

CRA 191 of 2017

In the matter of : Ahidul Islam & Ors.

Ms. Suman Sehenabis (Mondal)
Ms. Atulya Sinha ... for the petitioners

Mr. B. K. Ray
Ms. Sima Biswas ... for the State

This criminal appeal impeaches the judgement and order of conviction dated 27.2.2017 and order of sentence dated 28.2.2017 passed by learned Additional Sessions Judge, Mekhliganj, Cooch Behar in S.T. No. 3(8) of 2014 corresponding to S.C. No. 1 of 2014, convicting thereby the appellants for commission of offence within the meaning of Sections 325/34 and Sections 353/34 of Indian Penal Code.

Briefly stated on 28.11.2012 Sukhbit Singh, company commander at Border of Out Post Changrabandha under 104Bn. Of BSF informed the station house officer of Mekhliganj police station in writing that on 28.11.2012 around 18.10 hours a Patrolling Party of BSF led by constable G. Eswaran and three others namely constables Praful P. Bande, Ganesh Chowdhury and Mahesh N. Marathe while discharging their duty at Indo-Bangladesh Border near Boarder Pillar No. 840/4-S noticed that some Bangladeshi miscreants / smugglers were trying to lay improvised crane at two places to smuggle cattle heads with the assistance of Indian smugglers. When the BSF personnel made an attempt to stop the smugglers they started pelting stones with an

intent to cause grave bodily harm to kill the members of BSF and as a result constable Praful P. Bande sustained injury and had to be taken to PHC, Chanrabandha and from there he was shifted to Jalpaiguri District Hospital. Constable Bande had to resort to firing two rounds from his personal weapon Insas Service Rifle in self defence. In his written information, the informant also disclosed the names of five miscreants. The information since disclosed offence cognizable in nature, Mekhliganj P.S. Case No. 258/12 dated 28.11.2012 was registered under Sections 143/325/353/307 of the Indian Penal Code read with Section 12 of W.B. Cattle Licensing Act. Police accordingly took up investigation which was culminated into submission of charge sheet.

On 12.8.2014 trial was commenced and the accused persons stood the trial by pleading their innocence.

In order to crown success prosecution examined six witnesses. Learned Trial Court after considering the evidence on record both oral and documentary, was pleased to pass the impugned order.

Ms. Suman Sehenabis (Mondal), learned counsel representing the appellants submits that learned Trial Court failed to appreciate the evidence on record in its proper perspective. The incident allegedly took place on 28.11.2012 and at the place of incident there was not electric light. Natural light was not expected to be there sufficient to identify any person at that part as in the month of November during the winter season day light gets diminished well before 6 PM.

Drawing my attention to the testimony of P.W. 1 Ganesh Chowdhury, who was present at the place of occurrence Ms. Suman Sehenabis (Mondal) submits that the witness stated there was no light at the place of occurrence when the alleged incident took place.

P.W. 3 Mahesh Marathe was the accompanying constable deployed on patrol duty and he stated that altogether there were about thirty persons present as miscreants but he identified the accused persons in Court only. There was no T.I. Parade conducted by the I.A. during investigation.

P.W. 5 Praful P. Bande the victim stated that when the BSF personnel tried to stop the smugglers they started pelting stones with an intention of causing bodily harm and he sustained injury by the stone missed at him and he was also assaulted by an iron rod on his head. No such iron rod was however seized by the I.O. The victim made embellishment during his testimony before the Court. He stated that being assaulted by the miscreants he lost his sense but the attending physician P.W. 2, Dr. Kaushik Bhattacharya is not lending support to such assertion of P.W. 5. After giving him treatment the doctor discharged him. P.W.5 stated before the Court that as an aftermath of such injury he could not sleep properly. He was under treatment but in support of such contention no document was produced. P.W. 5 identified the three accused persons out of five in Court.

During cross-examination he stated that despite evening setting in at that time some natural light was therein which he was able to see some of the miscreants.

