

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. 619 of 2011

Sadhil Subba

-Vs-

State of West Bengal

For the Appellant : Mr. Biswajit Manna, Advocate

For the State : Mr. Partha pratim Das, Advocate
Ms. Manasi Roy, Advocate

Heard on : 15th March, 2022

Judgment on : 15th March, 2022.

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 29.09.2011 and 30.09.2011 passed by learned Sessions Judge, Darjeeling, in Sessions Trial No. 24/2007 convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for one year more.

Prosecution case as alleged against the appellant is to the effect that on 02.03.2007 he had come in drunken condition to the house of one Roshan Tamang (P.W. 11) and demanded money for purchasing

alcohol. Roshan refused to meet such unjust demand. At that time, Suroj Rai had also come to the residence of Roshan for inviting his son's birthday. Suroj intervened and asked the appellant to go away. Appellant became enraged and threatened Suroj that he would teach him a lesson. Around 6:00 p.m. Suroj left the residence of Roshan and proceeded towards his house. At that juncture, appellant mercilessly assaulted Suroj with a danda resulting in severe injuries on his head and chest. Appellant fell down at the spot and Suroj ran away. Incident was witnessed by Sapna Rai (P.W. 4) and while running away Suroj dashed against Chandrik Tamang (P.W. 2). Victim was initially shifted to a dispensary in the tea garden and thereafter to Darjeeling Sadar Hospital where he was examined by P.W. 17. Due to his precarious condition he was referred to North Bengal Medical College and Hospital. P.W. 1, father of the victim, lodged First Information Report resulting in registration of Darjeeling P.S. Case No. 30/2007 dated 03.03.2007 under section 326/307 I.P.C. against the appellant. He also shifted Suroj to Anandalok Nursing Home, Siliguri for better treatment. As there was no improvement in the condition of the victim, he was again re-admitted at Darjeeling Sadar Hospital on 06.03.2007 and expired on the next day, that is, 07.03.2007. Upon his death Section 302 I.P.C. was added to the First Information Report.

In course of investigation, appellant was arrested and charge-sheet was filed against him. Charge was framed under Section 302 of the

Indian Penal Code against the appellant. Appellant pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined 19 witnesses and exhibited a number of documents. Defence of the appellant is one of innocence and false implication. It was his specific defence that he had been falsely implicated due to his allegiance to a different political party. In conclusion of trial, the Trial Judge by the impugned judgment and order dated 29.09.2011 and 30.09.2011 convicted and sentenced the appellant, as aforesaid.

Prosecution case against the appellant is primarily hinged on the following:

- (a) Oral dying declaration of the deceased.
- (b) The evidence of sole eye witness P.W. 4 which is corroborated by P.W. 2 and 5.

Oral dying declaration by the deceased :

Prosecution has sought to prove the oral dying declaration of the deceased through the following witnesses:-

P.W.1, Ashok Rai is the father of the deceased and informant in this case. He was not present at the place of occurrence. He received information around 7.00 p.m. from his daughter-in-law Dipika Rai (P.W. 13). He went to Darjeeling District Hospital and found his son lying unconscious. He shifted his son to Anandalok Nursing Home, Siliguri. But as his condition did not improve, he re-admitted his son at Darjeeling Sadar Hospital on 06.03.2007. Finally, on 07.03.2007 his son expired. He

learnt from his daughter-in-law the appellant had assaulted his son. He lodged written complaint.

P.W. 13, Dipika Rai is the wife of the deceased. She deposed upon hearing the news that her husband was lying with bleeding injury at Beech Gaow, she came to the spot. She heard from one Sapna Rai that the appellant had assaulted her husband. She took Suroj to dispensary and from there to Darjeeling Sadar Hospital. On the way to Sadar Hospital, Suroj stated that he had been assaulted by the appellant. She had informed her father-in-law about the matter.

P.W. 3, Munna Thapa also arrived at the spot hearing that Suroj had been assaulted. She accompanied P.W. 13 and took Suroj to Darjeeling Sadar Hospital. She corroborated P.W. 13 that Suroj had said that the appellant had assaulted him.

In cross-examination, she admitted that at the dispensary of the tea garden Suroj was in unconscious condition. But in the vehicle he had regained his senses and stated that the appellant had injured him. She admitted she was a member of Gorkha Janmukti Morcha, while the appellant was a member of G.N.L.F.

