

(2012) 06 CAL CK 0085
In the Calcutta High Court
Case No : CRA No. 141 of 1999

Sk. Anawar Ali and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 07-06-2012

Acts Referred:

Evidence Act, 1872 — Section 25
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 7A
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 3 CALLT 550

Hon'ble Judges : Tapen Sen, J;Dipak Saha Ray, J

Bench : Division Bench

Advocate : Sekhar Kumar Basu, Mr. Siladitya Banerjee, Mr. Abhijit Ganguly and Mr. Kushal Kr. Mukherjee For the Appellant, for the Appellant;Prasun Dutta, Advocate Mr. Subrata Roy For the State, for the Respondent

Final Decision : Allowed

Judgement

Tapen Sen, J.—Heard the parties. This appeal is directed against the Judgment and Order dated 30.4.1999 passed by the learned Additional Sessions Judge, 2nd Court, Hooghly in Sessions Trial No. 31 of 1991 corresponding to Pursurah P. S. Case No. 25 dated 2.4.1990 whereby and whereunder the Appellants were convicted u/s 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and also to pay a fine of Rs. 1,000/- each and in default, to undergo rigorous imprisonment for a further term of six months. There are four Appellants in this Appeal. They are (i) Sk. Anawar Ali; (ii) Sk. Rehmat Ali; (iii) Sk. Maidul Islam and (iv) Most. Mehrunnisa Bibi.

2. Before proceeding with the case, it would be necessary to point out that so far as the Appellant No. 1, Sk. Anawar Ali is concerned, the Appeal preferred by him, stands abated in view of his death on 11.12.2000 which was duly recorded by a Division Bench of this Court presided over by Hon"ble the Chief Justice on 24.8.2011 and which reads as follows:

CRA No. 141 of 1999

24.8.2011

In the matter of : Sk. Anowar Ali & Ors. Appellants/Petitioners

Mr. Sekhar Basu Mr. Kushal Mukherjee Mr. Avijit Ganguly Mr. Siladitya Banerjee ... For the Appellants/Petitioners

Mr. Debasish Roy, Ld. P.P. Mr. Prasun DattaFor the State

Learned counsel for the appellants tenders Certificate of Death of the appellant Sk. Anowar Ali Son of Late Sk. Fazle Rahman. The same is taken on record.

In view of the fact that the appellant Sk. Anowar Ali has died on 11th December, 2000 the appeal preferred by him stands abated.

The appeal preferred by the other appellants, be now listed for hearing on Monday, i.e. 29th August, 2011.

(J. N. Patel, Chief Justice)

(Kanchan Chakraborty, J.)

3. So far as Appellant Nos. 2 and 3 are concerned (viz. Sk. Rehmat Ali, Sk. Maidul Islam) it is necessary to point out that by an Order dated 6.9.2011 passed by a Division Bench presided over by Hon'ble the Chief Justice and upon hearing an Application the learned Trial Court was directed to examine as to whether these Appellants were Juveniles on the date of commission of the offence. The said Order reads as follows:

CRA No. 141 of 1999

06.09.2011

Re: An application being CRAN 1876 of 2011

In the matter of : Sk. Rahamat Ali & Anr. Appellants/Petitioners

Mr. Sekhar Basu Mr. Souvik Mitter ... For the Appellants/Petitioners

At the request of the learned counsel for the appellants, the application being CRAN 1876 of 2011 be taken up for hearing by treating the same as on day's list.

Heard the learned counsel for the appellants/petitioners.

The appellants/petitioners, who happened to be the real bothers, have moved this application to seek an order to the Trial Court to enquire into their age as they claim that they were juvenile on the date of commission of the offence and, therefore, the matter should be referred to the Trial Court for determining their age as contemplated u/s 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "said Act") and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter

referred to as "said Rules"). In support of their application the documents like certificate from the Headmaster and school-leaving certificate have been annexed as Annexure P-1 and P-2.

We, therefore, direct the Trial Court to examine the case of the petitioners/appellants as to whether they were juvenile on the date of commission of the offence in accordance with Section 7A of the said Act and Rule 12 of the Said Rules and submit a report to this Court on or before 15th November, 2011, when the matter will be listed for hearing.

