

(2013) 07 CAL CK 0132
In the Calcutta High Court
Case No : C.R.A. No. 14 of 2009

Swapan Haider and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Citation : (2013) 4 CALLT 63

Hon'ble Judges : Toufique Uddin, J

Bench : Single Bench

Advocate : Biplab Mitra and Mrs. Trina Mitra, for the Appellant; Aryan Datta, for the Respondent

Final Decision : Dismissed

Judgement

Toufique Uddin, J.—This appeal arose out of the judgment and order dated 22.12.2008 and 23.12.2008 passed by the learned Additional District & Sessions Judge, Fast Track, 3rd Court, Diamond Harbour, South 24-Parganas, in Sessions Trial No. 3(8) 2005 arising out of Sessions Case No. 100(1)/2004 and thereby convicting the appellants for commission of offence under sections 325/304-II/34 of Indian Penal Code.

The fact leading to this appeal in short is as follows:

On 25.3.2003 at about 7.15 hours one Pranab Maule lodged an FIR alleging that on 23.5.2003 at about 7-00 hours a hot altercation took place between Aurobinda and brothers on one side and Swapan Haider and his brothers on the other side. At that time accused Swapan Haider and Tapas Haider assaulted Dinabandhu with a branch of babla tree on his head causing bleeding injury and subsequently he was removed to hospital.

A complaint was lodged with the police.

2. After investigation, police has submitted charge sheet against the accused persons under sections 325/308/304/34 of Indian Penal Code.

3. The learned ACJM, Diamond Harbour, committed the case to the Court of learned Sessions Judge, 24-Parganas (South). After hearing of both sides, learned Trial Court framed charge under sections 325/304 of IPC against the accused persons. The contents of the charges were read over and explained to them when the accused persons pleaded not guilty and claimed to be tried.

To contest this case the prosecution examined as many as sixteen witnesses while none was examined on the side of the defence.

However, the accused persons were examined u/s 313 of Cr.P.C. The defence case as it appeared from the trend of cross-examination and reply given by the accused persons at the time of examination u/s 313 Cr. PC was denial of offence with a plea of innocence.

On trial the learned Trial Court convicted the present appellants by the impugned judgment.

Now, it has to be seen if the impugned judgment suffers from any material irregularity and calls for any interference or not.

Sections 325/304-II/34 of IPC read as follows:

325. Punishment for voluntarily causing grievous hurt.-- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

"304. Punishment for culpable homicide not amounting to murder.-- or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death." -

34. Acts done by several persons in furtherance of common intention. - When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The learned Counsel for the appellants inter alia argued mainly on the following points:

- (a) Seven days delay have not been properly explained;
- (b) In the sketch map P.O. was not depicted;
- (c) The matter of alleged dying declaration was not put to the accused appellants at the time of examination u/s 313 Cr. PC and
- (d) Dinabandhu did not mention the name of the assailants.

In addition learned Counsel for the appellants submitted written notes of

argument which has been taken on record. He concluded that the prosecution failed miserably to prove the case against the appellants.

4. Learned Counsel for the State strenuously argued that there is no irregularity or illegality in the impugned judgment. The case has been proved not only by independent witness/P.W.-6 but also other witnesses i.e. P.W.- 3, 4, 5 and 7. He further argued that P.W.- 2's description given in evidence can be used as dying declaration.

To appreciate the case from a better angle, some relevant pieces of evidences be noted down.

5. The statement of Dinabandhu Majhi is Exhibit- 4. Therein he signed on 24.5.2003 stating that on 23.5.2003 around 7 O'clock in the morning he went near "Shitala than" a little away from his house for brushing his teeth. At that time Swapan Haider, Tapan Haider and Tapas Haider and some others together started hurling abuses at him. As he objected to it, Swapan and Tapan dealt blows on his head with a crowbar and a piece (sic piece) of wood. He suffered bleeding injuries, fell down and lost his sense. After that he heard that he was taken to Mandirbazar P.S. and from there he was taken to Diamond Harbour Hospital. He was then admitted in Chittaranjan Hospital.

Exhibit- 1 is the written complaint. Therein it was stated by the complainant Pronob Moule that on 23.5.2003 at about 7 O'clock in the morning a quarrel started at Ballavpur village between Arabinda Majhi and his brothers and Swapan Haider and his brothers over washing of their faces by the tap water. At that time Swapan Haider, son of Sudeb Haider, two brothers of Swapan - Tapan Haider and Tapas Haider hit Dinobondhu Majhi, brother of Arobindo Majhi with a branch of accacia and there were bleeding injuries. At present he is under treatment in Chittaranjan hospital.

Post-mortem report is Exhibit- 3. Therein marks of bruise and other injuries are clearly manifest.

P.W.- 1 is de facto complainant. He stated in evidence what he had stated in FIR. Nothing tangible could be taken by the defence from his cross-examination to suit their defence.

