
(2012) 09 CAL CK 0027
In the Calcutta High Court
Case No : C.R.A. No. 544 of 2004

Goutam Ghosh and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-09-2012

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 120B, 302, 34

Citation : (2012) 4 CALLT 664 : (2012) 5 CHN 121 : (2013) CriLJ 1577

Hon'ble Judges : J.N. Patel, C.J.; Joymalya Bagchi, J

Bench : Division Bench

Advocate : Jayanta Narayan Chatterjee, Mr. Partha Sarathi Basu, Nos. 1 and 4, Mr. Soubhik Mitter, Mr. Partha Sarathi Basu, Nos. 2 and 5 and Mr. Uday Chandra Jha, Mr. Gobinda Ghosh, Mr. Moneswari Sharma, No. 6 and Mr. Sudipto Moitra, Mr. Rajdeep Majumder, No. 3, for the Appellant; Siladitya Sanyal and Mr. Sandip Chakrabarty, for the State, for the Respondent

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J.—This appeal is directed against the judgement and order of conviction and sentence dated 23.02.2004 passed by learned Additional Sessions Judge, 9th Court, Alipore, convicting the appellants for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs. 5,000/- only each and in default to suffer rigorous imprisonment for two years more respectively. On 14th January, 2002 at around 1.45 a.m. one Gora Das (P.W. 1) lodged a written complaint at Thakurpukur Police Station alleging that on 13.01.2002 at around 8.30 p.m. he along with his friends were taking tea in a tea shop of one Bablu Pal alias Ranjan Pal (P.W. 5) at Shakherbazar; at that time, he heard a sound and after coming out of the tea stall, found a person lying in an injured condition; the injured person was one Saikat Saha alias Bua; he and his friends took the victim to Calcutta Hospital where the doctor declared the victim dead.

2. Pursuant to such information, Thakurpukur Police Station Case No. 12 dated 14.01.2002 under Sections 302/34 of the Indian Penal Code read with Section 120B of the Indian Penal Code and Sections 25/27 of the Arms Act, was registered for investigation against unknown persons.

3. In course of investigation, police visited the spot, examined available witnesses including one Sandipan Majumdar (P.W. 6) who named all the appellants, effected seizures, collected medical papers including the post mortem report of the victim and finally submitted a charge-sheet under Sections 302/34, 120B of the Indian Penal Code read with Sections 25/27 of the Arms Act against the appellants and one Jishu Jain, since acquitted.

4. The case was committed to the Court of Sessions, South 24-Parganas at Alipore and initially was transferred to the Court of learned Additional Sessions Court, 4th Court, Alipore for trial, but for the convenience of trial, at the behest of the prosecution, the case was subsequently transferred to the Court of learned Sessions Judge, 9th Court, Alipore, South 24-Parganas.

5. In reply of the charge, the defence of the appellants was one of denial and false implication. They however did not examine any witness to probabalise their defence.

6. In the course of trial, the prosecution examined 13 witnesses and exhibited number of documents including the post-mortem report, inquest report, death certificate, sketch map and seizure list.

7. In conclusion of trial, the learned Judge by the impugned judgement and order dated 23.02.2004 convicted the appellants for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentenced them to life imprisonment and a fine of Rs. 5,000/- only each and in default to suffer rigorous imprisonment for two years more respectively but acquitted the co-accused Jishu Jain of all the charges levelled against him. Hence the appellants have preferred the instant appeal.

Brief synopsis of the prosecution evidence :

8. The prosecution has examined 13 witnesses in the instant case. P.W. 1 Gora Das is the defacto-complainant of the case. In his evidence P.W. 1 deposed that he along with his friends had assembled to take tea at a tea stall owned by one Bablu alias Ranjan Pal (P.W. 5) on 13.01.2002 in the evening. At that time when he and his friends were present at the tea stall they heard a sound and upon rushing out they found that a person named Saikat Saha alias Bua was lying with bleeding injuries a few yards away from the tea stall. According to him, nobody dared to touch the dead body; the victim was taken by him for treatment to hospital where the victim was declared dead. He admitted that he lodged a first information report at Thakurpukur Police Station between 1 a.m. to 1.30 a.m. In cross-examination he admitted if one sits inside the tea stall only the front portion of Diamond Harbour Road is visible and nothing to the right and left of

the road is visible.

