
(2006) 05 CAL CK 0034
In the Calcutta High Court
Case No : Criminal Appeal No. 241 of 2003

Pacha alias Buddhadeb Mete and Others	APPELLANT
Vs	
The State of West Bengal and Others	RESPONDENT

Date of Decision : 04-05-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2006) 3 CALLT 109 : (2007) 1 CHN 448

Hon'ble Judges : Sadhan Kumar Gupta, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Sekhar Basu, Tapas Ghosh and Soubhik Mitter, for the Appellant;Samir Chatterjee and Jay Sengupta, for the Respondent

Final Decision : Dismissed

Judgement

Sadan Kumar Gupta, J.—This appeal has been preferred against the order of conviction, as passed by the learned Additional Sessions Judge, 3rd Court, Birbhum, Suri against the accused/appellants in Sessions Trial No. 4 of May, 2002 whereby the learned Judge, convicted all the accused persons for the commission of offence under Sections 302/149 IPC and u/s 147 of the Indian Penal Code and sentenced all of them to suffer imprisonment for life and to pay fine for the offence under Sections 302/149 IPC and also to suffer R.I. for one year and to pay fine for the offence u/s 147 IPC.

2. On 08.06.99 at about 6.25 a.m. the defacto complainant Smt. Anuva Mete submitted a written complaint to the O.C. Labhpur P.S. stating therein that on that day when her husband's brother Dulal @ Dhulo Mete was going to attend nature's call, at that time all the accused persons attacked him out of previous enmity. In order to save his life, Dhulo cried for help and entered into the courtyard of Nihar Ghosh. The accused persons entered into the said courtyard chasing Dhulo. The defacto complainant and Anr. also entered into the said courtyard of Nihar Ghosh and tried to save Dhulo, but failed. The accused

persons assaulted Dhulo severely by the weapons which were in their hands and as a result of that he died on the spot. It has been stated in the FIR that a long standing dispute was going on in between the parties. On the basis of the said written complaint, Labhpur P.S. Case No. 44 of 1999 dated 08.06.99 under Sections 147, 148, 149, 302 IPC was started against the accused persons and after completion of the investigation charge sheet was accordingly submitted against them. During trial charges under Sections 147 and 302/149 IPC was framed against all the accused persons who pleaded not guilty to those charges and claimed to be tried. In order to establish Its case, prosecution has examined 14 witnesses. The accused persons have examined one D.W. in support of their case. It appears that the defence has tried to set up a case of innocence and that they have been falsely Implicated in connection with this case out of previous enmity.

3. The learned Additional Sessions Judge, after considering the entire evidence on record was of the opinion that all the accused persons were guilty of forming unlawful assembly and in furtherance of their common object they caused the death of the deceased by assaulting him with dangerous weapons. This finding of the learned Additional Sessions Judge is under challenge, so far as the present appeal is concerned.

4. We have heard the submissions of the learned Advocate for both the sides and also perused the entire materials on record. At the very outset, the learned Advocate for the appellants argued that from the materials on record it appears that the accused/appellant Milan Mete alias Bhulu and Kada alias Sukhen Mete were juveniles at the time of commission of the alleged offence and as such their trial along with the other major accused persons is totally illegal and on that ground their conviction should be set aside. In support of his contention Mr. Basu, the learned Advocate for the appellants drew our attention to the examination sheet of the said accused Milan Mete alias Bhulu recorded u/s 313 Cr. PC. He pointed out that the age of the said accused was recorded as 17 years and as such there cannot be any doubt that the accused Milan alias Bhulu was minor at the time of the commission of the offence. But we are unable to accept this argument of Mr. Basu. It is the admitted position that the recording of the age in the form of the Section 313 Cr. PC is generally done by the ministerial staff of the Court concerned and simply because the age has been described as 17 years, that cannot be taken to be the correct position. In order to get the benefit of the Juvenile Justice Act, an accused is duty bound to raise this point before the Court preferably at the very out set by producing corroborating evidence. But the record shows that no such plea was taken by this accused before the Courts below at any stage whatsoever. Under such circumstances, we are unable to accept this contention of the learned Advocate for the appellants.

