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**(2012) 08 CAL CK 0105**  
**In the Calcutta High Court**  
**Case No : C.R.A. No. 343 of 2010**

Sourav Ghosh and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

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**Date of Decision :** 10-08-2012

**Acts Referred:**

Evidence Act, 1872 — Section 154

Penal Code, 1860 (IPC) — Section 307, 324, 326, 34, 427

**Citation :** (2012) 08 CAL CK 0105

**Hon'ble Judges :** Kanchan Chakraborty, J

**Bench :** Single Bench

**Advocate :** Y.Z. Dastoor and Mr. Prabir Majumdar, for the Appellant; Sabir Ahmed, for the Respondent

**Final Decision :** Allowed

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## Judgement

Kanchan Chakraborty, J

1. This appeal is directed against the judgement and order dated 21.4.2010 passed by the learned Additional Sessions Judge, Fast Track Court no. IV, Krishnagore, Nadia in Sessions Trial case no. V(II) 2008 arising out of S.C. 25(9) 2008, thereby convicting the appellants Sourav Ghosh and Ranjit Ghosh for committing offences under Sections 324/34 and Sections 427/34 of the Indian Penal code and sentencing them to suffer rigorous imprisonment for 2 years and 1 year, respectively, with fine. This judgement has been challenged on the following grounds:

- a) that the learned Court failed to appreciate the evidence on record in his true and proper perspective;
- b) that the learned Court failed to take into note that no injury on the chest of the injured Prithish Chandra was detected by the Doctor on medical examination;
- c) that the learned Court was oblivious of the fact that the incident was reported by the patient Prithish Chandra to the Doctor as road accident case;

- d) that the learned Court failed to take note of the fact that the seizure of the motor cycle and dragger was done on 20.9.2007 at 16.14 hours, i.e., long after the incident, according to the seizure list (Ex. 2) but in view of the statement of the P.W. 4, the seized motor bike was handed over to the P.W. 4 by the police officer on 19.9.2007 at mid night;
- e) that the learned Court did not put any importance on the fact that dragger which was allegedly seized from the open road side was a rusted dragger having no blood stain on it;
- f) that the learned Court believe the testimony of injured Pritish Chandra sacroscant as to the identity of the assailant which was not safe and sufficient enough for recording conviction of the appellants;
- g) that the learned Court failed to consider the evidence of P.W. 7 Midul Saha who stated in Court that there was a road accident wherein Pritish Chandra (P.W. 1) sustained injuries;
- h) that the learned court failed to take into consideration that the P.W. 9, P.W. 7 and P.W. 5 were declared hostile while P.W. 11 and P.W. 7 described the incident as road accident and the P.W. 3 could say the name of the assailant;
- i) that the learned Court did not take into consideration about the delay in lodging the F.I.R. and the discrepancies in the date and time of the lodging the F.I.R. and delay in sending the F.I.R. in the Court; and
- j) that the judgement being otherwise bad in law, is not sustainable.

2. Succinctly, the case before the learned Trial Court is stated below. Rabindra Nath Chanda, P.W. 2 lodged one F.I.R. with Kotiwali police station Krishnanagore, Nadia on 20.9.2007 at 7.20 hours alleging therein that on 19.9.2007 at about 10 P.M. while his son Pritish Chandra (P.W. 1) was coming by riding on a motor bike, was attacked by few persons riding on another bi cycle with ram da, dragger, tangi etc. from behind when he crossed Garia petrol pump. Pritish Chanda fell from his motor bike. The assailants caused injury on his head and on various parts on his body by sharp cutting weapon with a motive to kill him. His son could recognize the assailants as Sourav Ghosh and Ranjit Ghosh (Appellant herein). When the local people arrived on the spot they fled away. Before they leave the place, they set the motor bike of Pritish on fire and as a result, the motor bike was completely damaged. The local people admitted injured Pritish Chandra in Saktinagar Hospital in bleeding and serious condition. When Pritish felt little bit better in hospital he told Rabindra Nath Chandra (father) that Sourav Ghosh hit him on his head with ram da and Ranjit Ghosh hit on his hand with dragger. On the basis of said F.I.R. Kotiwali police station case no. 378 of 2007 dated 20.9.2007 was started against these two appellants u/s 326/307/427/34 and 435 of IPC. The appellants were arrayed to face charges under Sections 326, 307 and 427/34 of IPC to which they pleaded not guilty and, as a result, the trial commenced. In course of trial, prosecution examined as many as 12 witnesses.

