

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 321 of 1984

Moslem Ali Sheikh

-Vs-

State of West Bengal

For the Appellant : Mr. Soumya Nag
(Amicus Curiae)

For the State : Ms. Faria Hossain
Mr. Atulya Sinha

Heard on : 15.04.2024, 07.08.2024

Judgment on : 05.11.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order of conviction and sentence dated 07th July, 1984 passed by the Learned Sessions Judge, Nadia, in Sessions Case No.6 of January, 1984 corresponding to Sessions Trial No.1 of June, 1984, convicting the accused-appellant under Section 326 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 5 (five) years under Section 326 of the Indian Penal Code.
2. The prosecution case precisely stated on 28.02.1980 at about 6 p.m., the de-facto complainant/victim, a rickshaw puller, was waiting at Santipur Railway Station with his rickshaw to commute passengers. He was asked to accompany the appellant and another accused person to discuss certain issues. De-facto complainant was told that Keramat Ali

Sheikh's uncle had landed properties to be looked after. De-facto complainant/victim was taken to Raghu Mollar Dighi, at a distance away from the Santipur Railway Station on foot where the appellant and the other accused person disrobed and assaulted the victim/de-facto complainant with a sharp weapon. Immediately after the incident the victim raised a clamour and local people gathered at the spot to whom he narrated the incident. Subsequently, the injured victim was taken to his house wherefrom he shifted to Santipur Hospital and therefrom to Santipur Police Station. Finally, he was admitted to Ranaghat Hospital for treatment.

3. On the basis of the aforesaid complaint, Ranaghat Police Station Case No. 29 dated 28.02.1980 under Sections 326/307 of the Indian Penal Code was initiated against the present appellant and another co-accused.
4. Charge was framed against the appellant and another co-accused under Sections 307/34 of the Indian Penal Code, to which the appellant pleaded not guilty and claimed to be tried.
5. In order to prove its case the prosecution cited 10 witnesses and exhibited certain documents.
6. The Learned Amicus Curiae representing the appellant submitted as follows:-
 - i. The fact of having sustained grievous injury in the penis of PW-2 Asgar Ali Sheikh had been negated by the deposition of PW-1 Dr. Amiya Kumar Prodhan.
 - ii. The belated examination of the victim by the Medical Officer for more than five hours would have been fatal if the penis of the victim was injured and the same dilated the prosecution narrative.

- iii. Not a single uninterested and/or unknown person had been examined who alleged to have assembled at the Santipur Railway Station immediately after the occurrence.
 - iv. The evidence of PW-4 and PW-8 being the most interested witnesses should not have been accepted, in convicting the accused appellant.
 - v. The evidence of PW-9 Dr. Parag Ranjan Ghosh in its power perspective was not considered.
7. The Learned Advocate for the State submitted the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses supported by the medical evidence and the appeal shall be dismissed.
8. A circumspection of the prosecution witnesses revealed as follows:-
- i. PW-1 Medical Officer deposed to have examined the de-facto complainant (PW-2) at emergency department at 11:15 p.m. on 28.02.1980. PW-1, and on examination, found the following injuries:-
 - a) Skin was excised from the base of penis and prepuce.
 - b) The external urethral meatus was found lacerated.
 - c) Staining of blood was found on lower limbs and clothes.

PW-1 stated during his examination in chief that he came to know from the de-facto complainant/PW-2 that he was inebriated when the alleged incident occurred.

PW-1 during cross-examination deposed the injuries were not serious.
 - ii. PW-2 the de-facto complainant in his examination in chief could not ascertain the date or time of incident. PW-2 stated the appellant cut

off half of his penis with a knife. PW-2 further stated he was not treated in Santipur Hospital as it was closed. PW-2 deposed a day prior to the incident he assaulted his wife, who consequently left him. The appellant and the other accused person namely Keramat Ali Sheikh confronted his act leading to a brawl. PW-2 deposed his penis was completely cut off and a portion of the same fell on the ground.

