

(2007) 04 CAL CK 0050
In the Calcutta High Court

Case No : C.R.A. No. 354 of 1989 and C.R.R. No. 2281 of 1989

Sasthidhar Chowdhury and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 11-04-2007

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 149, 302, 304, 307

Citation : (2007) 3 CALLT 260 : (2008) 2 CHN 500

Hon'ble Judges : Kalidas Mukherjee, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Sekhar Basu and Soubhik Mitter, in CRA No. 354/1989 and Dhruba Mukherjee, in CRR No. 2281/1989, for the Appellant;J.N. Ram and J.K. Addhya, for the Respondent

Judgement

Kalidas Mukherjee, J.—This appeal and the criminal revisional application are directed against the Judgment of conviction and sentence passed by learned Additional Sessions Judge, 2nd Court, Suri, Birbhum convicting and sentencing the accused persons viz. Sasthidhar Chowdhury, Pradip Chowdhury, Sanat Chowdhury, Sishir Chowdhury, Nilmoni Mondal, Rammoni Mondal and Shyammoni Mondal to suffer RI for one year u/s 147 and to suffer RI for nine years and to pay a fine of Rs. 1000/- each in default to suffer RI for a further period of six months u/s 304 part I read with Section 149 IPC with the direction that both the sentences shall run concurrently.

2. Ten persons faced the trial and eight persons were convicted with the sentences as aforesaid and remaining two viz. Balak Mondal and Shaktipada Chowdhury were acquitted of the charges by the learned Trial Court. The defacto complainant Nirodbaran Chowdhury filed the revisional application against the order of acquittal passed by the learned Trial Court in respect of Balak Mondal and Shaktipada Chowdhury.

3. The informant Nirodbaran Chowdhury lodged complaint with the O.C. Mohammed Bazar P.S. alleging that on. 13.11.1983 at about 3.30 P.M. his father

Umapati Chowdhury and his uncle Nirmal Chowdhury were spinning rope under the "chala" of the cow shed. At that time the twelve accused persons having formed an unlawful assembly and being armed with deadly weapons came to the informant's plot No. 1140 for stacking straw. The father and the uncle of the informant forbade them and at that time the accused persons viz. Sishir having "tangi" in, his hand, Dulal with "kencha", Sanat and Sasthi with bamboo lathi assaulted the father and the uncle of the informant Dual Chowdhury being armed with spear (ballam) and Sishir by means of "tangi" inflicted assault. Sanat and Sasthi assaulted Umapati and Nirmal by means of lathi The injured were taken to the hospital. After receipt of the complaint the P.S. case No. 5 dated 13.11.1983 was started under Sections 147/447/323/326/307 IPC. Later on Umapari and Nirmal succumbed to the injuries and Section 302 IPC was added.

4. After the completion of investigation, charge sheet submitted. The learned Trial Judge framed charges against the eleven accused persons under Sections 147 and 302/149 and 337/149 IPC. The accused persons pleaded not guilty to the charges and claimed for trial.

5. The trial was faced by ten accused persons and during the pendency of this appeal one accused Sasthidhar Chowdhury died. In this case the prosecution examined as many as 12 PWs. including the informant (P.W.1) Smt. Minati Chowdhury (wife of deceased Nirmal Chowdhury) (P.W.2) Naba Kumar Chowdhury and Dhiren Chandra Kpnui as co-villagers (P.W. 3, 7) Ananda Gopal Chowdhury, the son of deceased Umapati Chowdhury, (P.W. 4), Barun Chowdhury another son of deceased Nirmal Chowdhury (P.W. 5), Medical Officer, Autopsy Surgeon and the I.O.

6. The defence examined Dr. Md. Anwar Alt as D.W.1 to prove the injuries on the person of accused Sishir.

7. The learned Trial Judge on perusal of the evidence on record and having regard to the facts and circumstances of the case was pleased to pass the aforesaid order of conviction and sentence. The learned Trial Judge observed that accused Sishir, Dulal Sanat Sashti "Pradip, Shyammoni and Rammoni formed unlawful assembly with the common object of causing death or causing such bodily injury as was likely to cause death of Nirmal Chowdhury and Umapati Chowdhury. The learned Trial Judge further observed that in view of the facts and circumstance the case the attack by the accused persons was not a premeditated one and the attack was in the heat of passion on altercation between the parties over the possession of a piece of land and in that view of the matter the learned Trial Judge was of the opinion that the said eight accused persons were not guilty of the offence u/s 302 IPC, but were guilty of the offence u/s 304 part 1 read with Section 149 IPC. The learned Trial Judge held that accused Balak Mondal and Shaktipada Chowdhury were not guilty of the offence charged against them and acquitted them of the charges.

8. Mr. Sekhar Basu appearing on" behalf of the appellants submits that there is

contradiction between the FIR and the evidence regarding the weapons used and that there" is allegation of participation by four persons in the alleged infliction of assault and the alleged pelting of stones by other accused persons would not come within the purview of Section 302/149 IPC.

