

**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. 221 of 2010
With
CRAN 3 of 2014 (Old CRAN 3511 of 2014)***

***Asan Ali Molla & Anr.
-Vs-
The State of West Bengal***

For the Appellants	:	Mr. Kallol Mondal, Adv. Mr. Krishan Ray, Adv. Mr. Souvik Das, Adv. Mr. Anamitra Banerjee, Adv.
For the State	:	Mr. Partha Pratim Das, Adv. Mrs. Manasi Roy, Adv.
Heard on	:	02.05.2022
Judgment on	:	02.05.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 18.12.2009 and 19.12.2009 passed by the learned Additional Sessions Judge, FTC-II, Baruipur, South 24-Paraganas in Sessions Trial Case No.14(1)08 arising out of Sessions Case No.38(12)2007

convicting the appellants for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life each and to pay a fine of Rs.5,000/- each, in default, to suffer rigorous imprisonment for two years more.

Prosecution case against the appellants as transpiring from the first information report lodged by P.W.2, Khokan Molla, son of the deceased is to the effect that on 27.05.2007 at around 8.30 P.M., there was a thunder storm. Hearing hue and cry near the grocery shop of Abed Ali Gazi, he came out of the house. Reaching the spot, he found Asan Ali Molla fleeing from the spot with arms in his hand. He proceeded to the spot and found his father lying in front of the shop with bleeding injuries. He alleged there was a long standing family feud between them and Asan Ali Molla over ancestral property. Litigation was pending and Asan had threatened to kill them.

On the basis of the aforesaid written complaint, Bhangore P.S. Case No. 74 dated 28.5.2007 under Sections 302/34 IPC was registered against the appellant No.1 viz., Asan Ali Molla. In course of investigation, Sokejan Bibi (P.W.3), wife of the deceased made statement before Magistrate implicating both the appellants. She claimed herself to be an eye witness. On the basis of the aforesaid statement and the other materials, appellant No.2 Motlep Molla @

Motaleb was implicated in the crime. In course of investigation appellants were arrested and a 'da' was recovered from the house of appellant No.1. Charge sheet was filed against the appellants. Charge was framed under Section 302/34 IPC against them. They pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 17 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. In conclusion of trial, trial Judge by the impugned judgment and order dated 18.12.2009 and 19.12.2009 convicted and sentenced the appellants, as aforesaid.

Mr. Kallol Mondal with Mr. Krishan Roy, learned Advocates appearing for the appellants argue none of the eyewitnesses viz., P.Ws.2, 3, 5 & 11 could have seen the incident. From the first information report lodged by P.W.2 it appears he is a post occurrence witness. He embellished his version in court and claimed himself to be an eyewitness. Though P.W.3 claimed herself as an eyewitness in her statement before Magistrate, deposition of the said witness in court would show she arrived at the spot after P.W.2. Hence, her claim as an eyewitness is extremely doubtful. Similarly, P.W.5 who accompanied P.W.3 to the spot could not have been an eyewitness. P.W.11 is an unreliable witness. He did not make statement before police that he had seen the incident. After two months he was examined under Section 164 of the Code of Criminal

Procedure where he claimed he was an eyewitness. Appellant No.2 was not named in the first information report and was subsequently implicated in the instant case. P.W.12, grocery shop owner or his wife P.W.13 did not support the prosecution case. There is long standing enmity and possibility of false implication runs high. Prosecution case is riddled with embellishments and contradictions and ought not to be believed. Accordingly, he prays for acquittal.

Mr. Partha Pratim Das, learned Advocate appearing for the State submits P.Ws.2, 3, 5 and 11 had witnessed the incident. They stated appellant No.1 chopped the deceased in front of the shop of P.W.12 while appellant No.2 had held him. Post mortem doctor (P.W.16) found incised injuries on the body of the deceased corroborating the ocular version of the witnesses. P.W.12 had been won over and was cross-examined with regard to his previous statement to police. Hence, the prosecution case has been proved and the appeal is liable to be dismissed.

