

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 259 of 2009
With
CRAN 2/2009 (Old No: CRAN 2591/2009)
Atul Sk @ Alam @ Ataur Sk & Ors.
-Vs-
State of West Bengal**

For the Appellants	:	Mr. Sujoy Sarkar Mr. Musharraf Alam Sk
For the State	:	Mr. Saibal Bapuli Mr. Narayan Prasad Agarwala Mr. Pratick Bose
Heard on	:	22.11.2022, 23.11.2022
Judgment on	:	25.01.2023

Ananya Bandyopadhyay, J. :-

1. The appeal is directed against the judgment and order of conviction dated 30.03.2009 and 31.03.2009 passed by the learned Additional District & Sessions Judge, Fast Track, First Court at Malda in Sessions Trial No. 1(3)/2008 arising out of Sessions Case No. 66/2006 convicting the appellants under Sections Part –II of 304/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for seven years each and to pay a fine of Rs. 5,000/- each, in default to suffer further rigorous imprisonment for six months each.

2. The prosecution case originated on the basis of a complaint dated 15.03.2004 wherein the complainant Fullu Sk stated an altercation to

have taken place between Atul Sk and Tafajul Sk the brother in law of the de-facto complainant. On 13.03.2004 a dispute arose over measurement of land in the presence of one Amin who consequently left. On 15.03.2004 at about 7.30 A.M. the aforesaid Atul Sk erected bamboo fencing which surrounded the land of Tafajul Sk who immediately opposed this act and prevented him resulting in a quarrel between them. At the relevant time Atul Sk along with others attacked the aforesaid Tafajul Sk and assaulted him with fists and blows. Being informed the complainant brought his injured brother-in-law Tafajul Sk. to Kaliachak hospital for his treatment wherein he was declared dead by the attending physician. The wife of Tafajul Sk., the elder sister of the de-facto complainant was admitted at Kaliachak hospital for the treatment of her injury. The de-facto complainant prayed for investigation and punishment of the miscreants.

3. Based on the written complaint, Kaliachak P.S. case No.87 of 2004 dated 15.03.2004 was instituted for investigation which resulted in the submission of charge-sheet being No. 253 of 2004 dated 13.08.2004 under Sections 324/325/304/34 of the Indian Penal Code. Charges were framed to which the accused persons pleaded not guilty and claimed to be tried.

4. The prosecution cited as many as 16 witnesses and exhibited certain documents.

5. Mr. Sujoy Sarkar, learned advocate for the appellants emphasized inconsistencies in the evidence of the prosecution witnesses. He further stressed upon the fact that once the prosecution witness was not declared hostile, his evidence was binding upon the prosecution

and should be considered in assessing the extent of guilt of the accused. This observation of the Learned Trial Judge cannot be accepted. It is the duty of the court to consider the evidence in its entirety to establish the guilt of the offender beyond reasonable doubt. The Post Mortem report along with evidence of the doctor P.W.5 stated the victim sustained abrasion over the back of right hip and lower lip which did not corroborate with the fact of the victim falling on the ground on the front side as well as on the back side. The Learned Trial Judge opined that the incident took place in the month of Chaitra not on the rainy season, contrary to the evidence on record and considered the evidence of P.W.7 to be untrustworthy. Most of the prosecution witnesses including P.W.6 were interested witnesses whose evidence did not corroborate the statements of P.Ws. 11 and 13. The process of conducting examination under Section 313 Cr.P.C. was faulty. There was a lack of corroborative evidence. There was enmity between the parties and as such the appellants were falsely implicated and, therefore, the appeal should be allowed.

6. Mr. Narayan Prasad Agarwala, learned advocate for the State submitted that the victim was assaulted by the appellants on dispute over land. There were eye witnesses to the said incident of assault. The P.M. doctor stated about cerebral haemorrhage to have taken place as a result of the injuries sustained by the victim. Accordingly, the prosecution has been successful to establish its case. Minor lapses on the part of the Investigating Officer and minor contradictions in the testimonies of the prosecution witnesses if otherwise strong shall not affect the prosecution case. Accordingly, the appeal shall be dismissed.

