

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 48 of 2017

Ashim Goldar & Ors.

-Vs-

The State of West Bengal

For the Appellants	:	Mr. Sekhar Kumar Basu, Sr. Adv. Mr. Pradip Kumar Roy, Adv. Mr. Swapan Kumar Mallick, Adv. Mr. Ujjal Roy, Adv.
For the State	:	Mr. Nequive Ahmed .. Id. A.P.P. Ms. Trina Mitra, Adv.
Heard on	:	13.09.2023, 19.09.2023 & 20.09.2023
Judgment on	:	20.09.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against judgment and order dated 19.12.2016 and 20.12.2016 passed by learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No. 21 of 2002 arising out of Sessions Case No.151 of 2000 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 and to pay a

fine of Rs.5000/- each, in default, to suffer simple imprisonment for three months more.

Prosecution case:-

2. Prosecution case as alleged against the appellants is as follows:-

On 28.05.1994 at 10.45 PM Rama Rakshit (wife of Bhanudeb Rakshit, the deceased) received information that her husband was lying in bleeding condition on the road near the house of Haradhan Pal (PW 4) of Mankundu Palpara. Hearing the news she rushed to the place of occurrence along with nephew of the deceased, Bablu Rakshit (PW 2). Her nephew viz, Pintu Dutta (PW 3) had already arrived at the spot. Upon enquiry, her husband told her at 10.30 PM while he was returning home, appellants and two others had assaulted him with napla (curved dagger), sword, revolver etc. As a result, he suffered severe bleeding injuries. Her husband was removed to Chandannagar Hospital for treatment.

3. On the complaint of Rama, Bhadreswar Police Station Case No.100 of 1994 dated 28.05.1994 under Sections 326/307/34 of the Indian Penal Code and under Sections 25/27 of the Arms Act was registered for investigation.

4. In course of investigation, appellants were arrested and charge sheet was filed against them. Charge was framed under Sections 302/34 IPC. Appellants pleaded not guilty and claimed to be tried.

5. In course of trial, prosecution examined thirteen witnesses and exhibited a number of documents including injury report containing dying declaration (Ext. 7). Defence of the appellants was one of innocence and false implication.

6. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 19.12.2016 and 20.12.2016 convicted and sentenced the appellants, as aforesaid.

Arguments at Bar:-

7. Mr. Sekhar Kumar Basu, learned Senior Advocate with Mr. Pradip Kumar Roy and Swapan Kumar Mallick argued there is no eyewitness to the incident. Time and place of death have not been proved. Two hands of the victim were severed and he received grave injuries on the throat. Having suffered such injuries, it is impossible for a person to speak. This is corroborated by the post mortem doctor (PW 10). The purported dying declaration recorded in the injury report is not reliable. As both the hands were severed, it is unlikely the LTI on the document was that of the victim. PWs 1 and 2 resides 1½ km. away from the place of occurrence. It is unlikely they could have heard the dying declaration made by the victim. Similarly, PW 3 could not have heard the dying declaration. Though the victim was found beside the residence of PW 4, none of the other witnesses spoke about PW 4's presence at the place of occurrence. PW 4 had political enmity with the appellants. Hence, the oral dying declaration proved through these

witnesses ought to be taken with a pinch of salt. Appellants are entitled to an order of acquittal.

8. Mr. Neguive Ahmed, learned Additional Public Prosecutor with Ms. Trina Mitra submitted the incident occurred beside the house of PW 4. He heard shouts and went to the place of occurrence. He found the victim in bleeding condition. Victim made a dying declaration implicating the appellants. Subsequently, PWs 1, 2 and 3 came to the spot and the victim again made similar statement. Nature of injuries noted by these witnesses are corroborated by the post mortem doctor. PW 11 who treated the victim at hospital recorded his dying statement in the injury report. Dying declarations are proved beyond doubt. Hence, the appeal is liable to be dismissed.

Evidence on record:-

9. PW 1 (Rama Rakshit) is the wife of the deceased and the de-facto complainant. She deposed at around 10.30 and 10.40 PM a person informed her that her husband was lying with bleeding injuries beside the house of Haradhan Pal. She along with Bablu Rakshit (PW 2) went to the spot. Her husband was gasping and stated the appellants had assaulted him. He was removed to Chandannagar S. D. Hospital. At the hospital her husband again made statement before the doctor. She lodged written complaint which was scribed by her nephew, Pintu Dutta (PW 3). She proved her signature. During cross-examination, suggestions were given to the witness that her husband was involved in

illegal activities like gambling and sale of illicit liquor. He was also involved in a double murder case.

