
(2011) 03 CAL CK 0038
In the Calcutta High Court
Case No : CRA No. 128 of 2000

Joynal Abedin Sk. and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 148, 302, 34

Citation : (2011) 03 CAL CK 0038

Hon'ble Judges : Kalidas Mukherjee, J; Abdul Ghani, J

Bench : Division Bench

Advocate : Sekhar Basu and Subir Ganguly, for the Appellant; Tapan Dutta Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Md. Abdul Ghani, J.—The instant appeal is directed against the judgment of conviction and sentence passed by learned Additional Sessions Judge, 3rd Court, Krishnanagar, Nadia, sentencing each of the Appellants, namely, Joynal Abedin Shaikh, Anwar Shaikh @ Anarul Shaikh, Jan Mahammad Shaikh, Asraf Shaikh and Hafiz Shaikh to suffer life imprisonment and to pay fine of Rs. 5,000/- i.d to suffer rigorous imprisonment for one year u/s 302/34 of the Indian Penal Code. They are also sentenced to suffer simple imprisonment for three years with fine of Rs. 2,000/- each i.d to suffer further simple imprisonment for one year u/s 148 IPC.

2. Prosecution case in short may be depicted as follows:

On 9th September, 1994 at about 12.35 p.m. one Samsul Shaikh (P.W.1) lodged an FIR with Karimpur Police Station to this effect that on the aforesaid date at about 10 a.m. his elder brother Sirajuddin Shaikh, deceased, High School teacher and his younger brother Giasuddin Shaikh, a student of Class X, since deceased, went out on separate two bi-cycles for attending Dhoradah Union High School and at about 10.30 a.m. when they reached near the house of Azimuddin

(P.W.6), at that time accused Joynal Abedin at the direction of accused Ali Hossain Shaikh, since deceased, hit deceased Sirajuddin Shaikh with a sharp-cutting hensua on his abdomen and thus, seriously injured Sirajuddin Shaikh fell on the road from his bi-cycle. It has been categorically alleged that immediately thereafter the accused Jan Mahammad Shaikh hit Sirajuddin Shaikh with a sword on his neck and accused Asraf Shaikh, Majibar Shaikh, since deceased, p Hafiz Shaikh, Anarul Shaikh and Tajimuddin, since deceased, hit aforesaid Sirajuddin Shaikh with sharp-cutting weapons like sword, bhojali, hensua, etc. causing serious injuries on different portions of his body as a result seriously injured Sirajuddin at once died on the spot. Giyasuddin, younger brother of Samsul Shaikh (P.W.1) rushed to the house and cried out and the neighbours came out and tried to catch hold of the accused persons, but failed, as they fled away. It has also been alleged that when Appellants Joynal Abedin, Jan Mahammad and Asraf were fleeing away with blood-stained wearing apparels and hensua, sword, bhojali, etc. in their hands, Hamid Shaikh (P.W.5) could see them and also Nifaz Shaikh (P.W.3) while returning from his paddy field of Beltala found the rest accused persons, namely, Hafiz Shaikh, Anarul Shaikh, Majibar Shaikh and Tajimuddin Shaikh, both since deceased, to flee away with blood-stained wearing apparels and deadly weapons like hensua, sword, bhojali, etc.

3. Upon receiving the FIR, Officer-in-Charge, Karimpur Police Station started Karimpur Police Station case No. 263/94 dated 9th September, 1994 u/s 302/34 IPC against the accused persons. The case was taken up for investigation and finally on completion of investigation, Investigating Officer concerned submitted Charge sheet u/s 302/34 IPC against all the present five accused persons and three others, namely, Ali Hossain, Majibar Shaikh and Tajimuddin Shaikh, since deceased.

4. It would be transparent from the record that the learned Trial Judge upon hearing the learned lawyers of both the parties and also giving due consideration to the materials on record was pleased to frame charges u/s 148, 302/34 IPC against all the accused persons. The said charges were read over and explained to the accused persons concerned to which they pleaded not guilty and claimed to be tried.

5. Mr. Sekhar Basu, learned Counsel appearing for the Appellants at the very outset of his argument drew our attention to the contents of the charges framed against the Appellants as also the evidence adduced by the prosecution witnesses as well as some other important materials on record including seized materials and emphatically submitted that the learned Trial Judge while adjudicating the case failed to appreciate the evidentiary value of the P.W.s in the light of the position of law and thus arrived at a wrong finding.