P.Ws. 16 and 17 are the doctors who treated the deceased at Darjeeling Sadar Hospital. P.W. 17, Dr. Nikhil Kumar Ghorai was present in the emergency department of the hospital on 02.03.2007 when Suroj had been brought to the hospital with injuries on his head and other parts of the body. Though he found the patient was conscious, father of the patient told him that appellant had assaulted the deceased.

P.W. 16, Dr. Surajit Nandi deposed the patient had been referred to North Bengal Medical College and Hospital as the injuries were grievous. On 06.03.2007, he was re-admitted and expired on the next day. He proved the injury report.

P.W. 19, Sourav Sen was the investigating officer of the case. He deposed on 02.03.2007 at about 22:40 hours he was on mobile van duty. He found a vehicle entering the police station. Out of curiosity he went inside and saw a lady alighting from the vehicle and proceedings towards the duty officer. There was another lady sitting beside an injured person who was bleeding from the head. Upon enquiry the lady in the vehicle disclosed her identity as Deepika Rai, wife of the injured Suroj Rai. The injured person was groaning and on enquiry he stated that the appellant had assaulted him. Thereafter, father of the appellant lodged First Information Report.

Mr. Manna, learned advocate appearing for the appellant submits the evidence of the aforesaid witnesses with regard to the oral dying declaration is unreliable. Dying declaration made by the victim is not reflected in the First Information Report lodged by P.W. 1. It is also submitted that the evidence on record does not convincingly establish that Suroj was conscious and in a fit state of mind to make the declaration. It is further submitted oral dying declaration to investigating officer (P.W. 19) is a figment of imagination. Had such dying declaration been made to P.W. 19, he would certainly have reduced the same into writing and treated such statement as the First Information Report. On

the contrary, a written complaint lodged by P.W. 1 has been treated as F.I.R. improbabilising P.W. 19 with regard to the so-called dying declaration.

I find much substance in the submission of Mr. Manna. Evidence of the witnesses with regard to the oral dying declaration does not give a clear and unequivocal impression that the victim was conscious and in a fit state of mind to make the statement. P.W. 3 stated victim was unconscious when he was admitted to the dispensary in the tea garden. However, he regained consciousness while he was shifted to Darjeeling Sadar Hospital and made statement before herself as well as P.W. 13, wife of the victim. P.W. 13 also spoke in similar lines. She, however, claimed to have narrated the incident to her father-in-law (P.W. 1) who lodged First Information Report. In the First Information Report, there is no reflection of the dying declaration made by the deceased. Absence of this vital fact in the First Information Report gives rise to a serious doubt whether the victim had at all made any statement before his wife, P.W. 13 and P.W. 3. First Information Report though not a substantive piece of evidence is the foundation of the prosecution case. Ordinarily, the F.I.R. may be used to contradict or corroborate its maker. However, if the complaint is lodged by the maker on the basis of information derived from another witness, absence of a vital fact in the F.I.R. as disclosed by the said witness is relevant under section 11 of the Evidence Act to test the veracity of the said witnesses vis-à-vis such fact (see **Ram Kumar**

Pandey Vs. State of Madhya Pradesh¹). In the present case, P.W. 1 lodged the First Information Report on the basis of information derived from P.W. 13, wife of the deceased. However, the report is completely silent with regard to the so-called dying declaration made to her. Absence of such fact in the First Information Report, therefore, shakes the very foundation of the claim of P.W. 13 that the deceased had stated to her that the appellant had assaulted him. It is argued on behalf of the state that in **State of M.P. Vs. Dharendra Kumar**² the Apex Court had distinguished **Ram Kumar Pandey** (supra) and relied on a dying declaration though it was not disclosed in the F.I.R. It is further contended that P.W. 17 who had treated the victim at the emergency department found him to be conscious. I have considered the ratio in **Dharendra Kumar** (supra). In the said report the Apex Court relied on the dying declaration in view of the evidence of the doctor that the deceased inspite of injuries was in a position to speak for about 10-15 minutes. However, on an assessment of an evidence of P.W. 17, I find the said doctor while opining that the victim was conscious did not state that he was in a position to speak. He deposed father of the victim had narrated the history of assault to him. In order to prove a dying declaration it is incumbent on the prosecution to establish beyond doubt that the maker of the dying declaration is not only conscious but in a fit state to make the statement. P.W. 17 did not state that the victim was in a fit state to make a statement. On the contrary, his deposition gives an

