

10.01.2023
S/L. 29+30
Court No.12
Suvayan/
Sourav

CRA 11 of 1995
With
CRA 19 of 1995

In the matter of: **Rajen Sarkar & Anr.**

....Appellants.

Mr. Jayanta Narayan Chatterjee
Ms. Moumita Pandit
Ms. Nandini Chatterjee
Ms. Jayashree Patra
Ms. Sreeparna Ghosh
Ms. Ritashree Banerjee
Ms. Pritha Sinha
Ms. Dipanwita Das

...for the appellant.

Ms. Zareen N. Khan
Mr. Ashok Das

...for the State.

1. Heard Mr. Jayanta Narayan Chatterjee, learned Counsel for the appellant and Mr. Ashok Das led by Ms. Zareen N. Khan, learned Counsel for the State.
2. Both these appeals arise out of self-same judgment. In CRA 11 of 1995, Rajen Sarkar and Jiten Mondal alias Sarkar are the appellants. In CRA 19 of 1995, Vikan Mandal, Kalachand Mandal, Bhutesh Mandal, Ganesh Mandal and Lakhin Mandal are the appellants.

Altogether nine accused persons faced the trial out of whom Bhadu Mondal having died in course of the trial, the trial has abated against him.

Now two appellants in CRA 11 of 1995 and six appellants in CRA 19 of 1995 have assailed the self-same judgment of conviction and order of sentence passed by learned Additional Sessions Judge, Malda in Sessions Trial No. 17 of 1994 arising out of Sessions Case No.48 of 1990 convicting the aforesaid appellants under Sections 302/34 IPC and sentencing each of

them to suffer imprisonment for life and to pay fine of Rs.500/- each, i/d to suffer S.I. for one year more each.

3. Two persons, namely, Subhas Mondal and Suren Mondal who are maternal uncle and nephew respectively have died in the incident. The occurrence happened in the night of 28/29th May, 1987 in between 2/3 a.m. As found from record, P.W. 1 is the informant, his son P.W. 3 and his another son P.W. 7 were present in the spot house at the time of occurrence; they having heard the sound of blasting of bomb, woke up. P.W. 1 saw the appellants by focussing torch light as it was a dark night. P.W. 3 one of the sons of P.W. 1 also saw the appellants. P.W. 7 another son of P.W. 1 also saw the appellants. After the appellants decamped, P.W. 1 going inside the house where the deceased persons were sleeping found that Subhas Mondal had died at the spot and there was still life in the body of Suren Mondal. On alarm being raised by him Sukdeb Mandal (P.W. 5), Haradhan Mandal (P.W. 10), Bidhan Mandal (not examined) and other persons assembled there at the spot, before whom P.W. 1 narrated the incident, mentioning the names of the assailants. Then they took injured Suren Mondal to the hospital by a hackney carriage. However, injured Suren Mondal succumbed to injuries on the way to the hospital. Therefore, P.W. 1 along with others took the dead body to the police station where he (P.W. 1) lodged FIR.

On the basis of the FIR, the I.O., P.W. 16 took up investigation, examined the witnesses made incriminating seizures, searched

for the accused persons, arrested them in course of the investigation and filed charge-sheet against them under Section 302/34 IPC.

4. On completion of investigation prosecution has examined 16 witnesses to prove the charge out of whom P.W.s 1, 3 and 7 are the alleged eyewitnesses as introduced (Supra), P.W. 2 is the medical officer who conducted the postmortem over the dead bodies of deceased Subhas Mondal and Suren Mondal, P.W. 4 who is another son of P.W. 1 is a witness to inquest over the dead body of Subhas Mondal, P.W. 5 as introduced (Supra) is Sukhdeb Mondal who has stated about some seizures only, P.W.s 6, 8 and 11 are the witnesses who did not support the prosecution case. Other witnesses are witnesses to seizures and police officials including the I.O., P.W. 16.

Defence plea is one of complete denial and false implication.

5. Learned trial court banking upon the evidence of P.W.s 1, 3 and 7 has found the appellants guilty under Sections 302/34 IPC and has sentenced each of the appellants to suffer imprisonment for life and also to pay fine of Rs. 500/- each, in default, to suffer S.I. for one year more each.
6. Learned Counsel for the appellants submits that conjoint reading of the evidence of P.W.s 1, 3 and 7 brings out such contradictions which strikes at the very root of the prosecution case and therefore they cannot be believed. It is further submitted by him that admittedly it was dark night; P.W. 1 is testified to have seen the appellants in the dark night by focussing a torchlight but while P.W. 7 is corroborating such

assertion of P.W.s 1, P.W. 3 is totally silent about the torchlight. It is further submitted that P.W. 1 is testified to have seen the appellants while they were fleeing through the back door towards the field and in that event he must have seen them from their back side only. The assertion of P.W. 1 to the effect that he saw the appellants from a distance of 400/500 cubits in a dark night cannot also be believed.

