

(2014) 06 CAL CK 0030
In the Calcutta High Court
Case No : C.R.A. 412 of 2003

Kuddus Sheik and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 17-06-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 134

Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2014) 06 CAL CK 0030

Hon'ble Judges : Shubhro Kamal Mukherjee, J; Shib Sadhan Sadhu, J

Bench : Division Bench

Advocate : Amzad Ali and Masum Ali Sardar, Advocates for the Appellant;
Madhu Sudhan Sur and Arnab Chatterjee, Advocates for the Respondent

Judgement

Shib Sadhan Sadhu, J.—The instant criminal appeal is directed against the judgment and order of conviction passed by the Learned Sessions Judge, Howrah in Sessions Trial No. 52 of 2003 decided on 05.08.2003 whereby they have been sentenced to undergo Rigorous Imprisonment for life each for commission of offence under Section 302 of the Indian Penal Code read with Section 34 I.P.C. and also to suffer Rigorous Imprisonment for further two years each for commission of offence under section 307 of the Indian Penal Code read with Section 34 I.P.C. However, both the sentences would run concurrently.

2. Sans unnecessary details the prosecution case may be reproduced in the following words:--

"That on 09.05.2000 at about 8.05 A.M. one Somenath Majumdar made oral complaint before Sub-Inspector of Police Dilip Pal of Shibpur Police Station to the effect that he had been residing in the house of Ashim Mukherjee @ Gopal Mukherjee situated at 141, Ramkrishnapur Lane, as a tenant for last 16 years. On that date, that is, on 09.05.2000 he returned home at about 6.50 A.M. after dropping his son in his school. He came to know from his neighbour Dharmadas

Nikel that sometime before hue and cry was raised in the house of Ashim Mukherjee @ Gopal Mukherjee. They then knocked the door and pushed the calling bell but got no response. All the windows facing the road were closed. So they went to the window on the southern side and saw one door of the window was open. They noticed that one person was peeping through the said window. He identified that person as Sk. Saroj who used to work as labourer of mason and used to stay in the house of Ashimbabu. Somenathbabu asked Sk. Saroj to open the door but he did not do so. Being suspicious they went to the back side of the house and saw that Sk. Saroj was fleeing away. They chased him but he managed to escape through the lane.

It is further stated in the complaint that about one and half months ago these two appellants and Sk. Saroj forcibly took away Rs. 6,000/- from the house of Ashimbabu. The de-facto complainant came to learn from Ashimbabu on 08.05.2000 at about 10 A.M. that on 07.05.2000 morning the present appellants along with Sk. Saroj came to Ashimbabu's house to take back wooden planks used for centering of the roof. Ashimbabu demanded repayment of Rs. 6,000/- as precondition for returning those planks. At that the appellants and Sk. Saroj threatened Ashimbabu with dire consequences."

3. It is yet further alleged in the complaint that after chasing Sk. Saroj, the de-facto complainant found so many neighbouring people were assembled there. He further saw that the para people were bringing out the daughter of Ashimbabu namely Sayani Mukherjee, aged about 11 years who sustained severe bleeding injuries. On being asked Sayani told them that the present two appellants and Sk. Saroj had murdered her father and grand-mother by assaulting with chopper and they had also assaulted her with chopper. The para people took her to hospital for medical treatment. Police came and entered inside the house. He saw the dead bodies of Ashimbabu and his mother with bleeding injuries.

4. The complaint was recorded by the said S.I of police Dilip Pal and he forwarded it to the Duty Officer of Shibpur police station who thereupon started Shibpur Police Station Case No. 102 of 2000 dated 09.05.2000 under Section 302/34 of the Indian Penal Code. That case was investigated into and on completion of investigation charge sheet was submitted. Thereafter, the case was placed for trial before the Learned Sessions Judge, Howrah who framed charges under Section 302/34 of the I.P.C. and under Section 307/34 of the I.P.C. against the present appellants and after conclusion of the trial he held the appellants guilty and convicted them as aforesaid.

