

(1999) 05 CAL CK 0038
In the Calcutta High Court

Case No : Criminal Appellate Jurisdiction Cri Appeal No. 135 of 1996

Ram Kumar Pal and Another

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 13-05-1999

Acts Referred:

Evidence Act, 1872 — Section 137, 138, 3, 45

Penal Code, 1860 (IPC) — Section 302, 304, 304(II), 323, 34

Citation : (1999) 3 CALLT 9 : (1999) CriLJ 3868

Hon'ble Judges : G.R. Bhattacharjee, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Mr. Sekhar Basu, Mr. Jaymala Bagchi and Mr. Firoze Idulji, for the Appellant; Mr. Sudipta Moitra, Assistant Public Prosecutor and Mr. Swapan Mallick, for the Respondent

Final Decision : Dismissed

Judgement

G.R. Bhattacharjee, J.—This criminal appeal is directed against the Judgment and order of conviction and sentence passed by the learned Additional Sessions Judge. Murshidabad in sessions trial No. 1 of March 1995 (Sessions Case No. 220 of 1992). By his impugned judgment and order the learned Additional Sessions Judge has convicted the three appellants/accused persons; namely. Ram Kumar Pal. Golok Behari Pal and Chand Gopal Pal u/s 302 read with 34 1PC and sentenced them to imprisonment for life. He has also convicted the appellants Ram Kumar Pal and Golok Behari Pal u/s 323 read with section 34 1PC and has further sentenced them to simple imprisonment for one month with a direction that both the sentences shall run concurrently. Being aggrieved by the orders of conviction and sentence the appellants have preferred the present appeal.

2. It may be noted here that the appellant Ram Kumar Pal is the father of the other two appellants Golok Behari Pal and Chand Gopal Pal. They are neighbours of P.W.1 Sanatan Pal who lodged the FIR in the case and who is the cousin brother of the appellant Ram Kumar Pal. The deceased Subhas Pal who is one of

the victims of the incident was the son of P.W.1 Sanatan Pal. It is the evidence of P.W.1 Sanatan Pal that on 5th Baishak 1397 B.S. corresponding to 19th April, 1990 at about 5.30 a.m. in the morning the southern side common passage leading to Khirki Pukur Ghat was closed by Babla Kantas Fence by the accused persons (appellants) and at that time when he tried to remove the same from the pathway the accused Golok Bahari Pal assaulted him with a lathi and he sustained injury on the left hand and that Ram Kumar Pal assaulted him with those Babla Kantas. It is his evidence that his son Subhas together with his younger son Samaresh came to rescue him and at that time the accused Chand Gopal Pal assaulted Subhas on his head with an iron rod and Subhas fell down on the ground and the other two accused Ram Kumar and Golok assaulted Subhas and Samaresh mercilessly with lathis. Subhas, he says, stated that he was having severe pain on his head and Subhas became unconscious. He says that he took Subhas in a bullock cart and then by train to Beharampur New General Hospital and he sent his youngest son Samaresh to the police station with a written information (complaint). He further says that at the time of occurrence Amiya Ghosh, Amrita Ghosh and Ekkari came to the place of occurrence and he narrated the incident to them. Subhas, he says, expired in the hospital on that very day. He says that he was treated in the New General Hospital at Beharampur and Samaresh after going to the police station was treated at Salar P.H.C. PW1. Sanatan is a High School teacher. In his cross-examination he says that he brought his son to hospital by a train which they boarded at Tenya station at 6.34 a.m. We get it from him that Tenya Station is about one mile from their place. He returned home (from Beharampur) at about 3 a.m. on 20.4.90. He says that the pathway to the south of his house is common to the co-sharers.

