

(2002) 03 CAL CK 0022
In the Calcutta High Court
Case No : C.R.A. No. 131 of 1987

Judhistir Mudi and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 12-03-2002

Acts Referred:

Evidence Act, 1872 — Section 134, 3, 6
Penal Code, 1860 (IPC) — Section 304, 34

Citation : (2002) 2 CALLT 228 : (2002) 3 CHN 690

Hon'ble Judges : Malay Kumar Basu, J;Debi Prasad Sengupta, J

Bench : Division Bench

Advocate : Balai Ch. Roy, Prabir Majumdar and Rupa Bandopadhyay, for the Appellant;Kazi Safiullah and Swapan Mallick, for the Respondent

Final Decision : Dismissed

Judgement

M.K. Basu, J.—This Criminal Appeal has been directed against the judgment and order dated 30th March, 1987 passed by the learned Additional Sessions Judge, Purulla in Sessions Case No. 21 of 1985 (Trial No. 23 of 1986) of that Court which arose out of G.R. Case No. 1977 of 1982 whereunder the learned Judge found the accused-appellants guilty of an offence u/s 304 part-I read with Section 34 IPC and convicted them thereunder and sentenced each of them to suffer rigorous imprisonment for ten years. Being aggrieved by that Judgment and order of conviction and sentenced the convicts have preferred the present appeal challenging the impugned judgment as illegal, incorrect and unsustainable.

2. The prosecution case has revealed from the materials on record was as follows. On 24th October, 1982 early in the morning at about 5-00 a.m. Chepu Mahato (the deceased) son of Indra Narayan Mahato of village Banbahal under P.S. Purulla was going towards the house of one Nibaran Mahato of village Pathardhi to fetch money. Behind him at a distance of about 30 cubits his brother Khandu Mahanto (the informant & P.W.2) was also going towards the same direction with a view to washing his hands and mouth to a nearby tank.

Sometime after Khandu found the accused persons, namely, Judhlstlir, Bibhatsa, Haren and Maliram Modi of the same village to come on that road and to assault Chepu with lathis and axes while he was walking along the eastern bank of the Upar Sayer Tank. Seeing this Khandu started crying and rushed to the place of occurrence and on sight of him all the accused persons ran away and he saw Chepu lying in a pool of blood with bleeding Injury on his head. In the meantime hearing the alarm raised by Khandu some villagers from the locality also rushed there, namely, Paltu Mahato, Rohl Mahato and Biru Mahato came to the place of occurrence and with their help Khandu took the Injured Chepu first to the house of Paltu and after procuring a cot therefrom they . carried Chepu in that cot to Purulta P.S. There he narrated the Incident to the OC who recorded the same and got it signed by him. Thereafter they took the injured to Purulla Sadar Hospital where he was admitted to, after 14 days he succumbed to his injuries. Police first registered on the basis of the said FIR a case under Sections 324/326/34 IPC against the above mentioned accused persons and took up investigation of the case but later on when the injured died, Section 304 IPC was added to the FIR. After completion of investigation police submitted charge-sheet against the accused Judhlstlir, Blbhatsa @ Blbhutl and Harendra Nath Modi u/s 304 part-I read with Section 34 IPC. A case being a Sessions trial one was committed to the Court of Sessions by the learned SDJM for trial thereof. The learned Additional Sessions Judge framed charge against all the three appellants under the above mentioned section of IPC when all of them pleaded not guilty and claim trial. The defence case as disclosed from cross-examination of witnesses and 313 statements was one of innocence and false implication. The learned trial Judge after considering the evidence adduced by the prosecution came to the finding that it had been able to substantiate the charge against all the three accused to the entire satisfaction of the Court beyond any reasonable shadow of doubt and accordingly, he found them guilty of the offence with which they were charged and convicting them there under awarded the above mentioned sentence.

3. The learned trial Judge has relied upon the testimony of the PW 2 who is the sole eyewitness to the occurrence. According to him, although this PW 2 happen to be the brother of the deceased and thus a relation-witness, that has no adverse effect upon his trustworthiness. In this respect he has relied upon the principle settled by the apex Court that a witness does not lose credibility, simply because he is related to the deceased although of course his evidence requires careful scrutiny in order to ascertain whether it suffers from embellishment or exaggeration due to Interestedness. But it never should be thrown away as inherently incredible. On the other hand, the evidence of a related witness rather provides some guarantee of truth since it is most unlikely that he would screen the real culprit by falsely Implicating some other accused persons (vide decision of the apex Court reported in AIR 1982 SC 1959). The learned Judge has then scanned the evidence of PW 2, Khandu Mahato in the light of his cross-examination and has found that there is nothing unnatural or Improbable in his statements or conduct as a witness and his evidence has been quite consistently

corroborated by the medical evidence as well as the testimonies of the other witnesses. Learned Judge has also found that there has been no discrepancies on the chief particulars of the allegations between the FIR and his deposition before the Court and the discrepancy which according to the learned defence lawyer appear to have emerged between the two are touching upon the most unimportant and minor details so that they do not affect the reliability of the witness. Learned trial Judge has also held that there has been no delay in the lodging of the FIR and there is absolutely no reason for suspecting the genuineness of the allegations made in the FIR which does not suffer from any embellishment