The seizure list, signature thereon, the F.I.R., bed head ticket of hospital, rough sketch map of Place of occurrence were admitted into evidence and marked exhibit on behalf of the prosecution. The motor cycle and the knife were also marked material exhibit 1 and 2 on behalf of the prosecution. No witness was examined on behalf of the appellant in course of trial. Upon consideration of the evidence on record, the learned Trial Court came to a conclusion that the prosecution brought home the charges u/s 324 and 427/34 of IPC and accordingly, recorded their conviction and sentence which is impugned in this appeal on the grounds already stated.

3. Mr. Dastoor Learned Counsel on behalf of the appellant started his submission right from the F.I.R. He contended that the incident alleged had taken place on 19.9.2007 at about 10 P.M. The F.I.R. was lodged on 20.9.2007 at 07.20 hours. There was inordinate delay in lodging the F.I.R. and no explanation whatsoever, has been given in the F.I.R. for such a delay in lodging the F.I.R. He further contended that the F.I.R. was sent to the Court of the learned Magistrate on 21.9.2007 although it was received on 20.9.2007 at 07.20 hours. This delay in sending F.I.R. was not also explained by the prosecution. He has taken this Court to the evidence of the injured who was examined as P.W. 1. The P.W. 1 Pritish Chandra stated in his cross-examination that police interrogated him in the said night i.e. 19.9.2007 at Saktinagore Hospital. Mr. Dastoor has also taken this Court to the evidence of P.W. 2 Rabindra Nath Chandra, the lodger of the F.I.R. who stated in his cross-examination that he met the police in connection with the incident for the first time in hospital at the same night perhaps at about 00.30 A.M. Police wrote down something after hearing the incident from him. The P.W. 2 stated further that on receiving information from his son over phone, he contacted police of Kotwali police station through telephone. He further stated that the written complaint was prepared at police station at about 01.00 hours and at that time Ranabir (P.W. 3), Mridul (P.W. 7) were with him at the police station. P.W. 3 Ranabir stated in his cross-examination that police interrogated him on the said night and the P.W. 7 has also stated in his cross-examination that he was examined by the police on the very night of the incident. Mr. Dostoor contended that according to the statements of the P.W 2,3 and 7, the information to the police was given at the very night the incident had taken place and interrogation was made by police on that very night and the F.I.R. was written in the police station at about 01.00 hours on the next morning. If so, how the F.I.R. i.e. exhibit 1 was received by the police station on 20.9.2007 at 07.20 hours? The endorsement of the exhibit 1 to that effect which was marked exhibit 1/2 makes it clear that the F.I.R. about the incident was received at 07.20 hours on 20.9.07. There is no explanation on the prosecution side as to why and how such thing could happen. Besides that the formal F.I.R. which is marked exhibit 3 clearly indicates that the F.I.R. was sent to the Court on the next date although the entire date i.e. 20.9.2007 was open to Kotwali police station to forward the F.I.R. This anomalies in the prosecution are fatal to the prosecution case.

4. Mr. Dastoor next contended that the Doctor Sudeb Biswas (P.W. 11) who

examined injured Pritish Chandra on 19.9.2007 at emergency department of Saktinagar Hospital stated that Pritish Chandra was admitted with history of road traffic accident. The Exhibit 4 series also disclosed that Pritish Chandra was admitted with 3 injuries with a history of road traffic accident. The Doctor was not declared hostile by the prosecution and was not cross-examination by the prosecution u/s 154 of the Evidence Act. Therefore, whatever the Doctor, (P.W. 11) stated in Court was accepted by the prosecution. So, in that case, there is a serious doubt as to whether it was a case of road traffic accident or assault.

