

(2010) 10 CAL CK 0003
In the Calcutta High Court
Case No : C.R.R. No. 1885 of 2005

Sri Palash Kayal

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 324, 34, 342, 506

Citation : (2011) 1 CALLT 157

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : Subhasis Pacchal, for the Appellant; Milon Mukherjee, Sukdeb Chatterjee and Subhasis Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

Girish Chandra Gupta, J.—This revisional application is directed against an order of acquittal dated 7th March 2005 passed in Sessions Trial No. 594 of 2003 State of West Bengal v. Natu Mondal and 5 Ors. of charges under Sections 342/302/506/324 of the Indian Penal Code read with Section 34 thereof.

2. The facts and circumstances of the case would appear from the written complaint lodged by Gunadhar, in the outskirts of whose teashop, the incident was alleged to have happened. The written complaint is in Bengali which when translated in English would read as follows:

To

The Officer-in-Charge, Shyampur Police Station,

Sir,

I, Sri Gunadhar Mondal, son of late Khagen Mondal, resident of village Mirzapur (Kala), within the territory of Shyampur Police Station in the district of Howrah, beg to state that I have a tea shop on the southern side of my dwelling house

which is owned by me. On the last 16th August 1999 in the night in the verandha of my aforesaid tea shop 1) Ganesh Kayal, 2) Jadu Mondal, 3) Atul Das and 4) Bhuvan Bag were playing cards. Mahadev Mondal, Dulal Mondal and my son Naba Kumar Mondal were watching the game. It was then around 10"O clock in the night I was preparing to close my shop. All on a sudden 1) Mantu Mondal, 2) Bhodu Mondal, 3) Sanat Mondal, 4) Natu Mondal, all sons of Habul Mondal, 5) Buro Mondal, son of late Prasad Mondal, all residents of village Mirzapur and 2/3 other unknown persons, armed with katari, bhojali, ballam and other sharp weapons intruded into my shop. They surrounded Ganesh Kayal and started assaulting him indiscriminately by katari, bhojali and ballam. Those who were playing the game as also those who were watching the same ran out of fear. My son Naba Kumar Mondal resisted the assailants whereupon Gora Mondal, another son of Habul Mondal retaliated by seeking to assault my son with a bhojali and, as a matter of fact, part of the bhojali had touched his thigh, as a result whereof he suffered a cut injury. Ganesh Kayal bleeding profusely fell down on the floor. Mantu Mondal then said "the rascal is alive. Cut down his throat." Bhodu Mondal then by his katari cut down both the neck and the throat of the victim Ganesh. My son and I were threatened by the assailants after we had closed our shop by showing us weapons "if this incident is divulged to anyone we shall finish you both and burn down your house". I somehow managed to sneak out of my house and met Shri Tarapada Kayal in village Malgachhi, who is the father-in-law of my child and narrated the whole incident to him. Tarapada Babu informed the matter to the villagers. I am an illiterate person. I can only sign my name. I narrated the whole incident which was written down according to my version by Shri Dinesh Mondal, resident of Rasulpur. Shri Dinesh Mondal, after reducing my version into writing, read out the same to me and finding the same to be strictly in accordance with my version I am signing this complaint. You are requested, Sir, to punish the accused persons after duly investigating the matter.

Scribe: Shri Dinesh Mondal Humble petition of Son of Late Ashim Mondal Sd- Sri Gunadhar Mondal Vill- Rasulpur, P.O.-Shyampur, 17.8.1999

3. The complainant Gunadhar Mondal is the PW1, his son Naba Kumar Mondal is PW 2, Bhuvan Bag is PW3, Jadav Mondal is PW 9, Mahadev Mondal is PW 5, Dulal Mondal is PW 4.

4. Gunadhar Mondal (PW 1), Naba Kumar Mondal (PW 2), Dulal Mondal (PW 4) and Mahadev Mondal (PW 5) turned hostile.

5. The learned Trial Judge passed the order of acquittal because according to him "it is most unsafe to hold that this PW 3 by saying "five sons of Habul Mondal and one son of Prasad Mondal," wanted to mean the accused Santu Mondal, Bhodu Mondal, Sanat Mondal, Natu Mondal and Gora Mondal being the five sons of Habul Mondal of village Mirjapur and the accused Buro Mondal being the son of Prosad Mondal of the same village."