Mr. Ashok Das, learned Counsel for the State on the other hand submits that the occurrence happened in a close vicinity of a house where both the deceased, P.W.s 1, 3 and 7 were present. Though it was dark night, P.W. 1 has specifically testified that he identified the appellants by focussing torchlight which is corroborated by P.W. 7. The spot of the case also cannot be disputed in view of seizure of bloodstained earth and controlled earth from the rooms which are testified to be spot rooms by P.W. 1. In such view of the matter, there is no infirmity in the impugned Judgement and the impugned Judgement be affirmed.

7. At the outset, we are constrained to say here that the occurrence happened in 1987 and the appeal was filed in 1995. We are hearing the appeal in 2023. In our considered view, this is a systematic failure so far as dispensation of criminal justice is concerned. We find that there is defect in the charge and on that ground alone the appeal is to succeed. Because there is no point in remanding the appeal for defect in charge after 35 years of the incident, we want to clarify the defects in the charge for reference by the trial courts in future.

In this case the charge reads thus:

“Shri B.C. Paul, Additional Sessions Judge of Malda hereby charge 1. Rajendra Mondal @ Sarkar, *dead 2. Bhadu Mondal, 3. Jiten Mondal, 4. Bhikan Mondal, 5. Girish Mondal, 6. Ganesh Mondal, 7. Kalachand Mondal, 8. Lakhin Mondal and 9. Bhutesh Mondal as follows.

That you on or about the 28th day of May 1987 at 17 miles (within J.L.34) within P.S. Kaliachak, Malda, in furtherance of your common intention committed murder intentionally causing the death of Subhas Mondal and Suren Mondal and thereby committed an offence punishable under Sections 302/34 of the Indian penal Code and within my cognizance.

And I hereby direct that you be tried by this Court on the said charge.

The above charge is framed, read over and explained to the accused persons to which each of them plead not guilty and claims to be tried.”

8. We find that though murder of two persons has been committed, there is no charge for murder of two persons. The charge is under Sections 302/34 IPC only. For the purpose of education of the trial courts, we want to make it clear that in the aforesaid charge after the word “code” and before the word “and” in the last line of second paragraph of the charge there should have been the words “on two counts”. The charge as framed in the present case is in respect of one murder only and it does not cover the second murder which has taken

place here. For this defect in charge the appellants must have been prejudiced in defending themselves though not raised in many words by learned Counsel for the appellants and for this defect in charge the trial must fail.

9. Coming to the second point on merit, it is found that P.W. 1 (informant) in his evidence has placed himself in the courtyard by the side of a tube-well. The courtyard was there in between the room of deceased Suren Mondal and himself. He woke up hearing the sound of bomb from the room of Suren Mondal. He was sleeping at a distance of about 6 cubits from the place where the bomb blasted. He came outside the courtyard through the eastern side with the torch in his hand and by the help of torchlight as he focused, he found Jiten Sarkar, Rajen Sarkar, Girish Mondal, Jagadish Mandal, Lakhinder Mandal, Vikhan Mandal, Ganesh Mandal, Kalo Mandal and Bhadu Mandal (since dead) coming out from the courtyard. All of them were armed with hansua, pistol and ballam. He also identified the accused persons in dock. After the accused persons fled from the spot, he came and entered into the room of Suren Mondal. He was found to be alive as he replied by moving his hand. Thereafter he entered the room of Subhas Mondal who was found to be dead.
10. Evidence of P.W. 3, the son of P.W. 1 is similar to the evidence of P.W. 1. **He has testified that at the time of occurrence he was sleeping by the side of his father. This fact has not been testified by P.W. 1. P.W. 1 has testified that he was sleeping alone.** P.W. 3 has also testified that he found his

grandmother and aunt weeping. **Such fact has also not been testified by P.W. 1.** P.W. 3 is testified to have seen all the accused persons who were running away after hurling of bomb but P.W. 3 had not testified as to by which way they decamped when P.W. 1 testified that they decamped by the backside door towards the field. P.W. 3 is totally silent about the torchlight in the hand of his father P.W. 1 by focussing which P.W. 1 is testified to have identified the accused persons. P.W. 3 is totally silent about the source of light by which he could identify the accused persons. P.W. 7 who is another son of P.W. 1 has testified that at about 1 a.m. in that night he was sleeping at home. He has not testified as to whether he was sleeping in the room or at the courtyard. Having heard the sound of bombs **when he woke up, he found his father going outside with a torchlight in his hand.** This evidence of P.W. 7 totally belied evidence of P.W. 1 to the effect that he was sleeping in the courtyard at the time of incident. If P.W.1 would have slept in the courtyard, P.W.7 would not have testified that “when he (P.W.7) woke up, he found his father going outside with a torchlight in his hand. P.W. 7 has further testified that Biren (P.W. 3) also accompanied his father. On the flashing of torchlight by his father he had recognised the accused persons, namely, Jiten Sarkar, Rajen Sarkar, Girish Mondal, Bhutesh Mondal, Uday Mandal, Lakhinder Mandal, Vikhan Mandal who were returning towards the east. Again these witnesses stated that his father was sleeping by the side of tube-well where his brother Biren was also by his side. At

first he was saying in his evidence that he saw his father going outside with the torchlight in his hand whom Biren, P.W. 3 accompanied and again in his examination-in-chief he has testified that his father was sleeping by the side of the tube-well where his brother P.W. 3 was also sleeping by his side.