P.W.2, Khokan Molla, P.W.3, Sokejan Bibi, P.W.5, Kader Molla and P.W.11, Sattar Gazi are said to be eyewitnesses.

P.W.2 is the son of the deceased and the first informant. He deposed on 12th Jaitha between 8/8.30 P.M. he was working in the field when he heard hue and cry. He rushed to the grocery shop of Abed Ali Gazi and with the help of torch light he found appellant no.1 was chopping his father with 'da' and his brother, appellant

no.2 had caught hold of his father. Hearing his cries, his mother Sukejan Bibi(P.W.3) and uncle Kader Molla (P.W.5) and others came to the spot. He lodged written complaint which was scribed by P.W.1.

P.W.3, Sokejan Bibi, wife of the deceased and P.W.5, Kader Molla, younger brother of the deceased has corroborated P.W.2. They stated hearing his hue and cry they came to the spot and saw the incident.

Mr. Mondal has vehemently argued the aforesaid eyewitnesses are untrustworthy. In the FIR, P.W.2 stated coming to the spot he had seen Asan Ali Molla running away from the spot with arms and his father was lying with bleeding injuries. All the other witnesses including P.Ws.3 and 5 had come to the spot after P.W.2 had arrived. Hence, these witnesses could not have seen the incident.

On the other hand, Mr. Das argues the aforesaid witnesses came to the spot and saw the incident as would appear from the statement of P.W.3 recorded before Magistrate, Ext.6. He also strongly relies on the evidence of P.W.11, an independent witness.

I have examined the evidence of the witnesses in the light of the rival submissions. P.W.2 appears to have embellished his version in court. While in FIR he claimed upon arriving at the spot he saw appellant no.1 running away with arms in hand and his father lying

with bleeding injuries on the ground, in court he claimed he had seen appellant no.1 assaulting his father while appellant no.2 was holding him.

In view of such prevarication, it is difficult for me to hold that P.W.2 had seen the incident. However, his evidence cannot be thrown out in toto. In the event a witness embellishes his version in court, it is the duty of the court to sift his evidence and separate the grain from the chaff. Upon testing the evidence of P.W.2 on the touchstone of the FIR, I am of the opinion P.W.2 had arrived at the spot immediately after the incident and had seen appellant no.1 running away with a 'da' in hand. His father was lying at the spot with bleeding injuries. This circumstance coming out from the evidence of P.W.2 clearly implicates the appellant No.1 in the murder of the victim.

P.W.3 deposed she had gone out in the stormy night to look for P.W.2. She was accompanied by P.W.5. They claimed upon hearing hue and cry of P.W.2, they came to the spot and saw the incident. Hence, these witnesses arrived at the place of occurrence after P.W.2 had reached the spot. If the depositions of the aforesaid witnesses are judged from that perspective, it is doubtful whether they had come to the spot at the time when the victim was being assaulted. Hence, I am unwilling to treat P.Ws.3 & 5 as eye

witnesses. But they corroborate the prosecution case that P.W.2 arrived at the spot first and lend credence to his version in the FIR.

I also do not feel confident to rely on the deposition of P.W.11.

P.W.11 deposed he was sitting with his wife near the window and saw the incident in front of the grocery shop of Abed Ali Gazi which is 8-10 feet away. He saw appellant No.1 chopping the victim with a 'da' while appellant no.2 held him. Thereafter, he came to the spot and found P.Ws.2, 3, 5 and others at the place of occurrence. He was also present when police seized a 'da' in presence of appellant no.1 from the latter's house.

P.W.14, Aloknanda Sarkar, Judicial Magistrate stated the aforesaid witness made statement before him on 14.8.2007 as per order dated 27.7.2007 passed by the learned Additional Chief Judicial Magistrate, Baruipur.

On the other hand, Investigating Officer (P.W.17) during cross-examination admitted P.W.11 had not stated to him that he had witnessed the incident.

Thus, deposition of P.W.11 before Magistrate or in Court is at variance to his earlier statement before Investigating Officer (P.W.17). About two months later, he changed his stance before Magistrate and implicated the appellants.

