

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

C.R.A.170 of 2021

**Rajkumar Tewari & ors.
VS.
The State of West Bengal**

For the Appellants : Mr. Milon Mukherjee, Sr. Advocate
Mr. Dattatreya Dutta,
Ms. Leena Mukherjee,
Mr. Prateep Bera

For the State : Mr. Ranabir Roy Chowdhury,
Mr. Mainak Gupta

Hearing concluded on : 20.03.2023

Judgement on : 20.03.2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated February 20, 2021 and order of conviction dated February 23, 2021, passed by the learned Additional District

and Sessions Judge, First Fast Track Court, Lalbagh, in Sessions Trial No.3/September/2017 arising out of Sessions Serial No.131 of 2017.

2. By the impugned judgment of conviction, the appellants were convicted under Sections 302/34, 307/34 and 325/34 of the Indian Penal Code, 1860.

3. Police received a written complaint dated April 29, 2017. Such written complaint was submitted by prosecution witness (P.W.2). In such written complaint it was stated that since the brothers of P.W.2 did not return to their home as usual around 9 to 9:30 p.m., the family became worried. He could not speak to the victims over mobile. At about 11 p.m. P.W.2 along with few other persons went to the brick factory by two motor cycles thinking that the two persons would be in the factory. When they reached near the government unmetalled road they found that two persons were lying besides the road. They examined one victim and found him dead while the other victim was tremendously injured. They came to know from the injured victim that while returning home at around 9 to 9:30

p.m. on motor cycle, they were stopped by the appellants who assaulted them violently with wooden rod and killed one of them in a preplanned conspiracy and ran away. They took the injured victim to the hospital for treatment. As his condition was not good, doctor referred him to the Medical College & Hospital. His condition was critical as his hands and ribs were fractured.

4. In the written complaint, it was also stated that, there was an old dispute with the appellants regarding business and property and out of old grudge, the appellants attacked the victims in a planned way.

5. On the basis of such written complaint, police registered a First Information Report being Murshidabad Police Station F.I.R. No.220 of 2017 dated April 29, 2017 under Sections 325/307/302/34 of the Indian Penal Code, 1860.

6. On conclusion of the investigation, police submitted charge-sheet. Charges under Sections 325/34, 307/34 and 302/34 of the Indian Penal Code, 1860 were framed as against the appellants on September 11, 2017. The appellants pleaded not guilty and claimed to be tried.

7. At the time of trial, prosecution examined 19 witnesses. Prosecution also relied upon various documentary and material exhibits to prove the charges beyond reasonable doubt.

8. Learned Senior Advocate appearing for the appellants submits that, the prosecution was unable to prove the charges beyond reasonable doubt. He draws attention of the Court to the Post Mortem Report of the deceased and to the deposition of the Post Mortem Doctor. He submits that Post Mortem Doctor was unable to say conclusively as to whether the death was homicidal or suicidal or accidental in nature. He submits that in absence of the Post Mortem Doctor classifying the death of deceased to be homicidal, it was inappropriate for the learned trial Judge to consider the case as one of murder.

9. Learned Senior Advocate appearing for the appellants submits that, the injured eyewitness, P.W.5 in his deposition, during cross-examination, as many as on two occasions, stated that there was an accident at the material point of time. Therefore, he submits that, the death and the injuries were a

result of accident. At least, the appellants were entitled to the benefits of doubt.

10. Moreover, learned Senior Advocate appearing for the appellants submits that, the prosecution did not examine any eyewitness to the incident. From the tenor of the deposition of the prosecution witnesses, presence of any eyewitness was ruled out. The maker of the written complaint arrived at the spot much after the occurrence of the incidence. He refers to the initial recording in the injury reports of the injured and submits that, the claim of assault by the appellants should be disbelieved.

11. Learned Senior Advocate appearing for the appellant submits that the most of the prosecution witnesses are relatives of the victims. Therefore, there are possibilities of such prosecution witnesses, exaggerating the incident. He relies upon **All India Reporter 1984 Supreme Court 1622 (*Sharad Birdhichand Sarda vs. State of Maharashtra*)** and **2011 (14) Supreme Court Cases (*Jalpat Rai And Others. Vs. State of Haryana*) 208** in support of his contention.