5. Mr. Dastoor contended further that the P.W. 1 stated categorically that appellant Sourav hurt him on his chest with a bojali. P.W. 1 Pritish Chandra had shown that cut injury mark on his chest to the Court while deposing. The P.W. 2 has stated also that he saw serious cut injury on the chest, left hand and scalp of Pritish Chandra. The P.W. 6 stated also that he found profuse bleeding from the wounds of Pritish on his head, chest, hand and many other parts of his body. But neither the injury report/bed head ticket (Exhibit 4 series) discloses or the Doctor (P.W. 11) has stated that an injury on chest was detected on examination of Pritish on 19.9.2007. There was cut injuries over scalp, wrist and left forearm. No other injury was detected. If so, Mr. Dastoor contended, how the injury on the chest was sustained by the injured but not detected by the Doctor.

6. Mr. Dastoor contended further that the seizure list which was marked Exhibit 2/3 was prepared on 20.9.2007 at 16.15 hours. This goes to suggest that from 10 P.M. on 19.9.2007 the motor cycle as well as the dragger were lying on open road side of the National High Way, 34. He has taken this Court to the evidence of P.W. 4, a night guard of the tin factory situated by the side of National High way, 34. The P.W. 4 stated that on 19.9.2007, in the mid night police party came to the go down and knocked at the door. He opened the door and the police official of Kotwali police station asked him to detain a motor bike in the godown and obtained his signature on a paper for keeping the motor bike. He put the signature on a blank paper which he identified in Court (exhibit 2). Although the P.W. 4 was declared hostile by the prosecution, Mr. Dastoor contended that the fact stated by him that police official of Kotwali police kept a motor cycle in the godown of tin factory in the mid night of 19.9.2007 remained unshakened. The signature i.e. exhibit 2 was proved to have been taken on the seizure list in the mid night of 19.9.2007. This contradiction of fact, according to Mr. Dastoor, is not only serious but strikes at the very root of the prosecution case.

7. Mr. Dastoor stated that amongst the witnesses the P.W. 9 Sanjay Saha, one of the friends of Pritish who received information over telephone and had been to the hospital to see Pritish, stated that Pritish did not say anything to him about the incident alleged. The P.W. 8 Raghu Nath Biswas stated that he received a phone call from Pritish who requested him to come to the spot as he was assaulted. He arrived there and found two local boys on the spot. He arranged for sending Pritish to hospital with a rickshaw with two local boys. Pritish told him that somebody else assaulted him. P.W. 8 failed to recollect the names of

assailant as they were unknown to him. That statement of P.W. 8 was controverted in cross-examination by the prosecution because he made a statement to the police that Pritish identified the appellants as assailants with the help of flash light of other vehicles. P.W. 7 Mridul who, according to the prosecution case, appeared in the scene first of all, stated that he received a telephone call from Pritish and came to know from the said call that there was an accident. He found Pritish lying on the spot in bleeding condition. He picked him up on a rickshaw and headed for the hospital. He was declared hostile by the prosecution. He denied that he stated police that Pritish told him that he was attacked with sharp cutting weapon by appellant Sourav and Ranjit. The two local boys who appeared on the spot as stated by P.W. 8 and as stated in the F.I.R. were not examined. The P.W. 5 stated that he neither knew Pritish Chandra nor the appellant. He denied that he knew about the incident. P.W. 3 Ranabir Sen who, according to the P.W. 2 had been to Pal Para while Pritish was being taken towards hospital by a rickshaw van and had been to the police station at 01.00 hours on 20.9.2007, stated that Pritish named the assailants who caused injury on him but he could not recall the names of the assailant. He stated also that Pritish told him the miscreants tried to set him on fire by pouring oil and destroyed the motor bike. The P.W. 2, the father of Pritish also stated that Pritish told him that the appellants poured oil on his body and the motor bike but somehow he escaped but the motor bike was set on fire. Mr. Dastoor contended that there are gross discrepancies in the evidence of the witnesses on all these material factual aspects and have made the prosecution case not at all believable one. The motor bike which was seized was not at all completely damaged. The seizure list (Ex. 2/3) indicates clearly that only some portion of the frontal side of the motor bike was found in burnt condition. No wearing apparel of the injured was seized to ascertain whether oil was poured on the body of the injured as stated by him, his father and the P.W. 3. Mr. Dastoor contended that all these facts were after thought and for that reason there are discrepancies regarding date and time of lodging of F.I.R., time of interrogation and delay in sending the F.I.R to the Magistrate. The injury on the chest was never received by the P.W. 1. The motor cycle and the dragger were seized from the open place after a consideration period of time. The seizure list shows the dragger was old one having rust and there was no stain of blood. He contended further that the injured was discharged from the hospital within two days although the prosecution claimed that the injured was hospitalized for 4 days.

