

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

Present:

**The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Bibhas Ranjan De**

**C.R.A. 255 of 2008
(CRAN 2 of 2017 (Old CRAN 512 of 2017))
Ali Mohammad @ Ali Ahamed
versus
The State of West Bengal**

**WITH
C.R.A. 346 of 2008
(CRAN 5 of 2016 (Old CRAN 2776 of 2016))
Sabiruddin Khan @ Jhoro & Anr.
versus
State of West Bengal**

For the Appellant : Mr. Neil Basu, Advocate
in CRA 255 of 2008 Ms. Afreen Begum, Advocate
Mr. Amit Pati, Advocate

For the Appellants : Mr. Krishan Ray, Id. Amicus Curiae
in CRA 346 of 2008

For the State : Mr. Nguive Ahmed, Id. A.P.P.
Ms. Trina Mitra, Advocate

Heard on : 05.08.2022 and 08.08.2022

Judgment on : August 8, 2022.

DEBANGSU BASAK, J.:

1. Two appeals were heard analogously as they emanate out of the same police case.
2. The two appeals are directed against the judgment of conviction dated February 28, 2008 and order of sentence dated February 29, 2008 passed by the learned Additional District and Sessions Judge, Fast Track Court IV, Alipore, South 24 Parganas in Sessions Trial No. 4(8) of 2006 (Sessions Case No. 15 (06) of 2006).

3. By the impugned judgment of conviction and order of sentence, the appellant in CRA 255 of 2008 (Ali Mohammad @ Ali Ahmed) was convicted under Section 394 of the Indian Penal Code, 1860 and was sentenced to rigorous imprisonment for 10 years with fine of Rs.3,000/- and in default for a further period of six months of rigorous imprisonment.
4. The appellants in CRA 346 of 2008, namely, Sabiruddin Khan @ Jhoro and Sk. Khokan were convicted under Section 394 of the Indian Penal Code, and also sentenced to suffer rigorous imprisonment for 10 years each and fine of Rs.3000/- each in default to suffer further period of six months of rigorous imprisonment.

5. The case of the prosecution before the learned Trial Judge was that, Dr. Sankar Nath Banerjee (P.W. 1) lodged a written complaint with the Budge-Budge P.S. on March 1, 2006 to the effect that on March 1, 2006 around 8 p.m. he was at his chamber at village Narkeldanga under Police Station Budge-Budge. At that time, Sabiruddin Khan @ Johro and Sk. Khokan entered his chamber. Sabiruddin Khan pointed a fire arm to his compounder. Sk. Sabiruddin demanded money from him and then P.W. 2 (wife of P.W. 1) raised alarm. Thereafter Sk. Sabiruddin hit P.W. 1 on his head with the butt of the revolver. Sk. Sabiruddin snatched Rs.500/- from his pocket and a Sonata wrist watch from his hand. Sk. Sabiruddin Khan with Sk. Khokan fled away the place. Sk. Sabiruddin was being assisted by Ali Mohammad @ Al Ahmed who was outside. Sk. Khokan assisted by Sabiruddin Khan @ Jhoro and Ali Mohammad @ Ali Ahamed in the robbery, by guarding the chamber from outside. At the time of the incident male and female compounders (P.W. 4 and P.W. 6) raised alarm and local people chased the miscreants and caught hold of them.
6. Interregnum Police came to the spot and Dr. Banerjee (P.W. 1) handed over the written complaint to the police.

7. The police registered such complaint of the Doctor as a first information report and conducted investigations thereon. The police filed charge-sheet against five accused. Charges under Sections 395 and 397 of the Indian Penal Code, 1860 were framed against all the five accused including the appellants. In addition thereto, charge under Section 412 of the Indian Penal Code, 1860 was framed against Sabiruddin Khan @ Jhoro.
8. A charge under Sections 25 and 27 of the Arms Act were framed against Sk. Khokan.
9. At the trial, prosecution examined 17 witnesses. The defence did not adduce any evidence either oral or documentary. After conclusion of the evidence of the prosecution, the accused persons were examined under Section 313 of the Code of Criminal Procedure. The accused persons denied the charges levelled against them.
10. By the impugned judgment and order, the learned Judge convicted the three appellants. Two of the accused persons were acquitted. The appellants preferred separate appeals. Sabir Ahammed @ Johro and Sk. Khokan filed an appeal being CRA 346 of 2008. Since they were not appearing in the appeal, the Court appointed amicus curiae for them.
11. Ali Mohammad @ Ali Ahamed preferred an appeal being CRA 255 of 2008.

