

(2007) 09 CAL CK 0086
In the Calcutta High Court
Case No : C.R.A. No. 140 of 1996

Joynal Mondal and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 07-09-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Evidence Act, 1872 — Section 14
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2008) CriLJ 620

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Dipak Kumar Sengupta and Mrityunjay Chatterjee, for the Appellant; Abhimesh Goswami, Public Prosecutor and Ranjit Kr. Ghosal and Minoti Gomes, for the Respondent

Judgement

Girish Chandra Gupta, J.—Joynal Mondal, Akkash Sk., Sadar Mondal and Tahajuddin Sk. were all charged u/s 302 read with Section 34 of the Indian Penal Code for intentionally and knowingly causing death of Abdul Latif Biswas on 16th February, 1984. By a judgment and order dated 9th May, 1996 in connection with Sessions Trial No. 1(5) 92 arising out of the Sessions Cases No. 28/89 they were convicted and found guilty. By an order dated 10th May, 1996 passed by the learned Addl. Sessions Judge, 2nd Court, Murshidabad they were sentenced to suffer imprisonment for life for commission of the aforesaid offence. The convicts came up in appeal. After the appeal was admitted by an order dated 2nd July, 1996 they were enlarged on bail. The appeal has now come up for final hearing.

2. The prosecution case briefly stated is as follows:

On 16th February, 1984 at about 4.30 p.m. the convicts chased the victim Abdul Latif, a resident of Kalidaspur. The victim took shelter in the verandah of the de facto-complainant Labani Das. Joynal fired a shot from a pipegun. The complainant Labani sought to pacify him but the former* was bashed aside with

a blow on his left cheek. He was also threatened with dire consequences. The accused persons thereafter dragged Abdul Latif to the courtyard of the adjoining house of Haru, the father-in-law of the de facto-complainant whereat Akkash Sk., Tahajuddin and Sadar chopped different part of the body of the victim including shoulder, neck, hand, belly etc. with pisli and hesua resulting in bleeding injury and instantaneous death.

3. The only point for consideration is whether the judgment under challenge holding the appellants guilty on the basis, of the evidence on record can be upheld.

4. The de facto-complainant Labajp Das, (P.W. 1) deposed that on the fateful day at about 4/4.30 p.m. he was feeding grass to his goats. At that time he found the accused persons chasing Abdul Latif. Abdul Latif took shelter in his house. The accused Joynal fired a shot aiming at Abdul Latif. Abdul Latif fell down. The P.W. 1 protested. Joynal in return dealt a blow on his face. As a result of which the P.W. 1 fell down on the ground. His wife Bhubani Dassi came to his rescue and lifted him. Both the husband and wife raised alarm being attracted Murtaza, P.W. 7 and Nizamuddin P.W. 9 came running. The accused Akkash and Tahajuddin took the victim Abdul Latif to the courtyard of his father-in-law's house and dealt blows on the victim by hesua and pisli. Hearing the hue and cry people of the locality also collected at the place of occurrence whereupon the accused persons left the place. Abdul Latif died instantaneously on the spot.

5. Bhubani Dassi (P.W. 2) the wife of P.W. 1 deposed that Joynal Mondal and three others chased Abdul Latif. She was unable to tell the names of the three other accused persons accompanying Joynal. They came to her verandah chasing Abdul Latif. Joynal fired a shot at Abdul Latif from a gun. Abdul Latif fell on the ground. Then rest of the three accused persons dragged Abdul Latif to the courtyard of her father Haru Das's house. Joynal brandished a gun like instrument in the courtyard of the house of her father and the other three assaulted Abdul Latif by giving blows by hesua and pisli. Abdul Latif died instantaneously on the spot. She deposed that her house and her father's house were adjacent to each other. She also deposed that her husband requested Joynal not to commit murder of the victim Abdul Latif. She deposed that besides herself, her husband and her father were present in their respective houses. She identified the accused persons on the dock. P.W. 7, Murtaza deposed that he heard a sound of a gun fire from the direction of the house of Labani the P.W. 1. At that time he was at a distance of 30/40 cubits from the house of P.W. 1 thrashing mustard seeds. When he was taking the thrashed mustard seeds by his bicycle he found Joynal, Akkash, Tahajuddin and Sadar in the courtyard of the house of P.W. 1 with sharp cutting weapons and pipegun. He saw Tahajuddin, Akkash and Sadar assaulting Abdul Latif and giving him blows repeatedly. However the accused persons had left the place of occurrence before he arrived there.

