

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. 392 of 2003

Tarun Bagdi

Vs.

State of West Bengal

With

CRA 455 of 2003

Maina Bagdi

Vs.

State of West Bengal

For the Appellants : Mr. Somnath Banerjee, Adv.
Mr. Pronojit Roy, Adv.

For the State : Mr. Narayan Prasad Agarwala, Adv.
Mr. Saryati Dutta, Adv.

Heard on : 21st March, 2022

Judgment on : 21st March, 2022

Joymalya Bagchi, J. :-

In Re : CRA 455 of 2003

At the outset, Mr. Banerjee, learned Counsel appearing for the appellants in both the matters submits Maina Bagdi, appellant in

Criminal Appeal No. 455 of 2003 has expired. Hence the appeal is disposed of as having abated.

In Re : CRA 392 of 2003

By the impugned judgment and order dated 11.08.2003 and 12.08.2003 passed by the learned Additional District & Sessions Judge, Fast Track, 2nd Court, Suri, Birbhum, in Sessions Trial No. 3 of February, 2003, arising out of Sessions Case No. 1 of 2003, the appellant Tarun Bagdi and Maina Bagdi were convicted for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and also to pay fine of Rs.1,000/- each, in default, to suffer further rigorous imprisonment for one year.

Prosecution case as alleged against the appellant and Maina is to the effect that the deceased Prabhu Bagdi had illicit affair with the wife of Maina. In retaliation on 17.05.2002 at 01:00 a.m. when Prabhu was sleeping in the courtyard along with his family members, Tarun and Maina came to the house and struck axe blown on his head. As a result, Prabhu died. Uttam Bagdi, P.W. 1, younger brother of Prabhu, lodged F.I.R.. He stated he was unable to name the persons who had murdered his brother. Seven days after the incident, P.W. 5, Ludu Bagdi, father of the deceased, disclosed Tarun and Maina had killed his son Prabhu. Out of fear he was unwilling to make statement before the learned Magistrate but on the assurance of police he made statement before the learned

Magistrate. Charge-sheet was filed against the appellant and Maina Bagdi and charges were framed under Sections 302/34 of the Indian Penal Code. In the course of trial, prosecution examined fifteen witnesses. Defence of the appellant and Maina was one of innocence and false implication. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 11.08.2003 and 12.08.2003 convicted and sentenced the appellant and Maina, as aforesaid.

Mr. Banerjee, learned Counsel appearing for the appellant submits none of the prosecution witnesses apart from P.W. 5 implicated the appellants. P.W. 1 and P.W. 6 were sleeping in the courtyard but did not see the appellant and Maina at the place of occurrence. Conduct of P.W. 5 is most unnatural. He did not divulge the names of the assailants to his family members for seven days. His deposition in court also suffers from embellishments and/or contradictions. Hence, prosecution case is improbable and appellant is entitled to an order of acquittal.

On the other hand, Mr. Agarwala, learned Counsel appearing for the State submits P.W. 1 was sleeping with his son in the courtyard. Due to illness he was awake and saw the incident. Out of fear, he kept quiet. Finally, he disclosed the incident to police and Magistrate. His deposition is reliable and corroborated by other evidence on record. His wife (P.W. 6) saw the appellant and Maina flee the spot. P.W. 7, his daughter-in-law stated P.W. 5 knew who had murdered the victim. P.W. 10, a neighbour also stated that P.W. 5 had told him that the axe belonged to Maina. Medical evidence also corroborates the ocular version of P.W. 5. Hence,

there is sufficient corroboration of P.W. 5 and conviction of the appellant ought to be upheld.

From an analysis of the evidence and the submissions made at the Bar, it appears P.W. 5, Ludu Bagdi, father of the deceased, is the star witness in the instant case. He deposed he was sleeping in the courtyard along with his son, Prabhu and his two grandsons. Due to illness he was unable to sleep. He saw the appellant and Maina assault Prabhu on the head with axe. He raised hue and cry. His son was removed in a trekker to the police station. Police came to the house in the morning on the next day. He did not say anything to the police. After seven days he disclosed the incident to the police. He voluntarily made statement to the Magistrate. In cross-examination, P.W. 5 stated out of fear initially he was unwilling to go to the Magistrate but on assurance of Officer-in-Charge, Kankartala Police Station he went to the Magistrate and made the statement. At the time of recording his statement before Magistrate, police was present. He further stated his wife, P.W. 6, younger son, P.W. 1, and P.W. 3, wife of the deceased, had seen the incident and had resisted the accused persons. He also stated there was a dispute between the appellant and Jhantu, Mantha and Joydev on the night of the incident. They worked with the deceased in the khadan and there was a scuffle between them on the night. He, however, denied that he had falsely implicated the appellant and Maina to screen the actual offenders. He, however, admitted he stated to the police hearing hue and cry of his elder daughter-in-law he woke up and found his son with bleeding injury on his

head. Deposition of witnesses of the prosecution are summarized as follows:-

P.W. 1, Uttam Bagdi, admitted that his elder brother Prabhu and his parents were sleeping in the courtyard on the fateful night. He stated he woke-up and found his brother with a bleeding injury on his head and an axe stuck in the wound. His mother removed the axe. He took his brother in a trekker to the police station and lodged complaint which was scribed by P.W. 2. In the complaint he stated that he was unaware of the name of the person who had murdered his brother. His brother died on the way to the police station. Police prepared inquest. He signed on the inquest report.

