

(2014) 09 CAL CK 0063
In the Calcutta High Court
Case No : C.R.A. 316 of 2005

Shibu Giri

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2014) 3 CALLT 641 : (2014) 4 Crimes 506

Hon'ble Judges : S. Chatterjee, J; Nishita Mhatre, J

Bench : Division Bench

Advocate : Kaushik Gupta, Sayanti Santra and Arijit Bhusan Bagchi, Advocate for the Appellant; Pawan Kumar Gupta, Advocate for the Respondent

Final Decision : Allowed

Judgement

Samapti Chatterjee, J.—The instant appeal is directed against the Judgment and Order of conviction passed in Sessions Trial being No. 426 of 2004 passed by the Learned 3rd Additional Sessions Judge, Howrah on 9th day of March 2005 and 11th day of March holding the accused/appellant guilty of offence punishable u/s 302 of the Indian Penal Code to suffer rigorous imprisonment for life and to pay fine of Rs. 10,000/- for commission of offence punishable u/s 302 of the Indian Penal Code and in default of payment of fine, he must undergo simple imprisonment for one year. Out of the entire amount of fine if realised, 75% of the same is to be paid to the wife of the deceased towards her compensation.

2. Briefly, the prosecution case runs as under:-

3. On 28.02.1998 at about 2:30 p.m. the victim Ajit Biswas came to the house of Paresh Senapati and there was altercation between accused Shibu Giri and his brother Swapan Giri. At the relevant time, Shibu dealt a blow to Ajit Biswas in his neck by a sharp katari and Swapan Giri caught hold the leg of Ajit at the time of cutting his neck by Shibu. Ajit began to shout and fell on the ground bleeding.

4. Petition of complaint was lodged by Arati Senapati, the wife of Sri Paresh Senapati. Thereafter, investigation was held and charge-sheet was submitted. After perusing the materials on record and having heard both sides the charge under Sec. 302/34 of the Indian Penal Code was framed against the accused person. The charge was read-over and explained to the accused person to which he pleaded not guilty and claimed to be tried. Accordingly, trial started against the accused and after completion of trial the learned 3rd Additional Sessions Judge, Howrah held the appellant guilty and convicted him as aforesaid.

5. The prosecution examined as many as 12 witnesses as under.

(a) P.W.1 Sandhya Biswas is the wife of deceased Ajit Biswas.

(b) P.W.2 Chandi Biswas is the son of deceased Ajit Biswas.

(c) P.W.3 Anup Kumar Gupta is a resident of Kalyanpur, District Howrah.

(d) P.W.4 Chittaranjan Santra is a resident of Amlajole.

(e) P.W.5 Sankar Senapati is the maternal uncle of deceased Ajit Biswas.

(f) P.W.6 Soma Mondal is a resident of Rakshita village.

(g) P.W.7 Mantu Charan Biswas is a resident of Rakshita village.

(h) P.W.8 Arati Senapati is the wife of Paresh Senapati and the defacto complainant of this case.

(i) P.W.9 Paresh Senapati is the uncle of deceased Ajit Biswas.

(j) P.W.10 S.I. Bimal Chandra Biswas held inquest over the dead body of deceased Ajit Biswas and prepared Inquest Report.

(k) P.W.11 S.I. Debdas Majumder is the Investigating Officer of this case.

(l) P.W.12 Md. Salim is the another Investigating Officer of this case.

6. The prosecution case is mainly based on the evidence of 4 alleged eye witnesses to prove that the accused committed murder of the deceased.

7. Mr. Kaushik Gupta learned Advocate appearing for the appellant, submitted that P.W.1 being the wife of the deceased is an interested witness and more so it is evident from her evidence that she is a hearsay witness as she stated in her evidence that she sent her son Chandi to call her husband. It was 2:30 P.M., her son P.W.2, informed her that his father told him that red flag will be hoisted. She also heard from her son Chandi, P.W.2 that Swapan called his elder brother Shibu to come with a Katari. She further deposed that her son informed her that his father was about to flee but fell down being struck by Katari. Her son further narrated to her that when the deceased fell down on the ground then Swapan caught hold of his legs and Shibu cut down the neck of the deceased by Katari. One Nemai was also present at that time, he did not raise any protest. In her cross examination she deposed what she had heard from her son Chandi. Mr.

Gupta submitted that P.W.1 is a hearsay as well as interested witness therefore, her evidence cannot be taken into consideration to prove the case of prosecution.

