
(2015) 04 CAL CK 0095
In the Calcutta High Court
Case No : C.R.A. No. 686 of 2006

Nakul Mondal

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 300, 313, 428
Penal Code, 1860 (IPC) — Section 300, 302, 304, 325, 326

Citation : (2015) 04 CAL CK 0095

Hon'ble Judges : Debasish Kar Gupta, J; Mumtaz Khan, J

Bench : Division Bench

Advocate : P.S. Bhattacharya, for the Appellant; Pawan Kumar Gupta, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Debasish Kar Gupta, J.—This appeal is directed against the judgment and order of conviction dated April 26, 2006 and sentence dated April 27, 2006 passed by the Ld. Additional District Sessions Judge, 5th Court, Murshidabad in Sessions Serial No. 624/2005. By virtue of the impugned judgment the appellant was held guilty of offence punishable under Section 302 of I.P.C. and sentenced him to suffer imprisonment for life as also to pay fine of Rs. 5,000/- and in default to suffer rigorous imprisonment for six months.

2. The case of the prosecution in a nutshell is as under:-

"On February 5, 2005 at about 1.45 p.m. Chandra Deb Mondal son of Durga Pada Mondal, PW 2, one Bonai Mondal son of Late Shibu Ram Mondal, PW 4, Tapan Mondal son of Jiten Mondal, PW 8, Jagannath Biswas son of Dhananjoy Biswas, PW 3, Sukhen Ghosh son of Suren Ghosh all of Bhabta Nichpara, Police Station Beldanga were lifting a slab of latrine from a place situated in between the houses of Sukhen Ghosh and the appellant. At that time there was an altercation in between appellant and his wife Kakali Mondal. Suddenly, the appellant assaulted Sukhen Ghosh @ Joybeb Ghosh, the deceased on his head with a thick

bamboo stick (khutbere). The aforesaid Sukhen Ghosh sustained severe injury and became senseless. He was admitted to Berampore hospital for treatment. The PW 1 lodged a complaint dated February 5, 2005 in the Beldanga Police Station, District - Murshidabad. The above letter of complaint was treated as FIR No. 15 dated February 5, 2005 to start Beldanga P.S. Case No. 15/05, initiating a proceeding under Sections 325/326 of IPC. The rough sketch map of the place of occurrence was prepared. Thereafter the aforesaid Sukhen Ghosh expired on the selfsame date i.e. on February 5, 2005."

3. The case was committed to the Court of Session for trial. PW 15 came to the medical surgical ward from Berampur General Hospital with his assistant Mukti Singha, PW 10 and prepared a surathal report dated February 5, 2005. According to surathal report the dead body of the deceased found wearing black sando gangi and one chek lungi and injury at the backside of the head of the dead body of the length of 4 fingers detected. Another deep wound was detected on the forehead of the deceased just on the right side of the eye. There was sign of blood in the nose and mouth of the deceased.

4. As per the post mortem report following injuries were found on the body of the deceased.

"1. One lacerated scalp injury on the left parietal region posteriorly about 2 1/2 x 1" in size.

2. Lacerated injury on the right side of the forehead above the right eye brow 1" x 1" in size."

5. According to the above post mortem report the cause of death was due to shock and haemorrhage following head injury which was ante-mortem and homicidal in nature.

6. After completion of investigation a charge-sheet dated March 23, 2005 was submitted against the appellant under Sections 325/304 IPC.

7. By an order dated September 19, 2005 passed by the Additional Sessions Judge, 5th Court, Murshidabad, the appellant stood charged under Section 302 IPC.

8. After examining prosecution witnesses the accused was examined under the provisions of Section 313 of Cr.P.C.

9. No oral or documentary evidence had been adduced by the appellant. After considering the evidences of the 15 prosecution witnesses and the relevant documents marked as Exbt.-1 to 9, amongst other materials on record, the impugned judgment and order of conviction dated April 26, 2006 and sentence dated April 27, 2006 was passed.

10. It is submitted by Mr. Partha Sarathi Bhattacharya, learned Counsel appearing for the appellant that the impugned judgment is liable to be set aside for the following reasons:

"(i) From the evidence of PW 1, who was one of eye witnesses in the case, it is evident that the bamboo piece which was alleged to be used for committing the offence was not identified by him.

(ii) The presence of PW 1 at the time of occurrence of the incident was not available in the evidence of PW2 who was one of the eye witnesses.

(iii) The PW Nos. 3 and 4 who were eye witnesses, amongst others, made the statement of assaulting the deceased with a bamboo piece by the appellant for the first time before the learned Court below in course of adducing evidence. The same was not mentioned in the statement recorded under the provisions of Section 161 Cr.P.C.