3. PW2, Amiya Ghosh is also a resident of the same village. He says that his house is in front of the house of PW1 {Sanatan} intervened by a road and a ditch and that the house of the accused persons is adjacent to the house of PW 1. According to his evidence on the date of the occurrence while he was going by the road towards the western side of the house of PW1, he noticed that Sanatan and the accused Ram Kumar Pal were having exchange of words and on hearing the same he went near them. He says that he saw Sanatan Pal removing Babla Kanta fence and was being assaulted by Ram Kr. Pal with a lathi and Golok Pal was also assaulting him with a lathi and he tried to pacify them so that there might not be further assault. According to his evidence Sanatan's son Subhas Pal came to the rescue of his father and at that time the accused Chand Gopal Pal hit Subhas with an iron rod on his head. He further says that the accused Golok and Ram Pal also assaulted Subhas with lathi and Subhas fell down on the ground and the accused persons escaped from there. According to his evidence he requested the accused persons with folded hands not to assault him (that is Subhas etc.). He says that Subhas sustained injury on his head and slight blood also oozed out from his nose. He further says that Sanatan and his wife took Subhas to hospital and his wife also accompanied them. Subhas, he says, eventually died at the hospital and his wife came home after cremation of

Subhas along with Satatan and his wife. The name of his wife. It is in evidence, is Anima. He says that his wife is unable to come to Court because of ailment. This explains the non-examination of Anima as a witness in the case. In his cross-examination PW2 Amiya says that when he reached the spot there was none else except the accused persons and the family members of Sanatan and he says that he was there for about half an hour and during his presence Ekkari Pal, Amrita Ghosh and others also came there. In answer to the question put to him in cross-examination he says that he has cordial relationship with PW1.

4. PW 4. Ashoka Pal is the wife of PW 1 Sanatan and the mother of the deceased victim Subhas Pal. She says that the incident occurred at about 5.30 a.m. while she was sweeping the road-side of her house. According to her evidence Ram Pal, Chand Pal and Golak Pal were obstructing the pathway by putting fence with Babla Kanta and at that time her husband went there to prevent them from fixing the fence when the accused Golak assaulted the left hand of her husband with lathi and thereafter her Bhasur, the accused Ram Pal assaulted her husband on his back with Babla Kanta and on seeing this her eldest son Subhas Pal and the youngest son Samaresh went there to save her husband and the accused Chand Pal hit her son Subhas on his head with an iron rod as a result of which Subhas fell down on the ground and thereafter the accused Ram Pal and Golok Pal assaulted Subhas with bamboo stick and also assaulted her younger son Samaresh on his left hand and head. She says that on seeing this she went to save her son Subhas when the accused Ram Pal pushed her. Subhas, she says, sustained injury on his head, nose and back and at that time she, her husband, her eldest son Subhas. youngest son Samaresh and Amiya were present there. She further says that she and Amiya requested the accused not to assault her son Subhas and Subhas stated her feebly that he could not bear the pain on his head and soon thereafter Subhas became unconscious and thereafter the accused persons left the place. According to her evidence she along with Amiya Ghosh took Subhas to Tenya station by a bullock cart which was driven by her husband, and her youngest son Samaresh followed them on bicycle. In-her-examination-in-chief she says that her daughter Susmita who was a witness in this case has since expired. She further says that Ekkari Pal who is the elder brother of her husband has close connection with the accused persons and so he will not depose in this case. She also says that Amrita Ghosh will not depose in this case as she also has close connection with the accused persons. In her cross-examination she says that at present litigation is going on between them and Ekkari and there is a land dispute between them.

5. P.W.5, Samaresh Chandra Pal is the son of P.W.1 Sanatan Pal and the elder brother of the deceased Subhas Pal. About the incident his evidence is that the accused Ram Pal. Golak Pal and Chand Pal were fencing the pathway by fixing Babla Kanta and splint bamboos and on seeing this his father went there to remove the fence and then the accused Golak Pal assaulted on the left hand of his father with a bamboo stick and the accused Ram Pal assaulted on the back of his father with Babla Kanta and on seeing this he and Subhas rushed to the spot

