
(1998) 05 CAL CK 0026

In the Calcutta High Court

Case No : Criminal Appellate Jurisdiction Criminal Appeal No. 15 of 1990

Sona Ghosh (in Jail) and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 12-05-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 323, 324, 34

Citation : (1998) 3 CALLT 450

Hon'ble Judges : Surya Kumar Tiwari, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Mr. Dilip Dutta, Mrs. Amit Talukdar and Ms. Joysree Chakraborty, for the Appellant; Mr. Sudipto Moitra and Mr. U.A. Dewan, for the Respondent

Judgement

K.J. Sengupta, J.—In this appeal the appellants/accused have challenged the judgment and sentence of a conviction passed by the learned Additional , Session Judge, 3rd Court, Krishnanagar, Nadia in Sessions Trial No. V of 1988 arising out of Krishnanagar Police Station case No. 5 dated 15th December. 1983 (G.R. Case No. 2678/83). The appellant No. 1 by the judgment and sentence of the learned Trial Judge has been awarded with life sentence u/s 302 of the I.P.C. and further to pay a fine of Rs. 2000 and in default to undergo rigorous imprisonment for further period of six months. Sudhir Ghosh being the appellant No. 3, Mallick Ghosh being the appellant No. 2 have been awarded with rigorous imprisonment for three years u/s 324 of the I.P.C. The appellant No. 3, viz, Sudhir Ghosh, appellant No. 2. viz., Mallick Ghosh and appellant No. 4, viz.. Ajoy Halder were awarded with rigorous imprisonment for one year u/s 323 of the I.P.C. Both the said sentences under sections 323 and 324 against appellant Nos. 2, 3 and 4 are to run concurrently. The accused/appellants along with other five persons, viz., one Swapan Chakraborty, one Shambhu Sengupta, one Subal Halder, one Ashok Halder. one Basudev Halder were tried jointly in pursuance of the complaint and/or FIR lodged by one Netai Ghosh. PW-1 herein. The case made out in the said FIR lodged by PW-1 is stated hereinbelow:

2. On 15th December, 1983 one Shri Mallick Ghosh, the appellant No. 2 herein being the neighbour of the PW-1 came to his house and started quarrel with his daughter, viz., Sumitra Ghosh being PW-3 herein. While quarreling, the appellant No. 2 herein assaulted PW-3. Such quarrel followed by assault took place because of a goat of PW-1 having strayed into the house of the appellant No. 2 at about 3.00 p.m. on 15th December. 1983. At that point of time neither the PW-1 nor any of his sons was in his house. His son namely Kesto being the victim and Sunil Ghosh, PW-7 on their return to the house at about 6.30 p.m. learnt about the said incident of quarrel and assault to PW-3. Having found Mallick Ghosh being the appellant No.2, the victim called for an explanation from him as to why PW-3 was assaulted. To this, there was an altercation ensued between the said victim and the appellant No.2. Appellant No. 1 while altercation was on, assaulted the said victim. Having seen Kesto being assaulted, Sunil Ghosh being PW-7 brought the victim back home and appellant No. 2 also went back to his house. About half an hour on that day around 7 p.m. when the said victim went to the tubewell situate behind the house of the PW-1 the appellant No.2 along with appellant No.1 Shri Sudhir Ghose, Shri Swapan Charkaborty, Shri Sunil Halder, Shri Sambhu Sengupta, Shri Basudeb Halder. Shri Subal Halder. Shri Ashok Halder, and Shri Ajoy Halder came to the said place of tubewell and they came in a group and started altercation with the said victim. They dragged the said victim from the side of the tubewell towards the banana plantation by the side of the house of the PW-1. Thereafter the appellant- No. 1 first assaulted Kesto being the victim on his head with an iron rod. Thereafter at the instigation of Shri Swapan Chakraborty, the appellant No. 1 Sunil Halder and Ajoy Halder and all others started assaulting the victim with iron rod, bamboo stick, tangi balidhara and other blunt weapons whatever they were having in their hands at that time. The PW-1 and Shri Gour Ghosh being PW-12 and his son Sunil Ghosh, went to save the victim. But PW-1 and the aforesaid persons were also assaulted and they got injured. Thereafter the aforesaid accused persons dragged the victim. Immediately after the said incident, the people of the locality, having found Kesto being the victim, lying in unconscious state took him to Bhajanghat Hospital. The complainant being PW-1 along with aforesaid persons were also taken to Bhajanghat Hospital also. Thereafter the victim was removed from Bhajanghat Hospital to Krishnaganj Hospital. One Sasthi Ghosh. Anand Bag. one Ashwani and one lyuddin, one Manoranjan Halder and one Rabi Ghosh of Bhajanghat took Kesto to Krishnaganj Hospital. After removal of Kesto from Bhajanghat Hospital to Krishnaganj Hospital, PW-1 fell sick. Accordingly he was also removed from the said Bhajanghat Hospital to Krishnaganj Hospital and on the way he became unconscious. After regaining his consciousness on the following morning, PW-1 found himself lying in the house of his elder son at Nawghata. Accordingly, there was a delay in lodging the complaint. The said complaint which was treated as part of the FIR is also exhibited being Exhibit No. I. The aforesaid story had been mentioned in the written complaint. In transpire from the evidence and case of the prosecution that on the date of occurrence of the incident at about 9 o'clock one Bikash Biswash being PW-15 informed the

