

(2023) 08 CAL CK 0088

In the Calcutta High Court

Case No : Criminal Appeal (SB) No. 180 Of 2022

Sukur Ali Mondal & Ors.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 29-08-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304II
Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 437A

Citation : (2023) 08 CAL CK 0088

Hon'ble Judges : Bibhas Ranjan De, J

Bench : Single Bench

Advocate : Jayanta Narayan Chatterjee, Moumita Pandit, Nandini Chatterjee, Jayashree Patra, Sreeparna Ghosh, Pritha Sinha, Bhaskar Mondal, Faria Hossain, Sandip Chakraborty

Final Decision : Disposed Of

Judgement

Bibhas Ranjan De, J

1. This appeal challenged judgement and order of conviction dated 26.09.2022/28.09.2022 passed by Ld. Additional Sessions Judge, 2nd Court, Serampore, Hooghly in connection with Sessions Case no. 85 of 2001(Sessions Trial No. 03/ 22) corresponding to Chanditala Police Station Case No. 339 of 2021 dated 02.09.2021 under Section 302/34 of the Indian Penal Code, 1860 (hereinafter referred to as IPC), whereby Learned Judge, found appellants/ accused guilty of committing offence under Section 304 part II read with Section 34 of the IPC and sentenced them to suffer rigorous imprisonment for a period of seven (7) years each and to pay fine of Rs. 25,000/-each in default, to suffer simple imprisonment of one(1) year.

2. On 02.09.2021 at about 23.45 hours one Mofijul Rahaman, son of late Riyal Hoque of Vaduya, Jalamadul, Dhobapara under Police Station Chanditala, lodged a written complaint alleging, inter alia, that on 02.09.2021 at about 7.30 p.m. Sk. Rejaul Haque, brother of complainant, on his way to home from Domjur,

stopped at the tea stall of Kashem.

Appellants/accused was also present in that shop. Quarrel took place between the appellants and said Sk. Rejaul Haque with regard to some accounts. Appellants/accused assaulted Sk. Rejaul Haque with slap and blows in order to kill him. Sk. Rejaul became unconscious and fell down. Local people remained over there took Sk. Rejaul Haque to Chanditala Rural Hospital where doctor declared him dead. Complainant believed that his brother died of assault by the appellants/accused.

3. On receipt of that written complaint, Chanditala Police Station Case no. 339/21 dated 02.09.2021 under Section 302/34 IPC. The case was investigated by Sub Inspector Subal Kumar Biswas (PW10). During investigation he visited place of occurrence, prepared inquest report with sketch Map and prepared seizure list of full pant of Sk. Rejaul Haque since deceased. On his transfer he handed over the case diary to the officer in-charge of Chanditala, Police Station. Thereafter, Sub Inspector Sujit Kumar Roy (PW9) submitted charge sheet under Section 302/34 of the IPC after obtaining permission from superior officer.

4. Ld. Additional Chief Judicial Magistrate, Serampore, after receiving charge sheet, committed the case to the Additional Sessions Judge, 1st Court, Serampore on 14.12.2021. Thereafter, Ld. Additional Sessions Judge, 1st Track Court, in turn, transfer the case record to the Court of Learned Additional Sessions Judge, 2nd Court on 23.12.2021 for disposal. Learned Additional Sessions Judge, 2nd Court, Serampore framed charge under Section 302/34 of IPC on 21.02.2022 and put the case into trial.

5. In order to bring whom the charges leveled against accused persons, prosecution examined as many as ten (10) witnesses namely complainant, Mofijul Rahaman, as PW1, Sk. Dilwar Hossain as PW2, Sk. Rafique Ali as PW3, Sanowara Begum as PW4, SK. Motiar Rahaman as PW5, Constable Chandan Ghosh as PW6, Constable Goutam Chakraborty as PW 7, Doctor Jayanta Sarkar as PW8, Sub Inspector Sujit Kumar Roy as PW9 and Investigating Officer, Sub Inspector Subal Kumar Biswas as PW10.

