

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. 105 of 2016

With

CRAN 2 of 2021

Dilip Das and Ors.

vs

The State of West Bengal

For the Appellants : Mr. Manojit Bhattacharya, Adv.

Mr. Bibaswan Bhattacharya appears as *Amicus Curiae*.

For the State : Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 17.05.2022

Judgment on : 20.05.2022

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 11.12.2015 and 15.12.2015 passed by the learned Additional District and Sessions Judge, Fast Tract, 1st Court, Alipore, South 24-Paraganas,

in Sessions Trial No. 2(11) 2008 arising out of Sessions Case No. 35(8) 2008 convicting the appellants under sections 302/34 and 324/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and pay a fine of Rs.10,000/- each, in default, to suffer rigorous imprisonment for two years more for the offence punishable under section 302/34 of the Indian Penal Code and to suffer simple imprisonment for three years and pay a fine of Rs.2,000/- each, in default, to suffer simple imprisonment for six months more for the offence punishable under section 324/34 of the Indian Penal Code; both the sentences to run concurrently.

Prosecution case as alleged against the appellants is to the effect that on 22.04.2008 around 11.30 pm the appellants assaulted one Parvez Alam @ Rajesh (P.W. 6) at Tarikhana More on Tiljala Road. Ashok Roy (the deceased) intervened. Thereafter, the appellants assaulted Ashok Roy. As a result of assault, Ashok sustained severe injuries and fell down at the spot. Parvez Alam @ Rajesh (P.W. 6) was also injured and fled away from the spot. He was treated by Dr. Sonali Dutta (P.W. 16). Sankar Roy (P.W. 4) and Rajesh Roy (P.W. 5) saw the incident. They informed the family members of Ashok. Asim Kumar Majumdar (P.W. 13) a police officer attached to Tiljala Police Station, on receiving telephonic information arrived at the spot. He removed Ashok to the Chittaranjan Hospital where he was declared dead. Post-mortem was held over the body of the deceased. Written complaint was lodged by Deb Kumar Roy

(P.W. 1), brother of Ashok resulting in registration of Tiljala P.S. case no.139/08 under sections 302, 326, 34 read with section 25, 27 of the Arms Act against Dilip Das, Sanjay Das, Santosh Kumar, Basudeb and others. In course of investigation, appellants were arrested by I.O. P.W. 17. On the statement of Dilip Das two iron rod, one bamboo, two wooden battam were recovered. On the leading statement of Ajay Das one country made pipe gun and one round of .303 ammunition were recovered. Post-mortem report was collected. I.O. submitted charge-sheet showing Sanjay Das had absconded. Charges were framed against the appellants and one Santosh and Basudeb under sections 302/34 and 307/34 of the Indian Penal Code. Upon arrest of Sanjay Das similar charges were also framed against him. In the course of trial, prosecution examined 17 witnesses and exhibited a number of documents.

In conclusion of trial, the trial Judge by impugned judgment and order convicted and sentenced the appellants, as aforesaid. Santosh and Basudeb were acquitted of the charges leveled against them. Hence, the present appeal.

Learned Counsel appearing for the appellants argued the prosecution case as narrated by the witnesses are at variance to one another. P.W. 1 has significantly deviated from FIR and stated Ashok and Rajesh had been called by the appellants from the house. They were assaulted in front of the house and thereafter Ashok was dragged away to some distance. His narration is not only contrary to FIR but inconsistent

with P.Ws. 4, 5 and 6 who stated assault took place at Tarikhana More. P.Ws. 4, 5 and 6 do not corroborate each other with regard to manner of assault. While Sankar Roy (P.W. 4) stated Parvez Alam @ Rajesh (P.W. 6) was initially assaulted by Sanjay and Dilip and thereafter others joined, Rajesh Roy (P.W. 5) and the injured Parvez Alam @ Rajesh (P.W. 6) stated the latter had been assaulted by all the appellants from the beginning. Sankar does not spoke of the role of Pradip Das in the assault. Names of Pradip Das and Ajay Das are also absent in the FIR. Hence, the appeal may be allowed.

