

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

C.R.A. 451 of 2002

Ramesh Kundu @ Bhombal

Vs.

State of West Bengal

With

C.R.A. 24 of 2003

Krishna Deb Prodhan

Vs.

State of West Bengal

For the Appellant : Mr. Abhra Mukherjee, Adv.
in CRA 451/2002 Mr. Sauradeep Dutta, Adv.
Mr. Arpayan Mukherjee, Adv.
Mr. Swakshar Kr. Mondal, Adv.

For the Appellant : Mr. Avishek Sinha, Adv.
in CRA 24/2003

For the State : Mr. Madhusudan Sur, Id. A.P.P.
Mr. Dipankar Paramanick, Adv.

Heard on : 25.9.2023 and 26.9.2023.

Judgment on : 26.9.2023.

Joymalya Bagchi, J. :-

1. Appeals are directed against judgment and order dated 27.09.2002 and 30.09.2002 passed by the learned Additional Sessions Judge, 9th

Court, Alipore, South 24-Paraganas in Sessions Trial No. 3(3) 2001 arising out of Sessions Case No. 35(1) 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. 5,000/- each, in default, to suffer rigorous imprisonment for one year more.

Prosecution case:-

2. On 18.07.1999 at 3.20 PM one Tulsi Charan Sinha, SI of Police attached to Topsia Police Station received telephone call from an unknown person that a dead body was lying on the burial ground No.2 at Mahendra Roy Lane. He informed the additional Officer-in-charge and proceeded to the spot. At the spot he found the dead body of an 18-19 year old boy lying on the cemented portion of the graveyard. On search a cap of entry cartridge and some scraps of paper containing phone numbers were recovered from the pocket of the deceased. He contacted one Ashoke Chakraborty (PW 4) who claimed to be the maternal uncle of the deceased. He came to the spot and identified the deceased as one Kausik Halder @ Lattu.

3. Statement of Ashoke Chakraborty was recorded and treated as First Information Report resulting in registration of Topsia Police Station Case No.95 dated 18.07.1999 under Sections 302/34 IPC and under Sections 25/27 of the Arms Act against unknown persons. Post mortem was conducted over the body of the deceased. Post mortem doctor (PW 16) opined that the victim had died due to gunshot injury.

4. During investigation Ramesh Kundu @ Bhombal (*appellant in CRA 451 of 2002*) was shown arrested on 02.08.1999. He was put up for Test Identification Parade examination on 23.08.1999 and one Abdul Wahid (PW 9) and Khurshid Alam (PW 11) identified him. Ramesh Kundu @ Bhombal protested and told the Magistrate (PW 8) during Test Identification Parade that he had been shown to the said witnesses a number of times during police custody. It is also contended that a bloodstained T-shirt and firearm were recovered on the showing of the said appellant.

5. On 03.09.1999 Krishna Deb Prodhan (*appellant in CRA 24 of 2003*) was arrested. He was also identified by Abdul Wahid and Khurshid Alam on 06.10.1999.

6. In conclusion of investigation, charge sheet was filed against the appellants. Charges were framed under Sections 364/302/34 IPC.

7. In course of trial, prosecution examined 19 witnesses and exhibited a number of documents to prove its case. Defence of the appellants was one of innocence and false implication.

8. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 27.09.2002 and 30.09.2002 convicted and sentenced the appellants, as aforesaid. Appellants were acquitted of the charge under Sections 364/34 IPC.

Arguments at the Bar:-

9. Learned Advocates for the appellants submit the most vital witnesses viz., PWs. 9, 10 & 11 are unreliable. The appellants were

unknown to PW 10. He did not name them either before police or in Court. But Investigating Officer (PW 17) claimed upon interrogating the said witness and one Rashid, he came to know the role of the appellants in the crime. Rashid had not been examined. Two years after the incident during trial PW 10 identified the appellants for the first time in Court. His identification in Court is highly doubtful as prosecution had not brought the said witness to identify the appellants during Test Identification Parade. Appellants had been shown to PWs 9 and 11 while they were in police custody. Hence, identification of these witnesses during Test Identification Parade or in Court is of little value. Presence of PWs 9 and 11 in the afternoon at the burial ground is more unlikely. PW 9 is an auto rickshaw driver and PW 11 is a labour contractor. Both stated they were engaged in their professional activities from 8.00 AM till evening. Their conduct during and after the incident is unnatural. Neither they raised hue and cry nor inform the incident to police. Alleged recoveries at the behest of Ramesh Kundu @ Bhombal are of no significance. PW 14 stated the fire arm allegedly recovered from the said appellant did not match the cartridge recovered from the pocket of the deceased. Serologist (PW 19) did not find blood on the seized T-shirt. Hence, the prosecution case has not been proved beyond doubt.