6. In course of evidence, written complaint, inquest report statements recorded under Section 164 of Code of Criminal Procedure(hereinafter referred to as CrPC), dead body challan with signatures, seizure lists with signatures, formal FIR, Post Mortem Report were admitted in evidence as exhibit 1 to 12 and wearing apparels of Sk. Rejaul Haque, since deceased were admitted as MAT. Exhibits I and II. After completion of prosecution evidence accused were examined under Section 313 Code of Criminal Procedure (hereinafter referred to as CrPC). In reply accused pleaded their false implication.

7. The Trial Court having gone through the records, the deposition as also the submissions put forward by the Learned Advocate appearing on behalf of the parties held that prosecution witnesses were consistent in their depositions that accused assaulted the deceased which proved fatal. Learned Judge, also relied on

the evidence of doctor who corroborated the injury stated by the witnesses. Contradictions which Learned Judge found were not at all material to the prosecution case.

Argument Advanced:-

8. Learned advocate, Mr. Jayanta Narayan Chatterjee, appearing on behalf of the appellants, has drawn my attention to the evidence adduced on behalf of the prosecution and pointed out some contradictions and doubt regarding presence of any of the witnesses at the time of occurrence alleged in this case. Written complaint was referred to by Mr. Chatterjee and submitted that contents of the FIR suggests absence of complainant at the time of alleged incident. But, in his evidence complainant exaggerated by saying that he was present at the place of occurrence and he hide himself out of fear of assault.

9. Mr. Chatterjee further assailed the Post Mortem Report (exhibit 10) along with evidence of doctor (PW8) and submitted that no external or internal injury was found on the body of the deceased save an expect fracture of hyoid bone and that was the reason of death. Mr. Chatterjee has submitted that fracture of hyoid bone is not possible without strangulation. But, in this case, it appears from the evidence that Rejaul Haque was assaulted by the appellants/accused by kicks, fists and blows. Mr. Chatterjee has further submitted that contradictions appearing in the evidence clearly shows that none of the witnesses was present on the alleged date of incident and also not trustworthy creating a doubt in favour of the appellants/accused.

10. Mr. Chatterjee, next, contended that cause of death could not proved by the prosecution beyond reasonable doubt. In support of his contention he relied on a case of Bhupendranath Prasad Vs. State of Bihar reported in 1992 SCC (cri) 701. On the point of contradiction between medical evidence and oral evidence Mr. Chatterjee relied on a case of State of Rajasthan Vs. Rajendra Singh reported in (2009) 11 SCC 106.

11. Per contra, Ld. Advocate, Ms. Faria Hossain appearing on behalf of the State has submitted that there is sufficient corroboration among the eye witnesses and further fortified by the doctor regarding cause of death. In support of her contention, he referred to the evidence of doctor particularly the cause of death i.e. fracture of hyoid bone due to heavy blow.

Decisions with reasons:-

12. At the very outset, I have gone through the written complaint addressed to officer in charge Chanditala Police Station lodged by complainant Sk. Mofijul Rahaman between the lines. In the written complaint it is stated that appellants/accused assaulted his brother by fist and blows and as a result he fell down and became senseless. Then the persons remained over there shifted his brother to hospital where doctor declared him dead. Tone and tenor of the written complaint is that complainant was not present at the time of alleged incident. Had he been

present there surely he would have taken effort for shifting his brother to hospital.

13. Departing from written complaint Mofijul Rahaman (PW1) testified that he saw accused to assault his brother but he hide himself out of fear. When accused left the place he along with other persons took his brother to Chanditala Hospital where doctor declared him dead. He further testified that on hearing hue and cry he had been to the place of occurrence and initially he took his brother to his house and then to Chanditala Hospital. He did not know the scribe of written complaint. He did not disclose before police when his brother was being assaulted or the accused fled away when his brother fell down. He did not find any bleeding injury on the person of his brother.

14. If I take the written complaint and evidence of the complainant (PW1) in juxtaposition, I am unable to hold that evidence of complainant was trustworthy at least with regard to his presence at the alleged place of incident.