12. Learned Senior Advocate appearing for the appellants refers to the deposition of the so-called injured eyewitnesses. He submits that such injured eyewitness named another person to be present in the place of occurrence. Such person was not examined by the prosecution. He relies upon **1976 (4) Supreme Court Cases 355 (*Ishwar Singh vs. State of U.P.*)** and **(2014) 14 Supreme Court Cases 22 (*Deny Bora vs. State of Assam*)** in support of his contention.

13. On the aspect of non examination of vital witnesses relying upon **2022 Supreme Court Cases Online Supreme Court 991 (*Khem @ Khem Chandra EPC vs. State of U.P.*)** learned Senior Advocate for the appellants submits that oral testimony can be classified into three categories. According to him in the fact and circumstances of the present case, the oral testimony does not support the case of the prosecution and ought to be disbelieved.

14. Learned Senior Advocate appearing for the appellants submits that consequently, the appellants should be acquitted of the charges as framed against them.

15. Learned Advocate appearing for the State draws the attention of the Court to the evidences of the prosecution witnesses. He submits that, despite the post-mortem doctor not classifying the death as homicidal, the nature of injuries suffered by the victim should be considered by the Court. According to him, the nature of injuries suffered by the deceased are such that, the only plausible conclusion is that, the victim was murdered. He submits that, the wooden batten was recovered on the leading statement made by one of the appellants. Such wooden batten was used in the incident of assault. The injuries suffered by the two victims are commensurate with an assault by a wooden batten on the two victims. Therefore, according to him, the charges against the appellants stood prove beyond reasonable doubt.

16. The scribe of the written complaint deposed as P.W.1. He stated that he was a practicing advocate for the last four years. The written complaint was prepared by him in his handwriting as per the instructions of P.W.2. The contents of the complaint was read over by him and explained in Bengali to P.W.2 and after understanding the contents thereof, P.W.2

put his signature therein. P.W.1, also signed the written complaint. The written complaint was tendered in evidence and marked as Exhibit-1.

17. P.W.2 is a brother of the two victims. He stated that Abdul Saddique and Nazle Ahamed, P.W.5 herein, were in a business of brickklins. For such business purpose, they used to return home at about 9 to 9.30 P.M. after day's work in the brickfield. On the fateful night, both of them did not return home in time. The family members became restless. In such a situation, he, accompanied by other persons in two separate motorcycles went out of the house in search of the victims. He identified the others persons accompanying him as Sahajamal Sk, Faruk Ahamed and Samsul Alam, P.W.10, all from the same village. As they were proceeding towards the brickfield they reached near the house of one of the appellants and availed the unmetalled road leading to a brickfield towards south. When they reached near the mango grove of Prithvi Tewari, they saw the victims lying on the earth with serious bleeding injuries on their persons. They got down from motorcycles. On seeing that, there was no movement of Abdul

Siddique, P.W.2 apprehended that he was dead by that time. The other brother Nazle Ahamed, P.W.5, was lying on the unmetalled road. He was alive but was in almost dead condition. The injured brother was picked up by them and taken on motorcycle to Lalbag Sub-Divisional Hospital. The attending doctor immediately referred him to the Medical College & Hospital at Berhampore. He saw both the hands and chest ribs of Nazle Ahamed, P.W.5, to be broken. On the same date, he came to know that the police reached the place of occurrence and with them people of the village subsequently brought the dead body of Abdul Siddique to Lalbag Sub-Divisional Hospital. The doctor of the Lalbag Sub-Divisional Hospital declared Abdul Siddique as dead on the same date.

18. P.W.2 stated that over the incident, he lodged the written complaint against the appellants. He identified his signature on the written complaint which was marked as Exhibit-1/1. He was a witness to the inquest of Abdul Siddique. He identified his signature on the inquest report which was marked as Exhibit-2.

