

(2019) 02 CAL CK 0050

In the Calcutta High Court

Case No : Criminal Appeal (Cra) No. 331 Of 1996

Jatindra Nath Mahato & Ors.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 149, 302, 380, 396

Arms Act, 1959 — Section 25A, 27

Code Of Criminal Procedure, 1973 — Section 313

Citation : (2019) 02 CAL CK 0050

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

Bench : Division Bench

Advocate : Ranadeb Sengupta, Asok Biswas, N.P. Agarwala, Saryati Datta

Final Decision : Dismissed

Judgement

Jay Sengupta, J

1. This appeal is directed against the judgment and order of conviction dated 09.10.1996 and sentence dated 10.10.1996 passed by the Learned Additional Sessions Judge, Purulia in Sessions Trial No. 113/89 arising out of Sessions Case No. 40/89 thereby convicting the appellants under Section 396 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 10 years each and to pay a fine of Rs. 500/- each, in default to suffer rigorous imprisonment for another 2 months. It was directed that the fine, if realised, would be paid to the widow of the victim/deceased as compensation. By the said judgment, the accused Manpa Mahato was found not guilty under Section 396 of the Penal Code and was acquitted and all the accused were found not guilty of the offence under Sections 302, 149 of the Penal Code.

2. Out of the five appellants who had preferred the appeal, two appellants namely the appellant no. 1 Jatindra Nath Mahato and the appellant no. 3 Mohanlal Mahato passed away during pendency of the appeal. Accordingly, the instant appeal stood abated in respect of the said two appellants by an order

dated 04.09.18.

3. On 12.10.1987 at 00:30 hours on getting information from PW 17, PW 11 had been to the place of occurrence. At 02:15 hours PW 11 recorded the statement of PW 1 there and forwarded the same to the Police Station for treating the same as FIR. The same was recorded as an FIR at the Police Station on 12.10.1987 at 7:15 hours against six unknown accused under Sections 302, 380 and 34 of the Penal Code and Sections 25A and 27 of the Arms Act. PW 1 alleged that on 11.10.1987 at about 16:30 hours, her father Manindranath Mahato went out of their house like on other days. He used to return late. PW 1 and her younger brother and sisters were studying at home. She heard the sound of breaking of door at about 20:30/20:45 hours and also heard conversations of men outside. She went out only to find that her father was surrounded by six persons, aged about 25-30 years, one of whom was wearing a 'chost' pant and a green coloured half vest. He had a gun in his hand. One person wore a 'dhoti' like 'lungi' and a white 'panjabee'. He was dark, of sound health and had a turban on his head. He had a dagger in his hand. One of them was of tender age and was slim and fair. His height was about 5 feet. He was wearing a pant and a Hawai shirt. He had a knife in his hand. They were speaking in the language of the informant as well as in Hindi. They were telling her father that they would finish him at the Chourda river, but they came to take his money. They were saying that the father was too proud, would get her daughter married in 'unchu piri' and would give motor cycle. They threatened that they would also murder his wife and his (special friend) Nagu Babu of Baghmundi. They also said that the victim was making her daughter study at Ayodhya More and just completed the study of his son from Orissa. Then they asked the whereabouts of the informant's mother. The victim told the informant not to disclose anything. The informant asked her the younger sister to give the keys. One accused followed her younger sister and returned after a short while. In the meantime one of the accused who was wearing a 'chost' pant and 'gangee' caught hold of the victim and took him to his parlour and shot him with the gun in his hand. While coming out the said accused dragged the informant by catching her hand and told that he would make the informant his wife. He also asked about her mother. The informant showed her aunt as her mother. Then the man said that she was not the informant's mother. The informant's mother was of fair complexion and had sufficient hair on her head. The accused searched for the informant's mother, but could not find her as she had gone out to see her elder son. The said accused dragged PW 1 out of the room, caught two of their hens and the informant made over to them some articles from a plastic box and also gave Rs. 400/-. After that they all left through the village fields. The informant suspected that the accused did not come for the purpose of committing dacoity because then they would have gutted the articles. The informant also alleged that during the last few months the son-in-law of the appellant Kanistha brought a boy for giving her in marriage with him. At that time the victim had said that they would not get her daughter married to anybody. He had given education to his daughter and would

give a motor cycle to his would be son-in-law. About 2/3 days before Durga Puja, the wife of the appellant Kanistha Mahato had fever and the appellant Jatin Mahato came and said that the mother of Shyamal was a witch, she had eaten her and she should be killed. The informant's mother had asked to intimate the matter to the police but it was not so intimated. The informant suspected that these persons might have caused the murder of her father with the help of others. A list of articles allegedly looted by the appellants was furnished by the informant.