(iv) There was no other witness to identify the bamboo piece allegedly used for commission of the offence.

(v) The seized articles were not sent to the forensic laboratory for obtaining a report.

(vi) PW 13 was the Investing Officer and the charge-sheet was prepared by him in consultation with his seniors. He did not visit the place of occurrence.

(vii) PW 14 was the Medical Officer attached to Berhampur New General Hospital and the post mortem report of this case was prepared by him. He was not an autopsy surgeon. From his evidence in course of cross-examination he stated that he had not seen any label on the foot of the deceased regarding his name.

(viii) PW 15 was the Police Officer in the above case who prepared the inquest report in course of his cross-examination he stated that the eye witnesses had not mentioned any "khutbere" bamboo piece."

11. Without prejudice to the rights and contentions of the appellant with regard to the submissions made hereinabove, it is submitted by Mr. Bhattacharya that the decision of the learned Court below with regard to the commission of offence by the appellant punishable under Section 302 of IPC was not based on evidence.

12. Our attention is drawn towards the First Information Report dated February 5, 2005, surathal report dated February 5/6, 2005, post mortem report dated February 6, 2005. It is further submitted that on the basis of the above materials, charge-sheet dated March 23, 2005 was filed against the appellant for committing offence under Sections 325/304 of IPC. It is also submitted by Mr. Bhattacharya that even according to the prosecution version there was no premeditation in the commission of crime. There was not even any suggestion that the appellant had any enmity or motive to commit any offence against the deceased and the act was done by the appellant in a heat of passion without taking any undue advantage or acting in a cruel manner.

13. According to him, the case of appellant fell within Exception 4 to Section 300 of IPC and the appellant should have been convicted for the offence of culpable homicidal not amounting to murder punishable under Section 304, Part-II, IPC.

14. Reliance is placed by Mr. Bhattacharya on the decision of Ankush Shivaji Gaikwad v. State of Maharashtra, reported in (2013) 3 C Cr LR (SC) 826 in support of his above submissions.

15. It is submitted by Mr. Pawan Kumar Gupta, learned junior Government advocate, appearing on behalf of the respondents that the impugned judgment and order of conviction and sentence were passed by the learned Court below on the basis of the evidences of eyewitnesses being PW Nos. 1, 2, 3, 4 and 8, medical evidence as also post mortem report. It is also submitted by Mr. Gupta that in course of cross-examination the PW 1 deposed that he had witnessed the incident and also had identified the bamboo piece. According to Mr. Gupta, disclosure of some facts in course of deposition for the first time without disclosing those facts in the statement prepared under Section 161 of Cr.P.C. cannot be a ground for setting aside the impugned judgment and order of conviction and sentence. It is also submitted that PW 7 was one of the witnesses of the seizure list and the seized articles were marked as Exbt.3/2. According to him, the PW 7 identified on dock his signature over the label pasted on the seized bamboo piece which was marked as Exbt.4/2. According to Mr. Gupta, PW 13 was the Investigating Officer in this case, who had examined the witnesses under the provisions of Section 161 of Cr.P.C. and recorded their statements only.

16. Drawing our attention towards the lower Court record it is also submitted that there was typographical error in respect of the deposition of PW 13 with regard to his visit to the place of occurrence. It is further submitted by Mr. Gupta that the minor error to mention the weapon of offence as "bamboo piece" or "lathi" was neither argued before the learned Court below nor the same has any adverse effect on the impugned judgment and order of conviction and sentence.

17. Mr. Gupta relied upon the decision of Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another, AIR 1999 SC 3717 : (1999) 8 JT 274 : (1999) 6 SCALE 477 : (1999) 9 SCC 525 : (1999) 3 SCR 435 Supp : (1999) AIRSCW 3756 : (1999) 8 Supreme 631 in support of his above submissions.

18. We have heard the learned Counsels appearing for the respective parties at length and we have taken into consideration the facts and circumstances of this case. The learned Court below took into consideration the evidences of the eyewitnesses i.e. PW Nos. 1, 2, 3, 4 and 8. According to all of those eyewitnesses the time and place of occurrence were proved. There was no contradiction in the aforesaid evidences. The evidences of the eyewitnesses corroborated the injury of the deceased mentioned in the post mortem report. Further the learned Court below took into consideration the evidences adduced by PW 14, who was Medical Officer attached to the Berampur New General Hospital, who had prepared the post mortem report.

