

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 349 of 2019

With

CRAN 2 of 2023

Parimal Sarkar

-Vs-

State of West Bengal

For the Appellant: Md. Apzal Ansari, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Mrs. Manasi Roy, Adv.

Heard on : 17.04.2023 and 19.04.2023

Judgment on : 25.04.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against the judgment and order dated 02.04.2019 and 03.04.2019 passed by learned Additional Sessions Judge, Kalna, Purba Bardhaman in Sessions Trial No. 17/2009 arising out of Sessions Case No. 12/2009 convicting the appellant for commission of offence punishable under sections 302/34 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to

pay fine of Rs. 5,000/-, in default, to suffer simple imprisonment for three months.

2. Prosecution case as alleged against the appellant is to the effect that on 19.11.2008 victim had gone to Lakshmipur market to buy medicine for his son. One Bhondul @ Subhash Ghosh along with the appellant and two other unknown persons accosted him and hit him behind his right ear. Victim rushed to the local police station and told the police personnel appellant and two others chopped him. Thereafter, he was removed to State General Hospital at Nabadwip. As his condition was precarious, he was shifted to Shaktinagar Zila Hospital at Krishnagar. On reaching the hospital, he was declared dead. Written complaint lodged by Nilkamal Mondal (P.W. 1) was treated as FIR and Purbasthali Police Station Case No. 190/08 dated 20.11.2008 was registered against the aforesaid Bhondul @ Subhash Ghosh, appellant and others.

3. In conclusion of investigation, charge-sheet was filed. Charges were framed against the appellant and Bhondul @ Subhash Ghosh under sections 302/34 IPC. To prove its case prosecution examined 22 witnesses and exhibited a number of documents. During trial, the said Bhondul @ Subhash Ghosh expired. Defence of the appellant was one of innocence and false implication.

4. In conclusion of trial, learned trial Judge by impugned judgment and order dated 02.04.2019 and 03.04.2019 convicted and sentenced the appellant, as aforesaid.

5. P.W. 1, Nilkamal Mondal is the de-facto complainant. He deposed he had gone to the spot and saw the victim lying with injuries at Lakshmipur Camp. He did not hear the name of the assailants. He was declared hostile. He admitted his signature in the FIR.

6. P.W. 2, Saktinath Biswas is the scribe. He was also declared hostile. He stated he drafted the FIR as per instruction of police.

7. P.Ws. 6, 7 and 8 are police personnel at Lakshmipur Camp.

8. P.W. 6, Prakash Saw stated one person with injury behind his right ear came to the camp. He was shouting "*bachao bachao*". He disclosed Bhondul Ghosh and Parimal Sarkar had assaulted him.

9. P.W. 7 stated the injured victim stated he was assaulted by Bhondul.

10. P.W. 8, Uday Sankar Saw stated that the injured victim told them Bhondul Ghosh had assaulted and Parimal Sarkar had restrained him.

11. P.W. 9, Baneswar Mondal is the uncle of the deceased. Hearing the news, he came to the spot. He heard that appellant had restrained the victim and Bhondul Ghosh had assaulted him. He took the victim to Pratapnagar Hospital.

12. P.W. 11, Manik Mondal is a co-villager. He deposed on arriving at the spot victim told him he was hit by Bhondul and Parimal. He also accompanied the victim to Pratapnagar Hospital.

13. P.W. 13, Ajit Mondal is the father of the victim. P.W. 14 (Gouri Mondal) is his wife and P.W. 20 (Sadhin Mondal) is his own brother. All

of them deposed hearing the news they came to the spot. Victim told them Parimal had restrained him while Bhondul assaulted. Victim was taken to Pratapnagar Hospital and thereafter to Shaktinagar Hospital where he was declared dead. P.W. 14, Gouri Mondal stated there was enmity between Bhondul and her husband.

14. P.W. 18, Dr. Prasanta Sarkar is the doctor who treated the victim at Nabadwip Hospital. He deposed according to patient party one Bhondul and three others had injured him with a *Da* at 3 PM near Lakshmipur Post Office. He found the victim under shock and unconscious. He was bleeding profusely. He found a deep sharp cutting wound on the right side of neck measuring approximately 6" X 3". Injury was grievous. Age of the injury was fresh within four hours and caused by heavy sharp cutting weapon.

15. P.W. 17. Dr. Ajit Kumar Biswas held post mortem over the body of the victim. He opined death was due to shock and haemorrhage resulting from the injuries noted in the post mortem report which was ante mortem and homicidal in nature. He proved the report (Exhibit – 5).

