

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. 259 of 2016

+

CRAN 3 of 2021

Palanu Roy & Anr.

Vs.

State of West Bengal

With

C.R.A.499 of 2015

Basu Roy @ Basudeb Roy & Ors.

-Vs-

The State of West Bengal

For the Appellants : Ms. Subhasree Patel, Advocate
Mr. Subir Debnath, Advocate,
Mr. Sohan Banerjee, Advocate.
Ms. Roma Roy, Advocate,
Ms. Saini Das, Advocate.

For the State : Mr. Swapan Banerjee, Advocate,
Mr. Narayan Prasad Agarwal, Advocate,
Mr. Suman De, Advocate,
Ms. Amita Gaur, Advocate.

Heard on : 28th March, 2022.

Judgment on : 28th March, 2022.

Joymalya Bagchi, J. :-

Criminal Appeal No. 223 of 2017 was dismissed as not maintainable vide order dated 16.03.2022. Similarly, Criminal Appeal No. 259 of 2016 is also dismissed as not maintainable since the appellants had preferred an earlier appeal being Criminal Appeal No. 499 of 2015.

In the said appeal, the appellants have assailed the judgement and order dated 27.03.2015 and 30.03.2015 passed by the learned Additional Sessions Judge, 2nd Court, Raiganj, Uttar Dinajpur in Sessions Case No.12/2010 convicting the appellants for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentencing them to suffer imprisonment for life each and to pay a fine of Rs. 5,000/- each, in default, to suffer rigorous imprisonment for five months more.

Prosecution case, as alleged against the appellants is to the effect that on 27.03.2007 around 7.45 a.m., one America Roy i.e. the deceased herein had left his residence in a bicycle for going to Raiganj Court. He was carrying legal documents. Around 8.15 a.m., his son Malin Roy went to the field of one Subal Mondal to defecate. When he was returning from the field after defecation, he saw the appellants catch hold of his father on the pucca road towards Bangal Bari to the north of the land of Subal Mondal. His father fell down on the road and thereafter Ajoy Roy and his son Sambhu Roy attacked the victim with farsha and sabol. Out of fright, Malin ran home and informed the incident to his mother. Thereafter, he returned to the spot with his mother and found body of his father lying at the place of occurrence with bleeding injuries in his head. House of Ajoy Roy was situated on the western side of the house of the deceased and a prolonged land dispute was going on between them. A case had also been lodged in this regard and Ajoy had held out threats to kill the victim few days earlier. Malin Roy (P.W.1) lodged written complaint at Raiganj Police

Station which was registered Raiganj P.S. Case No. 107 of 2007 dated 27.03.2007 under Sections 302/34 I.P.C. against the appellants and one Ajoy Roy, since deceased.

In course of investigation, Basu Roy @ Basudev Roy and Sambhu Roy were arrested and on their leading statement, a farsha was recovered. Subsequently, Ajoy Roy was arrested and Nishi Sarkar surrendered before the Court. The case was committed to the Court of Sessions and charges were framed under Sections 302/34 I.P.C. against the accused persons. They pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 11 witnesses to prove its case. Defence of the appellants was one of innocence and false implication. In course of trial, Ajoy Roy expired.

In conclusion of trial, learned trial Judge by judgment and order dated 27.03.2015 and 30.03.2015 convicted and sentenced the appellants, as aforesaid.

Ms. Patel, learned Advocate appearing for the appellants argued P.W.1 is not a truthful witness. His presence at the place of occurrence is highly unlikely. He claimed he had gone to the field of Subal Mondal to defecate. On his way back at around 8.15 a.m., he saw the incident. On the other hand, his mother (P.W.2) stated that he had gone out from the house for work. While P.W.1 stated the field of Subal Mondal was $\frac{1}{2}$ km away from their residence, P.W.2 claimed they went to a field which is 10 cubits away from their house to answer nature's call. P.W.1 saw the incident of assault for $\frac{1}{2}$ an hour but remained mum. He did not take

effort to save his father nor did he raise any hue and cry. P.W.6, his aunt who claimed to be present in their house on the fateful day stated P.W.1 upon going to the place of occurrence had seen the dead body of his father. This improbabilises the presence of P.W.1 at the place of occurrence when the incident occurred. There was enmity between the appellants and family of P.W.1. Hence, it is highly probable that the said witness out of previous grudge falsely implicated the appellants. Recovery of farsha on the leading statement of Basudev and Sambhu is also not proved. Statements of the said witnesses were not reduced into writing nor were they exhibited. P.W.5, witness to the seizure does not support the prosecution case that the recovery was on the showing of the said accused persons. In the event P.W.1 is disbelieved, mere abscondence by Nishi Sarkar cannot affix culpability. Hence, the appellants are entitled to an order of acquittal.

