

(2011) 01 CAL CK 0100
In the Calcutta High Court
Case No : C.R.A. No. 18 of 2007

Mobarak Sk. @ Mobarak Hossain and Others	APPELLANT
Vs	
The State of West Bengal	RESPONDENT

Date of Decision : 20-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Penal Code, 1860 (IPC) — Section 302, 326, 34, 341

Citation : (2011) 1 CALLT 388 : (2011) 2 CHN 362 : (2011) CriLJ 1677

Hon'ble Judges : J.N. Patel, J; Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Sekhar Kr. Basu, Rupa Bandopadhyay and Sourav Chatterjee, for the Appellant; Ranjit Kumar Ghosal, for the State and Saibal Bapuli, Saikat Datta and Suranjan Mondal, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Roy, J.—The criminal appeal is directed against a judgment and order passed in a sessions trial by the Learned Additional Sessions Judge, 2nd Court, Murshidabad convicting the Appellants u/s 302/34 of the Indian Penal Code and sentencing each of them thereunder to suffer imprisonment for life and to pay fine with default clause.

In the trial total 8 accused were charged but the Trial Court convicted these Appellants and acquitted the rests three.

2. Briefly stated the prosecution case is as under :

On September 16, 1998 the victim Maniruddin Sk. is the uncle of P.W. 5 Imdadul Haque and he was a teacher of Raja Rampur High School. On 16th September, 1998 in the afternoon while the victim was returning home from school the P.W. 5 Imdadul Haque was also returning from Pike Para village where he went for some personal work. Near Raja Rampur High School Imdadul met the victim and thereafter they were returned home together. They were proceeding through

Raja Rampur Moram Road and as soon as they reached near the house of Biren Sarkar, these accused and others being armed with various deadly weapons surrounded them from all side and pounced upon Maniruddin. The accused Entaj Sk. first assaulted Maniruddin with an iron rod on his right hand and asked the others to finish him, when all the accused started assaulting him with the weapons in their hands and consequently victim suffered injuries all over his persons and fell down on the ground and died at once. Seeing this assault the witness Imdadul raised alarm and started running away from the place out of fear and being attracted by the alarm raised by him many villagers collected to the spot and the accused persons fled away.

Then the incident was reported to the local police station by Imdadul Haque and a case against the present Appellants and others was registered. The police upon receipt of the complaint registered a case under Sections 341/326/302/34 of the Indian Penal Code and after completion of investigation submitted charge-sheet under Sections 302/34 IPC against the present Appellants and three others. Thereafter, the present Appellants and three others were placed on trial before the Learned Additional Sessions Judge, 2nd Court, Murshidabad to answer charges under Sections 302/34 of the Indian Penal Code.

3. The prosecution during the trial to bring home charges against the present Appellants examined as many as 13 witnesses. The P.W. 5 Imdadul Haque, P.W. 7 Ekramul Haque, P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk. were examined as eyewitnesses to the occurrence. Both the P.W. 1 Habibur Rahaman and P.W. 2 Anisur Rahaman were examined as witnesses of seizure of offending weapon two knives. The P.W. 6 Enamul Haque, P.W. 8 Makbul Hossain and P.W. 9 Md. Sademan Ali were examined as the witnesses to the inquest. The P.W. 4 Dr. Indranath Chatterjee is the doctor who held the post mortem. The P.W. 3 is a constable who took the dead body for post mortem. The P.W. 13 Sankar Kumar Roy Chowdhury is the Investigation Officer of the case.

4. Thus, the prosecution relied on the evidence of five witnesses to show that the murderous assault in which the victim died was taken place before them and two other witnesses, viz., P.W. 1 Habibur Rahaman and P.W. 2 Anisur Rahaman for establishing the fact that the offending knives were recovered from the residence of the accused Esar Sk. and Humayun Sk. from their residence at their instance, whereas on the evidence of the doctor P.W. 4 Dr. Indranath Chatterjee to prove the death was homicidal one.

5. Mr. Sekhar Kumar Basu, the Learned Counsel appearing on behalf of the Appellants at the very outset submitted that the Trial Court has disbelieved P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk., P.W. 12 Nurul Sk., who according to the prosecution claimed to be eyewitnesses. Similarly, the Trial Court did not accept the evidence of P.W. 1 Habibur Rahaman and P.W. 2 Anisur Rahaman on the question of recovery of the offending knives from the house of Esar Sk. and acquitted him.

6. Besides above Mr. Basu pointed out the following infirmities in the prosecution case :

(a) The FIR was sent to the Court 11 days after the alleged occurrence and no explanation was forthcoming from the Investigating Officer of the case to explain such unusual and inordinate delay and there are certain apparent discrepancies about the time of lodging of the FIR.

(b) Although, according to the P.W. 5 Imdadul Haque that immediately after the incident many female villagers were gathered near the place of occurrence, still none of them were examined.

