

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Joymalya Bagchi
And
The Hon'ble Justice Ajay Kumar Gupta

CRA 491 of 2015

Sambhu Sardar
-Vs-
State of West Bengal

With

CRA 391 of 2018

Pagla Barui alias Pagal
Vs.
The State of West Bengal

For the Appellant
(CRA 491 of 2015) : Mrs. Nasra Ali Rahman

For the Appellant
(CRA 391 of 2018) : Mr. Fazlur Rahman
Mr. Argha Banerjee

For the State : Mr. Nuguive Ahmed, learned APP
Ms. Amita Gaur

Heard on : **13.07.2023**

Judgment on : **13.07.2023**

Joymalya Bagchi, J. :-

1. Appeals are directed against the judgment and order dated 29.08.2013 and 31.08.2013 passed by the learned Additional District &

Sessions Judge, Fast Track Court No. 1, Barrackpore in Sessions Trial No. 2(1)2012 FTC-1 arising out of Sessions Case No.237 of 2011 convicting the appellants for commission of offence punishable under Sections 302/34 of the Indian Penal Code and under Sections 25(1-A) and 27 of the Arms Act and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- in default to suffer simple imprisonment for six months for the offence punishable under Sections 302/34 of the Indian Penal Code, to suffer rigorous imprisonment for seven years and to pay a fine of Rs.2000/- in default to suffer simple imprisonment for three months for the offence punishable under Section 25(1-A) of the Arms Act and sentence to suffer rigorous imprisonment for seven years along with fine of Rs.2000/- each in default to suffer simple imprisonment for three months for the offence punishable under Section 27 of the Arms Act. All the sentences shall run concurrently.

2. The prosecution case, as alleged against the appellants, is to the effect that at 9:00P.M. on 07.04.2017 appellants with one Babai and others had came to the residence of Subhash Yadav, a milk vendor (PW 1) and called his son Puglu @ Lalu. They took him to a pond near Gosala Math. Soon thereafter, Subhash Yadav heard sound of bullets. He along with others came to the pond and found his son Lalu lying with bleeding injuries. His younger son, Raju Yadav and others shifted to the victim to Ghola Hospital where he was declared dead. One Babu Yadav, his brother's son, was near the place of occurrence and had witnessed the incident. He knew the miscreants who committed the crime.

3. On the written complaint of Subhash Yadav (PW 1) Khardah Police Station Case No. 202 of 2011 dated 08.04.2011 under Sections 302 of the Indian Penal Code along with Sections 25/27 of the Arms Act was registered against Pagla Barui, Sambhu Sardar and one Babai. In the course of investigation the appellants i.e. Pagla Barui and Sambhu Sardar were arrested. It is alleged Pagla Barui made a disclosure statement leading to the recovery of an improvised shorter pipegun and an empty cartridge from Amarabati playground. Postmortem report showed that the victim had died due to gunshot injury. Ballistic expert opined the pipegun was in working condition and cartridge could have been fired from the said arms. Babai could not be arrested and was declared as an absconder.

4. Charge-sheet was filed against the appellants and the case was committed to the court of sessions. Charges were framed under Sections 302/34 of the Indian Penal Code against the appellants and under Sections 25/27 of the Arms Act. They pleaded not guilty and claimed to be tried. Prosecution examined 15 witnesses to prove its case and exhibited a number of documents. The defence of the appellants was one of innocence and false implication.

5. In conclusion of trial, the learned Trial Judge by the impugned judgment and order dated 29.08.2013 and 31.08.2013 convicted and sentenced the appellants, as aforesaid.

6. I have considered the evidence on record.

7. PW 1 (Subhash Yadav) is the father of the deceased. He deposed on 07.04.2011 at around 9.00 to 9.15 P.M. his son Lalu had been called to

Gosala Math by the appellants and one Babai. Soon thereafter, he heard sound of firing of bullets. He rushed to Gosala Math and found his son lying beside the tank known as Satish Pukur. He along with his two sons Raju and Gopal and his wife Asha shifted the victim to Gholra Hospital. There he was declared dead. Police was intimated. He lodged written complaint which was scribed by PW 7, Subhendu Bhattacharya. He signed the inquest report.

