
(2011) 08 CAL CK 0158
In the Calcutta High Court
Case No : C.R.A. No. 315 of 1987

Shyamal Saha @ Shyamlal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 10-08-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 34

Citation : (2012) 1 CHN 220

Hon'ble Judges : J.N. Patel, C.J.;Ashim Kumar Roy, J

Bench : Division Bench

Advocate : Subir Debnath, Debajit Kundu and Rupan Mukhapadhyay for the Appellant Nos. 2 to 4 and 7, Saswata Gopal Mukherjee and Sreyashee Biswas for the Appellant Nos. 1 and 8, for the Appellant;Debasish Roy and Anusua Sinha for the State, for the Respondent

Final Decision : Allowed

Judgement

Ashim Kumar Roy, J.—This criminal appeal is directed against a judgement and order passed by the learned Additional Sessions Judge, Cooch Behar convicting the appellant Shymal @ Shyamlal Sana, Malin Sarkar, Promatha Saha, Debabrata Bardhan, Sunil Chandra Sakar, Hiralal Saha, Puskar Bardhan, Anukul Das @ Anukul Sarkar u/s 302/34 of the Indian Penal Code and sentencing each of them to suffer imprisonment for life.

During the pendency of this appeal the appellants Hiralal Saha and Puskar Bardhan have expired and accordingly appeal stands abated so far as they are concerned. The prosecution case as is unfolded from the materials on record in brief is as follows:

On the date of the alleged incident, i.e. on 25th of November, 1979, a "Natai Puja" was held at the house of one Haridas Saha of village Garbhanga within the police station Tufanganj, Cooch Behar, when over the distribution of "Prasad" some dispute arose between Badal Pal and the appellant Malin Sarkar. Soon thereafter Subodh Chandra Sarkar, who happened to be the elder brother of

Malin Sarkar trespassed into the house of Badal Pal and assaulted his mother Kiranbala Pal with a lathi on her head. After the ends of days work, Paresh Dutta, the brother of Kiranbala returned home got the information about such incident from the inmates of his house and rushed to the house of Badal Pal, his nephew to see his injured sister Kiranbala being accompanied by his two nephews Shankar Dutta and Biswanath Dutta and two others, viz. Bhot Barman and Mahendralal Saha, went to the house of Badal Pal, Paresh Dutta carried a torch with him. Thereafter while they were returning home and reached near the house of Shymmlal Saha, all the appellants came there in a body and intercepted them. At first Shymmlal Saha assaulted Paresh Dutta with a lathi on his head and as a result he fell down on the ground, when all other accused persons pounced upon him and started assaulting him with the weapons in their hands. The appellant Anukul Das assaulted him with a dagger in his hand and the other accused assaulted him with lathies. The entire incident was claimed to have been seen by the witnesses, viz. the two nephews of the victim and others who was with the appellants and the appellants were recognized in the moonlight and in the light of the torch. As the nephews of the victim Paresh Dutta tried to resist the accused persons, they were also assaulted by the appellants with the lathies and they also sustained injuries. The victim Paresh Dutta succumbed to his injuries at the spot.

2. The aforesaid incident was reported to the local police station by the elder brother of the victim and a FIR was recorded against Shymmlal Saha, Promotho Saha, Hiralal Saha, Anukul Das and three/four others for the offences punishable u/s 148/149/302 of the Indian Penal Code.

After conclusion of investigation police submitted charge-sheet for the selfsame offences against the FIR named accused persons and four others, viz. Malin Sarkar, Puskar Bardhan, Debabrata Bardhan and Sunil Sarkar.

3. The appellants were placed on trial before the learned Additional District and Sessions Judge, Cooch Behar to answer charges u/s 302/34 of the Indian Penal Code.

In the trial all the appellants were found guilty for having committed offence punishable u/s 302/34 of the Indian Penal Code and sentenced to suffer imprisonment for life.

Hence, this appeal.

4. The learned Counsel of the appellants assailed the order of conviction and sentence on the following grounds;

(a) FIR was lodged after long delay.

(b) The appellants Malin Sarkar, Puskar Bardhan, Debabrata Bardhan and Sunil Sarkar are not named in the FIR and have been falsely implicated after due deliberation during trial.

