

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 53 of 2017

Sambhu Mishra & Anr.

-Vs-

The State of West Bengal.

For the Appellants : Mr. Sudip Ghosh Chowdhury, Adv.
Mr. Arghya Das, Adv.

For the State : Mr. Nguive Ahmed, Id. A.P.P.,
Ms. Amita Gaur, Adv.

Heard on : 10th March, 2022.

Judgment on : 10th March, 2022.

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 29.11.2016 and 30.11.2016 passed by learned Additional Sessions Judge, Fast Track 2nd Court, Hooghly in Sessions Case No. 49 of 2012/202 of 2014 convicting the appellants for commission of offence punishable under Section 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay a fine of Rs. 30,000/- each and in default to suffer further imprisonment for three years more.

Prosecution case, as alleged against the appellants is to the effect that on 27.09.2010 around 8.00 p.m., Apu Das had gone out of his house. At that time, he was assaulted by Sambhu Mishra with the assistance of his brother-in-law Sunil Das with a sharp cutting weapon. Hearing hue and cry, Bishnupriya Das, mother of the victim (P.W. 1) rushed to the spot. Local people had also assembled at the spot. Seeing them, appellants fled away from the spot. Apu was removed to Chinsurah District Hospital where he was admitted. On the written complaint of Bishnupriya Das, Mogra Police Station Case No.167 of 2010 dated 27.09.2010 under Sections 341/326/34 of the Indian Penal Code was registered. Apu died in the hospital on 28.09.2010 at 1:40 a.m. Section 302 of the Indian Penal Code was added to the first information report. In the course of investigation, appellant No. 2 Sunil Das was arrested. On his leading statement weapon of offence, a blood stained knife, was recovered from a bush behind the boundary wall of a paper mill. Thereafter, appellant No. 1 Sambhu Misra was arrested. In conclusion of investigation, charge sheet was filed against the appellants. Charge was framed under Sections 302/34 of the Indian Penal Code. Appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 11 witnesses and exhibited number of documents. Defence of the appellant was one of innocence and false implication.

In conclusion of trial, the Trial Judge by the impugned judgment and order dated 29.11.2016 and 30.11.2016 convicted and sentenced the appellants, as aforesaid.

Learned Advocate appearing for the appellants argues none of the witnesses had seen the incident. Out of suspicion, appellants have been falsely implicated. So-called dying declaration of the victim as narrated by P.Ws. 1 and 3 was stated for the first time in Court. P.Ws. 2 and 9 who claimed to be present at the place of occurrence, however, did not corroborate the dying declaration. Recovery of the weapon of offence is not supported by the independent witness, P.W. 5. P.W. 7, the other witness to the seizure is a relation of the deceased. No label was found on the seized knife produced in Court. Seized knife had also not sent for forensic examination to establish that it was stained with blood. Hence, the prosecution case is without merits and the appeal is liable to be allowed.

On the other hand, Mr. Ahmed, learned Additional Public Prosecutor with Ms. Gaur submits incident occurred beside the house of the deceased. P.W. 1, mother of the deceased, rushed to the spot and found the appellant No. 1 Sambhu running away from the spot. Her son made a dying declaration to her which is corroborated by P.W. 3. P.W. 3 also saw Sambhu running away from the spot. P.W. 2 found a man running away. P.W. 1 disclosed to P.W. 2 that Sambhu had assaulted the victim. P.W. 9, sister of the deceased, had seen both the appellants run away from the place of occurrence. On the leading statement of the appellant No. 2, Sunil Das, a blood stained knife was recovered from a bush behind a boundary wall of a paper mill in the vicinity of the place of

occurrence. Hence, the prosecution case against the appellants is fully established.

On an analysis of the evidence on record, I note P.Ws. 1, 2, 3 and 9 claimed to have come to the spot immediately after the incident.