to the rescue of his father and the accused Chand Pal assaulted his brother Subhas on his head with an iron rod and the accused Golak assaulted his brother Subhas on his neck and forehead with a bamboo stick and the accused Ram Pal assaulted his brother on his back with a bamboo stick, and as a result his brother fell on the ground. According to his evidence he was also assaulted by the accused Golok on his head and back with bamboo stick and Ram Pal assaulted on his left hand with a bamboo stick. He says that his mother also came there and she raised protest but the accused Ram Pal pushed her down and at the spot his father, mother, Amiya Ghosh and he himself requested the accused persons not to assault his brother Subhas and that when his brother Subhas fell on the ground with injuries the accused persons fled away. He testifies that Subhas told them that he was suffering from severe pain on his head, and sometime thereafter he became unconscious. He says that his father thereafter went in his room and wrote the written complaint and asked him to submit the same at the police station. He also says that on seeing the serious condition of his brother Subhas his father brought a bullock cart and on the said cart his mother and Amiya" Ghosh carried the injured Subhas to Tenya station and at that time his father was driving the cart and he followed the said cart on bi-cycle. Anima Ghosh, he says is the wife of Amiya Ghosh. According to his evidence his father, mother and Anima Ghosh and Subhas boarded the train and after that he went to Salar P.S. where he handed over the written complaint written by his father to the Barababu of the P.S. and after receiving the complaint the Barababu wrote a letter and sent him to the hospital and he went to the Salar PHC where he was examined by a doctor and after attending the PHC he again went to Salar P.S. and thereafter at about 11.55 a.m., Barababu took him to Salar station and they boarded a train and got down at Tenya station and therefrom he returned home with the Barababu. The witnesses so far discussed above are those who claim to be the eyewitnesses to the occurrence.

6. We now look to the medical evidence on record. PW 3, Dr. A.K. Moitra was posted as medical officer at Beharampur District Hospital on 19.4.90. On that day he examined PW 1, Sanatan Pal who was treated as OPD patient as he complained of pain on his body. PW 6, Dr. Manick Chandra Pal examined PW 5 Samaresh Pal on 19.4.90 at Salar P.H.C. where he was attached as M.O. on that day. He says that the patient came to him in injured condition. The doctor was on emergency duty at Salar P.H.C. on that day when he attended the injured patient. P.W.7, Dr. Mossaraf Hossain was also attached to Salar Primary Hospital as M.O on 19.4.90. He also examined Samaresh Chandra Pal on that day. He says that he found an abrasion over the left elbow and a hematoma over the left parital scalp. The patient, he says, was discharged after he was given primary treatment. The injury, he says might be caused by blunt weapon and the nature of the injury was simple. PW 9. Dr. S.K. Chakraborty is the autopsy surgeon who held post mortem examination on the dead body of Subhas Chandra Pal. He describes the injuries he found on the dead body. The external injuries were bruise marks on the forehead, bridge of the nose and chin. He also found

swelling over forehead and bruise with laceration over lateral part of the left side of the chest. On dissection, he found fracture of the fifth and sixth ribs on the left side of the chest, blood in the chest cavity. perforated wound over lateral wall of the heart, laceration and perforation of the left lung and crack fracture of frontal bone as well as blood over underlying brain matter. Death, in his opinion, was due to shock and haemorrhage as a result of the above mentioned injuries to the vital organs which were anti-mortem and homicidal in nature and which might be caused by use of violence with blunt weapon. He says that the injuries may be caused by using bamboo stick, iron rod or any blunt weapon. His evidence also shows that the wound, found in the lung and heart may be caused if the fractured ribs of the chest perforate the lungs and the heart. He says that after sustaining such injuries a person can speak for about 5 minutes and thereafter the person will die. It has been submitted on behalf of the appellants that the doctor does not say that the injuries found on him are sufficient in the ordinary course of nature to cause death. It is on the otherhand submitted on behalf of the State that the doctor has said that after sustaining such injuries a person can speak for about 5 minutes and thereafter the person will die which itself gives sufficient indication about the grave nature of the injuries and the serious consequences thereof. The learned advocate for the appellants submits that according to the prosecution case the injured Subhas died at the hospital at Beharampur and he did not die 5 minutes after sustaining such injuries. In this connection however it has to be noted that the doctor did not say that the injured will die immediately after 5 minutes. What the doctor says is that the injured can speak for about 5 minutes after sustaining such injuries and thereafter he will die. The doctor's statement read as a whole only indicates that the time span of 5 minutes spoken of by the doctor was not about the longevity of the injured but was about his capacity to speak after sustaining such injury. That the injured will die thereafter is not obviously connected with the time limit of 5 minutes. What is the import of the evidence of the doctor on this point is that a person sustaining such injuries is sure to die later even though he may be able to speak for about 5 minutes after sustaining such injuries. In his cross-examination the doctor says that it seems that the perforated wound was caused by a fractured portion of ribs. He further says that if any person is assaulted with blunt weapon there cannot be any perforated injury but if ribs are broken by the impact of the assault the same may cause perforated wound.