local police station to the effect that the appellant No. 1 herein had murdered the victim and that information was received by one Biswanath Palit being PW-14. Immediately after the receipt of such information the said PW-14 came to the spot at 10.30 p.m. and started investigation. He prepared a sketch map of the spot and examined PW-3 at the said place. Thereafter he made an inquest report of the victim on 17th December, 1993 at about 8.45 a.m. After making an inquest report the body of the victim was sent to Barrackpore Hospital and there one Dr. Amalendu Das Mahapatra being PW-16, made a post mortem of the body of the victim and this is how the story began.

3. The learned Trial Judge framed the following charges:

On or about 15th December, 1983 you in furtherance of common intention at Bhajanghat within Krishnaganj Police Station did commit murder by intentionally causing death of Krishnapada Ghosh alias Kesto and thereby committed an offence punishable u/s 302/34 of the Indian Penal Code and within my cognizance.

Secondly : That you on or about the same day at same place in furtherance of common intention voluntarily caused hurt to Netai Ghosh by instrument of cutting and thereby committed an offence punishable u/s 324/34 of the I.P.C. read with section 34.

Thirdly : That on or about the same day at the same place in furtherance of common intention voluntarily caused to Sunil by instrument of cutting and thereby committed an offence punishable u/s 324/34 of the Indian Penal Code and within my cognizance.

Fourthly : That you on or about the same day at the same place in furtherance of common intention voluntarily caused hurt to Gour Ghosh and thereby committed offence punishable u/s 323/34 of I.P.C. and within my cognizance.

4. In order to prove the charges as above, the prosecution has examined as many as 17 witnesses whereas defence examined one witness. Out of the 17 witnesses, there are as many as alleged 9 eye-witnesses, viz., PW-1, PW-2, PW-3, PW-5, PW-6, PW-7, PW-10, PW-11, and PW-12. After analysing evidence and considering evidence of defence the learned Trial Judge has found that appellant No. 1 is guilty for committing murder of the said victim. The appellants Nos. 2, 3 and 4 were found guilty for committing offence voluntarily causing hurt to the said victim and PW-1, PW-7 and PW-12. The other persons, viz., Swapan, Sambu, Ashok, Subal, Basudeb were found not guilty as the case has been proved against them.

5. Mr. Dilip Kumar Dutt, senior advocate appearing with Mr. Amit Talukdar, advocate and Mrs. Jayshree Chakraborty submits that the judgment and sentence of the learned Trial Judge is liable to be set aside on the basis of the evidence and materials on record, no reasonably prudent man can come to such

findings. The learned Trial Judge ought not to have believed and accepted the evidence of any of the witnesses of the prosecution since their evidence are contradicting to each other. He submits that there is material to support that neither of the appellants particularly the appellant No. 1 had inflicted any injury or committed murder of the victim. It will appear from the evidence of the prosecution itself that nothing has been proved beyond doubt as to place of occurrence. The version of the PW-2 and PW-3 is that the victim was assaulted with iron rod at the place where tubewell situate whereas PW-1 says the victim was assaulted and inflicted with injury with iron rod at different place. It is significant to mention that none of the witnesses excepting PW-3 was examined u/s 161 of the Criminal Procedure Code by the investigating Officer. The post mortem report suggests that victim sustained one injury on head and no other injury was found on the body of the victim and this itself demolishes the case made out in the FIR/complaint lodged by PW-1. It will appear from the evidence of investigating Officer being PW-I4 that no attempt was made to recover the blood-stained earth and controlling earth from the place of occurrence. No attempt was made to seize any vital thing namely wearing apparels of the victim. Even no statement u/s 161 of the Cr. P.C. from any of the witness was taken. This omission is a very serious and vital and it amounts to contradiction to the evidence. It will appear from the evidence of the said I.O. PW-14 that the alleged statement of other witnesses excepting PW-3 was fabricated and false certificate was given by i.O. himself. It will further appear from the evidence of the said i.O. that in fact there was an altercation between two groups and it is not sure how and from whom the victim got fatal injury. There was a counter case arising out of the same incident and based on FIR lodged by the appellant No. 1 which had been registered in the same police station being case No. 6 of 1983. From the evidence of the i.O. It will further appear that the accused persons sustained injury and were treated at the same time with the PW-1 in presence of investigating Officer.

