

(2016) 03 CAL CK 0033
In the Calcutta High Court
Case No : CRA 569 of 2006

Milan Sk. and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 162, Section 164, Section 209(a), Section 313

Penal Code, 1860 (IPC) — Section 147, Section 148, Section 149, Section 302, Section 323, Section 34, Section 448, Section 449

Citation : (2016) 03 CAL CK 0033

Hon'ble Judges : Rajiv Sharma and Shivakant Prasad, JJ.

Bench : Division Bench

Advocate : Kaushik Gupta, Sourav Bhagat and Arijit Bhusan Bagchi, for the Appellant; Manjit Singh and Pawan Kumar Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Shivakant Prasad, J.—1. The instant Appeal is directed against the judgment and order dated 4th July 2006 and 5th July 2006, passed by the learned Additional District and Sessions Judge, Rampurhat, Birbhum in Sessions Case No. 9/95 arising out of G.R. No. 537/92, convicting the appellants under Section 148, 149, 302 read with Section 149 and 323 of the Indian Penal Code.

2. Prosecution case, in brief, leading to filing of this Appeal is as follows:

"At about 7.30 a.m. in the morning of 09.08.1992 Amin Sk. S/o. Late Sekendar Sk. was moving towards his house from East Para when accused persons Milan Sk. Apel Sk., Kefatullah, Habibullah, Bakkar Ali, Ismail and some other persons being armed with lathi, spears, tangis, draggers etc. attacked him with intent to commit murder. Amin ran away out of fear of life and took shelter in the House of Muktar Hossain and the accused persons chased him and entered into the house of Muktar Hossain and inflicted injuries by means of sharp cutting weapons, causing serious injuries on his person as a result he succumbed to injuries in the

house of Muktar Hossain. Following the above incident Md. Muluk Chand Sk. lodged the written complaint at about 11.45 a.m. on the same day i.e. 09.08.1992 at Nalhati Police Station, on the basis of which Nalhati P.S. Case No. 110/92 dt. 09.08.92 under Sections 147, 148, 149, 448, 302, 34 IPC was started and on usual investigation the Investigating Officer submitted charge sheet."

3. In the course of investigation, inquest was held on the dead body of Amin Sk. which was sent to Autopsy Surgeon for post mortem to ascertain the cause of death. Muluk Chand Sk. and Mumtaj Begam were sent to Judicial Magistrate for recording their statements under Section 164 Cr. P.C. Since the offence was in the nature of sessions triable offence the case was committed to the Court of Sessions under the provision of Section 209(a) Cr.P.C and on receipt of the same the learned Sessions Judge, having taken cognizance over the matter was pleased to transfer the same to the court of Additional District and Sessions Judge, Rampurhat for trial and disposal. The trial started against 8 accused persons after framing of charges under Sections 147, 148, 149, 448, 302, 34 IPC to which they abjured the guilt. On closure of the prosecution evidence the accused persons were examined under Section 313 Cr.P.C. to which all of them declined to adduce any defence witness.

4. Defence is one of denial of charges levelled against them which emerges from the trend of cross examination of prosecution witnesses and their statement recorded under Section 313 Cr.P.C.

5. Learned Trial Judge by his judgment dated 04.07.2006 was pleased to hold accused Milan Sk., Kefat Sk. @ Kefatulla, Apel Sk. and Kulsum Bibi guilty of the offence punishable under Sections 148, 449 and 302 read with Section 149 of the Indian penal Code whereas, Bakkar Sk. and Ismail Sk. were convicted for charges under Sections 148, 448 and 323 IPC. Kalo Sk. and Habibulla Sk. were convicted under Section 323 IPC.

6. Accused Milan Sk., Kefat Sk. @ Kefatulla, Apel Sk. and Kulsum Bibi were sentenced to one year imprisonment for Section 148 IPC, three years rigorous imprisonment for charge under Section 449 and life imprisonment with fine of Rs. 10,000 each in default to suffer two years further imprisonment for charges under Section 302 IPC. Bakkar Sk. and Ismail Sk. were sentenced to one year imprisonment for charge under Section 148, three years imprisonment for charge under Section 448 and one year for charge under Section 323 IPC. Kalso Sk. and Habibulla Sk. were sentenced to imprisonment for one year for offence under Section 323 IPC. All the sentences were to run concurrently. Convicted persons namely, Bakkar Sk. Ismail Sk., Kalso Sk. and Habillulla Sk. were released on furnishing bond on Probation. The aforesaid sentences were awarded on the convicted persons by the impugned judgment of conviction and sentence dated 05.07.2006.