9. P.W. 2 claimed to be in a sweet shop adjacent to the tea stall of P.W. 5 and admitted of hearing of firing of two sounds and the fact that shop owners of the locality immediately closed their shutter. Later on, he came to know that one Saikat Saha alias Bua had been shot and that he was declared dead in hospital.

10. P.W. 3 is the brother of the tea stall owner who stated that he heard two sounds near the shop on 13.01.2002 between 7.30 to 8.00 p.m. and the customers who were taking tea entered the shop and he closed the shutter of the said shop. P.W. 4 is the owner of a fast food centre near the said tea stall who also corroborated the fact of hearing of a sound and closing the shutter of his shop. P.W. 5 is the owner of the tea stall. He claimed that he heard a sound in the evening of that fateful night and immediately closed the shutter of the shop for about 40 minutes.

11. P.W. 6 is the star witness of the prosecution. He is the sole eye witness. According to his deposition, on 13.01.2002 at around 8.30 p.m. he was sitting on his motorcycle and having tea in front of the tea stall of P.W. 5. He found the appellants come in a body to the place of occurrence with fire arms. At first, the appellant no. 3 abused the victim and asked him as to why he did not meet Jishu da in the Court as he was asked to do so on several occasions. Then the appellant no. 6 said that if the men of Khoka were not killed then there would be no peace. Then appellant Nos. 2 and 4 caught hold of the victim and appellant nos. 1 and 5 fired at him. P.W. 6 along with P. W. 1 took the victim to Calcutta Hospital where the doctor declared him dead. The P.W. 6 further stated that all the appellants used to come to Bua and hence, he knew all of them. He also deposed that he had heard from Bua that the appellants used to collect money from the flat owners in the locality and there was altercation over such matter. In cross-examination, P.W. 6 remained unshaken. He admitted that police had interrogated him. He also admitted that he did not tell the names of the assailants before the doctor. He however clarified such position by stating that he was not asked to mention the names of the assailants. He admitted that when the assailants threatened to eliminate the victim as he was a person belonging to the gang led by one Khoka, he was alarmed and became afraid and went aside. He further clarified that he did not enter the tea stall at the time of the incident or thereafter. He denied all suggestions that he had deposed falsely or had not seen the incident.

12. P.W. 7 is a formal witness who received the written complaint from P.W. 1 at the police station and recorded the formal first information report in the instant case. P.W. 8 is the maker of the inquest report and proved the same. He admitted that while making the inquest report he had not touched the body and due to mistake he did not note the injuries in the inquest report. P.W. 9 is the emergency doctor at Calcutta Medical Research Institute where the victim was brought dead. He deposed that there was two gun shot injuries on the body of the victim. P.W. 10 and P.W. 12 did not support the prosecution case and were

declared hostile. P.W. 11 is the post-mortem doctor. He proved that the death of the victim was due to effect of gun shot injury, ante-mortem and homicidal in nature. In cross-examination, he stated that he did not find any burning marks on the wearing apparel of the deceased and admitted that it was not possible for him to speak about the range of fire. P.W. 13 is the Investigating Officer of the instant case. He stated that after the registration of the first information report, he visited the place of occurrence and prepared a sketch map, seized blood stained earth and examined available witnesses u/s 161 Cr.P.C. including P.W. 6. He also collected post-mortem report of the deceased and filed charge-sheet in the instant case. In cross-examination, P.W. 13 admitted that he did not examine the acquitted co-accused Jishu Jain in jail custody and that he did not send anybody to meet Jishu Jain in jail.

