

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 200 of 2004
Rupesh Chattri
-Vs-
State of West Bengal

For the Appellant : Mr. Jayanta Narayan Chatterjee
Ms. Jayashree Patra
Ms. Sreparna Ghosh
Ms. Ritushree Banerjee

For the State : Mr. Avishek Sinha

Heard on : 25.11.2022

Judgment on : 25.01.2023

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment and order of conviction dated 22.12.2003 and 23.12.2003 passed by the Additional Sessions Judge, 2nd Court, Darjeeling, in Sessions Case No.7/2003 arising out of convicting the appellant under Section 304, Part-I of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for seven years.
2. The prosecution case emanated on the basis of a complaint dated 27.08.2002 wherein the de facto complainant inter alia stated that on the night of 26.08.2002 at around 8 pm his elder brother Sanjay Pariyar went to attend the inaugural ceremony of a temple at the house of Kabita Chettri which started at around 8.30 pm. at night attended by

Hemlata Thapa, Pranita Rai, Kaji, Parshuram Chettri, Bhakta B.K., Mohan B.K., Meghbahadur Chettri, Mahadev Thapa, Sanjay Chettri, Sanjib Raidhai, Rupesh Chettri, Sanjay Pariyar and other villagers. At around 10 pm, while the ceremony was in process, Sanjay Chettri, Sanjib Raidhai, Rupesh Chettri along with his elder brother Sanjay Pariyar entered the kitchen to have their meal. The said persons were served meal by sister-in-law Hemlata and subsequently an altercation cropped up between his elder brother and Rupesh Chettri at about 10.25 pm. Instantly, they started to fight at the yard of the house. The eye witnesses Hemlata, Mohan Thami and others saw Rupesh Chettri stabbing Sanjay with knife in his hand threatening whoever came to separate them will also be stabbed by him. Ultimately, they were separated and the elder brother of the de facto complainant reached home with bleeding injury and became senseless while hugging his mother. Villagers namely Saroj, Harsha Dewan and others took Sanjay to the hospital where the Doctor declared him dead. The de facto complainant sought legal action against Rupesh on proper investigation.

- 3.** Based on the above complaint Darjeeling Sadar P.S Case No. 100/2002 dated 27.08.2002 was instituted under Section 304 of IPC. Investigation pursued and chargesheet was submitted on completion of the same. Charges were framed to which the accused pleaded not guilty and claimed to be tried.
- 4.** The prosecution cited 18 witnesses and exhibited certain documents.

- 5.** The Ld. Advocate for the appellant, Mr. Jayanta Narayan Chatterjee stated no one saw the appellant to carry a knife in his hand and stab the victim which was an embellishment. PW 6 in his cross-examination denied to have seen anything regarding the murder of the victim. PW 5 superintendent of Sadar Hospital stated that the injury suffered by the victim could be even accidental. PW 7 in his examination stated to have heard someone calling him stating the victim to be sick, to be taken to the hospital. PW 7 also did not see anything regarding the stabbing of the appellant. It was further argued there was no direct evidence in the instant case. The prosecution failed to produce a single eyewitness. The complainant in his written complaint did not state that he saw a knife in the hand of the appellant and that his brother was bleeding. The prosecution failed to establish any motive to commit the murder by the appellant in absence of rivalry between the family of the appellant and the deceased. PW 12 in his cross-examination stated about verbal altercation and no one was carrying any weapon. PW 14 stated at the time of puja he found Rupesh and Sanjay having discussions.
- 6.** The Ld. Advocate for the appellant strenuously argued the Ld. Trial Court failed to appreciate the contradictions and inconsistencies in the evidence of prosecution witnesses. The prosecution evidence was circumstantial in nature and the prosecution failed to create a link in the chain of circumstances and accordingly, the appeal shall be allowed.

7. The Ld. Advocate for the State, Mr. Avishek Sinha submitted that PW 6, and PW 9 stated to have seen a knife in the hand of the accused. The prosecution witness nos. 6, 7, 10, 12 and 14 in unison corroborated the incident of altercation which took place between the appellant and the victim. The said prosecution witnesses tried to intervene and sort out the issues between them. The differences between the parties presumably lead to the commission of offence supported by the opinion of the post mortem doctor PW 5 to be ante mortem and homicidal in nature. The prosecution was successful in establishing its case and the appeal shall be dismissed.
8. PW 1 SI. B.K. Ghosh drew up the formal FIR as the Officer-in-charge of Sadar P.S., Darjeeling and endorsed the case to SI. PS. Chandra for investigation.
9. PW 2 S.I. D.D. Gazmer identified the certified copy of G.D. entry No. 1167 dated 26.08.2002 marked as ext. 3.
10. PW 3 D. Chettri reported the unnatural death of the victim to the O.C.-in-charge of Sadar PS.
11. PW 4 A.S.I. Pappu Kujur identified the seizure list marked as Ext. 4 and his signature thereon marked as Ext. 4/1.
12. PW 5 Dr. D. Banerjee conducted the post mortem examination of the victim found the following injuries:-
“(1) The wound position, size and character as follows:-

1/2" long insized wound on left lateral chest. (2)4" long 6"deep cut injury on left axial with brachial artery tear."