5. Mr. Basu further pointed out that so far as the accused/appellant Kada alias Sukhen Mete is concerned, this question was raised before the learned Magistrate at the very beginning. In this respect, he drew our attention to the

order dated 30.07.99 of the learned Magistrate wherefrom it appears that a plea of minority was taken and the learned Magistrate directed for ossification test of the said accused Kada @ Sukhen Mete. Mr. Basu submitted that since then learned Magistrate did not care to take follow up action for coming to a decision regarding the alleged minority of the accused/appellant Kada. We have gone through the order sheets of the learned Magistrate. It appears from the order dated 27.08.99 that ossification test report was submitted before the learned Magistrate by the Investigating Officer. That report is in the record of the learned Magistrate. It shows that accused Kada @ Sukhen Mete ossification test was held on 24.08.1999. The Doctor, who conducted the ossification test, gave a clear opinion that accused Kada @ Sukhen Mete was aged more than 18 years and less than 25 years on the date of examination i.e. 24.08.99. It would be relevant to point out here that the incident took place two months prior to this examination i.e. on 08.06.99. As such, from this ossification report there cannot be any doubt that accused Kada alias Sukhen was not a minor on the date of incident, as alleged and the learned Magistrate rightly did not consider the case of the said accused as per provisions of Juvenile Justice Act. So this contention of the learned Advocate for the accused Kada edicts Sukhen Mete also cannot be accepted.

6. Let us now turn our attention to the points that have been raised by the learned Advocate for the appellants in connection with this appeal. First of all, learned Advocate for the appellants argued that the statements as made by P.W.I Anuva Mete, P.W. 2 Puspa Mete, P.W. 5 Sridhar Mete, cannot be accepted as there is room for doubt regarding their statements. Mr. Basu pointed out that some statements as made by the P.W.I and P.W. 2 during their evidence, were not stated before the I.O. during investigation. As such, the learned Advocate for the appellant pointed out that those witnesses made exaggeration in their statements before the Court and under such circumstances it will not be wise to place reliance upon their statements in convicting the accused persons.

7. Mr. Basu, further pointed out that there are discrepancies in the statements of the eye witnesses regarding the weapons that were actually used by the accused persons in committing the alleged offence. Moreover, he further argued that considering the circumstances, as described by the P.W. 2, it is very much doubtful whether this lady could say vividly about the weapons that were in the hands of the accused persons.

8. It appears from the trend of the cross-examination that the defence has tried to set up a dispute regarding the actual place of occurrence. Mr. Basu, learned Advocate for the appellants at the time of argument clearly conceded that the prosecution witnesses have successfully been able to identify the place of occurrence to be the courtyard of Nihar Ghosh. If we look into the evidence of the D.W. 1 then also it will appear that she could not deny that the incident took place in the courtyard of Nihar Ghosh. As such, we have got no doubt in our mind that the prosecution has been able to prove successfully that the incident

took place in the courtyard of Nihar Ghosh.

9. Be that as it may, the learned Advocate for the appellants argued that the eye witness did not implicate all the accused persons in respect of the commission of the offence. For this, he drew our attention to the evidence of P.W. 1 who directly implicated two of the accused persons. That apart, according to the learned Advocate for the appellants although the P.W. 2 attributed specific overt Act of the accused persons, still as she did not say all these things before the Investigating Officer, so the learned Advocate for the appellants argued that prosecution has failed to prove that all the accused persons took active part in the commission of the alleged offence.