12. Ms. Afreen Begum, learned Advocate appearing for Ali Mohammad submits that, the prosecution failed to establish the charges beyond all reasonable doubt. She draws the attention to the evidence of the prosecution witnesses. She highlights the discrepancies in the evidence of the prosecution witnesses. She submits that the incident of alleged robbery through use of a fire arm was not established by the prosecution. Allegedly two of the eye witnesses were present at the locale being the doctor who filed the complaint and with his wife. The incident happened inside the chamber of the doctor in presence of his wife. It is alleged by the doctor that, Ali Mohammad was the patient. Sabiruddin and Khokan were accompanying Ali Mohammad. The doctor heard a cry of dacoity from outside his chamber. According to the version of the doctor miscreants entered into his chamber and pointed a fire arm at his head wherein a commission of robbery took place. Sk. Sabiruddin demanded money from the doctor. Sk. Sabiruddin was able to take away Rs.500/- from him as well as a Sonata wrist watch.

13. Learned Advocate appearing for Ali Mohammad submits that, the version of the incident as deposed by the doctor and the version of the incident as deposed by the wife of the doctor who claimed to be present inside the chamber of the doctor are contradictory. She submits that even subsequent to the incident are also contradictory as deposed by the prosecution witnesses. She refers to the injury report of the doctor and

submits that the same was concocted and manufactured. She submits that no reliance can be placed on the evidence led by the prosecution.

14. Learned Advocate appearing for Ali Mohammad draws the attention to the deposition of the prosecution witness no. 3 who claimed himself to be the driver of the doctor. She submits that the prosecution witness no. 3 claimed that he was going to fill the fuel while the incident happened. The driver claimed that he was there when the incident took place. She submits that the driver stated that he was out to take the fuel for the vehicle at about 7.30 p.m. in the evening while in the same breath he claimed that the appellant entered into the doctor's chamber with a fire arm.

15. Learned amicus curiae appearing for Sabiruddin and Sk. Khokan adopted the submission with regard to the discrepancies and contradictions in the evidence of the prosecution witnesses as submitted on behalf of the Ali Mohammad. He submits that the prosecution was unable to prove the charges beyond all reasonable doubt.

16. Learned amicus curiae appearing for Sabiruddin and Sk. Khokan submits that, the fire arm was shown to be recovered by the police. The same was not recovered on the leading statement of any of the appellants. He submits that the recovery of the fire arm is shrouded in doubt.

17. Learned amicus curiae submits that, surprisingly although the doctor implicates Sabiruddin Khan as the user of the fire arm, the charge

by the trial Court with regard to the fire arm was framed as against Sk. Khokan.

18. Learned amicus curiae draws the attention to the deposition of various prosecution witnesses. He submits that the time lines specified by the various prosecution witnesses with regard to the incident do not tally. None of the prosecution witnesses were able to describe the incident with any certainty so as to establish the guilt of any of the appellants beyond reasonable doubt.

19. Learned amicus curiae draws the attention to the medical documents pertaining to the injury allegedly suffered by the doctor. He submits that the son of the doctor was also a doctor. Therefore, both the complainant and his son were in a position to utilize their capacity as doctors to procure documents with regard to the alleged injury. He refers to the initial medical examination report of the doctor, allegedly suffered by the doctor in the incident. He submits that no credence should be given to such evidence brought on record.