The injury report was marked as Ext.3.

13. During his cross-examination he opined "*this type of injury may cause on falling of sharp surface. This type of injury may be caused due to accident.*"

14. PW 6 Kabita Chettri stated on 26.08.2002 during the puja being conducted in their house a commotion was heard between the victim Sanjay and the appellant. They went out and saw the appellant quarrelling with Sanjay and they tried to separate them. At that time she saw a knife in the hand of the accused. Thereafter, being afraid they fled from the spot. Subsequently, they heard a clamour that Sanjay had been assaulted with the knife. They went to the house of Sanjay and found injuries in his lower abdomen on the left side. Thereafter, the victim was taken to the Sadar Hospital for treatment.

During her cross-examination PW 6 stated at first quarrel took place inside the kitchen. The victim and the appellant dispersed and went out. She did not go outside at that time. She did not see the appellant to assault Sanjay but she had seen them to quarrel.

15. PW 7 Sahadev Thapa in his evidence stated to have heard his wife Hemlata Thapa asking the boys not to fight with each other from another room. He came out of the room along with others and found the appellants and the victim discussing issues. The victim and the

appellant were separated insisting them not to quarrel during continuance of puja. Thereafter, he was called by somebody stating the victim Sanjay had been sick and was to be taken to the hospital. PW 7 along with others transferred the victim to Sadar Hospital where he learnt the victim to have sustained stab injury in the heart.

During his cross-examination PW 7 stated after separating Sanjay and the appellant he did not know what happened after Sanjay and appellant went out.

16. PW 8, Rajani Singh was a scribe to the complaint written as per the dictation of the Sanjib Pariyar.

During her cross-examination PW 8 stated to have copied the written complaint written by the Police Officer at the P.S.

17. PW 9, Sanjib Pariyar stated on 26.08.2002 he was not present at the house of PW 6 Kabita Chettri. At about 10.30 pm when he was proceeding towards the house of Kabita on his way from the programme he attended, he saw the appellant having a fight with his brother Sanjay. As he reached near the place he saw a knife in the hand of the appellant and found his brother Sanjay Pariyar bleeding profusely with injuries on his body. Thereafter, Sanjay went to their house and he stayed there on the spot. At that point of time the appellant with a knife in his hand threatened anybody from approaching. PW 9 returned home and found his brother Sanjay lying on the bed. Thereafter, the victim was taken to

the Sadar Hospital, Darjeeling. According to his statement Rajani Singh had written the complaint marked as Ext. 1/3.

During his cross-examination PW 9 stated at about 10.10 pm. when he went towards his house he saw many people gathered at the place of occurrence from uphill. It was dark in the night without any light. When he reached the place of occurrence he saw 13/14 people whom he could not recognise. Thereafter, he left for his house. He did not state to PW 8 that he was returning to his house at 10.10 pm or that he had seen the appellant to invite a quarrel with his brother when he reached the place of occurrence or that he had seen the knife in the hand of Rupesh and that his brother was bleeding or the appellant brandished the knife in presence of others. He further stated to have heard about the incident from Hemlata and Mohan Thami. He also stated the absence of rivalry between the family of the victim and the appellant.

18. PW 10 Ram Badar Rai had seen the victim and the appellant to discuss and fight over certain issues, who were separated on intervention and sent to their respective house. He heard thereafter that Sanjay sustained injuries.

19. PW 11 also heard about the incident.

20. PW 12 Sahadeb Thapa saw the brawl between the victim and the appellant and separated them and sent them home thereafter, came to know that Sanjay was injured.

21. During his cross-examination PW 12 stated at the time of discussion between the victim and the appellant none of them carried weapon and there were verbal altercation.

22. PW 14 corroborated the statements of PW 12.

23. PW 15's evidence was based on hearsay.

24. PW 16 Buna Pariyar, the mother of the victim stated on 26.08.2002 his son returned home after attending the puja at the house of Kabita with severe bleeding injuries and caught hold of her and said he was dying. Thereafter he became unconscious. PW 16 stated she did not know how her son was injured.

25. PW 17 Sangita Pariyar stated the victim returned home with bleeding injuries and he lay down on the bed. Thereafter he was taken to the hospital where he was declared dead.

26. PW 18 S.I. P.S. Chandra, the Investigating Officer had visited the place of occurrence, prepared a rough sketch map along with index marked as Ext. 6. Inquest report was prepared and post mortem report was collected by him. He recorded the statement of available witnesses under Section 161 Cr.P.C. He arrested the accused on 27.08.2002 and thereafter on completion of investigation submitted the chargesheet.

