
(2011) 08 GAU CK 0073
In the Gauhati High Court
Case No : Criminal Rev. P. No. 22 of 2004

Sri Debasish Sarkar

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 26-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 251, 313
Evidence Act, 1872 — Section 9
Penal Code, 1860 (IPC) — Section 323, 34, 341

Citation : (2011) 4 GLT 549

Hon'ble Judges : A.K. Goswami, J

Bench : Single Bench

Advocate : P. Roy Barman and Samarjit Bhattacharjee, for the Appellant; R.C. Debnath, Special Public Prosecutor, for the Respondent

Judgement

A.K. Goswami, J.—This criminal revision is directed against the judgment and order dated 05.02.2004, passed by the learned Sessions Judge, West Tripura, Agartala, in Criminal Appeal No. 17(2)/2001, confirming the conviction under Sections 323 Indian Penal Code, 1860 and 341 Indian Penal Code, 1860, as rendered by the learned Court of the Judicial Magistrate 1st Class, West Tripura, Agartala, vide judgment dated 17.03.2001, passed in G.R. Case No. 288/1999. However, by the judgment dated 05.02.2004, the learned Sessions Judge modified the sentence of simple imprisonment for one year, as imposed by the learned trial Court to a sentence of simple imprisonment for a period of three months, u/s 323 Indian Penal Code, 1860. The learned trial Court had imposed sentence of simple imprisonment for a term of one month for the offence u/s 341 Indian Penal Code, 1860 and the same was maintained.

2. At this stage, it would be appropriate to mention that the learned trial Court had convicted four accused persons, namely, (1) Sri Debasish Sarkar, (2) Sri Sajal Ghosh, (3) Sri Sudhan Biswas and (4) Sri Babul Saha, for the offences under Sections 341/323 Indian Penal Code, 1860 and handed out sentences in equal measure. The appellate court, however, set aside the conviction and

sentence with regard to Sri Sajal Ghosh, Sri Sudhan Biswas and Sri Babul Saha. The present revision petition is, accordingly, preferred by Sri Debasish Sarkar.

3. The genesis of the prosecution case, is that, an FIR was lodged on 16.04.1999 by one Dr. Triguna Debbarma, stating that he had gone to a shop called "RAFCO" in connection with repair of a Fridge on 15.04.1999 and had paid a sum of Rs. 50/- for such repair. As the Fridge was not properly repaired, he wanted the money back or to have it repaired once again and, therefore, went to RAFCO again on 16.04.1999 and on 16.04.1999, an altercation had ensued, which resulted in his being beaten up. Finally, he was rescued by one Dr. Swapan Kumar Chanda and by some other persons, who had taken him to the hospital for treatment.

4. On conclusion of investigation, charge sheet was laid against the four accused persons, namely, (1) Sri Debasish Sarkar, (2) Sri Sajal Ghosh, (3) Sri Sudhan Biswas and (4) Sri Babul Saha, under Sections 341/323/34 Indian Penal Code, 1860. On examination u/s 251 Code of Criminal Procedure, the accused persons pleaded not guilty and claimed to be tried and, accordingly, the accused persons faced trial punishable under Sections 341/323 Indian Penal Code, 1860.

5. During trial, prosecution examined 11 witnesses, while defence adduced No. evidence. The accused persons were examined u/s 313 Code of Criminal Procedure, where they denied the allegations made against them.

6. I have heard Mr. P. Roy Barman, learned Counsel for the Petitioner as well as Mr. R.C. Debnath, learned Special Public Prosecutor for the State of Tripura.

7. The learned Counsel for the Petitioner submits that there is No. evidence on record to hold the Petitioner guilty under Sections 341/323 Indian Penal Code, 1860. The learned Counsel also submits that the conviction has been based solely on the basis of identification of the Petitioner by PW.8 (informant) in the Court room. He further submits that there is No. other corroborative evidence on record and, therefore, such identification by the informant (PW.8), during trial, could not have formed the sole basis for conviction of the Petitioner. The prosecution has miserably failed to prove its case by not examining material witnesses from the place of occurrence, where number of shops are located. None of the witnesses, apart from PW.8 in the manner aforesaid, had implicated the Petitioner and, therefore, the Petitioner is also entitled to the same benefit as has been given to the other three accused persons, by way of acquitting him of the offences alleged.

