

13.01.2023
S/L. 10

Court No.12
Suvayan/
Sourav

CRA 728 of 2006

In the matter of: **Amiya Majilla**

....Appellant.

Mr. Asim Kr. Niyogi

...for the appellant.

Mr. Swapan Banerjee

Ms. Purnima Ghosh

...for the State.

1. Heard Mr. Asim Kr. Niyogi, learned Counsel for the appellant and Ms. Purnima Ghosh led by Mr. Swapan Banerjee, learned Counsel for the State.
2. The judgment passed by learned Additional Sessions Judge, Fast Track Court, 1st Court, Burdwan in Sessions Case No. 157 of 2005/Sessions Trial No. 36 of 2005 is impugned by the appellant in this appeal. The appellant was convicted under Section 302 IPC and he was sentenced to suffer imprisonment for life and to pay fine of Rs. 5,000/- in default to suffer R.I. for six months more.
3. The prosecution case as found from the record is that on 13.04.2002 at about 8.30 p.m., the deceased Ashok Pramanik left the house with the appellant Amiya Majilla @ Bhomla for collection of due money from different places. On the next day P.W. 12, wife of the deceased came to know from two of her co-villagers that her husband has been chopped by the side of a tank at Karatpore. Thereafter, she along with her brother-in-law went to the Burdwan Hospital and found her husband in seriously injured condition.
4. On the basis of report submitted by Provat Tah, P.W. 6 the case was registered by the I.O., P.W. 26. He took up the investigation, examined the witnesses, sent the dead body for

postmortem, made incriminating seizures and on completion of investigation filed charge-sheet against the appellant for offence under Section 302 IPC.

5. Prosecution examined 26 witnesses to prove the charge. Nobody having witnessed the occurrence, the case is based entirely on circumstantial evidence. The relevant witnesses to the two circumstances sought to be proved by the prosecution are P.W. 12, wife of the deceased, P.W.s 6, 7, 8 and 11. Some medical officers have also been examined, whose evidence we do not think material for disposal of this appeal.

Defence plea is one of complete denial but no evidence has been adduced by the defence.

6. Learned Court below in finding the guilt of the appellant has relied on the evidence of the aforesaid witnesses and the statement of P.W. 12 recorded by the Magistrate under Section 164 Cr.P.C. vide Exhibit 8.

7. Mr. Niyogi, learned *amicus curiae* appearing for the appellant submits that learned Trial Court has relied on two circumstances, viz., i) the deceased was last seen together in the company of the appellant by P.W. 12; ii) the deceased made oral dying declaration before P.W.s 6, 7, 8 and 11 implicating the present appellant in the offence alleged. It is further submitted by Mr. Niyogi that the P.W.s, 6, 8 and 11 have been materially contradicted themselves under Section 145 of the Evidence Act read with explanation to Section 162 Cr.P.C. and P.W. 7 has turned hostile beyond repair.

8. Ms. Ghosh, learned Counsel for the State on the other hand

supported the impugned judgment and submits that there is no infirmity in the judgment impugned and the same be affirmed.

9. We proposed to take up the factum of oral dying declaration by the deceased first as that is the most vital evidence sought to be proved by the prosecution.

P.W. 6 in his evidence has testified that on 14.04.2002 at about 8.30 p.m. he along with others were playing in Kishalaya Pathagar in their village Karatpore; at that time they heard shouts 'bachao, bachao'. He along with 7-8 persons rushed to the spot and saw that one unknown person is lying there with his intestine out. Being asked by him in presence of others that injured person introduced himself as Ashok Pramanik, a resident of Kankuri and stated also that his friend Amiya Majilla (the present appellant) of the self-same village assaulted and injured him. Thereafter they took the injured near the Pathagar and from there they took him to Burdwan Hospital by a Maruti van. In his cross-examination, P.W. 6 has stated thus:

XXX XXX XXX XXX

"We wrote down what the injured person stated to us"

XXX XXX XXX XXX

"... I did not hand over to the same investigating officer the paper on which I wrote down the statements of the injured person."

From the aforesaid testimony of P.W. 6 in his cross-

examination, it is clear that whatever was stated by the deceased was taken in writing by P.W. 6 and, therefore, that writing became the primary and the best evidence of dying declaration by the deceased. Said writing having not been produced by P.W. 6 before the police and having not been exhibited before the Court, it is to be held that the best evidence on this score has been withheld by the prosecution. Though, we do not dismiss the evidence of P.W. 6 in its entirety on this score alone. Let us find out whether he is corroborated by any other witness, who was present at the scene.

