

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

Before: Hon'ble Justice Sugato Majumdar

CRA 620 of 2013

Amjad Ansari & Ors.

Vs.

The State of West Bengal

For the Appellants	:	Mr. Tapas Kumar Ghosh, Mr. Tanmoy Chowdhury.
For the State	:	Mr. Narayan Prasad Agarwala, Ms. Sujata Das, Mr. Pratick Bose.
Hearing concluded on	:	15/11/2022
Judgment on	:	22/11/2022

Sugato Majumdar, J.:-

The instant appeal is preferred against the Judgment of conviction dated 16/07/2013 and the Order of sentence dated 17/07/2013 passed by the Additional Sessions Judge, First Court, Asansol under section 304/34 of the Indian Penal Code in Sessions Case No.26 of 2007, whereby the Appellants were sentenced to suffer rigorous imprisonment for six years.

Genesis of the prosecution case is the written complaint dated 23/04/2002 lodged in Barakar Police Station by the de-facto complainant Md. Jalaluddin. It was alleged in the written complaint that on 23/04/2002

at about 3.30 p.m. an altercation and scuffle took place between two boys named Md. Amjad and Badsha, the later being the son of the victim Naseem. The victim Md. Naseem interfered into the said scuffle when Md. Haider and Chottu Ansari assaulted Naseem. All on a sudden Haider hit on the head of Naseem with an iron rod for which Naseem sustained serious injuries. He was admitted into Asansol Sadar Hospital initially. Md. Naseem was referred to Burdwan Medical College but he was taken to Saraidhela Hospital at Dhanbad. Naseem expired there on 27/04/2002.

The written complaint was received by Barakar Police Station on 23/04/2002 at 23.45 hours and was forwarded to the Officer-in-Charge of Kulti Police Station where formal F.I.R was drawn up and the case was registered as Kulti P. S. Case No.86/2002 dated 24/04/2002 under sections 341/326/34 of the Indian Penal Code. On death of Md. Naseem on 27/04/2002 section 304 of the Indian Penal Code was added.

On being so entrusted with, the Investigating Officer conducted investigation and on finishing the same, filed charge-sheet under sections 341/326/304/34 of the Indian Penal Code. Since the allegations are triable by the Sessions Judge exclusively, the matter was committed by the Additional Chief Judicial Magistrate to the Court of Sessions and subsequently to the Trial Court itself.

Charges were framed under section 304/34 of the Indian Penal Code which were read over and explained to the Appellants and they pleaded not guilty and claimed to be tried.

In course of the trial, the prosecution examined twelve witnesses and adduced documents which were variously marked as Ext.1 to Ext. 8.

Two defense witnesses were produced on behalf of the Appellants.

The Appellants were also examined under section 313 of the Code of Criminal Procedure. Defense of the Appellants were false implication and innocence.

The Trial Court convicted the Appellants in terms of the impugned Judgment and the Order, as aforesaid.

On being aggrieved and dissatisfied the instant appeal has been preferred.

Mr. Ghosh, appearing for the Appellants argued that the prosecution case is rife with contradictions and material discrepancies, warranting acquittal. According to him the prosecution case mainly rested upon ocular testimonies of P.W.1, P.W.2, P.W.4 and P.W.5. P.W.1, being the de-facto complainant did not state anything in the written complaint that he was present on the spot and eye witnessed the incident. Scribe was examined as P.W.3. He stated in evidence that the complaint was written as per direction of the P.W.1, the de-facto complainant. He stated that if they had

disclosed the incident to him as seen by own eyes then he must have mentioned the same in the written complaint. In course of cross-examination he further stated that they did not tell him about the place of occurrence. Mr. Ghosh invited attention to a statement of P.W.1 made during cross-examination where he stated that if he was present at the time of quarrel in between Badsha and Amjad he would have mentioned about his presence in F.I.R. Mr. Ghosh further submitted that it is in the evidence of P.W.1 that in course of rescuing the victim wearing apparels of P.W.1 got blood stained. Those blood stained wearing apparels of P.W.1 were not seized by the Investigating Officer. Therefore, presence of P.W.1 on the spot remains doubtful. P.W.10, the Investigating Officer stated in course of cross-examination that P.W.1 never stated him that he was present on spot. Similarly, P.W.5, the wife of the victim, also stated that she was on the spot when the alleged assault took place and her wearing apparels were also blood stained. Investigating Officer did not seize those apparels also. P.W.10 stated that P.W.5 never stated him that she was present on spot. P.W.11 Md. Alam was never examined by the Investigating Officer, P.W.10. In fact the Investing Officer stated that in course of investigation he never met with any person named Alam. P.W.11, Alam is not even a charge-sheeted witness. For the first time he made his statements before the court, that also after examination of the Investigating Officer. In nutshell, the point of argument of Mr. Ghosh is that the presence of the eye-witnesses in the place of occurrence are doubtful, therefore, cannot be relied upon.