6. I would like to notice the entire evidence of the PW 3 Shri Bhuvan Bag for no

other reason but to demonstrate the absurdity with which the evidence of the PW 3 in particular and the evidence both oral and documentary adduced by the prosecution in general was dealt with by him. PW 3 Bhuban Chandra Bag deposed as follows:

I know Ganesh Kayal since deceased. Ganesh Kayal was killed, about five years back on the Dawa of the tea stall of Gunadhar. He was killed about 10.00 P.M. on the relevant day. At the relevant point of time, myself, Ganesh Kayal, the second of son Gokul Mondal and the son of Sukdeb Bag were playing cards on the Dawa of Gundhar's tea stall. Mahadeb, son of Rajen, Gunadhar and his son were witnessing our play at that time. At that time five sons of Habul Mondal, one son of Prasad Mondal and 2/3 others came there and killed Ganesh Kayal with the help of katari. At that time all those sons of Habul and the son of Prosad were known to me.

At present I am not in position to see well due to my age. I am now aged about more than 100 years.

At present I am not in a position to identify all those miscreants.

Due to fear we could not raise any protest at the spot. I do know whether any amongst us sustained injury at that time. I was interrogated by police.

Xxn. I am wearing spectacles since about 15/20 years.

(Cross-examination is deferred on prayer of the defence)

I cannot speak properly. I also cannot understand all the matters.

Whatever I have stated before I did not say those facts to anybody else.

I also did not say anything to anybody else that at the relevant point of time I was playing cards and Ganesh was assaulted by any person.

My house is at a small distance from Gunadhar's tea stall.

On the next morning I woke up after sunrise. In the relevant night I took my usual food at about 11.00 P.M.

I spent yesterday night with the son-in-law of Ganesh Kayal. Subsequently I did not come back to that spot and I do not know what happened thereafter.

On that relevant day my wife was inside my house and I can not say as to who others were there. I did not visit anybody's house nor I called anybody in that night.

I do not know Biplab Kayal.

Not a fact that I was not playing cards on the varanda of the tea stall of Gunadhar at the relevant point of time. Generally I do not play cards. In the next morning none called me. Not a fact that I am deposing falsely.

Not a fact that the five sons of Habul and one son of Prasad Mondal and 2/3 others did not come to the spot and they never assaulted Ganesh Kayal. Not a fact that I was not playing cards along with the second son of Gokul Mondal and son of Sukdeb Bag and Ganesh Kayal.

Not a fact that anybody knows as to how Ganesh died and only on getting his dead body people come to know about his death.

7. The entire evidence of the PW 3 has been set out above. There is no suggestion given to the PW 3 that the assailants were not the five sons of Habul and one son of Prasad Mondal facing the trial.

8. The learned Trial Judge at page 9 of the judgment while analyzing the evidence of PW 3 observed that the PW 3 "stated that he is now aged more than 100 years and not in a position to see well". Surprisingly the inference drawn by the learned Trial Judge at page 14 of the judgment is that the PW 3 "did not state that he is not in a position to recognise these miscreants due to his poor eyesight".

9. Another reason given by the learned Trial Judge in support of his aforesaid conclusion is that "if the evidence of PW 3, PW 4 and PW 5 as stated above be read together it would be difficult to hold that PW 3 Bhuvan Bag, by saying "five sons of Habul Mondal and one son of Prasad Mondal" wanted to mean these six accused persons and none else."

10. PW 4 Dulal is a hostile witness. He disowned everything stated by him during examination u/s 161 of the Code of Criminal Procedure. He did not also try to conceal the reason why he became hostile. He, as a matter of fact, deposed during cross-examination by the prosecution that "as co-villagers I do not want that the accused persons be prejudiced". During cross-examination by the defence he deposed the following sentence "there are other persons known as Habul Mondal, Gokul Mondal and Prasad Mondal and they have their children".

11. PW 5 Mahadev Mondal, hostile from the very beginning of his deposition, did however during his cross-examination by the prosecution admitted as follows:

I know all the accused persons who are present in Court. Prasad Mondal is the father of Buro Mondal and Habul Mondal is the father of rest of the accused persons. I do not know there is any other Habul Mondal or Prasad Mondal at our village.

12. During his cross-examination on behalf of the defence he added as follows:

Habul & Prasad are very common to our village.

13. In the first place the PW 4 did not pinpoint any other Habul Mondal of the same village who has five sons nor did he pinpoint that there is any Prasad Mondal of the same village who has a son. Moreover he made a clean breast of the fact that he did not want to prejudice the accused persons by deposing against them. Therefore his evidence is unable to create any cloud as regards the

identity of the accused persons.

