

04.04.2023
S/L. 4
Court No.12
Sourav/
Suvayan

CRA 336 of 2003
In
CRAN 2 of 2004 (Old No. CRAN 1724/04)

In the matter of: **Kalipada Bera & Anr.**

....Appellants.

Mr. Rupayan Deb, *Amicus Curiae*

... for the appellants.

Mr. Prasun Kumar Dutta, Ld. APP
Md. Kutubuddin
Mr. Santanu Deb Roy

... for the State.

1. Heard Mr. Rupayan Deb, learned Amicus Curiae appearing for the appellants and Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor assisted by Md. Kutubuddin and Mr. Santanu Deb Roy, learned Counsels appearing for the State.

2. This appeal arises out of the judgment dated 13.06.2003 and order of sentence dated 16.06.2003 passed by Additional Sessions Judge, 3rd Court, Howrah in Sessions Trial No. IV (OCTOBER) 2000 Convicting the appellants under Sections 324/307/302/34 I.P.C. and sentencing each of them to suffer R.I. for three years and to pay fine of Rs. 3,000/- each for the offence under Sections 324/34 I.P.C. i.d. to suffer S.I. for six months more, to suffer R.I. for ten years and to pay fine of Rs. 5,000/- each for offence under Sections 307/34 I.P.C. i.d., to suffer S.I. for six months more and to suffer imprisonment for life and to pay fine of Rs. 10,000/- each for offence under Sections 302/34 I.P.C. i.d., to suffer S.I. for one year more with further order for concurrent running of the sentences so passed with benefit of set off under Section 428 Cr.P.C.

3. The occurrence happened at about 7.30 p.m. on 10.10.1996. Asto Mondal (P.W. 1) is the widow of deceased Ramesh Mondal. She is the informant. Deceased Ramesh Mondal was working as a hand

cart puller at Aluposta at the relevant time and his widow (P.W. 1) was working at Salkia. Manju Chakraborty (P.W. 8), Mina Bera (P.W. 6) and Anjali Jana (P.W. 5) were also working at Salkia. After finishing the day's work, they availed of a train and got down at Uluberia Railway Station. From there, Ramesh Mondal (deceased), his wife (P.W. 1), Manju Chakraborty (P.W. 8), Mina Bera (P.W. 6) and Anjali Jana (P.W. 5) were walking down to their village by the side of railway line. After walking for about five Minutes, all of a sudden, some miscreants assaulted Manju Chakraborty (P.W. 8) and Mina Bera (P.W. 6). Ramesh Mondal (deceased) rushed to their rescue. He was also assaulted by them with a knife in the left side of his stomach. The miscreants also snatched away two ear rings of Asto Mondal (P.W. 1). Seeing the incident, Anjali Jana (P.W. 5) rushed to the village for help and many villagers gathered at the spot. On information regarding the assault, the I.O. (P.W. 16) came over the spot along with S.I., Shalimar G.R.P.S. (P.W. 11).

3.1. P.W. 16 in course of investigation, visited the spot, prepared rough sketch-map with index, seized some incriminating articles from the spot, recorded the statement of some of the witnesses. He remained absent from 13.10.1996 on medical leave and rejoined on 08.12.1996 (after about two months). The informant, Asto Mondal (P.W. 1) made oral complaint about the incident before the I.O. (P.W. 16) in the same night in her house, which P.W. 11 reduced into writing under his hand and read over the contents of the report to P.W. 1. P.W. 1, thereafter, put her L.T.I. on the report. The said report was, thereafter, sent to the P.S. through Constable (P.W. 15) where P.W. 14, ASI of Police filled up the formal FIR and registered G.R.P.S. Case No. 29 of 10.10.1996. During absence of I.O. (P.W.