Mr. Bibaswan Bhattacharya as amicus curiae adopted the submissions of the learned Counsel for the appellants. In addition, he argued statements of vital witnesses like P.Ws. 4, 5, 6 and 8 suffer from embellishments when compared with their earlier statements to I.O.

On the other hand, learned Counsel for the State argued injured witness Parvez Alam @ Rajesh (P.W. 6) has implicated all the appellants in the murder. His deposition is corroborated by eye-witnesses Sankar Roy (P.W. 4) and Rajesh Roy (P.W. 5). P.W. 1, first informant, is not an eye-witness. Omission of names of Ajay and Pradip in the FIR does not affect the prosecution case in view of the consistent evidence of the eye-witnesses including the injured witness. Ocular version of the witnesses is corroborated by medical evidence on record. Hence, the appeal is liable to be dismissed.

Parvez Alam @ Rajesh (P.W. 6) is the injured witness. He deposed incident took place on 22.04.2008 at 11.15 pm. He was sitting at Tarikhana More along with others. Dilip came and abused him. Sanjay assaulted him at the forehead with the butt of pistol. He sustained injury. He fell on the ground and others assaulted him. Ashok came to the spot and tried to rescue him. Dilip assaulted Ashok with an iron rod. He fell down and other persons assaulted Ashok. He fled away from the spot. He identified the appellants in Court. His wife Ayesha took him to Chittaranjan Hospital at Park Circus.

P.W. 16, Dr. Sonali Dutta treated him at Calcutta National Medical College and Hospital. She found the following injuries:-

- “(i) 1cm with one stitch;
 - (ii) 3 cm with three stitches found over left parietal region of scalp;
 - (iii) 2 cm with two stitches found over right eyebrow.
- Blackening of eye was found over right eye. Swelling and tenderness found over right side of eye, cheek and eyebrow. Tenderness found all over body.”

She proved the injury report.

P.Ws. 4 and 5 are the eye-witnesses to the incident.

P.W. 4, Sankar Roy, deposed he was gossiping with Rajesh Roy, P.W. 5. Dilip and Sanjay assaulted Parvez Alam @ Rajesh (P.W. 6). Ashok intervened. Thereupon, Santosh, Basudeb, Ajay and another came to the spot with iron rod, wooden battam and assaulted Ashok. He heard sound of fire. Out of fear, he left the spot. He informed father of Ashok. Thereafter, he again returned to the place of occurrence. Police shifted

Ashok to Chittaranjan Hospital where he was declared dead. He interrogated before the police. He made statement before Magistrate. Police seized iron rod, wooden battam, two motorcycles. He signed on seizure list.

P.W. 5, Rajesh Roy, deposed he was gossiping with Sankar (P.W. 4) at Tarikhana More. He saw 4/5 persons whom he identified as Dilip, Sanjay, Pradip, Ajay and Basudeb assault Parvez Alam @ Rajesh (P.W. 6) at Tarikhana More. Ashok intervened and was also assaulted. He heard sound of firing. He informed the father of Ashok. He returned to the place of occurrence and saw police had arrived at the spot.

P.W. 8, Shib Kumar Yadav, is a post occurrence witness. He was sleeping in his house. Hearing hue and cry he rushed to the spot. He found Ashok was lying in the ground. Dilip, Sanjay, Pradip, Ajay standing with Bamboo. There was a bike standing. When the police came the miscreants fled away. Police took Ashok to hospital where he was declared dead. He made statement before Magistrate.

P.W. 13, Asim Kumar Majumdar, was posted as sub-Inspector at Tiljala P.S. at the relevant point of time. Around 12.15 am he received telephonic information with regard to some dispute at Tarikhana More on Tiljala Road. He reached the place of occurrence and found some persons fleeing away including Dilip, Sanjay and Pradip. A person was lying with bleeding injuries on the head. He came to know that the person was Ashok. He removed him to hospital. Thereafter, family members of the

deceased came to the spot. He took them to hospital. Doctor declared the victim dead.

P.Ws. 1, 2 and 3 are the relations of the victim.