14. The PW 5 has identified the 5 accused persons as the sons of Habul Mondal and one accused person as the son of Prasad Mondal. He also added that to his knowledge there was no other Habul Mondal or Prasad Mondal in their village. The aforesaid evidence of the PW 5 is very specific which was not and could not have been in the least impaired by the addition of the sentence uttered by him during cross-examination on behalf of the defence that Habul and Prasad were very common to their village. The witness had already deposed that he did not know any other Habul Mondal or Prasad Mondal of their village. The PW 5 did not deviate from that statement. When he said Habul and Prasad were very common in their village that could at the highest mean that there might be a Habul Mukherjee or there might be a Prasad Mukherjee or Habul Ghosh or Prasad Ghosh in the village. The Trial Judge was only concerned with Habul Mondal and Prasad Mondal as regards whom the evidence of the PW 5 is that there was no other Habul Mondal or Prasad Mondal in their village. Therefore the finding that "reading the evidence of the P Ws.3,4 and 5 together it is difficult to hold that the PW 3 by saying 5 sons of Habul Mondal and one son of Prasad Mondal meant the accused persons and none else" is altogether perverse. PW 3 specifically stated that "at that time five sons of Habul Mondal and one son of Prasad Mondal and 2/3 others came there and killed Ganesh Kayal...."

15. There is other evidence on the record with regard to the question of identity of the accused persons which the learned Trial Judge ignored altogether which is tabulated hereinbelow:

(a) The complainant Gunadhar Mondal (PW 1) before he became hostile deposed as follows:

I know Ganesh Kayal of our village. He was killed on the varanda in front of my tea stall about 51/2/6 years back. The incident took place at night. I lodged a written complaint over the said incident. Dinesh kayal scribe that complaint under my dictation. This is my signature on the written complaint.

As I do not know well to read and write and for that reason Dinesh Kayal scribed the same (signature is marked as Exbt.1)

(b) Dinesh Kayal (PW 10) scribe of the written complaint deposed as follows:

I know Ganesh Kayal since deceased. He was killed on 16th August 1999 at about 10.00 P.M.

Gunadhar Mondal narrated the entire incident of this murder.

As per dictation of Gunadhar Mondal I scribed a written complaint. After scribing the same I read over and explained the same to Gunadhar and thereafter he then signed thereon. I have also signed thereon as Scribe. (signature- Exbt.1/1 and the written complaint is marked as Exbt.1/2) Thereafter I handed over that written complaint to Gunadhar.

I know the accd. persons who are on dock.

Therefore the written complaint was fully proved which contains in unmistakable terms particulars of the accused persons including their identity. The scribe (PW 10) has reaffirmed the identity of the accused persons.

(c) The learned Trial Judge chose to rely on the evidence of the PW 9 and has disclosed his mind as follows:

This situation becomes more confusing where PW 9 Jadav Mondal, the other eyewitness of the alleged incident as per the prosecution, has categorically stated that he could not recognise any of those 4/5 assailants although he has stated in cross that these accused persons are known to him since their birth.

We already have noticed that in the written complaint it is alleged that when the victim was attacked the rest of the gamesters escaped. It is therefore possible that the PW 9 did not wait long enough to notice who the assailants were but that does not mean that those who had noticed cannot also be relied upon.

(d) We already have noticed from the written complaint that the case of the prosecution is that son of Gunadhar wanted to resist the attack and in the process he got injured. He was treated at the government hospital by the PW 8 Dr. Maity. Although Nabakumar PW 2 turned hostile but during cross-examination on behalf of the prosecution he admitted "on the next morning I was treated at Uluberia District Hospital by Dr. T.K. Maity.

16. Dr. T.K. Maity is PW 8. His evidence is as follows:

I am a Medical Officer now posted at Ghatal S.D. Hospital, West Midnapore.

On 17.8.1999 I was M.O. at Uluberia S.D. Hospital. On that day I examined one Nabakumar Mondal, 26 years Hindu Male, s/o Gunadhar Mondal, vill. Mirzapur under P.s. Shyampur in Emergency Department.

He came to our hospital above. He stated that he was injured by Tutul Mondal s/o Habal Mondal, on 16.8.99 at 10.00 P.M.

Patient complained of pain on his right thigh.

On examination I found 1" length scratch mark on the middle of the right thigh anterior.

Such injury may cause with sharp and pointed weapon. This is the copy of injury report. (exbt.7)

Xxn: Katari is not a sharp pointed weapon. This injury was not caused by any katari. I did not advise the patient to go to P.S. Scratch marks of this type may cause accidentally or self infliction and by friendly hands.