- iii. PW-2 deposed in his evidence that he knew both the accused persons namely Moslem Sheikh and Keramat Sheikh. Accused Moslem Sk. resided adjacent to the residence of PW-2. Keramat had his residence at Gopalpur which was intervened by one locality from the house of PW-2. The occurrence took place on the 15th/16th Falgoon about four years ago at about 6 p.m. He was waiting with his rickshaw at Santipur Railway Statoin. Moslem requested PW-2 to accompany him to the land of Keramat's uncle. His rickshaw remained at the Santipur Railway Station. They went to Raghu Mollar Dighi. Appellant Moslem assaulted PW-2 with a stick of "Ahir pulse plant" and both the accused persons threw him on the ground. Moslem disrobed him by stripping of his trousers. Moslem cut off half of his penis with a knife. As he cried aloud the accused persons escaped. The unknown pedestrians took him to Santipur Railway Station. Nil Kamal @ Nila and Swapan Kumar took him to Santipur Hospital on his own rickshaw, where he could not be treated as it was closed. He was taken home and thereafter, shifted to Santipur Police Station. His statement was written by one Mokshed Ali and he put his left thumb impression thereon at Santipur Police Station. The police officer sent him to Ranaghat Hospital. The doctor

examined him and PW-2 was admitted at the hospital. PW-2 was detained in the hospital for 13 days. At the time of the incident, he had trousers on and it was kept at the thana. Before the occurrence, accused Moslem and PW-2 were friends. PW-2's wife knew accused Moslem.

- iv. PW-3 was the Officer-in-Charge of Santipur P.S.
- v. PW-4, sister of de-facto complainant (PW-2). She had seen the appellant at her elder brother's house and told the wife of PW-2 that "*the allotted work is finished*" (*kaj finish*), thereafter the appellant had a conversation with PW-2's wife and left. During cross-examination, PW-4 stated that she stayed with her husband at a distance of 3/3 ½ miles away from her elder brother's wife.
- vi. PW-5 and PW-6, neighbours of PW-2 the de facto complainant were not declared hostile by the prosecution for not supporting its case.
- vii. PW-7 the Investigating Officer submitted charge-sheet.
- viii. PW-8 rickshaw puller was the post occurrence witness.
- ix. PW-9 doctor, on 28.02.1980 while treating PW-2, found his penis in an injured condition. He noticed auto-partial amputation of penis with loss of skin.
- x. PW-9, Medical Officer, stated in his evidence that on 28.02.80, he was attached to the Ranaghat Sub-Divisional Officer as a duty officer. On that date, a patient named Asgar Ali Sheikh was admitted to the said hospital. PW-9 found the following injuries on his person: Penis was in an injured condition. PW-9 noticed anto-partial amputation of penis with loss of skin. PW-9 remembered that the patient was shocked and was bleeding profusely. PW-9 operated the patient on that date and with the help of scrotal fat, the above injury

was repaired. At the time of discharge from the hospital on 10.03.80, the operation was found to be successful and the scrotal skin was viable. By viable, PW-9 meant that the circulation of the skin blood was sufficient. During the above period, the patient was under his treatment. On 28.02.80 PW-9 examined the patient with the above injury and at that time, it was not possible for him to undergo sexual intercourse. On 28.02.80, deep dorsal vein of penis was injured and it was a cut injury, which was repaired by him by operation. On 11.03.80 PW-9 removed the stitches and subsequent dressings were done to bring the penis back to its normal condition. The above injury could have been caused by a big knife or a dagger. On 28.02.80 PW-9 noticed the above injury on the patient and the said injury was sufficient to cause death, if untreated.