4. Mr. Balal Roy, learned counsel, for the appellants has attacked the Impugned Judgment on a number of grounds. According to him, the trial Court has committed a mistake by arriving at his finding of guilt of the accused on the basis of the sole testimony of PW 2 who apart from being a close relation of the deceased is not at all a reliable on other scores also. Thus, in the first place, he contends, the evidence of the said witness (PW 2) that he was following the deceased on the fateful morning from behind remaining at a distance of about 30 cubits suffer from some inherent improbabilities. Mr. Roy argues that this is against the normal course of human conduct because, they being two brothers, it is only likely that at that hour of the morning (at about 5-40 a.m.) they would go together walking side by side and the story of such following from behind appears to be unusual and not worth being believed. But we are not Impressed by this argument. There cannot be any fixed formula in which human beings would act or conduct everytime. There might be so many personal reasons why the two brothers in that morning went out of their house one after another and not together. Their destination were not the same and the two set out from the house as per their respective convenience and time. The only point to be ascertained is whether such an allegation has been satisfactorily established by means of evidence adduced by the prosecution and if it is so established, then that is a hard reality and has to be accepted irrespective of any such theorisation. The second ground on which the PW 2's evidence is not dependable according to Mr. Roy is that it is at variance with his story in the FIR with regard to the place of occurrence and the distance between himself and the deceased at the time of the occurrence. In his testimony before the Court he has shifted the place of occurrence to the western Bank of the tank whereas in his FIR he gave the eastern slope of the tank as the P.O. But in our estimation such a discrepancy is not at all very material, particularly in the context of the fact that the witness is an uneducated villager and is deposing before the Court several years after the occurrence and such mistake rather Indicated that he is not a tutored witness and what he says is simply out of his memory. The sketch map of the P.O. drawn by the I.O. gives support to the FIR-story which the witness originally gave out as an Informant and thus that averment gets corroborated and if the witness while deposing before the Court after the lapse of several years displays such a loss of memory, as regards the direction then that should not be regarded as an

Insurmountable shortcoming in the prosecution evidence. At any rate, this erroneous version of the PW 2 regarding the direction of the place of occurrence opposite to his earlier statement in the FIR does not strike at the root of the prosecution case and is to be Ignored in view of the other evidences on record on this point. Clearly indicating that it was the result of mere loss of memory due to lapse of time.

5. The next criticism levelled by Mr. Roy against this PW 2 is that he could not be in a position to see the occurrence as claimed by him, because at that time, viz, at about 5.45 a.m. during the month of November it must have been totally dark and he being at a distance of about 30 cubits as per his own statement could hardly see the details of how any such occurrence took place. But we are unable to accept this contention. Nowhere in the evidence there is anything to the effect that at that time there was darkness so as to prevent a person from seeing things from such a distance. It has been taken by the defence from the mouth of this witness (vide the very first Jline of his C.E) that the Incident took place just at dawn. It is a common knowledge that at "dawn" when though the sun is yet to rise, there is sufficient light emanating from the sky to make things visible and to enable the people to pursue their ordinary avocation. Moreover, in his cross-examination it has been repeatedly elicited from this witness by the defence that at the relevant time that is at the time of occurrence the deceased was at a distance of about 20/25 cubits from him. It is not Improbable or unbelievable that he could clearly see the accused persons to assault the deceased from such a distance at that hour of the day.

6. The third contention of Mr. Roy is that it is not believable that as a result of the "bleeding" Injuries which were allegedly caused by the assailants on the person of the deceased not single drop of blood would fall on the ground where the occurrence took place and the fact that as per the version of the I.O. no bloodstained earth could be seized from the PO as blood did not fall there at all falsifies the case of the prosecution. It is not believable that the I.O, would not see any trace of blood at the spot when evidence is to the effect that the deceased was profusely bleeding. But it is in evidence and is not disputed that the wearing garments of the deceased had been found stained with blood and as a matter of fact those have been also exhibited by the prosecution (vide material Exbt No.1). Secondly, as per the trend of evidence, after the deceased was assaulted by the miscreants he was lifted by the PW2 and some other neighbours who gathered there on hearing the cries of PW2 instantaneously and carried towards the hospital. Thus the body of the injured lay there for a very short time and the first round of blood that came out from his Injuries was soaked by his wearing apparel. Had the body been laid there for a longer time, then of course, blood in sufficient quantity would have fallen on the earth. Hence the mere fact that the I.O. could not collect blood-stained-earth from the PO should not be taken to show that no such occurrence of assault took place at that spot as alleged. Another argument advanced by Mr. Roy is that there has been no attempt on the part of the prosecution to examine one Nibaran of Pathardhi

village where the deceased was allegedly going on that fateful morning for collecting money and this shows that the prosecution has failed to prove its case in the manner in which it has been alleged. But from the evidence of PW2 we find that he has not given any such name of any villager known as Nibaran. What he has stated is that the deceased was going towards Parhardhi village to collect money. Nowhere in the cross-examination this statement of PW2 appears to have been put to challenge. Therefore, the omission of the prosecution to examine the particular person from whom the deceased was to collect the money will not have any adverse effect on the credibility of the prosecution case.