10. Mr. Basu, further argued that from the evidence on record it appears that there was grave provocation on the side of the family of the deceased and as the accused persons were under such provocation and acted under passion and emotion, so it cannot be said that it's a pre-planned murder. According to him, the accused persons can at best be convicted u/s 304 IPC and not u/s 302 of the IPC as done by the learned Trial Court. In support of this argument, the learned Advocate for the appellant further drew our attention to the nature of injuries as mentioned in the post mortem report of the deceased. According to him, those injuries show that the accused persons did not strike on the vital places of the body of the deceased and as such it should be considered that they had only the intention to cause injury to the deceased and not the intention of causing murder.

11. Lastly, learned Advocate for the appellants argued that from the evidence on record it cannot be said that accused Kada Mete @ Sukhen took any active part in the commission of offence. He has further argued that the P.W. 2 has stated that the accused Kada Mete had lathi in his hand. But the nature of injuries on the dead body of the deceased does not indicate the commission of any overt act by this accused with the help of lathi. Accordingly, Mr. Basu, the learned Advocate for the appellants, submitted that this accused Kada should be given benefit of doubt and should be acquitted.

12. As against this, the learned Advocate for the State submitted that from the evidence of the P.W. 1 and P.W. 2 it is very much clear that all the accused persons took active part in the commission of the offence and they have given vivid description regarding the weapons in the hands of the accused persons at the material time. He further argued that the evidence is sufficient to prove that the accused persons formed an unlawful assembly with the common object to commit the murder of the deceased.

13. Regarding the submission of the learned Advocate for the appellants that there are some contradictions in the statements of the witnesses particularly the statements made by the eye witnesses in Court and that of the statements recorded by the I.O. during investigation, he submitted that all those contradictions are minor in nature and should not outweigh the substantive evidence of the eye witness, as given before the Court below. In fact, he argued

that there is no material contradiction at all in the statements of those witnesses and as such the accused persons cannot get any benefit out of it.

14. As regards the submission of the learned Advocate for the appellants that the accused persons acted under grave provocation and under passion and emotion, the learned Advocate for the State submitted that there is no such evidence of provocation, as alleged by the defence. On the contrary, he submits that the evidence is sufficient to prove that the accused persons had the common object to cause the death of the deceased and as such question of converting the sentence from Section 302 to Section 304 IPC does not arise at all. By countering the submissions of the learned Advocate for the appellant, he submitted that the learned Court below rightly convicted the accused persons for causing murder of the deceased and this Court should not interfere into the said order of conviction.

15. We have heard the submissions of the learned Advocates for both the sides. It appears that in this case the evidence of the P.W. 1 and P.W. 2 are most vital, as because they are the eye witnesses of the incident and in their presence the incident took place. If we look into the evidence of the P.W. 1 Anuva Mete, who is the sister-in-law of the deceased, then it will appear that she has categorically stated that on the morning of the date of incident, she found that when the deceased was proceeding to attend nature's call, at that time she found that all those accused persons being armed with deadly weapons chased him and at that time Dulal, the deceased raised alarm for help and entered into the house of Nihar Ghosh. This witness has claimed that she and Puspa, P.W. 2 also entered into the house of Nihar Ghosh and tried to rescue Dulal, but failed. She has categorically stated that when Dulal fell down, accused Dhana pierced his body with a Bedlam and accused Pacha assaulted him with a Ramda. She has also stated that all the other accused persons, then started assaulting Dulal with various weapons like Tangi, Ballam, Khocha, Ramda etc. which were in their hands. Although she did not specifically mention the name of the other accused persons, but, it appears that at the time of her deposition she clearly identified the accused persons on dock by saying that they also took part in the assault on Dulal. The manner in which this witness has deposed, has inspired confidence and in our opinion the learned Court below did not commit any mistake in placing reliance on her evidence. If we look into the evidence of the P.W. 2 Puspa then it will appear that she has practically corroborated the P.W. 1 on all the material points. She in her evidence also stated that all the accused persons, whom she identified on dock, chased Dulal with deadly weapons. She has stated that accused Dhana was armed with Ballam, accused Anath was armed with Khocha, accused Biswanath was armed with Tangi, accused Jaga was armed with Bhojali, accused Bhulu was armed with Tangi. Accused Pacha was armed with Ramda and accused Kada was armed with Lathi. She has stated in her evidence that she found that accused Dharia assaulted the deceased with Ballam and accused Biswanath cut down the fingers of the deceased with a Tangt. She has also stated accused Pacha caused hurt with Ramda on the lower portion of the