15. Coming to rest evidence of this case i.e. PW2, PW3, PW4 & PW5, I find that PW2 claimed himself to be an eye-witness to the incident by saying that on 02.09.2021 at about 7.00 p.m./7.30.p.m. there was quarrel in between the appellants/accused and Rejaul Haque. Accused Sukur Ali assaulted Rejaul with a blow below his ear. They took him to Chanditala Hospital. In cross-examination he testified that Rejaul Haque was wearing pant and shirt and at that time of incident he was present along with three accused and victim only and no other person was present. Complainant came to the spot after the incident. He further testified that he was also assaulted by accused Sk. Kasem below his ear and he fled away.

16. If I analysis the evidence of PW2, it appears that at the time of alleged occurrence no other witness was present at the spot and he also fled away after being assaulted by accused Sk. Kasem. If that be so, question of his presence at the time of shifting Rejaul Haque to hospital does not arise. Once he stated that he was not examined by the police in his examination in chief but in cross-examination he disclosed about his examination by police. That apart, all other evidence of this case clearly bounce back that at the time of alleged incident Rejaul Haque was wearing only pant which was seized by the Investigation Officer, unlike the evidence of PW2, Sk. Dilwar Hossain.

17. PW3, Sk. Rafique Ali, testified that accused Sukur Ali Mondal initially punched temporal region of victim and thereafter Sk. Kasem and Faruque assaulted by fists blows and kicks. He remained silent about any quarrel between the accused and victim prior to alleged assault. He testified that local people took him to hospital and at that time Rejaul Haque, since deceased, was wearing pant and shirt.

18. If I believe evidence of PW2 that quarrel took place prior to incident of assault then, I have to disbelieve the evidence of PW3 who stated nothing about quarrel. From the evidence of PW2, I find that after being assaulted he fled away

from the spot and PW3 stated that local people shifted Rejaul Haque to hospital and he did not speak about any quarrel prior to incident of assault. Above all, PW2 refuted the presence of PW3 even at the time of incident.

19. PW4, Sanowara Begam, wife of deceased, has deposed that she heard the incident and complainant took her husband on her lap to her house. She stated that one Alauddin Mollah lodged FIR. The story of shifting Rejaul Haque to hospital has become blurred by contradictions.

20. If I believe the evidence of PW4, then I have to discard the evidence of PW 1 to PW3, who testified that Rejaul Haque was shifted to hospital by car though PW1 stated that Rejul Haque was taken to house first by an auto whereas PW2 stated that Rejaul Haque was taken to hospital by hired car.

21. PW5, Sk. Motiar Rahaman, has testified that on 02.09.2021 at 7 p.m. he heard about fighting at the tea shop of Kasem. He witnessed that Faruque and Kasem were holding Rejaul and Sukur Ali Mondal was assaulting Rejaul who fell down and then all three accused assaulted Rejaul by kicks. Complainant came to the spot and took his brother to his house thereafter to hospital. In cross-examination, he has stated that at the time of incident 8/10 persons including PW2 & PW3 were present.

22. After careful analyzing the evidence of PW1 to PW3 and PW5, I do not find any corroboration either regarding manner of assault or presence of witnesses on the spot and shifting of victim to hospital.

23. After going through the statement of witnesses namely PW1 to PW 3 and PW5 recorded under Section 164 of CrPC (exhibit 3 to 6), I find that all those witnesses testified a different story in course of their respective evidence on oath. All the witnesses stated that Rejaul Haque was shifted to hospital from the alleged place of occurrence though PW 2 in his statement under Section 164 CrPC stated that complainant shifted his brother to a doctor's chamber. Considering the statement of all witnesses along with their evidence on oath a reasonable doubt is found to have been created with regard to presence of the witnesses at the time of occurrence.

24. That apart, Investigation Officer (PW10) recorded statement of complainant (PW1) and Sk. Dilwar Hossain (PW2). PW1 never stated before Investigation Officer regarding assault or hiding himself out of fear. Dilwar Hossain (PW2) also did not state about his presence on the spot or Sukur Ali gave a blow below the ear of Rejaul Haque or Rejaul died on spot. Investigation Officer neither recorded any statement PW 3 or PW5 under Section 161 of the CrPC.