7. This is the impugned judgment in appeal before us preferred by Milan Sk. @ Milon Sk., Kulsum Bibi, Appel Sk. @ Apel Sk. and Kefat @ Sk. Kefatulla Sk. inter-

alia, on the grounds that the prosecution has not been able to substantiate the charges levelled against the appellants.

8. Learned Counsel for the appellants has contended that Momtaj Begam, PW 3 who was injured during the incident did not spell out the name of the Appellant No. 2, Kulsum Bibi before the Medical Officer who had examined her. Moreover Md. Muluk Chand Sk. PW1, FIR maker has stated on oath during the cross-examination that he did not mention the names of the accused Kalo and Kulsum Bibi in the FIR. It is submitted the learned Judge has failed to appreciate the inconsistency in the evidence between the PWs in respect of presence of Kulsum Bibi in as much as PW2 and PW3 were completely silent with regard to the presence of PW 5 and that PW2 and PW3 alleged eye-witnesses to the occurrence are related witnesses and not the natural witnesses and further that the Investigating Officer examined the PW 5,7,8 and 9 long after the date of occurrence without any justification, as such, their evidence are not worthy of credence. The evidences of PW 1, 6, 7 and 8 are hearsay evidences and they came to the place of occurrence after the alleged incident, as such they have no personal knowledge about the incident.

9. It is further contended that there were material improvements and contradiction in the deposition of the prosecution witnesses to that of the statement earlier recorded by the Investigating Officer under Section 161 Cr.P.C. which are material contradiction within the meaning of Section 162 Cr.P.C. and as such their evidences cannot be relied upon.

10. Now, let us examine oral testimony of the prosecution witnesses and also the documentary evidences adduced before the learned Trial Court. Written complaint (Ex. 1), Inquest Report (Ex. 2), Statement of Muluk Chand Sk. under Section 164 Cr.P.C. (Ex. 3), Statement of Mumtaj Begam under Section 164 Cr.P.C.(Ex. 4), Post Mortem Report (Ex. 5), Injury Report in respect of Momtaj Begam(Ex. 6), formal FIR (Ex. 7), rough sketch map of the place of occurrence with index (Ex. 8) have been adduced before the Trial Court by the prosecution in support of the charges framed against the accused persons. It reflects from the written complaint that on 08.09.1992 at about 8 a.m. in the morning a dispute arose in between son of Amin Sk. and son of Mannan Sk. on the issue of irrigating their cultivable lands which turned into fighting amongst them, however, the dispute was settled amicably by the villagers for the time being but on the date of filing the complaint at about 7.30 a.m. in the morning Amin, Sk. was proceeding towards his residence from the eastern locality of their house. When he reached near the house of Moktar Hossain on his way to his house, some of his villagers namely, Milon Sk. Apel Sk. Kefatullah Sk., Habibullah, Bakkar Ali, Ismail and some other persons being armed with tangis, draggers, lathis, spears attacked him in order to kill him. According to FIR maker, Amin Sk. ran away from that place and entered into the house of Moktar Hossain, to protect himself from their clutches but the accused persons had ran after him and entered into the house of Moktar Hossain and caught hold of him and began

to assault him with their weapons, as a result Amin Sk. expired after a little while. The complaint was lodged on the basis of which, Nalhati Police Station Case No. 110/92 dated 09.08.1992 under Sections 147,148,149,448,302 and 34 IPC was started.

11. Inquest in respect of the dead body of Amin was held by Sital Kumar Sarkar Sub Inspector, Nalhati Police Station (PW 12) vide Inquest Report (Ext. -2), who drew up a formal FIR (Ex. 7) and took up investigation of the case and the dead body along with the original inquest report was sent to the hospital under a dead body challan for post mortem by Autopsy Surgeon to ascertain the cause of death. Injured Momtaz Begam was also sent to the hospital for her treatment. I.O. collected post mortem report (Exbt.5) prepared sketch map with explanatory index of the place of occurrence (Exbt.8) and examined the witnesses under section 161 Cr. P.C. and sent witnesses namely, Md. Muluk Chand Sk. and Momtaz Begam to Court for recording their statements under Section 164 CR.P.C. I.O collected injury report of Momtaz Begam from the hospital and prepared seizure list Exht.9 in respect of alamat and submitted charge sheet against the accused persons.