P.W. 1 is the brother and first informant. P.W. 2 is the father of the deceased while P.W. 3 is his wife.

P.W. 2, Ram Naresh Roy, deposed on 22.04.2008 around 11.30/12.00 pm in the night he was sleeping. Sankar Roy and Rajesh Roy informed Dilip, Sanjay and others had assaulted Ashok. He proceeded to Tarikhana More which is 10/15 cubits from his residence. He found police at the spot. Police told him to go to the hospital to see his son. He went to the hospital and found his son lying dead.

P.W. 3, Durga Roy, is the wife of the deceased. She corroborated her father-in-law and stated she went to the hospital and saw the body of her husband. She made statement to police. Both the witnesses identified Sanjay and Dilip in Court.

P.W. 1, Deb Kumar Roy, is the brother of the deceased and first informant. He deposed Ashok was his younger brother. He was a supplier of sand. On 22.04.2008 at 4/5 pm Dilip and Sanjay came to their house and demanded money. At night around 11/11.30 pm while they were having dinner, appellants came to their house and asked his brother to come out. His brother's business partner Rajesh was also present in the house. Both of them went out and then the appellants and others assaulted them with iron rod. Rajesh informed them about the incident.

His brother was dragged some distance from the house. Upon hearing the incident, he and his father went to the spot. They heard sound of firing. Police came to the spot.

P.W. 9 held post-mortem over the body of the deceased, Ashok. He found five external and eight internal injuries after dissection. He opined death was due to the effect of the injuries as noted in the post mortem, ante mortem and homicidal in nature.

P.W. 15 held inquest over the body of the deceased.

P.W. 17 is the investigating officer. He went to the place of occurrence. He drew rough sketch map. He seized various articles from the place of occurrence including blood stained earth, wooden battam under seizure list (exhibit 4) in presence of P.W. 1 who signed on the seizure list. He forwarded witnesses for recording statement under section 164 Cr.P.C. On 25.05.2008 he arrested Dilip Das and on the basis of his statement recovered iron rod, bamboo and wooden battam under a seizure list marked as exhibit 9. On 26.05.2008 he arrested Ajay Das and on the basis of his statement one country made pipe gun and one round of .303 ammunitions were recovered. On 2.6.2008 he seized one iron chopper from Ajay Das under seizure list exhibit 13. He submitted charge sheet showing Sanjay Das as absconder. Subsequently, Sanjay Das was arrested.

From an analysis of the evidence on record, I find the injured witness Parvez Alm @ Rajesh (P.W. 6) is corroborated by other witnesses,

namely, P.Ws. 4, 5, 8 and 13. P.W. 16 examined Parvez Alam @ Rajesh in the hospital and also found injuries on his body. She proved the injury report marked as exhibit 11. Hence, evidence of the injured witness finds support both from eye-witnesses as well as medical evidence on record.

It is argued P.W. 4 had given a different narration of the incident which is at variance with P.Ws. 5 and 6. P.W. 4 deposed Dilip and Sanjay first assaulted Parvez Alam @ Rajesh. Then, Ashok intervened. Thereafter, Ajay, Santosh and Basudeb joined the assault. Pradip is not named as one of the assailants by P.W. 4. I have considered the aforesaid submission in the light of the other evidence on record. Evidence of the injured witness as well as the other eye-witness Rajesh Roy (P.W. 5) shows that the injured witness Parvez Alam @ Rajesh and the deceased were conjointly assaulted by all the appellants. The witnesses stated the appellants were variously armed and participated in the assault. There may be some discrepancy in the order in which the appellants had attacked the injured and the deceased but the crux of their deposition substantially corroborate to one another with regard to the presence, participation and pre-concert of the appellants in the assault of Parvez Alam @ Rajesh and the victim resulting in the latter's death. Minor discrepancies in the manner of assault may be attributed to varying recollective faculties of the witnesses but does not affect the authenticity of the prosecution case. It may not be out of place to mention presence of the appellants were also noted at the spot by P.W. 8, a post-occurrence

witness. P.W. 13, a police officer who arrived at the spot soon after the incident, also saw persons running away from the spot including Sanjay, Dilip and Pradip. Thus, variation between the evidence of P.W. 4 on the one hand and that of P.Ws. 5 and 6 on the other hand is minor and does not affect the foundation of the prosecution case.

