

(2016) 03 CAL CK 0050
In the Calcutta High Court

Case No : Criminal Appeal Nos. 743 of 2004 and 220 of 2006

Sattar Sk. and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 15-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 313
Penal Code, 1860 (IPC) — Section 304, Section 34

Citation : (2016) 03 CAL CK 0050

Hon'ble Judges : Rajiv Sharma and Siddhartha Chattopadhyay, JJ.

Bench : Division Bench

Advocate : Saswata Gopal Mukherjee and Sushil Kumar Mahato, for the Appellant; Pawan Gupta, for the Respondent

Final Decision : Disposed Off

Judgement

Siddhartha Chattopadhyay, J.—1. These two criminal appeals arose from the order of conviction dated 14.07.2003 and Order of Sentence dated 15.07.2007 passed by the learned Additional Sessions Judge, Second Court Murshidabad in connection with Sessions Trial No. 128 of 2002. The appellants mainly challenged the said order of conviction on the ground that the learned Court below failed to appreciate the evidence of the prosecution witnesses in its proper perspective. Had it been scrutinized seriously, in that event the learned Court below could have found many discrepancies in the testimonies of the witnesses and in that case order of acquittal would be passed.

2. The basis for setting the law into motion is the First Information Report (FIR) lodged by Gadare Paharia, in which he has ventilated his engrafted pain of losing his brother and he raised his finger against the convicts/appellants, who according to him are responsible for the untimely departure of his brother from this world. According to him, on 28th December 2000, at around 8 p.m. Ganesh Das and Sattar Sk. (both are convicts/appellants) were under influence of liquor started off using filthy languages. The victim protested. Being aggrieved they

had started to stab on the chest of the victim by bhojali. At that point of time of Shyamal Paharia and Bimal Paharia were present at the place of occurrence. They took injured victim to Lalbagh Hospital and admitted thereto and therefrom he was transferred to Baharampur Sub Divisional Hospital, where the victim breathed his last. After the post mortem is over, the FIR was lodged.

3. In course of investigation, Investing Officer has recorded the statement of the witnesses under Section 161 Cr. P.C., collected inquest report and post mortem report, prepared rough sketch map with index and after the completion of investigation he has submitted charge sheet under Section 304 Part-I read with Section 34 of the Indian Penal Code (IPC). Charges were framed accordingly by the learned Additional Session Judge and it was read over and explained to them to which the appellants pleaded their ignorance and claimed to be tried. After taking the evidence of prosecution witnesses, learned Court below has examined the accused persons under Section 313 of the Criminal Procedure Code (Cr. P.C.) and after hearing both sides, the learned Court below was pleased to find the appellants guilty and recorded order of conviction and sentence as regards the charge framed against them.

4. Since the main argument advanced by the learned Counsel appearing on behalf of the appellants, that there was no appreciation of evidence in its letter and spirit, so the conviction is bad in law. Since the witnesses are eyes and ears of justice, so we should now listen to the witnesses. The prosecution is obliged to establish with cogent evidence that the appellants faced the trial are the harbingers of death of the victim Kara Paharia.

5. Let us examine the evidence of PW 1 (Gadare Paharia) brother of the victim, i.e. the FIR maker. Learned Counsel appearing on behalf of the appellant contended that evidence of PW 1 is not trustworthy and it should be rejected. In examination-in-chief this, PW 1 categorically stated that he saw the incident. He further stated accused Sattar and Ganesh stabbed his brother with bhojali. Thereafter, he told that accused Sattar Stabbed bhojali while Ganesh caught hold of his brother at the time of stabbing. His evidence in examination-in-chief is self-contradictory on the ground that accused Sattar and Ganesh stabbed his brother with bhojali. Thereafter he told that the accused Sattar stabbed his brother with bhojali and accused Ganesh caught hold of his deceased brother. In course of examination, on being asked by the Court, this PW 1 categorically stated that at the time of incident he was pouring water to the crops of his cultivated land. If he was pouring water to the crops in that case how could he see the incident of assault and murder of his brother. Therefore, no reliance could be placed on his evidence.

