

(2016) 08 CAL CK 0056
In the Calcutta High Court
Case No : C.R.A 319 of 2009.

Shyamal Mondal - Appellant @HASH The State of West Bengal

Date of Decision : 24-08-2016

Acts Referred:

Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 304, Section 323

Citation : (2016) 3 CalLJ 545

Hon'ble Judges : Rajiv Sharma and Asha Arora, JJ.

Bench : Division Bench

Advocate : Mr. Swapan Kumar Mallick and Mr. Pulakesh Bajpayee, Advocates, for the Appellant; Mr. Sudip Ghosh, Mr. Pawan Kumar Gupta and Mr. Pratick Bose, Advocates, for the State

Final Decision : Dismissed

Judgement

Asha Arora, J. - The subject of challenge in the present appeal at the instance of the accused/appellant is the judgement and order of conviction and sentence dated 19th March, 2009 and 21st March, 2009 passed by the learned Additional Sessions Judge, 3rd Fast Track Court, Malda, in Sessions Case No. 7(1) of 2008 arising out of Sessions Case No. 374 of 2007 whereby the accused/appellant has been convicted for the offence punishable under Section 304 Part-I of the Indian Penal Code (hereinafter referred to as the IPC) and sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1000/- in default of which to suffer rigorous imprisonment for one month for the offence under section 304 Part I of the IPC. The appellant was also sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000/- in default of which to suffer rigorous imprisonment for one month for the offence under section 323 of the IPC.

2. Prosecution version, bereft of unnecessary details is that on 31st August, 2002 at 00.15 hours the complainant Padia Mandal, mother of the deceased victim Rajen Mandal of village Harishpur within Police Station English Bazar in District Malda lodged a written complaint at English Bazar Police Station alleging that on

30th August, 2002 at about 6 p.m. her elder son Khagendranath Mandal and his son Shyamal Mandal had a quarrel with her fourth son Rajen Mandal regarding family matters pursuant to which Khagendranath Mandal and Shyamal Mandal inflicted blows with lathi and iron rod on the person of Rajen Mandal. When the complainant tried to save the victim, accused Shyamal Mandal assaulted her with iron rod on her left hand. It is the further case of prosecution that the victim Rajen Mandal was severely injured due to the assault and succumbed to the injuries before he could be moved to the hospital.

3. On the basis of the aforesaid written complaint (Exhibit-3) of Padia Mandal, Sub-Inspector of Police Anil Kumar Roy (PW 7) registered English Bazar Police Station Case No. 304 of 2002 dated 31.08.2002 under Sections 304/323/34 of the IPC against accused Khagendranath Mandal and Shyamal Mandal. Investigation into the case by Sub-Inspector Subir Karmakar (PW 17) culminated in the submission of the charge-sheet under sections 304/323/34 of the IPC against both the accused persons namely, Khagendranath Mandal and Shyamal Mandal.

4. It appears from the Judgment of the Trial Court that accused Khagendranath Mandal died during the pendency of the case. Consequently the case was committed to the Court of Sessions Judge, Malda with only one accused namely, Shyamal Mandal who is the appellant before us.

5. The Trial Court framed charge against the appellant/accused for the offences punishable under Sections 304/34 and 323/34 of the IPC. Being so arraigned, the accused pleaded not guilty to the indictment and claimed to be tried. In course of trial prosecution examined as many as 17 witnesses and exhibited several documents. The defence of the accused/appellant as is projected from the suggestions given to the prosecution witnesses in cross-examination as well as from the answers given by the accused in his examination under Section 313 of the Criminal Procedure Code (hereinafter referred to as the CrPC) is complete innocence, false implication and outright denial of the prosecution case. After conclusion of the trial, the learned Additional Sessions Judge, 3rd Fast Track Court, Malda by the impugned Judgment and order convicted the accused for the offences punishable under sections 304 Part-I and 323 of the IPC and sentenced him to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1000/- in default of which to suffer rigorous imprisonment for one month for the offence under section 304 Part I of the IPC. The appellant was also sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 1000/- in default of which to suffer rigorous imprisonment for one month for the offence under section 323 of the IPC.

6. The point for consideration is whether the conviction and sentence of the appellant is sustainable.

7. The main thrust of argument of the learned counsel for the appellant is that the conviction of the accused/appellant for the offence under Section 304 Part-I

of the IPC is not justified since the incident occurred on the spur of the moment without any intention or predetermined motive for the commission of the offence. On behalf of the appellant it has further been submitted that save and except PW 9 none of the other witnesses examined by the prosecution were present at the time of the incident. According to the learned counsel for the appellant, it was the accused Khagendranath Mandal who alone was responsible for the commission of the offence. So, the appellant should be exonerated of the charge for the offence under Section 304 Part-I of the IPC.