27. During his cross-examination he stated the distance between the place of occurrence and the house of the accused was not mentioned in the sketch map or anywhere in the CD.

28. The complainant PW 9 in the complaint stated the eyewitnesses Hemlata and Mohan Thami and others saw the appellant stab the victim. However, Hemlata i.e. PW 12 during her cross-examination stated at the time of discussion nobody was carrying a weapon. She did not, therefore, see the appellant to stab the victim. Mohan Thami was not examined. In his complaint PW 9 stated to have learnt about an altercation taking place between his elder brother and the appellant. In his examination-in-chief PW 9 stated *“When I reached near the place, I saw a knife in the hand of the accused and found my brother Sanjay bleeding profusely with injuries on his body. Thereafter, Sanjay went to our house. I stayed there on the spot. At that time Rupesh was there with knife in his hand and was threatening anybody who came there. I also went back to my home and found my brother Sanjay lying on a bed.”*

During his cross-examination PW 9 stated *“at about 10.10 pm I went towards my house. I saw many people gathered at the P.O from uphill. It was dark in night. There was no light there. When I reached the P.O. I saw 13/14 people present there. I could not recognise those persons. Thereafter, I left for my house. I did not state to Rajani that I was returning to my house at 10.10 pm. I did not tell Rajani that I saw Rupesh invited a quarrel with my brother Sanjay Pariyar. I did not tell Rajani when I reached at the P.O., I saw a knife in the hand of the accused Rupesh and my brother was bleeding. I also did not tell Rajani that at that time the accused was brandishing the knife in presence of others. I heard*

about the incident from Hemlata and Mohan Thami. There is no rivalry in between the family of Rupesh and my family.”

29. There are serious contradictions and inconsistencies in the evidence of PW 9. PW 9's absence at the place of occurrence is distinctly clear from his statements in cross-examination. It was impossible for PW 9 to see a knife in the hand of the appellant threatening others who approached him when he was not present at the spot. He further stated to have heard about the incident from Hemlata and Mohan Thami. Hemlata (PW12) did not find a knife in the hand of the appellant and Mohan Thami was not examined. It is strange and unbelievable that after witnessing his brother Sanjay to bleed profusely he stayed there on the spot without assisting him on his way back home or cried out for help. He could not name any of the 13/14 people who had assembled at the place of occurrence according to his version to substantiate his piece of evidence. The evidence of PW 9 discredits trustworthiness. There are embellishments, prevarication and exaggeration in his evidence which cannot be relied upon. PW 6 Kabita during her examination-in-chief stated to have seen a knife in the hand of the victim however, in her cross-examination she stated that she did not go outside after the quarrel that took place inside the kitchen. None of the prosecution witnesses stated that the victim was assaulted inside the kitchen. PW6, further stated she did not see the accused to assault Sanjay but had seen the quarrel which denoted contradictions in her evidence as she

stated out of fear they fled from the spot. PW 7, PW 10, PW 11, PW 12, PW 14, PW15 were independent witnesses who acknowledged the fact of dispute between the victim and the appellant but none of them saw the appellant to assault the victim. From the evidence of the aforesaid prosecution witnesses it can be inferred that the nature of dispute between the parties was trivial to have been sorted and the parties been separated at their instance. None of them felt the disputation to be serious and of larger magnitude to seek their direct intervention to escort either of them to their respective house. PW 16 the mother of the victim denied to know the reason of his son's injury. The victim after returning home did not disclose to his mother the mode and manner of his assault. A person to have been assaulted by anybody would definitely disclose the name of the assailant to his mother at the time he returned home and was in a position to speak, who told his mother that he was about to die. The Investigating Officer did not recover the offending weapon i.e. the knife. Moreover, PW 5 the Doctor during his cross-examination stated the injuries suffered by the victim could also be accidental. In the facts and circumstances of the case and the evidence of the prosecution witnesses a link in the chain of circumstances could not be aptly created to indict the victim, in absence of preponderance of probabilities. Presumption of fight instantaneously resolved could not be of such a gravity and intensity to inculcate a person without substantial evidence on the part of the prosecution. A mother of a victim will

definitely want the assailant to be punished for the death of her child. The victim did not reveal the name of the assailant to the mother who had inflicted the injury upon his body. The victim could say that he was dying but did not reveal the cause of his death. In case of absence of motive and trace of severe animosity the substantial evidence should be extremely strong to steer towards one absolute cause without any other possibilities and/or probabilities leading to the exclusive and unambiguous reason of the death of the victim. In the opinion of this Court the prosecution could not establish its case beyond reasonable doubts.

30. Accordingly the appeal is allowed.

31. It is informed that appellant is on bail. Bail bond of the appellant shall be discharged after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

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

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

(Ananya Bandyopadhyay, J.)