It is made clear that the Trial Court may get the appellants and summoned witnesses, if any, at their instance, produced before it for the purpose of enquiry and investigation into the matter.

With the above observation, the application being CRAN 1876 of 2011 stands disposed of.

Office is directed to forthwith convey this order to the learned Trial Court.

Let photostat plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned counsel for the appellants on usual undertaking.

(J. N. Patel, Chief Justice)

(Ashim Kumar Roy, J.)

4. It appears that thereafter the matter was enquired into by the learned Additional Sessions Judge, 2nd Court, Hooghly and by Order No. 5 dated 11.11.2011 the said learned Court held that Sk. Rehmat Ali and Sk. Maidul Islam were Juveniles on the date of occurrence.

5. In view of the aforesaid facts and circumstances, the Appeal has abated in so far as the Appellant No. 1 is concerned. So far as Appellant Nos. 2 and 3 are concerned, we are not passing any Order on the merits of their Appeal but, we direct that they be tried under the law pertaining to juveniles in accordance with law and none of the observations made in this Judgment will be used by them save and except to argue their case separately on merits and in accordance with law.

6. We are, therefore, left with the Appeal of the Appellant No. 4, Most. Mehrunnisa Bibi which we now deal with in the following paragraphs.

7. The prosecution was initiated on the basis of an F.I.R. lodged/reported on 2.4.1990 at 6.30 A.M. by Sk. Anawar Ali (deceased Appellant No. 1). He alleged that he had three sons and the eldest, being Sk. Johur Islam, aged about 24 years, was unmarried and used to work as a Tailor. For the last couple of years, he had associated himself with "wicked youths" of the neighbourhood and used to consume alcohol, country liquor in large quantities and was involved in other anti-social activities. He further stated that his wife Most. Mehrunnisa Bibi

(Appellant No. 4) and he had tried their best to bring him back to the main stream but to no avail. Yesterday, at about 6.30 P.M., Johur Islam had gone to Chapadanga alongwith one Ashok Chamri of Itamchak village and had returned home at about 9.45 P.M. after having consumed alcohol. He had then lied down to sleep after having had his food. The informant, alongwith his wife and youngest son, Rehmat Ali, also went to sleep in their own rooms, but at 10.30 P.M. an unknown person, acquainted with Johur, arrived and the two (Johur and the unknown person) whispered something to each other and thereafter, he went away. In the meantime, the informant went off to sleep, but at 6 A.M., on the basis of information of the youngsters of the locality, he went to the Srirampur Football Field where he found his son's (Johur Islam's) dead body lying on his back. There were injuries on his right chest, bleeding injuries on his eyes and pounding injuries on his arms His vest was torn and contained marks of burning. His slippers were lying on the field. The villagers arrived whereafter the informant went to the Police and reported the matter.

8. While concluding, the informant repeated that his son used to remain absent from the house and that he used to consume alcohol and stayed elsewhere with his friends and under those circumstances, the informant suspected that Johur's friends had conspired and had murdered him leaving the dead body on the football field.

9. On the basis of the aforementioned report, a Police Case was registered and after investigation, Charge sheet was submitted. During trial, charge was framed against Sk. Anawar Ali, Sk. Maidul Islam, Sk. Rehmat Ali and Most. Mehrunnisa Bibi u/s 302 of the Indian Penal Code charging them that on the night of 1/2.4.1990, they had committed the murder of Johur Islam in the house of Sk. Anawar Ali.

10. The prosecution examined 15 witnesses. The defence examined three witnesses. The most important witnesses are the PWs 1, 2 and 4, because they have been heavily relied upon by the learned Trial Court. The evidence of PW 1 is important to the extent it speaks "of hearing voices". He has stated that he used to sleep in the house of one Jafaruddin @ Jafar, his childhood friend and on the day of the incident, he and Jafar were on the roof. At about 11.30 P.M., he heard Johur Islam crying "bachao, more gelum". He is also said to have heard voices of Anawar (Appellant No. 1) ordering to kill Johur and he also heard voices of the other brothers being the Appellant Nos. 2 and 3 as well as of his mother (Appellant No. 4). The cries of Johur lasted for about 5/7 minutes after which it stopped. He further stated that he did not pay much heed to the cries as it was a routine affair in Anawar's household and such incidents had taken place earlier also. However, on the following morning, when he got up he received information that the dead body of Johur was lying near a "Khal" by the side of the football ground. He further stated that in his presence and in the presence of the villagers, the accused persons had confessed that they had murdered Johur Islam.