P.W. 3, Smt. Promila Bagdi, stated that she was in her room along with her children. Hearing hue and cry from her father-in-law (P.W. 5), she came to the courtyard and found her husband with an injury on the head. An axe was stuck into his head. Her mother-in-law removed the axe from the head. She stated that the appellant and Maina had murdered her husband. In cross-examination, she stated she had heard there was a dispute with regard to extraction of coal in the khadan where her husband used to work. On the day of occurrence her husband and his friends from the khadan consumed liquor in their house.

P.W. 6, Smt. Khela Dasi, is the mother of the deceased. She stated that she was sleeping with her husband and the deceased in the courtyard. Hearing a groaning sound she woke-up and found an axe

stuck on the head of the deceased. She had seen the appellants flee away after assaulting her son.

P.W. 4, Joydeb Bagdi, is another brother of the deceased. He used to stay separately from his parents and the deceased. He stated his parents and the deceased were sleeping in the courtyard adjacent to his room. Hearing hue and cry of his parents he came to the spot and found his brother lying with injury on the head.

P.W. 7, Jaba Bagdi, wife of Joydeb Bagdi, corroborated her husband and stated her father-in-law knew who assaulted Prabhu by the axe. She further stated that hearing shouts of her father-in-law she woke-up and found Prabhu had sustained injury on his head with an axe.

P.Ws. 8 to 13 are local inhabitants. P.Ws. 8 to 11 had come to the spot after the incident. P.W.8 signed on the seizure list. P.W.s 9 and 10 signed on the inquest report. Though P.Ws. 8, 10 and 11 were declared hostile. P.W. 10, Phani Bhusan Ghosh claimed that Ludu Bagdi, P.W. 5, had stated to him out of fear he did not disclose the axe belonged to Miana.

P.W. 14, Dr. Alope Banerjee, is the postmortem doctor. He proved the postmortem report and opined death was caused due to injuries which were ante mortem and homicidal in nature.

Mr. Banerjee, learned advocate appearing for the appellant contends that P.W. 5 is an unreliable witness. Though he claimed to have witnessed the incident he kept quiet and did not divulge the name of the appellant

for seven days. His deposition in court is inconsistent and is also at variance to his earlier statement before the magistrate. Thus, the said witnesses ought not to be believed.

P.W. 5 is claimed to be the sole eye-witness. When a prosecution case hinges on the deposition of a sole eye-witness, it is important to assess his evidence to test whether he is (a) wholly reliable (b) wholly unreliable (c) partly reliable and (d) partly unreliable. If the witness is in the first two categories, there is no difficulty but when he falls in the third category, court must seek corroboration from other evidence on record before relying on his deposition (see ***Lallu Manjhi And Another Vs. State of Jharkhand***¹). I have applied the aforesaid legal principles to assess the evidence of P.W. 5.

It is true P.W. 5 did not state the names of the accused persons to the police before seven days. However, in cross-examination the witness divulged out of fear he was unwilling to go to the magistrate and make a statement. P.W. 10, an independent witness stated that P.W. 5 told him out of fear he had not stated the axe recovered at the spot belonged to the co-accused Moina Bagdi. A psychosis of fear had prevailed in the mind of the witness who was an elderly ailing person and as a result he appears not to have divulged the facts to the police at the earliest opportunity. It is argued P.W. 5 made statement on the tutoring of police who was present before the Magistrate. I am unable to accept such contention. Witness had