¹ (1975) 3 SCC 815 (Para 9)

impression the patient was unable to speak and the history of assault was narrated by his father. Thus, I am unable to draw sustenance from the evidence of P.W. 17 that the victim was in a fit state to make the dying declaration and the ratio in ***Dhirendra Kumar*** (supra) is factually distinguishable from the present case. Finally, the oral dying declaration to investigation officer, P.W. 19 also does not inspire confidence. P.W. 19 claimed he saw a vehicle entering the police station. Out of curiosity, he enquired and found the injured groaning inside the vehicle. Injured Suroj Rai stated to him that the appellant had assaulted him. The said witness who is a police officer did not reduce the statement into writing. No general diary to that effect was also made. Subsequently, P.W. 1 lodged written complaint which is treated as First Information Report which was completely silent with regard to the aforesaid oral dying declarations. These circumstances improbabilise the deposition of the aforesaid witnesses with regard to the dying declarations made by the victim. Therefore, I am not inclined to rely on the said dying declarations said to have been made by the victim.

Whether the sole eye-witness P.W.4 is reliable or not ?

The other pillar on which the edifice of the prosecution case stands is the evidence of the eye witness, P.W. 4. She is a resident of Beech gaow, Rishihat Tea estate. On 02.03.2007 at 6.30 p.m. she was in courtyard of her house. At that time, she saw that the appellant assault Suraj Rai with a danda. She raised hue and cry. The villagers came to the post and

² (1997) 1 SCC 93

removed the injured to the tea garden. She made statement before Magistrate.

In cross-examination, she stated on hearing hue and cry, Rajani Mukhia, P.W.5 and one Chandrika Tamang, P.W. 2 came to the spot. Presently she has poor vision but two years ago, her vision was good.

Her deposition is corroborated by Rajani Mukhia, P.W. 5 who claims on hearing hue and cry she came to the spot and found Swapna. She told her that appellant assaulted Suraj and fled away. Chandrika (P.W. 2) was also present at the spot. She told her that she had seen Sadhil fleeing away from the spot with a danda in his hand.

P.W. 2, Chandrika Tamang deposed on 02.03.2007 at 6.30 p.m. while she was returning to her matrimonial home, the appellant dashed against her and ran away. He had a danda in his hand. She narrated the incident to Rajani Mukhia, P.W. 5.

In cross-examination, she stated it was dark when the accused had dashed against her. There was no electricity in the area.

Mr. Manna submits that the evidence of P.W. 4 is not convincing. She is the sole eye witness but was examined six days after the incident by police. It is also submitted she has poor vision. Criticising the deposition of P.W. 2, Mr. Manna submits the said witness had admitted the place was dark and had no electricity. Hence, she could not have identified the accused in dark.

P.W. 4 is the sole eye-witness. Thus, a heavy duty is cast on the Court to examine whether the said witness is a) wholly reliable; b) wholly

unreliable; c) partly reliable and partly unreliable. In the first two instances, the Court can either rely or discard her evidence. With regard to the third situation it would be the duty of the Court to search for corroboration before relying on her version. In ***Lallu Manjhi And Another Vs. State of Jharkhand***³ the Apex Court held as follows:-

“10. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. (See: *Vadivelu Thevar v. State of Madras*⁴)”

I have applied the aforesaid principles to assess the evidence of P.W.

4. From the rough sketch map prepared by P.W. 19, it appears that her house is situated 10/12 ft. from the place of occurrence. She deposed she was standing in the courtyard of her house and saw the incident. Presence of P.W. 4 at the place of occurrence is, therefore, most natural and has been clearly proved. Upon witnessing the said incident, she raised hue and cry. Hearing her cries, Chandrika Tamang, P.W. 2 and Rajani Mukhia, P.W. 5 came to the spot. Rajani Mukhia saw her standing in front of her house and P.W. 4 stated to her that the appellant had assaulted the deceased. P.W. 4's version is further corroborated by

³ (2003) 2 SCC 401

⁴ AIR 1957 SC 614 : 1957 Cri LJ 1000

Chandrika, P.W. 2 who claimed that the appellant had dashed against her on the road while fleeing away. He was carrying a danda. Manner of assault with a danda is corroborated by medical evidence of P.W. 16 who treated the victim at Sadar Hospital and found injuries on the head and other parts of the body. Post mortem Doctor, P.W. 9 also found the following injuries on the deceased:-

“1. At temporal frontal and temporal parietal region measuring approximately 3”x 1”and irregular in shape.

