
(2013) 05 CAL CK 0029
In the Calcutta High Court
Case No : CRA No. 45 of 2007

Pasang Tamang and Others APPELLANT
Vs
The State of West Bengal RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (2013) 2 CALLT 498 : (2013) 4 CHN 81

Hon'ble Judges : Kanchan Chakraborty, J;Indira Banerjee, J

Bench : Division Bench

Advocate : Sekhar Kumar Basu, Mr. Biplab Mitra, Mr. Tina Mitra and Mr. Amarjit De, for the Appellant; Apurba Kumar Dutta and Mr. Madhusudhan Sur, for the Respondent

Judgement

Kanchan Chakraborty, J.—The Challenge in this appeal is to the judgment and order dated 20.12.2006/21.12.2006 passed by the learned Additional Sessions Judge, 3rd Court, Darjeeling in Sessions Case No. 33 of 2005, (Sessions Trial No. 6 of 2005) thereby convicting the appellants Pasang Tamang and other four others for committing offence punishable u/s 302/34 of IPC and sentencing them to suffer R.I. for Life and to pay a fine of Rs. 5000/- each, in default to suffer further imprisonment for one year for the offence u/s 302/34 IPC and to suffer R.I. for 5 years and to pay a fine or Rs. 1000/- each for committing offence u/s 201/34 of the IPC. One Rajkumar Ramtel lodged an F.I.R. with Darjeeling Sadar police station on 22.2.2005 stating therein that on that date, at about 5.45, A.M. when he came to open his shop, he found the severed head of Hari Chettri was hanging from the stairs of the public toilet in front of Bhanu Bhakta School and the torso was lying about 15 yards away therefrom at the corner of the way to Balaji Transport. Hari Chettri was a resident of Torikhet, Nepal and working as porter in Darjeeling for last four months and he had no place to reside. On the basis of said F.I.R., Darjeeling Sadar police station case no. 16 of 2005 dated 22.2.2005 u/s 302 IPC was registered. In course of investigation, the appellants

were apprehended. They allegedly made statements leading to discovery which ultimately led the investigating officer to recover and seize the offending weapons, i.e., daggers (2) and blood stained wearing apparels of Hari Chettri. The investigation ended in a charge-sheet. The appellants were arrayed to face the charges under Sections 302 and 201/34 IPC to which they pleaded not guilty. The learned Trial Court examined as many as 23 witnesses. The F.I.R., rough sketch map with index of the place of occurrence, the post mortem reports, the seizure lists, the inquest report, photograph of the severed head and torso of Hari Chettri, report of forensic department and Serologist were admitted into evidence and marked exhibits on behalf of the prosecution. The wearing apparels of deceased Hari Chettri and two knives were also produced in Court and marked as material exhibits. The learned Trial Court, upon consideration of the oral and documentary evidence adduced on behalf of the prosecution came to a finding that the appellants were the authors of the murder of Hari Chettri and accordingly, recorded the order of their conviction and sentence which is impugned in this appeal.

2. Mr. Sekhar Basu, learned Counsel appearing for the appellants contended that the trial Court was completely wrong in relying solely on the alleged statements leading to discovery which were neither reduced in writing nor admitted into evidence. The reference to that effect in the seizure lists, i.e., exhibit 1 and exhibit 2, by no stretch of imagination, can be categorized as "statements leading to discovery" in view of Section 27 of the Evidence Act. In fact, he contended, the exhibit 1 and exhibit 2 do not contain any such statement. Nowhere it has been spelt out within the length and breath of the exhibit 1 and 2 as to what statements were exactly made by the appellants amounting to statements leading to discovery. He contended further that even the recovery and seizure of material exhibit II and III as well as material exhibit I have not at all been established by sufficient and satisfactory evidence. The offending weapons, i.e. material exhibit II and III were not shown to the Autopsy Surgeon for his opinion as to whether the 16(sixteen) number of Punctured wounds could be caused by such knives. It was contended further by Mr. Basu that there is no circumstance or chain of circumstances which unquestionably leads to the only hypothesis that none but the appellants were the authors of the murder of Hari Chettri. It is not also established that the blood found on the seized knife and the blood of deceased Hari Chettri belonged to same group. There is no evidence whatsoever to indicate that there was any reason for the appellants to commit murder of Hari Chettri. There is also no evidence that at any point of time Hari Chettri and the appellants were found together. Hari Chettri was not present at the time when the two incidents allegedly had taken place previously wherein the appellants were involved. There are serious discrepancies in the evidence regarding time and place of seizure also. So, he contended, the judgment impugned is liable to be set aside.