abdomen of Dulal. In her evidence she also stated that other accused persons also assaulted Dulal. We have already pointed out that these two P.Ws viz. P.W. 1 and P.W. 2 are the close relatives of the deceased and it is quite natural that in the early morning when they found the accused persons chasing the deceased with deadly weapons they tried to rescue him. We find nothing unnatural in the behaviour of this P.W. 1 and P.W. 2 in this respect. Both of them clearly stated that all the accused persons after chasing Dulal assaulted him severely and caused his death. If we look into the cross-examination of these witnesses then it will appear that an attempt was made to establish that the deceased was murdered by Nihar Ghosh, in whose house the alleged incident took place. But if we look into the inquest report, as prepared by the Police Officer immediately after the incident, then it will appear that this Nihar Ghosh was also present at that time and he signed as a witness in the said inquest report. Had it been the fact that Nihar Ghosh is the actual culprit in causing the death of the deceased, then it is unbelievable that none of the witnesses would name him before the Police Officer as the real culprit. Moreover, the D.W. 1 also did not say anything regarding this suggestion of the defence as given to the prosecution witnesses. As such, we think that this suggestion, that actually Nihar Ghosh caused the murder of the deceased, as given by the defence, has got no leg to stand upon and should be out rightly rejected. A question may be raised that why the other neighbouring people including Nihar Ghosh have not been examined in this case. But we should not forget that the incident took place in the early morning when it is not expected that the villagers would be available to see the incident. In respect of non-examination of Nihar Ghosh, in whose house the alleged incident took place, it appears that sufficient explanation has been given by the P.W.I by saying that said Nihar Ghosh is now on the side of the accused persons and as such he would not depose in favour of the prosecution. This explanation appears to us to be quite reasonable and we find nothing wrong in it. It is the settled principle that the evidence of the near relatives should not be brushed aside if it is otherwise reliable and trustworthy. Non-examination of independent witnesses does not necessarily mean that the prosecution case should be disbelieved. If the case is proved by the evidence of the eye witnesses, they may be the near relations, there is no reason whatsoever to disbelieve the prosecution case. In fact from the facts and circumstances of the present case, we are of the opinion that the P.W. 1 and P.W. 2 are the most important witnesses and in fact they have corroborated each other in describing the incident, as took place, in causing the murder of the deceased. Their evidence does not suffer from any infirmity and as such we think that the learned Court below was perfectly justified in placing reliance on their statements.

16. Learned Advocate for the appellants submitted that it is very much doubtful as to whether the P.W. 2 being a lady could give a vivid description about the weapons that were in the hands of each of the accused persons and the part played by them in commission of the offence. We have perused the evidence of the P.W. 2 Puspa Mete. It appears that she in her examination in-chief gave a

vivid description about the incident. Her statement does not find any contradiction even after cross-examination. That apart, if we look into the post mortem examination report, then it will appear that the Doctor has clearly described the injuries that were found on the body of the deceased. These injuries, on the dead body of the deceased, supports the description, as given by the P.W. 2 in respect of the commission of the offence and the weapons used by the accused persons. Since the evidence of the P.W.1 and P.W. 2 finds clear corroboration from the evidence of the post mortem Doctor, we find no reason to disbelieve the statements of those witnesses. Learned Advocate for the appellants argued that in respect of Kada Mete alias Sukhen, the allegation is that he assaulted the deceased with lathi and the injuries found by the post mortem Doctor does not indicate any injury was sustained by the deceased caused by lathi. But if we look into the evidence of the post mortem Doctor i.e. P.W. 6 Priyajit Chatterjee then it will appear that he found lacerated injury on the body of the deceased. This injury suggests that it could have been caused by weapon like lathi. When there is specific statement of the P.W. 2 to the effect that accused Kada assaulted the deceased with lathi and when that statement finds corroboration from the evidence of the Doctor, then we are of opinion that there is no scope for disbelieving the statement made by the P.W. 2. As such, we hold that the prosecution has been able to prove that this accused Kada also assaulted the deceased with lathi in furtherance of the common object of the unlawful assembly.