5. In order to prove the charge the prosecution examined altogether 14 witnesses. Out of those witnesses, P.W.1 Somenath Majumdar is the de-facto complainant and a post occurrence witness who saw P.W.2 Sayani Mukherjee in injured condition. She narrated the incident and disclosed the name of the assailants to him, P.W.2 Sayani Mukherjee is the daughter of the deceased Ashim Mukherjee and grand-daughter of another deceased Namita Mukherjee and she is an injured eye witness, P.W.3 Biswanath Das and P.W.4 Dharmadas Nikel are

also post occurrence witnesses who saw P.W.2 was being removed to hospital in injured condition and she disclosed that the masons assaulted her father and grand-mother, P.W.5 is Prasanta Kumar Pal who came to the P.O. after arrival of police and witnessed the seizure of some wearing apparels and offending weapons and put his signature on the seizure list, P.W.6 is a retired WBCS Officer who was attached to Howrah Collectorate as Executive Magistrate and he recorded the statement of P.W.2 at Howrah General Hospital on 10.05.2000, P.W.7 is Laxmi Kanta Dutta who was attached to Howrah General Hospital on 10.05.2000 as Wardmaster who was present at the time of recording of the statement of P.W.2 by P.W.6, P.W.8 is Dr. Tapan Banerjee who was attached to Howrah General Hospital as Medical Officer on 09.05.2000 and he examined P.W.2 on that date, P.W.9 Santo Chakraborty is the Pisemasai of P.W.2 in whose presence a blood stained ganji(vest) was seized being brought out by the appellant Kuddus Sk from a shade over the septic tank in the P.O. house, P.W.10 is Dr. Harashit Sarkar who held the post mortem, P.W.11 is A.S.I. of police Ramkrishna Majumdar who made Shibpur P.S. G.D. Entry No. 583 dated 09.05.2000 on receipt of telephonic information, P.W.12 is S.I. of police Dilip Pal who took up the investigation, proceeded to the P.O., recorded the oral complaint made by P.W.1 and forwarded the same to Shibpur police station. He also held inquest over the dead bodies and sent those for post mortem examination and seized some articles including blood stained bhojali and knife from the P.O. under a seizure list. He also recorded a disclosure statement made by the appellant Kuddus Sk while in custody and leading to his statement, P.W.12 recovered the blood stained ganji (vest) from the shade over the septic tank in the P.O. house. He also seized the blood stained wearing apparels of Kuddus Sk. from his bed room. He further arranged for recording of dying declaration of P.W.2 and also sent the seized blood stained articles and the weapons for F.S.L. examination and report. Thereafter, on transfer, he handed over the case to the I.C., Shibpur police station on 21.06.2000. P.W.13 is A.S.I. of police Asoke Ghosh who received the complaint and registered the case and P.W.14 is S.I. of police Haripada Sarkar who took up further investigation of the case, perused the C.D., collected the bed head ticket of P.W.2 and submitted the charge sheet.

6. We have heard Mr. Sardar Amzad Ali, Learned Counsel appearing on behalf of the appellants while the respondent State has been represented by Learned Advocate Mr. Arnab Chatterjee.

7. Learned Counsel for the appellants Mr. Ali has taken us through the oral testimonies of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 and P.W.12. He pointed out some variations apparent from the evidence adduced by those P.Ws. and highlighted some infirmities in the prosecution case which are as follows:

"a) P.W.1 Somenath Majumdar stated that he made the F.I.R. at the P.O. but in evidence he stated that he made it in P.S.;

b) P.W.1 made contradictory version in the F.I.R. and in his evidence and so he cannot be relied upon at all for such improvements;