P.W. 1, Bishnu Priya Das is the mother of the deceased and informant in the instant case. She deposed around 8.00 p.m. his son had gone out of the house. She heard cries 'maa maa maa, amake bachao'. Hearing shouts she came out and saw that his son with injury on the abdomen, face and finger of hand. Profound blood was oozing from the cut injury. He was lying on the ground. She saw Sambhu fleeing away from the place of occurrence. She called local people. Arun Das (P.W. 2) and Arati Das (P.W. 3) came to the place of occurrence. Her son was conscious and stated that Sambhu had assaulted him. She lodged first information report which was scribed by her daughter Manju. P.W. 1 proved her signature on the first information report. P.W. 2, Arun and P.W. 3, Arati are neighbours who rushed to the place of occurrence immediately after the incident. They found Apu lying with a cut injury in the abdomen. P.W. 2 saw a person running away from the post. Bishnupriya told P.W. 2 that Sambhu had assaulted Apu. P.W. 3, Arati corroborated Bishnupriya with regard to the dying declaration made by Sambhu. She saw Sambhu running away from the spot. In cross-examination, however, she admitted she had not disclosed the dying declaration to police.

P.W. 9, Manju Das is the sister of the deceased. She came to the spot along with her mother hearing the cries of her brother. She stated she saw Sambhu and Sunil running away from the spot. She, however, did not corroborate her mother with regard to the dying declaration made by her brother. She scribed the first information and proved the same.

P.W. 11, Swapan Kr. Sikdar, Investigating Officer of the case deposed on receiving a telephonic message on 27.9.2010 he went to the place of occurrence and received complaint from Bishnupriya. He made endorsement on the complaint, Exhibit-7/1. Subsequently, S.I. Uday Sankar Chatterjee endorsed the complaint at the police station, Exhibit-7/2 and drew up the formal first information report, Exhibit-9. In the course of investigation, he went to the place of occurrence and prepared rough sketch map. He recorded the statements of witnesses. He arrested Sunil Das and produced him before Magistrate. He was remanded to police custody. On 29.9.2010 Sunil made a statement stating that he can take the police to the place where Sambhu Mishra had thrown the weapon. P.W. 11 proved the portion of the said statement, Exhibit-12. Thereafter, Sunil brought out a blood stained knife having a wooden handle from a bush behind the boundary wall of a paper mill at a distance of 90 ft. from the place of occurrence. He identified the knife in Court. After seizure another statement of Sunil Das was exhibited as Exhibit-13. Subsequently, he arrested Sambhu Mishra and after collecting post mortem report, he filed charge sheet.

Seizure of the offending weapon is said to be witnessed by P.Ws. 5 and 7. P.W. 5, an independent witness was declared hostile. He, however, admitted his signatures on the seizure list and label. In cross-examination, he stated he had signed on blank paper.

P.W. 7, Susanta Das, brother-in-law of the deceased, however, supported to the seizure and proved his statement in Court.

In Cross-examination he admitted that he had stated for the first time in Court the knife was blood stained.

P.W. 6, Dr. Jayanta Kr. Mishra is the post mortem Doctor who held post mortem over the dead body of the deceased and found the following injuries.

“External Injury :

1. Incised wound over forehead : ½” from outer angel of the left eye to forehead above upper eyelids.
2. Incised wound over left side of cheek : 2”x½” deep incised wound over the left side of cheek.
3. Incised wound over left side of neck : 3”x1” incised wound on the left side of neck.
4. 4” Lacerated injury over the left parietal region of the scalp.
5. 2”x1”x6” penetrating wound above the umbilicus.
6. Deep lacerated injury affecting the underline fascia, muscle of right palm between thumb and index finger.

Internal Injury :

1. Peritorial cavity was found full of blood (Pete rakta bhorti).

2. Multiple incised injury over the intestinal coil.
3. Penetrating wound over the liver.”

He opined death was due to the above stated injuries ante mortem and homicidal in nature. He stated that the knife which was produced in Court could be used to cause the injuries on the deceased.

From the evidence of P.Ws. 1, 2 and 3 it appears deceased had gone out from his house at 8.00 p.m. in the night. Soon thereafter he cried out for help. His mother P.W. 1 rushed out and found him with a cut injury in the abdomen and other bleeding injuries. She saw Sambhu Mishra running away from the spot. These portion of the evidence of P.W. 1 is corroborated by P.Ws. 2 and 3. They are neighbours who also came to the spot soon after the incident. They saw the deceased lying with a cut injury in the abdomen. His intestine had come out from the abdomen. P.W. 2 saw a person running away from the spot though could not identify the person. P.W. 3, however, identified the person running away from the spot as Sambhu. P.W. 1 told P.W. 2 Sambhu had assaulted her son.