6. Mr. Dutt further submits that in fact all the ingredients of section 302 and for that matter the charges of homicide has not been proved beyond doubt.

7. The learned Trial Judge ought to have considered the counter FIR lodged by appellant No.1 in connection with the same incident. In pursuance of the said FIR another criminal case was being tried, heard and the judgment thereof was awaiting. So without considering the counter case the learned trial Judge ought not to have held the appellant guilty and passed sentence.

8. Mr. Sudipto Moitra appearing for the prosecution submits that there are as many as 9 eye-witnesses, viz., PW-1, PW-2, PW-3, PW-5, PW-6, PW-7, PW-10, PW-11, and PW-12 who have deposed before the learned Trial Judge that accused/appellant No. 1 had inflicted fatal injury upon the victim with iron rod. They have deposed further that before such fatal injury was inflicted there was altercation between the two groups viz., appellants group on the one hand and the group consisting of PW-1, PW-5, PW-7 and the victim on the other hand. He

further submits that mere omission in making statement before the police u/s 161 by any of the witness does not render their evidence unbelievable. It has also been proved by the persons, viz., PW-1 who sustained injury inflicted by the appellants. He submits ones who sustained injury are the best persons to prove the case. Accordingly this has been done in this case also. It is true that excepting from PW-3 no statement was obtained from any other witness by the investigating Officer. It is the failure on part of the investigating Officer and because of this failure the prosecution case cannot be rendered to be invalidated or vitiated. It would appear from the evidence of the autopsy surgeon being PW-16 that the death of the victim, Kesto was due to that sole injury inflicted by hard, blunt substance like iron rod. He has further provided that the death was due to the shock and haemorrhage owing to such injury. Mr. Moitra further submits that no plea of self-defence has been put forward here. So, the initiation of the counter criminal case as against the victim as well as the prosecution witness by the appellant No. 1 is not at all relevant and is not required to be taken into consideration. Each of the case has to be adjudged and/or decided on its own merit. Mere discrepancy and/or little contradiction with regard to the place of the occurrence is not at all fatal in this case when all the witnesses have proved that appellant/accused hit with the iron rod on the head of the deceased. So the prosecution has been able to prove the case beyond all doubt.

9. We have heard the respective submissions of the learned lawyers. In order to decide as to whether the learned Trial Judge was correct and/ or justified in awarding sentence of life imprisonment against the appellant/ accused No. 1 and sentence of three years rigorous imprisonment against the other appellant Nos. 2 and 3 u/s 324 of I.P.C. and sentence of one year imprisonment against the appellant Nos. 2, 3 and 4 u/s 123 of Indian Penal Code. We are to examine and analyse the evidence.

10. The case has been initiated on the basis of the complaint lodged by the PW-1, the father of the victim. In the complaint in writing in Bengali it is stated amongst other that when Kesto being the victim at about 7 o'clock at night went to the tubewell behind his house. Shri Mallick Ghosh, Sona Ghosh, Sudhir Ghosh, Swapan Chakraborty, Sunil Halder, Sambhu Sengupta, Basudev Halder, Subal Halder, Ashok Halder and Shri Ajoy Halder forming a group came to Kesto and started altercation with him and from the place of tubewell Kesto was taken by all of them to banana groves, in banana groves the appellant/accused No. 1 at first started assaulted victim on his head with an iron rod. At the instance of Swapan Chakraborty, the appellant/accused No. 1. Sunil Halder, Ashok Halder and Ajoy Halder started assaulting victim with all the arms namely sticks, balidhara, tangi. The PW-1 being father of the victim and his brother Gour Ghosh, PW-12 his another son Sunil Ghosh being PW-7 having seen this incident rushed to protect Kesto, but the aforesaid persons assaulted them also and as a result whereof they were injured and fell on the ground. Thereafter Kesto was dragged a little farther by aforesaid persons. Little thereafter the neighbours having found victim lying unconscious took him to Bhajanghat Hospital. PW-1

along with his son, Sunil Ghosh and his brother Gour Ghosh were also taken to hospital.

