

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 9 of 2020

With

CRAN 2 of 2022

Bimal Tamang & Ors.

-Vs-

The State of West Bengal

For the Appellants	:	Mr. Sourav Ganguly, Adv. Mr. Abhishek Sarkar, Adv., Ms. Rishita Chakraborty, Adv., Mr. Bibek Tarafdar, Adv., Mr. Gopal Roy, Adv., Ms. Deblina Ray, Adv.
For the State	:	Mr. Aditi Shankar Chakraborty, Id. APP, Mr. Biswarup Roy, Adv.
Heard on	:	21.05.2024
Judgment on	:	21.05.2024

Joymalya Bagchi, J.:-

1. Appellants have assailed judgment and order dated 20.12.2019 passed by the learned Additional District and Sessions Judge, 3rd Court, Darjeeling in connection with Sessions Case No.05 of 2018 (Sessions Trial No.3(7) of 2018) convicting the appellant No.1 for commission of

offence punishable under Sections 302/449 of the Indian Penal Code and appellant Nos.2 and 3 under Sections 323/34 and 448/34 of the Indian Penal Code and sentencing appellant No.1 to suffer imprisonment for life and to pay fine of Rs.20,000/-, in default, to suffer rigorous imprisonment for one year for the offence punishable under Section 302 of Indian Penal Code and to suffer rigorous imprisonment for three years and to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for two months for the offence punishable under Section 449 of the Indian Penal Code and sentencing appellant Nos.2 and 3 to suffer simple imprisonment for six months on each count i.e. for the offence punishable under Sections 323/34 and 448/34 of the Indian Penal Code respectively. All the sentences to run concurrently.

Prosecution case:-

2. Prosecution case, as alleged, against the appellants is to the effect that wife of appellant no. 1 Smt. Panchu Rai (PW 5) had eloped with the deceased Binoy Rai in 2017. In January 2018 they returned to the village. Hearing the news on 28.1.2018, appellant no. 1, his mother Phulmaya Tamang (appellant no. 2) and his brothers Birgate Tamang (child in conflict with law) and Dipen Tamang (appellant no. 3) illegally trespassed into the house and assaulted Binoy and Panchu Tamang. Appellant no. 1 assaulted Binoy with a big stone on his head. As a result, Binoy died. Puran Rai, brother of Binoy lodged written complaint at the police station against the appellants resulting in registration of Jorebunglow P.S case no. 8 of 2018 dated 29.1.2018 under sections

448/449/302/34 IPC. Upon conclusion of investigation, charge sheet was filed and appellants were put on trial. Birgate Tamang being a juvenile was tried before the Juvenile Board. During trial, prosecution examined 9 witnesses and exhibited a number of documents to prove its case. Defence of the appellants was one of innocence and false implication.

3. In conclusion of trial, learned trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid.

Arguments at the Bar:-

4. Mr. Ganguly for the appellants contends FIR is ante-timed. FIR maker (PW1) was in a marriage ceremony. He was unaware of the manner and circumstances in which his brother Binoy had been murdered. He lodged FIR after interacting with Panchu (PW5), the eye-witness in the morning. The sole eye-witness Panchu had inimical relationship with the appellant. She was the wife of appellant no. 1 and had eloped with the deceased in 2017. Her sole testimony against the appellants ought to be taken with a pinch of salt and cannot be the sole basis of conviction. Accordingly, he prays for acquittal.

5. On the other hand Mr. Roy submits Panchu Rai (PW 5) was present at the place of occurrence with the deceased on the fateful night. She witnessed the incident and fled away. Her deposition is corroborated by PW4, sister-in-law of the deceased and medical evidence. Hence, appeal is liable to be dismissed.

Evidence on record:-

6. PW1 is the brother of the deceased and de facto complainant. He is a reported witness. He deposed he was at a marriage ceremony and heard the incident from his wife, PW4. He went to the place of occurrence and found his brother died. He lodged written complaint which was scribed by PW3.

7. PW 4 is the wife of PW 1. She deposed on the day of occurrence she had gone to attend the wedding ceremony at the house of one Agam Rai (PW 6). She returned home to serve dinner to her father-in-law. On returning home she found appellants assaulting Panchu Rai (PW 5). She also saw the dead body of Binay Rai. She rushed back to the wedding ceremony and informed her husband. Her husband returned home and lodged FIR.

8. PW 5 is the eye-witness. She deposed she was married to the appellant no. 1. She had eloped with the victim, Binay Rai. On the day of incident they returned from Siliguri and were lying in bed. At that time appellants came outside the house and threatened to kill them. Thereafter they entered the house. Appellant no. 1 Bimal had a sharp cutting weapon. Appellant no.2 Phulmaya was armed with a stick and Brigade was armed with a stone. Bimal and Brigade assaulted her husband. She was assaulted by Phulmaya and Dipen. Bimal struck her husband with a stone on his head. As a result her husband had suffered bleeding injury and fell down. She ran away. She returned home in the morning and narrated the incident to PW 1.

9. During cross-examination she stated her husband had a dispute with Bimal and Phulmaya. She was the third wife of the deceased. There was bitter relationship between the deceased and his family members as he was a habitual drunkard and had married thrice. There was no electric light. She guessed the identity of Bimal and Phulmaya from their voices when they were shouting outside the house.