6. He has further referring to the oral testimony of P.W.1, P.W.2, P.W.4 and P.W.5 strongly contended that all the aforesaid P.W.s being related to the deceased, their testimony does not deserve due importance, inasmuch as, their testimony suffers from contradiction and inconsistencies detected from the evidence

adduced in court and the statement made by them before the Investigating Officer (P.W.14). In support of his contention, he has urged that non-examination of impartial and disinterested witnesses by Investigating Officer (P.W.14) has weakened the prosecution case. Referring to the oral testimony of P.W.2, Sadikul Shaikh as also some other witnesses including the Investigating Officer it has been strongly contended by Mr. Basu that the prosecution case suffers from serious doubt for want of convincing, corroborative and cogent evidence. Further learned Counsel appearing for the Appellants having drawn our attention to the contents of the examination of the accused persons u/s 313 Code of Criminal Procedure conducted by the learned Trial Judge strongly argued and submitted that the manner of examination u/s 313 Code of Criminal Procedure being not based on legal provisions, the prosecution case could be said to be suffering from legal infirmities and inconsistencies causing prejudice to his clients. Learned defence Counsel has further argued that non-mentioning of the names of witnesses in the FIR (Ext.1) has curtailed the merit of the prosecution case. Lastly Mr. Basu, learned Counsel appearing for the Appellants urged that want of opinion of the Autopsy Surgeon regarding use of weapons seized in connection of this case has also given a blow to the prosecution case.

7. In support of his contention, he has relied upon the rulings reported in (2009) 2 CriLR (SC) 382 (Ranvir Yadav v. State of Bihar) (2009) 2.Cri. LR (SC) 371 (Shaikh Maqsood v. State of Maharashtra); (2009) 2 Cri. LR (SC) 253 (Inspector of Customs, Akhnoor J & K v. Yash Pal and Anr.) (2009) 2 Cri. LR (SC) (State of Punjab v. Hari Singh and Ors.); and Ishwar Singh Vs. State of U.P., and emphatically urged that in a case like the present one, prosecution has failed to establish and prove the charge beyond all reasonable doubts and accordingly the impugned judgment of conviction cannot be sustained in the eye and estimation of law.

8. On the other hand, Mr. Tapan Dutta Gupta, learned Counsel appearing for the State referring to the oral testimony of all the P.W.s as also the FIR (Ext.1) itself strongly contended that the evidence leading to the prosecution story adduced by the P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.7, P.W.8, P.W.9 and other P.W.s cannot be said to be inconsistent and contradictory, inasmuch as, the actual prosecution story has practically been well reflected in the oral testimony of all the aforesaid P.W.s. Mr. Dutta Gupta has also argued and submitted that all the P.W.s excluding P.W.6 (hostile witness) have given substantial support to the prosecution case. He has also contended that the evidence relating to the seizure of the weapons and alamats produced before the Court has given appropriate support to the prosecution story. In reply to the irregularity and infirmities pointed out by the learned defence Counsel , it has been argued by Mr. Dutta Gupta that there being no existence of illegality in course of examination of the accused u/s 313 Code of Criminal Procedure conducted by the learned Trial Judge, the merit of the prosecution case cannot be curtailed and washed away. Further, he has submitted that non-mentioning of the names of the witnesses in the body of the FIR (Ext.1) is not at all fatal to the prosecution case. In fine,

learned Counsel appearing for the prosecution has strongly urged that the learned Trial Judge while disposing of the case did not commit any mistake and arrived at a correct finding and, accordingly, the impugned judgment of conviction needs no interference by this Court.

9. Learned Trial Judge upon consideration of the evidence and materials on record passed the impugned judgment of conviction holding inter alia that all the accused persons in a pre-planned and calculated manner, committed the murder of innocent Sirajuddin Shaikh in a broad day light on 9th September, 1994 at about 10.30 a.m. in front of the house of Azimuddin (P.W.6) when it was drizzling, by use of sword, hunsua, etc.

10. On scrutiny of the record, it could be detected that out of the 14 witnesses examined on behalf of the prosecution, only one namely Azimuddin (P.W.6) was declared hostile. On further scrutiny, it could be seen that P.W.1 happens to be the full brother of deceased Sirajuddin Shaikh and eye-witness (P.W.2) is a relative, brother-in-law, of the deceased, P.W.3 is a local witness, but somehow related to the deceased, P.W.4 happens to be the wife of the deceased Sirajuddin Shaikh, P.W.5 is the brother-in-law of the deceased and P.W.7 happens to be a distant relative of the deceased, P.W.8 and P.W.9 are the local witnesses who signed the seizure list in respect of the weapons and articles used in connection with the murder of Sirajuddin Shaikh and P.W.10 happens to be the Doctor, who conducted post mortem examination over the dead body of the deceased Sirajuddin, P.W.11 is the constable who brought the dead body to the place of post mortem examination and identified the same before the Doctor, P.W.12, an ASI of Police who received the written FIR (Ext.1) from P.W.1, P.W.13 is the scribe of the FIR and P.W.14 is the Investigating Officer of the case. As a matter of fact, most vital witness, namely, Giasuddin younger brother of the deceased died in an incident in 1998. In the circumstances, P.W.2 happens to be the only eye-witness.