On the other hand, Mr. Swapan Banerjee, learned Advocate appearing on behalf of the State argued P.W.1 is a reliable eye witness. After his father had left on a bicycle for Raiganj Court with documents, he left his residence to defecate in the field of Subal Mondal. While defecating he saw the incident. As the incident occurred in a deserted place, he did not raise any hue and cry. Out of fear, he rushed to his residence and informed the incident to his mother. This is also corroborated by his aunt (P.W.6). F.I.R. was promptly lodged by P.W.1 ruling out any possibility of false implication. There was previous enmity between Ajoy Roy and the deceased which gave motive to commit the crime. On the leading

statement of Basudev and Sambhu, weapon of offence was recovered which was identified by P.W.1 in Court. Soon after the incident, Ajoy Roy and Nishi Sarkar had absconded which supports the prosecution case. Basudev and Sambhu had threatened P.W.1 during investigation and their bail was cancelled. These circumstances also point to the guilt of the appellants. Hence, the appeal is liable to be dismissed.

I have gone through the evidence on record. From the prosecution evidence and the submissions at the Bar, it appears P.W.1 is the sole eye witness. He is the son of the deceased. He deposed on the fateful day i.e. 27.03.2007 his father had left their residence on a bicycle for Raiganj Court. He went to defecate in the field of Subal Mondal. At that time, he saw Basu Roy, Palan Roy and Nishi Sarkar accost his father and they threw him on the ground. Then Ajoy and Sambhu gave farsha and sabol blow on his head, knee and thumb. Out of fear, he ran to his house and informed the incident to his mother and other village people. Thereafter, they came to the spot and found his father lying dead. His uncle, Radhesyam Roy, aunt, Fulkumari and others also came to the spot. There was a land dispute between his father and the accused persons. As a result, they murdered his father. He lodged written complaint which was scribed by Ratan Sarkar (P.W.4). He put his signature on the complaint. Police came to the village. Police held inquest over the dead body. He put his signature on the inquest report. Police also seized blood stained earth, blood stained wearing apparels, chappal, a nylon bag with documents and

Avon cycle of his father under a seizure list. He signed on the seizure list. He identified the articles in Court.

In cross-examination, he stated there was a paddy field on either side of the road where his father was murdered. There was wedding in the paddy field. His house is about $\frac{1}{2}$ kms. away from the place of occurrence. It takes 8/10 minutes from the place of occurrence in a bicycle to reach the house. It takes 12 minutes from the place of occurrence by walking. He was defecating at a spot 30 cubits from the place of occurrence when the incident occurred. He saw the incident for half an hour. He informed his mother around 8/8.30 a.m. He lodged complaint at 11 a.m.

P.W.2 (Rukh Muni Roy), is the wife of the deceased and the mother of P.W.1. She stated incident occurred around 8/8.30 A.M. She had been informed by her son Malin Roy about the incident. Thereafter, she went to the place of occurrence and found her husband lying dead.

In cross-examination, she, however, is silent with regard to the claim of P.W.1 that he had gone to the field of Subal Mondal to answer nature's call. On other hand, she claimed after taking meal, P.W.1 and his father had left for work. She, further, stated they went to the field which is 10 cubits away from their house to answer nature's call.

P.W.6 (Fulkumari Roy), aunt of P.W.1 deposed on the previous day of the incident she came to the house of the deceased. She further deposed that her nephew (P.W.1) went to the place of occurrence and after

seeing the dead body of his father came back. They also went to the place of occurrence.

In cross-examination, she stated after the deceased had left the house, her nephew left the house to attend nature's call. He had gone by foot.

From the aforesaid evidence he had gone to defecate in the field of Subal Mondal which is about $\frac{1}{2}$ kms away from his residence and saw the incident. Hence, he is a chance witness.