(c) The recovery of the weapon of assault was not proved as the seizure witnesses did not support the prosecution case.

(d) Both P.W. 5 Imdadul Haque and P.W. 7 Ekramul Haque are chance witnesses and according to their own admission they witnessed the occurrence from long distance.

(e) The P.W. 8 Makbul Hossain deposed in Court that inquest was held at about 5 p.m., i.e., much before the lodging of the FIR.

(f) The P.W. 8 Makbul Hossain is a witness of inquest, who claimed to have signed the inquest report at 5 p.m. but it appears from the inquest report that the inquest was held at 21.15 hours.

(g) Although the FIR was lodged at the police station at 18-15 hours naming the Appellants as assailants but in the inquest held at 21-15 hours it transpired that the victim was assaulted by some unknown miscreants, this circumstance goes to show the prosecution case is not at all reliable.

(h) No local person was examined although available.

(i) There is no evidence that injury was sufficient to cause death.

Mr. Basu in support of his above contention relied on the decisions of the Hon''ble Supreme Court in the case of Arjun Marik and Others Vs. State of Bihar, ; on the point of delay in dispatching the First Information Report to the Court; in the case of Thanedar Singh Vs. State of Madhya Pradesh, ; on the effect of non-disclosure of the gist of FIR or to the causes of death as narrated by the witnesses in the inquest report; on the point the defence can very well utilized in support of its case, the evidence of the prosecution witness, who though not supported the case of the prosecution still not declared hostile in the case of Kunju Muhammed @ Khumani and Another Vs. State of Kerala, ; similarly in the case of Chilamakur Nagireddy and Others Vs. State of Andhra Pradesh, as to the fate of the prosecution case when doctor has not disclosed the injuries are sufficient in ordinary course of nature to cause death. Various other decisions was also relied upon by the Learned Counsel since we found those are on identical points we feel the same requires no reference as would be mere repetition on same point.

7. On the other hand, the Learned Counsel appearing on behalf of the State supports the prosecution case and submitted the grounds on which the defence pleaded for acquittal is without any substance and merits no consideration. According to the Learned State Counsel the impugned judgment is well content and well reasoned and thus deserves no interference. However, the State Counsel has not cited any case law in support of its contentions.

8. We have given our anxious and thoughtful consideration to the rival submissions of the parties. We have very carefully perused the depositions of witnesses as well as the findings on which the impugned order of conviction is based and other materials on record.

9. At the very beginning Mr. Basu draws our attention to the various findings of the Trial Court, which are in favour of the defence and harping upon the same he invited this Court to confine only on the points which went against them. We are however not at all oblivious about the duty of the Appellate Court so far that relates to the hearing of appeal. It is well settled the duty of the Appellate Court is co-extensive with the Trial Court in the matter of assessment, appraisal and appreciation of evidence and in determining the disputed issues. The Appellate Court like Trial Court has to be satisfied affirmatively whether the prosecution case is substantially true and prosecution has established to prove its case beyond all reasonable doubt and at the same time to see whether decision of the Trial Court in disbelieving the part of the prosecution case and its refusal to act upon the same was correct. The Appellate Court is not supposed to blindly accept the findings of the Trial Court be that in favour of the accused or against them as a matter of course and without satisfying itself on reappraisal of evidence that such findings of the Trial Court was just and proper and could validly be acted upon.

10. Be that as it may, in this case, the prosecution case that Maniruddin Sk. died a homicidal death is not disputed. The evidence of P.W. 4 Dr. Indranath Chatterjee, the post mortem doctor that he found several injuries on the person of the deceased and his opinion those injuries are anti mortem and homicidal in nature and are the cause of his death has not been disputed by the defence. However, it was argued that in absence of the evidence of the post mortem doctor the injuries found on the dead body of the deceased were sufficient in ordinary course of nature to cause death of the victim, is a matter would be dealt in the later part of this Judgment.

11. Now, coming to the prosecution case we find that P.W. 5 Imdadul Haque, nephew of the victim Maniruddin Sk. is the main star witness of the prosecution case. It is claimed that both of them were returning together. While victim Maniruddin Sk. was returning from school, the P.W. 5 Imdadul Haque was also returning home from a nearby village. The witness further claimed that while they reached near the house of one Biren Sarkar the victim was surrounded by the Appellants and others and they started assaulting him with the various deadly weapons they were carrying. The witness claimed that out of fear he