- c) There are discrepancies on the point of time as apparent from the F.I.R., G.D., formal F.I.R. etc.;
- d) P.W.1, P.W.2 and P.W.3 are not cohesive and they contradicted with each other;
- e) P.W.6 did not record the statement of P.W.2 according to law, so it cannot be considered;
- f) The seized gangi (vest) was not produced in Court;
- g) P.W.2 was admittedly a child witness at the relevant time. She herself disclosed in her cross-examination that she was a student of Class-VI when the incident took place. She did not disclose the name of assailants before the persons who assembled at the P.O. She did not disclose the name of the appellant Lal Chand Sk. in her statement recorded by P.W.6 on 10.05.2000. Also she did not mention the name of the said appellant before the I.O. Further, she did not disclose before the I.O. that there was quarrel between the accused persons and her father for non-payment of Rs. 6,000/- for which her father refused to return the wooden planks and the accused threatened her father with dire consequences. Therefore, it would be very much unsafe to place reliance upon such vulnerable testimony of P.W.2;"

8. Summing up the aforesaid contentions, the Learned Counsel concluded that there is no clinching evidence against the appellants and that the prosecution has hopelessly failed to bring home the charge brought against the appellants and thus the conviction cannot be sustained and they are entitled to an order of acquittal by setting aside the impugned judgment and order.

9. As against this, Learned State Counsel, Mr. Chatterjee has opposed the present appeal and has submitted that taking into consideration the totality of the evidence on record the prosecution has been able to prove the guilt to its hilt and has successfully established the charge levelled against the appellants. He has further pointed out that the oral testimony of P.W.2 cannot be discarded simply on the ground that she was a student of Class VI at the time of incident specially when she witnessed the murderous assault upon her father and grandmother by the accused and she herself was brutally assaulted by them and also when the account rendered by her is otherwise trustworthy and inspires confidence.

10. According to the Learned State Counsel, the impugned judgment is well-contained and well-reasoned and thus deserves no interference. His contention may be summarized in the following lines:--

"a) The F.I.R. maker, P.W.1 is not an eye witness. He heard about the incident and name of the assailants from P.W.2. So it is not fatal for some discrepancies appearing in his evidence with reference to the F.I.R.;

b) P.W.3 is also not eye witness and he heard from P.W.2 after the occurrence;

c) P.W.2 sustained grievous injuries and she was under expectation of death but

she could survive. She was horror-stricken and thus it is too much to expect that she would be able to narrate all the minute details at that time. P.W.12's evidence that on the first day, P.W.2 was not in a position to give answers to his queries lends support to her such mental and physical condition;

d) After being recovered from the shock, P.W.2 made statement before P.W.6 giving details of the incident and P.W.8 who treated her stated that she was mentally alert when her statement was recorded. By lapse of time, she recovered from the shock and deposed in Court after about 3 years and gave vivid description of the incident. So some omissions on her part to disclose the name of the appellant Lal Chand Sk or about the quarrel between the accused persons and her father for nonpayment of Rs. 6,000/- in her previous statements are not material so as to effect the core of the prosecution case;

e) Oral testimony of P.w.2 cannot be doubted or discarded simply on the ground that she was a girl of 11/12 years at the time of incident specially when she was herself brutally assaulted and she witnessed the murderous assault upon her father and grand-mother by the accused and when the account rendered by her is otherwise trustworthy and inspires confidence. Also her version gets corroboration from the Doctors- P.W.8 and P.W.10.

f) Non-production of seized ganji (vest) in Court does not hit the merit of the prosecution case especially when such seizure went unchallenged.

g) Both the appellants during their examination u/s. 313 Cr.P.C. admitted in clear terms that they had worked in the house of the deceased Ashim Mukherjee as masons along with other accused day labourer Sk. Siraj @ Saroj. There is no bar in taking into consideration such statement as corroborative evidence specially when such statement supports the version of the P.Ws. and also the same is reflected from the F.I.R. and the Inquest Reports."

11. Therefore, according to him, the prosecution has well succeeded in proving the case against the appellants beyond all reasonable doubt and the Learned Trial Court has rightly convicted the appellants. He thus insisted upon dismissal of the appeal.

12. We have perused the record and proceedings in the context of the rival submissions. We have also meticulously scrutinized the oral testimonies of the P.Ws.

