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**(2015) 01 CAL CK 0033**  
**In the Calcutta High Court**  
**Case No : CRA 667 of 2007**

Maka Kumar and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision :** 29-01-2015

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 235  
Evidence Act, 1872 — Section 114, 6  
Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (2015) CriLJ 1659

**Hon'ble Judges :** S. Chatterjee, J.; Nishita Mhatre, J.

**Bench :** Division Bench

**Advocate :** Subir Ganguly, for the Appellant; T.D. Nandy, Advocates for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Nishita Mhatre, J.—The appeal is directed against the decision of the Additional Sessions Judge, Fast Track Court, Purulia passed in Sessions Trial No. 3 of 2007 on 24th May, 2007. All the appellants have been found guilty and have been punished under Section 302 read with Section 34 of the Indian Penal Code. They have also been convicted under Section 235 Cr.P.C. They have been sentenced to suffer imprisonment for life and to pay a fine of Rs. 5000/- (Rupees Five Thousand only) each. In the event of failure to pay fine they have been directed to suffer rigorous imprisonment for a further period of two months. The Trial Court has directed that 50 per cent of the fine realised from the appellants should be paid to the victim's widow Sahabati Kumar.

2. A complaint was lodged by Sarbani Kumar on 3rd September, 1995. He mentioned therein that on 2nd September, 1995 at about 10 a.m. his elder brother Bhagabat Kumar and he had gone to the embankment of Baral Bandh to answer the call of nature. Apparently, the time of 10 a.m. mentioned in the complaint is incorrect because the further statements in the complaint indicate

that this incident occurred at 10 p.m. The complainant has stated that within a few minutes he heard his elder brother screaming and crying out that he was being killed by Maka Kumar and his group. The complainant then claims that he focused the torch in his hand on the persons who are assaulting his brother and he found that appellants and one Rathu Kumar were the assailants. According to the complainant they had encircled his brother and he was able to identify the assailants with the help of his torch light. He was deterred from rescuing his brother because the appellants were carrying sharp edged weapons in their hands like tangi, bhojali, farsa, and also a lathi. The complainant has stated that the appellants chased him and he ran away from the spot. He then returned with some of the villagers and found his brother lying dead, having sustained several bleeding injuries. He has mentioned that the death could have been the culmination of a quarrel which occurred because one of their goats had strayed into the verandah of Rathu Kumar, the brother of Maka Kumar.

3. The appellants were arrested soon thereafter. They were all charged for having committed the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The appellants claimed to be tried and, therefore, the case was committed for the Sessions Court. As mentioned earlier, the Sessions Court found them guilty of the offence for which they were charged and has punished them with life imprisonment and fine. The case against Rathu Kumar was filed as he was absconding.

4. In order to establish the charge against the appellants the prosecution relied on nine witnesses. PW 1 and 4 were the brothers of the victim while PW 2 was his wife. PWs 3, 6 and 7 were other villagers, two of whom were witnesses to the seizure made. PW 8 was the doctor who performed the post mortem examination and PW 9 was the Investigating Officer.

5. The learned Counsel for the appellants has submitted that the Trial Court has erred in convicting and sentencing the appellants. He pointed out that PW 1 is the complainant in this case but has deviated from his complaint while deposing before the Court. The learned Counsel has submitted that the case of the prosecution was unbelievable because the only source of identification of the appellants was a torch light used by PW 1. He then pointed out that the seizure of the torch was not in accordance with law, as after the seizure of the torch it was not labelled or signed by the witnesses. The learned Counsel has then drawn our attention to the unnatural behaviour of the relatives of the deceased PWs 1, 2 and 4. He pointed out that they made no attempt to rush the victim to the nearest hospital although he had not died on the spot. Instead, they waited till the next morning to file the FIR. He submitted that there was no explanation whatsoever about the behaviour of these witnesses. The learned Counsel then submitted that the torch light would not have been sufficient to identify the assailants of the victim when it was admittedly a dark night. He urged that the non-examination of the mother of the victim who was also present after the incident is hit by Section 114 of the Indian Evidence Act. The learned Counsel

then drew our attention to Mat. Ext.2. This is a letter which was found close to the body. It was written by four persons mentioning that the deceased deserved to die because he had wrought insults upon the residents of the village. The learned Counsel connected this insult to the admission of PW 1 in his deposition that the deceased had been caught fishing covertly in a pond. The learned Counsel urged that there was no explanation from the prosecution about this letter and having exhibited the same, it was their bounden duty to throw light on the letter.