6. P.W. 9, Nazimuddin deposed that he was weaving a net about 1.5 bighas

away, from the house of P.W. 1. He heard a sound and went to the place from where the sound came. He went to the house of P.W. 1 and found Abdul Latif lying dead with bleeding injuries in front of the house of Haru. Haru, Labani and Bhubani Dassi told that Joynal and others assaulted the victim.

7. These are the four material witnesses of whom P.W. 1 and his wife P.W. 2 are the eye-witnesses. P.W. 7 and P.W. 9, according to the evidence of P.W. 1 came running to the place of occurrence on hearing the hue and cry. The significant point is that the evidence of P.W. 1 insofar as the part played by Joynal is concerned has been corroborated by Bhubani Dassi the P.W. 2. She however said nothing about her husband (P.W. 1) being assaulted when he wanted to pacify Joynal. P.W. 2 talked about Joynal and three others. She was unable to tell the names of the three others. She did not give any clue by which it can be established that the rest of the accused were actually meant by her. It is true that she identified the accused persons on the dock. But such identification, easy as it is, does not lend any assurance.

8. P.W. 7, it would appear, has given an altogether a different version of the incident. According to him, "I found Joynal, Akkash, Tahajuddin and Sadar in the courtyard of house of P.W. 1. Joynal was standing with an iron pipe in his hand and the other three accused persons were carrying pulsi and hesua. I saw Tahajuddin, Akkash and Sadar assaulting Abdul Latif and giving him blows repeatedly. The accused persons left the courtyard of the house of RW. 1 before my arrival there".

9. The evidence of P.W. 1 is that after firing the gun shot aimed at the victim, the victim had fallen down. Then the victim was dragged to the courtyard of Haru. It is in the courtyard of Haru that repeated blows with sharp weapons were given to the victim whereas the evidence of P.W. 7 suggests that the blows were given to the victim in the house of P.W. 1 himself. We could have understood that he found Joynal standing with a pipegun in the house of P.W. 1 but when he added that he also found the rest of the accused persons giving deadly blows to the victim in the house of P.W. 1 we cannot but hold that the version of this witness is wholly different from that of the P.W. 1. Admittedly P.W. 7 was not present at the place of occurrence. He was 30/40 cubits away according to his own deposition. Therefore the version of P.W. 7 cannot be preferred to that of the P.W. 1 in whose presence the entire incident is claimed to have happened and who is also to some extent corroborated by the evidence of his wife. We are, therefore, unable to place any credence on the evidence of P.W. 7. We are fortified in our view, in this regard, by the fact that Murtaza (P.W. 7) at 5 p.m. informed the incident to his elder brother Golam Mahabub Biswas but the names of the assailants were not disclosed to him. Had Murtaza really witnessed the incident it is inconceivable that he would not tell the names of the assailants to his elder brother.

10. P.W. 9 according to his own evidence came to the place of occurrence after the incident was over. His evidence is "Haru, Labani and the wife of Labani told

me that Joynal and others assaulted the victim". According to P.W. 1, P.Ws. 7 and 9 had come running hearing the hue and cry. P.W. 9 found the dead body of Abdul Latif in front of the house of Haru. This is another pointer to show that both P.Ws. 7 and 9 reached the place of occurrence after the event was over.

11. Another significant picture emerging from the evidence of P.W. 9 is that immediately after the incident Haru, Labani and his wife told him that Joynal and others had committed the crime. Therefore at the first available opportunity before there was any scope for any concoction the crime was stated to have been committed by Joynal and others. Haru is dead. The surviving two eye-witnesses immediately after the occurrence" did not give out the names of all the miscreants. Except Joynal, others were unidentified immediately after the occurrence and "tHey have remained unidentified even at the; trial as would appear from the evidence of the P.Ws. 2 and 9.

