

(2015) 08 CAL CK 0035
In the Calcutta High Court
Case No : C.R.A. 1000 of 2013

Krishna Mondal and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 313, 34, 428
Penal Code, 1860 (IPC) — Section 307, 324, 325, 326, 34

Citation : (2015) 08 CAL CK 0035

Hon'ble Judges : Indrajit Chatterjee, J

Bench : Single Bench

Advocate : Arnab Chatterjee, for the Appellant; Manjit Singh, Ld. P.P. and Anand Keshari, Advocates for the Respondent

Judgement

Indrajit Chatterjee, J—I am hearing this appeal as against the judgement and order of conviction dated 29-11-2013 passed by the learned Additional Sessions Judge, Lalbagh within the District of Murshidabad in Sessions Trial No. 10 of January, 2008 arising out of Sessions Case No. 47 of 2007 wherein the learned Trial Court was pleased to convict these appellants before this Court in respect of the charge punishable under Section 307 read with Section 34 of I.P.C. (hereinafter called as the Code) and both were sentenced to suffer rigorous imprisonment for six years and to pay fine of Rs. 5000/- each and in default of payment of fine, they were further sentenced to suffer rigorous imprisonment for six months more subject to the provision as contemplated under Section 428 of the Cr.P.C.

2. The case of the prosecution, as unfold before the Trial Court, can be stated in brief thus: that one F.I.R. was filed by the de facto complainant, P.W.1 before the Trial Court on 13-04-2004 at about 12:35 hours giving rise to Ranitala P.S. Case No. 26 of 2004 dated 13-04-2004 within the District of Murshidabad and the said case was registered under Sections 448/325/326/34 of I.P.C. The case was investigated by the I.O. of this case.

3. F.I.R. was scribed by one Golam Mustafa. As per the F.I.R. the incident took place at about 8 a.m. on that date. It was the day of Shiv Puja and the disciples were playing Holy on that occasion for which there was some quarrel in between. Thereafter the appellant No. 1, Krishna Mondal, appellant No. 2, Bhabesh Mondal and another accused Hemai Mondal since deceased attacked the victim P.W.2, by lathi, pasli and the later received three injuries.

1. Cresentric incised injury over occipital region measuring 5 cm x 1/4 cm.

2. Lacerated injury over port aspect of neck measuring 1 cm x 1/4 cm.

3. Incised injury over left forearm measuring 1 cm x 1/4 cm.

4. During the course of investigation, the wearing apparels of the victim were seized and the I.O. of the case also seized two "Hasuas" as per seizure list dated 13-04-2004 at 16.45 hours. The victim was medically examined by P.W.9 and his report was marked as Ext.4. The I.O. of the case, after investigation, submitted charge sheet against the three accused persons. I have already told that accused, Hemai Mondal died and as such, the case was filed as against him. The case was triable as sessions triable case and as such, the case was committed to the Court of Sessions. Ultimately, the case was transferred to the Trial Court and I have already said what was the result of the legal battle before the trial court.

5. Before the Trial Court charge was framed as against all the three accused persons in respect of the charge punishable under Sections 325/326/307/34 of the Indian Penal Code on 30th July, 2007 to which the accused persons pleaded not guilty and claimed to be tried.

6. On behalf of the prosecution in all 11 witnesses were examined. P.W.1, P.W.2, P.W.3, P.W.5 and P.W.6 are the alleged eye witnesses of the incident and they are all relations of the victim. P.W.4 was the scribe of the F.I.R., P.W.7 was a co-villager of the village Rajapur but he was declared hostile. P.W.8 who is also a witness of that village only came to prove his signature on the seizure list like that of P.W.7. P.W.9 was the doctor, who treated the victim and gave one injury report I have already mentioned the injuries which the doctor noticed. P.W.10 was the formal witness, being the recording officer. P.W 11 was the I.O. of the case. Defence did not adduced any DW and the accused persons were examined under Section 313 Cr.P.C. disclaiming their any role in the incident.

