

(2015) 10 CAL CK 0016
In the Calcutta High Court
Case No : C.R.A. No. 318 of 2007

Nakfuru Sk. and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 164(5)
Evidence Act, 1872 — Section 165
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2015) 10 CAL CK 0016

Hon'ble Judges : Ashim Kumar Roy and Ishan Chandra Das, JJ.

Bench : Division Bench

Advocate : Sekhar Kumar Bose, Sr. Advocate, Bitasok Banerjee and Kushal Kumar Mukherjee, Advocates, for the Appellant; Manjit Singh, Ld. Public Prosecutor, Pawan Kumar Gupta and Anand Keshri, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ishan Chandra Das, J.—In this Criminal Appeal, the appellants assailed the judgment and order of conviction dated March 29th 2007 and March 31st 2007 respectively recorded by Id. Addl. Sessions Judge Birbhum at Rampurhat in S.C. No. 72 of 1996 (S.T. No. 13 of 2002) where the appellants were convicted for committing the offence punishable under Sections 302 /201 /34 of the Indian Penal Code and all of them were sentenced to suffer Imprisonment for life for the offence punishable under Sections 302 /34 of the Indian Penal Code and to pay a fine of Rs. 10,000/- each in default to suffer imprisonment of one year more and further sentenced to suffer imprisonment for five years for the offence punishable under Sections 201 /34 of the Indian Penal Code and to pay a fine of Rs. 5,000/- in default, to suffer imprisonment of 6 months where both the substantive sentences were directed to run concurrently with a rider to set off and 80% of the fine amount, if realized, to be paid to the widow of the victim.

2. Briefly stated, the facts of the case, as revealed from the written complaint

dated 3rd February 1994 is that the de facto complainant Naimul Sk. and one Masid Sk. were being asked by victim Haider Sk. of village Mukhlispur started their journey to the house of Samail Sk. of village Fatepur at about 5 P.M. on 2nd February 1994 for the purpose of business and on their way to the place of destination, they called one Enamul Sk. of village Patagachi to accompany them. After staying there at the house of Samail Sk. for a couple of hours and taking light refreshment, the above-noted 4 persons (including victim Haider Sk.) started their return journey to village Mukhlispur at about 8-00 P.M. and when they reached nearby an orchard of Sadapur Math (field), the 4 appellants Sairuddin Sk., Lalu Sk., Nakfuru Sk. & Reazuddin Sk (who are the inhabitants of village Mukhlispur) appeared before them, all on a sudden and asked them as to why they went to the house of Samail Sk. of village Fatepur and instantly they started assaulting the de facto complainant with a sword/dagger and he got severe bleeding injuries. To this victim Haider Sk. tried to prevent the 4 miscreants who again started assaulting Haider Sk. aimlessly with sword, hansua, dagger etc. The de facto complainant out of fear and to save himself hid behind a heap of straw and saw all the appellants to pull Haider to the mustard field, killed him and left the place hurriedly towards Mukhlispur. Thereafter the de facto complainant went to village Patagachi, informed the matter to one Sukchand Sk., Ujir Sk. & others who instantly rushed to the spot being accompanied by the de facto complainant and found the dead body of Haider Sk., his head being severed from the body. The matter was not reported to the Officer-in-Charge of Muraroi Police Station instantly but in the next morning, due to bad weather and the Officer-in-Charge of the P.S. concerned was requested to initiate legal action against the assailants.

3. Consequently the charge-sheet was submitted against these appellants, the case was committed to the Court of Sessions where the appellants pleaded their innocence at the commencement of trial but Id. Sessions Judge after due conclusion of trial, on examination of 13 witnesses for the prosecution, 5 Court-witnesses and one Defence-witness found these appellants guilty of the offence punishable under Sections 302 /201 /34 of the Indian Penal Code, convicted and sentenced them to suffer imprisonment for life and 5 years for the offence punishable under Sections 302 & 201 of the Indian Penal Code respectively and to pay a fine of Rs. 10,000/- & Rs. 5,000/- in default to suffer imprisonment for 1 year and 6 months respectively with a rider that both the sentences to run concurrently subject to set off, as pointed out earlier.

4. Now, the only point for consideration left before us - whether Id. Trial Court was justified in convicting these appellants and sentencing them to suffer imprisonment for life and to pay fine, as noted above.