7. As regards the question raised by the learned counsel for the appellant that the PW2 being the elder brother and hence a close relation of the deceased should not be relied upon in order to convict the accused, particularly when he is the sole eyewitness, we are of the view that such a witness should not be condemned merely for the reason that he happens to be related to the deceased. Of course, his testimony should be subjected to greater scrutiny in order to ascertain whether he is giving any false or exaggerated version about the Incident or about the involvement of the accused persons or if he is displaying any Interestedness and presenting a distorted picture. In this perspective, the evidence of the PW2 which we have already discussed appears to have stood the test. From his cross-examination we get nothing to show that he is guilty of embellishment or exaggeration in narrating the incident as he saw by his own eyes and. more particularly, nothing has revealed from his cross-examination to the effect that he has any animosity or grudge against the appellants so that he is falsely implicating them in order to satisfy such inimical feeling. What is more, his criticism that the evidence of this PW2 is totally uncorroborated cannot be taken as correct. Although the PW4 and PW5 cannot be strictly be categorised as eyewitnesses their evidence constitute what is known as Res gestae under the provisions of Section 6 of the Evidence Act. Because, they came running to the place of occurrence just after the occurrence on hearing cries of PW2. The PW5 found all the four accused persons including the appellants running towards the West and found Chepu lying Injured on the slope of the bundh and thereafter he and PW2 lifted the injured and took him towards his house and procured on their way from the house to PW4 a cot whereupon the injured was laid and then taken to the thana and thereafter to the hospital. Therefore, clearly, the coming of the PW5 to the spot was almost instantaneous and there was hardly any time-gap or interval to enable the PW2 to get any scope to manufacture a false story against the accused person. Moreover, PW5 saw the accused persons to run away from the side of the place of occurrence towards the West. This by itself forms a strong piece of evidence by way of lending corroboration to the evidence of the PW2. Similarly the PW4 (Paltu Mahato) from whose house they took a cot and to whom the PW2 narrated the incident also is to be governed by the same reasoning. This witness also on hearing the alarm raised by PW2 came out of his house and started running towards the PO and on the way he found the PWs 2&5 carrying the injured Chepu and then the PW2 narrated the incident mentioning

the names of the persons who had assaulted Chepu, and thereafter the PW4 gave a cot to them from his house. The time-gap between the incident of assault and the narrating of the Incident by PW2 to this witness also is very short. Any fear that within this short time the PW2 would give a false or exaggerated version of the Incident is ruled out. Thus, there is much substance in the argument of Mr. Saflullah, the learned public prosecutor, that this is a fit case where the doctrine of Res gestae as enshrined under the provisions of Section 6 of the Evidence Act forming an exception to the rule of hearsay would be applicable and that in this way there has been sufficient corroboration of the PW2's testimony.

8. It is needless to mention that the medical evidence also is in full consistency with and support of the ocular evidence. The injuries found by the doctors (PWs 9, 11 & 12) tally with the evidence of the eyewitnesses giving a description of the manner, nature and extent of assault as well as the weapon used in the assault. The PW9, Doctor Sukumar Chatterjee, who held the postmortem examination of the deceased found the following Injuries: -

1. One stitched wound on the left side of the head measuring 3 1/2 in length.
2. Stitched wound on the left side cheek measuring 3 1/2 in length.
3. Stitched wound on the right parietal bone region of head measuring 2 1/2 in length.

9. The PW Dr. D.K. Chandra, the Medical Officer, M.R. Bangur Hospital who examined the injured as an Indoor patient on 28th October, 1982 has in his evidence stated that the incised wounds which were found on the person of the deceased could be caused by sharp cutting weapons like axe or tangi or sword. Thus the medical evidence is in harmony with the ocular evidence in so far as the nature of the wound found on the body of the deceased by the doctor fits in with the prosecution evidence that the injuries were caused by an axe. These Injuries were anti-mortem and homicidal in nature and were sufficient to cause death in the ordinary course of nature.

10. It is also found from the evidence that the prosecution has been able to prove that the assault was perpetrated on the deceased jointly by the four accused persons including all the three appellants and although the accused Judhisthir assaulted him with an axe and the other three with lathis, all the four assailants were being governed by the common intention of inflicting on the person of the deceased such Injuries as were sufficient to cause the death of the injured in the ordinary course of nature. Therefore, the learned trial Judge appears to have rightly held that the prosecution had succeeded in establishing the charge against all the appellants u/s 304 Part-1 read with Section 34, IPC.

11. As regards the sentence Imposed on the convicts by the trial Court we do not find it unjustifiable in its extent, regard being had to the manner in which the injuries were caused and weapons used.

In the result, we are inclined to hold that the Impugned judgment and order of the Court below do not suffer from any Infirmary or error and the same should not be interfered with. Accordingly, the Criminal Appeal be dismissed and the impugned judgment and order be affirmed.

D.P. Sengupta, J.

12. I agree.