7. The defence argued

1) the evidence of the so-called eye witnesses should not be believed as admittedly there is an enmity between the parties,

2) that the FIR was forwarded to Court only on 15.04.2004 and as such there was sufficient delay in forwarding the FIR,

3) That there is also disparity as regards the weapons of offence used. He submitted that as per the evidence of the so-called eye witnesses and as per F.I.R, the weapons of offence were pasli, and lathi but not Hasua. He also

submitted that in spite of this the I.O. of this case seized two hasuas,

4) that one police camp already there in the house of Madhu Mondal (P.W.5), but nobody of that police camp was cited by the I.O. as an witness,

5) that there is disparity between the evidence of P.Ws as regards the fixation of the place of occurrence. Learned counsel submitted that the P.W.7 was silent regarding the place of occurrence,

6) that as per P.W.2 it was the southern side of his house, as per P.W.3 it was besides their house (P.W.3 is the house wife of P.W.2s family), as per P.W.5 place of occurrence is his residence and P.W.6 did not fix up the P.O. but deposes that suddenly Krishna Mondal (A1) came out and assaulted the victim (P.W.2).

8. That in the injury report the names of the assailants were not mentioned as well as the history of assault was also not mentioned. He also argued that the examinations of the accused persons under Section 313 were defective as the sentences were jumbled up and were ambiguous. It was also argued that no question was put by the learned Trial Court regarding the evidence of P.W.9 vis-a-vis the injury report which is Ext.4.

9. He cited several decisions of the Apex Court, as reported in (Ram Prasad and Others Vs. The State of U.P., AIR 1976 SC 199 : (1976) CriLJ 201 : (1976) 1 SCC 406 : (1976) SCC(Cri) 24 : (1976) 8 UJ 186 .); a decision on Section 34 of the Code. (Ishwar Singh Vs. State of U.P., AIR 1976 SC 2423 : (1976) CriLJ 1883 : (1976) 4 SCC 355 : (1976) SCC(Cri) 629) as regards expert evidence. In the instant case before this Court no weapon of offence was shown to the doctor. In that decision the Apex Court held that it was the duty of the prosecution and no less of the court to see that the weapon of offence is shown to the medical officer and failure to do so, may sometimes cause aberration in the course of justice. Meharaj Singh (L/Nk.) Vs. State of U.P., (1995) CriLJ 457 : (1994) 3 JT 440 : (1994) 2 SCALE 632 : (1994) 5 SCC 188 : (1994) 3 SCR 592 a decision on interested witness and delay in sending the FIR.

10. One unreported decision of this Court as delivered in (CRA 221 of 1995) in the case of (Rebati Baidya & Ors. -vs- State of West Bengal); also on the point of delay in sending the FIR to the Magistrate.

11. On behalf of the prosecution, it was argued by Mr. Keshari led by learned Public Prosecution that there was practically no delay in sending the F.I.R. to the learned Magistrate having jurisdiction under Section 157 of the Code of Criminal Procedure as 14th April, 2004 was "Chaitra Sankranti" as well as birth day of Dr. B.R. Ambedkar which is a national holiday. He further submitted that the F.I.R. was placed before the learned Additional Chief Judicial Magistrate, Lalbagh, on 15.04.2004, i.e., just after the court re-opened. Thus, he submitted that the decisions of the Apex Court as cited by defence on this point are redundant, if the evidence of the witnesses are taken into consideration, this court may consider that actually there was no change in the place of occurrence. This may

also be taken into consideration that witnesses are rustic villagers and came to depose after four years after the incident and naturally their memory faded by that time. Regarding the non-production of the weapons of offence to the doctor, it was the submission of Mr. Keshari that when the doctor was examined as P.W.9, those "Hasuas" were not produced before him and those were marked as material exhibit only through the evidence of P.W.11. He also submitted that the point as regards recovery of weapons were duly proved through the evidence of the Investigating Officer and that those were duly produced before this court. He cited the decision of the Apex Court as reported in *Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another*, AIR 2012 SC 1292 : (2012) CriLJ 1991 : (2012) 3 JCC 1714 : (2012) 3 SCALE 414 : (2012) 4 SCC 722 : (2012) AIRSCW 1994 wherein the Apex Court held that the evidence police officer may be relied upon if his evidence is trust worthy. He took me to the evidence of the Investigating Officer to show that practically no contradiction was taken as regards the defective investigation on any count whatsoever.