P.W.- 2 stated that the incident took place on 23.5.2003 at about 7 a.m. He is a villager. On his way to village he came to the tube well and found Dinabandhu Majhi was lying on a van rickshaw belongs to Sunil Haldar with bleeding injuries on his head, body. The parents and the brother of Dinabandhu were weeping. He learnt the fact of assault by the accused persons from P.W.- 2, 3, 4 and 5. He took the injured to Mandir Bazar P.S. He was also accompanied with the injured when he was taken to D.H. and Chittaranjan Hospital, Kolkata. Subsequently, Dinabandhu Majhi expired at Chittaranjan Hospital, Kolkata on 25/26.5.2003. In cross-examination he stated that he heard the incident of assault from the persons who were assembled at the P.O.

P.W.- 3 heard hue and cry that "baba go, mere fellow go". P.O. is at a distance of 60/65 cubics from the door of his house. Rushing there he found accused Swapan Haldar assaulting Dinabandhu Majhi on his head by means of sabal and accused Tapan Haldar assaulting Dinabandhu by means of the branches of the babla tree. Accused Tapas Haldar fastened his brother Dinabandhu with his arm. As a result, his brother sustained bleeding injuries on his head.

P.W.- 4 is a van rickshaw puller. He stated that on 23.5.2003 at about 7-00 a.m. the accused Swapan Haldar assaulted Dinabandhu Majhi on his head by means of a sabal and accused Tapan Haldar also assaulted Dinabandhu by means of a branch of babla tree on his head. Accused Tapas Haldar fastened Dinabandhu with his arms. Dinabandhu sustained profuse bleeding injury on his head. The accused persons fled away. This witness along with Kripasindhu Majhi and Sunil Moula brought the injured to Mandir Bazar P.S. with his van rickshaw. Nothing was obtained from his cross-examination. There is nothing to disbelieve this witness.

P.W.- 5 stated that on 23.5.2003 he and his brother Kripasindhu Majhi (P.W.- 3) were preparing packet of dry chilly and turmeric sitting near their door. Hearing a sound of "babago mere fellow go" and understanding that it was the voice of his brother Dinabandhu Majhi, they rushed there and saw accused Swapan Haldar and others assaulting Dinabandhu Majhi in the manner the other witnesses stated.

P.W.- 6 is an independent witness. He came to the tube well to wash his face. He saw that accused Tapan Haldar hurling filthy languages to Dinabandhu Majhi. Thereafter all the three accused persons assaulted him by lathi on his head and chest.

P.W.- 7 saw accused persons including their mother abused in filthy languages Dinabandhu and assaulted him in the manner other witnesses stated. He sat on a broken electric post near the tube well.

P.W.- 8 is a co-villager. He saw that Dinabandhu Majhi was lying near the tube well on senseless condition with bleeding injury on his head. He felt uneasy seeing the injured Dinabandhu Majh.

P.W.- 9 is Debu Haider. He knows nothing about the incident. He heard about the incident.

P.W.- 10 is a police personnel. He drew the formal FIR. He is the I/O also. He collected statement of witnesses and after investigation submitted charge sheet.

P.W.-11 is the Doctor. He held post-mortem over the dead body of Dinabandhu Majhi and submitted report as Exhibit- 3. On examination he found following:

1. One haematoma 5" x 4" in the scalp tissue over left parietal region starting 3" above the tip of matoriod process and extended upto level sagittal suture.
2. Heamatoma 6" x 4" in the scalp tissue over front region with depressed

comminuted fracture 1 1/2 x 3/4 over left frontal eminence with one fissured fracture 3" long placed or less obliquely started from medial aspect of the depressed fracture and extended upto right side of frontal bone.

On removal of scalp cap there is evidence of tear and laceration of meninges with evidence of extra dural hemorrhage 4" x 2" with blood clot over both frontal lobe brain and subdural hemorrhage of left cerebral hemisphere including its underneath surfaces with laceration 1" x 1" x brain substance over left frontal lobe at the corresponding level of depressed comminuted fractured area.

4. Fracture of nasal bone of both sides.

5. Bruises 3" x 2" over upper and lower lid including its inner aspect including bulbar conjunctival of left eye.

P.W.-12 is S.I. of police. He recorded the statement of Dinabandhu Majhi as Exhibit- 4.

P.W.-13 is another Doctor. On 23.5.2003 he examined the victim and found head injury with large haematoma inside with fracture of skull. P.W.-14 is another Doctor. He issued death certificate. On 23.5.2003 he examined Dinabandhu Majhi as indoor patient. The patient sustained head injury. The patient was not in a fit condition to tell him how he sustained head injury at the relevant time. The death certificate is Exhibit- 7. He stated that he was not told the name of the assailant who caused head injury to the victim. P.W.-15 is another Doctor. He found head injury of the victim.