8. Mr. Dastoor contended that according to P.W. 1 he was first assaulted from behind on his head with a sharp cutting weapon. As a result, he fell on the ground from his motor cycle. Thereafter, he was assaulted on his chest, forearm, wrist with dragger. He could identify the appellants as assailants by the lights of passing vehicles. Mr. Dastoor questioned, was that possible for a man to identify his assailants in such a condition within a fraction of time by the lights of passing vehicles? Mr. Dastoor concluded his submission that taking everything into consideration, the Court should have given the appellants benefit of doubts.

9. Mr. Sabir Ahmed, Learned Counsel on behalf of the State of West Bengal contended that the injured informed about assault on him over phone to his father and friends and when they taken him to hospital, he mentioned the names of the appellants as his assailants. That fact has been established by sufficient and satisfactory evidence. There might be some discrepancies in the evidence of witnesses and there may be some latches on the part of investigating agency, those are not sufficient enough to demolish the prosecution case that the appellants assaulted Pritish Chandra on that particular night at particular time and particular place. Those discrepancies are natural and the learned Trial Court rightly ignored those discrepancies. He contended further that the history of road traffic accident was completely imaginary on the part of the Doctor. Nowhere it is stated who informed him that it was a road accident case. Therefore, he contended that the judgment impugned is not required to interfered in this appeal.

10. At the bar, the following decisions have been referred to :

- i) Ramnarayan Singh Vs. State of Punjab - (1975) 4 SCC 497.
- ii) Balaka Singh & Ors. Vs. State of Punjab - (1975) SCC (Cri)601.
- iii) Iswar Singh Vs. State of U.P. - (1976) 4 SCC 355.
- iv) Lasmi Singh & Ors. Vs. State of Bihar (1976) 4 SCC 394.
- v) KoraGhasi Vs. State of Orrisa (1983) 2 SCC 251 and

11. On careful appraisal of the judgement impugned it appears that the learned Court while discussing of evidence of P.W. 1 Pritish Chandra, ignored completely the fact that he stated categorically that the assailants poured oil on his body and tried to set him on fire. It also appears that the learned Court ignored the evidence of P.W. 1 that he was hit by chopper on his chest which he had shown to the Court in course of trial.

12. In a case of like nature, the injured is the best witness as there was no eye witness of the incident. Naturally, what was stated by him in course of trial is very important. It is clear from the materials on record that the injured did not inform anything to police after the incident or soon thereafter. In course of his examination as P.W. 1 he stated that while he was going back to his house by riding on his motor bike, he was hit by some miscreants from behind on his head. He fell from the motor bike on the road side. Thereafter, the assailants hit him with draggers on different parts of his body and on his chest. The fact that he was hit on his chest and sustained severe cut injury on chest was supported by his father the P.W. 2. The P.W. 1 had shown that injury on his chest to the Learned Judge in open Court. Astonishingly enough, the injury report i.e. exhibit 4 series does not support that statement of the P.W. 1. More astonishing factor is that the learned Trial Court did not spare a single word to that effect in the impugned judgement on this issue.

13. The P.W. 1 as well as P.W. 2 stated categorically that the assailant poured oil on the body of P.W. 1. But the wearing apparels of the P.W. 1 was not seized by the police. The witnesses examined on behalf of the prosecution state did not state that the wearing apparel of the injured was soaked with oil. The Doctor P.W. 11 had not also stated that he got smell of oil on the body of P.W. 1. Astonishing fact is that the learned Court did not spare a single word on this issue also.