19. Police prepared a seizure list in which he signed. Such signature was marked as Exhibit-3. Police seized the wearing apparels of the deceased brother on April 30, 2017 in his presence. He identified his signature on the seizure list which was marked as Exhibit-4.

20. He identified all the appellants in Court. He stated that Pradip Tewari and Sumit Tewari were not present in Court room. He stated that he came to know the name of the appellants from the mouth of the injured victim. He identified the material exhibits.

21. In cross-examination, P.W.2 stated that, on the date of the incident of murder, in the night, police met with him on the spot. He stated before the doctor at the time of admission about how the incident occurred, to the attending doctor of the injured brother, Nazle Ahamed.

22. In further cross-examination, he stated that, he asked his injured brother as to what happened, whereupon the injured brother narrated that while the injured brother and Abdul Siddique were returning home from the brickfield, the appellants intercepted them on the unmetalled road and

assaulted them. The injured brother told him that six persons assaulted them with wooded batten causing injuries to them.

23. A police constable deposed as P.W.3. He stated that, on April 30, 2017, a seizure was made of two wooden battens on the indication of Ramnath Tewari. He identified the seizure list dated April 30, 2017 which was marked as Exhibit-5. He identified the seized articles in Court.

24. The police constable who witnessed the seizure of the wearing apparels of the deceased on April 30, 2017 deposed as P.W.4. He identified his signature on such seizure list which was marked as Exhibit-4/1. He also identified the seized wearing apparels.

25. P.W.5 is an injured eye-witness. He stated that, as he and deceased were returning home from the brickfield he was driving the motorcycle and the deceased was pillion rider with him. At about 9 to 9.30 P.M., all of a sudden the appellants came in front of the motorcycle and stopped them. Then they left and right started assaulting them with wood batten. As a result of such assault, they sustained serious injuries. He was almost unconscious and unable to move. The deceased also

received serious injuries. After some time, the son Farooque Ahmed, his brother Abdus Samad, P.W.2. and others came there. From them, he came to know that Abdul Siddique expired. He was brought to the Lalbagh Sub-Divisional Hospital for treatment. Thereafter, he was referred to Berhampore Medical College & Hospital where he remained admitted for about 8/9 days.

26. P.W.5. stated that, at the spot he discussed with P.W.2 and his son about the incident. He claimed that on the relevant date and time he was assaulted by the appellants. He identified the appellants in Court.

27. In cross-examination, he stated as follows:

“On the relevant day coming from the brick field, we came just up to about 200-300 meter away only and then we sustained injuries due to accident and wherein my brother died.

.....

The accident took place at about 9pm to 9.30pm at night.”

28. P.W.6 is the hearsay witness. He heard about the incident from the mouth of the local people. His deposition apparently does not add any substance to the case of the prosecution.

29. P.W.7 is a neighbour. He stated that, there was a long pending land dispute in between the family members of the victims as also the appellants by reason of which, the appellants assaulted the victims. He stated that he came to know about the incident from the mouth of the injured witness being P.W.5. He, however, was a witness to the inquest of the deceased. He identified his signature on the inquest report which was tendered in evidence and marked as Exhibit-2/1. He was also a witness to the seizure made by the police at the place of occurrence. He identified the appellants in Court. He stated that, Amit Tewari @ Guddu and Pradip Tewari were not present in Court. In cross-examination, he stated that he saw the injured persons at the spot and it was about 11 P.M. in the night.

30. A police constable deposed as P.W.8. He stated that, he along with another constable led by a Sub-Inspector of Police went to the house of Ramnath Tewari on May 4, 2017, where

two wooden battens were seized. He identified his signature on such seizure list which was tendered in evidence and marked as Exhibit-5/1. He identified the seized articles. He identified Ramnath Tewari in Court.

31. The doctor who held the post-mortem on the dead body of the deceased deposed as P.W.9. He described the injuries that he found on the dead body of the deceased. He stated that, in his opinion the cause of death was due to the injuries as noted in the post-mortem report and ante-mortem in nature. The post-mortem report was tendered in evidence and marked as Exhibit-6.