Evidence of the aforesaid witnesses show that the victim had been brutally assaulted with a sharp cutting weapon resulting in extensive injuries including a deep cut injury in the abdomen. In the course of same transaction witnesses saw appellant No. 1 Sambhu Mishra running away from the spot. Their evidence with regard to Sambhu running away from the spot where the victim was found lying with bleeding injuries is

relevant as *res gestae* under Section 6 of the Evidence Act and implicates Sambhu Mishra in the assault of the deceased.

From an analysis of the aforesaid evidence on record it is evident deceased had suffered fatal injuries on his abdomen and other parts of the body by a sharp cutting weapon. Evidence of post mortem Doctor, P.W. 6 also corroborates the nature of injuries found by the aforesaid witnesses and opined that the death was due to the said injuries ante mortem and homicidal in nature.

However, I am not impressed by the embellished version of P.Ws. 2 and 3 with regard to the dying declaration of the victim. The aforesaid dying declaration does not find place in the F.I.R. lodged by P.W. 1. Nor is it disclosed by P.W. 3 to the police during interrogation. P.W. 2 who came alongwith P.W. 3 to the spot, though claiming that the victim was conscious, is mum with regard to the so-called dying declaration. Hence, I consider it unsafe to give credence to the so-called dying declaration as proposed by the prosecution.

It has been argued on behalf of the State that appellant No. 2 Sunil Das was also present with Sambhu when the latter assaulted the deceased. Mr. Ahmed, learned Additional Public Prosecutor, submits name of Sunil Das transpires in the F.I.R. which was promptly lodged after the incident. P.W. 9 states she saw Sambhu and Sunil running away from the spot.

I have given anxious consideration to the aforesaid submissions made on behalf of the prosecution regarding the presence of Sunil at the

spot. P.W. 1, the informant, has deviated from the F.I.R. in Court. She did not disclose that she saw Sunil running away with Sambhu from the spot. Neither the independent witnesses namely P.Ws. 2 and 3 state about the presence of Sunil at the place of occurrence. P.W. 2 states he saw one person running away from the place of occurrence, while P.W. 3 specifically named Sambhu as the individual who was running away from the spot. Only P.W. 9 claims to have seen Sunil running away with Sambhu from the spot. However, her presence at the place of occurrence is not corroborated either by her mother (P.W. 1) or by P.Ws. 2 and 3. On the slender and uncorroborated version of P.W. 9, I am unwilling to come to a conclusion that prosecution has been able to prove the presence of Sunil at the place of occurrence.

Mr. Ahmed further refers to the recovery of the offending weapon on the statement of Sunil to prove his complicity in the crime.

I have examined his leading statement marked as Exhibit-12. Section 27 of the Evidence Act is an exception to the bar of admissibility of a confession made by an accused to a police officer under section 25 and 26 of the Act. Only when a statement including a confession of an accused leads to the discovery of a fact, such portion of the statement which relates to the discovery and not the entire statement is admissible in law. Examining the statement marked as Exhibit-12 from that perspective, admission of Sunil that he knew the place where Sambhu after committing the crime had thrown the knife is admissible and nothing more. Pursuant to such statement it is claimed police recovered

a knife from a bush behind the boundary wall of a paper mill. In the absence of reliable evidence that Sunil was present along with Sambhu at the time of occurrence mere knowledge on his part with regard to the place where Sambhu had hidden the knife cannot implicate him in the murder. One ought not lose sight of the fact that Sunil was the brother-in-law of Sambhu and, therefore, may have acquired such knowledge after the occurrence. Hence, recovery of the knife on the leading statement of Sunil simpliciter cannot establish his participation in the murder.

In the light of the aforesaid discussion, I am of the opinion evidence adduced against Sunil with regard to his complicity in the murder is too weak and unreliable. Hence, he is entitled to the benefit of doubt. However, in the light of the overwhelming evidence on record particularly that of the witnesses P.Ws. 1, 2 and 3 who prove that Sambhu was seen running away from the spot where the appellant was found lying with fatal injuries caused by a sharp cutting weapon that ultimately resulted in his death, we are of the opinion the prosecution case against Sambhu has been proved beyond doubt.

In the light of the aforesaid discussion, I uphold the conviction and sentence of Sambhu Mishra while setting aside the conviction and sentence of Sunil Das.

Accordingly, appeal is partly allowed.

In view of disposal of the appeal, connected applications, if any, is also disposed of.

The appellant, Sunil Das, shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of section 437A of the Code of Criminal Procedure.

Period of detention suffered by the appellant, Sambhu Mishra, during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)