16), P.W. 11 arrested appellant no. 2, Sukumar Bera on 16.10.1996 and made prayer for addition of Section 302 I.P.C. in the FIR before the Court as Ramesh Mondal (deceased) had succumbed to the injuries in the night of 10.10.1996. P.W. 16 handed over the charge of investigation on 13.03.1997 on his transfer. Thereafter, P.W. 17 and P.W. 18 took charge of investigation successively but in course of investigation by them nothing substantial in the investigation has happened. Ultimately, P.W. 22 filed charge-sheet against the appellants under Sections 324/307/379/302 IPC on completion of investigation.

4. The prosecution has examined 23 witnesses to prove the charge against the appellants. P.W. 1 is the informant and eyewitness to the occurrence. P.W.s. 6 and 8 are the injured witnesses. P.W. 6 happens to be the mother of P.W. 5 who is also an eyewitness. P.W. 2 is a post occurrence witness. P.W. 3 is a witness to the cremation and he has testified that on the next day of occurrence, P.W. 1 told him about the occurrence implicating the appellants. P.W. 4 is a post occurrence witness and he is also a witness to the inquest over the dead body of the deceased. P.W. 7 is also a co-villager of P.W. 1 but his evidence is of no avail to either of the parties. P.W. 8 as introduced (Supra) is an eyewitness to the occurrence and also a witness to the inquest held by A.S.I. of Police (P.W. 9) over the dead body of the deceased Ramesh Mondal. P.W. 9 besides conducting inquest over the dead body also challaned the dead body to the morgue and thereafter for post mortem and also seized the wearing apparels of the deceased on production by Constable (P.W. 10) in presence of the sweeper (P.W. 19). P.W. 10 is the Constable who took the dead body for post mortem and

identified the dead body before the medical officer (P.W. 23) who conducted post mortem. P.W. 12 is a witness to the seizure of bed headed ticket in respect of injured P.W. 8 on production by the Record Keeper (P.W. 13) of Calcutta Medical College and Hospital. P.W. 20 is the Medical Officer who examined the injured witness, Mina Bera (P.W. 6) and proved the injury report. P.W. 21 is the Medical Officer who had referred injured Manju Chakraborty (P.W. 8) to Calcutta Medical College and Hospital for better treatment. There are several I.O.s as introduced (supra), but P.W.16 is the main I.O.

4.1. Defence plea is one of complete denial and false implication.

5. Mr. Rupayan Deb, learned Counsel for the appellants submits that there is material contradictions in the evidence of P.W. 1 (informant), P.W. 2 (immediate post occurrence witness), P.W.3, P.W.4 and P.W.7 who are testified to have come to know that the appellants had mounted the assault on the deceased and others from P.W.1 on the next day of the occurrence. So far as P.W.s 5, 6 and 8 are concerned, it is submitted by Mr. Deb, learned Counsel for the appellants that the occurrence having happened in darkness, it was not possible for them to recognise the assailants. P.W.s 6 and 5 being wife and daughter respectively of appellant no. 1, Kalipada Bera and they being in inimical terms with appellant no.1, they have tried to rope in appellant no.1 and his brother, Sukumar Bera out of guess that they might have assaulted them. It is further submitted by Mr. Deb, learned Counsel appearing for the appellants that P.W.8 having been admitted to hospital and she having been discharged from the hospital after treatment of 15 (fifteen) days and she having been examined by the I.O. after two

months of her discharge from hospital, her evidence implicating the appellants is also doubtful as by that time there was talk all around the village to the effect that the appellants have committed the crime. It is further submitted that in view of absence of light at the spot P.W.8 also could not have recognised the assailants. Lastly it is submitted by Mr. Deb, learned Counsel appearing for the appellants that when the accused persons were tried for serious offence, it was the duty of the Investigating Officer to record the statement of the witnesses with promptitude to avoid embellishment being influenced by heresy and inferences as made by other people. In the present case, however, some of the witnesses have been examined immediately but many of the witnesses have been examined after about two months of the occurrence as the I.O. remained on medical leave for about two months and no arrangement was made by the Officer-in-Charge of the police station to keep the investigation going in absence of the I.O. (P.W.16).