7. The last category of witnesses is the category of police witnesses. PW 8, Kumaresh Chakraborty is an S.I. of police who at the relevant time was posted at Beharampur P.S. as ASI. He held inquest of the dead body of Subhas. He says that he tried to interrogate Sanatan (at the time of the inquest) but as he was upset he could not give any answer at that time. There is nothing unusual in it. P.W.10. Arun Kumar Mondal is an S.I. of police who at the relevant time was posted at O.C at Salar P.S. He started the case on the basis of the written complaint of Sanatan Pal which was given to him at the P.S. by Samaresh Pal, the son of Subhas Pal. He says that the complaint was received by him on

19.4.90 at about 11.25 hours. He describes the steps taken by him in course of the investigation of the case. According to his evidence when he visited the P.O. on the very date of occurrence he searched for the accused persons but they could not be traced. It appears that on the very next day also he visited the P.O. He says that since he could not trace the accused persons during investigations he prayed before the court for issuance of warrant of arrest and ultimately the accused persons were arrested. It seems that he could not complete the investigation and the case was subsequently investigated by another officer after his transfer. It has been suggested to him in his cross-examination that he did not receive the FIR on 19.4.99 at 11.25 a.m. and that he received the FIR on 20.4.99 which suggestions however he has denied. P.W.11. Ganesh Chandra Roy is an S.I. of police who took charge of the investigation of the case from P.W. 10, Arun Kr. Mondol and held further investigation in the case and ultimately submitted charge-sheet against the accused persons. In his cross-examination he says that he cited Anima Ghosh, Ekkari Pal and Amrita Charan Ghosh as witnesses for the prosecution. The learned advocate for the appellants was critical of the fact that the prosecution did not examine these three witnesses Anima Ghosh, Ekkari Pal and Amrita Ghosh who were cited as witnesses in the charge-sheet. We have however seen that the reason of their non-examination has been explained by P.W.2 Amiya Ghosh, the husband of Anima Ghosh and P.W.4, Ashoka Pal. It has been criticised by the learned advocate for the appellants that the witness Ashoka Pal came to offer explanation for the non-examination of Ekkari and Amrita Ghosh as if she was conducting the prosecution. It is needless to mention that the learned advocate while conducting the prosecution obtained the necessary factual statements from Ashoka Pal explaining the reason for non-examination of certain witnesses who were not inclined to depose in favour of the prosecution case for their personal reasons of being biased against the de facto complainant. We do not understand what is wrong if the explanation is obtained by the prosecution through a witness who is competent to throw light on the matter on oath. On the other hand a mere verbal submission on behalf of the prosecution by the learned Advocate conducting the case about the factual reason for the non-examination of any witness might not have earned that credibility which a statement on oath by a witness is expected to inspire. Indeed facts are to be elicited from witnesses, and that is what precisely has been done by the prosecution through PWs 2 and 4.

8. The witnesses to the occurrence who have been examined on behalf of the prosecution are indeed all natural witnesses. The members of the family of the victim some of whom themselves sustained injuries as a sequel to the occurrence are indeed most natural witnesses. PW2. Amiya Ghosh as a neighbour of the parties is also a natural and probable witness. It has been severely criticised by the learned Advocate for the appellants that while PW2, Amiya claims to be an eye witness to the occurrence itself, in the FIR it has been stated by Sanatan that immediately after the incident Amiya Ghosh and others came to the spot. It is submitted that if Amiya Ghosh would have been there at the time or during the