17. It would appear that PW 2 contemporaneously disclosed to the PW 8 that he had been injured by the accused Tutul Mondal, son of Habul Mondal, on 16th

August 1991. The doctor prepared in the usual course of business an injury report which is on the record which also contains the name of the accused and is exhibit 7. Surprisingly the learned Trial Court got rid of this evidence on the following grounds:

Therefore, it reveals that there is no substantive evidence on record to show that this P.W.2 sustained injury on his person at the alleged place of occurrence, and as such the evidence of the doctor (P.W.8) and the injury report, loses its importance and in the available circumstances, can not take the place of substantive evidence.

18. The learned Trial Judge has criticised the PW 3 by observing that "immediately after the occurrence he (PW 3) went to his house, had his usual dinner at 11 P.M. with his wife and had his peaceful sleep till after arising of the sun in the next morning" whereas the evidence of the PW 3 is that "I spend yesterday night with the son-in-law of Ganesh Kayal". By ignoring this material piece of evidence the learned Judge advanced the aforesaid criticism with regard to the post-incident conduct of the PW 3 and concluded by saying that "this indifferent attitude of this PW 3 after the alleged occurrence seems to be abnormal, irrational, imprudent and also inconsistent with the usual human behaviour".

19. Therefore the conclusion is irresistible that the learned Trial Court did not apply his judicial mind nor did he carefully handle the evidence on record.

20. There are other instances wherein the learned Trial Judge displayed his inflexible mind which need not be dilated in great detail because I am only exercising a supervisory jurisdiction.

21. Mr. Mukherjee, learned Advocate appearing for the accused/opposite parties to this petition advanced the following submissions:

(a) P.W.3 did never disclose the names of the accused persons. He always referred to them with reference to their father.

(b) There is no evidence to show that there was any torch or any light for identification of the accused persons.

(c) PW 3 did not identify the accused persons in the Court.

(d) PW 9 did not recognise the culprits at all when the PW 9 could not recognise the culprits, it is difficult to believe that the PW 3 then aged about 96 years could identify the accused persons.

(e) PW 5 deposed that Habul and Prasad were very common names in their village.

(f) PW 6 did not identify the weapon allegedly recovered by the police on the basis of information allegedly furnished by one of the accused persons.

22. None of these submissions has impressed me. As regards identity of the

accused persons I already have indicated evidence on the record which the learned Trial Court ignored. Mr. Mukherjee is not correct in saying that there was no light nor any torch. There is evidence on the record to show that at the time when the incident took place the tea shop of the PW 1 was open. The victim and 3 others were playing cards and three persons were watching the game. In the absence of sufficient light neither could they have played the game nor could anyone watch the same. Therefore as regards availability of light there can be no doubt. Mr. Mukherjee is also not correct in saying that there is no evidence as regards existence of any torch. Exhibit 3 is the seizure list which goes to show that bloodstained playing cards and two torches were seized by the police in the morning of 17th August 1991.

23. PW 9 did not recognise the culprits because he took to his heels as soon as the victim was attacked. He ran for his life but that can be no reason why PW 3 could also not have noticed. PW 3 being 96 years old was playing cards. If he could see the marks on the cards of 3"X2" (three inches by two inches) dimension no one should have any doubt as regards his eyesight. PW 5 may have said that Habul and Prasad are common names in the village but he also deposed that to his knowledge there was no other Habul Mondal or Prasad Mondal in their village which I already have discussed above.

24. The mere fact that the PW 6 did not identify the weapon cannot nullify the whole of the evidence on the record. This, in any event, shall be considered during the retrial.

25. Lastly Mr. Mukherjee cited a judgment in the case of Akalu Ahir and Others Vs. Ramdeo Ram, wherein it was held that High Court was not entitled to reappraise the evidence for itself as if it was acting as a Court of Appeal and then pass an order for retrial. But in the selfsame judgment it was quoted with approval that interference in revision is permissible "when the material evidence has been overlooked only (either?) by the Trial Court or the Appellate Court".

26. I only have tried to discuss the evidence ignored by the learned Trial Court and the mishandling of the material which has occasioned a serious miscarriage of justice.

27. For the aforesaid reasons the petition is allowed and the order under challenge is set aside. The learned Trial Court is directed to retry the matter in accordance with law being uninfluenced by any observation which may have been made herein. The accused/opposite parties should be taken into custody at once. Their further release on bail shall depend upon the discretion of the Trial Court.

28. The department is directed to remit back the Lower Court Records with a copy of this judgment forthwith.

29. Urgent xerox certified copy of this judgment, be delivered to the learned Advocate of the parties, if applied for, upon compliance of all formalities.