(c) Inquest was held before registration of FIR.

(d) The P.W. 2 and P.W. 3 the nephews of the victim claimed to be present at the time of the occurrence but they made no attempt to remove the victim to the hospital and their conduct is quite unnatural.

(e) Although the place of occurrence was surrounded by many houses but none of the inmates of the house was examined although available.

(f) No blood was seized by the police from the place of occurrence which shows that no incident happened there nor anybody has seen the occurrence.

(g) The prosecution tried to prove its case by examining highly inimical and interested witnesses.

(h) No offending weapon was seized.

(i) Although P.W. 2 Shankar Dutta and P.W. 3 Biswanath Dutta were allegedly assaulted during the aforesaid occurrence and they suffered injuries and claimed to have been treated by the doctor but no doctor was examined in support of the same.

(j) The evidence of the postmortem doctor, P.W. 16 Suhas Krishna Sinha who admitted in his evidence that death occurred more or less 24 hours before the postmortem and he find no gapping injury the evidence of the alleged eyewitnesses stands falsified.

On the other hand, the learned Counsel for the State submitted that there was no delay in lodging the First Information Report because the incident was first reported to the Kumargram Police Station which was situated near the house of the victim and from there the said complaint was forwarded to the Tufanganj Police Station within whose territorial limit the aforesaid incident took place. It was further submitted the Investigating Officer visited the spot nearly 44 hours after the occurrence on 27th November 1979 and as such non-seizure of bloodstained earth from the place of occurrence become absolutely inconsequential. It is further contended both the eye-witnesses have given a detail account of the occurrence during the trial and by grueling cross-examination nothing could be brought out to suspect their testimony. According to the learned Counsel of the State mere allegations of animosity is no ground to discard the evidence of a witness who is otherwise truthful.

5. During the trial the prosecution examined as many as 19 witnesses. Out of those witnesses P.W. 2 Shankar Dutta, P.W. 3 Biswanath Dutta and P.W. 7 Bhot Barman appears to be the key witnesses who according to the prosecution was present at the place of occurrence and witnessed as to how and by whom the victim was assaulted. The P.W. 1 Ramesh Dutta, the maker of the FIR, the P.W. 4 Sachindra Mohan Saha, the P.W. 5 Mahendra Lal Saha, the P.W. 6 Badal Chandra Pal, the P.W. 8 Kamala Rani Dutta had no direct knowledge about the occurrence in which the victim was assaulted. The P.W. 9 Prafulla Kr. Saha, P.W. 10 Jagadish

Ch. Aich, P.W. 11 Harendra Dey Sarkar and P.W. 12 Paritosh Dey are seizure witnesses. The P.W. 16 Suhas Krishna Sinha is the Autopsy Surgeon who held the postmortem of the victim. The P.W. 13 Nripendra Nath Sarma is a police constable and P.W. 14 Paramesh Ch. Roy, an Assistant Sub-Inspector of Police and P.W. 18 Prabhas Ch. Chakraborty are formal witnesses. The P.W. 19 J.B. Rakshit is the Investigating Officer of the case and P.W. 15 Niranjana Ch. Das submitted charge-sheet.

6. We have heard the learned Counsel on behalf of the parties. Considered their respective submissions and the case laws relied upon on their behalf and have very carefully gone through the evidence on record.

7. We find although according to the prosecution case P.W. 2 Shankar Dutta, P.W. 3 Biswanath Dutta and P.W. 7 Bhot Barman are the eyewitnesses to the occurrence but none of them are the maker of the FIR. It is the P.W. 1 Ramesh Chandra Dutta lodged the FIR to the police and according to him after being reported about the aforesaid incident by P.W. 2 Shankar Dutta and P.W. 3 Biswanath Dutta he lodged the complaint and admitted in his cross-examination that he has not mentioned the name of Malin Sarkar, Puskar Bardhan, Debabrata Bardhan and Sunil Sarkar. Both P.W. 2 Shankar Dutta and P.W. 3 Biswanath Dutta admitted in their evidence about the facts of narrating to the P.W. 1, the maker of the FIR, the incident of assault upon the victim Paresh Dutta as well as the name of the appellants. From the evidence of P.W. 1 it does not transpire why the name of the aforesaid four appellants were not mentioned in the FIR. Although however the maker of the FIR in this case is not an eye-witness to the occurrence but when he before lodging the FIR was reported about the incident and the name of the assailants by the eye-witnesses to the occurrence, non-disclosure of such fact in the FIR, may not be by itself per se fatal to the prosecution case but is a circumstance which makes this Court to be extra cautious to accept the prosecution case as regards to the participation of the said appellants.