19. It is the settled proposition that the discrepancy found in the evidences of eyewitnesses, such discrepancy cannot affect the credibility of the evidences of those witnesses unless such discrepancy is so vital. Corroboration of evidence

with mathematical niceties cannot be expected in criminal cases and trivial discrepancies ought not to obliterate an otherwise acceptable evidence. Reference may be made to the decision of Leela Ram (supra) and the relevant portions of the above decision are quoted below:-

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimensions, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony. In para 10 of the Report, this Court observed:

"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weightily and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

20. With regard to the submissions of the Mr. P.S. Bhattacharya that the bamboo piece allegedly used as the article of committing offence was not identified but we find from the evidence of the PW 1 that the seized article was identified by him in Court. We also find that the learned trial Court took into consideration the evidence of eyewitness of PW 1 who had lodged the written complaint before the P.S.

21. Upon consideration of the evidence of PW 2, it is evident that he had not mentioned the name of PW 1 as one of the eyewitnesses. But he did not adduce evidence to the effect that the PW 1 was absent at the place of occurrence. Therefore, in view of the settled proposition of law as discussed hereinabove the above discrepancy cannot affect the credibility of the evidence of the witnesses concerned.

22. It is not in dispute that PW Nos. 3 and 4 were eyewitness and they disclosed the name of the article of offence (bamboo piece) in course of adducing evidences. Admittedly the description of the article of offence was not mentioned in their statements recorded under Section 161 of Cr.P.C. It cannot be a ground for disbelieving the above witnesses in view of the proposition of law that law would not expect mentioning minutest details either in FIR or statement under Section 161 of Cr.P.C. Reference may be made to the decision of State of U.P. Vs. Krishna Master and Others, AIR 2010 SC 3071 : (2010) CriLJ 3889 : (2010) 8 JT 240 : (2010) 7 SCALE 597 : (2010) 12 SCC 324 : (2011) 1 SCC(Cri) 381 : (2010) 9 SCR 563 : (2010) AIRSCW 4733 : (2010) 6 Supreme 193 and the relevant portion of the above decision is quoted below:-

"72. It is relevant to notice that six brutal and gruesome murders had taken place wherein firearms were used. The hard reality of life is that the person who has lost kith and kin in an horrific incident is likely to suffer great shock and therefore law would not expect him to mention minutest details either in his FIR or statement under Section 161. The question before the Court is whether the assertion made by the witness that soon after the incident he had gone to the place where his injured brother was lying and on enquiry by him, his brother had told him that the respondents were his assailants, inspires confidence of the Court.

73. Reading the evidence of the witness as a whole, this Court points that it has a ring of truth in it. There is nothing improbable if a brother approaches his injured brother and tries to know from him as to how he had received the injuries nor is it improbable that on enquiry being made the injured brother would not give reply/information sought from him. The assertion by witness Jhabbulal that after the incident was over he had gone near his injured brother and tried to know as to who were his assailants, whereupon his injured brother had replied that the appellants (sic respondents) had caused injuries to him, could not be effectively challenged during cross-examination of the witness nor could it be brought on record that because of the nature of the injuries received by Baburam he would not have survived even for a few minutes and must have died immediately on the receipt of the injuries."

23. With regard to identification of the article of offence by the PW Nos. 3 and 4 only, we are of the opinion that according to the settled proposition of law of evidences examination of any particular number of witnesses is not required for proving the prosecution case. Reliance can be placed on the solitary witness, if the Court comes to the conclusion that the said statement is true and correct

version of the case of prosecution. Reference may be made to the decision of State of U.P. Vs. Krishna Master and Others, AIR 2010 SC 3071 : (2010) CriLJ 3889 : (2010) 8 JT 240 : (2010) 7 SCALE 597 : (2010) 12 SCC 324 : (2011) 1 SCC(Cri) 381 : (2010) 9 SCR 563 : (2010) AIRSCW 4733 : (2010) 6 Supreme 193 and the relevant portion of the above decision is quoted below:-

"47. It is a well-known principle of law that reliance can be placed on the solitary statement of a witness if the court comes to the conclusion that the said statement is the true and correct version of the case of the prosecution. The courts are concerned with the merit and the statement of a particular witness and not at all concerned with the number of witnesses examined by the prosecution. The time-honoured rule of appreciating evidence is that it has to be weighed and not counted. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, where the court finds that the testimony of the solitary witness is neither wholly reliable nor wholly unreliable, it may, in a given set of facts, seek corroboration, but to disbelieve reliable testimony of a solitary witness on the ground that others have not been examined is to do complete injustice to the prosecution."

24. As discussed hereinabove, the learned trial Court took into consideration the corroboration of the evidences of the eyewitnesses, i.e. PW Nos. 1, 2, 3, 4, and 8 with the post mortem report and the evidence adduced by PW 14 who had prepared the post mortem report.