8. The learned Counsel for the Petitioner has placed reliance on the decision of the Apex Court in Mahabir Vs. The State of Delhi, , to buttress his contention that identification of the accused person at the trial for the first time is, from its very nature, inherently of a weak character. Placing reliance on the judgment of the Apex Court in Mulla and Another Vs. State of Uttar Pradesh, the learned Counsel would argue that when identification of accused by a witness is made for the first time in Court, it should not form the basis of conviction. He also contend

the fact that the Petitioner along with three other accused persons had surrendered before the police, should not be taken as a relevant circumstance to corroborate the identification made by PW.8 for the first time in trial. To fortify his submission, drawing an analogy with an absconding accused, the learned Counsel submits that the Apex Court had time and again laid down that ascendance by itself is not conclusive proof of either of guilt or of a guilty conscience. In support of the aforesaid proposition, he places reliance in the case of Paramjeet Singh @ Pamma Vs. State of Uttarakhand, . On the aforesaid broad premises, the learned Counsel would contend that, in the facts and circumstances of the case, the conviction and sentence of the Petitioner is liable to be set aside and the Petitioner be set at liberty forthwith.

9. Mr. R.C. Debnath, learned Special Public Prosecutor, Tripura, has submitted that it is not that the identification of an accused for the first time in the Court is not admissible evidence. The weight to attach such identification is a matter for the court of facts. Therefore, the identification made by PW.8 during trial cannot be wished away. He, however, submits that apart from the fact that the Petitioner along with three others had surrendered, there is No. other corroborative evidence available on the materials on record. The surrender as well as identification in the Court, according to the learned Special Public Prosecutor, can form the basis of conviction of the accused Petitioner.

10. I have considered the rival submissions of the parties. It appears from the materials on record that PW.1 had written the Ejahar, as per dictation of the complainant (PW.8), in which PW.8 had signed.

11. PW.2 had deposed that he had seen some persons assaulting PW.8 and had taken him to the IGM Hospital and on being asked, PW.8 had indicated to him that on a quarrel that had ensued between him and the employees of "RAFCO", he was assaulted by the staff of "RAFCO".

12. PW.3 is a seizure witness. PW.4 is the Medical Officer, who had examined PW.8 and had referred him to G.B. Hospital for further detailed examination. PW.5, who was working in the IGM Hospital, Agartala, was declared hostile. PW.6 is the Medical Officer of G.B. Hospital, who had examined PW.8 and had found injuries, which were simple in nature and caused by blunt object. PW.7, who was also working in the IGM Hospital, was declared a hostile witness.

13. The informant i.e. PW.8 had deposed that, on a dispute that had arisen out of repair of a Fridge, he was assaulted, perhaps, by the employees of RAFCO, as a result of which he received bleeding injuries on his lips, forehead and little finger of right hand. He stated that Sri Debasish Sarkar, Sri Sajal Ghosh, Sri Sudhan Biswas and Sri Babul Saha had assaulted him and he identified the accused Sri Debasish Sarkar by the face by pointing towards him and stating that Debasish Sarkar had assaulted him along with other miscreants, whom he could not identify. In his cross-examination, he stated that he had collected the names of the assailants from the shop owners near RAFCO, but had forgotten the names of

the person from whom he had gathered the names of the accused persons. According to his statement in the cross-examination, Sri Narayan Chandra Dey, owner of RAFCO was involved and he had instigated the miscreants to assault him. He denied the suggestion of the defence that Sri Debasish Sarkar, whom he had identified by face, was not involved in the assault with the other miscreants. According to his deposition, there were other persons, who had gathered at the place of the incident.