12. The incident happened at about 4/4.30 p.m. From the village where the incident took place the distance of the police station is about 9 kilometers. According to Gularh Mahabub Biswas (P.W. 3), he got the information, that his uncle Abdul Latif had been killed around 5 p.m. from his younger brother Murtaza, P.W. 7 but the names of the assailants were not disclosed to him. Mahabub rushed to the police station and informed that his uncle Abdul Latif had been murdered. Police came to the place of occurrence around 9 p.m. accompanied by Gulam Mahabub Biswas. According to P.W. 10 Moinudding Biswas he scribed the complaint as per the narration of Labani. He read over the contents of the complaint and thereafter he put his left thumb impression on that paper. He also signed the paper as a scribe thereof. He identified his signature on the written complaint.

13. According to P.W. 2 after the Dairoga had come at about 9 p.m. her husband got the written complaint written by Moinuddin and made over the same to Daroga Babu. Her further evidence is that before the arrival of the Daroga neither she herself nor her husband nor her father disclosed the names of the assailants who had assaulted the victim.

14. According to P.W. 1 the complaint was written at his house by Moinuddin in the evening. According to P.W. 1 Mahabub went to the police station after the complaint had been written disclosing the names of the assailants. According to P.W. 2 the complaint was written only after Daroga Babu came. Her further evidence as we already have indicated is that the names of the assailants were not disclosed untill the Daroga Babu came to the spot. She is emphatic in her statement. She stated that if Mahabub had gone to the police station he must have gone on the basis of some rumour.

15. Considering the evidence of Mahabub that he went to the police station after being informed by Murtaza the P.W. 7 who had not disclosed the names of the assailants, we are Inclined to hold that the complaint was written after the Daroga had come to the place of occurrence and it is at that stage for the first

time that the names of the assailants were disclosed.

16. P.W. 16, the Officer-in-Charge of the Harihar Para Police Station deposed that Mahabub Biswas, P.W. 3 reached the police station at about 8.35 p.m. and reported that his uncle Abdul Latif had been murdered. His examination and cross-examination were completed on 23rd July, 1992. The records reveal that on 8th March, 1994 the prosecution applied u/s 311 of the Code of Criminal Procedure seeking leave to call a competent witness either on behalf of the prosecution or as a Court witness on the ground that a GD entry bearing No. 452 dated 16th February 1994 had inadvertently not been tendered in evidence. By that time the case had already been fixed for arguments. The learned trial Judge by his order dated 18th March, 1984 allowed the prayer and granted leave to the prosecution to examine a competent witness for the purpose of proving the aforesaid GD entry. In pursuance thereof on 4th January, 1995 the P.W. 16 was recalled and a true copy of the aforesaid GD entry was tendered in evidence on the ground that original GD was missing. The true copy was marked exhibit "5". Exhibit "5" reads as follows:

452.

20.35. Information O/C.

One Golam Mehabub Biswas s/o Golum Ahammed Biswas of Kalidaspur P.S.H. Para, Msd. Came to P.S. and reported that today (66/2) at 16.30 hrs. his cousin uncle Abdul Latif Biswas was murdered by one Joynal Mondal, Akkas Sk., Tahajuddin, Sader Mondal by using pipe gun, push, Hasua. As he did not witness the matter so he did not note the fact in detail. Accordingly myself along with S.I.P. Bhattacharjee & Force left for Tehatta to look into the matter.

Sd/- N. Sarkar. O/C.

17. In the cross-examination on recall it was suggested that the document was subsequently prepared incorporating the names of the four assailants.

18. The genuineness of the copy which was tendered and marked exhibit "5" noticed above is in serious doubt. Golam Mehabub the P.W. 3 according to the GD is stated to have given out the names of the assailants at 8.35 p.m. on 16th February, 1984 whereas we already have discussed the evidence indicating that Mehabub himself was not aware about the names of the assailants. As a matter of fact, he has emphatically denied the suggestion that he narrated the incident in the police station which led to the death of his uncle Abdul Latif.