10. PW 2 (Bablu Rakshit) is the nephew of the deceased. He corroborated PW 1. He stated his uncle made dying declaration to them. During cross-examination, he stated he did not enquire from his uncle where he was actually assaulted. It took 40-45 minutes for them to reach the hospital.

11. PW 3 (Pintu Dutta) is another nephew. He stated the deceased Bhanudeb Rakshit was his maternal uncle. He found his maternal uncle lying near the house of Ex-Commissioner, Chandannagar Municipality, Haradhan Pal. His maternal uncle made dying declaration to him. He scribed the FIR. Police seized one napkin, one pair hawai chappals and bloodstained earth from the place of occurrence. He put his signature on the seizure list. During cross-examination, he stated PW 1 resided 1 km away from the place of occurrence.

12. PW 4 (Haradhan Pal) is the Ex-Commissioner of Chandannagar Municipality. He deposed at 11.00 PM he heard cries. He came outside and found the victim lying on the culvert of kutchra drain. Victim had suffered bleeding injuries. He stated he had been assaulted by the appellants with katari and other weapons. He also disclosed that his nephews resided nearby. They were informed. PW 3 came to the spot. Thereafter, PWs 1 and 2 came. Victim was removed to hospital.

13. Prosecution has relied on these witnesses to prove the oral dying declaration.

14. PW 11 (Dr. Pit Baran Chakraborty) Medical Officer at Chandannagar S. D. Hospital deposed he recorded the dying declaration at the hospital. He stated he examined patient at 12-12.20 AM on 29.5.1994. He found the following injuries:-

- “1) Right forehand nearly detached from just below elbow;*
- 2) Deep incised wounds, two in numbers, over the left forearm;*
- 3) Deep incised wound on upper part of front of neck- 3”x 2”x 2”.”*

In the history of the case he recorded the statement of the victim that he had been assaulted by the appellants with sharp cutting weapon. During cross-examination, he admitted due to profuse bleeding there may be anoxia. He had noted patient was drowsy. He also deposed injury having 2” depth on the upper part of the neck may touch the thyroid cartilage and vocal chord. If the injury cuts the vocal chord, the patient will not be in a position to speak.

15. PW 10 (Dr. Himansu Roy) is the post mortem doctor. In addition to the severed left and right hand, he noted the following injuries:-

- “1) Cut injury 4 inches in length with four stitches in the left clavicular region;*
- 2) Right lung was pale and severely injured;*
- 3) Left lung was pale;*
- 4) Heart –both sides empty;*
- 5) Vessells collapsed;*
- 6) Another incised wound over left chin with 11 stitches;*
- 7) There was head injury over the parieto-temporal region of skull;*

8) *Pharynx and oesophagus injured;*

9) *Liver, spleen and kidneys all were pale due to bleeding.”*

He opined death was due to severe blood loss followed by irreversible surgical shock due to aforesaid injuries which were homicidal in nature. Injuries were caused by a sharp weapon. He proved the post mortem report. During cross-examination, he stated severe blood loss causes anoxia. If bleeding from the parietal region and other parts of the body continued for 40 minutes, victim will not be in a position to speak. He also admitted he had kept the larynx and trachea column blank in his report.

16. PW 12 (Tarakeshwar Das) and PW 13 (Satyaprosad Banerjee) are the first and second investigating officers respectively. PW 13 stated he had handed over investigation to Bholanath Bhaduri who submitted charge sheet. Bholanath was not examined as he was not alive.

Findings of the Court:-

17. Analysis of the evidence on record shows the prosecution case is primarily founded on the dying declarations of the victim.

18. PW 11 is the medical officer who treated the victim at Chandannagar S. D. Hospital. He stated he examined the victim at 12.20 AM on 29.05.1994. He noted the injuries which comprised of deep incised wounds in front of neck, wounds on the right forearm and left forearm. Right forearm was wholly detached. He claimed patient had made statement disclosing the history of assault and had implicated the

appellants. During cross-examination, this witness, however, admitted there was profuse bleeding and the patient was drowsy. He stated huge loss of blood would create anoxia. Injury in front of neck was 2" deep and had touched the larynx. If thyroid cartilage and the vocal chord were cut patient will not be in a position to speak. Post mortem doctor (PW 10) corroborates these findings. He stated if there is profuse bleeding from the parietal wound and other parts of body for 40 minutes, victim may not be able to speak.

