

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE RABINDRANATH SAMANTA**

CRA 78 of 2018

Kamal Roy
-vs.-
State of West Bengal & Anr.

For the Appellant : Mr. J.G. Roy, Adv.
Mr. Indrajeet Dey, Adv.

For the State of West Bengal : Mr. Saibal Bapuli, Adv.
Mr. Navanil De, Adv.

Judgment on : 30.09.2021

Rabindranath Samanta, J:-

1. This appeal arises out of the judgment and the order of conviction and sentence passed by learned Additional Sessions Judge, Fast Track Court-II, Howrah in S.T. No. 706 of 2006 whereby the appellant Kamal Roy has been convicted for commission of the offence under Sections 302/34 of Indian Penal Code (in short IPC) and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/- (Rupees Five Thousand only), in default, S.I for six (6) months.

2. The prosecution case, in brief, may be stated as under :

In the intervening night of 19.10.1994 and 20.10.1994 the informant Abhijit Singh was sleeping in the store room on the roof of the house at 36/2/1, R.N.R.C. Ghat Road, P.S. - Shibpur with his grandmother and younger brother. The rest family members of their family were sleeping in the rooms on the second floor of the house. While he was sleeping, he heard a sound of movement of some persons on the roof outside his room. He came out of the room and saw the appellant Kamal Roy was walking round the roof with a little boy. While he asked Kamal as to why he was there, he then told him that he needed shelter for the child and him in the house. Meanwhile, the father of Abhijit came there and asked the appellant to leave the place then and then and forbade him to come back again. The appellant left the place along with the child. At about 12:30 a.m. he came back there with four/five associates armed with 'hasua' (sickle). The appellant assaulted Debendra Prasad Singh, the father of the informant Abhijit Singh with 'hasua' on his person. The appellant and his associates came there with an intention to assault his father, his younger brother and him. After inflicting assault on the person of his father, the appellant Kamal and his associates left the place. The father of the informant who sustained injuries on his person was brought to local hospital where he was declared brought dead. The appellant Kamal and his associates caused the death of the father of the informant.

3. Depicting the episode as above the informant Abhijit Singh lodged an FIR at Shibpur Police Station and the FIR was registered as Shibpur P.S. Case No. 300 dated 20/10/1994 under Sections 302/34, IPC against the appellant (hereinafter be called as the accused person) and others. During investigation the I.O. examined available witnesses and recorded their statements under Sections 161 Cr.P.C. In course of investigation the I.O. arrested the accused persons namely Kamal Roy and Sambhu Panda and forwarded them to Court. The I.O. collected inquest report and post-mortem examination report. After completion of the investigation the I.O. submitted charge-sheet against five accused persons including the accused persons Kamal Roy and Sambhu Panda under Sections 302/34, IPC.
4. As the offence was triable by Court of Session, the case was committed to the Court of learned Sessions Judge, Howrah. By an order of learned Sessions Judge, the case was transferred to the Court of learned Additional Sessions Judge, Fast Track Court-II, Howrah for trial.
5. Ultimately, charge under Sections 302/34 IPC was framed against two accused persons namely Kamal Roy and Sambhu Panda who pleaded not guilty to the charge and claimed to be tried. In course of trial both the accused persons who were on bail absconded and as such, warrant of arrest was issued against them. The accused Kamal Roy was arrested and he was produced before the learned

Additional Sessions judge, Fast Track Court-II, Howrah. He was denied bail and trial was conducted keeping him in custody.

6. Despite issue of warrant of arrest and proclamation of attachment another accused Sambhu Panda could not be brought on record and the case stood filed against him for the present.
7. To bring home the charge, the prosecution has examined as many as nine witnesses and some documents relied upon have been marked as Exhibits 1 to 4/1. Two seized weapons of offence have been marked as Mat Exhibit – I collectively.
8. Having taken into account the submissions advanced by learned Advocates appearing for the parties and on consideration of the evidence on record the learned Trial Judge found the accused person guilty of committing the offence and the charges framed against him being proved convicted and sentenced him as hereinabove.
9. Feeling aggrieved by and dissatisfied with the judgment and the order of conviction and sentence as above the accused person has filed the instant appeal before this Court.
10. We have heard Mr. J.G. Roy, learned Advocate assisted by Mr. Indrajeet Dey, learned Advocate appearing for the accused person as well as Mr. Saibal Bapuli, learned Advocate assisted by Mr. Navanil De, learned Advocate for the State.
11. Mr. Indrajeet Dey, learned Lawyer appearing for the accused person argues that the FIR which is the foundation of the