25. On evaluating the evidence of PW 1, PW2, PW3 & PW5, I do not think that their evidences are trustworthy and unblemished or of sterling quality. Therefore, much probative value cannot be attached to their version.

26. Let us come to the evidence of doctor to lend corroboration. Doctor Jayanta Sarkar (PW8) has testified as quoted below:-

" On 03.09.2021 I held P.M. Examination over the dead body of Sekh Rezaul Hok. The dead body was brought and identified by C/829, Chandan Ghosh.

On external examination, no injury was found.

On dissection, fracture of hyoid bone was found. The cause of death was due to asphyxia and apoplexy from ante mortem injury as noted. The probable time of death was more than 24 hours prior to P.M. Examination.

After P.M. Examination, I prepared P.M. Examination report of my official computer and signed the same with my official seal. This is the P.M. Examination report. Let it be marked as Ext. 10.

Fracture of hyoid bone may happen due to heavy blow in the anterior part of the neck and may cause death."

27. From the doctors evidence it reveals that cause of death was due to asphyxia and apoplexy. But, at the same time, doctor found no external injury on the body of the deceased though witnesses examined in this case stated about assault by three persons. Doctor reserved final opinion till receipt of viscera analysis reports. From the Post Mortem report, it is found that on dissection hyoid bone was found fracture. Doctor, in his evidence, has stated that fracture of hyoid bone may be caused due to heavy blow in the anterior part of the neck and may cause death. From the evidence of witnesses, I do not find any such heavy blow in the anterior part of the neck of the deceased by any of the accused.

28. Fracture of hyoid bone secondary to trauma other than strangulation is a rare incident. Hyoid bone is not susceptible to fracture owing to its inherent protection which is secured by its rare position and reinforced by its mobility. The hyoid bone is encircled, in normal anatomic position, by bones; anteriorly and laterally by mandible and posteriorly by the cervical spine. Therefore, it is a well protected bone in the neck. That apart, according to Modi's medical jurisprudence and toxicology hyoid bone and superior cornua of the thyroid cartilage are not, as a rule, fractured by any other means other than by strangulation.

29. It is now well settled by series of decisions of the Hon'ble Apex Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye witnesses has to get primacy has medical evidence is basically opinionative. But, when the Court finds inconsistency in the evidence given by eye witnesses which is totally inconsistent to that given by the medical expert then evidence is appreciated in different perspective by the Courts.

30. In this case, evidence of witnesses disclosed assault by fists blows and kicks but surprisingly Post Mortem report did not disclose any kind of external injury. Therefore, Court can draw adverse inference to the effect that prosecution version being put forth before this Court, is not trustworthy. In the present case, medical evidence completely rules out the prosecution version of the injuries.