¹ (2003) 2 SCC 401

disclosed due to fear he was unwilling to go and make statement before Magistrate. Under such circumstances, presence of police was to lay assurance to the witness and cannot be construed as an effort to tutor the witness. However, his presence at the place of occurrence is undeniable. All the witnesses including P.Ws. 1, 3, 4, 6 and 7 stated he was sleeping in the courtyard with his son. P.Ws. 3 and 7 have stated on hearing the cry of their father-in-law P.W. 5 have rushed to the spot. From the aforesaid evidence on record it is clear P.W. 5 was beside his son in the courtyard on the fateful night. He had raised the hue and cry which brought other family members like P.Ws. 3, 4 and 7 to the spot. This unequivocally establishes the fact that P.W. 5 was the first person who had raised alarm regarding the assault upon the deceased. Seeing the condition of the deceased P.W. 1 took him to the hospital in a trekker. Naturally he did not have opportunity to confer with P.W. 5 when he left with his brother in a trekker for the police station. Thus, he was unable to disclose the names of the accused persons in the F.I.R. However, mother of the deceased P.W. 6 who was present in the courtyard and woken up hearing the groaning sound of her son had claimed she had seen the accused persons fleeing away from the spot. P.W. 7, sister in law of the deceased who came to the spot soon after the incident also claimed her father in law P.W. 5 knew who had murdered the deceased. These witnesses corroborate the deposition of P.W. 5 and lend credence to the prosecution case.

It has been strenuously argued deposition of P.W. 5 suffers from various inconsistencies and contradictions. While in chief he claimed he

had witnessed the incident alone, in cross he embellished his version and claimed other family members had also seen the incident. He also admitted the suggestion of the defence that he stated to police upon hearing the hue and cry of his daughter in law, he woke up and found his son in injured condition at the spot.

With regard to P.W. 5's response to the aforesaid suggestion, I am of the view a witness cannot be assessed by culling a line out of his deposition and reading it out of context. It is the consistent evidence of P.W. 5 and all other witnesses that he and his wife along with the deceased were sleeping in the courtyard, while his daughter-in-law, that is, P.W. 3 was in her room. P.W. 3, herself deposed she came to the spot on hearing the cry of her father-in-law, P.W. 5. Response to the suggestion on behalf of the defence should be read in the conspectus of the other evidence on record and cannot by any stretch of imagination improbabilise the presence of P.W. 5 at the place of occurrence. However, I note that PW 5 has improved his version in court when compared to his statement before magistrate. P.W. 5 in chief claimed he was awake and had seen the incident. However, upon reading his statement before Magistrate it would appear he was sleeping in a cot beside his son and as the accused persons has dashed on the cot while fleeing away he woke up. If that were so, it is difficult for this court to accept the version of P.W. 5 that he was awake due to his illness and had seen the incident. However, it is trite law evidence of witnesses which partly reliable and partly unreliable ought not to be thrown out in toto. It requires to be distilled on the anvil of

probability and the kernel of truth be brought out from the chaff of falsehood. Assessing the evidence of P.W. 5 from that perspective, it appears he was sleeping in the courtyard beside his son when the latter was attacked by the appellant and Moina Bagdi. When the miscreants were fleeing away, they dashed against the cot. As a result, P.W. 5 woke up and saw the miscreants run away from the spot. While fleeing away, the accuseds threatened the witnesses with dire consequences. This portion of the evidence of P.W. 5 receives corroboration from his wife, P.W. 6 (mother of the deceased) who was also sleeping at the spot. Hearing groaning sound of her son, she had woken up and saw the appellant and Maina run away from the spot. It is contended deposition of P.W. 6 that she saw the accused persons fleeing away from the spot is a material omission in her previous statement amounting to contradiction in law. During cross-examination, investigation officer (P.W. 15) stated P.W. 6 did not state upon waking up she saw the accused persons assaulting the victim and fleeing away. But no suggestion was given either to the witness or investigating officer that she had not stated to police that she only saw the accused persons fleeing away from the spot. In the absence of such suggestion it cannot be said there is an omission on the part of the witness to disclose that she had seen the accused persons flee away from the spot. Thus, I am of the view both the witnesses, namely, P.W. 5 and 6 who were sleeping with the deceased in the courtyard had woken up and seeing the appellant and Maina fleeing away from the spot after assaulting their son to death.

Defence has sought to probabilise a different motive, that is, a enmity between the deceased and his fellow workers in the 'khadan' to cast a doubt with regard to involvement of the appellant and Maina in the crime. This Court's attention is drawn to P.W. 5 as well as P.W. 3 who stated appellant and his co-workers had consumed liquor on that night and there was scuffling between them over some dispute. However, though one of co-workers, namely, Mantu Bagdi was examined as a prosecution witnesses, no suggestion was given to him due to such dispute the victim had been murdered on the fateful night. Hence, the desperate effect of the defence to portray a different motive for the murder appears to be hollow and does not inspire confidence.

P.W. 14 who held post mortem found injuries on the body of the victim and opined those injuries were sufficient to cause death. His deposition supports the ocular evidence that injuries were caused by the appellant on the victim with intention to murder him.

In the light of the aforesaid discussion, I am of the opinion prosecution has been able to prove its case beyond reasonable doubt.

Conviction and sentence of the appellant is upheld.

Appeal is, accordingly, dismissed.

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

Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

tkm/sdas/PA (Sohel)