Let me examine whether such claim of P.W.1 is probable and consistent with other evidence on record. P.W.2, mother of P.W.1 does not support the claim of her son that he had gone out on that day around 8 a.m. to defecate. She stated her son had left for work in the morning after taking meal. She further stated they used to go to a field 10 cubits away from their residence to answer nature's call. The aforesaid evidence of P.W.2 renders the possibility of P.W.1 going to the field of Subal Mondal at a distance of $\frac{1}{2}$ km from their house for defecating improbable. P.W.2 further contradicts her son and stated he went out in the morning after taking meal for work and not for defecation. Thus, P.W.1 witnessing the murder of his father while defecating in the field of Subal Mondal situated at a distance of $\frac{1}{2}$ kms away from his residence is not compatible with the deposition of his mother, P.W.2. Though P.W.6 (aunt of P.W.1) stated her nephew had left the residence to answer nature's call, she states when her nephew went to the place of occurrence he saw the dead body of his

father and returned home weeping. If P.W.6 is to be believed, P.W.1 at its height can be treated as a post occurrence witness.

P.W. 1 stated the incident occurred on a road between paddy field where weeding was going on. In all probability there were agricultural workers who were undertaking the weeding in the paddy field. Hence, his plea that he did not find anyone while going or coming from the paddy field is most improbable. His conduct is also most unnatural. Though the witness, P.W. 1 saw the brutal assault of his father for half an hour he kept silent and did not make any attempt to save his father. These circumstances render the version of P.W. 1 unnatural and I do not consider it safe to rely on him as a truthful witness.

Mr. Banerjee strenuously argues first information report was promptly recorded by P.W.1 which rules out any possibility of false implication. He further submits there was prior enmity between Ajoy Roy and the deceased. As a result, appellants committed the murder. Prior enmity is a double edged sword. While it may provide motive to commit the crime, it may also act as an incentive for a grieving son to falsely implicate the appellants in the murder of his father. P.W.1 is not a natural witness. His presence at the place of occurrence which is half a kilometer away from his residence for the purpose of defecation appears to be based on shaky foundations. It is unclear why the said witness would go to defecate half a kilometer away from his house when his mother stated they used a field 10 cubits away from their residence to answer nature's call. His mother also did not support the claim of P.W.1

that he had gone out on the fateful day to answer nature's call. On the other hand, she stated he had gone out for work. P.W.6, aunt of P.W.1 states upon going to the place of occurrence, her nephew saw the dead body and came back weeping. Her evidence gives an impression that P.W.1 was a post occurrence witness.

From the cross-examination of P.W.5 (witness to the seizure of farsha), it appears the deceased had disputes with others which prompted him to repeatedly change his residence from Samatgaon to Barua and finally to village Chotonarayanpur. Thus it cannot be said that the appellants alone had inimical relationship with the deceased.

Recovery of the weapon of offence i.e. farsha also is also shrouded in mystery.

P.W.10 (Shambhu Pal) first investigating officer of the case stated that he recovered the offending weapon as per statement and instructions of Basudev Roy and Sambhu Roy. No statement of the aforesaid accused persons have been exhibited in the instant case.

P.W.5 (Ananda Sarkar) independent witness to the seizure stated he signed on the seizure list on the direction of police. He does not support the prosecution case that the offending weapon was recovered on the showing of the aforesaid accused persons.

Finally it is argued during investigation Basudeb and Sambhu threatened the witnesses while Nishi Sarkar and Ajoy Roy had absconded. Mere abscondence of an accused by itself does not establish

guilt¹. Admittedly the accused persons had inimical relationship with the deceased. They had been named in the F.I.R. Out of fear the accused persons may have run away. In the event the evidence of sole eye-witness (P.W. 1) is discounted as improbable such abscondence by itself cannot be the foundation of a finding of guilt against the appellants. Moreover, the factor of abscondence had not been put to the appellants for explanation during trial. Hence, it cannot be used against them.²

With regard to the allegation of threats held out by the appellants during investigation, I find that the evidence of P.W.1 in this regard is not supported either by his mother (P.W.2) or aunt (P.W.6). It is also bereft of material particulars with regard to the time when the appellants had held out such threat. Even if such subsequent conduct is believed it would be of little substance as I am unwilling to lend credence to P.W. 1 as an eye-witness in the present case.

In the light of the aforesaid discussion, I am of the opinion prosecution case primarily based on the sole evidence of P.W.1, an inimical interested witness, whose presence at the place of occurrence appears to be improbable has not been proved beyond reasonable doubt and the appellants may be extended benefit of doubt.

In view thereof, they are acquitted of all the charges levelled against them.

¹ Matru Alias Girish Chandra Vs. State of Uttar Pradesh (1971) 2 SCC 75
Rahman Vs. State of U.P. AIR 1972 SC 110

² Shamu Balu Chaugule Vs. State of Maharashtra (1976) 1 SC 438

The appellants 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.

The appeal is, accordingly, allowed.

In view of disposal of the appeals, connected application being CRAN 3 of 2021 is also disposed of.

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.)