
(2011) 01 GAU CK 0045
In the Gauhati High Court
Case No : Criminal Rev. P. No. 11 of 2003

Jitendra Malakar

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 14-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 3, 60
Penal Code, 1860 (IPC) — Section 326, 34

Citation : (2011) CriLJ 1955

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : N. Guha, for the Appellant; R.C. Debnath, Spl. Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.C. Upadhyay, J.—Accused revision-Petitioner was put on trial for commission of offence u/s 326, IPC read with Section 34, IPC together with three other co-accused. On conclusion of the trial before learned Judicial Magistrate, 1st Class, Kailashahar, the Petitioner together with other co-accused were convicted u/s 326, IPC read with Section 34 and sentenced to suffer R.I. for 3 years and to pay a fine of Rs. 5,000/- in default payment of fine to suffer S.I. for 6 months. The aforesaid judgment of the trial Court was carried on appeal before the learned Additional Sessions Judge, North Tripura, Kailashahar whereby the appellate Court acquitted all the co-accused except the Petitioner and maintained the conviction and sentence imposed on the Petitioner by the trial Court.

2. I have heard arguments advanced by Ms. N. Guha, learned Counsel appearing for the revision-Petitioner and Mr. R.C. Debnath; learned Special Public Prosecutor representing the State of Tripura.

3. The facts, leading to filing of this Re-vision Petition, may be stated, in brief, as follows:

On 16-1-1997 at about 6 p.m., the victim namely, Kripesh Dey was at Bairatal Bazar. The accused persons jointly attacked him with dagger causing bleeding injury on the right side at the back behind the abdomen. When the victim was allegedly stabbed with dagger by accused Jitendra Malakar from behind he was held up by other co-accused. The victim was shifted to Kanchanbari hospital immediately after the occurrence and later on, he was shifted to R.G.M. hospital at Kailashahar, for medical treatment. However, the FIR was lodged in Fatikroy P.S. on 18-1-1997 i.e. after two days from the date of incident. On the basis of the said FIR, a case was registered and investigation was launched. On completion of the investigation, the investigating officer submitted charge-sheet u/s 326 read with Section 34, IPC.

4. On conclusion of the trial, the learned Judicial Magistrate, 1st Class, Kailashahar convicted all the accused persons u/s 326/34, IPC and sentenced them as aforesaid.

5. The judgment and Order passed by the learned trial Court was carried on appeal before the learned Additional Sessions Judge, Kailashahar, North Tripura, wherein except the accused-Petitioner, all the remaining accused persons were acquitted. Learned Counsel appearing for the accused-Petitioner emphasized, mainly on the fact of identification of the accused-Petitioner with the help of "kupi lamp" (a small kerosene lamp with wick), which was placed far away from the place of occurrence. Learned Counsel further emphasised on the fact that the kupi lamp, which was the source of light for the purpose of recognizing the accused-Petitioner at night was not seized by the police during investigation.

6. Learned Counsel for the Petitioner further submitted that two days delay in lodging the FIR is fatal to the prosecution case. Though some explanation has been given for delayed submission of the FIR but the reason so given is not cogent and reliable since the first informant, on many occasions, passed through the police station where he could have lodged the FIR. Learned Counsel for the Petitioner further contended that evidence of the witnesses regarding the incident of occurrence is not direct evidence and the injured at no point of time reported the witnesses regarding the assault made on him by the accused-Petitioner. Therefore, the statement of witnesses, who reported to have heard the name of the accused-Petitioner from the victim, would only be hearsay evidence, which is not admissible in evidence.

7. By drawing the attention of this Court to the statement of P.W. 6 and P.W. 3, learned Counsel for the accused-Petitioner submitted that there are material contradictions in the evidence of these witnesses, which cuts at the root of prosecution story and as the mode of identification is not indicated by the victim in his evidence, Learned Counsel further pointed out that the victim could not come forward to explain as to how he knew accused-Petitioner, Jitendra Malakar, who happened to be resident of a different village.

8. Drawing the attention of the Court to an observation made by the learned trial

Court to the effect that "on perusal of the deposition of the victim, it appears that the prosecution side nowhere asked the victim as to how he could tell the name of the accused persons just after the occurrence. This silence of the prosecution on this material aspect gives a bitter test in regard to conducting of the prosecution case", learned Counsel for the Petitioner submitted that the complicity of the accused-Petitioner in the commission of offence alleged is not fully established. According to the learned Counsel for the Petitioner, in the facts and circumstances of the case, the accused-Petitioner deserved to be acquitted on benefit of doubt. The learned Counsel for the Petitioner submitted that had the victim really known the accused-Petitioner, he would have volunteered to tell the name of the accused-Petitioner during his examination u/s 161, Cr.P.C. by the Investigating Officer. Learned, ..counsel for the Petitioner further submitted that admittedly the victim was held up by other co-accused persons at the time of alleged assault, therefore, there was no likelihood of his turning back to look at the assailant,-,

9. Learned Counsel for the Petitioner, submits that since all the co-accused, who were tried together for the commission of offence u/s 326 read with 34, IPC have been acquitted, the accused-Petitioner is entitled to be acquitted on the benefit of doubt since the prosecution could not remove the confusion regarding complicity of the accused-Petitioner in the commission of the offence alleged against him.