14. According to the prosecution case, Mridul appeared in the scene first of all. Mridul, the P.W. 7 has stated that he was informed by the P.W. 1 over phone that the P.W. 1 sustained injury on the National High Way due to accident. He stated that fact categorically and the learned Court, however, explained the said statement in a different manner. The statement of P.W. 7 was supported by the Doctor (P.W. 11) who examined the P.W. 1 soon after the incident. He stated that the patient was admitted on 19.9.2007 with history of road traffic accident. The Doctor was not declared hostile by the prosecution. He did not support the prosecution case regarding the injury on the chest and the incident of assault. But he was not declared hostile by the prosecution and was not cross-examined u/s 154 of the Evidence Act. The Evidence of P.W. 11, therefore, has to be accepted. Therefore, we find two paralal sets of fact. One set of fact is that the P.W. 1 sustained injury due to assault and another set of fact indicates that he received injury due to road traffic accident. The learned Trial Court explained the situation in a very hypothetical way by stating that superficial injury are not excepted in a road accident without any abrasion. The learned Trial Court at page 7 in the judgement stated, "but this surgeon in his evidence stated that all the injury were superficial in nature and deep cut injury in his wrist and chest which speaks that generally in road traffic accident, superficial injury are not excepted and in a road traffic accident the abrasion are likely excepted but in this case there is no abrasion in the body of the injured". I have carefully scanned the evidence of P.W. 11 but failed to find out any such statement made by him in course of his examination. The view taken by the Court was his own creation and without support of any medical evidence. The Doctor (P.W. 11) while examined in Court was not asked by the prosecution whether the dragger i.e. material exhibit (ii) could at all cause such type of injuries which were detected by him. The dragger was not shown to him. We find from the seizure list i.e. exhibit 2/3 that the dragger was old one having rust on it. Nowhere within four corners of the seizure list it has been mentioned that there was stain of blood on the dragger. The learned Trial Court did not take note of all these factors, at all, into consideration. Therefore, the possibility that the injuries sustained by the P.W. 1 were due to a road accident cannot possibly be ignored.

15. The learned Trial Court did not consider the discrepancies in the date and time of seizure of motor bike and the dragger from the spot. If we believe the statement of P.W. 4, then it is to be accepted that the seizure of motor bike was done on 19.9.2007 in the mid night. There was no reason to disbelieve the statement of P.W. 4 although he was declared hostile by the prosecution. There

was no reason for the P.W. 4 to say that the police official of Kotiwali police station came to his godown in the midnight of 19.9.2007 and asked him to keep a motor bike in the godown and obtained his signature on a paper. There was no discussion over the issue by the learned Trial Court.

16. According to all the witnesses examined on behalf of the prosecution, the police official of Kotwali police station came to the hospital immediately after receiving the information of the incident and interrogated them. Even the P.W. 2, the lodger of the F.I.R. stated categorically that he was examined by the police in the hospital and his statement was reduced in writing by the police. Almost all the witnesses has also stated categorically that they along with police went to the place of occurrence directly from the hospital and the motor bike and a dragger was seized under a seizure list. The seizure list i.e. Exhibit 2/3 shows a completely different story. According to it, the motor bike and the dragger were seized on 20.9.2007 at 4.15 P.M. This fact is not matching with the prosecution case in any way. Again, the motor cycle and the dragger if seized at 4.15 P.M. on the next day, it is to be accepted that those were lying on open road for about 18 hours untouched and unnoticed. This fact really creates doubt as to the factum of seizure of the motor bike and dragger in the manner it has been mentioned in the seizure list. The learned Court described these discrepancies as trivial in nature and ignored the same being oblivious of the paralal story of accident.

17. From the evidence of P.W. 7 and others it is found that two local boys came to the place of occurrence and took the injured on a rickshaw van for hospitalization when Mridul (P.W. 7) appeared in the scene. Those two local boys were not examined by the prosecution.