4. Investigation commenced. PW 15, a Sub-Inspector of Police, held an inquest over the deadbody of the victim on 12.10.1987 at about 13:25 hours at the place of occurrence in the presence of witnesses PWs 12, 13 and three others. He found a deep bleeding wound on the victim's left chest, which might have been caused by bullets shot from firearms. There was profuse bleeding from the wound and patches of blood clots were found scattered on the cement floor. A preliminary investigation revealed a commission of robbery culminating in the murder of the victim deceased. PW 4, a doctor, conducted the post-mortem examination over the deadbody on 12.10.1987 at about 14:35 hours. According to him, death was due to severe shock and haemorrhage as a result of injuries mentioned, which were ante-mortem and homicidal in nature. It was a case of gunshot injury. After completion of investigation, a charge-sheet was submitted against six accused including the present appellants. On 15.05.1990, charges were framed against the accused under Section 302 read with Section 149 of the Penal Code and under Section 396 of the Penal Code. A charge under Section 302 of the Penal Code was separately framed against the appellant no. 1 Jatindra Nath Mahato.

5. From a careful perusal of the evidence on record, it appears that PW 1 was the daughter of the victim/deceased and the de facto complainant of the case. She was an eye-witness to the occurrence and supported her First Information Report. In fact, she deposed that she had lodged the First Information Report by taking some risk. Her mother had asked her not to disclose the names of the miscreants, otherwise they would kill her. She identified all the five appellants. In her cross-examination, PW 1 stated that the accused Karna was also a co-sharer with her father in some properties. She reiterated that she did not shout during the occurrence out of fear. She deposed that except the First Information Report she gave one more statement to the police in which she had mentioned about recognising the accused persons. She had stated to the police that she could recognise six accused persons, but she told names of five accused persons to them. The police had to guard their home till the 'shradh' ceremony of the victim/ deceased. After the incident when her mother and brother came, she had told them everything. Her mother asked her not to disclose the facts to others, or else she would be killed. PW 2 was the younger daughter of the victim deceased, aged about 11 years at the date of occurrence. She was an eye-witness to the occurrence and corroborated the evidence adduced by PW 1. She deposed that about 5/6 miscreants came by pushing the door and breaking the

'hurka' thereby. The accused Jatin took away the victim and killed him with a gun. The miscreants dragged PW 1 and took her away for sometime. They finally went away with their hens. She deposed that PW 1 and PW 12 told their mother about the incident. But she advised them not to disclose those facts. PW 2 identified the appellants in the TI parade. She also deposed about the earlier refusal of the victim to give PW 1 in marriage. The accused Jatin said that the victim's wife would be killed as she was a witch. In her cross-examination, PW 2 admitted that she did not tell the police that her mother had asked her not to disclose the facts. However, she had stated to the police that she saw the appellants in light and would be able to identify them. PW 3 was a police constable who carried the deadbody of the victim for post-mortem examination. PW 4 was the doctor who conducted the post-mortem examination over the deadbody of the victim. He opined that the death was due to severe shock and haemorrhage as a result of the injuries mentioned, which were ante-mortem and homicidal in nature (gunshot injury). He deposed that a person may die instantly from such injury. In his cross, PW 4 stated that rigor mortis was present in the deadbody. PW 5 was the wife of the victim and a post-occurrence witness. During the occurrence she was cooking in her kitchen. Hearing a sound she went to her son who was in another room of their house. She heard a sound of firing. She remained there and also asked her son not to go out. Afterwards PWs 1, 2 and others told them about the unfortunate incident. She asked her daughters not to disclose the matter to anyone. She also deposed about the earlier proposal for marriage of PW 1 and subsequent threats given by the accused Jatin. In her cross-examination, PW 5 admitted that the accused Karna, Mohan and Kanistha had shares in the tank along with the victim. She stated that the neighbours did not come despite the cries. She did not remember whether she was examined by the police. Later on, she gave a statement before the CID. PW 6 was the village chowkidar. At 19:00 hours he saw the accused Mohan near the place of occurrence. He deposed that the said accused had come to take some betel. PW 7 was a local man who turned hostile. PW 8 was the owner of a local betel leaf (pan) shop. According to him, the victim came and purchased a 'pan'. Thereafter the accused Mohan came and purchased 'pan'. This happened at about 16:00/16:30 hours. PW 1 was another local witness who turned hostile and PW 10 was tendered in evidence. PW 11 was the Officer-in-Charge of the Police Station. He deposed that PW 17, the brother of the victim had come to intimate that the victim had been murdered by someone. A GD Entry was lodged over the said information. PW 12 was another daughter of the victim and an eye-witness to the occurrence. She supported the prosecution case. She also deposed about turning down of the marriage proposal for PW 1 and the subsequent threats given by the accused Jatindra. She also deposed that their mother had asked them not to disclose the facts. In her cross-examination, PW 12 could not recollect a few things and added the allegation that an accused had tied a rope around the victim's neck. PW 13 was the son of the victim and a post-occurrence witness. But, he had heard the gun shot. The eye-witnesses told him about the incident. He also deposed about the marriage proposal for PW 1 and the accused