6. The learned Counsel for the State has submitted that the ocular evidence of PW 1, the brother of the deceased sufficiently proved that the appellants had committed the crime. He submitted that the medical evidence on record supported the ocular evidence and, therefore, there was no reason to disbelieve the evidence of PW 1. The learned Counsel then submitted that the letter had Mat. Ext.2 was not relevant as it had no connection with the present case. He has relied on Section 6 in support of his submission that the statements of the witnesses are *res gestae*. According to him, therefore, the evidence of the witnesses is admissible and believable.

7. Both the learned Counsels have relied on some judgments which we will presently refer to.

8. On scanning the evidence before us it is apparent that PW 1 has claimed that he identified the assailants with a torch light. He fled in fear on seeing his brother being assaulted with weapons. This witness has stated that he went straight to his house and narrated the incident to his mother and his sister-in-law, that is, the wife of the deceased. According to him he also informed the villagers of the incident. However, they refused to go to the scene of offence to rescue his brother and assured him that they would be there the next morning. The witness lodged the written complaint the next morning. He has mentioned in his deposition that he had handed over the torch, which he possessed when the incident occurred, to the police. In his cross-examination he has described the topography of the village. He has also stated that his mother and he sat with the dead body of his brother at the place of incident. The witness claims that he did not rush his injured brother to a hospital because the assailants were dangerous persons. After being recalled in order to identify the torch which was marked as Mat Ext. 1 he admitted in his cross-examination that such a torch is freely available in the open market. He also admitted that there was no label on the torch nor was there any signature on the torch.

9. PW 4 another brother of the deceased is a post occurrence witness. He was informed of the incident by PW 1 and he rushed to the spot immediately. He claims to have been interrogated by the police at the police station. He has also spoken of his mother accompanying him to the scene of offence.

10. PW 2 is the wife of the deceased. She has spoken about being informed of the incident by PW 1. She has stated that on learning the news she rushed to the

place of offence and found the deceased lying on the ground with bleeding injuries. She has identified the appellants in Court. Surprisingly, this witness has admitted that the family did not go to the police station that very night to report the death of her husband. She has denied the suggestion in her cross-examination that her husband was apprehended for stealing fish in Majhidih village. According to her the deceased was a bidi binder. The incident occurred on a dark night when the family was fasting as it was an auspicious day. The witness has admitted that she did not request the members of her family to take her husband to the hospital that very night even after seeing her husband lying in a severely injured condition.

11. PW 3, a villager residing in the same village as the deceased, has stated that he was informed by PW 1 about the incident but PW 1 did not disclosed the names of the assailants.

12. PW 5 is another villager who has identified his signature on the seizure list. In his cross-examination he has admitted that the nearest health centre was an hour away from their village. He was informed of the incident by PW1.

13. PW 6 is a witness to the seizure of the blood stained soil, a paper and three torch cells. This witness has also admitted that the torch was available in the open market and that no label was affixed on the torch by the Seizing Officer. He has denied having signed any label when the torch was seized.

14. PW 7 is a witness to the seizure of the torch, blood stained soil and other articles. Surprisingly none of the weapons allegedly used in the attack have been seized. PW 7 learnt of the incident from PW 1 at night but did not bother to rush to aid the deceased and his family. Instead, he waited till the next morning to narrate the incident to the police. He has categorically stated that PW 1 did not disclose the name of the assailant to him.

15. The doctor who has performed the post mortem examination has been examined as PW 8. He has described the injuries, namely,

1. 4" sharp cut injury transversely placed over the back of neck cutting muscle and cervical spine.

2. Fracture on the skull vault with 3" lacerated injury.

3. Sharp cut injury 1" on the left hand of web space between thumb and index finger.

He has opined that the first and third injury could be caused by farsa, bhojali, or with a spear. However, earlier in his deposition he has stated that the injury No. 1 was caused by a sword. As regards injury No. 2 the witness has opined that it could have been caused by a blunt portion of a sharp weapon or by any other blunt weapon. According to the doctor he found laceration of the cerebrum. He has deposed in his cross-examination that the injuries were sufficient to cause death even if he had been taken to the hospital in time.

16. PW 9 the Investigating Officer has stated that he found the letter which is at Mat. Ext. 2 near the body of the deceased. On 3rd September, 1995 at 9.35 a.m. he performed the inquest and arrested the appellants and Rathu Kumar. Despite the fact that according to PW 1 that the deceased had sustained bleeding injuries, the Investigating Officer did not find any blood stained earth. He did not send the clothes of the victim to the FSL because he did not find it necessary to do so.