31. In Bhupendra Nath Prasad (supra) following principle was held:-

" 4. We find considerable force in this submission. PW 6, the doctor, in his chief examination itself has stated that the family members who brought the deceased to the hospital told him that somebody made him take wine and betel and that since thereafter he started vomiting and feeling giddiness. In cross-examination PW 6 further admitted that he has written in the bed-ticket that the death was due to cardio-respiratory failure. It is also elicited from him that such failure could be due to over-drinking of wine or due to poison. He also stated that when brought to the hospital, the wine odour was coming from the mouth of the deceased. So his evidence is not very helpful as to the cause of death. As already mentioned the doctor who conducted the post-mortem has not been examined. However, the post-mortem certificate is on record. It only shows that the viscera was preserved for chemical analysis and the opinion as to the cause of death was reserved till the report of the Chemical Examiner regarding the viscera was received. As already noted no such report of the Chemical Examiner has been produced nor the doctor who conducted the post-mortem has given any opinion as to the cause of death. Therefore we are left with the Chemical Examiner's report given on the basis of the test examination of the stomach wash and the vomited substance, said to have been seized by the police and sent to the Chemical Examiner. PW 6 the doctor does not speak about any such seizure. PW 1, a compounder in the hospital, however, deposed that the vomited substance was put in a bottle and sealed but he does not say that the same was seized. PW 3, however, deposed that the police officer seized the vomited substance at the house of the deceased and a seizure report was prepared and he affixed his signature. PW 12, an Investigating Officer also stated that he seized the vomited substance. It is needless to say that in a criminal case the cause of death has to be ascertained conclusively. As already noted the post-mortem report does not in any manner establish the same. Even accepting that Nux Vomica was found in the vomited substance it cannot be concluded that the death was due to poisoning and particularly when PW 6, the doctor has noted that the death was due to cardio-respiratory failure either due to taking excess wine or due to poison. Admittedly the alcoholic smell was coming from the mouth of the deceased when he was unconscious. Therefore a reasonable doubt arises about the cause of death. Even otherwise there is no satisfactory evidence in this case that it was the accused who gave the betel containing poison to the deceased. The wife and the daughters of the deceased who took the deceased to the hospital stated before PW 6, the doctor that the deceased told them that somebody gave him wine and betel and thereafter he became giddy. These witnesses were cross-examined with their earlier statements and PW 12, an Investigating Officer admitted that the wife of the deceased did not state before him that the accused had taken her husband with him. Thus the evidence regarding the so-called oral dying declaration is also unsatisfactory and does not inspire confidence. It is well settled that in a case depending upon circumstantial evidence all the circumstances should conclusively point towards the guilt of the accused. In this

case even the cause of death has not been conclusively established. Therefore, we are constrained to interfere. Accordingly the conviction and sentence awarded against the appellant are set aside and the appeal is allowed. He is on bail. His bail bond shall stand cancelled.”

32. In Rajendra Singh (supra) Hon’ble Apex court also held in paragraph 7 & 8 as follows:-

“ 7. It was submitted by the learned counsel for the State that as many as six witnesses were found injured and that would establish their presence at the place of the incident. In our opinion, this contention is of no help to the appellant because their evidence has not been discarded on the ground that they were not present. Their evidence was discarded because they were found not telling the truth before the Court. It was also submitted by the learned counsel that the evidence of PWs 1 to 4 stood corroborated by two independent witnesses, namely, Ramjilal and Jeevan Singh. PW 8 Ramjilal had stated that he had gone to the spot on hearing the sound of a gunshot and tried to snatch away the gun from the respondent. But he was contradicted by his police statement wherein he had not stated anything regarding snatching of the gun. This omission on such a vital point has to be regarded as a contradiction and it creates a serious doubt about the truthfulness of his version. PW 9 Jeevan Singh had stated that he had also rushed to the spot on hearing the sound of a gunshot. He further stated that he had made an attempt to save Harveer and in doing so, he had received an injury. He had not so stated before the police. This also shows that this witness had made a material improvement before the Court in order to make his evidence acceptable.

8. All the witnesses had categorically stated that they had not beaten the respondent and seen any injury on the accused. But the evidence establishes that the respondent had two contused lacerated wounds: one on his face and one on his head. The injuries were bleeding injuries and visible and yet the witnesses stated that they had not seen any injury on the person of the respondent. That would mean that neither the family members of Harveer nor the two independent witnesses were willing to give a true version and had tried to suppress the part played by some of them which had resulted in causing injuries to the respondent. The High Court was therefore, justified in not placing reliance on their evidence.”

33. In my considered view, keeping an eye to the ratios quoted above, in the present case the prosecution has not been able to prove its case beyond reasonable doubt.

34. This appeal, therefore, succeeds. The judgment and order of conviction passed by the Ld. Trial Court in Sessions Case No. 85 of 2021 is hereby set aside. All Appellants are acquitted of the charge but the bail bonds already submitted on their behalf, will remain in force for the period of six (6) months from date in terms of Section 437A of the CrPC.

35. Thus, CRA (SB) 180 of 2022 stand disposed of.

36. Pending applications, if there be any, stand disposed of.

37. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.