Instead of relying upon the ocular testimonies of the witnesses as gospel truth, the Trial Court should have looked for corroborating evidences. This was not done by the Trial Court. Therefore, according to Mr. Ghosh the impugned judgment suffers serious lacuna.

Next, refuting the trustworthiness and reliability of the ocular witnesses, Mr. Ghosh, argued that there are dearth of corroborating or other evidences to make the prosecution case reliable and trustworthy otherwise. According to Mr. Ghosh, prosecution evidence is rife with contradictions and inconsistencies. It is contended that the victim was in full sense, as appeared from the deposition of P.W.8 Dr. Sanjib Chatterjee who treated the victim at Barakar P.H.C. P.W.8 stated further in evidence that the victim stated him that he was assaulted by three people but did not mention any name. Had the present Appellants been the assailants, the victim must have mentioned their names. Blood stained earth of the place of occurrence was not collected by the Investigating Officer. Time of occurrence is sometimes mentioned as 3.30 p.m., sometimes as 5.30 p.m. creating doubt again. All these doubts, contradictions and serious discrepancies undermined the prosecution case which the Trial Court failed to take note of, according to Mr. Ghosh.

It is further argued by Mr. Ghosh that there are not enough materials to sustain any conviction under section 34 of the Indian Penal Code. There was no evidence of common intention to murder or to fatally injure the victim. All took place, even if the evidences are assumed to be true, at the

spurt of the moment without any prior meditation or planning, according to Mr. Ghosh.

Per contra, Mr. Agarwala appearing for the State submitted that F.I.R. is not an encyclopedia to contain every fact in details. Names of all the three Appellants are there in the F.I.R. It is in the evidence of the scribe, namely, P.W.3 that he failed to mention on the written complaint that he had read over and explained the content of the written complaint to the de-facto complainant. Although there are minor discrepancies in evidences, such discrepancies do not go to the root of the case to make the whole corpus of evidence contradictory, according to Mr. Agarwala. He admitted that there were latches on the part of the Investigating Officer as he neither seized blood stained earth nor the blood stained apparels of PWs 1 and 5. But, absence of such seizure by itself cannot negate the probative value and reliability of testimonies of P.W.1 and P.W.5. Eyewitnesses, namely, PWs 1, 2, 4, 5 and 8 stated the incidence vividly without inconsistency. PW 11 Md. Alam was examined after examination of the Investigating Officer. But the Investigating Officer was recalled and once again examined thereafter, to clarify.

Mr. Agarwala further argued that P.W.1 was cross-examined by the defence and in course of cross-examination he stated that he was not present at the time of quarrel between Badsha and Amjad but P.W.1, was present at the time of assault on the victim. There is nothing to show that he stated falsely anywhere or there are serious inconsistencies in the

statement of P.W.1 on his presence on the place of occurrence. It is further submitted that Mr. Agarwala that the place of occurrence was well-identified by the P.W.4 in her evidence. Therefore, nothing is there to doubt or reject, the cogent and reliable evidences of prosecution witnesses. According to Mr. Agarwala, the prosecution case was proved beyond *iota* of doubt. Mr. Agarwala submitted that the impugned Judgment and Order of sentence need not be interfered into.

I have heard the rival submissions.

P.W.1 Jalaluddin who is the de-facto complainant, stated in examination-in-chief that the Appellants assaulted Naseem on his head, eye and other parts of the body with iron rod and piece of wood. Although he did not spell out in specific words that he was present on the place of occurrence he denied repeated suggestions of his absence in the place of occurrence. Nothing is there in his evidence that he heard the incident from someone else. He stated further in course of cross-examination that his wearing apparels got blood stained to rescue Naseem. He further stated in course of cross-examination that he showed blood stained clothes to police. The Appellants cross-examined him at length to test the veracity of his evidence but he withstand the cross without making any contradictory statement. P.W.11, the Investigating Officer stated in evidence that he examined P.W.1 and recorded his statements under section 161 of the Cr.P.C. He also stated he did not seize blood stained clothes of P.W.1 containing blood of Naseem. His evidence did not negate the presence of