20. Learned amicus curiae draws the attention to the fact that, it is claimed that there are two general diaries involved and one complaint lodged by the doctor. He submits that over the self-same incident, two first information reports cannot be lodged. In support of his contention, he relies upon (2001) 6 SCC 181 (T.T. Antony v. State of Kerala vs. State of Andhra Pradesh and Ors.

21. Relying upon (2010) 4 SCC 491 (Life Insurance Corporation of India & Anr. vs. Ram Pal Singh Bisen) learned amicus curiae submits that mere marking of a document as exhibit does not mean that the contents of the documents marked exhibit stands proved.

22. Learned Additional Public Prosecutor appearing for the State submits that the prosecution was able to prove the charges beyond all reasonable doubt. He further submits that the impugned judgment does not suffer any illegality warranting interference. He refers to the evidence on record. He submits that, the appellants were involved in arm robbery. He draws the attention to the fact that the currency note and the Sonata wrist watch belonging to the doctor were recovered from the possession of Sk.Khokan. The appellants were identified by the prosecution witnesses as the person involved in the armed robbery. Therefore, he submits that there is no infirmity in passing the impugned judgment and order of conviction and sentence.

23. 17 prosecution witnesses were examined at the trial. The doctor himself was the prosecution witness no. 1. His wife was the prosecution witness no. 2. Both are the eye witnesses to the incident.

24. It is the case of the prosecution that, the armed robbery took place in the chamber of the doctor. Besides P.W. 1 and P.W. 2 there were one male compounder (P.W. 6), female compounder (P.W. 4) and driver (P.W. 3).

25. With regard to the incident happening with the doctor, there are two versions of the same incident brought on record on behalf of the prosecution. One version is that the prosecution witness no. 1 who is the doctor and the other is the version of the prosecution witness no. 2 who is the wife of the doctor. The doctor and the wife of the doctor were in the same cubicle along with Sabiruddin Khan @ Jhoro.

26. The prosecution witness nos. 1 and 2 vary substantially with regard to the name of the patient. The doctor claimed that Ali Mohammad was the patient while his wife claimed that Sabiruddin Khan @ Jhoro was the patient.

27. Surprisingly in the evidence of the prosecution witness no. 2, it came out that she offered her gold bangles to the appellants for them to take them away. The appellants, however did not take the gold bangles of the prosecution witness no. 2. They only concentrated on five one hundred rupee notes and the Sonata wrist watch of the doctor.

28. The version of the driver of the doctor being prosecution witness no.-3 also requires comments. The driver claimed that he went away to fill fuel into the vehicle at 7.30 p.m. Although he also claims in his evidence that he saw the appellants to enter into the doctor's chamber. The incident is alleged to take place at about 8.00 p.m. in the evening.

29. The firearm was not recovered from any leading statement made by any of the appellants. The fire arm used in the armed robbery was

recovered by the police. The Trial Court acquitted the appellants with regard to the charge of the fire arm.

30. It is claimed by the doctor, his wife and his driver being prosecution witness numbers 1, 2 and 3 respectively that, the doctor suffered grievous hurt. Such claim is sought to be established by medical examination report exhibited at the trial. Exhibit-11 is a certificate by the Budge Budge Municipal Hospital dated March 15, 2006. The incident occurred on March 1, 2006. There is no contemporaneous injury report of the doctor exhibited at the trial. Such conduct is extremely fatal to the prosecution case.

31. Exhibit-11/1 is the injury report of the doctor. The injury report speaks of the doctor being assaulted and that the doctor suffered abrasion and haematoma on the right wrist, which was dressed up. The doctor also suffered cut injury on the scalp but he refused stitch with regard thereto. In fact Dr. Jhumur Bhadury (P.W. 14) examined P.W. 1, P.W. 3 (driver of P.W. 1) and P.W. 6 (male compounder of P.W. 1) on March 15, 2006 and issued three certificates admitted in evidence as exhibit-11 series.

