

(2006) 06 CAL CK 0019
In the Calcutta High Court
Case No : Criminal A. No. 255 of 2000

Tarit Kundu, Bishu Sarkar, Sahadeb Sarkar, Sasthi Sarkar,
Paresh Sarkar and Sukumar Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 06-06-2006

Acts Referred:

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

Citation : (2006) 3 CHN 809

Hon'ble Judges : Sankar Prasad Mitra, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Ashim Kumar Dey and Debabrata Roy, Nos. 2 to 6 and Himaugshu Dey and N. Dey, No. 1, for the Appellant; T. Dutta Gupta and Jayanta Narayan Chatterjee, for the Respondent

Judgement

Sankar Prasad Mitra, J.—This appeal has been preferred against the judgment dated 5th August, 2000, passed by the learned Additional Sessions Judge at Raiganj District, Uttar Dinajpur, whereby the appellants namely, Tarit Kundu, appellant No. 1; Bishu Sarkar, appellant No. 2; Sahadev Sarkar, appellant No. 3; Shasti Sarkar, appellant No. 4; Paresh Sarkar, appellant No. 5 and Sukumar Ghosh, appellant No. 6 were convicted and sentenced u/s 302/34 of IPC to suffer imprisonment for life each in connection with Sessions Case No. 47 of 1997 and Sessions Trial No. 18 of 1998 arising out of Raiganj P. S. Case No. 117 of 1995 dated 27th March, 1995 on the basis of a complaint lodged by de facto complainant, Shyamal Mullick.

2. The prosecution's case in brief is that on 27th March, 1995, the de facto complainant went to Raiganj Police Station and lodged a written complaint, vide Exhibit 1 series, scribed by one Mamood, alleging that after getting information from Gopal De, P.W. 3 and Sanjib Malakar, P.W.4 to the effect that the accused persons named in the complaint killed Raju Bose, the victim, nephew of P.W. 1 Shyamal Mullick, by assaulting him with Bhojali on the road near Dakshin Kasba,

near Petrol Pump to the west of National Highway 34. It is further alleged that the accused Paresh Sarkar, appellant No. 5 and Sukumar Ghosh, appellant No. 6 restrained Raju on the way and directed other accused persons to kill Raju. Pursuant to that order accused Sahadev Sarkar, Bishu Sarkar and Sasthi Sarkar caught hold of Raju (victim), and accused Tarit Kundu stuck him on his back with Bhojali from behind and, as a result, the victim fell to the ground but accused Tarit further penetrated the said bhojali and the victim Raju Bose died on the spot. On the basis of this complaint, Raiganj P.S. started a Case No. 117 of 1995 against the appellants herein. The case was endorsed to S.I., Md. J. Mollah, by I.C., Raiganj P.S. for causing investigation. The dead body of the victim Raju Bose was taken to Raiganj Hospital by Nepal De with the help of a rickshaw van. The S. I. J. Mollah, P.W. 11 took up the investigation of the case and he visited the place of occurrence, examined witnesses and recorded the statement u/s 161 of Cr. PC, prepared rough sketch map with index of the P.O. vide Exhibit 6 series, held inquest in respect of the dead body of the victim at Raiganj Hospital and arranged for sending the dead body of the victim to Raiganj Hospital morgue for P.M. examination through H.G. 1735, Pran Gobinda Das, P.W. 10 under a dead body challan vide Exhibit 3 series. At Raiganj Hospital morgue the dead body was identified by P.W. 10 before Dr. R.B. Ghosh, P.W.9, who held P.M. examination on the dead body of the victim on 27* March, 1995 and prepared P.M. report wherein he opined that the death of the victim was caused due to shock as a result of anti-mortem wound and haemorrhage and homicidal in nature. The I.O. in course of investigation seized P.M. blood, wearing apparel of the victim under a seizure list in presence of witnesses vide Exhibit 4 series. The I.O. on his transfer, handed over the Case Diary to I.C. Raiganj on 16th September, 1995 and thereafter P.W. 12, Sujit Kr. Ghosh submitted chargesheet against all the accused persons (appellants) u/s 302/34 of IPC. The appellants were charged u/s 302/34 of IPC and they pleaded not guilty. It is the further defence of the appellants that they were falsely implicated as there was strained relationship with the victim. It is also the defence of the appellant No. 6, Sukumar Ghosh that on the date of occurring of the incident he was attending his duty as an employee of N.B.S.T.C. at Raiganj depot and as such, he had no occasion to remain present at the P.O. where the incident occurred on 27th March, 1995. In this connection, appellant No. 6 adduced evidence through DWS. 1, 2 and 3 and for the rest one witness was examined as D. W. 4. In support of his defence, appellant No. 6 had exhibited attested copy of attendance register of N.B.S.T.C., Store Section, (Exhibit A), copy of chargesheet with regard to G.R. Case No. 643 of 1993 (Exhibit B), ration card of Sukumar Ghosh, (Exhibit C) and certificate of Voter's list (Exhibit D). On the other hand, the prosecution has examined as many as 12 witnesses including the I.O. and Doctor, who held the P.M. examination. Witnesses, P.W. 6, Nepal Karmakar and P.W. 8, Ananta Biswas had been declared hostile by the prosecution. P.W. 2, Nepal De and P.W. 3, Gopal De are the eye-witnesses examined in this case from the side of the prosecution. The prosecution in order to prove their case also exhibited the written complaint, Exhibit 1 series, inquest report, Exhibit 2 series, dead body challan, Exhibit 3