8. Repudiating the submissions on behalf of the appellant, learned counsel appearing for the State argued that apart from PW 9, PW 4 father of the deceased victim is also a material witness who testified regarding the culpability of the appellant. According to the learned counsel for the State, the evidence of these two witnesses corroborated by the medical evidence of the autopsy surgeon (PW 12) is sufficient to prove the charge for the offence under section 304 Part-I of the IPC against the appellant.

9. It is not in dispute that the death of deceased Rajen Mandal was homicidal in nature. PW 12 Dr. Maniklal Das who held post mortem examination on the dead body of the victim clearly opined that death was due to the effect of ante-mortem injuries as stated, homicidal in nature. The opinion of the autopsy surgeon as to the cause of death of the deceased has not been challenged by the accused in cross-examination. The incident has also not been disputed. The only point raised by the learned counsel for the appellant is whether the offence under Section 304 Part-I of the IPC can be attributed to the accused. For determining this issue let us advert to the evidence led by prosecution.

10. PW 1 Rina Mandal and PW 2 Dipali Mandal are the sisters of deceased and paternal aunts of the appellant. The version of PW 1 is that on the date of incident at about 6.00 p.m accused Shyamal Mandal and Khagen Mandal assaulted deceased Rajen Mandal with lathi and iron rod as a result of which he sustained serious injuries on his person and he succumbed to the injuries within five minutes. She further stated that Khagen Mandal and Shyamal Mandal also assaulted her mother Padia Mondal (PW 9) by means of lathi and iron rod in consequence of which she sustained injuries on her forehead and fracture on her left hand. It has emerged in the cross-examination of PW 1 that she was in her husband's house on the date of incident and on being informed by a co-villager she rushed to her father's house. It is clear from the elicitation in the cross-examination of PW 1 that she is a post occurrence witness whose evidence is hearsay.

11. PW 2 is another post occurrence witness as is evident from her cross-examination. She narrated the incident in almost the same manner as PW 1 but it has surfaced in her cross-examination that she was in her husband's house when she received a phone call from her mother who informed her about a quarrel which was going on and asked her to come at once. PW 2 accordingly rushed to her mother's house. It has emerged in the cross-examination of PW 2

that the entire incident was narrated to her by her mother Padia Moandal (PW 9)

12. PW 3 Gopesh Ch. Mandal is the husband of PW 2. He is also a post occurrence witness PW 3 testified in his evidence that he came to his mother-in-law's house on receiving a phone call from her and found the dead body of Rajen Mandal lying there. He heard about the incident from his mother-in-law.

13. PW 4 Mahendra Mandal is the father of deceased and grand father of the appellant. This witness asserted that accused Shyamal and Khagen Mandal assaulted Rajen Mandal by lathi and iron rod. PW 4 stated in his evidence that he witnessed the process of assault upon deceased. He further testified that accused Shyamal Mandal inflicted blows with lathi on his wife's hand. PW 4 conceded in his cross-examination that at the time of incident he was inside the room and came out of his house on hearing hue and cry and saw deceased Rajen Mandal and his wife lying on the ground. PW 4 further stated in his cross-examination that his wife was conscious at that time and she told him everything.

14. PW 5 Pratul Chandra Mandal is a formal witness who scribed the FIR. He is also one of the witnesses to the inquest and seizure. PW 6 Mantu Mallick is also just a formal seizure witness. PW 7 Anil Kumar Roy, another formal witness was, at the relevant time, the Officer-in-Charge of the concerned police station who received the written complaint from the complainant and registered the case. He endorsed the case for investigation to Sub-Inspector Subir Karmakar (PW 17). PW 8 Ambuj Kumar Jha is the constable who identified the dead body of deceased to the autopsy surgeon. He also witnessed the seizure of the wearing apparel of the deceased.

15. PW 9 Padia Mandal is admittedly an ocular witness to the incident. She is also a victim of assault. Before embarking upon a discussion of the evidence of this material witness, let us refer briefly to the other witnesses examined by prosecution. PW 10 Ghuran Mandal is the husband of PW 1. He is a post occurrence witness. PW11 and PW 14 are mere formal witnesses. PW 12 is the autopsy surgeon. PW 13, PW 15 and PW 16 are the co-villagers of the parties who turned hostile during the trial and PW 17 is the Investigating Officer.