9. Mr. Basu further contends that there is no allegation of pelting of stones in the FIR and the alleged pelting of stones negate the sharing of common object with others. It is further contended that presence simpliciter does not, ipso facto, constitute sharing of the common object.

10. Mr. Basu contends that two persons allegedly used lathi which in ordinary course of nature cannot cause" death and in the medical evidence there is no mention of punctured wound which does not support the ocular version that accused Dulal inflicted assault by means of spear.

11. It is contended that the eye witnesses are very near relatives of the complainant and none speaks of the presence of the other accused persons at the P.O.

12. Mr. Basu contends that four persons were allegedly fleeing away from the P.O. and from the surrounding circumstances and the F.I.R. there is no mention of participation by others; that there is non seizure of sword and stone. It is contended that other persons as alleged are not related to P.W.1 and from the standpoint of probability it indicates that others might not have taken part in tile alleged Incident. Mr. Basu contends that the learned Trial Judge was not Justified in passing the order of conviction and sentence on the basis of evidence on record Mr. Basu has referred to and cited the decision reported in 2007(1) SCC (Cri) 142 (Sabbi Mallesu and Ors. v. State of A.P.).

13. Mr. J.N. Ram appearing on behalf of the State has submitted that there is no evidence of provocation arid "the exhibit 7 i.e. the statement of the victim recorded by the 1.0 maybe treated as dying declaration; that P.W. 1 and P.W.2 were present when the incident took place inside the house. Mr. Ram contends that sharing of common object may be gathered from the surrounding circumstances and there is cogent and convincing evidence of infliction of assault by means of tangi spear and "lathi" and from the medical evidence it is clear that the cause of death was the cumulative effect of the injuries. Mr. Ram contends that the learned Trial Judge was justified in passing the impugned Judgment of conviction and sentence.

14. Mr. Dhruva Mukherjee, the learned Counsel appearing on behalf of the petitioner (defacto complainant) of the revisional application contends that the learned Trial Judge was not justified in recording the order of acquittal as against accused Balak Mondal and Shaktipada Chowdhury. Mr. Mukherjee contends that eye witnesses P.W. 1, P.W.2, P.W.3 and P.W.7 stated about the infliction of assault by means of the weapons as alleged in the F.I.R. and they saw the incident from some distance. It is contended by Mr. Mukherjee that there is evidence of pelting stones by others and with the aid of Section 149 IPC the learned Trial Judge

ought to have recorded the order of conviction against the two accused persons Shaktipada Chowdhury and Balak Mondal, It is contended further that the pelting of stones by others includes Balak and Shaktipada. Mr. Mukherjee has cited and referred to the decision reported in (2000)4 SCC 22 Jaswant singh v. State of Haryana).

15. As regards the contradiction between the F.I.R. and the evidence of P.W.s regarding the weapons used, we find that in the F.I.R. it has been clearly mentioned that Sishir had tangi, Dulal had spear (Varsha), Sanat and Sasthi had lathi in their handi. So far as the ocular version is concerned, we get from the evidence of P.W.1, P.W. 2, that Sishir was armed with tangi Dulal was armed with Ballam, Sanat and Sasthi had lathi and that Sishir struck Nirmal and Umapati On their heads by means of tangi, Dulal struck Nirmal and Umapati by means of Ballam and Sanat and Sasthi assaulted by means of lathi.

16. P.W.3 who came to the P.O. saw accused "Sishir being armed with tangi, Dulal with Ballam, Sasthi and Sanat with lathi fleeing away.

17. It is also in the evidence of P.W.3 that Umapati was in his senses and he disclosed to Him that Sishir Dulal, Sasthi, Sanat assaulted him with lathi, tangi, ballam etc. It is also in the evidence of P.W.4 the son of victim Umapati that on, being asked his father told him that accused Sishir struck him and Nirmal with tangi on their heads and Dulal struck them with ballam, Sasthi and Sanat struck them with lathi.

18. Mr. Ram in this connection has referred to exhibit 7 i.e. the statement of the victim Umapati Chowdhury recorded by the I.O. and submitted that such statement Can be treated as dying declaration. But we are unable to attach much importance to the statement because of the fact that the I.O. did not ask for the services of any doctor or any Magistrate for recording such statement and that there is no endorsement by the Medical Officer that at that point of time the victim was fit to make such a statement, So far as the ocular version is concerned we find that in view of the consistent evidence of the P.Ws. as discussed above there is no contradiction between the prosecution version as setforth in the F.I.R. and evidence of the P.Ws.

19. So far as the medical evidence is concerned, the Autopsy Surgeon (P.W.9) has noted the following injuries on the dead body of Nirmal Chowdhury:

- i) One incised wound 3" x 1/2" on left lateral aspect of scalp.
- ii) Fracture of left lateral aspect of the frontal bone
- iii) Fracture of 4th to 7th ribs of the right side.
- iv) Fracture of 4th to 6th rib"s of the left side.
- v) Right lung ruptured.
- vi) Liver ruptured.

