

THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 92 of 2020

Anil Mandal

Vs.

The State of West Bengal & Ors.

For the Appellant	: Mr. Aniruddha Singh, Adv. Mr. Avishek Bhandari, Adv. Mr. Hemanda Kr. Das, Adv. Mr. Nepesh Majhi, Adv.
For the Respondent Nos. 2 to 8	: Mr. S.S. Roy, Adv. : Mr. Santanu Banaerjee, Adv. : Mr. Pronojit Roy, Adv.
For the Respondent No. 9	: Mr. Sandipan Ganguly, Ld. Sr. Adv. Mr. Bihash Kr. Mukherjee, Adv. Mr. Sourav Kr. Mukherjee, Adv. Ms. Manaswita Mukherjee, Adv. Mr. Niladri Chakraborty, Adv.
For the State	: Mr. Saswata Gopal Mukherjee, Ld. PP Mr. Sandip Chakraborty, Adv.
Hearing Concluded on	: January 10, 2023
Judgement on	: January 18, 2023

DEBANGSU BASAK, J.:-

1. The appeal was directed against the judgment and order of acquittal dated November 28, 2019 passed by the learned Additional District and Sessions Judge, Fast Track

Court, Rampurhat, Birbhum in Sessions Trial No. 44/ September, 2018 arising out of Case No. 77 of 2018.

2. By the impugned judgement and order the respondents Nos 2 to 9 were acquitted of the charges under Sections 325/304/149 of the Indian Penal Code, 1860.

3. Learned Advocate appearing for the appellant submitted that, the prosecution examined 5 witnesses at the trial. Out of the 5 witnesses, 2 were injured eyewitnesses. He submitted that, some persons received injuries in the incident and one person died.

4. Learned advocate appearing for the appellants submitted that, PWs 1, 2 and 5 saw the incident of assault on the victims. According to him, the prosecution witnesses established beyond reasonable doubt the involvement of the respondent Nos. 2 to 9 in the crime.

5. Referring to the Post Mortem Report, learned advocate appearing for the appellant submitted that, such Post Mortem Report was marked as an Exhibit without any objection on the part of the respondent Nos. 2 to 9. The Post Mortem Report established that the person concerned suffered injuries. The injuries noted were the cause of death. PWs 1 and 2 identified the respondent Nos. 2 to 9 as the persons involved in the

assault on such victim. The respondent Nos. 2 to 9 are more than 5 in number. Therefore, the respondent Nos. 2 to 9 were guilty of culpable homicide not amounting to murder. In support of such contention, he relied upon **1993 Supp (2) Supreme Court Cases 356 (Sarman And Others Vs. State of M.P).**

6. Learned advocate appearing for the appellant submitted that, non-examination of the post mortem doctor was not fatal to the case of the prosecution. He submitted that, the genuineness and authenticity of the Post Mortem Report was proved and should be treated as valid evidence under Section 294 of the Criminal Procedure Code. The Post Mortem Report was tendered in evidence and marked as Exhibit. The respondent Nos. 2 to 9 did not object to the tender of the Post Mortem Report in evidence.

7. Since the Post Mortem Report established that, the victim died out of the injuries suffered, and since the prosecution witnesses established that the respondent Nos. 2 to 9 were involved in the assault, according to him, the prosecution established beyond reasonable doubt the commission of the crime of culpable homicide not amounting to murder by the respondent Nos. 2 to 9.

8. Learned advocate appearing for the appellant submitted that, the respondent Nos. 2 to 9 are to be held guilty under Section 394 Part II of the Indian Penal Code, 1860.

9. Learned advocate appearing for the State submitted that, the State did not prefer any appeal against the impugned judgement and order of acquittal.

10. Learned advocate appearing for the respondent Nos. 2 to 8 submitted that, the appeal was directed against an order of acquittal. According to him, when two views are possible in the facts and circumstances of a case, the view taken by the learned Trial Judge should not be upset particularly when, the impugned judgement and order was one of acquittal. In any event, when two views were possible, the one which favoured the accused should be adopted.

11. Referring to the oral testimony of PW 1, learned advocate appearing for the respondent Nos. 2 to 8 contended that, PW 1 cannot be said to be an eyewitness to the incident. He submitted that, 3 persons were injured. One of such persons being Fatick Konai was not examined by the prosecution.

12. Referring to PW 2 and his testimony, learned advocate appearing for the respondent Nos. 2 to 8 submitted that, although, PW 2 claimed himself to be injured, injury report of PW 2 was not tendered in evidence. Therefore, the testimony of PW 2 that, he was an injured eyewitness, is not reliable. Once a portion of testimony is found to be unreliable the other portion of testimony should also to be suspected.