- xi. PW-10 deposed in his evidence that on 28.02.80 he was attached to Santipur Police Station as a Sub-Inspector of Police. On that date, Santipur P.S. Case No.29 dated 28.02.80 was endorsed to him by the Officer-in-Charge of Santipur Police Station for the purpose of holding investigation of that case. As such he took up investigation of that case. On 28.02.80 he examined Asgar Ali Sheikh, the complainant of this case. PW-10 seized the trousers (Exbt.-1) at Santipur Police Station and he prepared the seizure list (Exbt.-2) in presence of witnesses. On 29.02.80 he examined Swapan Sarkar (PW-8). On 07.03.80, he examined the witnesses namely Saleha Bibi, Rajia Bibi (PW-4), Akbar Ali Sheikh (PW-6), Saiyad Ali Sheikh (PW-5) and Aitul Sheikh. PW-10 could not arrest the accused persons till that date despite attempts having been made on that score. He made several attempts to trace out the accused persons. On 11.02.81 he

received the injury report of Asgar Ali Sheikh and he made over the charge of investigation of this case on 09.07.1981 to the Officer-in-Charge, Santipur Police Station as he was transferred from that police station. He received only the injury report but he did not seize the bed head ticket of the injured. PW-5 Saiyad Ali Sheikh was examined by him in course of investigation of this case on 07.03.80 and PW-5 stated to PW-10 as follows:-

“Some days ago, Moslem Sheikh and Keramat Sheikh took Asgar Ali to Raghu Mollar Dighi on the pretext of having an urgent talk with him and Keramat pressed him and Moslem assaulted him with a knife and his penis sustained a bleeding injury.”

PW-10 examined PW-6 Akbar Ali Sheikh on 07.03.80 and he made the following statement to him in course of investigation of this case ‘Moslem Sheikh and Keramat Sheikh made this injury in the penis of Asgar Ali Sheikh. Keramat pressed him and Moslem made this cut injury with a knife’. PW-10 seized the trousers (Exbt.-1).

PW-10 did not examine the wife of PW-2/de-facto complainant. PW-10 also did not seize bed head ticket. He did not record any subsequent statement of PW-2. He collected injury report from one Dr. A. K. Prodhan who was not examined. PW-10 stated PW-4 did not mention of the presence of the appellant at the house of PW-2.

- xii. During cross-examination, PW-10 stated that he examined Asgar Ali Sheikh on 28.02.80 at Santipur Police Station around 10:50 P.M. He did not record his statement. It was true that he seized

navy blue coloured trousers. He did not send anything to the F.S.L. He collected the injury report from Dr. A. K. Prodhan of the Ranaghat Sub-Divisional Hospital. He did not seize the discharge certificate nor was it produced to him by Asgar Ali Sheikh. He visited the area around Raghu Mollar Dighi in connection with this case but he did not find any blood stain at any place. He did not examine any person living in that locality around Raghu Mollar Dighi. PW-10 perused the F.I.R. and he did not examine Md. Mahasin, Khaja Ahamded, Tinkari Sadhu Khan and Nil Kamal Debnath. There was no note in his case diary that he had examined Md. Mokshed Ali of Santipur. He did not remember to have examined the above person. He was posted at Santipur Police Station for nearly two years. He knew that Mokshed Ali was an Ex M.L.A. of Santipur. PW-4 Rajia Bibi did not state to PW-10 about Moslem's presence in their house on that date. PW-8 Swapan Sarkar stated to him that Asgar Ali Sheikh was in a drunken state before the happening of this incident. The trousers were not labelled.

9. The Hon'ble Apex Court in the case of ***State of Rajasthan v. Major Singh***¹ observed the following:-

"4. ...In our view, considering the medical evidence which corroborates the prosecution version, particularly, of the injured witness, PW 1 Jeet Kaur, there is no reason to disbelieve the evidence of the aforesaid two witnesses...."

10. The Hon'ble Supreme Court in the case of ***Malkiat Singh v. State of Punjab***² held the following:-

¹(1999) 9 SCC 106

²(1996) 10 SCC 274

“6. ...On the contrary, we find that the evidence of Mit Singh gets ample corroboration from the fact that within almost an hour of the incident he lodged the FIR wherein he not only detailed the prosecution case as to how Darbara Singh and Uttam Singh were assaulted by the appellant but also stated that the appellant had sustained minor injuries at the hands of Uttam Singh when he tried to rescue Darbara Singh. The medical evidence corroborates the ocular version of PWs 4 and 5 and the recovery of the kassi pursuant to the statement of the appellant which was found to contain human blood, when examined by the Forensic Science Laboratory, also lends credence to the prosecution story.”