3. Mr. Madhusudhan Sur, learned Advocate appearing on behalf of the State fairly conceded to what Mr. Basu contended. He expressed his inability to improve the

standard of evidence of the prosecution based on which, the judgment under challenge has been passed.

4. Admittedly, the death of Hari Chettri was ante-mortem and homicidal in nature. There is no denial to the fact that no one witnessed the incident of murder and that the appellants and deceased Hari Chettri were not seen together any point of time. It is clear from the evidence on record that there was no enmity between the appellants and deceased Hari Chettri and that Hari Chettri was not present when the two incidents had taken place previously wherein the appellants were involved. This is a case without any direct evidence and rests on circumstantial evidence only.

5. Mr. Basu referring to a decision of Apex Court in *Mustkeem @ Sirajudeen Vs. State of Rajasthan*, , contended that where the case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. No doubt, it is true that conviction can be based solely on circumstantial evidence but it should be decided on the touch stone of the law relating to circumstantial evidence which is settled. In *Mustkeem @ Siraj Uddin Vs. State of Rajasthan (Supra)* the Apex Court was pleased to refer to its earlier decision in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, which laid down some cardinal principles regarding the appreciation of circumstantial evidence. The principles so laid down by the Apex Court are set out below:

Whenever the case is based on circumstantial evidence following features are required to be complied with. It would be beneficial to repeat the same salient features once again which are as under:

- i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely may be fully established.
- ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused that is to say they should not be explainable on any other hypothesis except that the accused is guilty.
- iii) The circumstances should be of a conclusive nature and tendency.
- iv) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

6. We have meticulously scanned the evidence of the prosecution witnesses recorded by the learned Court during trial as well as the documents specially the Exhibit 1 and Exhibit 2. We have also minutely gone through the judgment impugned. It appears to us that the trial Court put much importance on the seizure lists i.e., exhibit 1 and exhibit 2 and the writings therein. Those were accepted by the trial Court as statements leading to discovery u/s 27 of the

Evidence Act. The exhibit 1 says-" I seized the above noted articles as to the weapon of offence (Alamat) from the place on being led by the accused and produced by him before the witnesses." The place of seizure has been shown as " below Bhanu Bhakta School on the side of stairs." The date and time of seizure have been shown as 27.2.2005 at 18.40 hours. The article seized under the exhibit 1 was a dragger with stain of blood. Om Prakash Taparia (P.W. 21), Sankar Chatri (P.W. 7) and Satyanarayan Agarwal (P.W. 16) signed the seizure list as witnesses to the seizure of the dragger.

7. The exhibit 1 does not disclose that the appellant Paswan Tamang made any statement leading to the discovery of the dragger at any point of time. It simply shows that he led the I.O. to the place wherefrom the dragger was recovered in the presence of the witnesses. Om Prakash Taparia, P.W. 21 has not supported the prosecution case that he witnessed the recovery and seizure of the dragger by police at the instance of appellant Paswan Tamang. He stated that he found police with 5/6 boys going towards Banu Bhakta School and after sometime, they returned with the dragger and some articles. He was told by police that those articles were recovered and for that purpose a paper was prepared. He signed the paper. The P.W. 16, Satyanarayan Agarwal stated that the police came to Marwari Samiti Bhavan and asked him to sign the paper. The P.W. 16 Satyanarayn Agarwal had no idea why police officer asked him to sign the paper. He did not witness any recovery and seizure of the dagger. Sankar Chatri, the P.W. 7 stated that on 27.2.2005 at about 7 P.M. police officer along with a person, tied up with rope, went near Bhanu Bhakta school. He was called by police. Police took out a dragger from a place near Bhanu Bhakta school which was buried inside the earth. He failed to recognize the person who was accompanying the police at that time. He failed to identify the dagger which was not shown to him also. The P.W. 7, in fact and in substance, stated clearly that appellant Paswan Tamang did not show the place where the dagger was hidden. His statement, on the contrary, goes to suggest that none but the police officer took out the dagger kept beneath the earth at his own instance not at the instance of appellant Pasang Tamang. To be stated preciously, we find that seizure witnesses of the exhibit 1 have not supported the prosecution case that appellant Pasang Tamang made any statement leading to the discovery of the dragger and that he led the police to recover the dragger by showing the place where it was kept.