10. Per contra, Mr. Madhusudan Sur, learned Additional Public Prosecutor contends PWs 9, 10 and 11 have proved the prosecution case beyond doubt. PW 10 saw the appellants taking the victim into a car. Thereafter, PWs 9 and 11 who were sitting in the burial ground saw them

dragging the victim inside the burial ground. They heard a sound. When they went to enquire, they found the appellants leaving the spot. One of them had a firearm. All the witnesses identified the appellants in Court. PWs. 9 and 11 also identified them during Test Identification Parade. Post mortem doctor proved death was due to gunshot injury. Hence, prosecution case is proved beyond doubt.

Evidence on record :-

11. On an analysis of the evidence on record and the rival submissions at the Bar it appears PWs.9, 10 & 11 are the star witnesses.

12. PW 10 (Sk. Kalu) deposed he is a potato merchant. On 17.07.1999 there was a *Rathamela* (fair) at Moulali, Sealdah. Lattu came to him and demanded an egg. He handed over an egg to Lattu. At that time 4-5 persons came in a taxi. They tried to catch Lattu. He raised hue and cry. Subsequently they pushed Lattu into the taxi and left. Later on he came to know Lattu had died. During cross-examination, he stated he does not have any licence to carry on the business of selling eggs. He was selling eggs at the *Rathamela* on that day. He was examined by police on 31.07.1999 in presence of one Khurshid and Rashid.

13. From the evidence of the said witness it appears that he is a resident of the same locality as Lattu (the deceased). He knew the deceased and heard he had been murdered. But he did not disclose to anyone that he had seen Lattu being dragged away in a vehicle by 4-5 unknown persons till his examination by police on 31.07.1999, that is thirteen days after the incident. His presence at Moulali where the

incident occurred is also fortuitous. He is a potato merchant and does not ordinarily sell eggs. On that day he claims he was selling eggs in a fair (*Rathamala*) at Moulali and saw the incident but did not disclose the same to anyone. Behaviour of the witness is contrary to normal human conduct and does not inspire confidence. His identification of the appellants in court is highly suspect. Appellants were not known to the witness. During his interrogation by police he did not disclose the features of the appellants. He also did not participate in the Test Identification Parade examination. After a lapse of two years, in court, he identified the appellants.

14. When a witness has not divulged the features of an accused before the police and has also not participated in the Test Identification Parade, his identification of the accused in court and that too after a lapse of two years is a weak piece of evidence. I do not consider it safe to rely on the identification of the appellant by PW 10 for the first time in court after two years of the incident.

15. PW 9 (Abdul Wahid) and PW 11 (Khurshid Alam) are the two other witnesses on whom the prosecution rests.

16. PW 9 deposed he is an auto rickshaw driver. On 17.07.1999 at 2-2.30 P.M. he along with Khurshid Alam (PW 11) was playing cards inside the burial ground. He noted a taxi came to the spot. Two persons went inside the burial ground and two others dragged another person inside the ground. When they enquired they were told not to interfere. They went on playing cards and heard a noise. Then they found the said

persons leaving the place and one of them had a revolver. Subsequently, they noticed that the person who had been dragged inside the graveyard was lying dead. He identified the appellants in court. During cross-examination, he stated that he had a licence to run auto rickshaw. He regularly starts his professional activities at 8.00 A.M. and returns home around 6-7 P.M. His auto rickshaw runs on the Dharmatalla to Park Circus route. He stated that he had identified the appellants in jail.

17. PW 11 stated that he was playing cards with PW 9 at the burial ground. They saw a taxi come to the burial ground. Two persons dragged another person into the burial ground. They were told to mind their affairs. They continued to play cards. After 5-6 minutes they heard a noise. They rushed to the spot and found the persons running away. One of them was holding a gun. He identified the appellants during Test Identification Parade examination and in Court.

18. PW 8 (Subhashis Ghosal) is the Judicial Magistrate conducted the Test Identification Parade. He deposed he conducted Test Identification Parade of Ramesh Kundu @ Bhombal, one Pappu Dey @ Kalu and Samir Mondal on 23.08.1999 in the jail. PWs. 9 & 11 identified the appellant viz. Ramesh Kundu @ Bhombal but did not identify the other suspects. On 06.10.1999 he conducted Test Identification Parade of Krishna Deb Prodhan in jail. Both the witnesses identified him. During cross-examination he stated Ramesh Kundu @ Bhombal had stated he had been repeatedly shown to the witnesses while in jail. Krishna Deb

Prodhan stated he had been shown to the first witness i.e. Abdul Wahid (PW 9) in jail.