started running from the place raising cry for help and thereafter went to the police station and reported the entire incident including the name of the assailants and came back to the place of occurrence with the police in the police vehicle and was present still the police held the inquest. It is the case of the prosecution that on being informed by the P.W. 5 Imdadul Haque a FIR was registered, the police came to the spot and undertook the investigation. In course of investigation police prepared the sketch map, held the inquest, sent the dead body for post mortem, seized the bloodstained earth from the place of occurrence and examined the available witnesses. Before us one of the very forceful argument for disbelieving the prosecution case against the Appellants is this, although after lodging of the FIR naming the Appellants as the assailants, police came to the spot and held the inquest, still in the inquest report it was noted that the victim was assaulted by some miscreants. It is no doubt true that the statement contained in an inquest report is the record of what Investigating Officer himself observed and found and such an evidence is the primary evidence in the case and there is no need to record the details of the prosecution case. But at the same time when the inquest is followed by the registration of a First Information Report as regards to the incident then in that case the gist of the FIR or the cause of death as narrated by the witnesses are also required to be noted. In the case of *Meharaj Singh v. State of U.P.*, reported in 1994 SCC 1390, one of the observation of the Supreme Court which have been upheld by a three Judges Bench of the Apex Court in the case of *Thanedar Singh v. State of M.P.* (*supra*), in our opinion would be very useful in this context. Where the Apex Court observed as follows;

Even though the inquest report, prepared u/s 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR.

Now, coming back to the case in hand, we find the P.W. 13 Sankar Roy Chowdhury was the Officer-in-Charge of the Lalgola Police Station at that relevant time and upon receipt of the complaint from the P.W. 5 Imdadul Haque recorded the FIR of the case and took up the investigation of the case by himself. The FIR was recorded was marked as Exhibit - 5 during the trial. In the aid FIR the name of the Appellants and the manner of their individual participation in the commission of the offence has been specifically mentioned. Admittedly, the said police officer P.W. 13 Sankar Roy Chowdhury held the inquest report and at the time of inquest P.W. 5 Imdadul Haque, the informant and an eyewitness to the occurrence was very much present. It is therefore beyond our comprehension when before holding of inquest the FIR was lodged by an eyewitness to the occurrence and in the said FIR the assailants have been categorically named,

then in that case as to why in the inquest report only it was noted that victim was assaulted by some miscreants. Mere non-mentioning of name of the assailants in the inquest report is one thing, but when before inquest, the name of the assailants has been transpired and they are named in the FIR, non-disclosure of their identities in the inquest is another thing. In other words, although it is not the law that inquest report must contain the name of the assailants but when before holding of the inquest the identity of the assailants were surfaced, a note in the inquest report that the assailants are unknown miscreants, in our opinion certainly casts a doubt as to the reliability of the prosecution case.

12. We further find that the First Information Report was sent to the Court nearly 11 days after the occurrence while the date of occurrence was September 16, 1998, the FIR was placed before the concerned Magistrate on September 27, 1998. There has been no explanation for such inordinate and unusual delay in sending the FIR to the Court from the side of the prosecution, which according to us is another circumstance which touches the credibility of the prosecution case. In this connection the reliance may very well be placed in the case of *Arjun Marik and Ors. v. State of Bihar* (supra) relied upon on the side of the defence.

13. The P.W. 8 Maqbul Hossain, who happened to be the teacher in-charge of Raja Rampur High School, the same school where the deceased was teaching was a witness to the inquest. This witness further claimed it is he, who reported the incident to the police station but not lodged any complaint. According to him Daroga Babu came with him at the spot and after reaching the place of occurrence held the inquest, made seizure and interrogated the persons present there. Both the aforesaid exhibits containing the signature of P.W. 8 Maqbul Hossain was proved during the trial by the said witness. This witness further admitted in his cross-examination that at around 5 p.m. he signed on the inquest report and left the place of occurrence. The factum of evidence of P.W. 8 Maqbul Hossain that he signed on the inquest report at 5 p.m. further creates doubt as to the authenticity of the prosecution case, inasmuch as it appears from the FIR the same was recorded at 18.55 hours and from the inquest report that the inquest was held at about 21.15 hours. This is another circumstance which certainly goes against the prosecution case.

14. The P.W. 7 Ekramul Haque also claimed to be an eyewitness to the occurrence, according to him at that time he was proceeding about 40/50 cubits behind the deceased Maniruddin and after the incident he left the spot out of fear and on the next day he was examined by the police. This witness has not reported anything about such incident to anyone. It is his categorical evidence that P.W. 10 Azmul Sk., P.W. 11 Jokimuddin and P.W. 12 Nurul Sk. came at the spot after being informed by him. This witness failed to recollect as to whether he stated to the police that he watched the incident from about a distance of 50/60 cubits. According to the Investigating Officer of the case no such statement was made to him.

15. According to the prosecution P.W. 10 Azmul Sk. is also an eyewitness to the occurrence. This witness has claimed to have witnessed the occurrence about 100 cubits away from the place of occurrence and further claimed that he stayed at the place of occurrence till the arrival of the police officer but on that day he has not disclosed anything about the incident to the police. He further stated on the day on being called by Daroga Babu he went to the police station with other witnesses and reported the incident to him. However, we find from the cross-examination of the Investigating Officer of the case he has not disclosed the facts that he saw the incident of murder of Maniruddin from a distance of about 10 cubits and at that time Imdadul, the nephew of the Maniruddin was also with him.

