

(2001) 07 CAL CK 0024
In the Calcutta High Court
Case No : Criminal Appeal No. 37 of 1992

Zullu Rahaman alias Sk

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-07-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 161
Evidence Act, 1872 — Section 136, 137, 3
Penal Code, 1860 (IPC) — Section 302, 304, 34

Citation : (2001) 3 CALLT 42

Hon'ble Judges : Sujit Barman Roy, J; Pradip Kumar Biswas, J

Bench : Division Bench

Advocate : Mr. Balai Chandra Roy, Mr. Pradip Majumder and Ms Shampa Paul, for the Appellant; Mr. Sudipto Motira and Mrs. Krishna Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Biswas, J.—Through this appeal, the appellant Zullu Rahaman alias Seikh challenges the judgment and order dated December 17, 1981, Passed by the learned Additional Sessions Judge, 4th Court, Murshidabad in Sessions Serial No. 160 of 1987 (Sessions trial No. 1 of February, 1990) whereby convict/appellant has been convicted u/s 302 of IPC and sentenced to suffer imprisonment for life and to a pay fine of Rs. 1000/- in default to suffer RI for a further period of three months.

2. Briefly stated, the prosecution case as mainly emerged from the recital contained in the FIR lodge by Emajuddin Sk., is as under :-

That on 2 1.9.84 at about 1.30 p.m. the Informant Emajuddin came home after attending "Jumma Namaj" then he heard some hue and cry from a place and on hearing such hue and cry. he rushed towards that place i.e., near the house of Hamed Sk., of Rampur. After reaching that place, Emajuddin Sk. found that his brother Naimuddin was lying there being critically injured. At that time Emajuddin also found his brother Naimuddin placing one of his hands on the left

side of his abdomen and viscera was seen coming out of the wound. Besides the above injury, Emajuddin also found another injury on the back of the left arm and left shoulder joint of his brother and he also noticed that one "Hansua" was still attached to the said place of Naimuddin.

3. Seeing his brother Naimuddin in such condition. Emajuddin asked him as to who has inflicted such Injury on him. In reply, Naimuddin disclosed that they were Zullu Rahaman and his brothers namely, Samru, Manjur and Motaruddin.

4. Thereafter, Emajuddin took his brother Naimuddin to a hospital at Arjunpur and there Naimuddin was given first aid.

5. On the advise of Doctor, Naimuddin was being shifted to a hospital at Farakka and on his way to such hospital, the victim Naimuddin succumbed to such injuries at a place named Lalmati near Shivnagar village.

6. On receipt of the aforesaid written complaint, O.C. Farakka started Farakka P.S. Case No. 9, dated 21.9.84 u/s 304/34 IPC and S.I. Sunil Kumar Biswas O.C. Farakka P.S. took up the investigation of this case by himself.

7. S.I. Sunil Kumar Biswas, O.C. Farakka P.S.. (P.W.10) after taking up the investigation visited the place of occurrence, held inquest over the dead body of the deceased in presence of the witnesses. The I.O. also examined the witnesses and recorded their statements u/s 161 Cr.PC on different dates, arrested the accused persons, collected P.M. report and on completion of the investigation submitted charge sheet against the present convict/appellant and 3 others.

8. Upon hearing both sides, the learned trial Judge framed charge u/s 302 read with section 34 of IPC against this convict/appellant and three others.

9. Prosecution in order to bring home the charge, as aforesaid, has examined in all 12 witnesses. Out of the witnesses examined, PW 5 Tofa Bewa, while deposing before the trial Court, became 111 and she had to be removed from the witness box with the help of others. Prosecution, however, could not produce said Tofa Bewa once again to afford an opportunity to the defence to complete the cross-examination of PW5. Due to non-production of Tofa Bewa before the trial Court by the prosecution, her evidence could not be regarded as legal evidence. Consequently, the prosecution finally went on trial in this case with 11 witnesses in all and they are PW1, Emajuddin Sk., PW2 Sohagi Bewa, PW3, Jallu Sk., PW4, Niajuddin Sk., PVV6 Erfan Ali, PW7, Alauddin Sk., PW8, Baidur Rahaman, PW9 Nazu Sk., P.W. 10, S.I. Sunil Kumar Blswas, P.W. 11, H.G. Nizamuddin Sk., P.W.12. Dr. K.M. Hossain.

10. The defence case, as made out through cross-examination is one of innocence and besides the above, it has also been alleged on behalf of the defence that there was no Incident as alleged through the evidence adduced from the side of the prosecution. The defence also alleged previous enmity.

11. The Learned Additional Sessions Judge after recording the evidence of 12

prosecution witnesses (one witness namely PW5, Tofa Bewa, whose evidence has been expunged) and after hearing both sides came to the conclusion that the prosecution has succeeded in bringing home the charge u/s 302 1PC against the accused appellant Zullu Rahaman @ Sk. only. He accordingly sentenced the accused/appellant to suffer imprisonment for life and also to pay a fine of Rs. 1000/- in default R.I. for a further period of three months.

12. Being aggrieved by the finding of guilt recorded against the convict-appellant Zullu Rahaman alias Sk., and the sentence awarded, the present criminal appeal has been filed by the aforesaid convict-appellant.

13. We have heard the learned senior counsel, Sri Balai Roy, appearing for the appellant/accused at length as also the learned additional P.P. Sri Sudipto Moitra and both of them have taken us through the evidence of the 11 prosecution witnesses, so also through the impugned judgment and order of the learned Additional Sessions Judge, 4th Court, Murshidabad.