series, seizure list, Exhibit 4 series, formal FIR, Exhibit 5 series, sketch map with index, Exhibit 6 series and the seized articles proved by Pran Gobinda Das, PW 10 vide Material Exhibit I to VI. The learned Trial Judge after considering the testimonies of prosecution witnesses as also the documents produced in this case from both sides came to a conclusion that it was the appellants who in furtherance of their common intention killed the victim Raju Bose on 27th March, 1995 between 9.00 to 9.30 a.m. on the western side of N.H. 34 near a petrol pump shown in the sketch map as "A".

3. Being aggrieved by this order of conviction and sentence imposed upon the appellants the judgment of the Trial Judge has been assailed in this appeal.

4. The moot question to be considered in this case is whether the judgment passed by the learned Trial Court can be sustained or not?

5. Learned Advocate, Mr. Ashim Kumar Roy with Debabrata Roy, appearing on behalf of the appellant Nos. 2 to 6 submitted before us that the Trial Court on the basis of evidence of P. W. 2 and P. W. 3 convicted the appellants. Learned Advocate referring to the testimonies of P. W. 2 and P. W. 3 submitted that their evidence cannot inspire the confidence of the Court because P.W. 2, who claimed to have seen the incident of assault upon the victim Raju by all the appellants at the behest of appellant Nos. 5 and 6, did not communicate such fact to the I.O. P.W. 11, while he was examined on 27th March, 1995 between 10.45 and 10.50 a.m. This witness did not disclose all material facts before the I.O. just after occurrence of the incident. Therefore, his evidence is not at all reliable. It is further submitted by him that nothing has been stated against appellant Nos. 2 to 6 before the I.O. however, after 4 years he has stated before the Court the involvement of six appellants. It is also pointed out by him that one injury was found by Dr. R.B. Ghosh during P.M. examination on the dead body of the victim (Raju), so the question of repeated assault upon the victim by appellant No. 1 as deposed by P.W.2 is a myth because the doctor, P.W. 9, did not find more than one injury on the body of the victim and as such the evidence of P.W. 2 is not trustworthy. Referring to the evidence of P.W. 3, it is submitted by Mr. Roy that appellant Nos. 1 to 4 assaulted the victim and in the process appellant No. 1 stuck Raju with a Bhojali but this fact was not disclosed before the I.O. by this witness immediately after the occurrence. But he excluded the presence of appellant Nos. 5 and 6 at the place of occurrence and, therefore, the alibi taken by appellant No. 6 supported by D.W.I to D.W.3 and in view of the existence of several contradictions, his evidence should be viewed with suspicion. It is, therefore, submitted by Mr. Roy that since the prosecution could not prove the charges against the appellants the order of conviction and sentence imposed upon them should be set aside by this Court.