32. In cross-examination, the post-mortem doctor, P.W.9, stated as follows:

“I did not give my final opinion in this report as it was kept awaiting till the arrival of chemical examination report. Had the chemical examination been there, I would have given my final opinion whether death was suicidal or accidental or else.”

33. P.W.10 is another witness who heard about the attack. He identified the appellants in Court. In cross-examination, he

stated that, he gave the statement for the first time in Court that he left his house in search of those two brothers.

34. P.W.11 arrived at the Lalbagh Sub-Divisional Hospital after hearing about the incident. He identified his signature on Exhibit 2/2 being inquest report of the deceased.

35. P.W.12 is a doctor who examined P.W.5 at Murshidabad Medical College & Hospital. He described the nature of injuries that he found on P.W.5. He tendered the injury report which was marked as Exhibit-7. He tendered the bed head ticket in evidence.

36. P.W.13 was also not present at the place of occurrence at the time of the incident.

37. P.W.14 is a doctor who was posted at Lalbagh Sub-Divisional Hospital as the Medical Officer. On April 29, 2017, he examined P.W.5. He stated that P.W.5 was brought to the Hospital in the emergency ward. On examination, he found P.W.5 was semi-conscious and delirious. At that time P.W.5 was bleeding from his nose. Ecchymosis was present around his left eye. There was abrasions over his left forearm and back of right elbow. After giving basic primary treatment,

P.W.5 was referred to the Murshidabad Medical College and Hospital for better treatment. He tendered the injury report of P.W.5 dated April 29, 2017 in evidence and the same was marked as Exhibit-9. The referral letter was tendered in evidence and marked as Exhibit-10.

38. P.W. 15 stated that, on May 3, 2017 he was posted as the Resident Medical Officer (RMO) of Murshidabad Medical College and Hospital. On such date, he examined P.W. 5. On examination, he found P.W. 5 conscious, alert and co-operative. At the time of examination, P.W. 5 was with the physical condition as he described in his evidence. He recorded the statement of P.W. 5. He narrated such statement in evidence. He tendered the bed head tickets which were marked as exhibit 11. In cross-examination, he stated that, a portion of the bed head ticket was over-written and the left thumb impression of the patient on the statement part of the bed head ticket was not endorsed as to be taken by P.W. 15 from the patient.

39. Another doctor of Murshidabad Medical College and Hospital deposed as P.W. 16. He stated that, he treated the P.W. 5 on April 30, 2017, May 1, 2017 and May 2, 2017. He tendered the bed head ticket of P.W. 5, which was tendered in evidence and marked as exhibit 11/1 series.

40. Another doctor attached to Murshidabad Medical College and Hospital as the RMO deposed as P.W. 17. He did not add much substance of the case of the prosecution.

41. P.W. 18 attended the P.W. 5 on May 19, 2017 in his chamber. P.W. 5 narrated a history of trauma on April 29, 2017 to him. In cross-examination, he stated that, fracture of ulna was possible due to falling from running motor cycle accidentally.

42. P.W. 19 is the Investigating Officer of the case. He narrated about the course of investigations. He tendered various documents and material exhibits in evidence.

43. On conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Criminal Procedure Code. All the appellants claimed to be falsely

implicated and being innocent. None of the appellants, disclosed any desire to adduce any defence witness.

44. The case of the prosecution is that, an incident of assault took place on April 29, 2017 where, a person was murdered and that P.W. 5 suffered injuries of grievous hurt and that there was an attempt of murder P.W. 5.

45. That the cause of death of the deceased was homicidal in nature was not conclusively established at the trial by the prosecution. The doctor conducted the post mortem on the dead body of the deceased, was unable to state conclusively that, the injuries were homicidal in nature. The post mortem report being Exhibit.6 did not state that the injuries were homicidal in nature.

46. P.W. 5, the injured eye witness, claimed that there was an incident of assault on him and the deceased at the behest of the appellants. P.W. 5 suffered grievous injuries. One of which was fracture on the ulna. He was treated both in government hospitals as also by a private practitioner. One of the doctors treating P.W. 5, the P.W. 18 stated in his cross-

examination that, fracture of Ulna was possible due to falling from the running motor cycle accidentally.