Jatin's threats to murder their mother. He was a witness to the inquest. PW 14 was tendered in evidence. PW 15 was an Investigating Officer of the case. He reached the place of occurrence at about 1:15 hours. He held the inquest, found a gunshot injury on the left rib of the victim and seized the wearing apparels as also some other articles including a hurricane and a lamp. He examined witnesses and then arrested the accused Jatindra. In his cross-examination, PW 15 admitted that there was no note in the case diary as regards the assembly of the villagers. He did not find any label on the hurricane and the lamp. PW 16, a Sub Inspector of the CID, was the second Investigating Officer. He examined the informant and held raids for rest of the accused. He arrested the accused Mohan on 23.10.1987 and the accused Karna and Prafulla on 26.10.1988. He submitted a charge-sheet on 02.11.1988. In his cross-examination, he admitted that the names of some miscreants transpired after recording the statements of PWs 1, 2 and 12. He stated that PW 12 did not tell him about the use of any rope. He further stated that during his investigation the names of the accused transpired for the first time. PW 17 was the younger brother of the victim and a post-occurrence witness. He heard the sound of firing. He lodged a GD Entry over the said incident, which was recorded earlier. PW 18 was the Learned Judicial Magistrate who conducted the test identification parade for the accused Mohanlal. The witnesses PW 2 and PW 12 identified the victim before him. The case of the accused in their examination under Section 313 of the Code was primarily a simple denial of the prosecution case.

6. Mr. Ranadeb Sengupta, the Learned Advocate appearing on behalf of the appellants vehemently opposed the judgment and order of conviction and sentence. He submitted that before lodging of the First Information Report, a prior information was given and a GD Entry was recorded on that at the instance of PW 17. Therefore, the First Information Report is hit by Section 162 of the Code. He submitted that it is strange that the police station number was incorporated in the inquest report although the First Information Report was allegedly registered later. He contended that the strangest part is that although the miscreants were alleged to be unknown as per the First Information Report, the description of some of them were given there and the informant stated that she would be able to identify the accused, yet subsequently the accused were found to be the relations of the informant, as per the informant herself. Although there was no description of any lame man as an accused in the First Information Report, PW 1 admitted in her evidence that one of the accused namely Kanistha was a lame man. PW 16, the second Investigating Officer claimed that the names of the miscreants came only after he had taken up investigation i.e., after quite a few days from the lodging of the First Information Report. According to the Learned Advocate, the delayed disclosure of the names of the accused creates a suspicion of false implication. He submitted that, although alluded to, no details of the marriage proposal, groom, threats, etc. were forthcoming. He submitted that the charges were defective in as much as the time of occurrence was not mentioned in the charge. He contended that there were contradictions between

the evidence of PWs 1 and 2 as regards how the dacoits entered the house. He expressed his surprise about why Mohan Mahato who was known to the witnesses was sent for a T.I. parade. The Learned Advocate submitted that it was indeed a very unnatural conduct on the part of the victim's wife PW 5 to have asked her daughters not disclose the facts to others. He submitted that PW 12 gave another version that the accused Mohan Mahato tied a rope on the victim. The Investigating Officer too contradicted PW 12 on this. According to the Learned Advocate, PW 12 thus cannot be trusted. Besides, several witnesses had turned hostile. According to the Learned Advocate, PWs 5 and 13 only gave out hearsay accounts. He submits that it is indeed very astonishing that no names of the accused were disclosed to the Investigating Officer/PW 15. Even as per PW 16, the second Investigating Officer, PW 1 mentioned the name of only one miscreant. This implies that the names of the other accused transpired after 24.11.1987 i.e., nearly two months after the incident. The Learned Advocate submitted that the examination of the accused under Section 313 of the Code was not proper as the questions put were very complex. The Learned Advocate relied on *Meharaj Singh's Case*, 1994 SCC (Cri) 1390 on the question of ante timed First Information Report, on the *State of Orissa Brahmananda Nanda*, AIR 1976 SC 2488 on the delayed disclosure of the names of an accused by an eye-witness and on *Naval Kishore Singh vs. State of Bihar*, 2004 SCC (Cri) 1967 on the issue of putting rolled up questions under Section 313 of the Code.