13. Now coming to the prosecution case, we find that P.W.2 Sayani Mukherjee who also sustained murderous assault is the main star witness of the prosecution case. She deposed that she is aged 14 years and that on 09.05.2000 was staying with her father and grand-mother in their house at 141, Ramkrishnapur Lane, Howrah-1. Their portion was a two storied building. There is a separate building in the same holding belonging to them and one tenant used to stay there and the name of the tenant is Somenath. She further deposed that she knew the accused persons who were working in their house as masons. On 07.05.2000 there was

altercation between her father and these two present appellants when they threatened her father. The trouble started when they took away a sum of Rs. 5,000/-/6,000/- from her father and the same was not paid back and for that her father refused to hand over the wooden planks. She heard the appellants gave out to take revenge for not returning of the wooden planks.

It is her further evidence that in the early morning of 09.05.2000 they were sleeping in their house. At the last stage of their sleep, she heard some sound but did not pay any heed. When the sound became more loud she along with her father woke up and she followed her father. They were sleeping in the first floor. Her father came down through the stairs and she was following him. She found the present appellants along with another person named Sk. Siraj were assaulting her grandmother with a bhojali like substance and a knife. When her father was near the last step of the stair, they dragged her father to the ground floor and started assaulting him with bhojali and knife. Immediately she came down stairs to save her father. They also dragged her to the ground floor. She tried to save her father when the accused persons got hold of her and Sk. Siraj assaulted her with a knife. She sustained bleeding injury on her neck, abdomen, hand, shoulder etc. (cut marks which were still visible were shown to the Court). She fell down on the ground and she could see everything as she was in her full senses. The accused persons thereafter went to the first floor and after sometime they came down stairs and went inside the kitchen, probably to wash their hands. She somehow opened the entrance gate and in feeble voice she called people who came there and removed her to hospital where she was treated. She disclosed the name of the assailants before the persons who gathered there and mentioned the names of Lal Chand, Sk. Kuddus and Sk. Siraj as their assailants.

She further deposed that subsequently she came to know that her father and grand-mother died. Her statement was recorded by the Magistrate in the hospital. She somehow stated the fact but it was not possible for her to sign at that time. Due to her health condition, she did not mention the name of Lalchand. She asserted that she could swear on oath and by the name of God that Lalchand was with them but due to mistake owing to her health condition, his name was not mentioned before the Magistrate at that time. Being asked by the Court, She repeated such assertion. She also identified the bhojali and the knife by which they were assaulted. She further identified her and her father's and her grand-mother's wearing apparels.

In cross-examination P.W.2 stated that she was a student of Class-VI when the incident took place and it was Tuesday and summer vacation was on in their school. She further stated that their main entrance is not in front of the main road but is situated in front of a bye-lane from the main road and there is another entrance in their house. Most of the time the doors are bolted from inside and the same is opened after the calling bail is pressed. She stated yet further that her grand-mother used to go to the kitchen after opening the

entrance and that one must open the entrance to go to the kitchen. She further disclosed that repairing work continued for a long period and the accused Sk. Siraj @ Saroj used to stay in a portion of their house so long the work was going on. She was interrogated by police after she was admitted in the hospital. She could not say with certainty whether she stated to the police that Kuddus Sk assaulted her with bhojali. In reply to a specific question -

"You came to know that Kuddus Sk and Lalchand murdered your father and grand-mother while you were admitted in the hospital" - put to her she answered that she had seen them murdering her father and grand-mother. She further stated emphatically that the bhojali and knife which were identified by her might be available in market and whether those had any special mark of identification but she had seen those two weapons were used by the assailants/accused persons. She admitted to have forgotten to mention the name of Lalchand before the police and that she did not state before the I.O. that on 07.05.2000, there was altercation between her father and the accused persons and the accused persons threatened to take revenge. She disclosed yet further that the green vegetable "goomty" (shop) is opposite to their house and the entrance of their house is visible from the said goomty. She made it clear that the incident which took place on 07.05.2000 was heard in part by her while the quarrel was going on and subsequently she heard the same when her father narrated to her. She failed to recall whether she mentioned the names of the accused persons to the people who were assembled there but she stated what actually took place inside their house to them when she came out after opening the door somehow."