In the given facts and circumstances of the case that after having seen the dead body of his brother P.W. 1 became senseless and sometime was consumed since before he left for Thana the witness went to the residence of their other relations to inform them about the incident, the delay if any in reporting the incident to the police does not assume any importance.

Similarly, we do not also find any force in the submission of the learned Counsel that the FIR has lost all its significance because the FIR was recorded after inquest. In this case admittedly the incident was first reported to the Kumargram Police Station on 26th November 1979 and as the place of occurrence was located within the territorial limit of the Tufanganj Police Station same was forwarded to that particular police station. In the meantime the P.W. 14 Paramesh Chandra Roy of Kumargram Police Station held the inquest and sent the dead body for postmortem examination.

8. As far as the facts the victim Paresh Dutta suffered a homicidal death due to the ante mortem injuries found in his body no question was raised from the side of the defence. We have also gone through the evidence of the postmortem doctor and are satisfied that the cause of death of victim Paresh Dutta was homicidal in nature and due to the ante mortem injuries sustained by him.

9. We have already noticed P.W. 2 Shankar Dutta, P.W. 3 Biswanath Dutta and P.W. 7 Bhot Barman are the prime witnesses of the prosecution, who claimed to be the eyewitnesses to the occurrence.

According to the P.W. 2 Shankar Dutta when the victim Paresh Dutta was returning home from the house of Badal Pal was accompanied by him, P.W. 3 Biswanath Dutta and P.W. 7 Bhot Barman. After they reached near the house of appellant Shyamal Saha, the appellant Malin Sarkar and Shyamal Saha assaulted victim Paresh Dutta with lathies. Due to such assault Paresh Dutta fell on the ground and his torchlight went out of his hand, soon thereafter the appellant Anukul Das, Puskar Bardhan, Debabrata Bardhan, Hiralal Sarkar, Sunil Sarkar and Promotho Saha started assaulting him with the weapons in their hands. Anukul Das had a dagger in his hand while other accuseds were armed with lathies. Beside them there were other miscreants who could not be recognized. The witness claimed to have seen the entire occurrence in the moonlight and also in the light of the torch. At that time as the P.W. 2 and P.W. 3 both tried to resist the assailants they were also assaulted by the appellants with lathies in their hands and the witnesses sustained severe injuries on their legs.

Next eye-witness to the occurrence P.W. 3 Biswanath Dutta fully corroborated the testimony of P.W. 2, as to how the deceased was assaulted by the appellants as well as the manner of assault. He also corroborated the P.W. 2 as to the source of light.

Now, coming to the testimony only other eye-witness to the occurrence P.W. 7 Bhot Barman, who according to both P.W. 2 and P.W. 3 was present at the time of assault and then out of fear fled away from the scene of occurrence, we find this witness gave no support to the prosecution case. According to P.W. 7 Bhot Barman, he along with the victim Paresh and P.W. 2 and 3 while were returning to the house of the victim and reached the house of Hiralal Saha, Paresh was assaulted by two persons and about 10/12 persons were with the said two miscreants but the witness was not able to identify any one of the miscreants.

We find from the evidence of P.W. 1 Ramesh Dutta that the P.W. 7 Bhot Barman was a resident of the same village and his house was situated to the East of their house. The P.W. 2 Shankar Dutta in his cross-examination disclosed that P.W. 7 was a resident of the same village and his house was situated about half a mile away from the house of Paresh Dutta. In this regard from the evidence of P.W. 3 Biswanath Dutta we do not find anything contradictory. Admittedly the appellants and the P.W. 7 Bhot Barman are the co-villagers, therefore a question very legitimately arises as to why the P.W. 7 Bhot Barman of the same village could

not identify them. It is not the case of the P.W. 7 that he was unable to identify the appellants for lack of light but his explanation is that the miscreants were unknown to him.