Arguments on behalf of the parties :

13. Mr. Moitra, Learned Counsel appearing for the appellant no. 3 submitted that P.W. 6, the sole eye witness, ought not to be believed because of inherent improbabilities in his evidence and as his evidence is not corroborated by other witnesses. According to him, the fact that P.W. 6 did not disclose the names of the appellants either to P.W. 1, the defacto-complainant with whom he took the victim to the hospital or to P.W. 9, the medical officer at Calcutta Research Medical Institute makes his conduct most unnatural. He further submitted that P.W.s 2, 3, 4 and 5 who were present at the place of occurrence did not support his version and therefore the evidence of P.W. 6 ought not to be believed due to lack of corroboration.

14. Mr. Moitra further submitted that the evidence of P.W. 9, P.M. doctor did not show any blackening marks on the clothes of the deceased and hence, the medical evidence contradicted the ocular version of P.W. 6.

15. Mr. Moitra finally submitted that appellant no. 3 had not fired at the deceased and even if the allegation of abusing or threatening the victim is believed, the said appellant could not be said to have share of the common intention to murder the deceased.

16. In support of his submissions Mr. Moitra relied on the following judgements :

- (1) Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad,
- (2) Vadivelu Thevar Vs. The State of Madras,
- (3) State of Orissa Vs. Mr. Brahmananda Nanda,
- (4) 1992 SCC (Cri) 329
- (5) AIR 1945 118 (Privy Council)
- (6) 2001 SCC (Cri.) 668
- (7) 2009 (3) SCC (Cri.) 1097

(8) Sripathi and Others Vs. Stae of Karnataka,

(9) 2005 SCC (Cri.) 1050

(10) 2008 (2) CCrLR (SC) 476

(11) 2010 (3) CCrLR (SC) 405

17. Mr. Uday Jha, learned advocate appearing for the appellant no. 6 adopted the submissions of Mr. Moitra and further submitted that the prosecution case ought not to be believed since T.I. parade was not held in the instant case. He further submitted that there was discrepancy as to the place of the occurrence and that case number was not reflected in the inquest report though it was held on 14.01.2002 after lodging of FIR. He further submitted that there was an inordinate delay in lodging the first information report in the instant case which affected the veracity of the prosecution case.

18. Mr. Soubhik Mitter, learned advocate appearing for the appellant nos. 2 and 5 stressed on the unnatural conduct of the sole eye-witness P.W. 6 in not naming the assailants either to P.W. 1 or to P.W. 9, the emergency medical officer at Calcutta Medical Research Institute. Mr. Mitter further submitted that the other prosecution witnesses did not corroborate the evidence of P.W. 6 and therefore prosecution could not be said to have proved its case beyond reasonable doubt.

19. Mr. Jayanta Narayan Chatterjee, learned advocate appearing for the appellant nos. 1 and 4 submitted that there is inconsistency in the version of P.W. 1 and P.W. 6, both of whom claimed to be present at the tea stall of P.W. 5. He stated that while P.W. 1 claimed that nobody touched the body of the deceased, P.W. 6 claimed to have held the body of victim. Mr. Chatterjee also reiterated the submission of other counsel that in the absence of corroboration from other prosecution witnesses P.W. 6 ought not to be believed.

20. Mr. Shiladitya Sanyal, learned Additional Public Prosecutor submitted that evidence of P.W. 6 is wholly reliable as he remained unshaken in cross-examination. Such evidence of P.W. 6 is corroborated by the medical evidence and also evidence of other prosecution witnesses with regard to place and time of occurrence and hence, it cannot be said that there is complete lack of corroboration in respect of evidence of the sole eye-witness. Mr. Sanyal further pointed out that P.W. 6 was outside the tea stall whereas the P.W. 1 was sitting inside the tea stall and therefore, it was possible for P.W. 6 to see the assailants whereas the P.W. 1 could not have seen them though he rushed to the spot immediately after the incident.