5. A plain reading of the written complaint dated 03.02.1994 (Exhibit-1) clearly manifested that victim Haider Sk. of village Mukhlispur was killed in the field of village Sadapur (under Muraroi Police Station) and in the said written complaint the de facto complainant Naimul Sk. (PW-1) alleged that these 4 appellants

before us attacked the victim and his companions at the Place of Occurrence with sword, dagger, hansua etc. and ultimately victim Haider Sk. lost his life and his dead body without head was recovered later on in the field i.e. near the place where he was attacked by these miscreants.

6. Claiming himself to be an ocular witness of the unfortunate incident, the de facto complainant Naimul Sk. (PW-1) stated that on the 2nd day of February, 1994 while he was returning to his home from the residence of Samail Sk. of village Fatepur with victim Haider Sk. and two other companions Mosid & Enamul, on their way he found the appellants Sairuddin, Reajuddin, Nakfura & Lalu to surround them, asked them wherefrom they were coming and called them "Mastaan" and there was altercation between them. He also stated that appellant Sairuddin began to hurt him (PW-1) below his neck and throat with Bhojali/Sword. It is also revealed from his oral testimony that at that time though he (PW-1) was dressed with a shawl and muffler, he sustained bleeding injuries on his person and fell down on the ground and he was again caught by appellant Lalu. He further stated that victim Haider was caught by appellant Sairuddin and another appellant Reazuddin who hurt Haider on his back with "Bhojali" (a sharp cutting weapon) causing bleeding injuries on his person. From the statement of this witness (PW-1), it appears that being threatened by the appellants, he hid himself beside the stack of straw and witnessed the incident of killing of victim Haider Sk. by appellant Reazuddin who cut the throat of the victim whereas the appellant Sairuddin sat on his (victim's) legs, and other two appellants flashed their torch light for helping them to commit such operation. It is also elicited from the statement of said witness (PW-1) that appellant Reazuddin took the head of the victim after it was separated from his (Haider's) body and instantly they left the place. Similar statements of the de facto complainant (PW-1) were echoed in the statement of Mosid Sk. (PW-2, a companion of the victim) who clearly narrated the manner in which the occurrence of killing of Haider Sk. took place.

7. Mr. Sekhar Kumar Bose, learned senior Counsel representing the appellants at the very outset submitted that as per statement given in written complaint (Exhibit-1), the de facto complainant never stated that he noticed any of the appellants to sever the head of the victim nor he stated that one of the appellants took the severed head from the place of occurrence while they were leaving such place. He also submitted that the alleged occurrence took place at about 8 p.m. in the fateful evening but the local police authority was reported about the incident in the next morning at about 6-30 a.m. Pointing out the statement given in the written complaint, he urged that the source of light for identification of the miscreants was not referred to in the written complaint but it was stated by the de facto complainant while he was examined as PW-1. To advance his argument he also pointed out that allegedly the de facto complainant was assaulted at the material time and sustained bleeding injury but his scarf and muffler were not seized by the Investigating Officer nor any charge was framed against the appellant for causing assault on his (PW-1) person. He

expressed that from the above noted facts his presence at the place of occurrence can be doubted and criticizing the findings of Id. trial Court over this issue, he tried to impress that this witness (PW-1) could not be a reliable witness.

8. To further his argument Mr. Bose, learned senior Counsel appearing for the appellants laid emphasis on the statements given in the written complaint and pointed out that the PW-1 claiming himself to be one of the injured persons over the incident stated that he sustained bleeding injuries on the fateful night i.e. in the night of 2nd February 1994 but his Medical Certificate was issued on the 17th February 1994 i.e. after a fortnight as per statement of Dr. Kuntal Mukherjee (PW-9), who issued such Medical Certificate reflecting the injuries, sustained by PW - 1 over the incident. He also criticized that the said so called victim (PW-1) was examined by the PW-9 but in the said Medical Certificate (Exhibit-6) the date of his examination was not noted and accordingly he opined that the PW-1 was not a companion of the Principal Victim nor he (PW-1) was proved to be one of the eye-witnesses of the incident.

9. In this context Mr. Bose, Ld. Senior Counsel appearing for the appellants also drew our attention to the statement of Samail Sk. (CW-1) and urged that the statement of said witness disproved the presence of the PWS 1& 2 at the place of occurrence. Criticizing the findings of Id. Trial Court, he confidently urged that Id. trial Court should examine the Ld. Magistrate, recording the statement of the witnesses in terms of Section 164 of the Cr.P.C. and opined that his non-examination was fatal to the case of the prosecution since it caused prejudice to his clients. In course of his impressive argument Ld. Counsel for the appellants pointed out that some samples/items were collected for FSL Examination, but no report was collected from the authority concerned whereas some samples though collected were not sent for examination to the Forensic Laboratory. In fine he opined that his clients deserved order of acquittal from the charges levelled against them, since they were prejudiced by the findings of Id. trial Court who failed to perform his duty, vested on him in terms of the provisions of Section 165 of the Evidence Act.

