
(2010) 02 GAU CK 0023
In the Gauhati High Court

State of Tripura

APPELLANT

Vs

Jyotirmoy Malakar and Others

RESPONDENT

Date of Decision : 16-02-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 148, 149, 27, 324, 326

Citation : (2010) CriLJ 1720 : (2010) 4 GLR 632 : (2010) 2 GLT 433

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

U.B. Saha, J.—By way of filing this appeal, the State appellant has challenged the judgment and order, dated 10-4-2002, passed by the learned Sessions Judge. North Tripura, Kailashahar in Sessions Trial No. 31 (NT/ K) 2001 whereby and whereunder the accused persons, 16 in number, have been acquitted from the charges levelled against them under Sections 148, 149, 326 of the Indian Penal Code (for short IPC) read with Section 27 of the Arms Act.

2. Heard Mr. A. Ghosh, learned Addl. Public Prosecutor for the State appellant and Mr. S. Dutta Choudhary, learned Counsel appearing for the respondents.

3. The prosecution case as required to be discussed for disposal of the instant appeal, in short, is that P.W. 1, Sunil Malakar lodged a written F. I. R. with the Officer-in-Charge of Fatikroy Police Station alleging that on 19-8-1994 at about 11.30 p.m. when Jitendra Malakar (P. W. 10), Malay Kanti Bhowmick (P. W. 2), Samar Malakar and Satyendra Deb (P.W.5) were working in the CPI (M) party office at that time accused persons namely, Jyotirmoy Malakar, Hiranmoy Malakar, Mohonbasi Das, Nimai Das, Abhimanyu Das and 20 others duly armed with gun, pistol, arrows and bows attacked the party office and thereby the aforesaid persons sustained serious injuries and left the office through the back door. Thereafter, there were hue and cry and other people came there and

shifted them to Fatikroy Hospital. It is also alleged in the FIR that all the assailants had absconded therefrom and they had threatened that they would kill all the CPI (M) supporters of the locality and burn their houses.

4. On receipt of the written ejahar as stated supra, a police case was registered being Fatikroy P. S. Case No. 56/94 and after investigation, the I/O. of the case (P. W. 11) submitted charge-sheet against the aforesaid accused persons under Sections 148, 149, 324, 326 of the IPC and u/s 27 of the Arms Act. In due course, the case was committed to the Court of learned Sessions Judge and the learned Sessions Judge framed charges against all the accused persons, respondents herein under Sections 148, 149 and 326 of IPC read with Section 27 of the Arms Act to which the accused persons pleaded not guilty and claimed to be tried.

5. To prove the charges levelled against the accused persons, prosecution examined as many as 12 witnesses including the official witnesses. Out of them P.W. 1, Sunil Malakar is the informant, P.W. 2, Shri Malay Kanti Bhowmik. P.W. 5, Shri Satyendra Deb and P.W. 10, Shri Jitendra Malakar are the injured eye witnesses. P.W. 3, Shri Subhas Dey is not an eye witness. He only heard regarding the incident. P.W. 4, Shri Dharendra Baidya Corroborated the statement of P.Ws. 2, 5 and 10 to some extent. P.W. 6 is Lal Mohan Malakar who stated that at the time of occurrence, he was in his house and only after the occurrence he went to the CPI (M) party office and found the aforesaid three injured persons namely, Jitendra Malakar (P.W.10), Malay Kanti Bhowmik (P. W. 2) and Samar Malakar (not examined by the prosecution as witness). P.W. 7, Shri Sukesh Bhowmik was tendered by the prosecution and P.W. 8 is Nigur Bashi Das from whose house the investigating authority seized 10 Nos. of arrows made of iron (triangular) in the sticks of bamboo and three Nos. of bow made of undried bamboo. This witness was also tendered by the prosecution. P.W. 9, Shri Akhil Malakar is a seizure witness of the aforesaid articles seized from the house of P.W. 8. P.W. 11 is Suman Paul, S. I. of Police who investigated the prosecution case and P.W. 12 Shri Maniksena Singh is a police officer who supervised the investigation.