11. It will appear from the contents of this complaint lodged by PW-1 on 16th December, 1983 being the following day of date of occurrence do not reveal that the victim was killed and/or murdered by appellant No. 1 and his group. Ex-facie only case made out is to the effect that the victim and the PW-1 and PW-7 were assaulted by appellants and his companions and they sustained grievous injuries and also that due to such injury the said victim fell unconscious and was taken to hospital. It is significant to mention that this complaint was lodged nearly 24 hours after the incident. It appears from evidence that one officer of local police station being PW-14 started investigation in pursuance of telephonic message given by Pradhan of the Gram Panchayat at 9 o'clock at night. The message given over telephone speaks of commission of murder by the appellant/accused No. 1 with his associates. It appears from evidence of PW-14 that in pursuance of such complaint, he immediately went to the locale and/or place of occurrence. He however, did not examine nor obtained any statement u/s 161 of the Criminal Procedure Code from any of the witnesses excepting PW-3. It is an admitted position that no- blood-stained earth or controlling earth from the place of occurrence was collected. The I.O. did not seize wearing apparels of the deceased or of the wearing apparels of PW-1. In Exhibit-I being the complaint made by PW-1 suggests that the victim was assaulted not only by Sona but by other persons with other weapons also. This also suggests that the victim sustained more than one injury on his person. In the evidence of autopsy surgeon as well as the post mortem report it will appear that the deceased victim had sustained only one injury on head. So the case made out in the complaint of PW-1 being Exh. 1 that all other associates along with appellant No. 1 assaulted victim is falsified. Therefore, the case made out by the PW-1 in Exhibit-I is not at all acceptable.

12. It will appear from the evidences of the so-called eye-witnesses that there are serious contradictions as regards the place of occurrence and also participation of some eye-witnesses for protection of Kesto and further resistance against assault and attack. P.W.1 being the complainant in his evidence categorically stated that the alleged incident of inflicting injury and assaulting with iron rod by Sona Ghosh upon Kesto is within his house. P.W.10, Ananda Bag stated alleged incident took place at the house of Kesto. Whereas PW-2, PW-3, PW-6, PW-7, PW-11, PW-12 have stated that deceased Kesto was assaulted by Sona with iron rod near tubewell situates outside the house of the P.W.1. P.W.2 has not stated about the dragging of deceased Kesto into banana grove whereas the other witnesses being PWs 1 and 12 have stated that Sona and his associates after inflicting injury dragged Kesto into banana grove. It appears from the evidence of PW-14 being investigation Officer that he found the place of occurrence at open field within the area of the house of PW-1. PW-1, PW-7 and PW-12 have stated about assault and inflicting injury by the appellant and his group and they fell down on the ground and were lying unconscious. But the

