter when he saw one person assaulting Shamim with a dagger. After some time when he opened

his shop he found the dead body of Shamim lying in a pool of blood. The witness could not identify the accused.

PW- 2 (Mukesh Kr. Kausal) :

Mukesh witnessed the inquest.

PW- 3 (Md. Safi Alam Khan) :

In the said area resistance group was formed by the local people which stopped violence in the said area. The witness identified Gama, Mukhtar, Chhoto, Rajua. The witness also identified the other three whose names were not known to him. The witness was a post occurrence witness. He found dead body lying at the place of occurrence in a pool of blood. He also signed the Inquest Report. In cross-examination he stated that the local MLA and other important persons including political leaders came to the spot.

PW- 4 (Jaswan Gupta) :

The witness was the seizure witness when Bhojali was seized from a garden by the side of a local market. The Bhojali was sharp on one edge.

PW- 5 (Jagadish Ghosh) :

Jagadish was also a seizure witness. He had a grocery shop. The Police came to his shop and got his assistance for the purpose of witnessing the seizure.

PW- 6 (Md. Barshati) :

The witness saw Shamim sitting in the telephone booth of Shankarlal when the Appellants came from the narrow lane by the side of a hotel. He found Gama having a sword in his hand, Nania having a dagger and Rajua having a bag in hand. Others were also equipped. He found Gama hitting Samim with the sword on his head. Shamim tried to resist by his hand and tried to escape when Saradia, Nania and Sultan caught hold of him. Shamim fell down. Rajua, Teri and Mukhtar were also standing there. Rajua then threw a bomb from his bag. The members of the public started disbursing. The witness also fled away from the place out of fear. He later on heard that Shamim had been killed and a young boy being the nephew of Shankarlal had sustained injury. The witness did not go to the police station on the date of the incident or on the following day. He made a statement to the Police Officer after about a month and half. He was a rickshaw puller by profession.

PW-7 (Md. Salim) :

The witness also corroborated PW-1 and 6. He found Rajua, Nania and Saradia scuffling with Shamim. He also saw Shamim falling down on the ground. He found Gama hitting Shamim with a sword on his head and various other places of the body. Rajua was having a bag in his hand. Mukhtar was standing by their side. He could hear the sound of hurling of bomb. People started disbursing. He also fled away from the place. The witness rightly identified Gama, Mukhtar and

Rajua. However, he mis-identified Saradia.

PW-8 (Haider Ali) :

The witness was a Clerk in a school. He found Shamim lying in a pool of blood. He found Gama with a sword having blood stain, Nania with a knife, Rajua with a bag and Saradia, Sultan, Teria and Mukhtar fleeing away. Those persons were also having weapons in their hands. The witness identified all correctly. He also witnessed the seizure list. He identified the belongings of the victim being material exhibit. He also stated that the local MLA and other important persons visited the spot.

PW-9 (Saira Khatoon) :

The witness only stated that she had seen Gama moving with a sword in his hand. She identified Gama in Court.

PW-10 (Md. Mustakin) :

The witness was also a post occurrence witness. He saw the dead body lying in a pool of blood having injury on the head and hand. He telephoned Bally and Malipanchghora Police Station giving information of the unfortunate incident. He told the Police that "some anti-social elements" committed murder.

PW-11 (Md. Ismail) :

The witness was going to the market. He found Sultan, Rajua and Nania having a scuffle with Shamim and Gama assaulting him with a sword. Shamim fell down on the ground. He died on the spot. Rajua and Kurban picked up bombs from their respective bags and hurled those. The witness mis-identified Gama and Sultan. He stated that he did not exactly know the identity of the persons as named by him.

PW-12 (Satyapriya Chattapadhyaya) :

Satyapriya was the finger print expert. He examined the finger print mark appearing on the sword.

PW-13 (Dr. K.B. Gupta) :

The witness was the medical officer who treated the injured child.

PW-14 (Ashok Dom) :

He identified wearing apparels belonging to the deceased.