6. At the conclusion of the trial, the learned Sessions Judge acquitted the accused persons from all the charges levelled against them by the impugned judgment and order as noted earlier. Being aggrieved, the State has preferred this appeal.

7. Mr. Ghosh, learned Addl. Public Prosecutor in support of the appeal urges, inter alia, that the State appellant in its appeal has challenged the impugned judgment and order of acquittal of the accused persons mainly on the ground that the learned trial Court failed to consider the evidence of P.Ws. 2, 5 and 10 who are injured witnesses though their evidences have been corroborated by P.W. 1 as well as P.W. 4. He contended that the findings of the learned trial Court on identification of the accused is wholly inconsistent with the evidence of prosecution witnesses as the prosecution witnesses specifically stated that they

identified the accused persons with the help of moonlit as well as with the help of electric light and according to English calendar, the date of occurrence, i.e. 19-8-1994 was one day ahead of full moon night and even if according to the defence, there was no electricity at the relevant time in the village then also witnesses could have identified the accused persons with the help of moonlit. He further contended that in each crime, the appreciation of evidence regarding the identification of the accused persons has to be made in the context of facts and situation of that case. He contended that the village people are accustomed to identify any person with the help of moonlit and in the instant case, P.Ws. 2, 5 and 10 who were injured in the alleged incident specifically stated in their deposition that they identified the accused persons not only with the help of electric light, but also with the help of moonlit. Therefore, even if it is presumed that there was no electric light, the presence of moonlit cannot be waived. Moreover, it was not difficult for the prosecution witnesses to identify the accused persons as all the accused persons were known to them prior to the alleged occurrence as they reside in the same village and belong to rival political party and they were also familiar to each other. He also referred to injury report. Exbt. 6 from which it is established that P.Ws. 2, 5 and 10 were injured on that night of occurrence. His further contention was that the date of occurrence being just prior to Panchayat elections, it cannot be ruled out that the accused persons being the member of the rival political party committed the alleged offence to achieve their political goal. He finally contended that the omission and the contradictions, which are minor in nature, should not be given more weightage by the learned Sessions Judge. He ought to have believed the injured witnesses, particularly P.Ws. 2, 5 and 10 whose evidences were corroborated by P.Ws. 1 and 5 and on the basis of those evidence, the accused persons should have been convicted by the learned trial Court, instead of acquitting them from the charge levelled against them.

8. In support of his contention relating to identification of the accused persons with the help of moonlit, Mr. Ghosh placed reliance on the decision of the Apex Court in *Machhi Singh and Others Vs. State of Punjab*,

9. Per contra, Mr. Dutta Choudhury, learned Counsel appearing for the accused respondents strenuously urges that the prosecution miserably failed to prove the case against the accused respondents under any of the charges levelled against them and for such failure on the part of the prosecution, the learned trial Court very rightly acquitted the respondents from the charges levelled against them. He contended that the mode of identification as stated by the prosecution , witnesses, particularly P.Ws. 2, 4, 5 and 10 are the developed version of their statement and for the first time, they made such statement before the learned trial Court, which , was absent in their statement recorded u/s 161 Cr. P. C. by the I/O. of the case " (P.W.11). Therefore, according to Mr. Dutta Choudhury, the learned trial Court Very " rightly disbelieved the story of identification narrated by the prosecution witnesses before the learned trial Court. His further contention was that though the injury report relating to P.Ws. 2, 5 and 10 was