prosecution case has not been marked as an Exhibited document on proof and as such, the credibility of the prosecution case gets shaken. The learned Lawyer points out that the charge framed against the accused person is defective as the number of the premises where the offence allegedly took place is omitted. In such context learned Lawyer has cited a decision in the case of **Rebati Baidya & Ors-Vs- State of West Bengal** reported in **2014 (1) Cal LJ 67**. Mr. Dey, further submits that the investigating officer of the case has not been examined and due to his non-examination the accused person was deprived of putting some vital and relevant questions to him to discredit the evidence of the prosecution witnesses. In such conspectus learned Lawyers argues that defects as pointed out above strike at the root of the prosecution case. Learned Lawyer further argues that most of the prosecution witnesses are interested and it will be unsafe to place reliance on such evidence to record conviction.

12. Per contra, Mr. Navanil De, learned Lawyer appearing for the State submits that the contents of the FIR have been proved by the informant P.W. 4 Abhijit Singh. Even if the FIR is not formally exhibited, the Court can rely on an un-exhibited FIR as the FIR is used for corroboration or contradiction of the prosecution evidence. Mr. De submits that despite summons were issued to the investigating officer on a number of occasions, the I.O. could not be available for examination. Mr. De argues that non-examination of

the I.O. due to his non-availability, the prosecution case which is otherwise proved, should not get discredited in any manner. As regards framing of charge learned Lawyer for the State submits that the charge contains all the allegations levelled against the accused person. Mere non-mentioning of the premises number in the charge does not vitiate the charge and the defence has failed to establish that miscarriage of justice has been caused to him due to omission of premises number in the charge. Mr. De emphasizes that the evidence on record is sufficient to arrive at a finding that the accused person is guilty of commission of the offence.

13. Since, it is a Court of First Appeal we have scrutinized the evidence and the materials on record meticulously to assess the sustainability of the findings of guilt of the accused person as arrived by the learned Trial Judge.
14. As noted above, P.W. 4 Abhijit Singh, is the informant who lodged the FIR at Shibpur Police Station. It is in his evidence that in the intervening night of 19/10/1994 and 20/10/1994 at about 12:30 a.m. while he was sleeping in their store room on the roof of the premises along with his grandmother then someone knocked the door of the room. After opening the door he found one person standing there along with a child. He told him to give shelter in the said house as the police was running after him. While he refused to allow him to stay in their house, he dragged him to the ground floor holding his hand. After he raised alarm his father opened the

door of his room and asked him about the matter. After hearing the said person his father refused to allow him to stay in their house. After a few minutes the person who is identified in Court as the accused person Kamal Roy came back to their house along with his associates armed with 'Katari' and assaulted his father on his chest with the said 'Katari' (a sharp cutting weapon). His father sustained bleeding injuries on his person and he was removed to Howrah hospital where the doctor declared him brought dead. From cross-examination I find that the evidence of the witness implicating the accused person Kamal Roy in commission of the offence remains unshaken. Nothing has been elicited from his cross-examination by the defence to blemish his evidence as to identifying the accused person in Court.

15. The evidence of P.W.4 as analyzed above reveals that the contents of the FIR as lodged by him stand proved. His evidence shows that he put his signature on the FIR and his signature has been marked as Exhibit 2. As the evidence of P.W. 4 suggests, the learned Trial Judge, ought to have exhibited the FIR on proof. However, as pointed out by learned Lawyer for the prosecution, we maintain the same view that an FIR is used for corroboration or contradiction. Therefore, the argument advanced by learned Lawyer for the accused person that non-exhibiting the FIR strikes at the root of the prosecution case is not acceptable.