12. Now we have to find out as to whether the FIR has been corroborated by its maker. It is reflected from the evidence of PW 1 that Amin Sk. son of his uncle was murdered on 09.08.1992 at about 7.00-7.30 a.m. in the house of Moktar Hussain, his father-in-law. He came to the house and saw Moktar and his wife Momtaz Begam were weeping and on query they told him that accused Milan Sk. Apel Sk. Kefat Sk., Ismail Sk. Habbibur Sk. Bakkar Sk. Kulsum Bibi and Kalo Sk. had entered into their house and assaulted Amin Sk. with deadly weapons causing serious injuries on his person as a result he expired at the spot. It is true that he has not mentioned the name of accused Kalo and Kulsum Bibi in the FIR but the events taking place on the date of occurrence finds corroboration of FIR by its maker.

13. Moktar Hossain PW 2 and Momtaz Begam PW 3 are eye witnesses to the occurrence. According to ocular testimony of PW2, Amin Sk. was murdered on 24th Sraban, Sunday 1399 B.S. at about 7.00-7.30 A.m. His evidence reflects that at the relevant point of time, he was taking tea in his house when his daughter Momtaz Begam was also present there. In the meantime, Amin Sk. all of a sudden entered into his house in a very terrified condition and requested him to save his life. Then he told his daughter Momtaz Begam to hide him in the food storage room of his house so that the accused persons could not trace him out and his daughter kept Amin in the said room and chained the door of the room from outside. Accused persons, namely, Milan, Kefat, Apel, Bakkar, Kulsum Bibi, Ismail Sk. Habibullah Sk. & Kalo Sk. entered into his house at a time and asked him to bring out Amin Sk. then he told them as to why they should kill Amin Sk. and requested them to call other villagers but they did not listen to his words. He also told the accused persons that he would give his five bighas of land in lieu of the life of Amin Sk. and his daughter told them likewise that she

would give 4 bighas of land to spare the life of Amin. But on being instigated by Kulsum Bibi, Milan brought out a sword from a sword cover and dashed Momtaz Begum from the door side of the food storage room. Accused Bakkar caught hold of Moktar and Kulsum Bibi hurt him on his left hand with a lathi. Accused Ismail held a tin kata that is, three pointed weapon. Then accused persons namely, Milan, Apel and Kefat tried to break open the door of the food storage room by hitting on the door and opened the door of the room and started assaulting Amin with sword, sabal and daw resulting in serious injuries on his person who ultimately expired on the spot and the said accused persons left the place by raising slogans. The injured Amin was brought to veranda by PW2 and his family and poured water on the mouth of Amin who had already expired on the spot.

14. PW2 has proved his statement under section 164 Cr.P.C (Exbt.3) before Judicial Magistrate which reflects that he disclosed the names of the said accused persons who perpetrated the crime of murder. Though, FIR maker has not disclosed the name of Kulsum Bibi in the FIR but the same finds corroboration by him being an eye-witness to the occurrence in general term.

15. Suggestion of the defence that at the instigation of his daughter Baghu and Kustur murdered their father Amin is without any basis and appears to us to be defensive plea, cannot be accepted.

16. It is axiomatic from ocular testimony of Momtaj Begam PW3 and her statement u/s. 164 Cr.P.C. Exbt.4 and the testimony of Moktar Hossain PW2 and his statement u/s 164 Cr.P.C. Exbt.3 recorded by the Judicial Magistrate that they are in corroboration to each other. Although, accused persons namely Milan, Apel, Kefat Ismail, Bakkar, Kulsum Bibi, Habibullah and Kalo entered into their house, nevertheless, it was Milan, Apel and Kefat who inflicted injury on the person of Amin Sk causing his ultimate death. Therefore, it can safely be said that though the appellant No. 2 Kulsum Bibi was present in the house with other appellants but except the allegation against her that she had instigated the accused Milan with her utterance,

"oi buro ar buror maike bandh tarpar Amin ke cut, Aminer rakto na dheke bari jabo na" (tie that old man and his daughter and cut Amin, without seeing the blood of Amin we would not return home) but it is evident from evidence of PW3 during cross-examination that she did not state to her husband (PW1) about Kulsum Bibi instigating Milon to murder Amin Sk. but she stated to her husband that her father was assaulted by accused Kulsum with lathi. She could not state specifically the participation of Kulsum in committing murder of Amin Sk. As such, it can be said that though Kulsum presence was shown in the melee, but she had not committed the crime of murder of Amin Sk. This was why, the name of Kulsum did not appear in the FIR by its maker (PW1) and so also in their statements under section 164 Cr.P.C. recorded by the Judicial Magistrate vide Exbt. 3 & Exbt. 4.