exhibited as Exbt. 6, but the doctor who examined those injured persons has not been examined by the prosecution. On that count itself, the said injury report should be disbelieved. He also contended that though one Samar Malakar was injured and was allegedly lying in front of the CPI (M) party office in injured condition, but the said Samar Malakar was not examined, rather withheld by the prosecution. Had he been produced by the prosecution, he might have stated a story contrary to the prosecution story and non-production of such a witness also creates doubt regarding the truthfulness of the prosecution case. He urged that all the witnesses being the members of rival political party of the accused respondents are partisan witnesses and their evidences should not be believed by a Court without proper scrutiny and corroborated by the independent witnesses, which in this case is totally absent. He contended that the story of identification with the help of moonlit as stated by the prosecution witnesses before the learned trial Court for the first time should not be believed in view of the evidence of P.W. 8, who specifically in his; cross-examination stated that there was heavy shower for 2/3 days prior to the date of occurrence and when there was heavy shower, it was not possible on the part of the prosecution witnesses to identify the accused respondents and as such, he contended, the learned trial Court rightly acquitted the accused persons from the charges levelled against them. He submitted that the instant appeal has been filed against the order of acquittal and if two inferences are possible after going through the evidence on record then the Court should accept one which favours the accused. In support of this contention, learned Counsel relied upon the decision of the Apex Court in the case of Ram Das Vs. State of Maharashtra, ; Tota Singh and Another Vs. State of Punjab, " He also relied on the case of Narinder Singh and Another Vs. State of Punjab, wherein the Apex Court noted that if the evaluation of the evidence by the trial Court does not suffer from manifest error or perversity and the main grounds on which it has passed its order are reasonable and plausible, the High Court should not disturb the order of acquittal even if another view is possible.

10. To appreciate the submissions of the [earned counsel appearing for the parties, it would be necessary to reproduce the relevant portion of the evidence of P.Ws. 2, 5 and 10 as the same would be profitable for decision of this case. Accordingly those are reproduced herein under:

EXAMINATION-IN-CHIEF

I was inside the party office at that time I saw that about 20/25 persons were coming towards party office. They fired indiscriminately towards us and one bullet hit me. I fell down on the ground and found that Jyotirmoy, Hiranmoy, Mohanbasi Das, Nema Das and others were there. With the help of moonlit and also with the party office's electric light I saw the persons.

CROSS

I was working sitting inside the party office. The party office has got fencing. I

stated to the I. O. that with the help of moonlit and also with the help of electric light I could recognize the accused persons.

On perusal of 161 statement no such statement was found.

P.W.5

EXAMINATION-IN-CHIEF

... I could identify them with the help of electric light in my house there is electricity and on the road also there was electric light.

CROSS

... I did not state to the I. O. that I could recognize the accused persons with the help of the electric light as because he did not ask me anything in that direction. I did not show the electric light to the Darogababu.

P. W. 10

EXAMINATION-IN-CHIEF

I could identify the accused persons Jyotirmoy, Hironmoy and Mohanbasi with the lit of electric light of party office and there were lights in the market also. Jyotirmoy, Mohonbasi and Hironmoy belong to our village and I know them since my childhood.

CROSS

I did not tell to the I. O. that I could identify the accused persons with the electric light of party office and market.

11. Having heard the learned Counsel for the parties and after going through the evidence on record as well as the law report cited by the learned Counsel, this Court is of the view that there might be an incident occurred on 19-8-1994 as alleged by the prosecution witnesses and P.Ws. 2, 5 and 10 might have got injury, but question is who caused the injury, whether the present accused respondents or somebody else. If the present accused respondents caused the injuries and participated in the alleged incident then obviously they are liable to be convicted by a Court of Law. But on going through the evidence on record it appears that none of the prosecution witnesses including the injured witnesses stated before the I/O, of the case that they could identify the accused persons either with the help of moonlit or electricity. For the first time, they introduced such a fact before the learned trial Court. According to this Court, the same were the developed version and, therefore, those versions cannot be believed by a Court of law for the purpose of convicting any person like the present respondents. The I/O. of the case though specifically stated that there was no market in and around the place of occurrence during the period of the alleged incident and he did not mention whether there was any electric light post or not, but he voluntarily stated that electricity was there in that area. The learned trial Court in para 8 of the judgment while discussing whether the accused persons