13. Learned advocate appearing for the respondent Nos. 2 to 8 submitted that, the scribe of the written complaint was not examined. The Investigating Officer was not examined. The doctor conducting the post mortem on the deceased was also not examined. Non examination of such vital witnesses was fatal to the case of the prosecution.

14. PW 5 claimed himself to be an injured witness although, no injury report was produced. The weapons of assault were not recovered.

15. Referring to the oral testimonies of the prosecution witnesses, he submitted that, the respondent No. 7 was not stated to be present at the place of occurrence at all.

16. Learned advocate appearing for the respondent Nos. 2 to 8 highlighted the contradictions between the contents of the written complaint and the oral testimony of PW 1.

17. Learned Senior advocate appearing for the respondent No. 9 submitted that, PW 5 was not stated to be injured in the written complaint although, in the oral testimony, PW 5 claimed that she was injured.

18. Learned Senior advocate appearing for the respondent No. 9 submitted that, the Investigating Officer was not examined. It did not come on record as to whether, any of the prosecution witnesses recorded any statements under Section 161 of the Criminal Procedure Code or not. According to him, there was divergence in the narration of events between the contents of the First Information Report and the testimonies of the prosecution witnesses. Even between the prosecution witnesses, there were variations of the incident in their oral testimonies.

19. Learned Senior advocate appearing for the respondent No. 9 submitted that, it cannot be said that the impugned judgement and order of the learned Trial Judge was perverse. Therefore, the question of taking a contrary view, more so, when the view expressed by the learned Trial Judge was the plausible view, does not arise.

20. Police registered a First Information Report on August 17, 2003 inter alia under Sections

147/148/149/323/325/304 of the Indian Penal Code, 1860 on the basis of a written complaint of the PW 1 being Exhibit 1. Police filed a charge sheet against the respondent Nos. 2 to 9. Charges were framed against the respondent Nos. 2 to 9. They pleaded not guilty and claimed to be tried.

21. According to the prosecution, the respondent Nos. 2 to 9 in furtherance of the common object of voluntarily causing grievous hurt to Sudhir Das, Fatik Konai, Dhiren Das and Uttam Mandal, assaulted them and therefore committed an offence punishable under Sections 325/45 of the Indian Penal Code, 1860 on August 15, 2003. The respondent Nos. 2 to 9 in furtherance of the common object of committing culpable homicide not amounting to murder by causing the death of Sudhir Das committed an offence punishable under Sections 304/149 of the Indian Penal Code, 1860. The respondent Nos. 2 to 9 assaulted Sudhir Das, Fatick Konai, Dhirendranath Das and Uttam Mandal on August 15, 2003 at about 8 A.M. Due to such assault, Sudhir Das, Fatick Konai, Dhirendranath Das and Uttam Mandal suffered grievous hurt and Sudhir Das succumbed to his injuries.

22. At the trial, prosecution examined 5 witnesses. The prosecution tendered 5 documentary evidence which were marked as Exhibit 1 to 4.

23. PW 1 stated in his deposition that, the incident took place on August 15, 2003 at about 8 A.M. The respondent Nos. 2 to 9 were constructing a house forcefully. He came out of his house upon hearing the hue and cry and saw the respondent Nos. 2 to 9 to be assaulting Sudhir Das, Birendranath Das, Habu Das , Sridhar Mondal, Uttam Mandal, Fatick Konai and Taposh Das. According to him, other victims also sustained injuries. He took the injured persons to the Nalhati Police Station. Thereafter, he took the injured persons to hospital. Fatick Konai and Sudhir Das were referred to Rampurhat Sub-divisional Hospital but Fatick Konai did not go to Rampurhat Sub-Divisional Hospital. Sudhir Das was referred to NRS Medical College, Calcutta from Rampurhat Hospital.

24. PW 1 lodged the written complaint which was marked as Exhibit 1. He was interrogated by the police. He identified the respondent Nos. 2 to 9 excepting Srikumar Nandi who was dead. In his cross-examination, PW 1 stated that, he did not mention in his written complaint that, after hearing

the hue and cry, he came out from his house. He acknowledged that there was no mason or labour at the place of occurrence.