6. PW 2 (Shyamal Paharia) who was present at the time of the incident and is an eye witness of the incident. In his evidence he has stated that after the hearing of hue and cry he came to the spot along with his brother. They had a torch with them and in the light of the torch he identified the convicts/appellants and found that Ganesh caught hold of the victim while convict appellant Sattar were

stabbing him. Thereafter, they fled away. In course of cross examination he stated that the torch which they had carried was not seized by the Police. He did not tell the police that with the help of the torch he saw the incident. Referring this part of his evidence, learned Counsel appearing on behalf of the appellants contended that his evidence is to be disbelieved. In our view, it was the duty of the Police Officer to ask how he could identify. If such question was put to him he could have given answer to that effect, that with the help of the light of the torch he saw the incident. At the same time it was the duty of the police officer to seize the torch and not the duty of the witness to hand over the torch to the Investigating Officer, if not demanded by the IO.

7. PW-3 (Khorshed Ali) has stated in his evidence that he had written the petition of complaint under instruction of Gadare Paharia. He is not an eye witness. He wrote the FIR as per direction of PW1. Learned defence Counsel pointed out that in course of cross examination this witness had stated that he belonged to a political party and there was office of another political party in their locality and the supporters of those two political parties used to go their respective party offices from the place of occurrence. This witness neither helps the prosecution nor it helps the defence on the ground that he is not the eye witness and whatever he was instructed to write, he just wrote that.

8. PW 4 (Awri Paharia) in his evidence in chief had categorically stated he found that there was an altercation between the victim and the convicts/appellants. He further stated that all of a sudden the convict/appellant Ganesh caught hold the victim while convict/appellant Sattar had stabbed him. Thereafter, both of them fled away. In course of cross examination he stated that he had told the Police that Ganesh caught hold the victim and Sattar stabbed him with bhojali. In course of cross examination it was stated to him that on that very night he was present in his house and he replied in affirmative. Referring this part of his evidence he argued that PW 4 was not on the spot. The cross examination did not mention the time as to when this witness was in house. Normally every person stays in his house at night but that does not mean that he was not present at the place of occurrence at the relevant point of time.

9. PW 5, Mabin Sk's, evidence is important because he had corroborated PW 4 in the same tone and tune. The addition that he made that he found that blood was coming out from the chest of the Kara Paharia, since the alleged assault was done with the help of a bhojali (which is a sharp cutting weapon) there was fatal injury which he found. He was not cross examined at length, on the contrary only suggestion was given to him that he was told by somebody that Ganesh caught hold while Sattar stabbed on the chest of Kara Paharia and he denied the said suggestion.

10. Evidence of PW 6 (Ibrahim Sk.) is such that he heard shouting of murder and thereafter rushed to the P.O. and found the victim lying on the ground with bleeding injury. In course of cross examination he stated that his house is about two and half miles away and in his examination-in-chief he categorically stated

that at the relevant point of time of incident he was in his house. Therefore, his evidence cannot help the prosecution.

11. PW 7 (Pabitra Ghosh) has stated in his evidence that he found accused Sattar stabbed with a bhojali on the chest of Kara Paharia while accused Ganesh caught hold Kara Paharia. Police seized the blood stained wearing apparels of Kara Paharia. He put his LTI on the seizure list. At the time of holding inquest over the dead body of Kara Paharia he was present and he put his LTI on the inquest report. In cross examination, he has specifically stated that he told the Investigating Officer that accused Sattar stabbed on the chest of Kara Paharia with a bhojali while the accused Ganesh caught hold Kara Paharia. So from such cross examination the defence could not gather anything in their favour.

12. PW 8 (Mukti Singh) is the Home Guard who took the dead body of the victim for post mortem. He was not cross examined.

13. PW 9 (Bimal Kumar Paharia) narrated the incident in detail. In course of examination-in- chief he has made statement that they took the victim to Murshidabad Police Station and from there the victim was taken to Lalbagh Sub Divisional Hospital. Referring this part of the cross examination learned Counsel appearing on behalf of the appellants contended that no other witnesses told this fact and if the evidence of this witness is to be believed then the evidence of other witnesses should be discarded. After going through the entire evidence of PW 9, we are of the view that this argument does not lie on the ground that no other witnesses had stated that they had taken the victim to Murshidabad Police Station. In course of cross examination he had stated that they reached Murshidabad Police Station at or about 8.30 to 8.45 p.m. and did not lodge any written complaint but they narrated the incident to the police and police referred them to hospital. Being bolstered up by such statement of PW 9, the Counsel appearing on behalf of the appellants, contended that if any statement was made to the Police and if it was a cognizable offence, then it was the duty of the Police to record their verbal complaints. The evidence of PW 9 goes to show that they are rustic people and do not have sufficient educational qualifications. Being a layman they might have narrated the incident to the Police and they were not aware of the fact that it was the duty of the Police to record their statements. If there is any remissness on the part of the Police authorities that cannot be treated to be a passport of acquittal. In cross examination PW 9 had categorically stated that he had seen the incident.