5.1. Per contra Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor submits that P.W.s 6 and 8 being injured witnesses, their evidence is the best evidence according to criminal jurisprudence and they cannot be disbelieved. It is further submitted by Mr. Dutta, learned Additional Public Prosecutor that P.W.5 in her deposition has testified that they could identify the assailants in the light of the signal post and therefore the possibility of absence of light at the spot to facilitate identification is not at all an issue in the present case. Mr. Dutta, learned Additional Public Prosecutor submits that in view of the clinching evidence on record, learned Trial Court is justified in finding the appellants guilty for the offences charged and the appeal being devoid of any merit be

dismissed.

6. From the evidence of P.W.s. 1, 5, 6 and 8, it is found that all of them have implicated appellant no. 1, Kalipada Bera and appellant no. 2, Sukumar Bera both being brothers, so far as the assault on the deceased, P.W. 6 and P.W. 8 is concerned. Such evidence of the aforesaid witnesses is corroborated by the post occurrence witness P.W. 2 inasmuch as P.W. 2 has testified that he heard from P.W. 1, Asto Mondal that Kalipada and Sukumar (appellant nos. 1 and 2 respectively) assaulted them due to family disturbance. P.W. 3 who is also a co-villager has also testified that on the next day of incident, he heard from P.W. 1 that Kalipada and Sukumar (appellant nos. 1 and 2 respectively) murdered Ramesh Mondal. P.W. 4 is the brother of P.W. 1. He has also testified that on the next day of the occurrence, he met her sister (P.W. 1) and she (P.W. 1) stated before him that Kalipada and Sukumar (appellant nos. 1 and 2 respectively) murdered his 'bhagnipati' (deceased Ramesh). P.W. 7 who is also a co-villager has testified that on the next day of the occurrence, he came to know from P.W. 1 that Kalipada and Sukumar (appellant nos. 1 and 2 respectively) murdered her husband in the railway line.

7. When the evidence of the aforesaid witnesses are read in conjunction with their cross-examination in their entirety, it is found that the FIR lodged by P.W. 1 is against unknown persons. There is no mention of name of any assailants in the FIR. P.W. 1 has further testified in her cross-examination that she had not disclosed the names of the appellants i.e., Kalipada and Sukumar before the police owing to fear. She has further testified that she met local people but owing to fear she did not disclose the names of

the appellants to her village people.

8. P.W. 2 who can be taken as a corroborative witness being a co-villager in his cross-examination has testified that he was examined by the I.O. in the night of occurrence itself but at that time, he could not disclose the names of the appellants as he had not talked with Asto Mondal (P.W. 1) by then. P.W. 2 is the witness who had rushed to the spot on hearing hue and cry and saw Ramesh, Manju and Mina lying there in injured condition. He is also the person who presumed that injured Ramesh has died. He is the person who accompanied others to Uluberia Hospital where P.W.s 6, 8 and the deceased were taken for treatment and he having scope to talk about the assailants at the spot has testified that he had no scope to talk with Asto Mondal (P.W. 1) and, therefore, he did not name the appellants in his statement recorded by the police. Such an explanation of P.W. 2 cannot be believed inasmuch as P.W. 1 herself has testified in her cross-examination that she had not stated before any villager regarding the names of the appellants.

9. Evidence of P.W. 3 also is on the same footing. P.W. 3 has testified in his cross-examination that when Asto Mondal (P.W. 1) was crying, she disclosed the name of appellants Kalipada and Sukumar (appellant nos. 1 and 2 respectively) and thereby he heard the same. So on the basis of soliloquie while crying P.W. 1 uttered the names of the appellants and P.W. 3 came to know about the name of the assailants but he has further testified that he has not been examined by the police though his name, etc., were taken by the police. The incident of aforesaid soliloquie of P.W. 1 took place on the next day of occurrence according to P.W. 3. Such evidence of P.W. 3 when P.W. 1 was completely silent about the identity of the