10. Clarifying the provisions of Section 34 of the Indian Penal Code, Mr. Bose, Ld. Senior Counsel representing the appellants further submitted with reference to the statement of the witnesses that as per statement of the so called ocular witnesses some of the appellants did not take active role in committing the crime as alleged and accordingly he opined that there was a difference between "similar intention" and "common intention". Accordingly he submitted that in terms of Section 34 of the Code for "common intention" there must be a pre-arranged plan. He also urged that in order to convict an accused of an offence by applying Section 34, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Relying on a decision of the Privy Council in Mehbub Shah vs. Emperor, reported in 1945 Privy Council 119, he opined that there cannot be direct evidence to prove the intention of an individual and it has to be inferred from the given circumstances of the case and

expressed that care should be taken not to confuse "similar intention" with "common intention" rather there should be a clear demarcation between the two in order to hold any person guilty in terms of section 34 of the Indian Penal Code. To fortify his argument, in this context, he relied on a decision of the Hon"ble Apex Court in Mohan Singh Vs. State of Punjab, and urged that since the role of some of the appellants were not clearly stated by the witnesses their conviction in terms of Section 34 of the Indian Penal Code could not be sustained. Relying on a catena or decisions of the Hon"ble Apex Court over the issue of "Common Intention" of the miscreants in an incident, he urged that his clients should not be attributed to be guilty of "Common Intention" as held by Id. Court in the impugned judgment.

11. In course of his argument Mr. Bose also pointed that Mokbul Sk. (PW-4), the brother of the victim Haider Sk. guarded his brother"s headless dead body throughout the fateful night but he did not take the trouble to lodge any written complaint before the police station concerned in the said night for initiation of a Criminal Proceeding against the miscreants rather he allowed the present de facto complainant (PW-1) to do the same in the next morning. Pointing out the statement of other Court witnesses (Court-Witnesses No. 1-5) & Defence-witness-1, he urged that in the fateful night it was dark and there was bad weather for which it could not be possible for the witnesses to identify the actual culprit but they incriminated his clients upon certain baseless allegations and Id. Trial Court placing reliance upon the statements of those witnesses convicted his clients though they did not deserve the same as they were innocent all along.

12. Further placing reliance on a decision of the Hon"ble Supreme Court in Raju @ Debendra Choubey vs. State of Chhattisgarh reported in 2014 (7) Supreme 290, Mr. Bose pointed out that the witnesses, examined on behalf of the prosecution so far, did not reveal specific role of two other appellants named Lalu Sk. & Nakfuru Sk. and urged that they should not be convicted on any score taking recourse of the provisions of Section 34 of the Code since there was no allegation of "Common Intention" by way of attributing any motive against them to commit the offence of brutal killing of a man - he added.

13. His Id. Counterpart, appearing for the state of West Bengal, at the very outset, drew our attention to the oral testimony of the PW-1 Naimul Sk. and urged that said witness being the de facto complainant was one of the victims of the occurrence and sustained cut injuries on his neck and other parts of his body before he was hiding to save himself. Drawing our further attention to the cross-examination of the said witness (PW-1 in cross-examination at page 19 of the Paper Book) and pointed out that said witness was examined by the Medical Officer of Muraroi Hospital as he was sent from the P.S. after lodging F.I.R. at the Police Station in the very next morning of such occurrence. He further submitted with reference to the oral testimony of the Medical Officer (PW-9) and the Medical Certificate (Exhibit-6) that the presence of the de facto complainant (PW-1) cannot be doubted rather it is well established from the oral testimony of

Dr. Kuntal Mukherjee (PW-9), the then Medical Officer of Muraroi P.H.C., who examined him (PW-1) on 03.02.1994 at the said Primary Health Centre. With reference to the oral testimony of the PW-9, he also pointed out that before his examination, the PW-1 disclosed the names of the persons (i.e. the present appellants) who attacked him in the fateful evening and caused injuries on his persons with sword. Criticizing the conduct of the appellants, as pointed out by Id. counsel appearing on their behalf, he urged once again that as a part of their defence, the appellants tried to establish (by pointing out the date of examination of the PW-1) that the informant herein was not an eyewitness of the occurrence, by simply referring that the date of examination of the patient (PW-1) was not incorporated in the said medical report (Exhibit-6). To further his argument Id. Public Prosecutor, appearing for the state submitted that the witness (PW-9) was never suggested by the defence that the injury report was a manufactured document at the behest of the police. He also pointed out that the FIR was lodged in the very next morning i.e. About 10 hours after the said incident but considering gravity of the offence committed and the fact that the maker of the FIR sustained injury over the incident, with reference to that he opined that in the given situation it could not be said that there was delay in lodging the FIR.