8. PW 2 (Gopal Kumar Yadav) is the son of PW 1 and the brother of the deceased. He corroborated his father that the appellants and one Babai had come to their house and had taken away his brother. Soon thereafter he heard sounds of bullets. He went to the spot and found his brother was lying in bleeding condition. They took him to Panihati General Hospital. On the way his brother stated the appellant and Babai had killed him.

9. PW 3 (Asha Devi Yadav) is the mother of the deceased. She stated that on the way to the hospital her son stated appellants had killed him. She, however, was silent with regard to the fact that the appellants had come to their residence and taken away the victim. She stated that one Babu Yadav came to their house and informed them about the incident. He did not disclose the names of the appellants.

10. P.W 4 (Rana Yadav) is the wife of the deceased. She corroborated PWs 1 and 2 and stated that the appellants had taken away the victim.

11. P.W 5 (Raju Yadav) is another brother. He stated he was in Gosala Math and heard the sounds of firing. He saw the appellants run away from

the spot. He returned to his residence and informed the incident to his parents and sister-in-law.

12. PW 6 (Dinonath Yadav) is a reported witness.

13. PW 13 (Deb Narayan Ganguly) is the ward Master attached to Panihati General Hospital. He deposed on 07.04.2011 the Emergency Medical Officer had noted that a dead body was brought to the hospital. Police was informed. The relations identified the body as that of Lalu Yadav. Police came to the spot and prepared inquest.

14. PW 12 (Sukumar Ghosh) is an ASI of police who conducted inquest over the body of Lalu Yadav. He proved the inquest report. After inquest body was sent for postmortem examination.

15. PW 10 (Dulal Krishna Das) conducted postmortem over the body of the deceased Lalu Yadav. He found the following injuries :

1. *One abrasion $\frac{1}{2}$ inch x $\frac{1}{2}$ inch on the back of the right elbow.*
2. *One bruise 2 and half inch x 1 inch on the back of the left wrist.*
3. *One abrasion $\frac{1}{2}$ x $\frac{1}{2}$ on the back of the left elbow.*
4. *One abrasion $\frac{1}{3}$ x $\frac{1}{4}$ inch on the left side of the lower neck.*
5. *One gun shot wound of entry $\frac{3}{4}$ x $\frac{1}{2}$ inch into bone immediately below the route of the left ear line 5 and half inch to the left from the anterior mid line, 6 and $\frac{1}{2}$ inch below the top of the head and 62 and $\frac{1}{2}$ inch below the left heel. The wound track goes upward and backward and to the right to a wound of exit. 4x1 and half inch into bone in the right side of the occipital area lying 2 inch in front of the post mid line, 6 inch below the top of the head and 63 inch above the*

right heel associated with echymosis of the scalp around the wound.
The wound of entry is associated with blakish discolouration of the
margin and associated with echymosis scalp around the wound.

16. He opined death was due to the effect of ante mortem injuries homicidal in nature. He further opined the injury nos. 1 to 4 may have been caused by fall from height or physical assault. The injury no. 5 may have been caused by firearm.

17. PW 14 (Brojo Gopal Sharma) is the investigating officer. He deposed one GDE No. 621 dated 07.04.2011 was lodged by Officer-in-Charge of Khatra Police Station. In the General Diary it was noted some unknown persons fired at Puglu Yadav at Gosala and he was taken to Ghola Hospital. He went to the place of occurrence. He prepared sketch map with index. He recorded statement of the witnesses. He seized blood stained earth and sample earth. He arrested the appellants. He could not arrest Babai Yadav. He recorded the statements of the accused persons. On 15.04.2011 he again recorded statements of Pagla Barui. Pursuant to his statement he conducted raid at Amarabati Playground and as per the identification of the accused he recovered an improvised shutter pipegun loaded with empty cartridge. He prepared seizure list. He obtained postmortem report and inquest report. He submitted charge-sheet.

18. PW 15 (Dr. S. Dhabal) is the Assistant Director, FSL, Belgachia. He proved the ballistic report. The report stated the improvised firearm was in working condition and had been fired previously. The empty cartridge was fired through the firearm.

19. Evidence on record shows there is no direct evidence implicating the appellants in the murder. It has been strongly urged that the best evidence in the case i.e. Babu Yadav was withheld. It is contended in the FIR that he has been cited as an eye-witness. On the other hand, learned Counsel for the State submits Babu Yadav did not disclose the names of the miscreants and his examination has not affected the unfolding of the prosecution case.