7. P.W.1 Siddiq Sk. stated that his younger brother Tafaful Sk expired as a result of fight which took place between the deceased and others over the issue of land. He was absent from his house on the date of the incident and his evidence is based on hearsay.

8. P.W.2 Bazaul Sk was declared hostile by the prosecution.

9. P.W.3 Kishor Kumar Saha was the scribe of the complaint marked as Ext. 1.

10. P.W.4 Sufia Bibi deposed about the disputation over fencing of land between the deceased and the appellant. She further submitted she was not aware of anything, more about the incident nor the cause of death of Tafajul who was his brother-in-law.

11. P.W.5 Dr. Manik Lal Das held the post mortem examination of the dead body of the victim and found the following injuries:

“Multiple small abrasion over back of right hip and lower lip. No other external injury detected. On desection brain and its meanings were hemorrhagic. Stomach was healthy and contained flied.”

12. In his opinion the death was due to effect of ante mortem cerebral haemorrhage. He further opined the cause of injury to be blunt and sufficient to cause death in ordinary course of nature.

13. In his cross examination P.W. 5 stated that abrasion cannot be the cause of death. In case of excitement there is possibility of cerebral attack.

14. P.W. 6 Harenrabi Das was a signatory to the inquest report and had taken the dead body of the victim to Malda Sadar Hospital morgue for post mortem from the mango garden of Sujapur, Jodhpur.

15. P.W.7 Safiar Rahaman stated about the brawl between the victim and Atul Sk and others over the issue of bamboo fencing in the land of Atul Sk when suddenly Tafajul Sk. fell down on the ground and thereafter he was taken to the hospital.

16. In his cross-examination P.W.7 stated that the appellant Atul Sk & Ors. constructed bamboo fencing on their land as per the direction of the Amin. The victim Tafajul Sk. became excited over the raising of bamboo fencing on the land of Atul Sk and fell on the ground.

17. P.W. 8 Fulo Bibi the wife of the victim stated about the altercation that took place between the appellant Atul Sk and her husband. Appellant Atul caught the collar of the shirt of her husband and the other appellants assaulted him with fists, blows and kicks. She rushed to the place in order to save her husband but was prevented by the appellants. She was thrown away by the appellants and Tafajul fell on the ground and became unconscious. Thereafter the appellants left the place. P.W.8 along with her children cried out. Two brothers of P.W.8 came to the spot who were also assaulted by the appellants. The victim was thereafter taken to Silampur hospital by Khatia who ultimately expired.

18. During her cross-examination P.W.8 stated at the time of the incident other villagers were not present and she did not discuss the incident with the other villagers. She further stated she could not say whether her husband became excited or not.

19. P.W. 9 Ramijuddin Sk in his cross-examination stated while he was brushing his teeth, he approached the spot. He did not go to the spot at the relevant time. The evidence of P.W.9 is based on hearsay.

20. P.W. 10 Dr. Koushik Ghosh identified his signature along with injury report marked as Ext. 6.

21. P.W. 11 Rocky Sk. narrated the manner in which the incident of assault took place and thereafter stated to have rushed to the spot which inferred that he reached the spot after the incident of assault took place. He further stated to have been assaulted by the accused persons along with his elder brother Fullu Sk.

22. During his cross-examination he stated that he narrated the police about the incident of assault to have occurred in front of the house of Tafajul on the western side of the kuchcha road which ran from north to south within their village.

23. P.W. 12 Md. Nuhul Islam, who was the Amin deposed to have conducted survey of the land of Tafajul, Atul and 2/3 others. He fixed the poles on the boundary lines and returned to his house after completion of survey of land which was accepted by all the persons without any dispute.

24. P.W. 13 Md. Fullu Sk. stated to have rushed to the dwelling house of the victim. He found his sister Fulo Bibi i.e. P.W.8 and Rocky Sk i.e. P.W.11 crying at that time. He found the victim lying unconscious on the ground and enquired about the reason of his unconsciousness from his sister who stated that the appellants assaulted Tafajul severely. One villager Ramijuddin P.W.9 was also present. P.W.13 and four others shifted Tafajul to Silampur hospital with the help of khatia made of a rope whereat he was declared dead. P.W. 13 further stated that his sister Fulo and brother Rocky were also assaulted.