14. PW.9 had endorsed the case to PW.11 for investigation and PW.10 had received the complaint, which was registered as Ejahar.

15. PW.11 had stated that, on 17.04.1999, the four accused persons had surrendered at the police station and, accordingly, he had arrested them. It also came out from his cross-examination that though there were number of shops near the place of occurrence, in the Index, which he had prepared, he had not mentioned any shop. He has also not examined any shop owners from the aforesaid area.

16. The narration above would indicate that the prosecution had made No. effort to examine witnesses who could have thrown light of the incident. When the PW.8 himself stated that he could ascertain the names from the shop owners in the vicinity of the place of occurrence, the explanation offered by PW.11, that he could not examine any owner of shops because they were temporary shops, is difficult to accept. It is also not known as to why he did not indicate in the Index, existence of shops which were in the neighborhood of the place of occurrence. There are No. materials available on record to indicate that the present Petitioner is an employee of RAF Company It is also not in doubt that the PW.8 did not know the identity of the assailants and could collect some names much later. It is in this context that Mr. P. Roy Barman had pointed out that holding of a Test Identification Parade would have been most appropriate.

17. Test Identification Parade, which do not constitute substantive evidence, is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding in the right direction. Such identification can be used as corroborative of the statement in the court. The basic premise of holding a Test Identification Parade is that the witnesses who claimed to have seen the culprits at the time of the occurrence, are to identify them from the midst of other persons without any aid or any other source. The idea is to check upon their veracity. The purpose of prior Test Identification Parade is to test and strengthen the trustworthiness of the evidence. It is also true that absence of Test Identification Parade in all cases is not fatal.

18. As has been held in the case of Harbajan Singh Vs. State of Jammu and Kashmir, it is permissible to record conviction on the basis of the identification in Court corroborated by other circumstantial evidence.

19. In paragraph-12 of Mahabir (supra), the Supreme Court stated thus:

12. It is trite to say that the substantive evidence is the evidence of identification in Court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused person, are relevant u/s 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in Court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character...

20. In paragraph-21 of Mulla (supra), the Supreme Court held thus:

21. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction. As was observed by this Court in Matru alias Girish Chandra Vs. The State of Uttar Pradesh, identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in Court. (Vide Santokh Singh Vs. Izhar Hussain and Another,

21. In the case of Paramjeet Singh @ Pamma (supra), the Supreme Court stated thus:

34. Abscondance by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, mere abscondance by the Appellant after commission of the crime and remaining untraceable for a period of six days itself cannot establish his guilt. Absconding by itself is not conclusive proof of either of guilt or of a guilty conscience.

22. No. doubt, the Petitioner along with three others had surrendered before police on 17.04.1999. It is also to be noticed that three other persons had been acquitted by the learned appellate court. In the considered opinion of the Court, like absconding, surrender itself cannot be construed to be conclusive proof of either of guilt or of a guilty conscience. The evidence of PW.8 is also very sketchy inasmuch as he could not even say from whom he came to know the names of the assailants. Though four persons had surrendered on the very next day of the occurrence, for reasons not known, Test Identification Parade was not conducted. In absence of any materials on record, corroborating the identification during the course of trial in the Court, which, as been noted by the Apex Court, though admissible, is weak in character, I do not consider it safe to convict the Petitioner solely on the basis of such identification during the course of trial.

23. Accordingly, the Court is of the considered opinion that the prosecution has not been able to prove the case against the Petitioner beyond reasonable doubt and as such the accused is entitled to benefit of doubt.

24. In the result, the criminal revision petition is allowed. The impugned judgment and order dated 05.02.2004, passed by the learned Sessions Judge, West Tripura, Agartala, in Criminal Appeal No. 17(2)/2001, is set aside and the Petitioner is set at liberty, if he is not required in any other case. The Bail Bond of the Petitioner shall stand discharged.

25. The Criminal Revision Petition is disposed of accordingly.

26. The Lower Court Records be transmitted forthwith.