11. According to P.W.1, the incident of murder of his elder brother Sirajuddin Shaikh was reported to him by his younger brother Giasuddin Shaikh, since deceased. He learnt from deceased Giasuddin that accused Joyanal Abedin Shaikh, Jan Mahammad Shaikh, Anarul Shaikh, Hafiz Shaikh, deceased Majibar Shaikh and deceased Tajimuddin murdered his elder brother Sirajuddin Shaikh and fled away. Thereafter he (P.W.1) accompanied by his younger brother Giasuddin, since deceased, rushed to the place of occurrence that is near the house of Azimuddin (P.W.6) and found the dead body of Sirajuddin Shaikh lying on the road in front of the house of Azimuddin (P.W.6). P.W.1 noticed some multiple injuries on different portions of the body of deceased Sirajuddin Shaikh.

12. He has also stated that upon reaching the spot, he found P.W.2, P.W.3, P.W.5 and others standing at the place of occurrence and then learnt from P.W.2 that Joyanal Abedin and other accused persons murdered Sirajuddin Shaikh and fled away. Further it transpires in the evidence of P.W.1 that P.W.5 stated that he found accused Joyanal Abedin, Jan Mahammad and Asraf fleeing away with blood-

stained wearing apparels and hensua, sword, etc. in their hands. He has also stated that P.W.3 told him that four persons, namely, Hafiz Shaikh, Anarul Shaikh, Majibar Shaikh and Tajimuddin were found fleeing away with blood-stained clothes through the local field. Thereafter, P.W.1 accompanied by Chitta Biswas (P.W.13) rushed to the local police and lodged FIR (Ext.1). It would transpire in the cross-examination of P.W.1 that house of Azimuddin (P.W.6) stands situated at a distance of about 100 yards from the High School, where the deceased used to serve as an Assistant Teacher. Further it would be explicit from the cross-examination of P.W.1 that deceased Sirajuddin was a local leader of Congress Party. P.W.2 has given substantive support to the prosecution story stating that on the date of incident that is on 9th September, 1994 (Friday) at about 10 a.m., he had gone to Dhoradah Panchayat Office for renewal of his gun licence, but he was coming back therefrom due to absence of the local Anchal Pradhan. P.W.2 has categorically stated that he found Sirajuddin Shaikh and his younger brother Giasuddin proceeding on bi-cycles with umbrella as it was then drizzling. He has further categorically stated that accused Joynal Abedin suddenly hit Sirajuddin Shaikh with a sharp-cutting hensua on his abdomen as a result cyclist Sirajuddin Shaikh fell on the road and thereafter Jan Mahammad hit Sirajuddin on his neck with a sword and then at the direction of accused Ali Hossain, since deceased, accused Asraf, Hafiz, deceased accused Tajimuddin and Majibar mercilessly assaulted Sirajuddin Shaikh at random with sharp-cutting weapons like bhojali, sword, etc. in front of the house of (P.W.6) Azimuddin. Although it is established that P.W.2 happens to be the brother-in-law of the victim Sirajuddin who saw the incident in a broad day light, but nevertheless, the circumstances under which he narrated the incident to the other P.W.s at the place of occurrence cannot be disbelieved.

13. The oral testimony of P.W.3 has also given substantial support to the prosecution story. It has been stated by P.W.3 that on the date of incident at about 10.30 a.m., while he was returning home from Beltala Math after visiting his paddy field, he found four persons, namely, Anarul, Majibar, Hafiz and Tajimuddin fleeing away with blood-stained wearing apparels by saying that they had killed Siraj master. Thereafter he went towards the place of occurrence and found the dead body of Sirajuddin lying with various marks of injuries in front of the house of Azimuddin Shaikh (P.W.6) and learnt about the whole incident from P.W.2 and others. He has further stated that P.W.2 narrated the incident as also the names of the assailants. P.W.4 Laila Banu, who happens to be the wife of the deceased stated that after receiving death information of her husband from her brother-in-law Giasuddin, since deceased, she rushed to the place of occurrence and found her husband lying dead with marks of injuries near the house of Azimuddin Shaikh (P.W.6). She also found P.W.2, P.W.3, P.W.5 and others at the spot. She has further stated that P.W.2 told that Joynal assaulted on the belly of her husband and Jan Mahammad hit her husband on his neck and others assaulted her husband mercilessly. She also stated that P.W.3 and P.W.5 saw the accused persons fleeing away with blood-stained wearing apparels and sharp-