7. Mr. N.P. Agarwala, the Learned Advocate appearing on behalf of the State strongly supported the conviction and sentence imposed on the appellants. He submitted that PW 1 was a vital witness - the de facto complainant of the case and an eye-witness. Her evidence was substantially corroborated by the two other vital eye-witnesses PWs 2 and 12. He submitted that the inquest report corroborated the post-mortem report as regards the gunshot injury. Rigor mortis was present. Therefore, the timing matched. PW 6, an independent witness, had seen the accused Mohanlal sometime before the incident. PW 8 supported the presence of the victim in the village. The Learned Advocate submitted that the prior GD Entry did not give the details of the incident and hence, was not treated as a First Information Report. He further submitted that there is no evidence as to when the inquest ended. The FIR was received on that night only. The non-disclosure of names by the eye-witnesses was due to fear and the daughters clearly deposed that their mother PW 5 had asked them not to disclose the facts, or else she would be killed. As to the apparent contradiction between the evidence of PWs 1 and 12 regarding how the dacoits entered the house, PW 1 and 2 might not have been there in the same place at the same point of time. The date and time of marriage proposal may very well not to be remembered by PW 1. The Learned Advocate also submitted that if the accused thought that the examination under Section 313 was not proper, they could have adduced defence witnesses.

8. We heard the submissions of the Learned Advocate appearing on behalf of the appellants as well as the State and carefully went through the evidence and

other materials on record and the impugned judgment and order of conviction.

9. It appears that the motive to commit the offence has played a very important role in this case. Although purportedly out of fear, PW 1, the de facto complainant of the case and an eye-witness to the occurrence, earlier failed to specifically name the accused who were known to her, she nevertheless could master the courage to allude to certain earlier events that gave a clear inkling about the motive to murder. In the First Information Report as well as in her evidence, PW 1 clearly stated that one of the accused who accosted the victim at the time of commission of the offences, told the victim that the victim was too proud and would get her daughter married in 'unchu piri' and would give a motor cycle (to the groom). The accused threatened that they would also murder the victim's wife and his special friend Nagu Babu of Baghmundi. They also said that the victim was making her daughter study at Ayodhya More and just completed the study of his son from Orissa. The reference of such utterances by the accused during the dacoity could be traced back to the earlier events as mentioned by PW 1. PW 1 alleged that during the last few months the son-in-law of the appellant Kanistha brought a boy for giving her in marriage with him. At that time the victim had derided that they would not get her daughter married to anybody. The victim also said that he had given education to his daughter and would even given a motor cycle to his would be son-in-law. PW 1 further alleged that 2/3 days before Durga Puja, the wife of the appellant Kanistha had fever and the appellant Jatindra Mahato came and said that their mother was a witch and she should be killed. The other eye-witnesses and siblings of PW 1 namely PWs 2, 12 and 13 as also their mother PW 5 substantially corroborated PW 1's account of the prior incidents regarding refusal of marriage proposal and threats by the appellant Jatindra. These prior facts make out a clear motive atleast for some of the appellants to conjure up a devious method to wreck vengeance upon the victim.

10. As regards the issue of lodging of a prior GD Entry at the instance of PW 17, it is apparent that the same was not detailed and cogent enough to be treated as First Information Report. Therefore, a subsequent detailed information was treated as the First Information Report in this case.

11. The delayed disclosure of the names of the accused, although known to the de facto complainant and other eye-witnesses, was due to the fear in their minds and in the minds of the other family members who were victims of the depredations caused by the appellants. It is quite clear from the evidence of the eye-witnesses namely, PWs 1, 2 and 12 that the appellants also wanted to finish off PW 5, their mother. But they could not do so as she was not found at that place. There is also evidence about prior threats given by the appellant Jatindra for murdering PW 5. In such circumstances, it is not at all unnatural for PW 5 to have requested her daughters, the eye-witnesses not to disclose the names of the miscreants and for the said young girls from the keeping her request and from out of fear not disclosing the names of the accused for sometime. The fear

of a subsequent harm was so ominous that, as per PW 1, the police had to guard their home till the 'shradh' ceremony of the victim/deceased was over. The non-mentioning of the presence of a lame man amongst the accused, as the appellant Kanistha was indeed a lame man, too might have been out of the same fear that doing the same would specifically identify the said accused, which was not what PW 1 intended at that point out of fear. It appears that PW 15, the Investigating Officer in fact arrested one of the appellants namely the appellant Jatindra Nath on the very night of occurrence on the basis of suspicion as indicated in the First Information Report. But the names of the accused were mentioned later on before the second Investigating Officer PW 16. Therefore, we do not find that the non-mentioning of the names of the miscreants in the First Information Report or immediately after the incident was fatal to the prosecution case.