17. According to Nazrul Sk. PW 4, when he was proceeding towards his house,

he heard sound of weeping and noise from the house of Moktar Hossain and saw all the accused persons fleeing from the house of Moktar Hossain. As he was chased by the accused persons for interrogating them, he ran away and he went to the house of Moktar Hossain from other side of the house where he saw Moktar and his daughter Momtaz Begam removing the dead body of Amin Sk from their food storage room to the veranda. He learnt from Moktar that Milan, Apel, Ismail, Kulsum Bibi, Kafatullah, Bakkar Ali, Habibullah and Kalo all 8 persons murdered Amin. PW4 is undoubtedly a post-occurrence witness and what he deposed about the names of the accused persons of having committed the crime of murder of Amin was hearsay.

18. Kased Ali PW5 has stated that Amin Sk. was murdered in the house of Moktar Hossain where Amin had taken shelter in the house of Moktar Hossain in a very terrified condition when accused persons entered into the house of Moktar to kill Amin. On seeing such incident, PW 5 flew away from the house of Moktar out of fear. This witness did not spell out the name of Kulsum Bibi appellant No. 2.

19. Abdur Rafik PW 6 and Mustakin Sk. PW 7 are also post occurrence witnesses who have seen the dead body of Amin Sk with serious injuries in the house of Moktar Hossain but they did not reveal names of any of the accused persons.

20. Jabirul Sk. PW 8 on hearing news from co-villagers that Amin Sk. was murdered in the house of Moktar Hossain had been to his house and saw dead body of Amin. P.W. 8 is a witness to the inquest report in respect of the dead body of Amin Sk.

21. Md. Rahamatullah PW 9 is a witness to the seizure list. According to him at the relevant point of time he saw all the accused persons coming out from the house of Moktar Hossain where he rushed and learned from Moktar and his daughter Momtaz that Milan, Apel, Bakkar, Kulsum, Kalo Sk. and Habibullah had murdered Amin and flew away from the house. He saw the dead body lying on the veranda with serious injuries. He is also a witness to the seizure list in respect of alamats seized by the I.O. in the house of Moktar Hossain. So, this witness though seen the accused persons coming out from the house of Moktar, but did not spell out their names.

22. Dr. A.K. Saha PW 10 Superintendent of Rampurhat Sub Divisional Hospital held post mortem examination over the dead body of Amin Sk. and found injuries as follows:

"1. Skull-4 inch x 3 inch x brain deep. 2. Right thigh-2 inch x 3 inch x bone deep. 3. Right hand - 3 inch x 2 inch x bone deep. 4(a) 3 inch x 2 inch x lung deep x heart puncture (both ventricles) over back left side (b) 3 inch x 2 inch x upper part of left of back x left side of lung deep. (c) Blood preserved."

23. In the opinion of Autopsy Surgeon, cause of death was due to shock and haemorrhage and due to above-mentioned injuries, which were ante mortem and homicidal in nature caused by sharp cutting weapons. This fact is reflected from

post mortem report Ext. 5.

24. According to Dr. Uday Nath, PW 11, of Nalhati Primary Health Centre, he treated Momtaz Begam on 09.08.1992 and found 6 inch long vertical cut injury on the lateral aspect of the left forearm starting at a point, 2 inch below the left elbow being superficial and simple injuries in nature caused by sharp penetrating object as per medical evidence. As per the statement of PW 11, she stated to the doctor that Milan, Apel and Kefat had attacked Amin Sk. on 09.08.1992 at about 7.30 a.m. when she was trying to protect Amin Sk., she was hurt.

25. Although, Muluk Chand Sk. PW 1 did not state to the IO having seen any injury on the person of his wife Momtaj Begum nor his father-in-law ever stated the same, nevertheless, it is evident from ocular testimony of Mumtaz and the medical evidence that she received injury while she was guarding and protecting the life of Amin Sk. rather begging life for Amin in lieu of giving them her 4 bighas of land but she did not state to the I.O. about Kulsum Bibi having instigated Milan Sk. to kill Amin Sk. PW 2 has also not stated to IO specifically as to why the accused persons should kill Amin and requested them to call the villagers and no such statement was made by him that he would give 5 bighas of land in lieu of life of Amin Sk. and his daughter Momtaz Begam would also give 4 bighas of land to spare the life of Amin Sk.

26. It is also true that the IO did not send wearing apparels of the deceased smeared with blood for chemical analysis but that is not fatal to the prosecution case. In our considered view the place of seizure as per the exhibit 9 is the house of Moktar Hossain. That apart, sketch map of the P.O. with index depict the food storage room in the house of Moktar Hossain.

27. The defence argument that the crime perpetrated by somebody else cannot be accepted. Had it been so the accused persons could have pointed out in detail about the incident having taken place and crime committed by somebody else. But there is no mention in their statement under section 313 Cr.P.C.