PW- 15 (Utpal Banerjee) :

The witness was the Sub-inspector of Police who seized a chopper from the road side in presence of PW- 4 and 5

PW- 16 (Smt. B. Bhattacharjee) :

The witness was the Judicial Magistrate who took the finger print of Teri and Mukhtar.

PW- 17 (Shri Partha Pratim Roy) :

The witness was the Judicial Magistrate who took the finger print and thumb impression of Sultan and Gama.

PW- 18 (Shiwjee Roy) :

The witness being a constable attached to Bally Police Station, identified trouser, shirt and a pair of chappal being material exhibit -8/2 .

PW-19 (Dinabandhu Chakkraborty) :

The witness was the Sub-inspector then posted at Bally Police Station. He initiated Bally Police Station Case No. 126 of 1996 against Gama and two / three others.

PW- 20 (A.N. Ganguly) :

He was another Police officer who forwarded Gama and Sultan to Court. He identified Gama and Sultan.

PW- 21 (Dr. S.R. Biswas) :

The witness was the Superintendent of Howrah District Hospital on the relevant date. He conducted the post mortem examination. He opined that the injuries found on the victim could be had by the seized weapon being material exhibit No. 1. According to him, the death was due to shock and haemorrhage as a result of head injury which was anti-mortem and homicidal in nature. According to him, the material exhibit 1 was not double-edged.

PW-22 (Mrimmay Sarkar) :

The witness being another Police Officer received the telephone call and diarised the information and proceeded to the spot.

PW-23 (M.K. Majhi) :

The witness was another Police Officer who took up the investigation at the instruction of the Inspector in-charge. He visited the place of occurrence and held inquest over the dead body. The witness did not obtain the forensic examination report of the blood stained bhojali and blood stained earth. According to him, Salim did not tell him that the accused were having scuffle with Shamim.

4. EXAMINATION OF THE ACCUSED :

The entire evidence was put to each of the accused. They however feigned ignorance of the incident and consistently contended that they were falsely implicated in the said case.

5. JUDGMENT OF THE COURT BELOW :

The Learned Judge considered each and every piece of evidence and analysed the same, in our view, very correctly. The learned Judge observed that PW-1 categorically asserted even in cross examination that he knew the contents of the complaint that was read over and explained to him. The witness stood by the complaint at the time of trial. The learned Judge also observed that PW-3 although not a post occurrence witness categorically stated that he had been the accused coming from the narrow lane by the side of a hotel. The witness also asserted that they were all equipped with weapons. It was his direct evidence that he found Gama hitting Shamim with a sword on his head. He also referred to Rajua, Teri and Mokhtar standing over there. The witness got corroboration from PW- 7. PW-8 also found the Appellants being armed with weapons. He found Gama with a blood stain sword fleeing away along with others. He discarded the submission of the defence that PW-6 and 7 were mere chance witnesses. On the issue of local witness the learned Judge was of the view that it was not always possible to get local witness. He also discarded the argument made on behalf of Mokhtar and Teri that Post Mortem Report was a suspicious document. Considering each and every piece of evidence the learned Judge held all of them guilty except Kurban for whom he was not convinced with the evidence. Hence this appeal by the Appellants.

6. CONTENTION OF THE APPELLANT MD.TERI :

Mr. Ashis Bhattacharya, learned Counsel appearing for Md. Teri contended as follows :

- i) The FIR was ante-dated and manufactured.
- ii) There were material contradictions of the so-called eyewitnesses.
- iii) The material eyewitnesses were not examined.
- iv) The contradiction regarding the nature of weapon used in the alleged crime, was not considered.
- v) Identification of the accused by the witnesses and the anomaly thereof was also not considered.
- vi) Seizure was not conducted properly.