25. P.W. 14 Sajiruddin Sk heard about the death of the victim when he was at the market. He was declared hostile by the prosecution.

26. P.W.15 Farid Hosen, the Investigating Officer visited Silampur B.P.H.C. and prepared inquest report of the dead body of the victim marked as Ext. 3/2. P.W. 15 did not examine the complainant at the hospital since his statement corroborated his complaint. He examined Dr. Kousik Ghosh of Silampur B.P.H.C. hospital. He visited the place of occurrence and prepared rough sketch along with index containing one page. He seized certain articles as alamats under a seizure list Marked as Ext. 5/1. Thereafter examined the available witnesses under Section 161 Cr.P.C. including the Amin. He arrested the accused persons and forwarded them to the learned Court. He further collected the injury report and the post mortem report. Thereafter, made over the case diary on his transfer to his successor. He had submitted a nil seizure list along with charge-sheet.

27. During his cross-examination he stated that P.W.9 Ramijuddin Sk. did not state before him that Fulo the wife of the victim and her brother Rocky Sk came to the place of occurrence and was assaulted by the accused persons. P.W. 11 did not state before him that Atul caught the collar of the victim Tafajul and both of them fell on the ground. P.W.11 did not state before P.W.15 that in connection with the placing of fence by Atul on the land of Tafajul the incident of assault took place and the rest of the accused persons fell on the body of Tafajul and Atul. P.W. 11 further did not state that his elder brother Fullo Sk. was also assaulted by the accused persons. P.W. 11 also did not mention the name of Latib and Mukulesh as assailants.

28. P.W. 16 Bipul Mozunder had submitted the charge-sheet against eight accused persons under Section 324/325/304/34 of the Indian Penal Code being No. 253/04 dated 13.08.2004.

29. None of the prosecution witnesses described the individual act of the assailants on the victim. The post mortem stated multiple small abrasions over back of right hip and lower lip. No other external injuries were detected. According to P. M. doctor the death of the victim was due to the effect of ante mortem cerebral haemorrhage. He further opined that abrasion cannot be the cause of death and in case of excitement there is possibility of cerebral attack. P.W. 1 the de-facto complainant was not present at the spot when the incident of assault took place. The evidence of Amin (Md. Nuhul Islam) evinced a survey of a land demarcated by installing bamboo fence. The prosecution evidence revealed that appellant Atul was erecting bamboo poles on his land which agitated the victim Tafajul Sk as would reveal through the testimony of the independent witness P.W. 7. P.W. 9 stated that Atul caught hold of the collar of Tafajul and started assaulting him joined by other appellants. P.W. 8 (Fulo Bibi) and her brother Rocky Sk. (P.W. 11) were present at the spot and they were also assaulted and Tafajul fell on the ground.

30. The testimony of P.W. 9 is controverted by him during his cross-examination where he stated that he did not go to the spot at that time. During his cross-examination P.W. 9 stated to have found swelling on the entire face and chest of Tafajul. Such statement of P.W.9 is contrary to the statement of the P.M. Doctor P.W.5 who found multiple small abrasions over back of right hip and lower lip. He could

not detect any other external injury. Accordingly, the evidence of P.W.9 is contradictory and prevaricated. P.W.11 deposed that Atul caught the collar of Tafajul and pulled him. As a result, both Tafajul and Atul fell on the ground. The other seven persons of Atul, fell on their bodies and assaulted with fists and kicks. Thereafter, his sister P.W.8 rushed to the place of occurrence and was assaulted by Atul and seven other persons. P.W.11 further stated P.W.8, his sister was pushed aside by the appellants. Then, he rushed to the spot. He was also assaulted by the accused persons. Thereafter, his elder brother Fullu Sk. came to the spot and the accused persons started assaulting him too. P.W.8 the wife of the victim stated that the appellants assaulted her husband with fists, blows and kicks. She rushed to the spot and tried to save her husband, but was unsuccessful as she was thrown away by the miscreants. Thereafter, her husband fell on the ground and became unconscious. After the accused persons left the place, P.W.8 and her children started to cry. She further stated *“then my two elder brothers Rocky and Fullu came to the spot. But those two elder brothers could not do anything and the eight accused persons also assaulted them.”* The inconsistency in the testimony of the P.W.8 is conspicuous as in the first instance she stated after the appellants left the place her brothers i.e. P.W.11 and P.W.13 arrived at the spot and thereafter stated both her brothers to have been assaulted by the appellants which signified ambiguity. P.W.11 deposed to have been assaulted by the appellants. However, P.W.13 during his cross-examination stated *“on hearing the hue and cry I rushed to the dwelling house of Tafajul. I found my sister Fulo Bibi and my brother Rocky crying at that time. I also found Tafajul*