P.W.1 in the place of occurrence. On the other hand presence of P.W.1 in the place of occurrence is confirmed by P.W.5 Hafiza Khatoon and P.W.12 Alam both of whom stated that they along with P.W.1 took Nassem to hospital from the place of occurrence. P.W.4 Md. Basir is another eye-witness. He categorically stated in cross-examination that he made statement to police that he saw the incident with his own eyes. Nothing is there in his evidence to doubt his presence in the place of occurrence. It was conceded by P.W.1 in course of cross-examination that he was not present when the quarrel took place. Evidence shows that there was a trial of events initiated with quarrel and ended up with the assault. P.W.1 was not present at the initial stage, as stated when the quarrel took place. But nothing is there in his evidence to indicate that he was not present at the time of assault on Naseem. P.W.5 Hafiza Khatoon stated clearly that she was present in the place of occurrence which was Tahir's tea stall. In course of cross-examination she confirmed that she was on the place of occurrence. Nothing is there in her evidence to show that her evidence was hearsay or that she was not present in the place of occurrence. P.W.11 Md. Alam is not a charge-sheeted witness. He was summoned to appear in the Court and all his statements were made for the first time. Such statement should be relied upon cautiously and only on corroboration. However, P.W.11 did not name the present Appellants as assailants. Therefore, his evidence cannot be looked into to ascertain whether the Appellants were assailants or not. But he cannot be regarded as a planted witness, as his

presence in the spot and accompanying the injured Naseem to hospital were confirmed by both P.W.1 Jalaluddin and P.W.5 Hafiza Khatoon. Therefore, it is not a case that his named suddenly appears in the array of witnesses or that he is planted. He was cross-examined at length in course of which he stated that before giving evidence he did not meet with any lawyer and he denied suggestion among others that he did not eye-witness the incident. Nothing emanates from his evidence and cross-examination which makes his presence on the spot doubtful.

Although P.W.10, the Investigating Officer stated in his evidence that neither P.W.1 Jalaluddin nor P.W.2 Alamgir, P.W.4 Md. Basir P.W.5 Hafiza stated him that they saw the incident, that itself cannot negate presence of all of them at the place of occurrence. All these witnesses deposed before the court that they eye-witnessed the incident and their extensive cross-examination did not create any dichotomy in their version. Testimonies of P.W. 1, P.W. 5 and P.W. 11 mutually corroborate that they were presented on the spot and took Naseem to hospital. Therefore, their evidence can be relied upon safely.

A substantial part of argument of Mr. Ghosh is devoted to establish that uncertainty of the place of occurrence undermines the prosecution case. It was argued that the Investigating Officer did not produce any rough sketch map. He stated in evidence that none showed him the place of occurrence. As discussed above, P.W. 5 Hafiza Khatoon specifically stated that the incident took place before Tahir's tea stall. This she

reiterated in cross-examination consistently. Tacit suggestion was also given to Tahir's tea stall to P.W.2 in course of cross-examination. There is neither any evidence nor any suggestion given in cross-examination that the place of occurrence is somewhere else. Evidence leaves no ambiguity as to place of occurrence. Minor discrepancies in the testimony of the witnesses without being dichotomous and contradictory do not diminish otherwise reliable and cogent evidences.

The prosecution case owes origin to the written complaint dated 23/04/2002 lodged in Kulti Police Station by P.W.1. It is stated in the written complaint that on that date at about 03:30 P.M. when Md. Amjad and Badsa had scuffle between them, the victim Md. Nasim intervened. Thereafter Md. Haider and Chottu Ansari assaulted Nasim. Haider injured Nasim on his head with an iron rod. P.W.1, in evidence before the Court stated that on 23/04/2002 at about 03:00 to 03:30 P.M. A quarrel was going on between Amjad and Badsa when Nasim, father of Badsa came to the spot for settlement. At that time, Haider, Amjad and Chottu Ansari assaulted Nasim by an iron rod and piece of wood on his head, eye and other parts of the body as a result of which Nasim was grounded. At that time, he himself along with Hafiza Khatun (P.W.5) and one Alam (P.W.12) took to Barakar Primary Health Centre. Nothing emanated from him in course of cross-examination which is inconsistent or grossly contradictory or makes his evidence given in examination-in-chief suspicious. P.W.2, Md. Alamgir Ansari stated in examination-in-chief that on 23/04/2002 at about 03:30