Elaborating his submissions, Mr. Bhattacharjee contended that Investigating Officer in his deposition did not state in detail about recording of the complaint. From a close look of the FIR it would appear that it was an ante-dated one. He also contended that even if it was held that Gama was responsible for the murder merely because Teri was a member of the crowd assembled there to watch the incident, could not permit the prosecution to implicate him as an accused in absence of any definite overt act. He also contended that no test identification parade was held. Mr. Bhattacharjee lastly contended that even if this Court would rely upon the evidence Teri was entitled to an order of acquittal being similarly

placed with Kurban who was acquitted by the learned Additional Sessions Judge.

7. CONTENTIONS OF THE APPELLANTS - SULTAN AND NANIA :

Mr. Kallol Mondal, learned Counsel appearing for the above named Appellants contended as follows :

- i) The FIR was fake and ante-dated one.
- ii) No name transpired from the Inquest Report. PW-10 did not disclose any name contemporaneously. Hence, there could be no definite circumstance which could deserve conviction of the above named Appellants.
- iii) There had been inordinate delay in examining the witnesses u/s 161 of the Criminal Procedure Code.
- iv) The material eyewitnesses were not examined and the prosecution thus prevented from bringing the truth at the trial.
- v) There was inordinate delay in accepting the FIR by the learned Magistrate.
- vi) There had been discrepancy in deposition with regard to the nature of the weapon used in the alleged crime.

Elaborating his argument, Mr. Mondal contended that on a bare perusal of the G.D. Entry, FIR and the complaint it would appear that those were nothing but a result of fabrication. According to him, once the complaint was lodged it was the duty of the Police to submit it to the Magistrate immediately. In the instant case the incident was reported at 14.15 hrs. on May 23, 1996. It was received by the learned Magistrate on May 30, 1996 about seven days after the day of reporting. On the issue of non-examination of the witnesses, Mr. Mondal drew our attention to the depositions and pointed out that several persons whose names transpired during investigation were neither examined by the Police nor produced in Court. Hence the Court was prevented from knowing the actual truth. On the issue of user of weapon, Mr. Mondal stated that PW-1 stated that the sword was double-edged whereas the Bhojali produced as material exhibit and seized by the Police was having one sharp edge. Hence, there was no definite proof that the material exhibit being the Bhojali seized by the Police was the one used at the time of commission of the crime. With regard to delayed examination, he contended that the crime was committed on May 23, 1996 whereas the witnesses were examined by the Police much after the date of the incident as would appear from the record. Hence, there was no contemporaneous investigation conducted by the Investigating Authority. While summing up, Mr. Mondal contended that it was a fit and proper case where benefit of doubt must go in favour of all the accused as there was no definite unimpeachable evidence available on record, which would deserve conviction and sentence.

8. CONTENTION OF THE PROSECUTION :

Appearing for the prosecution, Mr. Sushil Kr. Mahato, learned Counsel while

opposing the appeal contended as follows : -

i) PW-1, 3 and 10 identified the accused and termed as anti-social elements. Once the accused were known for their anti-social activities operating in the said area and the witnesses knew them before hand, there was no necessity for holding test identification parade.

ii) There was no delay in lodging the FIR. Incident occurred on May 23, 1996. The Police promptly acted on the basis of the telephonic information received by them. The FIR was immediately lodged and despatched to the concerned Magistrate on the next day being May 24, 1996. In any event, no suggestion was given to the witnesses on the issue of alleged delay.

iii) The witnesses were examined immediately after arrest of the accused. Hence, there was no delay in recording the statements of the witnesses by the Police u/s 161.

iv) The prosecution was entitled to decide who would be produced as witness. Non examination of any witness would not, per se, be fatal.