assailants and has *ipse dixit* testified that she did not disclose the names of the appellants before the villagers out of fear, cannot be believed without a pinch of salt. P.W. 4 who has been examined as a corroborative witness to the evidence of P.W. 1 in his cross-examination, has testified that he was examined by the I.O. after about two months but he did not tell the names of the appellants before him (I.O.). In view of such omission by P.W. 4, his evidence to the extent that on the next day he met his sister (P.W. 1) and his sister (P.W. 1) told him that the appellants murdered Ramesh cannot be believed. P.W. 7 is another co-villager who is testified to have heard from P.W. 1 about the appellants who have committed the murder of Ramesh. P.W. 7 also has not stated before the I.O. though he was examined on 11.10.1996 (next day of the occurrence) that some miscreants stabbed the victim at about 7.30/8.00 p.m. on 10.10.1996 or that he heard from Asto Mondal (P.W. 1) that Kalipada and Sukumar (appellant nos. 1 and 2 respectively) stabbed the victims, i.e., Ramesh, Mina and Manju. In view of such material omission, which amounts to contradictions evidence of P.W. 7 also cannot be taken as a corroboration to the evidence of P.W. 1 who has filed FIR against the unknown persons though allegedly an eyewitness to the occurrence.

10. P.W.s. 5, 6 and 8 are the remaining witnesses who were present at the spot out of whom of P.W.s. 6 and 8 had received injuries in the alleged transaction. P.W. 5 is the daughter of appellant No. 1, Kalipada Bera and P.W. 6 is the wife of appellant No. 1, Kalipada Bera. P.W. 8 was examined by the I.O. after about two months and 15 days of the occurrence as she in her cross-examination has testified that she was examined by the I.O. after

two months of her discharge from the hospital. She (P.W.8) has, however, implicated the appellants so far as the occurrence is concerned. Same is the evidence of P.W.s. 5 and 6.

11. P.W.6 is the wife of appellant no.1, Kalipada Bera. Kalipada Bera and P.W.6 were blessed with two sons and two daughters. Anjali Jana (P.W.5) is the eldest daughter of the couple. She was married by the time her evidence was recorded by trial Court, but at the time of occurrence she (P.W.5) was in her maiden state and was working with her mother at Salkia and other places. The house of P.W.6 is situated contiguous to the house of Ramesh Mondal (deceased). According to her (P.W.6) at the spot at about 7:45 p.m., Sukumar stabbed Manju (P.W.8) by knife and that then Ramesh (deceased) rushed to rescue Manju (P.W.8) and that at that time Kalipada (appellant no.1) stabbed Ramesh by knife in his left side stomach and that Kalipada also stabbed her (P.W.6) by knife in the backside of her body and that two earrings of Asta (P.W.1) was snatched away by her husband Kalipada and then Anjali (P.W.5) rushed to the village and raised hue and cry; Thereafter many villagers came to the spot of occurrence. She (P.W.6) in her examination-in-chief has further testified that she narrated the incident to the local people and also narrated the incident to police on Friday i.e. 11.10.96.

11.1. Peculiarity of the evidence of P.W.6 is that she in her examination-in-chief is testified to have narrated the incident before the local people and she has also testified that Anjali (P.W.5) seeing the occurrence rushed to the village and raised hue and cry. None of the independent witnesses examined in the case i.e. P.W.s 3, 4 and 7 has whispered a word that hearing hue and cry from P.W. 5