19. Learned Advocates for the appellants have argued there is delay in holding Test Identification Parade and the appellants were shown to the witnesses prior to such examination.

20. Identification by a witness during Test Identification Parade is not substantive evidence. It corroborates the substantive evidence of identification in court and lends assurance to such identification. Prompt Test Identification Parade examination ensures the sanctity of the investigation process and rules out the possibility of the accused being shown to the witness earlier. There is no hard and fast rule with regard to the timeframe within which the Test Identification Parade examination is to be conducted. It depends on the facts and circumstances of each case.

21. In the present case, there was a delay of 21 days to conduct Test Identification Parade examination of Ramesh Kundu @ Bhombal and 33 days in respect of Krishna Deb Prodhan. Systemic and bureaucratic delays, non-availability of judicial personnel and various other unavoidable issues intervene resulting in delay of Test Identification Parade examination. Hence, mere delay in holding Test Identification Parade without anything more may not affect the credibility of the prosecution case. But in the present case appellant viz. Ramesh Kundu @ Bhombal claimed that he had been shown to the witnesses repeatedly in police custody. Krishna Deb Prodhan also claimed that he had been shown to Abdul Wahid (PW 9).

22. Appellants had raised objection at the earliest opportunity before the Magistrate (PW 8) who conducted the Test Identification Parade examination. These aspects need to be borne in mind while considering the quality of evidence regarding identification of the appellants by the aforesaid witnesses either in the Test Identification Parade or in court.

23. There are other issues which also affect the reliability of these witnesses. Both the witnesses are residents of the same locality as the deceased. They were examined by the Investigating Officer on 13.08.1999 i.e. about a month after the date of occurrence. No explanation for such delayed examination of these vital witnesses is forthcoming. On the other hand, PW 10 (Sk. Kalu) who was examined on 31.07.1999 by police claimed Khurshid Alam (PW 11) and one Rashid were present during interrogation. It is most unnatural that Khurshid who had seen the appellants dragging the victim inside the burial ground where he was murdered would remain silent and not come out with this information to the police when PW 10 was interrogated. Only after Ramesh Kundu @ Bhombal was arrested on 02.08.1999, Investigating Officer claimed he interrogated Khurshid Alam and Wahid and belatedly they came out with the story that they had seen two persons dragging the victim inside the burial ground.

24. These facts particularly silence of Khurshid Alam with regard to this incriminating circumstance at the time of interrogation of Sk. Kalu (PW 10) on 31.07.1999 and their belated disclosure 10-11 days after the

arrest of one of the appellants cast serious doubt with regard to their reliability.

25. Presence of both these witnesses in the afternoon at the burial ground on the fateful day is unlikely. Both of them are active professionals. Abdul Wahid is an auto rickshaw driver while Khurshid Alam is a labour contractor. Both claimed they remained engaged in their professional activities from the morning till evening. Abdul Wahid plied his auto rickshaw between Dharmatalla to Park Circus. It is nobody's case that the auto rickshaw stand is near the burial ground. This renders the presence of these two witnesses at the burial ground in the afternoon remote.

26. Their conduct during and after the incident also raises suspicion. They claimed they had seen two persons drag the victim inside the burial ground. They were told to mind their business. Instead of fleeing, they calmly remained at the spot playing cards. Even after seeing the dead body they did not inform the incident to anyone including police. Their conduct is very unnatural and does not probabilise their presence at the place of occurrence.

27. For these reasons, I do not consider the evidence of the chance witnesses i.e. PWs. 9 & 11 reliable or worthy of credence.

28. Involvement of the appellants in the crime appears to have been concocted by the Investigating officer. Investigating Officer (PW 17) claimed involvement of the appellants transpired from the statements of Sk. Kalu (PW 10) and one Rashid. Rashid has not been examined in

court. Evidence of Sk. Kalu shows he was unaware of the identity of the appellants nor did he disclose their features either to police or in court.

29. In this backdrop it is surprising how police found clues from the statements of Kalu to implicate the appellants. On the other hand, this gives rise to an inference of mere speculation on the part of the Investigating Agency to implicate the appellants in the case and thereafter build the prosecution case to support their hunch.

30. In the light of the aforesaid discussion, I am of the opinion prosecution case has not been proved beyond reasonable doubt and the appellants are entitled to an order of acquittal.

31. The appeals are accordingly, allowed.

32. Appellants viz. Ramesh Kundu @ Bhombal and Krishna Deb Prodhan shall be discharged from their bail bonds after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

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

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

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)

as/akd