Death in my opinion was due to the effects of head injury and associated injuries ante mortem and homicidal in nature. Other organs were healthy and normal. The injuries were sufficient to cause death in normal course of nature. Injuries No. 1 as stated might have been caused by sharp cutting weapon such as tangi.

P.W.9 also noted the following injuries on the dead body of Umapati Chowdhury.

- i) One incised wound 5"X 2" on right lateral aspect of scalp.
- ii) Fracture of right lateral aspect of the frontal bone.
- iii) Fracture right wrist joint.

Death in my opinion was due to the effects of head injury ante mortem and homicidal in nature. Other organs were healthy and normal.

Injury Nos. 1 and 2 were sufficient to cause death in ordinary course of nature injury No. 1 might have been caused by sharp cutting weapon such as tangi. Injury No. 2 may be the effect of injury No. 1. Besides that injury No. 2 and 3 may be caused by hard and blunt substance such as lathi, rod etc.

20. Mr. Basu in this regard contends that there is no mention of any punctured wound in the P.M. report and this goes to show that accused Dulal was not at all present at the time and place of the alleged occurrence. Mr. Basu also points at the enmity and litigations between the parties. But so far as the enmity is concerned we are of the considered view that it cuts both ways. The only point which needs our consideration is whether accused Dulal can be convicted in view of the absence of any punctured wound when it is the specific prosecution case that Dulal inflicted assault by means of ballam.

21. We find that there is cogent and consistent evidence as to the infliction of assault by four accused persons - Sishir by tangi, Dulal by ballam, Sanat and Sasthi by lathi which resulted in the death of Umapati Chowdhury and Nirmal Chowdhury. Nothing has been elicited in the cross-examination of the P.Ws. so as to shake the veracity of the prosecution case in this regard. From the evidence on record it further appears that Dulal took active part with others in the attack on the victims. In view of this convincing evidence we are of the considered view that although the Autopsy Surgeon did not find any punctured wound, Dulal being one of the active participants having ballam is also responsible for causing the death of Nirmal Chowdhury and Umapati Chowdhury with the aid of Section 149 IPC

22. We have already mentioned that during the pendency of the appeal Sasthidhar Chowdhury died. After giving anxious consideration to the submission of Mr. Basu and Mr. Ram and considering the evidence on record we are of the considered view that the appellants Sishir, Dulal and Sanat are responsible for causing the death of Nirmal and Umapati. As regards the involvement of other appellants viz. Pradip Chowdhury, Nilmoni Mondal, Rammoni Mondal and Shyammoni Mondal, we find from the evidence on record that they were

allegedly pelting stones to prevent others from coming; to the rescue of the victim.; This pelting of stones would not, ipso facto come within, the purview of Section 149 IPC, in as much as, they had no common object of launching attack on Nirmal and Umapati. The evidence of pelting stones by others is not inseparably associated with the common object of causing death of Nirmal and Umapati. Therefore we are of the considered view that the appellants Pradip Chowdhury Nilmoni Mondal, Rammoni Mondal and Shyammoni Mondal are not gully of the charges levelled against them.

23. As regards the revisional application preferred by the defacto complainant Nirodbaran Chowdhury we find that the learned Trial Judge recorded the order of acquittal in respect of accused Balak Mondal and Shaktipada Chowdhury. We find from the evidence of the P. Ws. that they did not specifically mention the names of accused Balak Mondal and Shaktipada Chowdhury, such being the position, the findings of learned Trial Judge can neither be said to be perverse nor clearly unreasonable. The ratio of the decision cited by Mr. Mukherjee in this regard is not applicable here in view of the facts and evidence on record.

24. In the result, the Criminal Revisional Application bearing No. CRR 2281 of 1989 is hereby dismissed. The, Criminal Appeal No. CRA 354 of 1989 is allowed in part. We maintain the order of conviction and sentence as recorded by the learned Trial Judge in respect of the appellants Sishir Chowdhury, Dulal Chowdhury and Sanat Chowdhury. We set aside the order of conviction and sentence in respect of the appellants Pradip Chowdhury, Nilmoni Mondal, Rammoni Mondal and Shyammoni Mondal who are acquitted of the charges levelled against them and they are discharged from the respective bail bonds.

25. We find from the record that the appellants Sishir, Dulal and Sanat are on bail. We direct them to surrender within a month from the date of this order, failing which, the learned Trial Court shall take appropriate steps against them so as to send them to Correctional Home to serve out their respective sentences.

Let a copy of this order along with the L.C.R. be sent to the learned Trial Court immediately.

Urgent xerox certified copy, if applied for, be handed over to the parties as early as possible.

Alok Kumar Basu, J.

26. I agree.