The other witness who claimed to have seen the incident is P.W. 11 Jokimuddin Sk., who claimed to have saw the incident from a distance of about 30/40 cubits. He claimed as the assailants saw him at the spot, chased him and he immediately left the place. According to the said witness on the following day on being summoned at the police station he went there and Daroga Babu took his statement. According to the evidence of the Investigating Officer of the case the witness did not state to him that he watched or he saw the incident of murder of Maniruddin from a distant place.

The next witness who claimed to have seen the entire incident is P.W. 12 Nurul Sk. He claimed to have seen the occurrence from a distance of about 70/80 cubits while was returning from Raja Rampur side and proceeding towards the house of Biren Sarkar. The witness did not disclose anything about the incident to the police on the same day but on the next day on being called at the police station reported the entire incident. According to the Investigating Officer of the case this witness never told him at the time of the incident he was returning from Raja Rampur and witnessed the entire incident from a distant place.

16. Now, we are posed with the question as to whether any reliance can be placed on the evidence of P.W. 7 Ekramul Haque, P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk. Not only the P.W. 7 Ekramul Haque has not disclosed to the police that he was 40/50 cubits behind the deceased at the time of the occurrence but admittedly the entire incident of murder was reported to the police by him, on the next day only after being summoned at the police station. Similarly P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk. all three also disclosed the incident to the police only on the next day that too when they were summoned at the police station. In our opinion, when after viewing a serious crime like murder a witness preferred to remain silent and made no disclosure to the police about the incident, although not prevented by any justifiable reason there such delayed disclosure shattered their credibility. Apart from everything on the face of the evidence of P.W. 7 Ekramul Haque that on being informed by him P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk. came to the spot, it become impossible for us to accept the said three witnesses as the eyewitnesses to the occurrence. We are of the opinion the Trial Court has not committed any mistake in refusing to rely on the evidence of P.W.

10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk.

Now, having regards to the evidence of P.W. 7 Ekramul Haque, we find his evidence is also not beyond question. We are already observed when a witness after watching a serious offence like murder did not report the same to the police until they called at the police station and more particularly when was not otherwise prevented from making such disclosure, their evidence become suspicious. Last but not least, we do not find anything from the prosecution case as to how the Investigating Officer found the said witnesses are very material witnesses for the prosecution case and thus summoned them at the police station when the said witnesses neither on their own went to the police and disclosed the incident nor when the fact that they saw the incident transpired from any other materials. In our opinion none of these witnesses can at all be relied upon.

17. Now, coming to the question of the recovery of the alleged weapons of assault from the house of Esar Sk. and the Appellant Humayun Sk. are concerned, we find both the seizure witnesses P.W. 1 Habibur Rahaman and P.W. 2 Anisur Rahaman have disowned the factum of such seizure in their presence, still the said witnesses were not declared hostile. Similar is the position with P.W. 7 Ekramul Haque, who claimed in his deposition that P.W. 10 Azmul Sk., P.W. 11 Jokimuddin Sk. and P.W. 12 Nurul Sk. came to the spot only being informed by him that also demolished the prosecution case that those three witnesses are eyewitnesses. Still the P.W. 7 Ekramul Haque was never declared hostile by the prosecution. It is well settled when a witness examined by the prosecution, did not support the prosecution case and made any statement which on the other hand shattered the credibility of the prosecution case, if not declared hostile then in that case the defence can very well rely on such witness to prove its innocence. In this connection Mr. Basu the Learned defence Counsel very rightly relied on the decision of the Hon'ble Apex Court in the case of Kunju Muhammed @ Khumani and Anr. v. State of Kerala (supra).

18. In view of the discussion as above, in our opinion the prosecution has not been able to prove the case against the Appellants beyond all reasonable doubt. Thus, it would be mere and futile exercise to deal with the other grounds on which the Appellants challenged their conviction.

In the result the appeal succeeds and is allowed. The order of conviction and sentence accordingly stands set aside.

The Appellant No. 1 Mobarak Sk. @ Mobarak Hossain, Appellant No. 2 Huma @ Humayun Sk., Appellant No. 3 Samayun Sk., Appellant No. 4 Bedarul Sk. @ Beda, Appellant No. 6 Manu Sk., who are now in custody shall forthwith be released, if not wanted in connection with any other case. So far as the Appellant No. 5 Entaj Sk., who is now on bail be discharged from the bail bond.

Let the Lower Court Records be sent down to the Court below forthwith.

Criminal Section is directed to deliver urgent Photostat certified copy of this judgment to the parties, if applied for, as early as possible.