From the aforesaid discussion, I am of the opinion none of the witnesses viz., P.Ws.2, 3, 5 and 11 can be treated as eyewitnesses. However, distilling the truth from the evidence of P.W.2, it appears that he had arrived at the spot at the earliest point of time and had seen appellant no.1 armed with a 'da' and running away from the spot where his father lay with bleeding injuries.

P.W.12, Abed Ali Gazi is the owner of the grocery shop where the incident occurred. Though he has been declared hostile, he was cross-examined with regard to his previous statement to police.

P.W. 17 (Aminul Islam I.O.) deposed the said witness had told him upon hearing hue and cry he and his wife came out of his residence and seen the appellant No.1 run away from the spot with a 'da'. Departure from his previous statement to Investigating Officer shows P.W.12 have been won over during trial. However, tenor of his statement to Investigating Officer corroborates the stance of P.W.2 taken in the First Information Report with regard to appellant No.1 fleeing away from the spot with 'da' in his hand.

P.W.4(Md. Ruhul Amin Sk.) younger son of the deceased also stated upon arriving at the spot, he had seen the appellants run away from the spot.

These pieces of evidence consistently establish appellant No.1 had been seen running away from the spot immediately after the incident with a 'da' in his hand. Further more, in the course of

investigation I.O. (P.W.17) recovered the 'da' from the house of the appellant No.1. Seizure was witnessed by P.Ws. 1, 7 and 11. They proved their signatures on the seizure list prepared by police.

P.W.16 (Dr. Debasish Sarkar) P.M. doctor noted the following injuries on the body of the deceased:

1. One chop wound over the dorsum of left wrist joint. = 3" x 1 ½ x bone deep, with cut fracture of the lower end of radius and ulna of the left side.
2. One chop wound over the back of left occipital region = 6" x 4"x bone deep with cut fracture of the occipital bone and cut fracture of the second cervical vertebrae.
3. One chop wound over the left temporal 4" x 1 ½" x bone deep with cut fracture of the left temporal bone.

He opined the death was due to the above noted injuries caused by moderate to heavy sharp cutting weapon, which are ante mortem and homicidal in nature.

From the aforesaid materials on record it can be safely concluded upon hearing hue and cry P.W.2 had come to the place of occurrence and seen the appellant No.1 run away from the spot with a 'da' in his hand. His father was lying dead with bleeding injuries. P.W.16 post mortem doctor found inside wounds on the body of the deceased which was caused by moderately to heavy sharp cutting weapon. 'Da' was recovered in presence of appellant No.1 from his

residence by the Investigating officer. Motive to commit crime has also been established. All the witnesses have deposed there is long stand family feud over ancestral property between the appellants and the deceased. Appellants had threatened to kill them. Hence, guilt of the appellant No.1 is established beyond doubt.

Presence of appellant No.2 at the place of occurrence has not been proved beyond doubt. For reasons recorded hereinbefore P.Ws. 2, 3 & 11 can not be treated as eyewitnesses. Appellant No.2 was not named in the First Information Report by P.W.2. Previous statement made by P.W.12 (a hostile witness) to I.O. also does not implicate the said appellant. Presence of appellant No.2 at the spot as noted by P.W.6 when considered in the light of the aforesaid circumstances provides scratchy and unreliable support to the prosecution case with regard to his involvement in the crime. There is enmity between the family of the appellants and that of the deceased. Possibility of false implication of appellant No.2, who is the brother of appellant No.1, on such score cannot be ruled out. Under such circumstances, I am inclined to extend the benefit of the doubt with regard to involvement of appellant No.2 in the murder.

Conviction of appellant No.1 is recorded under Section 302 of the Indian Penal Code and his sentence is confirmed. Conviction and sentence of appellant No.2 is set aside.

Appeal is partly allowed.

Appellant No.2 shall be discharged from his bail bond after expiry of six months in terms of section 437A Cr.P.C.

In view of disposal of appeal, connected application being CRAN 3 of 2014(Old CRAN 3511 of 2014) is also disposed of.

Period of detention suffered by the appellant No.1 during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 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.)