14. PW 10 (Prabir Kumar Dutta), Sub Inspector, who at the time of incident was attached to the Murshidabad Police Station, and he is the I.O. of this case. In his evidence he has stated that during investigation he has prepared a rough sketch map with index, examined the witnesses available at the Police Station, seized the wearing apparels of the deceased and after completion of investigation has submitted charge sheet. In course of cross examination he had stated that PW4 did not tell him that he found accused Ganesh caught hold of Kara Paharia while the other accused Sattar stabbed Kara Paharia with bhojali. He also stated that

PW 7 did not tell him that he saw the accused Sattar stabbed in the chest of Kara Paharia with a bhojali while accused Ganesh caught hold of Kara Paharia. So far as PW 9 is concerned, he stated that he did not tell him that he found Gadare Paharia, Shyamal Paharia at the Place of Occurrence. This goes to show that PW 2 had not stated to him that he saw the incident with the help of a torch but this IO could not seize the torch because the IO did not insist PW 2 to produce the torch. Emphasis was given by the learned Counsels appearing on behalf of the appellants that they made a statement before the Police Officer on duty at Murshidabad Police Station but as per IO (the PW 9) he did not tell him that he took the injured with a van to Murshidabad Police Station. Therefore, after going through the entire materials on record we do not find any infirmity in the evidence of these witnesses.

15. Learned counsel appearing on behalf of the appellant argued on the point of place of occurrence of incident. According to him the place of occurrence has not been as assessed by the IO and a confusing rough sketch map with index was prepared. On perusal of the rough sketch map with index, (exhibit four series) we find that the incident took place in the morum road which the IO has specifically mentioned by giving a "black spot". Therefore, place of occurrence is established.

16. Learned Counsel appearing on behalf of the appellants also made pincer movement in his argument, contending inter alia that FIR itself speaks that two other witnesses were there at the time of incident but the IO has shown four witnesses as eye-witnesses. It is perhaps, needless to say that FIR maker had not written the FIR, it is scribed by some other person. In the FIR, at the first blush two names were there but during investigation IO had ascertained the presence of two other witnesses whose names were not mentioned in the FIR. The scribe himself stated that he wrote the FIR under the Instruction of Gadare Paharia, PW1. Therefore this argument does not hold water.

17. Learned Counsel also drew our attention that bhojali was not seized. It is true that the IO could not seize the offending weapon. It transpires from the evidence that after the incident those accused persons fled away from that spot. Secondly eye- witnesses stated that the victim was assaulted by a bhojali, which is a sharp cutting weapon. Post mortem report speaks that the victim was assaulted with a sharp cutting weapon. Therefore, when the ocular evidence is there, mere non-seizure of offending weapon is not fatal for the prosecution.

18. Learned Counsel on behalf of the appellants bolstered up his submission as regards credibility of the witnesses and according to them the witnesses who had deposed are interested witnesses. In our view, such logic does not stand in view of the circumstances under which the assault took place. Theory of discarding interested witnesses has been started deprecating more than half a century ago. In the case of Dalip Singh & Ors. V. The State of Punjab , AIR 1953 SC 364 (Vol. 40, C.N. 81) the Hon"ble apex Court held that:

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person."

19. The doctrine of leaving the evidence of interested witnesses mechanically is a dangerous one. The application of such logistic formula would certainly sterile the criminal justice delivery system. Looking for calibration is neither rule of law nor a rule of prudence, but absolutely a rule of caution. There are umpteen decisions on this point but we do not wish to make this judgment hefty and cumbersome by analysing those judgments.

20. The learned Counsel appearing on behalf of the appellant also vehemently argued that there are some variations, omission and contradiction in the evidence which should go in favour of the convicts. It would not be out of place to mention that credibility of the testimony depends much on judicial evaluation of data and not by on isolated scrutiny. Whether any omission amounts to contradiction in a case is purely question of fact. The court, has to circumspect the fact, considering the common course of natural events, human conduct and thereafter consider whether it is materially significant or whether it is best fitted with the circumstances or not.