P.W.-16 is also a Doctor. He referred the patient to surgery department for treatment after preliminary examination. His injury report is Exhibit- 10.

All incriminating matters were put to the accused at the time of examination u/s 313 Cr.P.C. but each of them simply denied the incident and answered the questions by stating "I don't know". "I am an innocent".

6. In Rai Sandeep @ Deepu Vs. State of NCT of Delhi, the characteristics of a sterling witness were summarized as follows:

A "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstances should

give room for any doubt as to the factum of the occurrence, the person involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

7. The eye witnesses can very well be categorized as sterling witnesses. Exhibit-"9" is the treatment sheet of Calcutta National Medical College and Hospital. That shows that relatives of victim named the assailants as Swapan Haider and others i.e. the accused persons.

8. A suggestion was given by defence to P.W.- 1 that during altercation Dinabandhu fell on the chatal of tube well and dashed his head to sustain injury. So, the presence of accused persons stands admitted. They did not deny their presence in 313 examination.

9. Learned Counsel for the State submitted that incident took place on 23.5.2003 but the FIR was lodged on 25.5.2003. Delay was not explained. This argument holds no water because it appears that the victim was taken from Diamond Harbour hospital to Calcutta hospital for better treatment. So, it is quite expected the relation remained busy for two days. The delay in the meantime is no so fatal as to render the prosecution case vulnerable.

10. It was contended that P.W.-3, 5 and 6 who claimed to be eyewitnesses did not accompany the injured Dinabandhu to hospital. Learned Defence Lawyer argued that it was unnatural conduct and so they should be disbelieved. Further it was stated that P.W.-3 instructed his brother to collect money for medical expenses and he offered explanation for not accompanying his brother to the hospital for collecting money for medical expenses. This is not a sound piece of argument which can destroy the very basis fabric of the prosecution case. It was further argument that conduct of P.W.-2 is very suspicious and he is not at all a reliable witness though he claimed to be an eyewitness. Neither he offered any help nor informed the incident to anybody. This behaviour cannot go to destroy the prosecution case. P.W.-7 is a fruit seller usually goes for selling fruits and he

left house in between 5.30 to 5.45 a.m., but the incident took place two years back at about 6.30/7 a.m. He is a rustic villager. It is not possible for him to give exact timings.

11. Argument was advanced that the P.O. has not been mentioned in the sketch map. It is not necessarily required to be given in all circumstances.

12. Last but not the least, argument of the learned Counsel for the appellants is that the so called dying declaration Exhibit-4 cannot be relied upon. It was contended that the Doctor Subir Kumar Das/P.W.- 14's opinion was that the patient was unconscious throughout 23.5.2003 to 27.5.2003. Doctor stated that patient was not in a fit condition at that relevant point of time. So, this piece of evidence of the Doctor practically shatters the factum of dying declaration allegedly to have been given by the victim Dinabandhu Majhi on 24.5.2003. The signature of Dinabandhu Majhi in English appears in Exhibit- 4 and the dying declaration was recorded by S.I./P.W.-12 at Calcutta National Medical College, Kolkata. But there is no signature of either any nurse or any attendant or Doctor. So, I am reluctant to put in reliance on such dying declaration. That apart this very fact was not put to the accused at the time of examination u/s 313 Cr.P.C. So, it is liable to be ignored in view of (2009) 2 SCC Cri. 243.

13. The following judgments cited by the learned Counsel for the appellants and as mentioned in the written notes of argument are not of much help to the appellants due to distinguishable nature of fact and circumstances of the case and the findings arrived at above.

(i) 2004 SCC (Cri) 1776 and

(ii) 2005 SCC (Cri) 73 : regarding delay in lodging FIR.

(iii) (2004) 1 SCC (Cri) 958 and

(iv) (2003) 1 SCC (Cri) 856 : regarding unnatural conduct of prosecution witness.

(v) AIR 1924 Cal 324 and

(vi) AIR 2004 SC page 797 : regarding benefit of doubt.

(vii) 2009 (Cri L) 2833 - giving false evidence in dying declaration.

(viii) AIR 1976 SC 976- Substratum of the prosecution case found to be false, untrustworthy.

14. Human beings are prone to commission and omission. It has to be seen if such omission is fatal or not. Criminal trial is like a looking glass. If evidences are more or less consistent and trustworthy, although there may be some minor omissions and contradictions yet the truth can be reflected in evidence and prosecution is said to have succeeded bringing home the charges. But if projection of evidence is blurred and not visible due to fabrication, falsehood and embellishment, the prosecution case fails. Here the former is available in view of the totality of materials on record.

15. I find no merit in the appeal. Accordingly, the criminal appeal stands dismissed.

16. Let a copy of this judgment along with LCR be sent back to the learned Trial Court immediately. Criminal Section is directed to supply the urgent photostat certified copy of this judgment to the parties, if applied for.