Contradictions between the previous statements of P.Ws. 4, 5 and 6 to the I.O. and their evidence in Court are also minor. It is not expected that the evidence of a witness would be a facsimile of his previous statement to police. Slight variations between the two do not constitute omissions of material particulars which would qualify as contradictions and would improbabilise their versions.

It is also argued that medical evidence is at variance with ocular version. It is alleged in the FIR victim was fired on the head. Statements of witnesses including eye-witnesses, namely, P.Ws. 2, 4 5 and 8 state Dilip and Sanjay had fired at the deceased. However, no gun shot injury was noted in the post-mortem report. Incident occurred in the course of a melee. Appellants who were variously armed came to the spot and assaulted the injured Parvez Alam @ Rajesh and thereafter the deceased indiscriminately. Injured witness P.W. 6 does not state the appellants had fired at the victim. He was closest to the victim and had the best opportunity to see the incident. Though other eye-witnesses stated they heard sound of firing and presumed some of the appellants had fired at the deceased, none of them stated that the bullet had actually hit the

deceased. They also spoke of assault on the deceased causing bleeding injuries. A large number of external and internal injuries were found on the body of the deceased. Ocular evidence of the eye-witnesses is, therefore, not wholly ruled out by medical evidence on record. Only when ocular evidence is wholly ruled out by medical evidence would such inconsistency affect the intrinsic truth of the prosecution case.¹ Such a situation is clearly absent in the facts of this case.

It is contended Ajay Das and Pradip Das have been belatedly implicated in the instant case. They were not named in the FIR nor in the injury report of Parvez Alam @ Rajesh (exhibit 11). P.W. 4 does not state Pradip as one of the assailants while P.W. 13 did not identify Ajay as one of the persons running away from the spot. Other similarly situated accused persons, namely, Santosh and Basudeb were acquitted by the trial Judge. FIR was lodged by P.W. 1 who is not an eye-witness. He and other family members of the deceased heard about the incident from the eye witnesses, P.Ws. 4 and 5. As Dilip and Sanjay played predominant role in the assault, it appears their names were specifically mentioned along with unnamed others both in FIR as well as in the injury report. However, role of Ajay and Pradip in the assault was categorically narrated by injured witness in Court. His deposition is corroborated by another eye-witness Rajesh (P.W. 5) as well as post-occurrence witness Shib

¹ Abdul Sayeed vs. State of Madhya Pradesh, (2010) 10 SCC 259
Guru Dutt Pathak vs. State of Uttar Pradesh, (2021) 6 SCC 116 [para 30]

Kumar Yadav (P.W. 8) who saw all the appellants with arms standing at the spot. P.W. 4 the other eye-witness while naming three of the appellants stated there was another person who had participated in the assault. As the incident occurred in the course of a melee it is possible P.W. 4 failed to identify Pradip as one of the assailants. But presence and participation of Pradip has been noted by other witnesses as well as the police officer P.W. 13 who subsequently came to the spot and saw the assailants fleeing away. Thus, role of Ajay and Pradip as the assailants along with Dilip and Sanjay is fully established. Santosh and Basudeb were not noted as the assailants by the injured eye-witness. P.W. 8 post-occurrence witness also did not see them standing with arms at the spot. Hence, they cannot be treated on par with Pradip and Ajay who were convicted as their presence and participation in the crime is well established through the evidence of the injured eye-witness and other witnesses, as aforesaid.

Conviction and sentence of the appellants are, therefore, upheld.

The appeal is dismissed. Connected application being CRAN 2 of 2021 is also dismissed.

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

I record my appreciation for the able assistance rendered by Mr. Bibaswan Bhattacharya, learned advocate as *Amicus Curiae* in disposing of the appeal.

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.)

PA (Sourav)