6. Mr. Himangshu Dey, with N. Dey, appearing on behalf of appellant No, 1, Tarit Kundu, submitted before us that the case rests upon the evidence of P.W. 2 and P.W. 3 and it cannot be singled out and it has to be read out with reference to the testimonies of P.W. 9, Dr. R.B. Ghosh and P.W. 11, I.O., Md. J. Mollah. According

to him P.W. 2 did not state all the facts before the I.O. P.W. 11 as to what has been stated by him before the Court. In the list of eye-witness the name of P.W. 3 Gopal Dey is not mentioned although he has been examined in this case. Mr. Dey drawing our attention to the deposition of P.W.2 and P.W.3 submitted that P.W.2 speaks about the involvement of 6 appellants whereas P.W.3 disclosed the names of 4 persons (appellants) i.e. appellant Nos. 1 to 4. Therefore, their contradictory evidence should be viewed with a doubt as regards the presence of all appellants at the time of occurrence of incident. It is also pointed out by him that P. W. 7, Bidu Bhusahan Barman saw the victim Raju lying by the side of road facing downwards with a knife which pierced the back side of the victim and the dead body was found in that condition and the said knife was not either seized or produced before the Court in support of the prosecution case and as such, the evidence of P.W. 2 and P. W.3 with regard to the incident of assault upon the victim by appellant No. 1 should be held untrustworthy and their evidence should not be relied upon by this Court. It is further submitted by him that P.W. 2 never stated before I.O., P.W. 11 what has been stated by him before the Trial Court although he was examined by the I.O. within half an hour of the incident. The I.O. did not find any mark of blood and P.W. 11 explained in his evidence that supporters of the assailants washed away the blood but he did not enquire about from P.W.2 and P.W.3 as to who washed the blood. Referring to the testimonies of P.W.2 and P.W.3 it is submitted by him that P.W.2 saw appellant No. 1 Tarit Kundu to assault the victim with a bhojali repeatedly on the back side but P.W.9 Dr. R.B. Ghosh only found one injury and nothing more. Therefore, according to him P.W. 2 did not at all see the incident of assault because his testimony as regards the incident of assault has been belied by P.W.9. It is therefore submitted by Mr. Dey that there was business rivalry and inimical relationship between the appellants and the victim and several criminal cases were pending against Raju (victim), in which the appellant Nos. 5 and 6 stood as witness. Thus, considering the contradictions and lack of evidence the Court should not accept the prosecution case as being proved to the hilt. According to him, the prosecution has miserably failed to bring home the charges against the appellants and, therefore, they are entitled to an order of acquittal.

7. Mr. T. Dutta Gupta with Jayanta Narayan Chatterjee, appearing on behalf of the State, drawing our attention to the testimonies of P.W.2, P.W.3, P. W.5, P.W.9, P.W.11 and P.W.12 submitted that the prosecution has proved their case against all the appellants in spite of the fact that P.W.6 and P.W.8 have been declared hostile by the prosecution. According to him the incident occurred on 27th March, 1995 between 9.00 to 9.30 a.m. to the west of N.H. 34 near a petrol pump at Dakshin Kasba shown in the sketch map (Exhibit 6) marked "A" where the victim Raju Bose was killed by all the appellants. The presence of all the six appellants will appear from the FIR, Exhibit 1 series, oral testimonies of P.W. 1, P.W.2, P.W.4, and P. W.5, and therefore the defence taken by appellant No. 6 that he was engaged in NBSTC's store room at Raiganj on 27th March, 1995 within 6.00 a.m. to 2.00 p.m. should not be accepted by this Court as a reasonable alibi.

According to him P.W.2 witnessed the incident at a distance of 30 to 35 cubits from his house while he was fencing the open space of his house with spilt bamboo and he saw six persons at the place of occurrence and appellant No. 1 stuck the victim with bhojali on his back. The evidence of P.W. 3 also totally supported the prosecution case, although, there are some discrepancies but those discrepancies do not go to the root of the prosecution case. Moreover, P.W.5, Kanai Sarma saw the appellant No. 1 assaulting the victim on his back side with bhojali. The presence of all the six appellants has also been confirmed by P.W. 4, Sanjib Malakar, who deposed before the Court that he saw six persons leaving the place. It is also submitted by Mr. Dutta that non-recovery of knife/ bhojali and non-production of the same before the Court by the prosecution will not adversely affect the prosecution case because the I.O. explained in his evidence that he did not find any knife on the body of the victim which is in tune with the testimonies of eye-witness P. W. 2 and P. W. 3 who saw the incident of assault upon the victim with bhojali by the assailants.