8. The exhibit 2 is in respect of seizure of another dragger from a place near Laldighi on 27.2.2005 at 20.20 hours. The recovery and seizure of the said dragger was allegedly witnessed by Gita Pradhan (P.W. 8), Gori Singh (P.W. 9) and P.W. 19 Chungdo Bhutia. The exhibit 2 says, " I seized the above noted article from the bushes on the eastern side of Brahma Samaj building near Laldighi, P.S. Sadar Darjeeling on being produced by four (4) accused persons mentioned above in presence of witnesses during the search leading to their statement. I seized same as Alamat of the case."

9. The exhibit 2 does not disclose what was the statement leading to the discovery of the dagger allegedly made by four appellants. It does not also indicate which of the appellants made the statement and what was the exact statement. Was it a statement of one appellant or a joint statement? It does not also indicate which of the appellants had show the place where the dragger was hidden in the bush. The aforesaid writings of the seizure list (exhibit 2) can hardly be categorized as statement leading to the discovery within the meaning of Section 27 of the Evidence Act.

10. The fact of production of the alleged weapon of offence by the accused himself has to be proved by the contents of the seizure memo which fact cannot be proved by the inhibition contained in Section 27. If there is no proof of disclosure which was made u/s 27 of the Evidence Act, the consequence is that the recovery made pursuant to such disclosure cannot be used for establishing the guilt of the accused. Where the disclosure of fact in the Panchanama/seizure list has already been written and not written in presence of witnesses, no sanctity could be attached to such disclosure of fact narrated in the seizure list.

11. Mr. Basu referred to a decision in *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, and contended that statement which is admissible u/s 27 is the one which is the information leading to discovery and it can only be admitted when it has been proved. The Hon"ble Court, in this regard, observed:

In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accuse and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent event. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in *Palukuri Kotayya V. Emperor*, AIR 1947 PC 67, is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (see *State of Maharashtra Vs. Damu Shinde and Others*,). No doubt the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led to police and the witnesses to the place where he had concealed the articles is not indicative of the

information given.

12. In view of the principles laid down by the Hon''ble Apex Court, we are of opinion that the contents of the seizure lists which were accepted by the trial Court as statements leading to the discovery, by no stretch of imagination can be categorized as such. The statement allegedly made by the appellants was not reduced in writing in presence of any person by the police. It is not also established by sufficient and satisfactory evidence which of the appellants made what statement. It is not also established that what were the exact words used by the appellants when they allegedly made such statements leading to the discovery. In this context, the decision of Apex Court in Mohd. Abdul Hafeez Vs. State of Andhra Pradesh, an well be referred to. The Hon''ble Court opined that if evidence otherwise confessional in character is admissible u/s 27, it is obligatory upon the investigating officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.

13. We reiterate that there is no evidence from the side of prosecution to the effect that which appellant made what statement and what was the exact words he/they used when making such statement. Simple mentioning in the seizure list that recovery was made on the basis of statement leading to the discovery of the appellant is not enough. It is to be proved beyond all reasonable doubt. Besides that, the recovery and seizure of the articles are also to be established by clinching evidence.

14. We have already found that alleged seizure of dragger on the basis of alleged statement of appellant Pasang Tamang leading to discovery has not been supported by the witnesses to the seizure. The seizure and recovery of the second dagger have also not been supported by P.W. 8, P.W. 9 and P.W. 19. On the contrary, it appears to us also that the said seizure list (Ext 2) was prepared not in presence of the witnesses and they had no idea about the contents of the seizure list.