P.M. while he was returning home from garage, the inmates of the Nasim's house and inmates of the Haider's house were quarreling with each other on snatching of money. The quarrel was stopped after his arrival on the spot. At that time, some one hit on head of Nasim by a patta from his back as a result of which Naseem sustained multiple fractures. He identified Haider as one of the assailant but could not recollect the other. His evidence remained consistent in course of cross-examination. Previously statement of P.W.2 was recorded under Section 164 of Cr.P.C. on 22/05/2002. Except some embellishments, his statement corroborated his deposition given in Court. P.W.4 also stated in examination-in-chief that on 23rd April, 2002 at about 03:00 to 03:30 p.m. a quarrel took place between Amjad and Badsha when Naseem went to intervene. Haider, Amjad and Chottu assaulted Naseem with an iron rod and wooden patta and on his head and all over body as a result of which Naseem was grounded. He was taken to hospital. He was cross-examined and his evidence remained unshaken. His statement also was recorded under Section 164 of the Cr.P.C. on 22/05/2002 wherein he stated that there was initially an altercation between Badsha and Amjad which was intervened by the witness. Thereafter near Tahir's Hotel Chottu Ansari, Amjad and Haider assaulted Naseem on his head and body as a result of which Naseem was grounded. This earlier statement of Md. Basir is in the same tune with his statement made in Court. P.W. 5 Hafiza Khatun, being another eyewitness stated in evidence that there was altercation between her son Badsha and Amjad.

Her husband Naseem was sitting in the tea stall of Tahir and tried to stop their altercation when Chottu, Amjad and Haider assaulted him with an iron rod and wooden patta as a result of which Naseem was grounded and sustained bleeding injuries on his head and left eye. Her evidence was also not shaken in course of cross-examination or she stated nothing contradictory, inconsistent or against her statement made in course of examination-in-chief. Her statement also recorded under Section 164 of the Cr.P.C. on 22/05/2002 wherein she stated that there was altercation between Badsha and Amjad on snatching of Rs. 30/- subsequently when Naseem was near Tahir's shop, Amjad, Chottu Ansari and Haider assaulted Naseem with an iron rod and wooden patta on head. Chottu also assaulted Naseem on waist by a road as a result of such assault Naseem was grounded and sustained bleeding injury.

P.W.11 Md. Alam stated in evidence that the occurrence took place near tea stall of Tahir when Naseem was assaulted. But he did not name to accused assailants.

PWs 1, 4 and 5 identified the present Appellants on dock.

P.W. 5 stated that the incident took place in front of tea stall of Tahir confirmed the same in place of occurrence in course of cross-examination. This was corroborated by P.W.11 in examination-in-Chief.

Statements of PWs 1, 2, 4 and 5 are consistent on dock as well as on previous occasion, recorded under Section 164 of Cr.P.C. Their evidence

corroborate each other substantially although P.W.2 did not mention name of all the Appellants except Haider and P.W.11 did not mention name of any all the Appellants as assailants. Such omissions are neither contradictory nor made the prosecution case doubtful or untrustworthy. Mutually corroborative evidences do not any manner created any dichotomous version. Observations of different witnesses may be different. Way of recapitulations may vary, from person to person. Memory in course of passage of time may be faded away. There may be minor discrepancies omissions or embellishments in the statements without affecting the sum and substance of their evidences. In this case evidences of PWs 1, 2, 4, 5 and 11 are credible, acceptable and reliable.

When Naseem was taken to Barakar Primary Health Centre in a seriously injured condition by gesture, he indicated to attending doctor P.W.8 Dr. Sanjib Chatterjee, that he was assaulted by three people although he could not name them. This is in the deposition of P.W.8 and P.W.11 who corroborated that by gesture and posture Nasim showed the doctor who assaulted him. This further corroborates the evidence of the witnesses that Nasim was assaulted by three Appellants. Head injury of Nasim is corroborated by medical documents and testimony of P.W.8 Dr. Sanjib Chatterjee and also by P.W.9 Dr. Sailendra Kumar who conducted post mortem examination on the person of Naseem.