21. Mr. Sanyal in supported of his submission relied on the following decisions :

1) Vadivelu Thevar Vs. The State of Madras,

2) Vithal Pundalik Zendge Vs. State of Maharashtra,

3) 2010 (4) SCC 633

Our Findings :

22. The point which therefore emerges is whether P.W. 6, who is the sole eye witness, can be treated as a reliable witness in the facts and circumstances of the instant case.

23. The first challenge thrown by the appellants to the veracity of the evidence of P.W. 6 who claimed to be an eye-witness is that he could not be an eye witness at all as P.W. 1, who is the defacto-complainant in the instant case and was present at the place of occurrence, did not claim to have seen the incident. However, an analysis of the evidence of P.W. 1 and P.W. 6 would show that P.W. 1 admitted that he was sitting inside the tea stall of P.W. s 3 and 5 and that from inside the shop only the frontal view of the road could be seen and nothing on the right and left of the road were visible. On the other hand, P.W. 6 stated that he was sitting on a motorcycle in front of the tea stall and having tea. The incident took place on the road a few yards away from the said tea stall. Hence, P.W. 6 was in a vantage position to see the murderers/assailants as he was sitting on his motorcycle outside the stall whereas P.W. 1 who according to his own admission was sitting inside the tea stall could not see the incident.

24. The second point raised by the appellants was that P.W. 6 in his cross-examination admitted that when the appellants threatened the deceased, he got alarmed and went away and hence, he could not have witnessed the murder of the victim. This submission appears to be wholly unfounded inasmuch as in the course of cross-examination P.W. 6 had clearly explained that on hearing the threat he became alarmed and stepped aside. He, however, unequivocally clarified that he did not enter the tea stall at the time of the incident or thereafter. A proper reading of such evidence of P.W. 6 would therefore clearly reveal that he was the most natural eye witness to the incident of murder and though he stepped aside and did not try to save the victim as he became alarmed as the appellants were in a threatening mood and were armed with fire arms, he had not gone inside the tea stall and the incident of murder occurred within his visibility.

25. Thirdly, Learned Counsel for the appellants have most vehemently argued that the conduct of P.W. 6 is most unnatural as he did not divulge the names of the assailants to P.W. 1 prior to the lodging of the FIR or to the doctor (P.W. 9) who declared the victim dead. Evidence of P.W. 13, the Investigating Officer, is that P.W. 6 was examined on 14.01.2002 itself within 24 hours of registration of FIR. Admittedly, P.W. 6 divulged such names of the assailants to P.W. 13 during such interrogation. Moreover, P.W. 6 in his cross-examination clearly explained that he had not divulged the names of the assailants as he was not asked to mention their names. Nowhere in his deposition P.W. 1 stated that he enquired from P.W. 6 the names of the assailants. No question had also been put in cross-examination to P.W. 1 and 9 as to whether they specifically asked for the names of the assailants from P.W. 6. In the conspectus of such evidence, we are of the opinion that the explanation given by P.W. 6 as to non-disclosure of names of

assailants to P.W. 1 and 9 is most probable and natural. The next question is why did not P.W. 6 on his own volunteer to give out the names of the assailants. In this context, one must not lose sight of the fact that the assailants were members of an organised gang of extortionists who used to collect money from the flat owners of the locality and P.W. 6 had fortuitously witnessed them murdering the deceased, who is a member of a rival gang. It is common knowledge that common public are loath to expose themselves to reprisals from members of organised crime racket by complaining against them. This explains why P.W. 6 kept mum against the appellants till he was specifically questioned by P.W. 13 as to the identity of the assailants. Furthermore, P.W. 6 is an independent witness who had no enmity with the appellants and was interrogated by police (P.W. 13) immediately after registration of FIR to whom he disclosed the names of the assailants. This prompt examination of a vital and independent witness during investigation rules at any likelihood of false implication of the appellants. We are therefore unable to accept the submission of the appellants that the conduct of P.W. 6 was unnatural as we feel that P.W. 6 was prompted by desire of self preservation to keep mum before P.W. 1 to P.W. 9 as to the identity of the assailants who were running an extortion racket in the locality till he was specifically asked about their identities by the investigating officer during investigation.