8. Mr. Dutta Gupta referring to the oral and documentary evidence on record submitted before us that the prosecution in this case has reasonably proved beyond any shadow of doubt the involvement of six appellants for killing the victim, Raju Bose, on the fateful day and the judgment passed by the learned Trial Court should be upheld by this Court as it does not call for any interference.

9. It transpires from the evidence on record that the incident occurred on 27th March, 1995 between 9.00-9.30 a.m. at Dakshin Kasba near a petrol pump on the western side of N.H.34 marked "A" in the sketch map vide Exhibit 6 prepared by P.W.11, I.O., where the victim Raju Bose was killed. The P.M. examination on the dead body of the victim was held by Dr. R.B. Ghosh, P.W.9, on 27th March, 1995 identified by P.W.10. P.W.9 opined that death was due to shock as a result of anti-mortem wounds and haemorrhage which was homicidal in nature. This witness found one stab-wound transverse like margin incised 2" long on the side of chest, 1 1/2" from midline on the back which perforated the lungs upper part of lower lobe through including other soft tissues in the wall causing fatal bleeding. According to him the wound was inflicted from backside and perforated whole of the lungs and this type of injury may be caused by sharp-cutting weapon like bhojali or dagger. So the death of the victim was homicidal in nature and soon after the incident P.W.2 poured water on the body of the victim in order to save him and ultimately he took the dead body of the victim by a rikshaw van to Raiganj Hospital wherefrom the dead body was sent to Raiganj Hospital morgue and there P.W.9 held P.M. examination on the dead body of the victim. P.W.6 and P.W.8 had been declared hostile by the prosecution in this case and they did not say anything in favour of the prosecution. P.W. 7 did not see the incident of assault upon the victim but he found the dead body of the victim lying on the road with a knife which pierced the backside of the victim but this evidence of P.W. 7 does not find any support from P.W. 11 nor the other witnesses supported such statement of this witness. Therefore, his evidence does not lend any help to the prosecution. P.W.5 Kanai Sarma claimed in his evidence

that he saw the incident of assault upon the victim by all the six appellants but, he has admitted in his cross-examination that he arrived at the place of occurrence after the assailants fled away. Therefore, his evidence to the effect that he saw the incident of assault upon the victim by all the appellants is also a myth and it cannot be accepted and as such, we do not place any reliance upon his evidence. P.W. 1, Shyamal Mullick, who lodged the written complaint had his source of information from P.W. 3 Gopal Dey and P.W. 4, Sanjib Malakar and accordingly he implicated all the appellants as assailants of the victim Raju and he being not an eye-witness spelt out in his evidence the involvement of all the appellants in the incident of killing victim Raju. But his evidence to the effect that he got information from P.W. 4 regarding involvement of six appellants cannot be accepted as true because the evidence of P.W.4 shows that he did not see the incident of assault upon the victim by all the six accused persons, as he only found on the fateful day six persons to flee away whom he could not identify and he saw the body of the victim lying by the side of N.H. 34. It is claimed by him that he received information from P.W.2 and P.W. 3 that all the appellants assaulted the victim and left the place after killing him. The statement of P.W.4 as regards collecting the names of the assailants does not find any support from the evidence of P.W.2 and P.W.3 both being the eye-witness. The testimonies of P.W.2 and P.W.3 do not show that they told the names of six appellants to P.W.4 and, therefore, his evidence becomes a hearsay with regard to his knowledge about the names of the assailants. In the circumstances, the evidence of P. W. 1 to the effect that he came to know about the names of all the assailants is not acceptable as truthful and believable piece of evidence supporting the prosecution case. On the contrary, the incident of killing by the assailants has been ventilated by P.Ws. 2 & 3 who had the occasion to watch the incident at a distance of 30 to 35 cubits from the P.O. P.W. 3 saw the appellant Tarit Kundu, Bishu Sarkar, Sahadev Sarkar and Sasthi Sarkar assaulting Raju with fists and blows and he also saw appellant No. 1, Tarit Kundu assaulting the victim (Raju) with bhojoli and due to scuffling, victim fell to the ground facing downward. It is also stated by him that when he was going out from his house he saw Tarit Kundu, Bishu Sarkar, Sahadeb Sarkar and Sasthi Sarkar fleeing away after the incident but, he did not speak about the presence of appellant No. 5, Paresh Sarkar and appellant No, 6, Sukumar Ghosh at the place of occurrence of the incident. In this context P.W.2, another eye-witness for the prosecution told about the involvement of all the appellants in this incident of killing, however, in spite of hearing the names of the six appellants from P.W.2 he did not believe the same because he did not see appellant Nos. 5 and 6 at the scenario. On the contrary, he saw appellant Nos. 1 to 4 at the P.O. involved in killing the victim. Therefore, he only disclosed the names of 4 appellants i.e. appellant Nos. 1 to 4 to P.W.1, Shyamal Mullick, as the persons who actually killed Raju on the fateful day. Therefore, his testimony contradicts the testimonies of P. W.1, P.W. 2 and the F.I.R., Exhibit 1 as regards the involvement of appellant Nos. 5 and 6 in the commission of offence. In this context the alibi taken by appellant No. 6, Sukumar Ghosh cannot be ignored because he claimed that he was on duty in