2. Left leg and back of the neck and left jaw.

3. There was diffused bruise over the neck and the swelling were opposite the chest.

4. There was fracture in the scalp.

On examination of the brain, there were multiple haemorrhages in the brain.”

“On the chest, there was a fracture on the right 3rd and 4th ribs.

There was a fracture on the left jaw and left shin.

There was no deformity seen on the body and there was a dislocation on the left jaw bone.”

He opined the death was due to multiple cerebral hemorrhages with multiple fracture of the scalp and homicidal in nature. All these injuries are in the nature of fracture and internal haemorrhages probalising assault by a hard blunt substance like danda.

From an analysis of the aforesaid evidence on record, I find P.W. 4 is a natural eye witness to the incident. She is also a disinterested witness and does not have any enmity with the appellant. Argument that the witness had weak vision at the time of deposition is wholly misconceived as the said witness clarified that her vision was good at the time of

occurrence. That apart, the incident occurred 10/12 ft. in front of her house and, it is most probable she had seen the assault upon the deceased.

P.W. 4 also receives corroboration from P.W. 2, Chandrika who stated soon after the incident, appellant had dashed against her while running away from the spot. Her deposition is criticised on the ground the place was dark and did not have electricity. Hence, the witness could not have identified the appellant. The appellant resides in the same tea estate with the witnesses. Hence, he was known to the said witness. He had dashed against her giving the latter ample opportunity to see him at close quarters. The incident occurred at around 6:30 p.m. on the road which was running through hutments occupied by the tea garden workers. Although there may not have been electricity in the locality, it is most probable that lamps had been lit in the hutments and the ambient light in the locality was sufficient to identify the appellant.

Evidence of the sole eye-witness, P.W. 4, is not only convincing but is corroborated by P.Ws. 2, 5 and the medical evidence on record. Under such circumstances, mere delay in examining the witness during investigation does not affect her credibility or truthfulness. In view of the aforesaid, even if one ignores the dying declarations of the victim as doubtful, the wholly reliable evidence of the eye-witness, P.W. 4 corroborated by other evidence on record is sufficient to prove the prosecution case that appellant had hit the victim on the head and various parts of the body with a danda resulting in his death.

Whether conviction requires to be altered from section 302 of the I.P.C. to section 304 of the I.P.C. :

Finally, it is argued that the incident had occurred in the course of a sudden altercation and the appellant did not intend to murder the deceased. Hence, conviction may be altered from section 302 to section 304 Indian Penal Code.

I am unable to accede to this contention too. The appellant had come to the residence of P.W. 11 around 5:30 p.m. in a drunken condition and had demanded money from him. Suraj was present there and an altercation broke out between him and the appellant. Appellant left the house after threatening he would teach Suraj a lesson. Around 6.00 p.m., Suraj left the residence of P.W. 11 and appellant assaulted him around 6:30 p.m. in front of the house of P.W. 4 which is 20 minutes' walking distance from the house of P.W. 11.

From the aforesaid evidence on record it does not appear the assault upon Suraj was in the course of a sudden altercation. On the other hand, the deceased objected to the improper conduct of the appellant at the residence of P.W. 11 which gave him motive to commit the crime. Moreover, post mortem Doctor has noted multiple injuries caused by the appellant on the vital parts of the body viz., head and chest. The assault had resulted in fracture in the scalp and there were multiple hemorrhages in the brain as well as fracture of a number of ribs. The manner and severity of assault which gave rise to multiple and grave injuries on the deceased clearly show that the appellant had intended to murder him.

Thus, I am of the opinion conviction and sentence of the appellant does not call for interference. The appeal is accordingly dismissed.

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

We are informed that the appellant has already undergone 15 years of actual imprisonment. He does not have any criminal antecedent and comes from a poor socio economic background. In the event, he makes an application for remission of sentence in terms of Section 433A of the Code of Criminal Procedure, the appropriate authority may consider his prayer in the light of the aforesaid circumstances and other relevant factors including his conduct in the Correctional Home.

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 compliance of necessary formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)