10-11. Per contra, the learned Special Public Prosecutor would submit that the usual reaction of an individual when he is assaulted from behind would be to turn back to see, as to who had caused him the assault. Therefore, according to learned Public Prosecutor, there would not have been an exception to such normal human behaviour.

But, the only question which remains to be answered is, when the victim was admittedly held up by the co-accused persons at the time of assault on the back, would it be normally possible for an individual to turn back and see if he is held up by few persons. More so, to identify the assailant standing behind, in such a situation, in a dark place, may be more difficult. Unless of course, such situation, is explained by the witness. The victim did not clarify as to how he reacted immediately after he was assaulted on his back. Evidence of the victim clearly reflects that immediately after the assault, he fell down in front of the shop house of P.W. 3. Therefore, apparently, the identification made by the victim appears to be a guess work and conjecture. Which would be hazardous for a Court to rely on, in a criminal trial.

12. Learned Special Public Prosecutor relied on decision reported in State of U.P. Vs. Krishna Master and Others, wherein the Apex Court held that it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably

be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case.

13. Learned Special Public Prosecutor also relied on the decision of the Apex Court in Superintendent of Police, C.B.I. and Others Vs. Tapan Kr. Singh, wherein it was observed that mere absence of indication about source of light in the FIR for identifying assailants does not, in any way, affect prosecution version. The FIR is not the last words in the prosecution case and in some cases detailed FIR could be a ground for suspicion. What is relevant to find out is whether the FIR was lodged promptly and whether it is actuated by mala fides.

14. On the question of identification of the accused-Petitioner, the victim did not come forward to explain as to how he was known to the accused-Petitioner since before, so as to identify him at night without adequate source of light. Admittedly, except the state-merit of the victim P.W. 2, there is no other eye-witness to the occurrence. There is no evidence on record to show that the accused, Jitendra Malakar was known to the victim from long before. The source of identification of the accused by the victim is a small "kupi lamp", which can admittedly reflect light only up to 3 to 4 cubits. Admittedly, the victim was held by other co-accused persons, when he was assaulted from behind, if at all he was held by other accused persons, he could not have turned around to see, who was the actual assailant, among four of them, who were holding him up. This is a situation, which creates ample doubts as regard complicity of the Petitioner only in the commission of the crime allegedly when all other charged together have been acquitted by the appellate Court.

15. Now the question which arise for consideration is when a definite number of known persons were alleged to have participated in the crime and all except the Appellant, were acquitted, can the Appellant alone be convicted u/s 34, IPC. In Brathi alias Sukhdev Singh Vs. State of Punjab, the Apex Court held as follows:

18. The authorities thus show that it is not essential that, more than one person should be convicted of the offence and that section, Indian Penal Code, can be invoked if the Court is in a position to find that two or more persons were actually concerned in the criminal offence sharing a common intention. Where the evidence examined by the appellate Court unmistakably proves that the Appellant was guilty u/s having snared a common, intention with the other accused who were acquitted and that the acquittal was bad, there, is, nothing to prevent the appellate Court from expressing that view and giving the finding and determining the guilt of the Appellant before it on the basis of that finding.

19. We have noticed the series of decisions where the view held is that when a definite number of known persons were alleged to have participated in the crime and all except the Appellant were acquitted, the Appellant alone cannot be convicted u/s 34, IPC and he would be liable only for his individual act of assault, see Prabhu Babaji Navle Vs. State of Bombay, ; Krishna Govind Patil Vs. State of

Maharashtra, ;Baul v. State of U.P. (1968) 2 SCR 454; Maina Singh Vs. State of Rajasthan, ; Karnail Singh Vs. State of Punjab, and Piara Singh v. State of Punjab, (1980) 2 SCC 401 .

20. These cases are distinguishable on the ground that in none of them the appellate Court is shown to have disagreed with the trial Court's conclusion on facts, and the appellate Court has proceeded on the footing that the order of acquittal recorded is correct. The doctrine of issue estoppel has also no application in the present case/ The appeal before the High Court against & the conviction is not a subsequent proceeding against the acquitted person.

16. In, Prabhu Babaji Navle Vs. State of Bombay, Hon"ble Supreme Court removed the puzzle as follows:

That at once raises the conundrum that arises in this class of case. The Appellant was not charged for having committed the murder himself, nor does the evidence indicate that he was charged for having shared the common intention of four named persons and for having participated in the crime. If these four persons are all acquitted, the element of sharing a common intention with them disappears; and unless it can be proved that he shared a common intention with the actual murderer or murderers, he cannot be convicted with the aid of Section 34.