32. At the trial, the prosecution did not produce any documents of the medical examination of the doctor on March 1, 2006 at Budge Budge Municipal Hospital. As noted above, the de facto complainant is a doctor. His son is also a doctor. Therefore, the possibility of the de facto complainant and his son raking up the documents to be marked as

exhibit-11 cannot be ruled out in absence of contemporaneous documents of the hospital concerned on March 1, 2006 being produced at the trial.

33. The three appellants before us were required to answer charges, inter alia, under Sections 395/397 of the Indian Penal Code, 1860.

34. Two of the ingredients that are required to be established by the prosecution with regard to Section 397 of the IPC are that, the victim suffered hurt, and that there were valuables of the victim which were stolen.

35. The appellants were convicted under Section 394 of the IPC, 1860. Section 394 requires the prosecution to establish that, the victim suffered hurt in the commission of a robbery. As the materials in the record stand, we are of the view that the prosecution could not establish the factum of the doctor suffering hurt in the incident. So far as the robbery is concerned, five one hundred rupee notes and a Sonata wrist watch of the doctor were claimed to be recovered from the possession of Sabiruddin Khan @ Jhoro. The recovery is also shrouded in mystery. It is claimed by the investigating officer that when he visited the place of occurrence, there were huge crowd at the spot. The son of the de facto complainant being PW-9 claimed at the trial that the mob was around 2000 and odd.

36. The evidence on record suggests that the appellants were being assaulted by the mob.

37. PW-1, in his deposition claims that the stolen articles were recovered from his chamber. There is an aspect of the gold bangles being offered by the PW-2 to the appellants which the appellants chose not to take.

38. All these facts taken together, do not persuade us to believe that the prosecution was able to establish beyond reasonable doubt that the appellants were involved in robbery.

39. There is substance in the contention made by the amicus curiae that the doctor in his statement recorded under Section 164 of the Cr.P.C. did not speak of any theft of any articles.

40. There are contradictions, therefore, between the evidence that the PW-1 testified at the trial and the statement recorded under Section 164 of the Cr.P.C. which was prior in time with regard to the theft. In that view of such discrepancies, our view leads us to doubt the credibility of the evidence of the prosecution.

41. The materials on the records suggest that the prosecution made two general diaries of the same incident. There are claims that the PW-1 lodged the First Information Report and the PW-9 was the scribe of such First Information Report. There is also claim of the PW-6, lodging the First Information Report.

42. T.T. Antony v. State of Kerala (supra) is of the following view:

“18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information

report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report — FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an

FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H — the real offender — who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.”

43. Life Insurance Corporation of India & Anr. (supra) is of the following view:

“25. We are of the firm opinion that mere admission of a document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be done in accordance with law.”

44. In the facts of the present case, the police proceeded on the basis of the First Information Report as marked exhibit at the trial. So far as the documents claiming to establish the hurt that the doctor suffered, we returned our finding on the same.

45. In view of the discussions above, we are unable to affirm the judgment of conviction and order of sentence passed by the learned Trial Judge. We set aside such judgment and order of conviction. We acquit the appellants from all the charges.

46. We place on record the appreciation of the assistance rendered by Mr. Krishan Ray, learned advocate as amicus curiae for the appellant in CRA 346 of 2008.

47. The Court is informed that Sabiruddin Khan @ Jhoro was released from the correctional home upon serving the period of sentence. The Court is also informed that Sk. Khokan is on bail. In view of this judgment, Sk. Khokan will keep the bond valid for a period of six months from date in view of Section 437A of the Code of Criminal Procedure.

48. The Court is informed that Ali Mohammad @ Ali Ahamed is still in custody. In view of this judgment, Ali Mohammad @ Ali Ahamed be released on a bond valid for a period of six months from date in view of Section 437A of the Code of Criminal Procedure.

49. CRA 255 of 2008 and CRA 346 of 2008 along with all connected applications stand disposed of.

50. Trial Court records along with a copy of this judgment be remitted to the appropriate Court forthwith.

51. Urgent photostat certified copy of this judgment be given to the parties, if applied for, on usual undertakings.

52. I agree

(Debangsu Basak, J.)

(Bibhas Ranjan De, J.)