21. In a celebrated judgment reported in Criminal Law Journal , 2002 (Vol.3) page 2645 Krishna Mochi & Ors. V. State of Bihar and Ors. At page 2664 at para 76 our Hon"ble apex Court held that:

".....In case discrepancies pointed out are in the realm of pebbles, Court should tread upon, it but if the same are boulders, Court should not make an attempt to jump over the same...."

22. Applying that formula in the present case we find that there is no substantial difference in the deposition of the witnesses. One of the witnesses has stated that the incident was happened at 7 p.m. some says it is at 8 p.m. This does not make any difference on the ground that the alleged incident took place in the night of winter and witnesses stated the time according to their own perception but on the same night the victim was taken to Lalbagh Sub Divisional Hospital. This goes to show that the alleged incident took place on 28.12.2000 after evening. In our view, it is a minor discrepancy so we can tread upon it. Therefore, we are not inclined to allow the truth to be sacrificed at the altar of hyper technicalities.

23. It was further submitted that the persecution failed to show any motive for such incident. In this regard we may be permitted to say that there is no legal canon that motive has to be proved in all the cases where there is ocular manifestation of the evidence of the eye-witnesses, and accordingly the same is inconsequential. On the contrary, it appears to us that under the influence of liquor the appellants had committed the offence. There is no specific mentioning

in this regard in cross examination and there was no suggestion that there was enmity between the victim and the appellants.

24. There is also no adumbrated rancour between the parties. But in course of cross examination under Section 313 Cr.P.C. the convicts stated that he had bad relation with the victim. This is just an alibi, only to save his skin from the net of law. Therefore, the argument of the learned Counsel is demonstrably unsustainable.

25. The learned Counsel appearing on behalf of the appellant has also made forceful submission for rendering "benefit of doubt". This legal phrase has stolen away many valuable judicial hours of the judges and law thinkers. It would be an auto limitation if anybody wants to venture to defend it. Ratio of the Supreme Court's judgments of following cases:

", AIR 1978 SC 1091: , AIR 1988 SC 1998 State of UP v. Anil Singh and , (1994) 1 SCC 73 State of West Bengal V Orilal Jaiswal & Anr."

26. The expression in all the cases are "so long chaff, cloud remained the criminals are clothed with these protective layer to receive "benefit of doubt". But the duty of the Court within permissible limits is to find out the truth. The Court should not lose sight of the realities of life and cannot afford to take any unrealistic approach by sitting on the ivory towers. After going through the entire evidence and other documents, we find that the role of Ganesh Das was such that he caught hold of the victim and the appellant Sattar stabbed the victim. Ganesh as well as Sattar were under influence of liquor. There is no other overt act on the part of Ganesh. Although charge was framed under Section 34 of the IPC, yet we are of the view that the punishment imposed upon Ganesh Das should not be equated with the punishment given to Sattar.

27. It is established fact that the convicts were under influence of liquor has committed this crime. So some sort of leniency can be shown to them in regard to the sentence. Considering this aspect we are of the view that a logical conclusion should be there and this Court think that the imposition of sentence must be in accordance with the rule and on the fact along with the circumstances of its commission.

28. Now we are almost going to conclude our journey. The convicts were in jail for a substantial period and were all along present during the trial and also at this appellate stage. For the last 12 years this appeal is pending. Considering all these aspects, we are of the view that rigorous imprisonment of 7 years for convict Sattar and 5 years for the convict Ganesh Das shall meet the demand of justice. Since the convicts/appellants are enlarged on bail, their bond shall be forfeited and they are directed to surrender before the learned Additional Session Judge, Second Court, Murshidabad for serving out the rest part of the sentence. The period of sentence which already they have undergone shall be deducted from the period of sentence, imposed by this court.

29. Let a copy of the judgment along with the Lower Court Records be sent down to the Trial Court for necessary action.

30. Let a copy of this judgment be given to the convicts free of cost.

31. Urgent photostat certified copy of this Judgment, if applied for, shall be supplied to the Advocates for the parties upon compliance with all requisite formalities.

Rajiv Sharma, J.—I agree.