cutting weapons in their hands. P.W.5 has also given substantial support to the prosecution case. He has stated that Sirajuddin was murdered in front of the house of Azimuddin (P.W.6) and he noticed multiple injuries on his persons. He has stated that he found three persons, namely, accused Joynal, Jan Mahammad and Asraf fleeing away with blood-stained wearing apparels. P.W.6, Azimuddin who was declared hostile stated that Sirajuddin was murdered in front of his house. In the cross-examination, P.W.6 admitted that he found P.W.2 and P.W.4 weeping over the dead body of Siraj master at the spot that is near by his house. Of course, P.W.6 has denied to say as to who caused the death of said Sirajuddin. P.W.7, P.W.8 and P.W.9 happen to be the witnesses to the seizure of the weapons and articles seized in connection with the incident of murder of Sirajuddin Shaikh. P.W.10, Autopsy Surgeon Dr. Ajit Kumar Biswas has stated that on 9th September, 1994, he held post mortem examination over the dead body of Sirajuddin Shaikh and found the following injuries.

1 sharp cut injury on left parietal region of head extending upto right side of occipital region transversely and obliquely. Size of the wound being 8" x 1" x skull deep with fracture skull.

2 Sharp cut deep wound on back of upper part of neck transversely extending from lobule of left ear upto 1" posterior to right ear lobule - 8"/4" x survival vertical No. 1 deep.

3 Sharp cut wound on right shoulder joint extending up to root of neck on right side size of the wound being 6"/3" x bone deep.

4 Sharp cut wound on right scapular region on back / 2" x 1" muscle deep.

5 Sharp cut wound on right lateral side of neck transversely - 3"/1" x muscle deep.

6 Sharp cut wound on inferior angle of right scapula - 4"/11" x bone deep.

7 Sharp cut wound on inferior angle of left scapula - 4"/2" into muscle deep.

8 Sharp cut stabbed injury on abdomen transversely below umbilicus - 5" x 1" x abdominal cavity deep with expulsion and poggusion of small intestine which is also punctured.

13. It would be pertinent to point out that during investigation of this case one bicycle, umbrella, barsha, hensua and sword, etc. were seized by the investigating agency. It would be transparent from the record that all these weapons and articles were, during the trial of the case, produced before the learned Trial Judge and the same were marked as mat Exts. I, II, III, IV, v. and VI respectively. Further, in this context, it would be worth mentioning that victim Sirajuddin was murdered by use of sharp-cutting weapons viz. hensua, sword, etc. The Autopsy Surgeon (P.W.10) who held post mortem examination over the dead body of the deceased Sirajuddin Shaikh found the aforementioned injuries which were caused by sharp-cutting weapons.

14. In the opinion of P.W.10, Autopsy Surgeon, death of Sirajuddin Shaikh was due to shock and haemorrhage as a result of multiple sharp-cutting injuries on his body which were ante-mortem and purely homicidal in nature.

15. As a matter of fact, the medical evidence remains unchallenged as there was no cross-examination of P.W.10. Therefore, from the evidence and circumstances, it could be seen that the evidence of Autopsy Surgeon regarding death of Sirajuddin Shaikh gives substantive and corroborative support to the evidence of P.W.s referred to above leading to the incident of death of Sirajuddin Shaikh.

16. From the evidence of P.W.s, it would be explicit that Sirajuddin Shaikh sustained injuries on his abdomen, neck and different other portions of his body caused by sharp-cutting weapons like hensua, sword, bhojoli, etc. From the evidence of P.W.10 as also from post mortem report (Ext.7), it appears that there is corroborative and convincing version in regard to the injuries inflicted on Sirajuddin Shaikh. As a matter of fact, the evidence adduced by P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5, etc. cannot be said to be suffering from any inconsistency or discrepancy. In the circumstances, we are of the considered view that the corroborative evidence adduced from the end of the prosecution is worthy of credence and there is no ground to disbelieve the evidence of the P.W.s.