25. PW 2 claimed himself to be injured in the assault. According to him, the respondent Nos. 2 to 9 were raising construction. The respondent Nos. 2 to 9 became furious and started assaulting him and others with wooden stick and iron rod. He stated that, Fatick Konai, his brother Sudhir Das who died and himself were injured. He made a telephone call to the police at the time of the incident. On receipt of such phone call the police came to the place of occurrence. PW 2 stated that, he went to the police station along with Sudhir Das when, the police seeing the injured condition of Sudhir Das asked Sudhir Das to be taken to the hospital. He stated that, when the police came to the village the accused persons fled away from the place of occurrence. He narrated the incident to the police at the place of occurrence. He took Sudhir Das to Nalhati Hospital where he was treated and referred to Rampurhat Hospital. On the next day, Rampurhat Hospital referred Sudhir Das to NRS Medical College and Hospital, Calcutta. On August 17, 2003, Sudhir Das expired at NRS Medical College and Hospital about 4:10 A.M.

26. In cross-examination PW 2 stated that at the time of the incident about 20/25 persons of the locality were present. Six police personnel came to the village after receiving his phone call. The police went to the house of the accused persons for searching. During such, police did not recover the wooden sticks or iron rod or any other weapon from the house of the accused persons. He could not say who assaulted the deceased on his head. He did not find some of the accused at the hospital. He stated that, at the time of the incident, PW 1 was in his house. He acknowledged that he was an accused in a criminal case filed by the accused persons against him.

27. PW 3 claimed that he cannot say anything about the incident as he was not present at the place of occurrence. He was declared hostile by the prosecution. On cross-examination by the prosecution, he denied that he was examined by the police. In cross-examination by the defence, he claimed that there was no enmity between him and the deceased or his brother.

28. PW 4 also claimed that he was not present at the time of the incident. He was declared hostile by the prosecution. On cross-examination by the prosecution, he denied making any statement to the police. In cross-examination by the

defence, he denied that there was any enmity between him and the deceased.

29. PW 5 claimed that, the incident occurred at about 8 o'clock in the morning. The accused persons were making construction which she along with others tried to stop. To that, the accused person started assaulting with iron rod, wooden sticks and crowbar. As a result of such assault, the deceased sustained bleeding injury on his head. Other persons also sustained injuries. She did not go to hospital or to any doctor for any treatment. The deceased was taken to the police station from where he was taken to the hospital. She did not go to the police station with the deceased. She identified the accused persons in court.

30. In cross-examination she denied that, PW 1 assaulted Srikumar Nandi on the head. She denied the suggestion that, Srikumar Nandi died as a result of the assault. She stated that there was no mason and labour engaged for the construction work. According to her, about 30/40 persons were present at the time of the incident. She could not say who brought the police to the village. She stated that the police came to the village at about 1/1:30 PM. There were no bricks at the place of occurrence. She could not say whether

the police saw blood at the place of occurrence. According to her, there was no blood stain on the clothes of the injured persons.

31. The accused persons were examined under Section 313 of the Criminal Procedure Code where they claimed their innocence and to be falsely implicated. They denied to adduce any defence witness.

32. The learned trial judge framed two issues at the trial. The issues were, whether the accused persons committed any offence under Sections 325/304/149 of the Indian Penal Code, 1860 and whether the prosecution was able to prove the guilt of the accused persons beyond reasonable doubt.

33. The learned trial judge evaluated the evidence led at the trial. According to him, it was not clear from the evidence which accused assaulted whom. He noted that, there were eight accused persons at the same time. He noted that, according to PW 1 there were eight persons who were assaulted by the accused persons. None of the prosecution witnesses including the injured persons could say who assaulted them and by whom was the deceased assaulted. According to him, it remained doubtful as to who caused injury to whom. He noted that, all the eight victims did not

suffer injuries. He held that, since there were eight alleged assailants, eight victims and three injured and since there was no evidence who assaulted whom, neither of the accused can be held accountable for the injuries to the above persons. He noted that, there was no medical evidence about the injuries of PW 2 and 5. The doctor who examined them was not cited as a witness. Therefore, whether they actually sustained any injury remained doubtful. The post-mortem doctor was not examined. Nor was the doctor who examined the deceased at the emergency was examined as witness. The absence of cross-examination of the opinion of the post-mortem doctor also persuaded the learned judge to acquit the accused. He noted that, the prosecution witnesses were not present at the time of death of the deceased and as such their evidence of the death of the deceased as a result of the assault could not be accepted. He found that, there was no conclusive evidence that the accused persons caused grievous injuries or culpable homicide not amounting to murder to any of the victims and as such acquitted them.