14. P.W.12 S.I. of police Dilip Pal, the Investigating Officer was confronted in cross-examination with the statements made by P.W.2 before him and he disclosed that P.W.2 Sayani Mukherjee did not mention the name of Lalchand specifically regarding assault on her father and grand-mother and that the accused persons caught hold of her and the other absconding accused Siraj @ Saroj assaulted her. P.W.12 further made it clear that P.W.2 stated before him that she went inside the kitchen and bolted the door from inside and that after she came out from the room she narrated the incident to the persons who were assembled there but did not mention the names of the accused persons specifically before them and that there was quarrel between the accused persons and her father for non-payment of Rs. 6,000/- for which her father refused to return the wooden planks and the accused persons threatened him with dire consequences.

15. In cross-examination of P.W.2, there are no material omissions or contradictions so far as the core or substratum of the prosecution case is concerned. On the contrary from the cross-examination of P.W.2 and P.W.12, it appears that the presence of P.W.2 and the death of the deceased at the place of occurrence are admitted facts. To be more precise, nothing tangible could be elicited in their cross-examination to impair their credibility save and except the omission by P.W.2 to mention the name of the accused Lalchand in her previous

statements made before P.W.6 and P.W.12. P.W.2 all through her evidence categorically and repeatedly asserted that both the appellants Lalchand and Kuddus assaulted her father and grand-mother and they caught hold of her and Sk Siraj assaulted her and that due to her health condition, she forgot to mention the name of Lalchand before. She further asserted that she mentioned the names of Lalchand, Sk. Kuddus and Sk. Siraj as their assailants before the persons who gathered there. Corroboration on this score is found from the F.I.R. (Ext.1) lodged by P.W.1. In the F.I.R., it is specifically mentioned that being asked, P.W.2 stated that Kuddus, Lalchand and Sk Saroj had killed her father and grand-mother by assaulting with chopper and they also assaulted her with chopper with intention to kill her causing grievous injuries to her. Therefore, it is oblivious that P.W.2 disclosed the name of Lalchand as well at the very first opportunity. So her explanation that she forgot to mention the name of Lalchand before the Learned Magistrate (P.W.6) and the I.O. (P.W.12) due to her health condition is credible and can be accepted.

16. Relevant in this context to refer to the observation made by the Supreme Court of India in the case of State of Rajasthan Vs. Smt. Kalki and Another, which is as follows:--

"In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person." Therefore, keeping in view the entirety and the attending facts and circumstances we find no scar in the evidence of P.W.2 and we find it trustworthy and can be safely relied upon."

17. P.W.1 Somenath Majumdar, P.W.3 Biswanath Das and P.W.4 Dharmadas Nikel are the post occurrence witnesses and they saw P.W.2 was being removed to hospital in injured condition and they heard about the incident as well as the name of the assailants from P.W.2. P.W.1 is the tenant in respect of the ground floor of the P.O. house under the landlord deceased Ashim Mukherjee, P.W.3 is a resident of the locality whose "goomty" is situated opposite to the P.O. house and P.W.4 is the contiguous neighbor of the family of the deceased and his house is situated just opposite to the P.O. house. So it is quite natural and normal that they saw P.W.2 sustained severe injuries and they heard about the incident as well as the name of their assailants from P.W.2. Cumulatively, we find that there is ring of truth in the oral testimonies of those witnesses which cannot be discarded merely on the ground of some technicalities.

18. P.W.2 is an injured eye witness and her evidence stands on higher pedestal. There is no reason to either disbelieve her version or her presence at the place of occurrence. It is well-settled position of law that as a general rule the Court can and may act on the testimony of a single witness provided he/she is holding reliable and that there is no legal impediment in convicting a person on the sole

testimony of a single witness. That is the mandate of Section 134 of the Indian Evidence Act, 1872. In fact, it is not the number or quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. The bald contention that no conviction can be recorded in case of a solitary eye-witness, therefore, has no force and must be negated. (vide 2007 AIR SCW 1835).