16. It transpires from the case record that charge was framed under Sections 302/34 IPC against the accused persons Kamal Roy and Sambhu Panda on 10/07/2008. As we find, the date, time and place of occurrence are noted in the charge, but only the premises number is omitted. From the trend of cross-examination of the prosecution witnesses we find that as to place of occurrence as indicated in the charge is not disputed from the side of the accused person. From the statement of the accused person under Section 313 Cr.P.C. we also do not find that the accused has raised any contention as to the place of occurrence. That being so, the argument advanced by the learned Lawyer for the accused person that the trial is vitiated due to defective charge is not acceptable.
17. As the evidence of the informant P.W. 4 reveals, the accused person in the intervening night of 19/10/1994 and 20/10/1994 at about 12:30 a.m. assaulted Debendra Prasad Singh, the father of the informant on his chest and other parts of the body with a sharp cutting weapon and as a result of which he sustained injuries on his person and ultimately he succumbed to the injuries. P.W.1 Biswajit Singh and P.W. 2 Sujit singh, two sons of the deceased in the evidence testify that in the intervening night of 19/10/1994 and 20/10/1994 the accused person Kamal Roy and his associates came to their house and the accused person Kamal Roy assaulted his father on his chest and other parts of body with a sharp cutting weapon and as a result of which their father sustained injuries and

he ultimately succumbed to the injuries. We find that nothing is elicited from the cross-examination of P.W.1 and P.W. 2 to vent the credibility of their evidence. P.W.3, Sahebraj Singh, a neighbour of the deceased deposes that he received one information that a staff of their jute-mill named Fort William Jute Mill became injured and he informed this incident to Shibpur Police Station.

18. P.W.5 Daya Kumar Limma, then a local councilor of Howrah Municipal Corporation says in his evidence that after hearing the incident he as a councilor of the locality went to the house of the deceased and he came to know from the wife of the deceased that a dispute took place between the accused person and the deceased and following such dispute the deceased was murdered. P.W. 7 Krishna Prasad @ Krishna Nanda, a neighbour of the deceased deposes that hearing a hue and cry in a night in 1994 he came out of his room and went to the road where there was a gathering of people. After going to the quarter of the deceased Debendra Prasad Singh, he found that he was lying on the staircase with profuse bleeding. Lohar Singh and himself took the victim to the hospital.

19. On analyzing the evidence of the prosecution witnesses we find that P.W. 4 Abhijit Singh, P.W. 1 Biswajit Singh and P.W. 2 Sujit Singh witnessed the incident. It is their substantial evidence that the accused person Kamal Roy came to the premises of the deceased with a child and requested the informant to allow them to stay in their premises, but his request was turned down. Soon

thereafter, he returned to the place of occurrence with his associates and the accused person Kamal Roy inflicted injuries on the chest and other parts of the body of the deceased with a sharp cutting weapon termed either as 'hasua' or 'katarai' by the witnesses. The deceased, ultimately succumbed to the injuries. It appears from the seizure list that two 'kataris' (sharp cutting weapons) were seized on identification by the aforesaid accused person. As noted above, the I.O. could not be examined. But, from the evidence of P.W. 9, constable Sripati Charan Guria we find that the aforesaid sharp cutting weapons were seized on identification by the accused person and those weapons have been marked as Mat Exhibit I collectively.

20. Learned Lawyer for the accused person submits that the witness P.W. 4 Abhijit Singh in his evidence says that the accused used 'Katari' while the other prosecution witnesses P.W. 1 and P.W. 2 have deposed that the accused used 'Hasua'. Be that as it may, the fact remains that on identification of the accused person two 'kataris' were seized and a seizure list was prepared accordingly. 'Hasua' and 'Katari' look like the same. While the handle of 'hasua' is either of wood or bamboo, the handle of 'katari' is of metal. Therefore, the deposition of the witnesses that the accused used 'hasua' or 'katari' does not blemish the credibility of the evidence as a whole.

21. As stated above, much emphasis have been laid on the credibility of the witnesses namely P.W.1 Biswajit Singh, P.W. 2 Sujit Singh and P.W. 4 Abhijit Singh as interested witness being the sons of the deceased.
22. It is trite to say that a witness cannot be said to be an interested witness merely by virtue of being a relative of the victim. A related witness poses some kind of relation with the victim and interested witness postulates, someone having direct interest and derives some benefit out of the result of the litigation. So it becomes imperative for the Courts to examine the credibility of such witnesses to rule out any possibility of tainted evidence being given in the Court of law. However, in the decision in the case of **Hukam Singh-Vs- State of Rajasthan** reported in **2000 (7) SCC 490** the Hon'ble Apex Court at paragraph 7 has held that relative witnesses cannot be termed as interested witnesses and if they had seen the occurrence it is only natural that they would implicate the real offender.
23. The evidence of P.W.s 1, 2 and 4 do not indicate that they have implicated the accused person in commission of the offence out of any enmity or rivalry. They saw the accused person to assault their father with sharp cutting weapon on the vital part of his body and thereby he caused his death. On careful scrutiny of their evidence we find that their evidence is credible and trustworthy.