34. The private respondents being acquitted by the learned Trial Judge one must bear in mind that there was double presumption in their favour. First was the presumption of

innocence and second was the securing of acquittal. However, a judgement of acquittal can be reversed in the appeal if the judgement suffered from the vice of perversity. A judgement of acquittal can be said to be perverse if the finding of fact returned was arrived at by ignoring or excluding relevant material or taking into consideration irrelevant or inadmissible or extraneous materials or the findings defied logic or were irrational. The impugned judgement and order was required to be tested on such anvil.

35. In ***Sarman and Others (supra)***, the Supreme Court on evaluation of the evidence, found that, nobody stated which of the assailants caused particular injury which resulted in the death of the deceased. It was also found that, since the accused inflicted injuries with wooden stick and particularly when such injuries were simple and at non vital parts of the body, it cannot be said that the object was to kill the deceased. Accordingly, the conviction of the accused under Section 302/149 of the Indian Penal Code, 1860 was set aside and the accused were convicted under Section 304 II/ 149 of the Indian Penal Code, 1860.

36. In ***Akhtar And Others (supra)***, Medical Officers were not examined. The Post Mortem Examination Report was

however, tendered and marked as Exhibit at the trial. It was held that, if genuineness of any document filed by a party is not disputed by the opposite party it can be read as substantive evidence under Section 294 of Sub-Section 3 of Criminal Procedure Code.

37. In the facts of the present case, out of 5 witnesses, who claimed themselves to be eye witnesses, PW 1 claimed to come out of his residence upon hearing the hue and cry and seeing the private respondents assaulting the deceased and others. PW 2 as the injured eye witness stated in cross-examination that PW 1 was in his house at the time of the incident. Therefore, the veracity of the evidence of PW 1 as an eye witness was put to doubt at the behest of PW 2.

38. PW 2 who claimed himself to be an injured eye witness, did not produce any document to substantiate his injury at the trial. It is therefore doubtful as to whether PW 2 was injured in the incident in absence of corroborating medical evidence particularly given the nature of the incident and the nature of assault that the prosecution witnesses claimed.

39. PW 5 claimed that the private respondents started to assault her also with iron rod, wooden stick, crowbar. She

also did not produce any injury report of any injury being suffered by her. According to her, PW 2 also suffered injury. In cross-examination she stated that there was no blood stain on the clothes of the injured persons. As noted above the claim of injury suffered by PW 2 was not corroborated by any Doctor examining him or any injury report. The claim that PW 5 was injured was also not corroborated by medical evidence.

40. According to PW 5 the incident occurred when she along with others went to stop the construction of the accused persons. She stated that no mason or labour was engaged by the accused persons. There was no brick at the place of occurrence. PW 2 and PW 5 stated that there were 20 to 40 local people present at the place of occurrence. None came forward at the trial to implicate any of the accused.

41. It transpires from the evidence of the prosecution witnesses that, two persons died. One of them was Sudhir Das and the other was Srikumar Nandi. PW 5 denied the suggestion that Srikumar Nandi died as a result of the assault. She however, admitted seeing Srikumar Nandi at the place of occurrence.

42. The version of the prosecution witnesses with regard to the incident is that, the private respondent assaulted the

deceased, Birendranath Das, Habu Das , Sridhar Mondal, Fatick Konai and Taposh Das. However, it appears from the suggestions put and the admissions made in cross-examination of the prosecution witnesses that, there was dispute with regard to the land with the family of Nandi. Srikumar Nandi, Prabir Nandi, Subir Nandi and Mihir Nandi were involved in the incident.

43. The doctor who conducted the post mortem on the victim was not examined at the trial. The Post Mortem Report being Exhibit 4 stated that the death was due to the effects of head injury ante mortem and homicidal in nature. However, the prosecution witnesses were unable to establish who caused the head injury to the deceased.

44. The learned Trial Judge on evaluation of the evidence held that, there was no conclusive evidence as against the accused person. At the trial, the prosecution sought to weave a chain of events so as to press home the charges. However, the evidence led at the trial left sizeable swathe to accommodate legitimate skepticism as to the veracity of the testimonies of the prosecution witnesses. The view of the learned Trial Judge being a plausible one in the facts and circumstances of the present case, we accept the same.

45. The respondent Nos. 2 to 9 were acquitted of the charges they were charged with. We uphold the judgement and order of acquittal. They shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

46. In view of the discussion above, CRA 92 of 2020 is dismissed.

47. Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.

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

[DEBANGSU BASAK, J.]

49. I agree.

[MD. SHABBAR RASHIDI, J]