19. P.W.10 Dr. Harashit Sarkar conducted post mortem examination over the dead bodies of Ashim @ Gopal Mukherjee and Namita Mukherjee on 09.05.2000. He found the following injuries on the dead body of Ashim @ Gopal Mukherjee:--

- "i) A sharp cutting wound in the neck - 6" x 3" x 3".
- ii) A stabbing wound in the anterior chest wall below the left nipple - 3" x 2" x 6" perforating lung, heart and vessels.
- iii) A big chopping wound in the right axilla.
- iv) An incised wound on left thumb.
- v) A big stabbing wound in the abdomen."

On dissection he found the following injuries:--

- a) Number of stabbing wound is six.
- b) Number of incised wound is four.
- c) Multiple sharp cutting wound in both the hands.

P.W.10 found the following injuries on the dead body of Namita Mukherjee:--

- i) A big incised wound in the front of the neck.
- ii) A big incised wound in the front of the neck separating skin, muscles and great vessel and windpipe 6" x 6" x 6".
- iii) A stabbing wound 6" x 3" x 1" in the left anterior chest wall.
- iv) Stab wound in her abdomen.

20. Dr. Sarkar opined that in both the cases, the cause of death was due to sudden collapse of the vital organs which were ante-mortem and homicidal in nature. On being shown the offending weapons (Mat Exts. I & II) he further opined that the injuries sustained by the deceased can be caused by such weapons.

Supporting evidence in this regard is also furnished by the Inquest Reports

(Exts.2 & 3) in which the I.O. (P.W.12) noted the injuries seen by him on the dead bodies of Ashim Mukherjee and Namita Mukherjee during the inquest. The defence did not make any cross-examination to the Doctor (P.W.10) on his opinion so as to rule out the factum of homicidal death of the deceased Ashim Mukherjee and Namita Mukherjee.

21. P.W.8 Dr. Tapan Banerjee examined P.W.2 on 09.05.2000 at Howrah General Hospital and found the following injuries on her person:--

- "a) Two injuries on neck both 6" in length muscle deep.
- b) Lower face: right side of the face below angle 3" muscle deep and another 2 1/2" muscle deep.
- c) Left forearm: 3" x 1/2".
- d) Right shoulder: 2" x 1/2".
- e) Left glutel region (buttock) 1" x 1" - left middle finger.
- f) Just above umbilicus - 1" in length through which omentum was coming out."

According to him the injury on the abdomen was grievous. He further opined that neck is one of the vital parts of the whole body and that if a patient is not treated medically the aforesaid injuries are sufficient to cause death in ordinary course of nature. He further opined that those injuries can be caused by sharp cutting weapons like bhojali and knife.

22. The evidence of the injured eye witness P.W.2 received full corroboration from the medical evidence. Thus, there is no room for harbouring any doubt that on 09.05.2000 in the early morning hours the appellants had inflicted murderous assault on the person of the deceased Ashim @ Gopal Mukherjee and Namita Mukherejee and also assaulted P.W.2 Sayani Mukherjee with intention to cause her death being armed with bhojali and knife causing instant death of the deceased Ashim @ Gopal Mukherjee and Namita Mukherjee and also causing serious injuries to P.W.2.

23. We, therefore, have no hesitation to hold that the prosecution has been able to prove the guilt against the accused to its hilt and the Learned Trial Court has rightly held that the guilt is proved against the appellants.

24. The sum total of the foregoing discussion is that the Trial Court has properly appreciated the evidence on record and has held the appellants guilty. We do not find any merit in the appeal. No interference is called for in exercise of our appellate powers. The appeal must fail and stands dismissed.

The office is directed to send down Lower Court Records at once.

Shubhro Kamal Mukherjee, J.

I agree.