were properly identified by the prosecution witnesses or not stated, inter alia, "It may be mentioned here that according to P.W.1 he learnt from the injured persons that accused persons fired from guns and also exploded bomb in the party office but no other witness spoke about bombs. According to P.W. 2 he identified the accused persons with the help of moonlit and also with the party office's electric light but when his attention was drawn to his statement recorded u/s 161 Cr. P. C. in course of cross-examination, it was found that he did not state these things to the I. O. He also did not state to the I. O. to the effect that the accused persons fired from a distance of 15/20 cubits. The learned trial Court also discussed the evidence of P.W. 4. According to P.W. 4 he could; identify the accused persons with the help of electric light in the party office as well as in the market. In his cross-examination, this witness stated that he stated that before I. O. he did not give any statement saying that he saw the accused Joytirmoy and Nimai were armed with gun and they were firing, as because I. O. did not ask him any question on that line. He also did not state to the I. O. that other accused persons were armed with arrows and bows, because of non asking by the I. O. in that line. P. S. 5 also deposed that he could identify the accused persons with the help of electric light, but towards that he did not give any statement to the I. O. because, according to him, the I/O. did not ask him any question in that direction. P.W. 10 also echoed in the same line and according to this Court, in a criminal case the Court is not deciding whether a crime was committed or not, rather the Court is deciding whether the accused committed the alleged crime or not. In the instant case, even if it is assumed that there was an incident occurred as alleged by the prosecution and some of the prosecution witnesses were injured at the time of such incident, but the prosecution failed to prove its case beyond the shadow of doubt as P.W. 2 in his examination-in-chief though stated that at the time of alleged occurrence he was inside the party office and saw that about 20/25 persons were coming towards the party office and they fired indiscriminately towards them and one bullet hit him and he fell down on the ground and found that Jyotirmoy, Hiranmoy, Mohanbasi Das, Nemai Das and others were there, but from the injury report, it appears that there was no bullet injury caused to P.W. 2. Therefore, it can be easily presumed that the story of bullet injury is an afterthought and only for the purpose of convicting the accused persons the said statement was made. Therefore, when one part of the statement of prosecution witness is to be disbelieved by the Court then the other part cannot be relied upon as some doubt was created by the earlier part of the statement. There is no doubt that the identification of any person even with the help of moonlit can be possible by the village people where the electricity is not available as they are accustomed and known to each other, but here in the instant case, even the story of identification with the help of moonlit was stated by the prosecution witnesses including the injured persons to the I/O. of the case while their statements u/s 161 Cr. P. C. were recorded. For the first time, such statement was made before the learned trial Court. Therefore, according to this Court relying on such a developed statement, an order of conviction cannot be passed. This Court is of the view that the learned trial Court very rightly

disbelieved the story of identification of the accused persons by the prosecution witnesses either with the help of moonlit or with the help of electric light. Not only that, according to the prosecution story the place of occurrence is the CPI (M) party office whereas according to the I/O. the place of occurrence is a road which marked as "A", not the CPI (M) party office, which is marked as "C in the sketch map. Therefore, regarding the place of occurrence also a doubt has been created in the mind of this Court.

12. There is absolutely no standard of proof in a criminal trial and the question whether the charges made against the accused person have been proved beyond all reasonable doubts must depend upon the facts and circumstances of each case and the quality of the evidence adduced in the case and the materials placed on record. Lord Denning in *Bater v. Bater* (1950) 2 All ER 458 , 459 has observed that the doubt must be of a reasonable man and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject-matter. The aforesaid observation of Lord Denning has been taken note of by the Apex .Court in the case of *State of West Bengal Vs. Orilal Jaiswal and another*,

13. Order of acquittal affirms presumption of innocence and that can only be interfered with in case of non-consideration of the evidence and/or materials on record by the learned trial Court causing grave miscarriage of justice, which is absent in the instant case.

14. There is no quarrel with the proposition that reasonable doubt does not mean some light, airy, insubstantial doubt that may flit through the mind of the Court almost anything at some time or other; it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons. (See *K. Gopal Reddy Vs. State of Andhra Pradesh*,

15. From the aforesaid discussion, it cannot be said that there is no doubt regarding the involvement of the present accused persons in the alleged offence and as the conclusions of the learned trial Court in the background of the evidence on record are tested on the touch stone of the principles set out above, the inevitable conclusion is that the learned trial Court's judgment does not suffer from any infirmity to warrant interference. Accordingly, the appeal is dismissed.