16. P.W. 22, Nirmal Kumar Ganguly is the investigating officer. He went to the place of occurrence, prepared rough sketch map. He examined witnesses. He seized articles from the place of occurrence in presence of P.Ws. 3 and 5 who proved their signatures in the seizure list. He recorded confessional statement of Bhondul @ Subhash Ghosh. He proved the seizure list with regard to seizure of fish knife on the

showing of Bhondul @ Subhash Ghosh. However, the witnesses to the said seizure i.e. P.Ws. 15 and 16 had turned hostile. He submitted charge-sheet.

17. Learned Counsel for the appellant referring to the aforesaid evidence submits there is no eye-witness to the incident. Role of the appellant in the dying declaration as narrated by various witnesses are at variance to one another. His name did not transpire in the injury report prepared by Nabadwip Hospital. Accordingly, he prays for acquittal.

18. Learned Counsel for the State submits appellant was assaulted at Lakshmipur. Soon after the incident he rushed to the police outpost and made dying declaration before P.Ws. 6 and 8. P.W. 8 has disclosed the role of the appellant in the assault. Thereafter, other witnesses i.e. P.Ws. 11, 13, 14 and 20 came to the spot. Victim made dying declaration to them implicating the appellant in the crime. FIR was promptly recorded which also disclosed the role of the appellant. Hence, prosecution is proved.

19. Analysing the submissions at the bar in the light of the evidence on record, it appears that the prosecution case entirely hinges on the oral dying declaration of the victim. P.Ws. 6, 7, 8, 11, 13, 14 and 20 deposed victim made statement to them. P.Ws. 6, 7 and 8 police officials who were present at Lakshmipur Camp. P.W. 6 stated victim came to the police camp in injured condition. He was shouting. He told them Parimal and Bhondul assaulted him. P.W. 8 stated victim told them

Parimal had restrained him while Bhondul assaulted. But P.W. 7 stated victim had only named Bhondul. It is true the police officers are disinterested witnesses. Victim met them immediately after the incident. However, their version with regard to the contents of the dying declaration is not consistent. While P.Ws. 6 and 8 stated that the victim had named the appellant, P.W. 7 claimed he had named only Bhondul. Even the version of P.Ws. 6 and 8 with regard to the role of the appellant in the incident are at variance. P.W. 6 claimed Bhondul and the appellant assaulted the victim but P.W. 8 stated appellant had restrained the victim while Bhondul assaulted.

20. The other set of witnesses who claimed to have heard the dying declaration are P.W. 11, a co-villager and the relations of the victim being P.Ws. 13, 14 and 20. All of them were present in the village when the incident occurred. Evidence has come on record village is at a distance of three kilometres from Lakshmipur. All the witnesses stated after hearing the incident they rushed to the spot. When they came to the spot the victim disclosed the incident to them. Soon thereafter, he was transferred to Pratapnagar Hospital. P.W. 9 is another relation of the victim. He also claimed hearing the incident he had come to the spot from the village and heard victim had made a dying declaration. He did not state that the dying statement was made before him. P.W. 9 had come to the spot at the time when other witnesses i.e. P.Ws. 11, 13, 14 and 20 had arrived at the spot. As per P.W. 9 victim did not make dying declaration when he arrived at the spot. This contradicts the other

witnesses who claimed the dying declaration was made their presence when they came from the village after hearing the incident. This casts doubt with regard to the credibility of their version that the dying statement was made in their presence.

21. Soon thereafter, P.Ws. 9 and 11 took the victim to the Nabadwip State Hospital. P.W. 17 treated the victim at the hospital. He found a sharp cutting wound on the right side of the neck of the victim. He noted victim was unconscious. He recorded in the injury report as per patient party one Bhondul and three others had injured the victim. Name of the appellant is significantly absent in the said document.

22. The aforesaid circumstance strikes at the root of the prosecution case that the victim had made a subsequent dying declaration to his relations and co-villagers who rushed to the spot after hearing the incident. Hence, I do not lend credence to their versions. Even if one holds that the evidence of P.Ws. 6, 7 and 8 with regard to the dying declaration are plausible, vis-à-vis the principal assailant Bhondul, deposition of the said witnesses are at variance with regard to the role of the appellant.

23. As discussed earlier, P.W. 7 stated the victim only named Bhondul as the assailant. Role of the appellant as per P.Ws. 6 and 8 is also not consistent. While P.W. 6 deposed victim stated both Bhondul and appellant assaulted, P.W. 8 claimed victim told them appellant restrained him while Bhondul assaulted. Dying declaration can be the sole basis of conviction provided the same is consistent. When the

contents of the dying declaration as per the prosecution witnesses are at variance to one another vis-a-vis the role of the appellant, it would be hazardous to rely on such evidence to come to a finding of guilt against him.

24. Hence, I am of the opinion appellant is entitled to the benefit of doubt.

25. The appeal is, accordingly, allowed.

26. In view of disposal of the appeal, the connected application being CRAN 2 of 2023 is also disposed of.

27. Appellant shall be forthwith released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

28. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

29. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)