12. Moreover, there was no cross-examination of the Investigating Officer PW 16 over which specific names of the accused were disclosed to him before 24.11.1987. In any event, raids were conducted to nab the other accused even before 24.11.1987. So some names were surely there before the Investigating Officer before 24.11.1987.

13. We do not agree with the submission of the Learned Advocate for the appellants that any further details of the marriage proposal, groom's name and details of threats ought to have been given by the concerned witnesses. Sufficient details were already given. No man of ordinary intelligence and memory is supposed to remember any further details of these events even if the same were made known to him.

14. As regards the apparent contradiction between PWs 1 and 2 regarding how the dacoits entered the house, it is quite possible that PW 2 was a witness to the events from before PW 1. Therefore, it is quite probable that PW 2 was a witness to certain initial acts.

15. It is true that PW 12 added a new facet to the sequence of events. Unlike others she additionally deposed that the appellant Mohan Mahato tied a rope on the victim. The Learned Advocate for the appellants contended that PW 2 stated this for the first time in Court in 1995 although the incident had taken place in 1987. But it appears from the records that the story of tying of the victim with a rope found a mention by PW 12 during the test identification parade of the accused in 1987 itself. Be that as it may, putting a rope on the victim might have been a temporary act witnessed and/or mentioned only by PW 12.

16. The evidence of the purported eye-witnesses PWs 1, 2 and 12, if considered in their entirety, are quite cogent and credible and the same could not be shaken during cross-examination. Moreover, there is no reason for these young girls to falsely implicate the appellants as it would be their endeavour to see that the real culprits responsible for the murder of their father got punished.

17. The evidence of the victim's wife PW 5 and the victim's son PW 13, who were

the immediate post-occurrence witnesses to the incident also supported the prosecution case in good measure. Despite being relations, they too were the most natural witnesses and they would be more interested to see that the real guilty were punished.

18. It is also quite significant that PW 6, an independent witness, had seen the accused Mohanlal who stayed in another village, sometime before the incident near the place of occurrence. PW 8 supported the presence of the victim in the village near about the time.

19. As regards the medical evidence, the inquest report seems to corroborate the post-mortem report in ample measure. It was indeed a case of gunshot injury. Rigor mortis was found to be present and as such, the timing also matched. The medical evidence, therefore, clearly supported the prosecution case.

20. Although the Learned Advocate for the appellants contended that the exact time of occurrence was not mentioned in the charge, the same is clearly not sufficient to question the validity of the conviction and sentence. It is a mere irregularity and a trial and the consequent verdict cannot be called into question on account of the same. Moreover, from the trend of cross-examination of the prosecution witnesses it is clear that the accused were very much aware of the charges they were facing.

21. Regarding use of complex and rolled up questions in the examination of the accused under Section 313 of the Code, the same, if at all, did not seem to prejudice the accused. As discussed earlier, it appeared that the accused had a clear idea of the circumstances that were appearing against them. Moreover, the accused were not able to show that they suffered any prejudice for such questions or for any other purported defect in the examination under Section 313 of the Code.

22. The decisions relied upon by the Learned Advocate of the appellants lay down established principles of law. But the facts of the present case were quite different from those in the said decisions. The factual context of the existence of a grim fear prompting a delayed disclosure of the names of the accused is absolutely different here. As regards Section 313 of the Code, as discussed earlier, no prejudice was shown to have been caused in the present case.

23. In the circumstances, the strong motive behind the murder, the unshaken evidence of eye-witnesses PWs 1, 2 and 12, the corroborative post-occurrence accounts presented by PWs 5 and 13 coupled with the supportive medical evidence, unerringly point towards the guilt of the present appellants.

24. In view of the above discussions, the appeal is dismissed and the impugned judgment and order of conviction and sentence are affirmed.

25. A copy of the judgment along with the Lower Court Records shall be sent down to the learned Trial Court forthwith for information and necessary action.

26. 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.