17. Learned Advocate for the appellants at the time of argument drew our attention to the fact that there are contradictions in the statements of the eye witnesses made in the Court and in the statement made before the I.O. In this respect, he drew our attention to the evidence of the Investigating Officer. True it is that the I.O. has stated that some portions of the statements, as made by the eye witnesses in Court were not stated before him during investigation. But those discrepancies appear to us to be of very minor in nature. For example the I.O. has stated that the witness did not tell him that she heard the cry of "Bacho, Bacho". If such a statement is not made by the eye witnesses before the I.O. then in view of the facts and circumstances of the case, in our opinion it cannot be said to be a material contradiction for disbelieving the prosecution case. Moreover, if we look into the evidence of the Investigating Officer then it will appear that he clearly stated that the eye witnesses did not specifically (emphasis supplied) mention about a particular statement. The evidence of the I.O. in this respect shows that the eye witnesses as a whole narrated the incident vividly before him. Simply because there is any omission in mentioning a specific fact, that does not mean that those witnesses have exaggerated their statements in the Court deviating their earlier statement made before the I.O. What is required to be looked into, is, whether the statements, as given by the eye witnesses, inspired confidence or not. We have already pointed out that the manner in which the P.W. 1 and P.W. 2 gave deposition in Court certainly has inspired confidence and we find no reason to disbelieve their statements.

18. Lastly, learned Advocate for the appellants argued that as there is no clear evidence in respect of accused Kada Mete that he also committed any overt act by way of assaulting the deceased by lathi, so he should be given the benefit of doubt and should be acquitted. According to the learned Advocate, since there is no overt act performed by accused Kada Mete he should not be convicted for the offence u/s 302 IPC. Only because he was also present on the spot. In this respect he has cited a decision reported in 1999 SCC (Cri) 533 Manoj @ Bhau and Ors. v. State of Maharashtra. By citing this decision the learned Advocate argued that since the positive role played by the accused Kada Mete was not proved, so he is entitled to get the benefit of doubt. We have considered the said decision of the Hon"ble Apex Court. It appears that in this case all the accused persons were held guilty for the commission of the offence under Sections 302/149 IPC. The learned Court below was of the opinion that they all formed unlawful assembly and in furtherance of their common object they caused the murder of the deceased. Law in this respect is very clear. It is the settled position that each member of an unlawful assembly can equally be held responsible for the commission of the actual offence even if he did not actively take part in the incident. In this respect we rely upon the decision reported in All India Law Reporter 2006(2) AICLR 1 Rabindra Mahato and Anr. v. State of Jharkhand with Balram Mahto v. State of Jharkhand with Girish Chandra Mahto alias Girish Mahto and Ors. v. State of Jharlkhand.

Section 149 of the Indian Penal Code postulates an assembly of 5 or more persons having a common object i.e. one of those named in Section 141 of Indian Penal Code and then doing of the act as by the members of it in prosecution of that object. The basis of constructive guilt u/s 149 is mere membership of an unlawful assembly. u/s 149, if the accused is a member of an unlawful assembly, the common object of which is to commit a certain crime, and such a crime is committed by one or more of the members of that assembly, every person who happens to be a member of that assembly would be liable for the commission of the crime being a member of it irrespective of the fact whether he has actually committed the criminal act or not. There is a distinction between the common object and common intention. The common object need not require prior concert and a common meeting of minds before the attack, and on unlawful object can develop after the assembly gathered before the commission of the crime at the spot itself. There need not be prior meeting of the mind. It would be enough that the members of the assembly which constitutes five or more persons, have common object and that they acted as an assembly to achieve that object. In substance, Section 149 makes every member of the common unlawful assembly responsible as a member for the act of each and all merely because he is a member of the unlawful assembly with common object to be achieved by such an unlawful assembly. At the same time, one has to keep in mind that mere presence in the unlawful assembly cannot render a person liable unless there was a common object and that is shared by that person. The common object has to be found and can be gathered from the facts