other eye-witnesses being PW-2. PW-5 have stated that they have not found either Sunil or PW-1 or Gour. PW-3 and PW-10 have not whispered about the presence or absence of PW-1, PW-7, PW-12. They have stated that at the time or place of occurrence there was professed bleeding in the courtyard, and PW-6, PW-7 have also stated that there was profuse splashing of blood near the tubewell. It is significant to mention that PW-14 being the investigating Officer did not find any blood stained earth at any place. PW-2, PW-3, PW-4, PW-12 did not speak about bleeding or blood stained earth. PW-4 has stated that the deceased Kesto was taken to Bhajanghat Hospital first. Since no doctor was available there, they shifted him to Krishnaganj Primary Health Centre. This evidence is falsified by the evidence of PW-9 being the doctor who stated in his evidence that he was on that day at 8.10 p.m. present at Bhajanghat Hospital and that he treated PW-1 and PW-7. PW-4 took deceased Kesto to Krishnaganj Primary Health Centre and there the doctor declared him dead. PW-6 Naren Halder has categorically stated that at 10.30 p.m. Kesto was declared dead by the doctor at Krishnaganj Primary Health Centre. Therefore, it would appear from the evidence that even before Kesto was declared dead the Prodhhan being PW-15 at about 8.45 p.m or 9 p.m. Informed the Officer-in-Charge of the Krishnaganj Policed Station that Kesto had been murdered by Sona Ghosh. Admittedly PW-5 did not go to Hospital and he could not get information of death before 10.30 p.m. It further appears from the evidence that there was another complaint lodged by Sona Ghosh being the appellant as against the deceased victim and his father, uncle and his brother Sunil about assaulting and/or attempt to assault and raiding of their houses. This information was given at 8.45 p.m, on 15th December, 1983. Thereafter the investigating Officer, on receipt of the complaint of Bikash Biswas being Prodhhan (PW-15) went to the said village. It appears from evidence that he was informed there that deceased Kesto had been admitted to hospital. Even at that place he was not informed by any person that the said deceased had expired. On the following day he went to the said Primary Health Centre at Krishnaganj and found Sona Ghosh and his associates were being treated by the doctor as they had sustained injuries. Investigating Officer has admitted categorically that there were two separate incidents of assault and counter assault mutually inflicted by both the groups. He further admitted the place of occurrence is same. Though Sona Ghosh and his associates were the named accused and/or culprits of murdering Kesto they were not even arrested till 17th December, 1983. It is surprising that even after this ghastly incident the PW-1 took so much time to lodge formal complaint. In the complaint even PW-1 has not made out a case for murder of his son by either of the appellants. The PW-1 in his complaint being Exhtbit-I, stated that Kesto was dragged by the appellants from tubewell near his house and taken to banana groves by the side of his house and there Kesto was hit with iron rod. But in the trial court he stated that Kesto was hit in the courtyard of his house. In the record we do not find the sketch map but we find reference of sketch map in the evidence of PW-16 being exhibit it. We have seen the index of the sketch map. From the index of sketch map we do not find that any incident took place in banana grove.

13. On the discussion of the aforesaid fact it is absolutely crystal clear that it is wholly unsafe to believe any of the version of any of the witnesses produced by the prosecution. It is surprising that most of the eyewitnesses are either of close relations or they are member of the same political party. Some of the witnesses have stated that a large number of local inhabitants were present at the place of occurrence and some of the witnesses have stated that none was present. None of the local inhabitants was examined by the I.O. nor in court. It is astonishing that so many alleged eye-witnesses despite having seen Kesto being inflicted with injury or assaulted did not make any attempt to resist to save Kesto nor the appellants were chased. This inaction is totally contrary to normal human conduct. But fact remains none of the nearest neighbour was called as a witness nor even investigating Officer made any attempt to interrogate the local neighbours. This is very surprising. It is further surprising that the investigating Officer did not collect very vital materials, viz., wearing apparels of the deceased who admittedly on the date of occurrence was wearing "lungi" and "shirt". It is further surprising that the blood stained cloth of Sunil, Gour and Netai were not seized nor collected by the investigating Officer. These omissions are very serious and fatal. This gives serious cloud if not doubt to the version of the prosecution. In the circumstances we are of the view that defence have been able to raise serious doubt and/or cloud as to the version of the prosecution. These doubts have been dispelled by cogent evidence or explanation.

14. The learned Trial Judge has committed serious mistake in law ignoring the above doubt/ suspicion. He has taken into consideration the sum and substance of evidence of the prosecution witness, individually in isolation of the evidence of other prosecution witnesses. It was the duty of the learned Trial Judge to compare and read the evidence Juxtaposition of all the eye-witnesses as to the date, time and place of occurrence. The learned Trial Judge should have read with the evidence of all the witnesses altogether in order to ascertain the circumstances and/or probability and/or improbability and further truthfulness of their version of the case. Unfortunately, the learned Trial Judge has not done so. There is further mistake on the part of the learned Trial Judge i.e. when there was counter case in connection with the same incident and admittedly at the same place of occurrence both the cases should have been heard separately but decided on the same day. The learned Trial Judge has also overlooked the decision cited by the defence on misconception of law. It is settled law that the latest decision of the court over-rides and/or overrules the earlier decision of the same court. If the earlier decision of any High Court or Supreme Court was rendered by a larger Bench than that of the later one then the former prevails. It appears the decision cited by the defence was not rendered by smaller Bench. Therefore, the learned Trial Judge ought not have brushed aside the impact and ratio of the decision cited by the defence.

15. On the facts and circumstances we allow the appeal and set aside the conviction and sentence passed by the learned Trial Judge. The appellants are acquitted of the charge u/s 302 I.P.C. Appellant No. 1 be set at liberty forthwith,

if not required to be detained in connection with and other case. Appellants 2 to 4 are already on bail. Their bail and bonds are discharged.

S.K. Tiwari, J.

16. I agree.

17. Appeal allowed