26. Fourthly, it has been argued by the Learned Counsel for the appellants that the evidence of P.W. 6 has not been corroborated by the other prosecution witnesses. We are unable to accept such proposition. The evidence of the sole eye witness, P.W. 6, has been corroborated in material particulars by the evidence of the autopsy surgeon, P.W. 11 in the instant case. P.W. 6 has stated that the deceased suffered two gun shot injuries in his presence. Evidence of P.W. 11 corroborates this fact. Furthermore, the evidence of P.W. 6 is also corroborated as to the place and time of occurrence by other prosecution witnesses namely P.W. s 1, 2, 3, 4 and 5. All these prosecution witnesses have stated in unison that the incident occurred on or about 8.30 p.m. a few yards away from the tea stall of P.W. 5. These witnesses have also stated that at the fateful place and hour they had heard a sound and thereafter had found the deceased lying with bleeding injuries at the place of occurrence. Such evidence of the prosecution witnesses therefore clearly corroborates the evidence of the eye witness P.W. 6 in material particulars.

27. The contradictions which have been pointed out by the Learned Counsel for the appellants between the evidence of P.W. 6 and the other prosecution witnesses are minor in nature and do not strike at the root of the prosecution case. P.W. 1 had stated that nobody dared to touch the body but P.W. 6 stated that he held the body immediately after the occurrence. Such contradiction in respect of a post occurrence event is a minor one and does not militate against the possibility of presence of P.W. 6 and he witnessing the incident of murder.

28. None of the prosecution witnesses in the instant case have deposed against

the core edifice of the prosecution case and their inter se minor contradictions do not affect its credibility and, hence, no sustenance can be sought by the appellants from the ratio of 2005 SCC (Cr.) 1050 wherein it is held that prosecution witnesses, if not declared hostile, binds the prosecution case.

29. The submission made by the learned lawyers for the appellants that the place of occurrence had not been established in the instant case is also untenable in view of the consistent evidence of the prosecution witnesses and that of the Investigating Officer P.W. 13 and the sketch map which has been proved in the instant case. Such evidence without any doubt establishes the place of occurrence on Diamond Harbour Road few yards away from the tea stall of P.W. 5. The contradiction relating to the time of occurrence are also minor in nature and are most natural in view of the fact that the witnesses cannot be expected to have marked time with exact precision and had relied on approximation which was not at wide variance from one another.

30. Other contention raised by Mr. Jha that no test identification parade was held is without substance inasmuch as it is the evidence of P.W. 6 that the appellants were known miscreants of the locality and the said witness knew the said appellants from before inasmuch as they used to visit the victim regularly.

31. Mr. Moitra's submission with regard to the apparent contradiction in the ocular and medical evidence in the instant case is also not tenable. It is not the prosecution case that the firing was at very close range and therefore absence of blackening marks on the wearing apparel of the victim is of no consequence at all. On the other hand, the ocular version as unfolding through the evidence of P.W. 6 stands corroborated by the twin gun shot injuries found by the autopsy surgeon, P.W. 12, during his post-mortem examination.

32. The FIR in the instant case was promptly lodged by P.W. 1 within a couple of hours from the incident and that too after he had taken the victim to hospital where the latter was declared dead. We are therefore of the view that there is no inordinate and inexplicable delay in lodging the FIR and the prosecution case cannot be said to be improbabilized on that ground. The inquest was prepared by P.W. 8, a police officer, attached to a police station within whose jurisdiction the dead body was kept. As a result, the number of the FIR in the instant case registered at a different police station, that is, Thakurpukur Police Station was not reflected therein.