16. We now revert to the evidence of PW 9 who recounted the incident in the following matter: " Accused Shyamal Mandal and Khagen Mandal murdered my son out of simple quarrel by means of iron rod and lathi. Blows of iron rod and lathi inflicted upon my deceased son on his chest, back and hands and I was also assaulted by accused Shyamal Mandal on the left hand wrist by means of lathi while I attempted to save my son and I sustained fracture on my left hand wrist as well as little finger. My wearing conch was broken due to blow of lathi on my left hand given by accused Shyamal Mandal. My son Rajen Mandal died while attempted to shift him on the car for hospital."

It is clear from the evidence of PW 9 that accused Shyamal Mandal (appellant) was armed with lathi. While he (appellant) was inflicting blows with lathi on the person of deceased, PW 9 tried to save him whereupon she was assaulted with

lathi by the appellant. Nothing could be elicited in the cross-examination of PW 9 to doubt the creditworthiness of her evidence. In fact, the evidence of PW 9 remained unscathed in cross-examination. Being quizzed in cross-examination, PW 9 categorically iterated that after receiving blows by iron rod and lathi deceased Rajen Mandal fell on the ground and she rushed to the place where he was lying and at that time accused Shyamal Mandal gave blow with lathi on her left hand. The evidence of PW 9 clearly proves that the appellant was one of the assailants of the deceased. It was the appellant who inflicted blows with lathi on the person of the deceased. The fact that the appellant was armed with lathi finds credence and support from the testimony of PW 9 who stated unequivocally that when she attempted to save Rajen Mondal, accused Shyamal assaulted her with lathi on her left hand. Significantly, the evidence of PW 9 in this regard remained virtually unchallenged in cross-examination. No specific suggestion was given to PW 9 in cross-examination denying the factum of assault upon her with lathi by the appellant. This apart, we are not unmindful of the settled position that a victim of assault is the best witness in the sense that he is least likely to exculpate the real assailant and falsely implicate an innocent person. No plausible motive could be attributed to PW 9 for bringing a false case against the appellant who is her grandson. It is also not believable that PW 9, the mother of deceased would spare the real assailant of her son and invent a false charge against her grandson. The suggestion given to PW 9 in cross-examination that accused Shyamal Mandal has been falsely implicated due to property dispute could not be substantiated by any iota of evidence. In the given facts of the present case PW 9 is a natural witness whose evidence inspires complete confidence.

17. The ocular version of PW 9 has been corroborated by the medical evidence of PW 12 Dr. Manik Lal Das who held post mortem examination on the dead body of the victim. Deposing with reference to the post mortem report (Exhibit 7) PW 12 found the following injuries on the person of deceased :

- (1) Three ?" x ?" lacerated injuries over the left arm with fracture of left humerus
- (2) one ?" x ?" lacerated injury over the left elbow;
- (3) multiple bruises over left side of chest, ribs and left leg.

On dissection brain and its meninges were pale, fracture of left 6th rib, left lungs and spleen were ruptured. In the opinion of the autopsy surgeon death was due to the effect of the ante mortem injuries and it was homicidal in nature. Being quizzed in cross-examination the post mortem doctor specifically stated that no alcohol was detected during the post mortem examination on the dead body. PW 12 also ruled out the possibility of such injuries being caused due to fall. The conclusion that necessarily follows is that the culpability of the appellant stands convincingly established by credible evidence which is beyond reproach.

18. Learned counsel for the appellant invited our attention to the fact that the iron rod and lathi were not seized by the Investigating Officer. We are not

impressed with the argument that non seizure of the weapon of offence is sufficient to put the prosecution out of court. It is true that the weapon of offence ought to have been seized but on account of such an omission on the part of the Investigating Officer prosecution case cannot be disbelieved particularly when there is reliable evidence to prove that the accused/appellant inflicted injuries with lathi on the person of the deceased.

19. In the ultimate analysis, we unhesitatingly hold that the appellant failed to make out any case for interference with the judgement and order of conviction and sentence passed by the Trial Court. We therefore, do not find any merit in the appeal.

20. Consequently the appeal is dismissed.

21. A copy of this judgment along with the L.C.R shall be sent immediately to the Trial Court.

22. Urgent photostat certified copy of the judgement, if applied for, shall be given to the parties upon compliance of requisite formalities.

Rajiv Sharma, J. - I agree.