17. As stated by earlier, all the witnesses PWs 1, 2 and 4 are interested witnesses. Their testimony will have to be assessed with caution. The ocular evidence of PW 1 does not match with the medical evidence on record. The doctor has opined that sharp cut injuries could be caused by a farsa or spear. However, this does not appear to be correct. Farsa is a weapon with an arrowhead. Thus, it would probably cause a piercing injury. Such injuries have not been sustained by the deceased. It is true that a bhojali could cause a cut injury. The doctor at one stage has mentioned that the cut injury was caused by a sword. However, PW 1 has not spoken of the appellants carrying a sword. In fact, he mentioned that the assailants used bhojali, farsa and spear in his deposition before the Court. However in his complainant he has stated that they used tangi, bhojali, farsa and lathi. He has stated that Makai @ Maka Kumar was armed with a bhojali. Bhatu was carrying a farsa, Nakul had a spear and Rathu was holding a bhojali. It is difficult to believe that the PW 1 was able to identify the assailants in the dark with the help of the torch light.

18. In the case of Munni Singh and Others Vs. State of Bihar , the Supreme Court dealt with a similar case where the weapons of assailants were not found and the assailants had been identified with a torch light. It is not believable that the PW 1 would have switched on his torch while the assailants were beating his brother, watched him being beaten in the torch light and then fled from there. It is unnatural that the PW 1 who was the brother of the victim would not run to his assistance, especially if he had seen the assailants.

19. The credibility of this witness is at stake. There is evidence on record to show that the relations between the family of the deceased and the appellants were strained. In fact, PW 1 has said so in his deposition before the court as well as in his complaint. The dispute had arisen when a goat owned by the deceased strayed into the property of the appellants.

20. The submission of the learned Counsel for the State was that the appellant had a motive to kill the deceased because of the aforesaid strained relation. However, this fact of animus between two families would also mean that it was not improbable that PW 1 would have incriminated them falsely.

21. In the case of Om Singh Vs. State of Rajasthan, the Rajasthan High Court had held that if a statement has been made contemporaneously with the Act or immediately thereafter and not at an interval of time so as to allow any fabrication the statement should be accepted as it forms part *res gestae*. This

judgment does not help the prosecution though it has been cited on behalf of the State. The complaint of PW 1 has been recorded and submitted on 3rd September, 1995 at 7.30 a.m. whereas the incident occurred on the previous night. Thus the complainant PW 1 had ample time to embellish the facts and improve upon the facts of the incident.

22. In the case of Ravulappalli Kondaiah and Others Vs. State of Andhra Pradesh, the Court observed that the temptation to rope in or incriminate an innocent party cannot be ruled out when there was a background of fractional disputes. The Court has also observed that though the testimony of a related witness need not be discarded as unreliable the Court must be on guard and examine the testimony with more than ordinary care. The Court must seek corroboration of such testimony from independent sources. Even trivial contradictions assume importance. In the present case, as mentioned earlier, the witnesses who have deposed on behalf of the prosecution namely, PWs 1, 2 and 4 are relatives of the deceased. PW 3, 5, 6 and 7 are villagers residing in the same village but had no personal knowledge about the incident. They learnt of the incident from PW 1 and went to the site only on the next day. This behaviour of the villagers again is not natural. Therefore, in our opinion, it is difficult to believe the testimony of PW 1. The next judgment cited on behalf of the State is Chimanbhai Jagabhai Patel Vs. State of Gujarat and Another, in which the Court has elucidated Section 34 of the Indian Penal Code.

23. In our opinion the prosecution has not been able to prove the allegations against the appellants beyond reasonable doubt. The mother of the victim who would have been a vital witness has not been examined by the prosecution. The conduct of the related witnesses is completely unnatural even assuming the witnesses were frightened because the assailants were armed. There was nothing to stop the witnesses from informing the police immediately after the incident as according to PW 1 the assailants had fled away from the site. The fact that none of the villagers rushed to the aid of the victim is also unbelievable. The weapons of assault have not been recovered. Thus the possibility of the appellants having been falsely implicated in the present case cannot be ruled out.

24. Accordingly the appeal is allowed. The judgment of the Trial Court is set aside. The appellants are acquitted. They shall be set free if not required to be detained in any other case.

25. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.