14. Id. Public Prosecutor, in course of his argument with all fairness admitted that the prosecution did not examine all the eyewitnesses but opined that non-examination of all the witnesses, as per charge-sheet cannot be a ground to disbelieve those witnesses who came before the Court and cried for justice. In this context, he relied on a decision of the Hon"ble Apex Court in State of U.P. Vs. Anil Singh, and urged that Id. trial Court committed no mistake by placing reliance upon those witnesses in awarding conviction of these appellants. Pointing out the essentials of the provision of Section 34 of the Indian Penal Code, Id. Public Prosecutor also urged that the victims and others were attacked by these appellants who came to the place of occurrence in the fateful evening with preconcert of mind to commit the offence. He candidly admitted that despite some of the charge-sheet witnesses were gained over during trial but even then their oral testimony as Court witness could not exonerate the appellants from the liability of committing offence. With reference to the oral testimony of one Samail Sk. (CW-1 in his cross-examination) he pointed out that in the fateful evening he accompanied the victim and others to some extent while they were leaving his (Samail's) house at Fatepur. Pointing out the evidence of the Court witness, he submitted that the defence tried to confuse Id. trial Court by way of establishing bad weather and deep darkness at the place of occurrence so that they could get benefit of doubt. Supporting the findings of Id. trial Court, he submitted with a confident tune that the present appeal should be dismissed, since the appellants deserve adequate punishment for the offence they committed i.e. brutal killing of a man and causing disappearance of evidence, of offence to screen the offenders, punishable under Sections 302 /201 of the Indian Penal Code, in furtherance of their "common intention".

15. From a critical appreciation of the evidence and materials on record, it is revealed that on the 2nd day of February 1994 at about 8 P.M. while victim Haider Sk. being accompanied by his other 3 companions was returning from the house of Samail Sk. of Fatepur (P.S. Muraroi), he was attacked by these appellants. Dr. Mosaraf Hosein (PW-10) who held the Post Mortem Examination over the dead body of the victim (without head), found the following injuries as per Post-Mortem report (Exhibit-7).

1. "Traumatic amputation at the regar of neck at the level of C3 and 4 with clear cut margin. Plenty of blood and blood clots Sean in and around the wound.
2. Traumatic amputation of the left ring finger (carpophalyngeal joint);
3. One incised wound about 2" x 1" x bone deep between left index and middle finger.
4. One incised wound about 3" x 1" x bone deep on the medial aspect of the left wrist;
5. One incised wound about 3 1/2" x 1/2" x skin deep on the dorsolateral part of right hand;
6. One incised wound of 1 1/2" x 1/2" x skin deep on dorsolateral right thigh;
7. One incised wound 1" x 1/2" x skin deep over the right illiac crest region;
8. One incised wound 1 1/2" x 1/3" x skin deep on the back of chest below and medial to inferior angle of right scapula."

16. In the another Post-Mortem Report of the head (without body) of the victim (Exhibit-8) the autopsy surgeon (PW-10) expressed that while examining the head of the victim, he found the margin of amputated head at the level of C3 & C4 clean cut, plenty of blood & blood clots and mud seen in and around the wound, wrinkles of skin present on the same and when the head and thorax put together, good alignment found. The Medical Officer holding Post-Mortem Examination opined that the cause of death of the victim was due to shock and hemorrhage from amputation injuries which were ante-mortem and homicidal in nature.

17. Such Post-Mortem reports clearly reflected that the severed head, recovered from a pond nearby the Place of Occurrence, was of none but the victim Haider Sk., who was killed in the evening of the 2nd day of February 1994. The de facto complainant while examining himself as PW-1 categorically narrated the manner in which the victim was killed and he raised his finger to these appellants who committed such offence in the fateful evening i.e. in the evening of the 2nd day of February 1994 in the field of Sadapur (near a mango garden). It is elicited from the oral testimony of the witnesses that it was a moonlit night having clouds floating in the sky. Said witness in his statement recorded in terms of Section 164 of the Code of Criminal Procedure (Exhibit-9) also echoed the statement given by him during trial in presence of these appellants in open