and circumstances of each case.

19. The decision reported in 2006(2) AICLR 172 Yusuf Gayen and Ors. v. State of West Bengal with State of West Bengal v. Prabodh Purkait and Ors. of the Division Bench of this Court also lays down the same principle. From those decisions it appears that the law is that even if a person does not participate in the act of assault on the victim, the person being a member of the unlawful assembly and sharing the common object of the said unlawful assembly, he cannot be absolved of the responsibility and he can be easily roped with aid of Section 149 IPC. We have already pointed out that from the evidence of the P.W.I and P.W. 2 it is very much clear that this accused Kada along with others, on the date of incident, formed an unlawful assembly with their common object to cause death of the deceased. Prosecution has been successfully able to prove that this Kada Mete and Ors. formed the said assembly with the sole object in their mind to cause the death of the deceased. As such, participation or no participation by making any overt act by this accused Kada Mete in causing the death of the deceased is immaterial. Since this Kada Mete was also a member of the said unlawful assembly having sharing the common object of the said unlawful assembly, he cannot be absolved of the responsibility of the incident in question. He is equally liable along with the other accused persons. Moreover, we have already pointed out that from the evidence of the P.W. 2 it is clear that this accused Kada @ Sukhen also took active part in the assault of the deceased by assaulting him with lathi which was in his hand. The P.W. 2 clearly stated that this accused Kada also assaulted the deceased with lathi and this statement finds corroboration from the evidence of the post mortem Doctor. Under such circumstances, we are unable to accept this contention of the learned Advocate for the appellants that at least this accused/appellant Kada Mete should be given the benefit of doubt and should be acquitted.

20. Regarding the argument of Mr. Basu that the accused persons had no intention to cause death of the deceased, it will be sufficient to point out the injuries that are there in the post mortem report. This post mortem report shows that the deceased was assaulted on vital parts of his body and even when he fell down on the ground, the fingers of his hand were chopped off brutally by Tangi. This shows that how brutal the accused persons were at the time of commission of the offence. This brutality cannot be ignored simply by saying that the accused persons acted on being influenced by passion and emotion. The manner in which all the injuries were caused certainly shows that the accused persons had from the very beginning the intention to cause the death of the deceased. As such, we are of the opinion that prosecution has been able to prove that the accused persons caused the death of the deceased in a pre-planned manner. So. we reject this contention of the learned Advocate for the appellants.

21. Therefore, from our above discussion, we are of opinion, that the prosecution has been able to prove successfully that all the accused persons took part in the commission of the murder of the deceased Dulal @ Dhula Mete and we think that

the learned Court below did not commit any mistake in believing the statements of the eye witnesses and thereby holding all the accused persons guilty for the commission of the offence under Sections 147, 302/149 of the IPC. We find no reason whatsoever to interfere into the finding of the Court below. As such, the order of conviction, as passed by the learned Trial Court in respect of all the accused persons, in our opinion, should be confirmed.

22. In the result, the appeal is dismissed on contest. The Judgment and order of conviction, as passed by the Court below is affirmed. CRAN 104/2006 and CRAN 1263 of 2005 also stand disposed of.

Send a copy of this Judgment along with the Lower Court Record to the Court below at once for information and necessary action.

Xerox certified copy, if applied, be handed over to the parties on urgent basis.

A.K. Basu, J.

23. I agree.