occurrence, that fact would have been stated expressly in the FIR instead of stating therein that he and others came to the spot immediately after the incident. He further submits that the prosecution tried to improve upon the case from witness to witness which suggests the falsity of the allegation made against the accused persons as well as about the manner of the occurrence sought to be projected at the time of leading evidence. In our opinion, the matter is not of much significance, having regard to the facts and circumstances, as can discredit the prosecution case so far as the core aspect is concerned. As we have seen the complainant PW1, Sanatan Pal wrote the written complaint himself immediately after his son Subhas sustained injury and became unconscious. At that time it was necessary to take care of the unconscious son Subhas and to take him to hospital which is situated quite at a distance from the place of occurrence and necessary arrangements were also required to be made for that purpose. The mental condition of the complainant was understandably overwhelmed by pain, grief, worries and anxieties. At that stage, having regard to the normal reaction of the human mind, it cannot be expected that the complainant while describing the incidents in the complaint will be meticulously accurate in respect of every detail associated with attending the occurrence. In that view of the matter we are not prepared to accept that there is any substantial variance between the prosecution version as reflected in the written complaint and that in the evidence adduced at the time of hearing, and even for the sake of argument if we exclude the evidence of PW2, Amiya about the actual occurrence on the ground that the written complaint it is stated that he along with others came to the spot immediately after the incident yet we do not find sufficient reason to exclude the evidence of the other witnesses, namely, the evidence of PW1, PW4 and PW5. regarding the manner in which the occurrence took place. PW4, Smt. Ashoka Pal, the wife of PW1 Sanatan has also not been named in the written complaint. It has also been criticised by the learned advocate for the appellant that there is nothing in the written complaint that Smt. Ashoka Pal and Amiya Ghosh requested the accused persons not to assault the victims as introduced in evidence. In our opinion these are matters of details which one should not expect to find place in the written complaint that has been written immediately after the occurrence while the victim was lying unconscious awaiting removal to the hospital at a far off place. .We for a moment cannot doubt against the fact that Ashoka Pal being the mother of the victim Subhas was present in her house at the time of occurrence and witnessed the same. It is also quite natural, whether stated in the FIR or not, that on seeing the incident that her husband and sons were being assaulted she would rush to their rescue and request the assailants not to assault them. We therefore find no reason to disbelieve the prosecution evidence as to the manner of the occurrence and the participation of the accused persons therein.

9. It has also been forcefully contended by the learned Advocate for the appellants that the medical evidence namely the evidence of the autopsy surgeon does not support the ocular evidence adduced by the prosecution about

the manner of assault on Subhas, in this connection he refers to the decisions in *Ramnarayan v. State of Punjab* AIR 1975 SC 1727. *Amar Singh and Others Vs. State of Punjab*, *State of Jammu and Kashmir Vs. Hazara Singh and Another*, in support of his submission that the ocular evidence should not be relied upon if the medical evidence does not support the same. It is submitted on behalf of the appellants that the medical evidence shows that Subash sustained fracture of two ribs on the left side of the chest but none of the eye witnesses says that Subhas was assaulted with lathi or rod by any of the accused persons on his chest so that fracture of ribs as found by the doctor could have happened. It is true that the witnesses did not say particularly that Subhas was assaulted on his chest by lathi but it has also to be noticed that the prosecution evidence does not exclude assault by lathi on the chest of Subhas. It is only natural that when some persons are inflicting assaults it may not be possible for a witness seeing the occurrence to keep an account on every stroke delivered by every assailant on the victim and also every part of the body on which each such stroke of assault was applied. To expect such an account from a particularly in a case of multiple and repeated strokes of assault in succession during an occurrence, would amount to an expectation of absurdity. PW1. Santosh Pal says that Ram Pal and Golak assaulted Subhas and Samaresh with lathi mercilessly. This clearly indicated that such assault might have been inflicted on the chest as well as on the other parts of the body. PW2, Amiya Ghosh also says that Chand Pal hit Subhas with an iron rod on his head and Golok, Ram Pal assaulted Subhas with lathi. The statement that the accused persons assaulted Subhas with lathi clearly include the possibility of assault with lathi on the chest also. Similarly, PW4, Ashoka Pal says that after Subhas fell down on the ground accused Ram Pal and Golok Pal assault Subhas with bamboo stick. This clearly includes the possibility of assault on the chest also, particularly when the medical evidence says that the ribs of the chest of Subhas were broken. Therefore it is wrong to say that the ocular evidence adduced by the prosecution does not support the medical evidence regarding fractured ribs. Having regard to the facts, circumstances and evidence on record we therefore find no reason to disbelieve the prosecution version of the occurrence as supported, sustained and established by the evidence adduced by the prosecution.