Strong arguments was made by the Mr. Ghosh, learned Counsel for the Appellant that name one of the Appellants Amjad Ansari is absent in

the written complaint making the prosecution case doubtful. It is no longer res integra that FIR is not an encyclopaedia which is expected to contain all the minute details of the incident alleged. Omissions of the one of the name of the accused of F.I.R. may not be fatal for prosecution case. In **Jitender Kumar vs. State of Haryana [(2012) 6 Supreme Court Cases 204 : (2012) 3 Supreme Court Cases (Cri) 67]**, the Supreme Court of India held that merely because the name of the accused is not in the F.I.R. would not necessarily result in his acquittal. An accused who has not been named in the F.I.R. but to whom a definite role has been attributed in the commission of crime and when such role is established by cogent and reliable evidence and the prosecution is also able to prove its case beyond reasonable doubt, such an accused can be punished in course of law, if found guilty. Every omission in the F.I.R. may not be so material so as to unexceptionally be fatal to the case of the prosecution. Various factors are required to be examined by the Court, including the physical and mental condition of the informant, the normal behavior of a man of reasonable prudence and possibility of an attempt on the part of the informant to falsely implicate an accused.

In the instant case the written complaint was lodged in the same night of incident. P.W.1 escorted Nasim to Barakar Primary Health Centre. After returning home, he lodged the written complaint which was written by Helen Ansari, P.W.3. There was no delay in making the written complaint. In hest there may be omissions but nothing is there in the

record or in evidence to indicate that the omitted Appellant is falsely implicated. Nothing is there in the record or in evidence to indicate any fabricated evidence against the omitted Appellant. Cogent reliable and credible evidence of eyewitnesses, as discussed above attributed specific role of Amjad Ansari in the offence. It is mentioned in the written complaint that Amjad was present on the spot and there was a scuffle between him and Badsha. However the written complaint failed to attribute any specific role of Amjad in commission of the offence. Evidences adduced on behalf of prosecution is not contradictory but in consonance with the written complaint. That omission does not import and suspicion or doubt or chance of false implication and has no material bearing with the prosecution case. Argument of Mr. Ghosh is not acceptable in this regard. For the same reason and in view of very cogent and reliable and trustworthy evidence of eyewitnesses absence of seizure of any offending weapon also does not make the prosecution case vulnerable.

Reliable and cogent evidences establish that the victim was assaulted by the Appellants on head leading to his death. There is dearth of evidence to establish that the Appellants nurtured intention or assaulted the victim with sole intention to cause his death. Genesis of the incident is quarrel between Amjad and Badsha on stealing of Rs. 30/- followed by scuffle, resulting in a tensed situations which culminated in assault on the victim, being father of Badsha who intervened into the matter. It is not a case where the Appellants premeditated conspiracy, collected deadly weapon,

attacked the victim with shouting “kill him” or made repeated blow on the vital part, namely on head of the victim to ensure fatal injury. It is also not a case where the Appellants, inflicting injuries had taken undue advantage or had acted in a cruel or unusual manner like giving repeated blows, as appears from the evidence. Therefore, it cannot be said that the Appellants had animus or intention to kill the victim. But they made blow on the head of the victim, so it can be said that they had knowledge that the injuries inflicted by them were likely to cause death of the victim. The whole circumstance strongly establish a case coming under the fourth exception of section 300 of the Indian Penal Code as death owes its origin to a tensed situation, scuffles, heated moments and heat of passion.

Mr. Ghosh argued that nothing is there in evidence to substantiate and sustain conviction under section 34 of the Indian Penal Code. Evidence of witness shows that there was concerted attack on the person of the victim by the Appellants in course of and as a trial of same course of action. There was scuffle between Amjad and Badsha. When Nasir intervened all the Appellants assaulted him. A common intention can well develop on the spot. There is no evidence that the victim had any encounter with Haider and Chottu prior to the assault. It is manifest from the evidence that all the Appellants had common intention and conviction under section 34 of the Indian Penal Code is not unwarranted.

It is observed that the case comes within ambit of the fourth exception of section 300 of the Indian Penal Code. Nothing is there in the

record that the Appellants are history-sheeters; they are not hardcore criminals. Considering the entire factual aspect of the matter, sentence of the six years imprisonment seems reasonable and is not interfered with.

The Trial Court appreciated the evidence in a proper manner and applied the law correctly. The observation of the Trial Court in the perspective of correct position of law demands no interference and the well-reasoned Judgment and Order of sentence stands upheld.

Unserved part of sentence is to be served out, if any.

The instant appeal stands disposed of. Lower court records along with a copy of this Judgment be remitted back.

(Sugato Majumdar, J.)