P.W. 6 is the de facto complainant who did not have any direct knowledge about the incident. He set the criminal proceeding into motion by submitting a written information.

According P.W. 4 during investigation he visited the place of occurrence and prepared the sketch map with index which was admitted as Exhibit 2 and he examined witnesses, collected injury report Exhibit 3 from the B.S.F. Hospital. He further stated voluntarily during cross examination that BSF search light and flood light were switched on along Indo-Bangladesh Border.

I.O. was examined with reference to the statement of witnesses he recorded particularly the victim P.W. 5 and he stated that P.W. 5 did not tell him that he heard the name of Aihidul being called by the miscreants at the time of incident. He did not tell the I.O. that he could identify some of the miscreants in the natural light prevailing at the time of incident despite evening was setting in.

P.W. 5 however during cross examination stated that police interrogated as he was still suffering, so he did not say to the I.O. that he heard the name of Aihidul at the time of incident. He told to the police that despite evening was setting in there was some natural light sufficient to identify the miscreants.

Since the statement made by P.W. 5 in course of investigation, recorded by the I.O. under Section 161 of Cr.P.C. was not drawn to the attention of P.W. 5, the benefit of contradiction cannot be extended to the defence counsel.

Ms. Suman Sehenabis (Mondal) further drawing my attention to the impugned judgment whether the learned Trial

Court held that the argument as to the paucity of light and did not find favour with the Court. It was apparent that BSF and the miscreants / smugglers were at a very short distance wherein the stones were being pelted by the miscreants, therefore, at such a short distance it would have been quite possible for the prosecution witnesses including the victim to identify the miscreants. It is rightly argued that there was no such evidence available with the record regarding the proximity in terms of the distance between the BSF personnel and the miscreants. The victim opened two rounds of fire from Insas Rifle. Had there been such close proximity between the miscreants and the victim, it would have culminated into loss of life. The accused persons however did not suffer any injury.

Mr. Roy, learned counsel representing the State relying upon cross examination of PW. 5 stated that when the witness being the victim stated that there was sufficient light to identify the miscreants, Court should not feel any hesitation to rely upon such testimony and to come to a conclusion that the victim identified the miscreants. There was nothing to suggest that P.W. 5 the victim had enmity with the accused persons, therefore, had no reason to implicate them falsely. The sketch map and the index Exhibit 2 does not indicate any source of electric light as claimed by P.W. 6, the de facto complainant. P.W. 1 was present at the time of incident and according to P.W. 1 there was no light in the said place of occurrence when the alleged incident took place. True it is P.W. 5 stated that there was natural light available though evening was telling knell of parting day. The incident took place on

28.11.2012. It was the winter season and at that point of time there was hardly any chance to find natural light, may be darkness was not visible but the testimony of P.W. 1 when speaks contrary to the testimony of P.W. 5 and oral testimony of P.W. 1 when is lending support to the accused persons, between the two narratives available, about the existence of light at the place of occurrence, the one which tilts in favour of the accused persons should be accepted by the Court which is the golden rule of appreciation of evidence in the criminal administration of justice.

Learned Trial Court relying upon the testimony of P.W. 5 derived inspiration to record an order of conviction by holding that the victim and the miscreants were at arm's length or in other words were closed to each other. But in absence of any evidence to that effect, such observation of learned Trial Court appears to be nothing but surmise and conjectures, which should not be taken into consideration.

The prosecution case cannot be said to have been proved beyond reasonable doubt. Therefore, in my humble opinion the impugned judgement should not be allowed to remain in force. Learned Trial Court ought to have extended benefit of doubt to the accused persons and the infirmity as pointed out hereinbefore is sufficient to set aside the impugned judgement which I accordingly do.

The criminal appeal is thus allowed.

The appellants may be discharged from bail bonds, subject to execution of bond under Section 437(A) of Cr.P.C.

Let a copy of the order be sent to the learned Trial Court for information and necessary action.

(Siddhartha Roy Chowdhury, J.)