12. It was the submission of the learned Public Prosecutor by taking me to the questions and answers given by the accused that neither the questions were jumbled up nor the questions were ambiguous. He submitted that the defence did not make out any positive case and answered in the negative the questions put to the accused persons in their examination under Section 313 of the Code of Criminal Procedure and as such, the argument of the defence on that score should not be relied upon by this court as regards non-citing of the police personnel who were in the camp at that village. It was argued by the learned Public Prosecutor that no question was put to any witnesses that they relied the incident to any member of such police force and as such, this argument also has no leg to stand upon.

13. Regarding the omission in the medical report, the names of the assailants or the history of injury, it was his submission that those were omission but the evidence of the eyewitnesses are there to cure all these. Regarding the decision of the Apex Court in *L/NK Meharaj Singh (Supra)*, it was submitted by Mr. Keshari that the said decision has been overruled as per the decision of the Apex Court reported in *Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P.*, AIR 2006 SC 951 : (2006) CriLJ 1121 : (2006) 2 CTC 762 : (2006) 1 JT 428 : (2006) 1 SCALE 369 : (2006) 2 SCC 450 : (2006) 1 SCR 519 : (2006) 1 UJ 370 : (2006) AIRSCW 421 : (2006) 1 Supreme 371 .

14. In reply, it was submitted by learned defence Counsel that P.Ws. 7 and 8 were both declared hostile and such there was no reason to believe the story of recovery.

15. I have taken into consideration the argument put forward by the learned Advocates for the parties. I have gone through the evidence of the P.Ws. and perused the lower court records as regards as well as the documents particularly the F.I.R., the medical reports, seizure list. Considering the evidence of P.Ws. 1, 2, 3 and 5, this court is satisfied that the appellant No. 1 along with the other

accused came out of their house and the appellant No. 1 assaulted the victim by one "Pasali" and the appellant No. 2 assaulted the victim by one "Lathi". Keeping my searching eyes on the cross-examination of those witnesses, I am satisfied that whatever they omitted or contradicted in between themselves this can safely be covered considering the fact that they came to depose after four years of the incident and they are rustic villagers. In every true case there must some omissions or contradictions. I am not unmindful of the fact that already there is litigation pending between the parties. It is needless to say that enmity cuts both ways. On scrutiny of the evidence of the eyewitnesses, this court is satisfied that the injuries (at least one) which the victim sustained was inflicted by the appellant No. 1. It is very difficult to say which blow this appellant No. 1 gave and which blow the deceased accused gave. It is the positive evidence of the witnesses that the appellant No. 2 hit the victim by "Lathi" but the medical report is not suggesting this. He was implicated with the aid of Section 34 of the Code and the witnesses consistently deposed that he was with the co-accused person with "Lathi".

The accused appellants did not come up with any specific plea as to how the victim sustained injuries. It is well settled that any person who has claimed himself to be innocent and pleas of false implication was raised, he must also prove that the foundation of his false implicated. There is nothing in the cross-examination of these witnesses to show as to why the accused persons were falsely implicated. It is true that these eyewitnesses are coming from the same family and naturally they are related witnesses but on that ground their evidence cannot be brushed aside. I have meticulously perused their evidence there is nothing to impeach their credibility.

The argument of the defence that the witnesses deposed at variance regarding the place of occurrence is also not convincing to me, there is no delay in sending the FIR and I accept the argument of the prosecutor on this point. There is no evidence that the witnesses transmitted to the police men camping at that village as to the incident. Thus, there is no reason to disbelieve the prosecution story for there to non-examination.

It is true that the doctor was not shown the weapons of offence and this court is not unmindful of the decision of the Apex Court in Ishwar Singh (Supra) but in that decision there was no specific direction of the Apex Court that the weapons of offence must be shown to the doctor. That case before the floor of the Apex Court was not of this type where the production of the weapons to the doctor was of great importance.