11. The Hon’ble Apex Court in **Jai Karan v. State of U.P.**³ held the following:-

“12. Great emphasis was led on the approximate time of injury. That in no way affects the credibility of PW 2’s evidence. Though the evidence of PW 1 does not specifically indicate the injury on PW 2, that is but natural. Before a young person two murders were committed and it is quite natural to create a sense of shock and minor variations in his evidence do not affect his testimony which is otherwise credible. Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. (See Solanki Chimanbhai Ukabhai v. State of Gujarat [(1983) 2 SCC 174 : 1983 SCC (Cri) 379 : AIR 1983 SC 484] .) To similar effect is the decision in State of U.P. v. Krishna Gopal [(1988) 4 SCC 302 : 1988 SCC (Cri) 928 : AIR 1988 SC 2154] .”

12. In **Balu SudamKhalde v. State of Maharashtra**⁴, the Hon’ble Supreme Court held the following:-

³(2003) 12 SCC 655

⁴2023 SCC OnLine SC 355

“26. *When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:*

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

27. *In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite*

plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.”

13. The Hon’ble Supreme Court held the following in **Thathanna v. State of A.P.**⁵:-

“10. ...The evidence of A-3, A-8 and A-9 though is not accepted in respect of their own assailants but the fact that the occurrence has taken place is accepted and that in respect of these appellants the other witnesses have also consistently spoken regarding the parts played by the three appellants. The nature of the injuries inflicted by these three accused to that extent is corroborated by medical evidence and also spoken to by the other eyewitnesses consistently and the same has been accepted. For all these reasons we see no ground to interfere.”

14. The Hon’ble Supreme Court in the case of **Leela Ram v. State of Haryana**⁶ held the following:-

“9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1

⁵1994 Cri LJ 632

⁶(1999) 9 SCC 525

SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] . In para 10 of the Report, this Court observed: (SCC pp. 514-15)

“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.”

10. In a very recent decision in *Rammi v. State M.P.* [(1999) 8 SCC 649] with *Bhura v. State of M.P.* [(1999) 8 SCC 649] this Court observed: (SCC p. 656, para 24)

“24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind

that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.”

This Court further observed: (SCC pp. 656-57, paras 25-27)

“25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

‘155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—

(1)-(2)

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;’

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be ‘contradicted’ would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to ‘contradict’ the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to ‘contradict’ the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012 : 1959 Supp (2) SCR 875]).”

11. *The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.*

12. *It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.*

15. The evidence of the injured victim i.e. PW-2 corroborated with the evidence of PW-5 who had seen him to bleed with an injury on his private part. The evidence of PW-8, rickshaw puller too found the victim, PW-2 sustaining injuries in the lower part of his body. The injury suffered by the victim was vividly described by the evidence of the Medical Officer, PW-9 who categorically stated that the injury sustained by the victim

could have been caused by a big knife or a dagger. The evidence of PW-9, the Medical Officer therefore became nugatory. There had been an animosity between the victim and the appellant to have prompted him to assault the victim. The injured victim sustaining such a severe injury had no occasion to falsely implicate the appellant.

16. Based on the corroborative evidence of the injured witness and that of the medical evidence fortified by the evidence of PW-5 and PW-8, the impugned judgment and order pronounced by the Learned Trial Court is not interfered with. The appeal is accordingly dismissed.
17. In view of the above discussions, the instant criminal appeal being CRA 321 of 1984 is dismissed.
18. There is no order as to costs.
19. I record my appreciation for the able assistance rendered by Mr. Soumya Nag, Learned Advocate as Amicus Curiae in disposing of the instant criminal appeal.
20. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
21. 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.)