(Anjali) any of them rushed to the spot or they had heard about the assault by the appellants from the mouth of P.W.6. P.W.2 and P.W.4 are the immediate post occurrence witnesses who were there at the spot immediately after the occurrence. P.W.2 has testified that Bijali (we think the name of Anjali has been wrongly typed as Bijali in P.W.2's deposition) created hue and cry in the locality and stated that 'Bachao Bachao' and Ramesh, Manju and Mina were assaulted. But P.W.2 has not whispered a word that he heard anything from either from Anjali (P.W.5), Mina (P.W.6) or from Manju (P.W.8) regarding the appellants mounting the assault. He rather has testified that he heard from Asta Mondal (P.W.1) on the next day of the occurrence that Kalipada and Sukumar (appellant no.1 and 2 respectively) assaulted them due to family disturbance. P.W.2 is specific in his evidence that Anjali only raised hue and cry that the injured persons and the deceased were assaulted. There is nothing in his evidence to show that Anjali had taken the names of the appellants. On the other hand P.W.4 who is also an immediate post occurrence witness and was present at the spot immediately after the occurrence, is completely silent about hue and cry raised by Anjali. He has only testified that hearing hue and cry he came out and went to the post of occurrence. He is also silent about the fact as to whether Mina Bera (P.W.6) as claimed by her said before him (being a co-villager) about the identity of the assailants. P.W. 7 though an independent witness had not gone to the spot.

12. P.W.5 who is the daughter of appellant no. 1, Kalipada, has testified in the same fashion as P.W.6 with a slight variation to the extent that Sukumar, appellant no. 2 at first assaulted Manju (P.W.8) by knife and that when her mother Mina Bera (P.W.6) and

Ramesh Mondal (deceased) approached to rescue her (P.W.8) Kalipada (appellant no.1) stabbed by knife Ramesh Mondal (deceased) in the left side stomach and her mother Mina Bera (P.W.6) in her backside and that as a result of such assault Ramesh Mondal and her mother, Mina Bera, fell down on the ground. She has further testified that seeing the incident, she rushed to the village and called the local people from the village. In her cross-examination, she has testified that she told the village people that her father and her paternal uncle stabbed by knife to her mother, Manju and Ramesh Mondal. She has further testified that she also told this fact to Timir Chakraborty, Bhoglu and others of her village. Both Timir Chakraborty and Bhoglu have not been examined by the police. P.W. 5 has further testified that her mother (P.W.6) and Manju (P.W.8) told before the Doctor that the appellants attacked them by knife. Regarding the presence of light P.W.5 has testified that there was no light in the railway line but there was flash of railway signals (red and blue) where they had been walking. P.W. 8 who *ipse dixit* has testified that she was examined by the I.O. after two months of her discharge from hospital, in her evidence-in-chief has testified about the manner of assault in the same fashion as testified by P.W.5. In her cross-examination she has testified that she did not disclose the name of the appellants before the Doctor as she was ill.

13. From the evidence of P.W.s 5 and 6 (daughter and wife respectively of Kalipada), it is found that there was frequent quarrel between the husband and wife i.e. Kalipada and Mina (P.W.6) and P.W.5 has further testified that Kalipada had made incestual attempt on her and her 'Pisima' named Chhabi Bera. It is further

revealed from the evidence of P.W.s 5 and 6 that prior to three years from the date of occurrence appellant no.1, Kalipada was living separately in another village by constructing a hut in his own land. Such evidence of P.W.s 5 and 6 is corroborated by P.W.2 when he testifies that he does not know correctly the appellants but he knows their wives.

14. There is no evidence on record to the effect that after the separation between Mina Bera and appellant no.1, Kalipada prior to three years from the date of occurrence, there was any quarrel between them or Kalipada had ever come to the house of Mina (P.W.6) during the period.

15. From the aforesaid evidence on record, we do not find any immediate cause that prompted Kalipada Bera and Sukumar Bera (appellant nos.1 and 2 respectively) to choose the date of occurrence to mount the assault on Mina (P.W.6). Further a question which puzzles our mind, is that if the appellants had intention to assault Mina (P.W.6) then why they assaulted Manju (P.W.8) who is in no way related to Kalipada and Sukumar or to Mina (P.W.6). In our considered view, assuming *arguendo*, the appellants were the assailants, they assaulted Manju (P.W.8) first on misidentification as Mina (P.W.6) owing to darkness and when Ramesh Mondal (deceased) and Mina (P.W.6) rushed to rescue of Manju (P.W.8), they were assaulted without knowing their identity. We do not find from the evidence on record any other reason as to why Manju (P.W.8) was assaulted or what are the motive of the appellants (if they are the real culprits) to attack Manju (P.W.8) when they had a grudge to grind against Mina (P.W.6) or Anjali (P.W.5).