10. The learned Advocate for the appellants has also contended that the evidence of PW5 Samaresh is that he first went to the Salar P.S with the written complaint of his father and handed over the same to the Barababu of the P.S. and then he was sent to Salar P.H.C. where he was examined by the doctor, but the FIR and the injury report exbt. 1 and exbt. 4 respectively show that Samaresh was examined by the doctor at Salar P.H.C. at 9.20 a.m. and the FIR was received at the P.S. at 11.25 a.m. on that day. It is submitted by the learned advocate for the appellants that the time of examination of Samaresh at the Salar P.H.C. and the time of reception of the written complaint at the P.S. are not consistent with the oral evidence that Samaresh first went to the P.S. and then to the P.H.C. in our opinion the matter however stands explained by the evidence of

P.W.5. Samaresh. His evidence on the point is that he first went to Salar P.S. where he handed over the written complaint to the Barababu and then the Barababu wrote a letter and sent him to the hospital and he went to Salar P.H.C. where he was examined by the doctor and then again he went back to the Salar P.S and from there at about 11.55 a.m. he and Barababu left the P.S for going to the place of occurrence. There is therefore no difficulty in understanding that after Samaresh went to the P.S. and handed over the written complaint to the Barababu he was first sent to the Salar P.H.C. where he was examined by the doctor and thereafter when he came back to the P.S from the P.H.C the FIR was recorded at 11.25 a.m. on the basis of the complaint which was handed over to the Barababu at the P.S by Samaresh before he was sent to the Salar P.H.C. There is nothing in these sequences which can discredit the prosecution case. Having regard to the facts, circumstances and evidence on record we are therefore clearly of the opinion that the prosecution have been able to prove that on the date of occurrence the deceased Subhas was assaulted with an iron rod by the accused Chand Gopal Pal on his head and the other two accused Ram Kumar Pal and Golok Behari Pal also assaulted Subhas mercilessly with lathi on different parts of his body and Subhas sustained injuries as found by the post-mortem doctor as a result of such an assault and succumbed to the same. It has also been proved that accused Ram Kumar Pal and Golak Behari Pal assaulted Sanatan and Samaresh with lathi. We have seen, the accused Chand Gopal Pal hit Subhas with an iron rod on his head. The post-mortem doctor has also described the injuries found including the external and internal head injuries. The evidence on record shows that the accused Chand Gopal delivered only one blow with an iron rod on the head. The other accused persons however assaulted Subhas rather mercilessly and incessantly with lathi over different parts of the body and the chest injury including the fracture of ribs clearly indicates that the lathi blows were also delivered on the chest of Subhas. The evidence also shows that the occurrence took place as a sequel to a quarrel over placing of a fencing on the pathway followed by an attempt to remove the same. Having regard to the totality of the facts, circumstances and evidence on record it appears to us that in this case the accused persons should be convicted under Part-II of section 304 read with section 34 IPC instead of section 302/34 IPC inasmuch as it is doubtful whether any higher degree of mental culpability can be attributed to the conjoint performance of the accused persons than that the act was done in furtherance of their common intention to give a good beating to the victim with the knowledge; as is indicated by the manner of beating, that such beating was likely to cause death, but without any intention to cause death or such bodily injury as was likely to cause death. We therefore change the conviction of the accused persons from section 302/34 IPC to section 304 Part-II/34 IPC in respect of all the appellants/ accused persons so far as the death of Subhas is concerned and sentence them to rigorous imprisonment for seven years each for their conviction u/s 304 Part-II read with 34 IPC. The conviction and sentence of simple imprisonment of one month u/s 323/34 IPC against the appellants Ram Kumar Pal and Golok Behari Pal are however maintained. Both the sentences

shall run concurrently. The appeal is dismissed subject to the modification regarding conviction and sentence as noted above. The learned court below is directed to immediately take the appellants who are on bail in custody and commit them to prison for serving out the sentence.

A. Talukdar, J.

11. I agree

12. Appeal dismissed with modification