8. Mr. Kaushik Gupta learned Advocate further submits that P.W.2 being the son of the deceased claiming to be an eye witness of the occurrence. But from his evidence it is found that he did not put signature at that point of time being only 12 years old. He further stated in his deposition that he narrated the entire incident to the police to the effect that there was no altercation prior to giving blow to his father (deceased) by the accused person. His father (deceased) was talking with his paternal grandfather. Then Shibu Giri told the deceased "E Sala Ki Bolche". The P.W.2 further deposed that his father fell down on the ground while fleeing away. Swapan caught hold of the legs of the deceased and Shibu gave blow by Karari over the neck of the deceased. P.W.2 further deposed that the P.W.1 (mother) saw that Swapan and Shibu were fleeing away after committing the offence. Mr. Kaushik Gupta, stated that evidence of P.W.1 and evidence of P.W.2 are contradictory and these are full of discrepancies. Therefore, cannot be relied upon by the Court.

9. Mr. Kaushik Gupta further contended that the P.W.3 the resident of that locality also the signatory of the Inquest Report as well as seizure list (marked as Exbt. 2 and Exbt. 3 respectively) stated in his deposition that he wrote the petition of complaint as per instruction of Arati Senapati and read over the same and she put her LTI on it. But he also stated in his evidence what he heard from the gathering which proved that P.W.3 is a hearsay witness. P.W.3 in his cross examination stated that Arati told her to write the complaint. Mr. Gupta further submitted that P.W.5 who allegedly claiming to be one of the eye witnesses, was not examined by the prosecution.

10. Mr. Kaushik Gupta urged that P.W.8 being defacto complainant stated in her evidence that when the accused assaulted the deceased no other person was present there. Thereafter she narrated the incident to one Anup Gupta who wrote down the complaint and thereafter the P.W.8 put her Left Thumb Impression on it. She further deposed that Swapan caught hold the legs of the deceased and accused Shibu cut down his neck. Thereafter the accused persons flee away from the house. P.W.8 further deposed that she put her Left Thumb Impression in a written paper but she cannot say what was written over there. She did not go to the police station and she remained in her house. One Anup Gupta submitted the said paper to the police station.

11. Mr. Kaushik Gupta further emphasised that P.W.9 being the uncle of the deceased in his evidence stated that on 20th February, 1998 the deceased told him that red flag will be hoisted shortly. At that time accused Swapan caught hold of his leg and accused Shibu cut his neck. Thereafter the accused persons fled away. P.W.9 further deposed that he is short of hearing and short of vision. He also deposed that after casting vote at 2:30 p.m. he came to his house. Mr. Gupta contended that incident occurred on 28th February, 1998 at 2:30 P.M. but the P.W.9 in his evidence deposed that after casting vote at 2:30 P.M. he came to

his house prior to the incident. It is the contention of Mr. Gupta that it is not physically possible for a human being to be present at 2:30 p.m. at polling booth and at the same time at the place of occurrence which also took place at 2:30 p.m. on 28.02.1998. Therefore, evidence of P.W.5, P.W.8 and P.W.9 are contradictory and full of discrepancies and do not deserve any acceptance by the Court.

12. Mr. Kaushik Gupta further contended that from the question no. 2, question no. 3 and question no. 4 taken u/s 313 of the Cr.P.C. it is revealed that witnesses P.W.2, P.W.3, P.W.4, P.W.6 and P.W.7 all were busy at about 2:30 p.m. for casting their vote in the polling booth where Panchayat Election was going on (Except P.W.2 being minor). Mr. Kaushik Gupta further submitted that place of occurrence was at Paresh Senapati's residence which is far away from the polling booth and the incident occurred on 28th February, 1998 at about 2:30 p.m. almost all the witnesses deposed that at about 2:30 p.m. when they were at the polling booth for casting their vote. Therefore, it is not physically possible for any human being to be present simultaneously present at the polling booth as also at the place of occurrence which is far away from the said polling booth. Therefore, the evidence of P.W.2, P.W.3, P.W.4, P.W.8 and P.W.9 are not believable the appellant was convicted on the basis of the evidence of those PWs.

13. Mr. Kaushik Gupta also emphatically contended that Magistrate before whom statement of the accused u/s 164 Cr.P.C. was recorded was not examined. Not only that Post Mortem Doctor was also not examined by the prosecution.

14. Mr. Kaushik Gupta further urged that it is revealed from the evidence that three persons were involved in the so called incident but no charge was framed against Swapan only against Nemai and Shibu charges were framed. Subsequently on 09.03.2005 accused Nemai was acquitted by the Judge, but the appellant was convicted.