11. So far as PW 2 is concerned, he is Jafaruddin, the friend of PW 1 (Dilip Kr. Dutta). He has stated that he and Dilip heard cries of quarrel coming from the house of the accused persons and when they went towards the edge of the roof, he heard Johur crying "more gelum, more gelum". He stated that they also heard someone commanding the other persons to kill Johur. According to him, he was sure that the commanding voice was that of Anawar (father of Johur).

12. PW 4 is Smt. Reba Pramanick who is said to be known to the accused persons. She has stated that on the night of the incident she had heard cries from the house of Anawar Ali. She had woken up her husband and they had both come out of their room. The house of the accused persons was visible and there was a hue and cry inside the house of Anawar. She heard voices of the accused persons as well as the voice of Johur crying out for help.

13. Thus, from the aforementioned evidences, we do not find any ingredient by which the Appellant No. 4 can be said to be involved or that she can be charged for an offence u/s 302 of the IPC except the statement of PW 1 who stated that he "heard" voices of the other two brothers as well as of this Appellant. Merely hearing voices cannot successfully prove that this Appellant is guilty of an offence u/s 302 of the Indian Penal Code. Moreover, the statement of PW 1 to the effect that the accused persons had confessed, was a confession before the Police which is inadmissible in view of Section 25 of Indian Evidence Act, 1872. In this context, reference may be made to the judgment of the Hon''ble Supreme Court in the case of Kashmira Singh Vs. State of Madhya Pradesh, . Another important factor is the evidence of PW 14, S.I. Bimal Kr. Banerjee who was the Investigating Officer of the Case. While stating that Anawar (Appellant No. 1) had confessed that he, alongwith Maidul, had used Sabals to kill the deceased, he had also mentioned that Anawar had led him to his bed room from where two Sabals from beneath his cot had been brought out which he had seized. However, in cross-examination, this Sub-Inspector of Police stated that he had not sent the Sabals for chemical examination.

14. The Hon''ble Supreme Court, in the case of Sk. Yousuf vs. State of W.B. reported in (2011) 4 SCC 331, has held that in a case of circumstantial evidence, the act of not sending the weapon used in the crime for chemical analysis, is fatal, because in such a case, circumstantial evidence may not lead to the only irresistible conclusion that the offender was the perpetrator of the crime and none else and that in the absence of any report of a Serologist as to the presence of human blood on the weapon, may make the conviction of the accused unsustainable.

15. Let it be recorded that learned Trial Judge, while delivering his judgment, had clearly stated that this was a case of circumstantial evidence. Considering the aforementioned facts and circumstances, we find that if, at all, there was a circumstance, the same could not possibly have implicated the Appellant No. 4 for reasons already stated above. Under the circumstances it is evident that the prosecution has miserably failed to establish the charge u/s 302 I.P.C. framed

against Appellant No. 4.

16. So far as Appellant Nos. 2 and 3 are concerned, they will face trial as per the provisions of the Juvenile Justice Act for the reasons stated at the outset. So far as the Appellant No. 1 is concerned, the appeal filed by him has already abated in view of the earlier Order passed by the Division Bench referred to above.

17. Consequently, the Appellant No. 4 is found not guilty and we accordingly acquit her from the charge of Section 302 IPC. She be set at liberty and be released from her bail bond at once.

The Appeal of the Appellant No. 4 stands ALLOWED and the impugned Judgment under Appeal, set aside. There shall be no Order as to Costs. Let a copy of this Judgment and the L.C.R. be sent down to the concerned learned lower Court. Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.

Tapen Sen, J.

I agree.