11. Conjoint reading of the evidence of P.W.s 1, 3 and 7 make it clear that they are contradicting each other so far as the place where the witnesses were there at the time of occurrence or they are deposing falsehood regarding their presence with reference to the spot. The night being a dark night admittedly only source of light was torchlight in the hand of P.W.1. Regarding the torchlight, P.W. 3 who claims himself to be the eyewitness is totally silent. The torchlight has also not been seized by the police though P.W. 1 in his cross-examination has specifically testified that he had gone to the police station with the torchlight. In absence of the light, therefore, the identification of the appellants in dark night becomes doubtful.
12. P.W. 1 in his cross-examination has given a graphic picture as to how he could come to see the appellants. His evidence in cross-examination by accused Jiten and Rajen runs thus:

“I was lying on the bed on the ground of the courtyard. That place was in adjacent to the tube-well. The room of Suren is at a distance of about 6 cubits away from the place where I was sleeping to the north. The room of Subhash where he was sleeping at a distance of about 5/6 cubits away from the place where I was sleeping. There is one door in the room of Suren to

its south-facing. The room of Subhash is to the east-facing with one door. At first I did not enter into the room of Subhash. I did not see anybody to come out from the room of Subhash. The room of Suren was dark including the door. On seeing the darkness on the door I could not come there. Then I found so many persons to run away from the back side of our house to the field. I found them from my courtyard. That field belonged to our village, but I cannot say the name. That field is about 10 bighas starting from the side of our house. At that time paddy was there in the field. I found those persons at a distance of 400/500 cubits away from our courtyard.....”

13. From the aforesaid evidence of P.W. 1 as quoted (Supra) it is clear that if he has seen, he has seen the appellants fleeing the spot by the back door and he (P.W. 1) saw them at a distance of 400/500 cubits away from the courtyard. Even if, P.W. 1 was having a torchlight, it was not possible to identify all the appellants with exactness by focusing the torchlight 400/500 cubits away when all the appellants were running away. Even if P.W. 1 has seen them, he has seen them from their back side and it is not possible to identify a person from the back side in running state from such a long distance in a dark night by focussing torchlight by the gait, mannerism, dress, etc. The aforesaid evidence of P.W. 1 totally belies the evidence of P.W.s 3 and 7 regarding their assertion of seeing the appellants at the spot.

14. In Criminal Investigation by Gross, 5th Edition, Page 159, it is discussed thus –

“It is appropriate here to call attention to what has been said about the distance at which we can recognise persons, presuming the eye sight to be normal and the light good.

One is able in broad day light to recognise:

(a) Persons whom one knows very well, at a distance of from 50 to 90 yards; when there are particular and very characteristic signs – 110 yards; in exceptional cases up to 165 yards.

(b) Persons one does not know very well and has not often seen, from 28 to 33 yards.

c) People one has only seen once, 16 yards.”

Roughly 2 cubit is equal to 1 yard and PW-1 is testified to have seen the appellants at a distance of 400/500 cubits means 200/250 yards, that too in dark night when the appellant were in a running state having fled from the spot. The observation of Mr. Gross as quoted *supra* may not be scientific but he has described the distance from which a person can be recognised on the basis of his long experience and facts. Though, of course, these are approximate indications, as stated *supra*, but after giving a further allowance of some cubits in respect of PW-1 also it would not be possible for him to clearly identify the appellants from such a long distance of 200/250 yards in dark night seeing them from backside when they (appellants) were in running state.

15. Taking into consideration all the aforesaid facts and discussions, we are constrained to hold that the prosecution

has failed to prove the charge against the appellants and they are entitled to be acquitted.

16. Accordingly the impugned judgment passed in Sessions Trial No. 17 of 1994 arising out of Sessions Case No.48 of 1990 by the learned Additional Sessions Judge, Malda is set aside.
17. Both the appeals are allowed accordingly.
18. The appellants in both the appeals be set at liberty forthwith if they are in custody and their detention is not required in any other case. They be discharged of the bail bond if they are on bail.
19. Accordingly, the appeals being CRA 11 of 1995 along with CRA 19 of 1995 are disposed of.
20. The L.C.R. along with a copy of this order be sent down to the concerned trial court, immediately.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)