28. Having appraised the evidence on record we are of the view that the trial court rightly concluded that none else but accused persons namely Milan, Kefat @Kefatullah and Apel had committed the murder of Amin Sk. inside the food storage room of Moktar Hossain. We agree with the observation of the trial court that whole of the prosecution case cannot be demolished for the reason that the offending weapons were not sent for forensic test. It is settled principle of law that in case of defective investigation, the court has to circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect in the investigation. To do so would tantamount to playing in the hands of the investigating officer if the investigation is designedly defective. Principle of law has rightly been applied by the learned Trial Judge as decided in the case of Ram Bali v. State of Uttar Pradesh reported in 2004(2) Crimes 497.

29. Non-mentioning of the name of Kulsum Bibi in the FIR is not the infirmity or

serious contradiction in the FIR as the FIR has been duly corroborated by its maker as we have found that name of Kulsum Bibi was not disclosed by Momtaz Begam to her husband and for which her name could not appear in the FIR. The omission of name of Kulsum Bibi in the FIR does not go to the root of the prosecution case.

30. The motive behind the crime is unfathomable. We find on perusal of the statements of the accused appellants under Section 313 Cr.P.C. that every incriminating evidence have been brought to their notice by putting 44 questions and no prejudice appears to have been caused to the accused appellants. We find corroboration of the statements of PW 2 and PW3 recorded under the provision of Section 164 Cr.P.C. by the Judicial Magistrate which cannot be equated with deposition given in Court and while it may be legitimately used for cross examining the witnesses with a view to elucidate contradiction or vital omission, is not to be compared and contrasted with his testimony in Court with a view to avoiding omissions in minute to minute detail, such omission cannot be elevated to the rank of contradictions which would have effect of discarding the witnesses. It is a matter of common experience that statements of witnesses recorded by Magistrate under Section 164 Cr.P.C. on requisition by the investigating police officer are, as a rule, more concise than even the statements recorded by the police in the course of investigation under Section 161 Cr.P.C.

31. We do find some discrepancies as well as improvement but from common experience stand point discrepancies may occur in statements of perfectly honest witnesses which are due to difference in individual faculties with regard to observation, recollection and recital of details. This is what is the settled position of the law. However, considering the statements of the witnesses mainly of PWs 1, 2, 3 and 9 while scrutinizing them with special care and sifting the chaffs from the grain, we have come to a conclusion that though Kulsum Bibi the appellant No. 2 was present at the time of incident along with other appellants but prosecution witnesses could not prove the common object behind the crime of murder as required under section 149 IPC involving the appellant No. 2 but specific proof has been laid against other appellants namely, Milan Sk. (Appellant No. 1), Apel Sk. (Appellant No. 3) and Kefat @ Kefatulla Sk. (Appellant No. 4) having perpetrated the crime of murder of Amin Sk. At the best, she stood on the footing of Bakkar, Ismail Sk. Kalo Sk. and Habibulla Sk. who were released by furnishing Bonds subject to satisfactory report of the Probation Officer Birbhum. We accordingly, deal with appellant No. 2 that she ought to have been released on probation but she was convicted by the learned trial Court along with appellants Milan Sk., Apel Sk. and Kefatulla Sk for charges under sections 148, 449 and 302 IPC read with section 149 IPC.

32. Thus, bestowing an anxious and careful thought over all aspect of the matter we reached to a clear conclusion that applying the standards of proof beyond reasonable doubt required in a session trial, we allow the Appeal in part in respect of the Appellant No. 2 Kulsum Bibi whose conviction is altered to one

under Sections 148, 448 and 323 IPC as there is no conclusive evidence involving her for the charge under section 302 IPC except causing simple injury on Moktar. Finding that Appellant No. 2 Kulsum Bibi is in incarceration since the date of the impugned judgment on 04.07.2006 but was released on bail vide order No. 113 dated 02.02.2007 in CRAN No. 1710 of 2006 in connection with CRA No. 569/2006 of this Hon''ble Court, as such, she suffered incarceration for a substantial period of one year six months and 28 days. Therefore, she shall be released at once after completion of necessary formalities, if not liable to be detained in connection with any other case. However, the appeal is dismissed in respect of Milan Sk. (Appellant No. 1), Apel Sk. (Appellant No. 3) and Kefat Sk (Appellant No. 4) affirming the judgment of conviction under Sections 148, 449 and 302 IPC read with Section 149 IPC and sentence passed thereunder.

33. Let the Lower Court Record together with a copy of this Judgment be sent down to the learned Trial Court forthwith.

34. Urgent Photostat certified copy of this Judgment, if applied for, shall be supplied to the Advocates for the parties upon compliance with all requisite formalities.

Rajiv Sharma, J.—I agree.