19. As per the prosecution case, victim was found lying injured near the house of Haradhan Pal around 10.30/11.00 PM. From the injury report it appears he had been admitted to the hospital at 12.20 AM, the next day i.e. after 1½ hours from the time the victim was found lying with bleeding injuries. As the victim had suffered profuse bleeding for more than an hour before he reached the hospital, it is most unlikely if not impossible as per opinion of PWs 10 and 11 that he would not be in a position to make statement. Capacity of the victim to make statement to PW 11 is highly doubtful. PW 11 could not identify the LTI put on the injury report. Victim had suffered severe injuries on his right and left forearm. Both the arms were severed at the wrist as per post mortem report. In view of such injuries, it is impossible for the victim to have put his LTI on the statement. Dying statement endorsed in the injury report by PW 11 in all likelihood is fabricated at the behest of the relations who brought the victim to the hospital. In view of the aforesaid, no reliance

can be placed on the purported dying declaration endorsed in the injury report.

20. If the injury report is not believed, prosecution is left with the purported oral dying declarations as deposed by PWs 1 to 4. Evidence on record proves PWs 1 and 2 resided at a place which was not less than 1 km. away from the place of occurrence. PW 1 deposed a person informed her about the incident. Thereafter, she along with PW 2 went to the place of occurrence. Similarly, PW 3 also deposed he was informed by a person that his maternal uncle was lying with bleeding injuries and went to the place of occurrence. Prosecution has not led evidence to show the distance between the residence of PW 3 and the place of occurrence. Though these witnesses claimed they took 5-10 minutes to reach the place of occurrence, in view of the distance between residence of PWs 1 and 2 and the place of occurrence, estimation of time appears to be highly optimistic. It is unclear what is the distance between the residence of PW 3 and the place of occurrence which would probabilise his presence at the place of occurrence immediately after the occurrence.

21. Opinion of the medical doctors clearly show the victim had suffered profused bleeding. With such profuse bleeding for 40 minutes, victim would not be able to speak. Victim had also suffered 2" deep injury on the throat which had touched the larynx. PW 11 opined if the injury touches the thyroid cartilage and the vocal chord, victim would

not be in a position to speak. Post mortem doctor did not clarify whether the injury touched the thyroid cartilage or the vocal chord. Column relating to these organs were kept blank. It was not recorded that they were intact and healthy. Prosecution does not dispel the lingering doubt with regard to the capacity of the victim to speak due to the grievous injuries causing profuse loss of blood and imminent possibility of damage to thyroid cartilage and vocal chord.

22. Mr. Ahmed strenuously argued notwithstanding such injuries dying declaration made to PW 4 cannot be said to be improbable. Body of the victim was found beside the house of PW 4, the Ex-Councillor. He stated he heard cries and came out. He saw the victim lying in the drain beside the culvert. Victim made dying declaration to him.

23. I am unwilling to give credence to the said witness for the following reasons. It is true victim was found beside the residence of PW 4 and the said witness had claimed hearing hue and cry he had come out and victim made the dying declaration to him. But his evidence must be judged from the capacity of the victim to make such statement.

24. As discussed earlier, victim had suffered 2" deep injury on the neck which in all likelihood would have injured his thyroid cartilage and vocal chord. Post mortem doctor did not dispel the doubt with regard to the injury on these organs. He merely stated the relevant columns were kept blank. This does not dispel the doubt that the thyroid cartilage and vocal chord may have been damaged due to the deep cut injury on the

throat affecting the victim's power of speech. In addition thereto, presence of PW 4 at the spot is also doubtful. He had sent information to PWs 1, 2 and 3 and they came to the spot. But none of these witnesses corroborates PW 4 with regard to his presence at the place of occurrence. PW 4 is an active member of a political party and was the former chairman of the municipality. During cross, he admitted the appellants belonged to a different political party. Possibility of concoction of the dying declaration at his behest to implicate his political opponents in the murder cannot be ruled out.

25. For these reasons, I am unwilling to give reliance on the aforesaid witnesses and hold the oral dying declaration has been proved beyond doubt.

Conclusion:-

26. In the light of the aforesaid discussion, I set aside the conviction and sentence of the appellants.

27. Appeal is accordingly allowed.

28. Appellants are directed to be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

29. Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

akd/as/PA