18. Again, there was a mystery as to lodging of the F.I.R. If the statement of P.W. 2 is believed, the Kotwali police station was informed about the incident by the P.W. 2 soon after he received the phone call from his son P.W. 1. It is already found that police official came to the hospital and interrogated the witnesses in hospital. It is also found that the statement of P.W. 2 was reduced in writing by police in the hospital. According to the P.W. 2 and other witnesses, the F.I.R. was prepared in the police station at 01.00 hours. The exhibit 1/2 shows that F.I.R. was received at 7.20 hours on 20.9.2007. It is not understood how it could happened. The learned Court ignored this fact by describing this as trivial discrepancies. The learned Court did not also taken into consideration that although the police received the information at 7.20 hours on 20.9.2007, the F.I.R. was despatched to the Magistrate on 20.9.2007. The delay was not explained. In this context, the decision of Apex Court in Balaka Singh and others (Supra) can well be referred to. It creates a doubt specially in the background that there was gross discrepancies in the matter of time and date of filling of the F.I.R. It is true that the prosecution failed to establish that there was inimical relation between the P.W. 1 and the appellants but keeping in mind the second story of road traffic accident, it can be said that the discrepancies in the matter of time and date of filing of F.I.R and the delay in dispatching the F.I.R. to the



Court obviously have cast shadow of doubt on the prosecution case.

19. Learned court put much stress on the seizure of motor bike and dragger from the spot. But, the learned Court was oblivious of the fact that those were recovered from an open place accessible to all. The evidence regarding seizure and time of seizure is found contradictory in this case. In such a situation, the learned Court should not have given much weight on recovery of crime articles from an open place accessible to all. In this connection, the decision of Hon''ble Apex Court in Khoraghshi (Supra) can well be referred to.

20. In Iswar Singh (Supra) the Hon''ble Court opined that when medical witness was not shown the weapon to enable him to connect the injury found on the injured with one of the weapons, is fatal to the prosecution. In the instant case, there is paralal story of rad traffic accident. No injury on chest, although shown to the learned Trial Judge in open Court, was detected by the Doctor (P.W. 11). The seized dragger was not shown to the P.W. 11 to enable him to connect the injury found on the body of the P.W. 1 with the said seized dragger (material exhibit ii). This is obviously fatal to the prosecution case which was completely ignored by the learned Trial Court. Again, nowhere it has been stated that the dragger seized from the place of occurrence was having stain of blood. This fact was completely forgotten by the learned Trial Court.

21. The most important question raised by Mr. Dastoor in this appeal is that how could the P.W. 1, under such a situation, recognize the appellants as his assailants by the light of passing vehicles. Nowhere it is found in the evidence that National High way, 34 was having sufficient street lights. The P.W. 1, according to him, recognized the appellants by the light of passing vehicles. In such a situation when nowhere it is described about the position of injured and position of the assailants on spot clearly, it is really doubtful whether the injured could recognize his assailants by the light of passing vehicles. There was no inimical relation between the injured and the appellant. As the injured had no reason to implicate the appellant falsely, at the same time, the appellant had no reason to cause hurt to the P.W. 1. At least, there is nothing on evidence to support that the appellant had any reason to assault the P.W. 1 with a dragger and damage his motor bike.

22. This apart, according to the P.W. 2 the motor bike was completely damaged. This is an exaggerated statement. The seizure list makes it clear that only some frontal portion of the motor bike was found burnt which might be due to accident.

23. All these factors had to be considered by the learned Trial Court before taking a conclusion that none but the appellants actually assaulted the P.W. 1 in the manner it has been described. The learned Court had given a hypothetical view regarding the road accident case. But, the road accident case got support from the evidence of P.W. 7 and P.W. 11 as well as from the discrepancies in the prosecution case mentioned above. When there are two possible set of facts, the set of fact which goes in favour of accused, has to be accepted. In the instant

case learned Court ought to have accepted the another set of facts which was available on record and ought to have given the appellant the benefit of doubt.

24. I, upon consideration of the entire evidence and facts and circumstances of the case, am of considered view that there are many loose ends in the prosecution case which the learned Trial Court Trial tried to cover up with some views of his own without support of any logic. I do not like to share the view of the learned Trial Court on the grounds already discussed. This is a fit case where the accused ought have been given benefit of doubt. Accordingly the judgement impugned is liable to be interfered with in this appeal as it is not sustainable in law.

25. Accordingly, the appeal succeeds. The judgement impugned is set aside. The appellants are found not guilty to the charges and are acquitted therefrom. They be set at liberty at once and discharged from bail bond, if any.

26. A copy of judgement together with the L.C.R. be sent to the learned Trial Court without delay. Urgent Photostat certified copy of the judgement, if applied for, be handed over to the parties on compliance of necessary formalities.