Elaborating his argument, Mr. Mahato drew our attention to pages 45, 48 and 59 of the paper book where PW-1, 3 and 10 categorically described the Appellants as local anti-social elements. On a sum total of the evidence, it would appear that the Appellants were known for their anti-social activities in the area. Hence, it was not a fit case where test identification parade was required. On the issue of FIR Mr. Mahato further contended that due to Saturday and Sunday intervening in between the learned Magistrate might have delayed in accepting the FIR, that would not, per se, vitiate the entire proceeding, particularly when there was no fault on the part of the Investigating Authority who immediately despatched the complaint as would appear from the record. On the issue of delayed examination, Mr. Mahato contended although the incident occurred on May 23, 1996 the Police took some time in arresting the accused. Immediately after their arrest the witnesses were examined. According to him, it was natural for the witness not to assist the Police unless and until the accused were placed behind the Bar.

9. CASES CITED :

Cases cited by Mr. Mondal :

- i) (Habeeb Mohammad Vs. The State of Hyderabad,
- ii) (State of U.P. and Another Vs. Jaggo alias Jagdish and Others,
- iii) (Ranbir and Ors. Vs State of Punjab. 1973 SCC 858
- iv) (Balaka Singh and Others Vs. The State of Punjab,
- v) (Ishwar Singh Vs. State of U.P.,
- vi) (Vidyasagar V. State of Uttar Pradesh. 1977 SCC 286

- vii) (Ganesh Bhavan Patel and Another Vs. State of Maharashtra,
- viii) (Bhagwan and Another Vs. State of Madhya Pradesh,
- ix) (Palanisamy and Raju Vs. State of Tamil Nadu,
- x) (Arjun Mrik and Ors. V. State of Bihar. 1994 SCC 1551
- xi) (T.T. Antony V. State of Kerala and Ors. 2001 SCC 1048
- xii) (Thanedar Singh V. State of Madhya Pradesh. 2002 SCC 153
- xiii) (Jangh Singh and Ors. V. State of Rajasthan. 2002 SCC 1027
- xiv) (Bijoy Singh and Anr. V. State of Bihar. 2003 SCC 1093
- xv) (Rajeevan and Anr. V. State of Kerala. 2003 SCC 751
- xvi) (Kunju Muhammed @ Khumani and Anr. V. State of Kerala. 2004 SCC 1425
- xvii) (State of Uttar Pradesh V. Gambhir Singh and Ors. 2005 AC 693

Cases cited by Mr. Ashish bhattacharjee :

(T.T. Anthony V. State of Kerala. 2001 SCC 1048

Cases cited by Mr. Sushil Kr. Mahato :

- i) (Zahoor and others Vs. State of U.P.,
- ii) (State of Madhya Pradesh V. Mansingh and Others. 2007 2 SCC 390
- iii) (Acharaparambath Pradeepan and Another V. State of Kerala. 2008 1 SCC 241
- iv) (Jayabalan V.Union Territory of Pondicherry. 2010 2 SCC 966
- v) (Jarnail Singh Vs. State of Punjab,

10. OUR VIEW :

Before we go into the case in hand let us discuss the precedents cited by the learned advocates for the parties. The cases cited by Mr. Mondal are principally on two propositions -

- i) the delayed FIR would have an adverse effect on the proceeding;
- ii) similarly delayed recording of the statements u/s 161 would also create suspicion in the mind of the Court with regard to alleged commission of crime.

Mr. Mahato cited the latest decision in the case of Jayabalan (Supra) on delayed FIR. He cited the decision in the case of Jarnail Singh (Supra) on the anomalies and/or discrepancies and/or omissions in FIR and the effect thereof. If we read all those precedents we would find that an FIR was nothing but a first hand information received by the Investigating Authority with regard to commission of crime. It is not so important that each and every details of the commission of crime as well as particulars of the persons involved therein would be mentioned

in the FIR. What is important is, that the subsequent disclosure of facts by the prosecution at the time of trial should have a consistency with the information received by the Investigative Authority through FIR and/or written complaint. If there are material anomaly or conscious omission which surfaced subsequently at the trial it would certainly raise doubt in the mind of Court. At the same time that would not, per se, be fatal. Such anomaly and/or discrepancy and/or omission would certainly raise doubt in the mind of the Court and the Court would be cautious and extra-cautious while deciding on the issue. Once the doubt was removed the Court was competent to sign the judgment. Merely because there are omissions and/or contradictions, it would, in our view, per se, be not fatal and would not permit the court to reject the case in limine.