33. In the cases relied by the appellants reported in 2008 (2) Cal Cr.L.R. 476, the prosecution case was not believed as there was delay in lodging FIR and insufficient light for identification and in (2010) 3 Cal Cr. L.R. (SC) 405 what weighted with the Apex Court was the irreconcilable inconsistency in medical and ocular versions. None of such infirmities are found in the prosecution case and the said cases are of no relevance.

34. In the case of Vadivelu Thevar Vs. The State of Madras, the Apex Court held that a conviction may be safely recorded on the evidence of sole eye witness and

corroboration in material particulars may be sought for as a rule of prudence when the evidence of such sole eye witness is neither wholly reliable nor wholly unreliable.

35. In the facts of the instant case we find that the sole eye witness P.W. 6 is a natural witness to the occurrence and had stood the test of cross-examination. He was promptly interrogated by the police on 14.01.2002 within 24 hours of the incident and had divulged the names of the assailants during such interrogation. He also explained that nobody had asked him the names of the assailants and hence he did not disclose such names earlier. Said evidence of P.W. 6 therefore has a ring of truth about itself and is wholly reliable. That apart, the evidence of P.W. 6 is corroborated in material particulars both by medical evidence as well as the evidence of other prosecution witnesses as to the place and time of occurrence. The judgements relied upon by Mr. Moitra are of no assistance to him. Hence the ratio of *Vemireddy Satyanarayan Reddy and Others Vs. The State of Hyderabad*, that sole eye witness requires corroboration in material particulars stands satisfied in the facts of this case.

36. P.W. 6 was promptly examined by police within 24 hours of the incident where he disclosed the names of the assailants. He had also explained the reason for non-disclosure prior thereto which appears to be a plausible one. Hence, the cases reported in *State of Orissa Vs. Mr. Brahmananda Nanda*, (Eye witness not disclosing names for 11/2 days), 1992 SCC (Cri.) 329 (Eye witness not disclosing names for 2 days) are clearly factually distinguishable from the present case.

37. In view of the aforesaid discussion, we have no hesitation to rely on the consistent evidence of P.W. 6 as corroborated in material particulars by the medical evidence to come to a finding of guilt against the appellants.

38. Finally, the appellant Nos. 2, 3, 4 and 6 have argued since it is not the prosecution case that they fired at the victim it cannot be said that they shared a common intention to commit murder.

39. In the instant case, the appellants came in a body being armed with fire arms and thereafter they accosted the victim. The appellant Nos. 3 and 6 abused him and threatened him with dire consequences; thereafter the appellant nos. 2 and 4 held the victim while appellant nos. 1 and 5 fired at him, resulting in his death. Then the appellants left the spot in a body. It is also the prosecution case that the appellants used to operate as a gang and collect monies from flat owners in the locality.

40. From the aforesaid facts it is clear that the appellants had come armed in a body and acted in a pre-concerted and co-ordinated manner to the spot to do away with the life of the victim and therefore there is no escape from the obvious conclusion that all the appellants shared the common intention to commit the murder of the victim. It is trite law that the existence of common intention is a question of fact which is to be inferred from the circumstances of each case.

41. In view of the circumstances as delineated above, we come to the sole and irresistible conclusion that the appellants shared the common intention to murder the victim.

42. In respect of the judgement cited on the score of existence of common intention we are of the opinion that the same being a question of fact each case has to be decided on its own facts. The cases cited by Mr. Moitra have been decided in the peculiar facts of each case, and therefore cannot be held to be binding precedent in this case where the facts are different. Hence we refrain from analysing each case separately as they are decided on a different factual matrix from the present one. For the aforesaid reasons, we dismiss the appeal and uphold the conviction and sentence imposed upon the appellants.

J.N. Patel, Chief Justice

I agree