15. Mr. Kaushik Gupta continued his submission urging that the prosecution case is based on the evidence of P.W.1, P.W.2 and P.W.9. All of them are interested persons and relative of the deceased and they were tutored by the prosecution, therefore cannot be believable. No evidence of independent witnesses was taken by the prosecution to prove its case.

16. Mr. Kaushik Gupta strongly urged that only on the basis of the evidence of P.W.8 whether conviction could be granted by the prosecution. He further urged that the appellant should be acquitted as the prosecution miserably failed to prove its case beyond reasonable doubt against the accused that he is guilty of committing murder. Therefore, the appellant is entitled for benefit of doubt.

17. Mr. Kaushik Gupta further submitted that no motive was proved against the appellant for committing murder.

18. Mr. Pawan Kumar Gupta learned Counsel appearing the State submitted that the conviction was based on the evidence of P.W.5, P.W.8, P.W.9 and P.W.10. He

further submitted that the charge was framed after 7 years. Mr. Pawan Gupta further contended that it is not the quantity of evidence, but the quality of evidence should be considered by the prosecution for conviction.

19. Mr. Pawan Gupta further submitted that evidence of P.W.2, P.W.5, P.W.8 and P.W.9 are corroborating with each other and not contradictory. Therefore, on the basis of their evidence relied on by the prosecution the appellant was convicted and evidence of those witnesses cannot create any doubt in the mind of the Court to affirm the instant judgment and order. Mr. Pawan Gupta further contended that it was the obligation of the defence to establish in the cross examination that whether P.W.2, P.W.8, P.W.9 were present in the place of occurrence or not.

20. Mr. Pawan Gupta further submitted that examination of Doctor is not mandatory when all the eye witnesses stated that they have seen the appellant killed the accused.

21. Mr. Pawan Gupta further contended that it would not be right to reject the prosecution's version only on the ground that all the witnesses of the occurrence have not been examined. In support of his contention Mr. Pawan Gupta relied on Apex Court decision reported in State of U.P. Vs. Anil Singh, as follows:-

Para 13- ".....In some cases, the entire prosecution case is doubted for not examining, all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Nor it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version."

"Para-15-It is also our experience that invariably the witnesses add embroidery to prosecution story perhaps for the fear of being disbelieved. But that is no round to throw the case overboard, if true, in the main. If there is a ring of truth in the main the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

22. Mr. Pawan Gupta also relied on another Apex Court decision reported in Satbir Singh and Others Vs. State of Uttar Pradesh, as follows:-

"Para-24-The long standing enmity between two branches of the same family stands admitted. It is, therefore, unlikely that other villages would come to depose in favour of one of the parties or the other.

Para-25-It is now a well steered principle of law that only because the witnesses are not independent ones may not by it self be a ground to discard the prosecution case. If the prosecution case has been supported by the witnesses and no cogent reason has been shown to discredit their statements, a judgment of conviction can certainly be based thereupon."

Mr. Pawan Gupta contended that the prosecution case should not be discarded only on the ground that no independent witnesses was examined.

23. Mr. Pawan Kumar Gupta further urged that omissions and discrepancies in the evidence of witnesses are bound to happen. Therefore, evidence of witnesses need not be rejected, if corroborated by other evidence. In support of his contention Mr. Pawan Gupta relied on an Apex Court decision reported in Subal Ghorai and Others Vs. State of West Bengal, as follows:-

Para 18-".....Some of the witnesses have omitted to mention the names of some of the accused. But, in our opinion, on the substratum of the prosecution story, there are no omissions or contradictions. While analyzing the evidence, we have kept in kind the manner in which several accused persons armed with weapons attacked the deceased. In an attack of this type, in the nature of things, there are bound to be some omissions or discrepancies in the evidence of witnesses. Experience shows that witnesses do exaggerate and this Court has taken note of such exaggeration made by the witnesses and held that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record. Therefore, the fact that some witnesses have not referred to certain accused in their police statements but have attributed role to them in the Court, does not lead us to conclude, in the peculiar facts of this case, that the said witnesses are not credible witnesses."

In our opinion these decisions have no manner of application in the present case although we are conscious of the ratio-decendi.

24. There is no dispute that the deceased Ajit Biswas had died a homicidal death. The question is whether the prosecution has been able to connect the present appellant with the alleged crime.

25. Giving a close and critical scrutiny into the evidence both oral as well as documentary with meticulous care we see that the whole prosecution edifice is built on the evidence of alleged eye witnesses namely P.W.2, P.W.5, P.W.8 and P.W.9 and we find that evidence of P.W.8, P.W.5 and P.W.9 are contradictory in nature and full of discrepancies and cannot be relied upon by the prosecution to convict the appellant.