47. P.W. 5 in his depositions stated that, he was riding the motor cycle with the deceased being the pillion rider with him. During his cross-examination, P.W. 5 used the word 'accident' twice to describe the incident in which he suffered the injuries. His statement in cross-examination are noted above.

48. The possibility of P.W. 5 suffering the injuries by way of an accident was not ruled out by the prosecution. The deceased was riding as a pillion rider of the motor cycle of P.W. 5. Therefore, the possibility of the deceased succumbing to death due to the injuries suffered in an accident was not ruled out conclusively. In this regard, the oral testimony of the post mortem doctor, being P.W. 9 becomes extremely relevant. He stated that, he could not give any final opinion with regard to whether the death was suicidal or accidental or else in absence of chemical examination report. The chemical examination report was neither tendered in evidence during the trial nor the attention of the post mortem doctor, P.W.9 drawn to it. In our view, therefore, whether the death of the

deceased was homicidal in nature was not conclusively established at the trial by the prosecution.

49. P.W. 2, as a maker of the written complaint, stated that, he was accompanied by three other persons when they arrived at the place of occurrence. Of the three other persons accompanying P.W. 2 to the place of occurrence, only one was examined i.e. P.W. 10. Two others were not examined.

50. Prosecution did not produce any witness other than P.W.5 claiming that, such witness saw the incident occurring. The incident occurred at night without any other person being available at the place of occurrence. Injury suffered by P.W.5 was said by the doctor examining him as one capable of being inflicted by a motorcycle accident. Therefore it would not be prudent to deduce that the injuries suffered or the deceased died due injuries sustained in an incident of assault. Element of doubt creeps into the narrative of assault propounded by the prosecution.

51. In **Ishwar Singh** (supra), the Supreme Court observed that, non-examination of some witnesses would not matter if the witnesses examined unfolded the prosecution case fully. It

is well-established that witnesses essential to the unfolding of the narrative on which the prosecution is based must be examined.

52. In **Deny Bora** (supra), the Supreme Court found that, witnesses who were not examined were natural and competent witnesses and that such witnesses could throw immense light on the facts.

53. In the facts and circumstances of the present case, two persons, who apparently were the first responders along with P.W. 2 were not examined by the prosecution.

54. **Sharad Birdhi Chand Sarda** (supra) recognises the fact when the witnesses are relatives of the injured or the deceased, there is possibility of such witnesses exaggerating the incident, may be not consciously. The same view was expressed by the Supreme Court in **Jalpath Rai & Ors.** (supra).

55. **Khem @ Khem Chandra EPC** (supra) observes that, oral testimony can be classified into three categories namely, wholly reliable, wholly unreliable or neither wholly reliable nor wholly unreliable. In the first category, there would be no

difficulty in the Court coming to its conclusion either way. In the second category, again, the Court will find no difficulty in coming to a conclusion. In the third category, the Court is required to circumspect for corroboration in material particulars by reliable testimony, direct or circumstantial.

56. In the facts of the present case, death of the victim was not established conclusively to be homicidal in nature. One of the Doctors treating the injured eye-witness, P.W.-5, stated in cross-examination that, the fracture suffered of such injured could be a result of an accident. No eye-witness came to the dock to claim they saw any of the appellants assaulting any of the two victims.

57. In absence of assault being established and in absence of the death of the deceased being established conclusively as one of homicidal in nature, we are afraid, the appellants are entitled to the benefit of doubt.

58. In such circumstances, we reverse the judgment of conviction and set aside the order of sentence.

59. CRA 170 of 2021 is **allowed**.

60. The appellants be released from custody in the event they are not required in any other police case and subject to them furnishing a bond under Section 437A of the Criminal Procedure Code which shall remain valid for a period of six months from date.

61. A copy of this judgment and order along with all trial Court's records be remitted to the appropriate Court for further action, expeditiously.

62. Urgent 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.)

63. I agree.

(Md. Shabbar Rashidi, J.)