Similarly the proposition so canvassed by Mr. Mondal to the effect that the delayed examination of witnesses and non-examination of material witnesses would vitiate the proceeding, is not acceptable to us. In State of Uttar Pradesh - VS- Gambhir Singh (Supra) the Court considered a case where PW-3, an alleged eye-witness was examined by the Police more than one year after the incident. The Court observed that PW-3 was not an independent witness and was cousin of the deceased. The Court also considered the fact that PW-2 claiming to be with the deceased since morning, did not state that the victim had food whereas some semi-digested food was found in the stomach of the victim. Taking a sum total of the said evidence, the apex Court affirmed the judgment of acquittal passed by the Allahabad High Court. In our view, each case has its own merit and the proposition of law is dependent on each and every peculiar fact involved in a particular case. In the instant case, the witnesses were examined one or two months after the incident whereas in the case of Gambhir Singh (Supra) the concerned witness was examined more than a year after. Mr. Mahato, learned Counsel for the prosecution also tried to explain the delay which sounds logic.

Hence we are of the view that merely because there was delay in examining a witness u/s 161 would, per se, not vitiate the proceeding. It would certainly raise a pointer, however it would have to be weighed with other evidence coming out of the trial.

Let us now come to the case in hand. PW-1, defacto complainant narrated each and every details of the incident. His statement found corroboration from the other witnesses discussed above. It is true that he identified the accused on dock, however could not properly name the accused. There had been some anomaly with regard to identification of names. One thing is however consistent that the witnesses identified the accused except Kurban. The incident occurred in 1996. All of them were involved in the crime. The total time taken in the incident was five/six minutes. There might be some confusion with regard to the names. Once the definite identification was made by the witnesses which was consistent we do not find any scope to disagree with the learned Judge on this score. Similarly whether the sharp cutting weapon was one edged or double-edged, may not be possible for the witnesses to correctly describe because of the

suddenness of the incident and short time involved in it. The Bhojali was examined. The finger print expert certified the finger print. The post mortem doctor opined that the injuries could be had through the weapon seized by the Police being material exhibit. Hence, there was no scope to raise any doubt on that score.

Lot was said with regard to delayed FIR and ante-dating of the same. We are unable to appreciate such contention. On a close look of the FIR we find that the information was received on May 23, 1996. The complaint was despatched on the next day as recorded in the FIR. The learned Magistrate might have delayed in receiving the same that would, per se, not vitiate the proceeding. Similarly we are unable to appreciate the argument made on the issue of G.D. Entry. The information was received over phone that was diarised by the Police. Police promptly acted on that basis. The written complaint was subsequently received from PW-1. We do not find any irregularity on that score.

Lot was said about non-naming of the accused in the complaint or by some of the witnesses before the Police. We have to keep in mind that common people would dare to come out openly to support the prosecution particularly when the crime was committed but the accused were yet to be apprehended. If we look to the statement of PW-1 made contemporaneously by way of written complaint we would find that he named Gama in the said complaint. Other people might not have disclosed the name at the time of inquest apprehending unnecessary trouble particularly when the accused were well known for their anti-social activities in the area. The witnesses consistently described the incident and the involvement of the accused in such commission of crime. We thus uphold the conviction so held by the learned Judge and affirm the sentence imposed by him.

11. RESULT :

Appeal fails and is hereby dismissed.

12. DIRECTION :

The Police Authorities are directed to continue search of the Appellant Nos. 1, 2 and 6. As soon as they are arrested they must be produced before the Court below for appropriate order.

The Appellants Nos. 3, 4 and 7 are now in jail. They are directed to serve out the remaining part of the sentence.

A copy of this judgment be sent to the correctional home, where the Appellants Nos. 3, 4 and 7 are suffering the sentence, for their information.

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.

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