We find that out of 12 witnesses most of the witnesses namely P.W.1, P.W.3,

P.W.4, P.W.6 and P.W.7 are hearsay witnesses and no credibility could be attached to the evidence of those witnesses. We further find that the prosecution claimed the P.W.5 as an eye witness but the appellant was not asked for his explanation for the version of P.W.5 as required u/s 313 Cr.P.C. by the Court. This has caused serious prejudice to the appellant.

26. We further find from the evidence of P.W.2, P.W.3, P.W.5, P.W.6, P.W.7 and P.W.8 that all were busy at about 2:30 p.m. on 28th February, 1998 for casting their vote in the polling booth (except P.W.2 being minor) and we also find that the place of occurrence was at Paresh Senapati's residence which is far away from the polling booth. We also find that the incident occurred on 28th February, 1998 at about 2:30 p.m.. Therefore, in our opinion, it is not humanly possible for the above mentioned witnesses to be present simultaneously at the place of occurrence and as well as at the polling booth on 28.02.1998 at 2:30 p.m. Therefore, the evidence of those above-mentioned witnesses have no credibility to prove that the accused committed the said offence.

27. We also find that the Magistrate before whom the statement of accused u/s 164 Cr.P.C. was recorded was not examined by the Court. Not only that the Doctor who prepared the post mortem report was also not examined by the prosecution. The prosecution case is full of lacunae, loopholes, discrepancies and at the same time had been very inefficiently handled. Therefore, we cannot accept the submission advanced by Mr. Pawan Gupta.

28. We find that P.W.3 the resident of the locality and also the signatory of the Inquest Report as well as seizure list (marked as Exbt. 2 and Exbt. 3 respectively) stated in his evidence that he wrote the petition of complaint as per instruction of Arati Senapati, P.W.8 and he read over the same and she (P.W.8) put her LTI on it. But P.W.8 the defacto complainant stated in her evidence that that she put her left thumb impression on a written paper but she could not say what was written over there. Furthermore, she deposed that she did not go to the police station and she remained in her house. P.W.3 Anup Gupta submitted the said paper to the police. She also deposed that no one was there at the place of occurrence.

29. We find that P.W.1, the wife of the deceased is an interested witness and she is also a hearsay witness, she stated in her evidence that her son Chandi P.W.2, narrated the incident to her. We further find that the P.W.2 at the time of incident was minor and the Magistrate did not satisfy regarding the maturity of the P.W.2 and his capability to comprehend the questions put to him. P.W.2 in his evidence stated that he narrated entire incident to the police to the effect that there was no altercation prior to giving blow to his father by the accused persons when his father was talking with his paternal uncle. We find there are discrepancies, inconsistencies, contradictions between the evidence of P.W.1, wife and P.W.2, son. Therefore, we are not inclined to accept the evidence of P.W.1 and P.W.2.

30. We find that the P.W.9 is also an interested person and relative of the

deceased. Not only that P.W.9, stated in his evidence that he is short of hearing and short of vision also. Therefore, we are not inclined to accept the evidence of P.W.1, P.W.2 and P.W.9.

31. We notice that the post mortem report mentioned two wounds and the Inquest Report also stated about two wounds but the eye witnesses never said that there were two injuries, so factum of two wounds are established. Therefore, it is very much doubtful whether these eye witnesses are at all real eye witnesses or not.

32. We also notice that offending weapon was missing. Further no motive was proved against the appellant for committing murder to the deceased. We find that prosecution failed to prove it's case beyond any reasonable doubt. Therefore, the appellant is entitled for benefit of doubt.

33. We further find that 3 persons were involved in the incident namely Swapan, Shibu and Nemai. No charge was framed against Swapan. Only against Nemai and Shibu charges were framed but Nemai was acquitted by the Court on 9th March, 2005. We hold that prosecution miserably failed to connect the appellant with murder of the deceased.

34. Therefore, in the light of the totality of the aforesaid discussions we hold and conclude that the prosecution has utterly failed to prove the guilt of the appellant u/s 302 of the Indian Penal Code.

We therefore, allow this appeal on the ground of benefit of doubt and set aside the impugned judgment and order of conviction and sentence passed in Sessions Trial No. 426 of 2004 by the learned 3rd Additional Sessions Judge, Howrah on 9th March, 2005 and 11th March, 2005 and we acquit the appellant of the said charge.

34. The appellant Shibu Giri is in jail and he shall be released forthwith unless wanted in any other case.

35. Let the Lower Court Record be sent to the Court below at once.

36. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.