Court. The ocular witnesses (PWS 1 & 2) were categorical in stating that they identified the miscreants at the Place of Occurrence and the PW-1 who sustained injury over the incident stated that he was stabbed with a bhojali/sword by appellant Sairuddin who hit him below his neck or throat. We find no reason to disbelieve such a witness who identified the miscreants from a close proximity. His (PW-1) statement regarding involvement of the appellants was fortified by the statement of Dr. Kuntal Mukherjee, the Medical Officer of Muraroi P.H.C., before whom the de facto complainant stated the names of the miscreants immediately after the incident while the PW-1 was examined by him (PW-9). There is no reason to believe that this injured person (PW-1) stated the names of these appellants excluding the actual culprits though attempts have been made on behalf of the defence to establish their innocence in order to exonerate them from criminal liability. Moreover the appellants were not the strangers to the place of occurrence rather they are local villagers and known to these witnesses and therefore left no scope for their mistaken identity.

18. Ld. Counsel for the appellants pointed out that there was delay of about 9/10 hours in lodging the F.I.R. which cannot be said to be fatal in the given facts and circumstances of the case, particularly when the offence was committed in a winter night having bad weather, as it is revealed from the oral testimony of the witnesses who rushed to the Place of Occurrence after hearing the news from the de facto complainant (PW-1) and that included the brother of the victim (PW-4) who found the headless body of his brother at the Place of Occurrence and that might have got the witnesses of the occurrence perplexed and in the above circumstances it cannot be said that there was abnormal delay in lodging the F.I.R. when the Police Station situates about 9 kilometers away from the said Place of Occurrence.

19. Ld. Counsel for the appellants also submitted that the case of the prosecution can be doubted since all the witnesses named in the charge-sheet were not examined by the prosecution and accordingly he opined that the appellants should be given the benefit of doubt since the version of the prosecution was not corroborated by a good number of witnesses, referred to in the charge-sheet. We find no force in such argument particularly when we find evidence of the ocular witness whose evidence was of unimpeachable character and who convincingly established the role of the appellants in the Commission of the Crime, as alleged. In this context, we may refer to the decision of the Hon"ble Apex Court in State of U.P. Vs. Anil Singh, where the Hon"ble Court held:-

(13).....
....."In some cases the entire prosecution case is doubted for not examining, all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject

the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version....."

20. In the instant case we find that the witnesses examined on behalf of the prosecution so far gave consistent statement not only before the prosecuting agency but before Id. Magistrate recording the statement of the witnesses in terms of Section 164(5) of the Code. A comparative and comprehensive study of the statements of the vital witnesses (Exhibits 9 & 10) with the Inquest Reports, (Exhibits 2 & 3), we did not find any exaggerated version in the statement of the ocular and other witnesses at any stage of investigation or trial in order to make their statement reliable but their consistent statement nullified the defence version of mistaken identity of the miscreants at the place of occurrence. Id. Public Prosecutor appearing for the state further relied on the said decision of the Hon'ble Apex Court in the State of U.P. vs. Anil Singh (supra) where it was categorically held.

(15) "It is also our experience that invariably the witnesses add embroidery to prosecution story perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

21. Having regard to the facts and circumstances of this case and taking into consideration the materials available on record so far, we firmly conclude the Id. trial Court drew a legitimate conclusion in arriving at the decision and found these appellants guilty of the offence, as complaint of.

22. Undoubtedly, it is a case of brutal murder where Id. trial Court found these appellants guilty but did not term the offence as a "rarest of rare cases" and imposed life sentence against them and in our considered view imposing of life sentence by Id. trial Court was sufficient to meet the ends of justice and he was justified in doing so. It would be pertinent to mention here that Id. trial Court categorically held in the impugned judgment that non-production of the F.S.L. Report during trial could not in any way outweigh the credibility or veracity of the testimonies of the ocular witnesses and other witnesses in order to decide the merits of the case and concurring with the views expressed by Id. trial Court, we find no reason to interfere in the present appeal since it is devoid of merit. In the result, the instant criminal appeal fails.

23. Hence, it is ordered that the CRA No. 318 of 2007 arose out of judgment and order of conviction dated March 29th 2007 and March 31st 2007 respectively recorded by Id. Addl. Sessions Judge Birbhum at Rampurhat in S.C. No. 72 of 1996 (S.T. No. 13 of 2002) imposing life sentence upon each of the appellants and payment of fine as indicated earlier are hereby affirmed.

24. A copy of the judgment & the LCR be sent to Id. trial Court and another copy of the said judgment be sent to the jail authorities at once.

25. Urgent Photostat certified copy of this judgment, if applied for, shall be supplied to the advocates for the parties upon compliance with all formalities.

Ashim Kumar Roy, J.

I agree.