16. Coming to the question of presence of the light at the spot,

admittedly in the month of October in this part of India darkness engulfs early and by 7:30/7:45 p.m. it becomes dark prohibiting identification even of a known person. There is no positive evidence from the side of prosecution regarding the presence of light at the spot. P.W.s 1, 6 and 8 or immediate post occurrence witnesses, namely, P.W.2 or P.W.4 have not whispered a word about the presence of light at the spot. The I.O. P.W.16 or P.W. 17 has also not whispered a word about the presence of light at the spot. Admittedly, there is no mention of presence of light post or signal post near the spot in the sketch map prepared by the I.O. P.W.5 in her examination-in-chief has also not testified that she identified the appellants by the light of the signal post. In her cross-examination only she has testified that there is no light in the railway line but there was flash of railway signal (red and blue) where they had been walking.

16.1. Signal posts of railway are generally at a higher level to catch the glimpse of the driver of the train from a distance. Signal posts are not focusing light. But they are designed to attract the attention of the driver of the train from a particular distance. Further red and blue lights are not conducive for identification as there are chances of misidentification also in such lights. Lastly, as we have marked, focus of signal post is never towards the ground to facilitate identification but it is focussed straight to catch the glimpse of the train driver. In view of such facts we are constrained to hold that the light spoken of by P.W.5 was not sufficient for identification in darkness in absence of positive evidence by the prosecution about the presence of light or the day of the fortnight and the time of rising of the moon. Had there been light facilitating identification

there would not have been so much omission and contradiction in the evidence of the witnesses (as discussed *supra*) and F.I.R. could not have been lodged against unknown assailants.

17. In view of our discussion *supra* we are of the view that P.W.s 5 and 6 having a presumption in their mind for long enmity against the appellants might have happened to think that the assault was mounted by them though there was no light for facilitating identification and their words having spreaded in the village, the appellants might have come to be labelled as the assailants on the basis of version of P.W.5 who alone was there in the village. If the assailants would have been identified at the spot as testified by P.W.6 that she told the names of the appellants before the villagers who rushed to the spot, P.W.1 (informant) must have come to know about the assailants and she must not have lodged the FIR against unknown persons. The explanation of P.W.1 to the effect that she did not disclose the names of the appellants out of fear, is difficult to accept inasmuch as she being the neighbour of Mina (P.W.6) must have proper knowledge about the appellants also and there was no point for her fear after the villagers gathered there and police also came immediately. Taking into consideration all the aforesaid facts, we are of the view that the appellants are entitled to get benefit of doubt especially in view of the contradictions in the evidence discussed *supra*.

18. Accordingly, the impugned judgment and order of sentence are set aside and consequently the appeal is allowed.

19. From the order dated 19.10.2004 passed by Division Bench of this Court, we find that the appellants were granted bail by this Court to the satisfaction of the Chief Judicial Magistrate, Howrah

but learned Amicus Curiae has no knowledge as to whether the appellants have availed the benefit of bail or not. Mr. Dutta, learned Additional Public Prosecutor is also not in a position to say whether the appellants are on bail or in custody.

20. In view of such fact, each of the appellants be discharged of the bail bond, if they are on bail. But if they are in custody each of them be released forthwith if their detention is not required in any other case.

21. The appeal being **CRA 336 of 2003 and CRAN 2 of 2004 (Old No. CRAN 1724 of 2004)** are accordingly disposed of.

22. LCR be sent down to the Trial Court along with a copy of this Judgement.

23. Urgent Xerox certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