24. Now it is to be seen whether the evidence of the aforesaid witnesses gets corroborated by medical evidence. P.W. 8 Dr. Ashu Ranjan Saha was attached to Howrah District Hospital on 20.10.1994 as a medical officer. It is evident from his evidence that he conducted post-mortem examination over the dead body of the Debendra Prasad Singh s/o Late Bhola Singh, aged about 50 years. He deposes that on examination he found the following injuries: Incised wound 3 and $\frac{1}{2}$ "x 2" into thoracic cavity placed obliquely over left side of anterior surface of chest over left nipple with evidence of perforation of left lung and heart with free and clotted blood in thoracic cavity. The autopsy surgeon has opined that the death of Debendra Prasad Singh was due to the effects of injuries mentioned above ante-mortem and homicidal in nature. The wounds as noted in the post-mortem examination report similarly find place in the inquest report (Exhibit 1/1) proved by its maker P.W. 6 A.S.I Gobinda Chandra Das. The evidence of P.W.s 1,2 and 4 conjointly with the medical evidence as reflected from the evidence of Dr. Ashu Ranjan Saha and the post-mortem examination report (Exhibit 3) unequivocally prove that due to inflicting injuries on the person of the deceased by the accused Kamal Roy the deceased Debendra Prasad Singh breathed his last.
25. As it transpires from the case records, the learned Trial Judge issued summons on several occasions to the I.O. to ensure his attendance before the Court for examination, but to no effect. As

evinced from the prosecution evidence including the post-mortem examination report, the prosecution has established the charge against the accused person beyond any shadow of doubt. We do not find that non-examination of the I.O. has occasioned any prejudice to the defence resulting in miscarriage of justice. The effect of non-examination of investigating officer has been considered by the Hon'ble Apex Court in a catena of decisions. In the decision in the case of **Ram Deo Vs State of Uttar Pradesh** reported in **1995 (1) SCC 547**, the Hon'ble Apex Court has held that it is always desirable for the prosecution to examine the investigating officer. However, non-examination of the investigating officer does not in any way create any dent in the prosecution case, much less affect the credibility or otherwise trustworthy testimony of the eye-witnesses. In the decision in the case of **Ambika Prasad-Vs- State (Delhi Administration)** reported in **AIR 2000 SC 718** it was held by the Hon'ble Apex court that non-examination of investigating officer could not be a ground for disbelieving eye-witnesses. In the decision of **Ram Gulam Choudhury -Vs- State of Bihar** reported in **2001 AIR SCW 3802** the Hon'ble Apex Court held as under: "**In our view, in this case also non-examination of investigating officer has caused no prejudice at all. All that Mr. Mishra could submit was that the examination of the investigating officer would have shown that the occurrence had taken place not in the**

courtyard, but outside on the road. The investigating officer was not an eye-witness. The body had already been removed by the appellants. The investigating officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have given credible and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the investigating officer was not examined. The non-examination of investigating officer has not led to any prejudice to the appellants. We, therefore, see no substance in this submission". Therefore, in view of the credible evidence on record as discussed above and the decisions of the Hon'ble Apex Court *supra* the argument advanced by the learned Lawyer for the accused person that non-examination of the I.O. deprives the accused to place its defence properly before the Court is not acceptable.

26. On analyzing the evidence on record we find that the learned Trial Judge has arrived at the finding based on evidence and recorded conviction of the accused person. The order of sentence as passed by the learned Trial Judge is quite justified.
27. In view of the above, we do not find any infirmity in the judgment and as such we refrain from interfering with the judgment rendered by the learned Trial Judge.
28. In the result, the appeal merits dismissal.

29. Accordingly, the appeal is dismissed. No order as to costs.
30. The judgment and the order of conviction and sentence passed by the learned Trial Judge is confirmed.
31. Send down the LCR along with a copy of this judgment to the learned Court below.
32. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(Rabindranath Samanta, J.)

I agree

(Soumen Sen, J.)