19. Considering the fact that the victim was a near relation of the P.W. 3 it is difficult to believe that he would knowingly suppress the names of the assailants. P.W. 16 who proved the exhibit "5" did not in his evidence depose that the names of the assailants were disclosed to him by Golam Mehabub, the P.W. 3. We are therefore inclined to view this document with suspicion and are further inclined not to place any credence on that.

20. P.W. 6 Dibakar Saha deposed that the accused party belonged to CPM whereas the relatives of the victim belonged to SUCI. P.W. 3 in his cross-examination deposed that he had heard that his uncle the victim was convicted and sentenced to imprisonment for life and later was enlarged on bail by the Hon"ble Court. P.W. 1 has been suggested that the case was cooked up falsely against the accused persons under the influence of Chowkidar, local police and the prosecution party.

21. It appears from the records that the FIR being exhibit "3" was noted "seen" by the learned SDJM, Behrampore on 20th February, 1984 whereas the date of despatch is 17th February, 1984.

22. P.W. 14 N.C. Pandit, the duty officer of the police station on the relevant day deposed that he received the written complaint from the Officer-in-Charge, Harihar Para on the date of incident and on the basis thereof he registered Harihar Para P.S. Case No. 7 dated 16th February, 1984. The FIR has been marked exhibit "3". In his cross-examination he deposed that it takes one hour to reach Behrampore from Harihar Para Police Station. Behrampore and Hariharpara are connected by metallic road. Yet the SDJM received the FIR on 20th February, 1984. He did not disclose any reason for the delay.

23. Exhibit "1" the seizure list goes to show that bloodstained earth, the sample earth and two pellets were seized from the veranda of Labani Das which go to corroborate the deposition of Labani and his wife Bhubani Dassi that Abdul Latif was given a I gun shot in their veranda.

24. P.W. 15, Dr. S.N. Sinha who conducted the post-mortem examination deposed that as many as 13 injuries were found on the dead body which included a gun shot injury on the upper back of the left arm with presence of three pellets. He opined that the death was due to the injuries giving rise to profuse haemorrhage and shock which was ante-mortem and homicidal in nature.

25. From the evidence discussed above we are of the opinion that Joynal inflicted the gun shot injury on the victim. We, however, are unable to arrive at any definite conclusion as regards the involvement of the three other accused persons for the reasons already discussed.

26. We shall now consider the views expressed by the learned trial Judge and indicate our views with regard thereto.

a) P.Ws. 1, 2 and 7 witnessed the incident.

We already have discussed and indicated our reasons why P.W. 7 cannot be said to have witnessed the incident.

b) P.W. 10 on hearing the incident of murder before evening went to the house of P.W. 1 and came to learn that the four accused persons had committed the crime.

We are unable to concur with him. We are sorry to say that the learned trial Judge omitted to notice that P.W. 10 was told the names of the accused persons

only when he was asked to write out the complaint. The evidence of P.W. 2 is that the complaint was written after the Daroga came at 9 p.m. There was in the circumstances enough time and scope to concoct a story particularly when the evidence of P.W. 2 is that the names of the assailants were not disclosed before the Daroga came.

c) The evidence of P.Ws. 1, 2, 7, 9 and 15 goes to establish that all the four accused persons committed the crime.

P.W. 7 according to us is not an eye-witness. P.W. 9 does not profess to be an eyewitness. His evidence is that he came to know that Joynal and others assaulted the victim. P.W. 15 is a medical officer who conducted the post-mortem report. Therefore the only persons left are P.W. 1 and P.W. 2. P.W. 1 has been materially contradicted by P.W. 2 which we already have discussed. Therefore it is not possible to hold on the basis of the evidence of P.Ws. 1, 2, 7, 9 and 15 that all the accused persons committed the crime.

d) Exhibit "5" the GD entry was recorded at 8.35 p.m. on 16th February, 1984 and unerringly pointed the finger towards the accused persons.

Exhibit 5 according to us is a suspicious document for reasons already discussed which we need not reiterate and the same cannot be taken into consideration.

e) The fact that no TI Parade was held was of no consequence because P.W. 2 identified the accused persons in Court. The accused persons were known to P.W. 2 by face except for Joynal whom she knew by name.