10. PW 6 (Agam Rai) stated there was wedding ceremony in the house. She came to know of the incident on the next day.

11. PW 8 is the investigating officer. He visited the place of occurrence and conducted inquest over the body of the deceased marked as Exbt.-6. He seized a big stone. He prepared rough sketch map. He recorded statements of witnesses. He collected medical report of Panchu Rai marked as Exbt.-11. He sent Panchu Rai to Magistrate for recording her statement. He sent articles including the stone boulder for FSL examination. He collected FSL reports marked as Exbts.-13 and 14. He submitted charge-sheet.

12. PW 9 post-mortem doctor found the following injuries:-

- “1. There was a fracture on the left fore head.*
- 2. The brain tissue was fully smashed over the fracture side.*
- 3. There was cut injury on the left eye.”*

Discussion with findings:-

13. PW 5 is the eye-witness of the incident. She deposed on the fateful night she was sleeping with Binay Rai. At that time appellants came outside the house and threatened to kill them. Thereafter they entered the house. They assaulted her and Binay. During assault appellant no.1

Bimal hit Binay with a stone boulder on the head resulting in his death. Her deposition has been severely criticized by Mr. Ganguly on various counts. He contends PW 5 is an interested witness. She was the wife of appellant no. 1 and had eloped with the deceased. She had bitter relationship with her husband i.e. appellant no. 1 and her mother-in-law i.e. appellant no. 2. She had motive to falsely implicate them. There was no light in the house and it was not possible for PW 5 to have witnessed the incident. He further submits there was inimical relationship between Binay and his family members and there is possibility that his son from the first marriage had committed the murder.

14. I have given anxious considerations to the aforesaid submissions. During cross-examination, PW 5 admitted she had bitter relationship with her husband Bimal and mother-in-law, Phulmaya. However, she remained unshaken that she was present with the deceased at the time he was murdered. When prosecution rests on a sole interested witness it is incumbent on the Court to examine the intrinsic truth of her deposition and see whether her version is corroborated by other evidence. PW 5 is supported by PW 4, sister-in-law of the deceased. PW 4 deposed she had gone to a wedding party. Her husband was also in the wedding party. When she returned home to give food to her old father-in-law she saw the appellants were assaulting PW 5. She also found Binay Rai lying dead. She ran back to the wedding house and informed her husband. Thereafter her husband (PW 1) lodged FIR. Mr. Ganguly submits PW 4 is an unreliable witness. She stated Panchu was assaulted outside the

house but Panchu (PW 5) claimed she was assaulted inside the house. Panchu (PW 5) claimed she talked with the FIR maker (PW 1) in the morning and thereafter FIR was lodged. But FIR was lodged at midnight.

15. I find little substance in the submissions. PW 4 has explained the circumstance why she returned home i.e. to give dinner to her old father-in-law. At that time she saw Panchu (PW 5), being assaulted. This corroborates PW 5's version that she was also assaulted by the appellants at the time of the incident. Her medical report marked as Exbt.-11 has also been produced in Court. This probabilises the prosecution case that Panchu (PW 5) was present at the place of occurrence and was assaulted when victim was murdered. Whether the assault was inside or in front of the room is of little consequence. Soon after the assault Panchu ran away and PW 4 saw the dead body of her brother-in-law. Evidence has come on record that the deceased had inimical relationship with his family members owing to his drunken habits and three marriages. PW 4 is one of the relations of the deceased and Panchu is his third wife. There was no love lost between them. In this backdrop I find there was no reason why PW 4 would falsely depose and support PW 5.

16. It has also been argued there was no light at the place of occurrence. Admittedly, appellant no. 1 was the husband of PW 5 and other appellants were her in-laws. They came outside the house and threatened her. From their voices PW 5 could identify them. Thereafter they entered the room and assaulted PW 5 and the victim. As PW 5 knew the appellants well and the incident occurred at close proximity, her

evidence that the appellant no.1 had struck the victim on the head with a stone cannot be glossed over on the score of insufficiency of light.

17. There is some departure in the deposition of PW 5 with regard to the roles of the other appellants. During examination-in-chief PW 5 stated the appellants were armed but she had omitted to state this before police or Magistrate. In her statement before Magistrate she stated during assault appellant no. 1 went out and brought a big stone and smashed the head of the victim. In view of such embellishment trial Judge came to a finding other appellants did not share common intention to murder the victim. This finding with reference to common intention does not affect the prosecution case against the appellant no. 1 which is founded on the clear and unequivocal evidence of PW 5 that he dealt a fatal blow on the head with a big stone. Her ocular version is corroborated by medical evidence i.e. the post mortem doctor, PW 9 who opined death was due to injury on the head. FSL report marked as "Exbt.-13 and 14" noted presence of blood on the stone which was found at the place of occurrence. These pieces of evidence corroborate the version of the eye-witness (PW 5) and establish the prosecution case beyond doubt.

18. In the light of the aforesaid discussion conviction and sentence of the appellants are upheld.

19. Bail bond of the appellant no. 1, Bimal Tamang @ Dally is cancelled and he is directed to surrender forthwith and serve out the sentence.

20. Period of detention suffered by appellant no.1 during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of 428 of the Code of Criminal Procedure.

21. Appellant nos. 2 and 3, Phulmaya Tamang and Dipen Tamang respectively have served out their substantive sentences. They are directed to deposit the fine amount within seven days from date failing which the fine amount shall be recovered in accordance with law.

22. Appellant nos. 2 and 3 shall be discharged from their bail bonds upon expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

23. The appeal is, accordingly, dismissed. In view of dismissal of the appeal connected application is also dismissed.

24. Copy of the judgment along with lower court records be sent down to the trial court at once for necessary compliance.

25. Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)