14. Placing reliance on a decision reported in *Ishwar Singh Vs. State of U.P.*, it has been contended by Sri Balai Roy, learned Sr. counsel that from the materials available, specially looking into the FIR (Exhibit 2). It is seen that date and hour of occurrence as recorded in the FIR is 21.9.84 at about 13.30 hrs. He has further contended that FIR was lodged at the Police Station on 21.9.84 at 17.45 hrs. and the same was despatched from the P.S. on 22.9.84 at 08.00 hrs., and as per the endorsement at the top of the FIR, it is further seen that the same was received by the concerned S.D.J.M. on 5.10.84. He has further contended that as per the above materials, it is clearly established that the learned Magistrate received it after lapse of almost a fortnight. Sri Roy, in this connection, has submitted further that section 157 of the Code of Criminal Procedure 1898 as well as 1973 both require that the First Information Report to be sent forthwith to the Magistrate, competent to take cognizance of the offence but in the Instant case, no explanation has been offered that why it was received by the learned Magistrate after lapse of a fortnight. This circumstance, according to Sri Roy, provides a legitimate basis for suspecting that FIR was recorded much later than the stated date and hour in the FIR affording sufficient time to introduce improvements and embellishments and to set up a distorted version of the occurrence.

15. As against that it has been contended on behalf of the respondent-State that true it is that the concerned Magistrate received it after a lapse of almost a fortnight and that by itself does not constitute a ground to throw out a prosecution case, but in the instant case taking us through the evidence and record, it is contended by the learned Additional P.P. that even if the FIR was not immediately sent to the Court of Magistrate, but it is of no consequence, since the FIR in question had been lodged within 3-4 hours from the time of occurrence and nothing tangible has been taken out by the defence to discard the other evidences adduced relating to the FIR, lodged in the P.S. by other witnesses.

16. Further it has been contended by the learned Additional P.P. that the mere fact/that there has been some delay in receiving the FIR by the concerned Magistrate, yet, the aforesaid fact alone, without being backed by positive and cogent evidence that there has been some embellishment in the FIR itself, would not cast doubt on the prosecution case, nor trustworthy and reliable evidence can be cast aside to record acquittal on that count. Sri Moitra has also taken us through the evidence of S.I., Sunil Kumar Biswas (P.W. 10) wherein it has been stated by the aforesaid witness that on 21.9.84 after recording the FIR he started this case and being the Officer-in-Charge of the concerned P.S. he himself took up the investigation and visited the P.O., held the inquest over the dead body of the deceased in presence of the witnesses, prepared sketch map with Index, seized materials by seizure list which were prepared on 21.9.84.

17. Taking us through the aforesaid evidence of PW10, it has been contended on behalf of the respondent that the FIR in the instant case was recorded without delay and the investigation was started promptly on the basis of that FIR. That being the position, when no other infirmity could be taken out by the defence, the delayed receipt of the report by the learned Magistrate concerned alone cannot by itself justify the conclusion that the FIR was anti-dated or the investigation was tainted and the prosecution was insupportable.

18. Assessing the materials on record with meticulous care, we also find no infirmity in the FIR, lodged in connection with this case. Rather the evidence adduced by the PW2 (Sohagi Bewa) PW3 (Jallu Sk.) P.W.4 (Niajuddin Sk.) and P.W.9 (Nazu Sk.) goes to establish the prosecution story beyond reasonable shadow of doubt regarding Involvement of accused appellant in committing the murder of victim of this case and such evidence has also been solidly corroborated through the medical evidence of PW12 Dr. K.M. Hossain) as also by PW1 (Emajuddin Sk.).

19. It has further been contended by learned Senior Counsel Sri Roy that the genesis of the prosecution case as per the evidence adduced is that the convict appellant Zullu Rahaman alias Sk. along with others were abusing Tofa Bewa at about 1 p.m. to 1.30 p.m. on Friday i.e., 21.9.84 and over that issue quarrel ensued between the victim and the accused party but the aforesaid fact has not been disclosed by other witnesses except PW2, Sohagi Bewa and the evidence of PW5 Tofa Bewa being expunged, there is no legal evidence to hold that Tofa Bewa was being abused and for which quarrel ensued between the accused party and the victim and subsequently the victim was assaulted by one of the accused party namely Zullu Rahaman alias Sk. with the "hansua" in his abdomen and in other parts of the body. But, even if the evidence of PW 5 Tofa Bewa has been expunged in this case, the evidence adduced by other witnesses namely PW 2,3,4 and 9 corroborated by the evidence of PW12 (Dr. K.M. Hossain) and PW1 (Emajuddin Sk.) has clearly established the charge u/s 302 of IPC levelled against the accused convict appellant Zullu Sk.

20. True it is that there are few omissions here and there in the evidence of the

above witnesses, but they are so insignificant that no importance can be attached with them and as such they are relegated to the background. It is also quite established principles of law that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment--sometimes there could have been deliberate attempt to offer embellishment and sometimes due to over jealousy they may give slightly exaggerated account. The duty of the Court is to sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total rejection of the evidence is unnecessary as the evidence has to be considered from the point of the view of trustworthiness and if such test is satisfied it ought to inspire confidence in the mind of the Court to accept such evidence.

21. Now, having gone through the entire evidence, recorded by the trial Judge and reading the entire Judgment and order of the trial Court, as a whole, we find that the judgment of the trial Court is a well written judgment and the learned trial Judge has correctly convicted and sentenced the convict appellant and as such the impugned judgment requires no interference whatsoever from this Court.

Thus, after hearing both the sides and after going through the entire materials on record, we are of the clear opinion that there is no merit in this appeal.

The appeal, therefore, fails accordingly. The conviction of the accused appellant will have to be upheld.

In the result, the instant appeal is dismissed.

S. Barman, Roy, J.

I agree.

22. Appeal dismissed