The learned Counsel for the State to overcome this controversy urged before us since the P.W.7 was first in the queue therefore he was not able to recognize the assailants of the victim. In this background it would be quite relevant to note according to the testimony of P.W. 2, the P.W. 7 Bhot Barman was just behind the appellants and was about two and half cubits away, it is not the case of the P.W. 7 that he did not see the occurrence in which the victim Paresh Dutta was assaulted but it is his definite testimony that the two miscreants who assaulted the victim and 10 others present with the said miscreants were not known to him. Therefore the submissions of the learned Counsel of the State that the P.W. 7 missed the appellants due to the fact he was in front is not acceptable. Moreover, we find from the evidence of the other two witnesses the incident continued for about 10 minutes and the appellants and the witness being the co-villagers and thus the inability of this witness to identify them creates serious doubts about the involvement of the appellants in the commission of the offences. Despite above the prosecution has not declared the P.W. 7 Bhot Barman hostile, thus his evidence can very well be utilized by the defence to prove their innocence. In this regard we may rely on the decision of the Hon''ble Supreme Court in the case of Raja Ram vs. State of Rajasthan reported in 2005 SCC (Cri) 1050 and in the case of Mukhtiar Ahmed Ansari vs. State reported in 2005 SCC (Cri) 1037.

10. We further find although according to the P.W.2 after receiving bleeding injuries when the victim Paresh Dutta fell down on the ground the place was smeared with blood but when the P.W. 19 the Investigating Officer of the case visited the place of occurrence nearly 44 hours after the incident seized no bloodstained earth as same was not found there but he seized the broken piece of glasses of the torch which was in the hand of the victim at the time of occurrence. We further find from the evidence of P.W. 3 that when the P.W.19 the Investigating Officer of the case visited the place of occurrence the broken torch was found lying there and the P.W. 3 pointed out the same to the P.W.19 but the P.W. 19 did not seize the same. Both P.W. 2 and 3 claimed to have also been assaulted by the appellants while they were trying to save the victim from their hands and was subsequently treated by a doctor but during the trial neither any medical case paper was forthcoming nor the doctor who attended the said witnesses and treated them was examined. Both the witnesses all through claimed that in the selfsame incident they were also assaulted by the appellants to establish their presence and further asserted in their cross-examination that such fact was told to the Investigating Officer of the case but the Investigating Officer of the case denied the same. In our opinion, this omission is very material and vital one and therefore amounts to contradiction, which further weaken the credibility of P.W. 2 and P.W. 3. It is an admitted position that the place of occurrence is surrounded by a number of residential houses and full of

inhabitants there but none of them were examined by the prosecution in support of its case. It is the evidence of P.W. 2 and 3 as soon as the appellants started assaulting the victim they raised hue and cry when one of the co-villagers Shanti Kar came there to whom they first disclosed the entire evidence and then with his help the deadbody of Paresh Dutta was taken to his house, however this Shanti Kar was not examined during the trial.

11. In this case the post-mortem was held by the P.W. 16 Dr. Suhas Krishna Sinha. According to the P.W. 2 Shankar Dutta during the incident one of the appellants Anukul Das assaulted the victim with dragger in his hand but the P.W. 16, Autopsy Surgeon stated in his evidence if any injury is caused by a dragger there will be gapping injury but no such gapping injury was found. Thus, on the face of the evidence of P.W. 7 Bhot Barman, in our opinion it will not at all be safe to sustain the conviction of the appellants on the face of the evidence of P.W. 2 Shankar Dutta and P.W. 3 Biswanath Dutta, which is also not beyond question. Accordingly the order of conviction and sentence is set aside and the appellants are acquitted.

In the result the appeal stands allowed and the impugned order of conviction and sentence is set aside. The appellants who are now on bail now be discharged from the bail bonds.

Let the Lower Court Records be sent down to the Court below forthwith.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

J.N. Patel, CJ.

I agree.