10. P.W. 7 is another witness to the alleged dying declaration by the deceased but he has turned hostile as he posed himself as a post-occurrence witness during his examination-in-chief.
11. P.W. 8 is yet another witness who has vividly testified about the manner in which the deceased introduced himself when asked by them and how he received the injuries. In his cross-examination, however, P.W. 8 has testified:

xxx xxx xxx xxx

“I did not state to police that I asked the injured person as to why he was in such condition.

I did not state to police that the injured person stated to us that his friend Amiya Majilla assaulted him and fled away by a motorbike.”

From such evidence of P.W. 8 also it is found that he has

materially contradicted himself under Section 145 of the Evidence Act read with explanation to Section 162 Cr.P.C.

12. P.W. 11 is another witness to the dying declaration. In his examination-in-chief he has testified that on being asked by him about his name and address the injured stated to him further that his friend Amiya Majilla took him to Burdwan to pay him money and took him there (to the place of occurrence) and after assaulting him with bhojali fled away by Hero Honda motorbike. In his cross-examination P.W. 11 has stated thus:

XXX XXX XXX XXX

“I did not state to the same I.O. that being asked by me at the place of his lying the injured person stated to me his name and address.

I did not state that to the same I.O. that the injured person stated to me that his friend Amiya Majilla took him to Hurdwan stating that he would pay him (injured person) money and taking him to his place of lying assaulted him with vajali and fled away by Hero Honda motor cycle.”

From the aforesaid cross-examination it is clear that this witness has also been materially contradicted under Section 145 of the Evidence Act read with explanation to Section 162 Cr.P.C.

13. It is not more *res integra* that when the credit of a witness is to be impeached, different methods have been provided in the Evidence Act. One of the methods is to confront the witness with his previous statement. If he is denied to have stated the

fact what he has testified in his examination-in-chief, in his previous statement before the police, the credit of the witness is held to have been impeached under Section 155 (3) Evidence Act if it is a material contradiction according to explanation in Section 162 Cr.P.C. or an omission of material facts, which amounts to contradiction. However, if such witness denied the fact of having made the statement what he has stated in the chief even after confrontation, said statement along with the examination-in-chief of the witness is confronted to the I.O. and he is asked as to what the particular witness had stated before him or omitted before him in course of recording of his statement under Section 161 Cr.P.C. On conjoint reading of the evidence of the witness and the evidence of the I.O., a Court has to reach of finding as to whether credit of the witness has been impeached or he has been contradicted in material particular.

14. From the discussion (Supra), we are clear in our mind that P.W.s 8 and 11 have contradicted themselves in material particular by stating something new before the Court for the first time during their examination-in-chief. So far as P.W. 6 is concerned, he having suppressed the very primary evidence of dying declaration, his evidence *per se* should not be accepted without corroboration. P.W. 6 himself had testified that he had written down what was stated by the deceased but that written script was not handed over to the I.O. and was not exhibited in Court.
15. In view of our discussion (Supra), we rather loath to accept the

evidence of the prosecution regarding the alleged oral dying declaration made by the deceased before P.W.s 6, 8 and 11 and are constrained to hold that prosecution has failed to prove the factum of oral dying declaration by the deceased.

16. After we eschewed the proof regarding oral dying declaration, in our discussion (Supra), the only circumstance that remains on record is to the effect that the deceased was last seen in the company of the appellant in the evening of the previous day by P.W. 12 (wife of the deceased).
17. Even if we accept the circumstance to have been proved by the evidence of P.W. 12, the circumstance of 'last seen together' is such a circumstance which has potency to be a link of a chain consisting of other circumstances, but same when proved as a solitary circumstance cannot be made the basis of conviction in a criminal trial.
18. Regard being had to the facts and submissions, in fine we hold that the conviction of the appellant under Section 302 IPC along with the consequent sentence are liable to be set aside.
19. Accordingly, the impugned judgment and order of sentence passed by learned Additional Sessions Judge, Fast Track Court, 1st Court, Burdwan in Sessions Case No. 157 of 2005/Sessions Trial No. 36 of 2005 dated 26.10.2006 and 27.10.2006 are hereby set aside.
20. Accordingly, the appeal is allowed.
21. The appellant be released forthwith from custody if his detention is not required in any other case.
22. Department is directed to send a copy of this order forthwith to

Superintendent, Burdwan Correctional Home or to the Correctional Home where the appellant is lodged after due enquiry from the concerned police station.

23. Department is also directed to send a copy of this order forthwith to the Secretary, DLSA, Purba Burdwan for action needful at his end for early release of the appellant.
24. Accordingly, the appeal being **CRA 728 of 2006** is disposed of.
25. Let a copy of this order along with LCR be sent down at once.
26. 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.)