16. It is true that the doctor did not mention the names of the assailants or the history of the injuries in his report, Ext. 4 but this may be treated as omissions and these omissions may be covered through the evidence of as many as five eyewitnesses. I have gone through the examination of the accused persons recorded under Section 313 of the Code of Criminal Procedure. This court is of considered opinion that no prejudice was caused to the accused appellants who

duly answered put to them but answered in the negative knowing the implications of the questions.

17. It is true that no question was put by the court on exhibit 4 or as to the evidence of the doctor but this defect may be cured considering the answers given by the accused persons in their statement recorded under Section 313 of the Code when they answered in the negative. When the doctor was also examined, he was not asked as to why he missed to mention in Exhibit 4 the names of the accused person or the history of assault. Thus, this point was not thrashed before the doctor. Thus, this court is satisfied that no prejudice was caused to the appellants when they were examined under Section 313 of the Code of Criminal Procedure.

18. This Court is satisfied on scrutiny of evidence on record both oral and documentary that it was the accused persons/appellants who caused the injuries to the victim in furtherance of their common intention. Now, the question is whether the injuries sustained by the victim can be covered under Section 307 of the IPC. I have gone through the injury report meticulously and also noted what were the injuries sustained by the victim. I have also taken into consideration the weapons which the accused appellants were carrying at that point of time. The victim got practically two slight sharp cutting injuries. It is true both were on the vital parts of the body and as per opinion of the doctor it was grievous in nature but the nature of injuries cannot secure my confidence to attract Section 307 of the IPC which is a vital grave Section. The appellant No. 1 assaulted the victim by one sharp cutting weapon and the victim received injuries on his head, neck or in the fore arm. I again like to mention what types of injuries the victim suffered when at least two of the accused were armed with deadly weapons and one was armed with "Lathi". The Injuries were as follows:

1. Cresentric incised injury over occipital region measuring 5 cm x 1/4 cm.
2. Lacerated injury over port aspect of neck measuring 1 cm x 1/4 cm.
3. Incised injury over left forearm measuring 1 cm x 1/4 cm.

The person with deadly weapons could have inflicted more vital blows on the victim which could have resulted in fatal injuries which the assailants did not do. This shows that the assailants had no intention to kill the victim and if that be show there is no question attracting Section 307 of the IPC. I am not at one with the doctor that the injuries sustained by the victim were grievous in nature even though the vital part of the body was attacked. The offence can safely be covered under Section 324 read with Section 34 of the IPC and not even under Section 326 read with Section 34 of the Code.

19. I am told by the defence that the appellant No. 1 remained in custody from 17.5.2004 (when he was in hospital) and remained in judicial custody till 18.10.2004 and the appellant No. 2 remained in custody from 16th July, 2004 to 18th October, 2004 and, thereafter, both the appellants remained in custody

from 29th November, 2013 till they were released on bail as per the order of this court dated 29.01.2015 in CRAN 4194 of 2014. But, these are mere submissions which needs scrutiny by the proper authority. I cannot pass any comment as to period of defection already undergone by the convict appellants.

20. Thus, this Court affirms the findings of guilt as arrived by the trial court but not for the offence punishable under Section 307 read with Section 34 of the Code but it would have been under Section 324 read with Section 34 of the Code.

21. Thus, the order of conviction clamped on the appellant under Section 307 read with Section 34 of the Code is altered to that of Section 324 read with Section 34 of the Code maintaining the finding of guilt.

22. This being so the substantive sentence is reduced from six years to two years in respect of both the appellants. The fine amount will remain the same and this court is not interfering with it.

23. Let a copy of this judgement be forwarded to the learned trial court along with the Lower Court Records.

24. Criminal Section is directed to comply with this order at once.

25. The appellants must surrender before the learned Trial Court within 15 days from the communication of this order by the Additional Chief Judicial Magistrate, Lalbagh, to serve out the remaining portion of the sentence. The ordering portion of the sentence be communicated to the said Additional Chief Judicial Magistrate, Lalbagh, separately by the department.

26. If the surrender is not made effective within the stipulated time, then the learned Additional Chief Judicial Magistrate, Lalbagh, within the District of Murshidabad will issue warrant of arrest against both the accused persons for the purpose stated above. Seized articles to be destroyed after the period is over.