20. It may be profitable to set out the relevant portion of the FIR with reference to Babu Yadav. In the FIR Subhash Yadav (PW 1) stated as follows:

“At the time of the incident, Babu Jadav, my brother’s son was near the place of incident and he witnessed all. He knew well three of the persons mentioned above who killed my son. He can recognise the others of that gang.”

21. The aforesaid contents of the FIR would give an impression that Babu Yadav had witnessed the incident and was aware of the identity of the appellants.

22. PW 3, mother of the victim, deposed the said Babu Yadav had come to their house and disclosed the incident. She stated Babu Yadav did not disclose the names of the miscreants. Investigating officer (PW 14) had examined Babu Yadav and recorded his statement under Section 161 of the Code of Criminal Procedure.

23. In the light of the aforesaid materials on record it appears Babu Yadav was near the place of occurrence and had witnessed the incident. Immediately thereafter, he rushed to the residence of the victim and intimated his relations regarding the incident. Though the said witness was examined during investigation for reasons best known to the prosecution he

was withheld. In this backdrop, this Court is inclined to draw an adverse inference against the prosecution for withholding a vital witness who as per FIR appears to be an eye witness.

24. Instead of relying on the deposition of Babu Yadav, prosecution sought to prove its case through circumstantial evidence. Even there the prosecution suffers a setback. One of the most vital incriminating circumstance, namely, oral dying declaration of the victim appears to rest on shaky ground. It is the prosecution case that the victim Lalu Yadav while being taken to the hospital had implicated the appellants in the murder but (PW 1) who had accompanied his son to the hospital is completely mum with regard to this vital circumstance. Even in his FIR there is no reference to an oral dying declaration made by the victim.

25. It is true other witnesses namely PWs 2, 3 and 5 who accompanied the victim to hospital have spoken about the dying declaration. But PW3 has stated about the dying declaration for the first time in Court. She was silent with regard to such fact in her earlier statement to police. Version of PWs 2 and 5, brothers of the deceased with regard to so-called dying declaration are inconsistent to one another vis a vis its contents. While PW 2 claimed deceased named appellants and one Babai as the miscreants, PW 5 claimed he had only named Pagla Barui and no one.

26. In view of the aforesaid contradictory and inconsistent nature of evidence with regard to dying declaration and its significant absence in the FIR and deposition of PW 1, I am of the opinion prosecution has not proved this circumstance beyond doubt.

27. Another circumstance relied by the prosecution namely recovery of weapon of offence i.e. improvised pipe gun and empty cartridge on the leading statement of Pagla Barui has also not been proved. Investigating officer PW 14 claimed Pagla Barui made a disclosure statement leading to the recovery of the aforesaid arms and ammunitions from Amarabati play ground. But the said disclosure statement has not been exhibited. PWs 8 and 9 independent witnesses to the seizure have not identified the appellants as the accused persons who were present at the time of recovery. Recovery of the fire arm and cartridge was made from a different place than the place of occurrence i.e. pond situated in Gosala Math. These sketchy evidences on record does not inspire us to hold that the fire arm and the cartridge was recovered from the leading statement of Pagla Barui or that the same was used for the commission of offence.

28. The only circumstance which the prosecution could claim to be of substance is that the appellants and one Babai had called the victim from his residence immediately prior to the incident. This fact was deposed by the family members namely father PW 1, brother PW 2 and wife PW 4. Strangely, mother of the victim (PW 3) who was also present in the house is completely silent with regard to such fact.

29. I am also not convinced with the version of PW 5 that he was present at the Gosala Math and had seen the appellants run away. He claimed he returned home and informed the incident to his parents and sister-in-law. None of the said relations corroborated him. On the other

hand, the mother of the victim (PW 3) claimed they had heard about the incident from Babu Yadav who has not been examined in the case.

30. For the aforesaid reasons we are of the opinion prosecution has not been able to establish the vital and incriminating circumstances beyond doubt. Babu Yadav who appears to have been cited as an eye-witness to the incident has been withheld. Accordingly, we are of the opinion prosecution has not produced the best evidence and has failed to prove its case beyond reasonable doubt. Appellants are entitled to the benefit of doubt and are acquitted.

31. The appeal is, accordingly, allowed.

32. The appellants namely Sambhu Sardar and Pagla Barui alias Pagal shall be 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.

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

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

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)