We are sorry to say that the learned trial Judge erroneously thought that P.W. 2 knew the accused persons by the face because she identified the accused persons on the dock. He however erred in not considering that it is easy of the easiest to say that the persons standing on the dock are the culprits. P.W. 2 did not in her deposition say that she knew the assailants by the face. Reference in this regard can also be made to the judgment in the case of Vaikuntam Chandrappa and Others Vs. State of Andhra Pradesh, wherein the following view was expressed.

It is true that the substantive evidence of a witness is his statement in Court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in Court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding.

f) The fact that the P.W. 3 deposed that the names of the assailants were not disclosed to him by the P.W. 7 has been attributed by the learned trial Judge to failing memory of a human being. He reasoned that if P.W. 3 had not known the names of the assailants he could not have given the names of the accused persons in the police station at 8.35 p.m. on the basis whereof the GD entry was recorded which was tendered and marked as Exhibit "5".

The learned trial Judge obviously gave undeserved importance to the copy of the GD entry, belatedly tendered, and on that basis ignored the definite evidence of P.W. 3 that the names of the assailants were not disclosed to him by the P.W. 7. The learned trial Judge also ignored the fact that the P.W. 3 was on the date of the incident an Honours Graduate or at any rate was a graduate having had read an Honours subject. Being an educated person he is not likely to have made any such mistake particularly when his near relation was the victim.

g) The delay in despatching the FIR to the Magistrate cannot according to the learned trial Judge displace the prosecution case.

It is true that mere delay in despatching the FIR to the Magistrate will be viewed as a lapse on the part of the investigating agency. However the Courts would in that event be more circumspect in assessing the evidence. If any authority is needed reference can be made to the judgment in the case of Karnel Singh Vs. State of M.P., :

Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective....

h) The submission that P.W. 16 did not depose that he found any trail of blood from the house of P.W. 1 to the house of Haru was rejected by the learned trial Judge on the basis that in the light of petromax he may not have noticed the same.

We are of the view that it is not proper in assessing the evidence to assume an explanation which the witness himself did not give unless a presumption can properly be based on Section 14 of the Evidence Act.

27. The reasons which weighed with the learned trial Judge in convicting all the four accused persons and our views with regard thereto having been discussed we reach the following conclusion.

The deliberate omission on the part of the eye-witnesses to disclose the names of the assailants until the Daroga came after more than four hours of the incident, inability on the part of the P.W. 2 to identify the three accused persons other than Joynal, belated marking of the exhibit "5", belated receipt of the FIR by the Magistrate, lack of T.I. Parade, incredible evidence of P.W. 7, admitted political rivalry between the parties, lead us to conclude that the chances of false implication of the accused persons except Joynal cannot be ruled out.

28. In our view the charge u/s 302 / 34 of IPC against the accused/appellant namely Akkash Sk., Sadar Mandal and Tahajuddin Sk. has not been proved beyond doubt and therefore, we set aside the judgment and conviction of the learned trial Court in respect of the aforesaid accused/appellants and acquit them

of the charge framed against them. They are also discharged from the liability of their bail bonds. The charge u/s 302 / 34, of the IPC against accused/appellant Joynal has been proved beyond all reasonable doubt and therefore, we confirm the judgment and conviction of the learned trial Court in respect of accused/appellant Joynal. Joynal is now on bail. His bail bond shall stand cancelled. Through his Counsel, he is directed to surrender before the learned trial Court within two weeks to serve out rest of the sentence. Thus, this appeal is partly allowed and stands disposed of in the above terms.

29. On failure to comply with the direction as aforesaid, the learned trial Court shall take appropriate legal steps against the accused/appellant Joynal and his sureties, under intimation to this Court.

30. Lower Court Records with a copy of this judgment to go down forthwith to the learned trial Court for information and necessary action.

Argent xerox certified copy of this judgment be made available to the learned Advocates for the parties on compliance of all formalities.

Kishore Kumar Prasad, J.

31. I agree.