the office of N.B.S.T.C., Store Department, Raiganj on 27th March, 1995 from 6.00 a.m. to 2.00 p.m. which gets support from the prosecution witness, P.W.3.

10. Considering the evidence on record as well as attending circumstances of the case, we find that the evidence of P.W. 3, Gopal Dey is wholly trustworthy and he has given true picture of the incident of assault upon the victim by appellant Nos. 1 to 4. It is true that another eye-witness for the prosecution is P.W.2, Nepal Dey who saw the incident of assault upon the victim by appellant Nos. 1 to 4 and appellant No. 1, Tarit Kundu stuck the victim with bhojali, but he has implicated appellant Nos. 5 and 6 stating that at their behest appellant Nos. 1 to 4 killed the victim. In view of the evidence given by eye-witness, P.W.3, we can simply say that this is an embellishment. That apart he also found appellant Tarit Kundu stuck the victim repeatedly with bhojali, although, P.W.9 found only one injury and considering the fact that the witnesses deposed in Court after 4 years from the occurrence of the incident and since the power of observation and its reproduction varies from man to man, we can simply say this is also an embellishment or exaggeration. But we can safely ignore this embellishment or exaggeration because the basic fact with regard to the incident of assault upon the victim by appellant Nos. 1 to 4 remains uncontroverted. In the circumstances, we accept the evidence of P.W.2 as partly trustworthy.

11. Both P.W.2 and P.W.3 spoke about the incident of assault upon the victim (Raju) on the fateful day by appellant Nos. 1 to 4 while appellant No. 1, Tarit Kundu stuck the victim with bhojali and as a result of the incident of assault the victim died on the spot and his dead body was taken to Raiganj Hospital by P.W.2. It is true that P.W.11 did not find any knife on the on the dead body of the victim as claimed by P.W.7 and there was also no recovery of bhojali by the I.O. But that cannot change the complexion of the case because the incident of killing of the victim by appellant Nos. 1 to 4 has been clearly established in this case by the eye-witnesses, P.W.2 and P.W.3, supported by P.W.9 and P.W.11.

12. Thus, considering the submission made on behalf of the respective parties and materials on record we find that the prosecution in this case has proved the guilt of the appellant Nos. 1 to 4 beyond any shadow of doubt that they killed the victim/ Raju, on the fateful day. But we find from the record that the prosecution in this case has failed to prove the charges framed against appellant Nos. 5 and 6 with regard to the incident of murder of Raju. It is clearly established in this case that appellant Nos. 5 and 6 were not present at the place of occurrence on 27th March, 1995 as has been ventilated by P.W.3 and D.Ws. In the circumstances, we find that the appellant Nos. 5 and 6 are not guilty as the prosecution has failed to bring home the charges against them and, as such, they deserve an order of acquittal.

13. Appellant Nos. 5 and 6 are, therefore, found not guilty to the charges and they be acquitted and set at liberty. The appeal is accordingly allowed in respect of appellant No. 5, Paresh Sarkar and appellant No. 6, Sukumar Ghosh. However, we find no merit in the appeal in respect of appellant Nos. 1 to 4 and, therefore,

we uphold the order of conviction and sentence imposed upon appellant Nos. 1 to 4 by the Trial Court and the appeal is accordingly dismissed against them.

14. Sent a copy of this judgment to the learned Additional Sessions Judge, Raiganj, Uttar Dinajpur for information and taking necessary action.

Amit Talukdar, J.

15. I agree.