15. The reasons for not relying on the contents of the exhibit 1 and 2 sacrosanct as discussed above, are sufficient enough to strike at the very root of the prosecution case. We find that the learned Trial Court was entirely wrong in accepting the contents of the seizure lists as statements leading to discovery. The learned Court, as we find, was oblivious of the fact that seizure and recovery of dragger and wearing apparels of the deceased Hari Chettri was not supported by the signatories of the seizure lists. It is also found that the learned Court linked up two previous incidents with the incident of murder in order to create a chain of circumstances. The learned Court was entirely wrong in doing so because the evidence of P.W. 1 to P.W. 6 makes it abundantly clear that Hari Chettri, the deceased was not present in the scene when those two incidents took place on the previous day. Nowhere it has been also stated by the witnesses

that Hari Chettri raised any protest against the hooliganism of the appellants at any point of time. Therefore, those two incidents cannot be linked up with the murder of Hari Chettri. Those two incidents cannot also be accepted as circumstances together with the murder of Hari Chettri in order to complete the chain of circumstances. Therefore, we find ourselves not in agreement with the view of the learned Trial Court both in respect of accepting the contents of seizure lists as statements leading to discovery and the previous incidents dated 21.2.2005 as circumstances having link with the murder of Hari Chettri.

16. In the case in hand, we find that there are some flaws in the prosecution case which also create doubt as to the involvement of the appellants in the murder of Hari Chettri. The weapons allegedly used for killing Hari Chettri were produced in Court and marked material exhibits II and III. Those were not shown to the Autopsy Surgeon, i.e., P.W. 10 Doctor U.T. Phinju. The inquest reports, i.e., the exhibit 6/2 and exhibit 7/2 as well as Post mortem reports, i.e., exhibit 3 and 4 altogether indicates that the severed head and torso of Hari Chettri were containing 16 punctured wounds. It was the duty of the prosecution to invite opinion of the P.W. 10 as to whether any such punctured wounds could be caused and a person could be beheaded by using material exhibit II and III. The Hon"ble Apex Court in *Ishwar Singh Vs. State of U.P.*, observed,- "It was the duty of the prosecution no less of the Court to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion was invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes, cause aberration in the course of justice."

17. The report of serologist in respect of blood found on the alleged offending weapons was marked exhibit 4 but the group of the blood so detected by the serologist and the group of blood of the deceased Hari Chettri was not compared to find out whether those were matching with each other or not. This is another flaw in the prosecution case which the learned Trial Court did not take into consideration.

18. We find that there are discrepancies in the statement of seizure witnesses in respect of place of seizure and time of seizure. We, however, do not put much stress on such discrepancies which do not appear to be significant.

19. In view of overall discussion above, we are of view that the prosecution has miserably failed to establish the chain of circumstances leading to the only hypothesis that the appellants were the authors of the murder of Hari Chettri. The learned Court being suspicious about the activities of the appellants on the previous date i.e. 21.2.2005, linked up the murder of Hari Chettri with those two incidents. Suspicion, however, grave it might be, cannot take place of proof. We do not find any reason to link up those two incidents with the incident of murder of Hari Chettri When the basis of the prosecution case is not established by satisfactory and sufficient evidence and no circumstances against the appellants has been established towards their guilt, we are unable to accept the findings of

the learned Court. In our considered opinion, the prosecution failed to bring home the charges levelled against the appellants and, as a result, the judgment impugned is liable to be set aside. Accordingly, the appeal is allowed, the judgment and order of conviction and sentence passed by the learned Court are set aside. The appellants are found not guilty to the charges and are acquitted therefrom. They be set at liberty at once and be discharged from bail-bonds, if any. No order as to cost.

Indira Banerjee, J.

I agree

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An advance copy of the operative part of the order be communicated to the concerned Correctional Home by the department concerned at once.

Criminal Section is directed to supply urgent Photostat certified copies of this order to the parties, if applied for, upon compliance of necessary formalities.