17. Position being so, non-production of the weapons alleged to have been used in the murder of Sirajuddin Shaikh, before the Autopsy Surgeon (P.W.10), cannot be said to have curtailed the merit of the case. Further, in scanning the evidence of P.W.s, some minor discrepancy in regard to the evidence of P.W.3, P.W.5, etc. could be detected, but in the totality of the circumstance of this case, the same is ignorable for arriving at a just decision. In regard to the examination of the accused u/s 313 Criminal Procedure Code, it has been contended on behalf of the defence that the incriminating material was not put to the accused persons and there was practically no compliance with the provisions of Section 313 of Criminal Procedure Code. As a matter of fact, unless material prejudice is shown to have been caused for the alleged non-compliance of the provisions contained in Section 313 Criminal Procedure Code, prosecution case cannot fail. In the instant case, defence has not been able to show that any prejudice was caused for the alleged non-compliance of Section 313 of the Criminal Procedure Code. In this connection, the decisions reported in 1998 SCC 790 (Shobhit Chamar and Anr. v. State of Bihar); Sukhadeo Tumdam Vs. State of Maharashtra, may be relied upon. Such views have been highlighted in para 9 of the aforesaid ruling reported in: 1997 (CRI) LJ 1059, which is as follows:

Non-compliance of the requirement u/s 313, Code of Criminal Procedure could under law, be only an irregularity being so, the same cannot vitiate the whole trial or the finding by the Trial Court. In the decision, Ram Shankar Singh and Others Vs. State of West Bengal, , the Supreme Court held that there may be error or omission in complying with Section 313 but that does not vitiate the trial." Similar view has been taken in the case of Shobhit Chamar and Anr. v.

State of Bihar reported in 1998 SCC 790.

18. To part with the discussion, it would be worthy to note down that the incident of brutal and heinous murder of Sirajuddin Shaikh, a school teacher, as also a leading person of the locality occurred on 9th September, 1994 forenoon in an open broad day light when it was drizzling.

19. From the circumstances revealed in the evidence of the P.W.s, it could be said that the murder of Sirajuddin Shaikh was a pre-planned action of the Appellants. On this score also the evidentiary value of the P.W.s cannot be discarded for mere certain minor discrepancies in the evidence.

20. We have gone through the decision relied upon on behalf of the defence, we have also gone through the evidence of P.W.s and other materials on record. Having heard the learned Counsel for both the parties and also considering the materials on record as also regard being had to the principles of the ruling indicated above, we are of the considered view that the learned Trial Judge while examining the accused persons u/s 313 of Code of Criminal Procedure explained the incriminating circumstances as also the substance of accusation to the concerned accused persons. In the circumstances, it cannot be said that the accused persons have been prejudiced thereby in any manner. As regards the relation witness being P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, etc. it has been highlighted in the ruling reported in 2000 Cri LR (SC) 515 (Hukam Singh and Ors. v. State of Rajasthan) and in view of the said ruling there is no reason to disbelieve the relation witnesses who are supposed to be interested in conviction of real culprit. In this context, it may be pertinent to point that that the evidence of P.W.s as discussed above persuades us to understand and believe that the incident was the outcome of previous dispute between the deceased Sirajuddin Shaikh, a supporter of Congress Party and the accused persons. From the evidence of P.W.s it would appear that there is evidence of forming unlawful assembly, the common object of which was to commit murder of Sirajuddin Shaikh. Further it is manifest from the evidence that the Appellants took active part in the incident of murder of Sirajuddin Shaikh. In the instant case, it is in evidence that the Appellants were armed with deadly weapons and they were members of the unlawful assembly. Further in this context, it may be pertinent to point out that non-mentioning the names of the witnesses in the FIR (Ext.1) is not at all fatal as the same does not cause any prejudice to the accused. Also there is no material irregularity or legal infirmity in the matter of framing of charge. Under such circumstances, it cannot be said that the defence has suffered any prejudice which could render the prosecution case wholly unacceptable and vitiating. In the result, we are unable to accept the contention made on behalf of the defence.

21. Therefore, considering the submission made on behalf of the parties concerned and also regard being had to the evidence and materials on record we are satisfied to hold that there is no ground to interfere with the findings arrived at by the learned Trial Judge. Resultantly, the appeal merits dismissal.

22. The appeal is, therefore, dismissed.

23. The Appellants are directed to surrender before the learned Trial Court within one month from the date of communication of the order to serve out the sentence.

24. Let a copy of this judgment along with the lower Court records be sent down to the learned Court below immediately.

25. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.