17. Keeping in view the rival contentions advanced by the learned Counsel for the Petitioner, as well as learned Special Public Prosecutor, it is required to be ascertained if at all the accused is entitled to be acquitted on benefit of doubt. P.W. 3, Kanai Bhowmik, who was the first witness to notice the injury of the victim. According to P.W. 3, the victim after having assaulted fell down in front of the shop of P.W. 3. P.W. 3 stated in his evidence that the victim told him that he was assaulted by Jitendra Malakar, Bharat Goala, Swapan Malakar and Birendra Dey and subsequently, one/two others also told him that Jitendra hit the victim by dagger. However, P.W. 3, did not clarify as to who were the "one or two Others", who had told him that the victim was assaulted by Jitendra Malakar.

18. From the evidence of the prosecution witnesses, it appears that all the witnesses have stated that they were reported by the victim regarding the names of the assailants. Now the fact remains that if a statement of fact is reported by the victim to the witnesses immediately after the occurrence, such evidence of the witnesses would be admissible, only if the victim comes forward to state in his evidence that he had reported such fact to the witnesses immediately after the occurrence. But, in the absence of such evidence of the victim witness regarding reporting of the incident to other witnesses, the evidence given by the other witnesses, regarding the occurrence as told to them by the victim, would not be admissible in evidence. On careful analysis of the evidence of P.W. 2, the victim, it appears that he never stated or reported the incident to any of the witnesses immediately after the occurrence.

19 . Now, evidence can either be oral or documentary, as contemplated in

Section 3 of the Indian Evidence Act. Chapter III of Evidence Act relates to oral evidence- All facts except contents of documents may be proved, by oral evidence, and u/s 60 of the Act, oral evidence must, in all cases, whatever be direct, that is to say, if it refers to a fact which would be seen, it must be the evidence of a witness who saw it; and if it refers to a fact which could be heard it must be the evidence of a witness who says he heard it.

In this connection, in a decision of the Gujarat High Court reported in *Kanbi Vaghji Savji Vs. State of Gujarat*, it was held that no evidentiary value can be attached to such evidence of witnesses as the very source from which it emanated was not clarified. Appropriate illustration given in the decision, may be gainfully depicted here in below:

Now, in this case the Sarpanch is said to have spoken to witness Jivanlal about his having learnt from the accused No. 1. that there was a scuffle between accused No. 1 and deceased Karamshi. Unfortunately, the Sarpanch has not been asked any question about his having spoken what Jivanlal has said in his evidence. It is the evidence of Sarpanch which would primarily be the evidence of a person who heard about the scuffle having taken place between Karamshi and Vaghji, and when he does not say any such thing the evidence of Jivanlal in that respect would become inadmissible, as neither falling u/s nor u/s of the Indian Evidence Act, inasmuch as that fact is concerned. Besides, in absence of any evidence given by that Sarpanch in respect of any such statement made by Jivanlal in his evidence, it can have no evidentiary value. In a case of *Awadh Behari Sharma Vs. State of Madhya Pradesh*, a similar question had arisen. In that case one witness Guard averred about this having been informed by another witness Mukadam that the new porter had lowered the signals and that the down train had Collided with the stationary up train. The witness Mukadam who had so informed witness Guard was not asked any such questions about his having so spoken to witness Guard, and as to what would be the effect of such evidence given by witness Guard, and as to what would be the effect of such evidence given by witness Guard. Their Lordships of the Supreme Court held that in absence of such evidence, and at any rate, in absence of such opportunity being given to that witness Mukadam for giving evidence in that direction, it would be inadmissible in evidence. They also held that no evidentiary value can attach to such evidence of that witness as the very source from which it emanated was not asked about it. No attempt was made to ask the Sarpanch in that direction, and in fact, it was not attempted to have that Sarpanch recalled as he was already examined before Jivanlal and to speak about it.

20. Now question arises whether the statement of fact revealed by the witnesses, who were reported by the victim P.W. 2, would be admissible, if the Victim P.W. 2 does not come forward to State that he had in fact stated the names of the assailants before the witnesses immediately after the occurrence. Apparently, the injured P.W. 2 in his evidence did not confirm to have immediately revealed the names of the assailants to the witnesses. Therefore,

the statement made by other witnesses that the injured had told them about the incident of assault, is not admissible in evidence, being hit by the rule against hearsay. This circumstance cannot, therefore, be relied upon by the prosecution to prove that the Petitioner had assaulted the injured.

21. None of the witnesses saw the occurrence. The victim also made a guess work, to indict the assailant, because in the circumstances he also could not have identified the assailant.

22. The arguments advanced by the learned Counsel for the Respondent State with regard to visible signs of injuries on the person of the victim and his natural reaction to turn back, cannot be accepted on a proper consideration of the evidence on record.

23. In the result, without lingering the discussion on other issues raised by the Petitioner, for the reasons discussed above, this revision is allowed. The impugned judgment and order are hereby set aside. The accused-Petitioner is held not guilty of the charge framed against him u/s 326/34, IPC and acquitted accordingly on benefit of doubt.

24. Let the Petitioner be set at liberty forthwith unless he is required to be detained in connection with any other case. The bail bond furnished on behalf of the Petitioner stands discharged.

25. Send back the Lower Court Records along with a copy of this judgment and order immediately.