25. After considering the lower Court's record, we do not find any substance in the submissions made on behalf of the appellant that the Investigating Officer of the case, i.e. PW 13 did not visit the place of occurrence.

26. According to the settled principle of law preparation of post mortem report by an autopsy surgeon is not mandatory. Therefore, we do not find any substance with regard to the above allegation raised on behalf of the appellant.

27. Our attention has been drawn towards the evidence of the PW 15, the Investigating Officer of this case to submit that the eyewitnesses had stated before him that the victim was assaulted with lathi and not with "khutbere" bamboo piece. According to us, there is a little difference in between the "lathi" and "khutbere" bamboo piece and such discrepancy was not so vital for affecting the credibility of evidence of the above witness, in view of the settled principle of law decided in the matter of Leela Ram (supra).

28. The next issue which needs our consideration is whether the case falls under the provisions of Section 302, IPC or under Section 304, Part I or Part II, IPC? Once the elements mentioned in Exceptions to Section 300, IPC are not established, the offence is murder. In the event a case comes within the elements prescribed in Exceptions to Section 300, IPC, it is culpable homicide not amounting to murder. The provisions of Section 300, IPC are set below:-

"300. Murder. - Except in the case hereinafter excepted, culpable homicide is

murder, if the act by which the death is caused is done with the intention of causing death, or -

Secondly. - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or -

Thirdly. - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or -

Fourthly. - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

29. The above provisions are interpreted by the Hon"ble Supreme Court in the matter of Virsa Singh Vs. The State of Punjab, AIR 1958 SC 465 : (1958) CriLJ 818 : (1958) 1 SCR 1495 and the relevant portions of the above decision are quoted below:-

"14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly";

15. First, it must establish, quite objectively, that a bodily injury is present;

16. Secondly, the nature of the injury must be proved; These are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and,

19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

30. In the matter of Jagrup Singh Vs. State of Haryana, AIR 1981 SC 1552 : (1981) CriLJ 1136 : (1981) 3 SCALE 1807 : (1981) 3 SCC 616 : (1981) SCC(Cri) 768 : (1981) 3 SCR 839 : (1981) 13 UJ 820 , the Hon"ble Supreme Court altered the conviction of the appellant under Section 302, IPC, to one under Section 304, Part-II, IPC considering the natural injury on the head of the deceased with a blunt side of gandhala in the heat of the movement consequent upon a sudden quarrel and with any intention to cause the death of the deceased. The relevant portions of the above decision are quoted below:-

"14.

In our judgment, the High Court having held that it was more probable that the appellant Jagrup Singh had also attended the marriage as the collateral, but something happened on the spur of the moment which resulted in the infliction of the injury by Jagrup Singh on the person of the deceased Chanan Singh which resulted in his death, manifestly erred in applying clause Thirdly of Section 300 of the Code. On the finding that the appellant when he struck the deceased with the blunt side of the gandhala in the heat of the moment, without premeditation and in a sudden fight, the case was covered by Exception 4 to Section 300. It is not suggested that the appellant had taken undue advantage of the situation or had acted in a cruel or unusual manner. Thus, all the requirements of Exception 4 are clearly met. That being so, the conviction of the Appellant Jagrup Singh, under Section 302 of the Code cannot be sustained."

31. In the case in our hand PW Nos. 1, 2, 3, 4, and 8, who were eyewitnesses, deposed that consequent upon a sudden quarrel with the deceased, the appellant struck on the head of the deceased with a bamboo stick. We find that there was no scope for the learned Court below to convict and sentence the appellant under Section 302 of IPC, taking into consideration the evidences and other materials on record. The learned Court below failed to consider at the time of passing the judgment that no evidence was brought on record to prove that there had been an intention to inflict the body injury to the deceased to cause death.

32. Attention of this Court has not been drawn by Mr. Gupta towards any material on record to take a different view. Therefore, the impugned judgment and the order of conviction and sentence are liable to be interfered with.

33. We find that the decision of Ankush Shivaji Gaikwad (supra), referred to, is applicable in this case.

34. We allow this appeal to the extent that the conviction of the appellant under Section 302 is altered to one under Section 304, Part II of the Indian Penal Code. For the altered conviction, the appellant is sentenced to suffer rigorous imprisonment for a period of ten years. The fine imposed upon the appellant and the default sentence awarded to him remain unaltered. The period of detention of the Appellant during the investigation inquiry or trial be set off against the period of substantive sentence of imprisonment stated hereinabove, in accordance with the provision of Section 428, Cr.P.C.

35. Copy of this judgement along with the lower Court records be sent down to the trial court immediately.

36. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Md. Mumtaz Khan, J.

I agree.