lying unconscious on the ground. I asked my sister as to what happened and my sister stated that the persons named above assaulted Tafajul severely.” During his cross-examination, P.W.13 stated to have found four/five persons at the spot when he reached there including his brother Rocky and his sister Fulo, Ramijuddin i.e. P.W.9 General and Jhabul. He stayed at the spot for four to six minutes. P.W.13 did not concur with the deposition of P.W.8 and P.W.11 to have been assaulted by the appellants. The discrepancies and disparities in the evidence of P.W.8, P.W.11, P.W.13 yield their evidence to be untrustworthy and unreliable. Evidently P.W.11 and P.W.13 were not present at the place of occurrence. Apart from Ramijuddin, the other two persons named by P.W.13 were not examined. There would have been serious impact on the chest and other parts of the body if the victim fell on the ground on his face, thereafter being overpowered by seven to eight persons. The injury would have been grave and not small abrasions. If the victim had fallen on the ground on his back and had been assaulted by the conglomerate of the assailants with fists, kicks and blows, there would be reflection of such assault on his body, whereas the P.M. Doctor P.W.5 noticed a cut on his lip. During his cross-examination the P.W. Doctor stated *“abrasions cannot be cause of death. In case of excitement there is possibility of cerebral attack.”*

31. Apart from P.W.9 the prosecution did cite any independent witness. P.W.9 went to the spot, however, did not witness the incident of assault. P.W.9 deposed that the brother-in-law of Tafajul namely Rocky i.e. P.W.11 was assaulted by the appellants with fists and blows. Thereafter, he said *“Tafajul fell down on the ground.”* He could not have

seen P.W.11 to have been assaulted by the appellants since P.W.11 reached the spot after the dispute. None of the prosecution witnesses categorically specified the individual role of each of the appellants witnessed by them. P.W.7 stated about the altercations between the appellant Atul Sk and the victim which excited the victim over issue of raising bamboo fencing on the land of appellant Atul Sk who thereafter fell on the ground. P.W.5 the doctor stated the possibility of cerebral attack might have been an excitement which is more probable in the facts and circumstances of this case, disregarding the assault of the victim by the appellants inflicting injuries in the manner described by P.W.8 which should not have resulted in multiple small abrasions as noticed by P.W.5. The ambivalent evidence of P.W.8 cannot be relied upon in case of enmity between the family of P.W. 8 and the appellant Atul Sk, with possibilities of false implications.

32. In order to hold an accused to be guilty and to be punished under second part of the Section 304 of IPC, the death must be caused by the miscreants under any of the circumstances enumerated in the five exceptions to Section 300 of IPC.

33. To make out an offence punishable under Section 304 Part-II of the Indian Penal Code, the prosecution has to prove the death of person in question and such death to be caused by the act of the accused with his knowledge that such act of his was likely to cause death of the victim (AIR 2012 SC 3104). Small abrasions to be found on the body of the victim cannot cause death in the opinion of the P.W.5 the postmortem doctor in cross-examination. Though during examination-in-chief he stated the injuries were sufficient to cause

death in ordinary course of nature. On dissection of the brain and its meninges he found haemorrhage. He did not specifically mention that the haemorrhage was a result of injury inflicted on his head. The knowledge and intension on the part of the appellants to cause grave injury on the body of the victim in order to cause his death was not established by the prosecution.

34. In view of the aforesaid discussion, in the opinion of this Court the prosecution had failed to establish his case and accordingly the appeal is allowed.

35. Connected applications, if there be any, also stand disposed of.

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

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

38. 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.)