

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 103 of 2002

Suranjan Das & Anr.

-Vs-

The State of West Bengal

For the Appellants : Mr. Avishek Sinha
(Amicus Curiae)

For the State : Mr. Saryati Datta

Heard on : 11.12.2023, 08.02.2024, 05.04.2024,
14.05.2024, 17.09.2024

Judgment on : 23.04.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against a judgment dated 22.02.2002 passed by the Learned Additional Sessions Judge, 2nd Court, Dakshin Dinajpur at Balurghat in Sessions Trial No.19/2001 arising out of Sessions Case No.61/2001 convicting the appellants under Section 304 (Part-II) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 6 years each and to pay a fine of Rs.2000/- each in default to suffer further rigorous imprisonment of 3 months each. The Learned Judge was however pleased to acquit two other accused persons of the charge under Section 304 (Part-II) of the Indian Penal Code.
2. The prosecution case precisely stated on 28.03.1994 PW-1, the informant invited her brother and father to her house on the occasion of Holi, who

came to her house around 01:30 p.m. At that time the appellants and two other accused persons namely Raju Das and Sanatan Das were inebriated and entered into a brouhaha with one Bipul Sarkar, the brother of the informant regarding past issues and started assaulting him. When her son i.e., the deceased went to save his maternal uncle, the appellant no.1 took a wooden stick from the hand of the appellant no.2 and allegedly struck on the head of the deceased as a result of which he fell down on the ground. Thereafter he was taken to Hili Hospital, wherefrom transmitted to Balurghat Hospital where he died in the evening on 28.03.1994.

3. On the basis of the aforesaid complaint, the Police initiated Hili P.S. Case No.57/94 dated 28.03.1994 under Sections 341/448/325 of the Indian Penal Code.
4. After completion of investigation, the Police submitted charge- sheet against the appellants and two others under Sections 341/448/323/304 of the Indian Penal Code.
5. Charge was framed under Sections 304/34 of the Indian Penal Code against the appellant and two other persons, who pleaded not guilty and claimed to be tried.
6. In order to prove its case, the prosecution examined as many as 10 witnesses and exhibited certain documents.
7. Learned Amicus Curiae representing the appellant submitted as follows:-
 - i. The judgment of the Learned Judge was not a proper judgment in the eye of law, inasmuch as the Learned Judge failed to consider various infirmities in the prosecution evidence which falsify the prosecution case and that had vitiated his judgment.

- ii. The Judgment of the Learned Judge was based on conjectures and surmises, not warranted by the evidence on record.
- iii. The Judgment of the Learned Judge had been vitiated by reasons of non-consideration of materials which were elicited in the cross-examination of the prosecution witnesses.
- iv. The ingredients of the offence charged not having been established, the conviction of the appellants was not at all sustainable in law.
- v. It had escaped the notice of the Learned Judge that the story as alleged by the informant in the F.I.R., was in complete variance to what she deposed in her evidence during trial, inasmuch as in the F.I.R., it was alleged that over some past dispute, Bipul Sarkar and the deceased were beaten by the appellants, whereas the said story as alleged did not find place in the evidence of PW-1 where a different story was introduced during trial that on 28.03.94 at about 01:00/01:30 p.m., an altercation took place between PW-1 and her father, PW-4 and on hearing such hue and cry the accused persons came there and suddenly the appellant no.1 struck the deceased with a Bamboo which was given to him by the appellant no.2. It was further deposed that she rushed to the spot and her brother told her that the accused persons assaulted her son i.e., the deceased. She further deposed that the accused persons thereafter attacked her relations with Hansua, Spade etc. It was pertinent to mention here that in the entire evidence of PW-1 no motive was attributed to the appellants as to why they assaulted Bipul Sarkar and the deceased and

surprisingly which the Learned Judge had completely lost sight of the fact was that the said Bipul Sarkar, the most vital witness had not even been cited as a witness by the prosecution for which the Learned Judge should have drawn an inference adverse to the prosecution under Section 114(g) of the Evidence Act for deliberately withholding such important witness.

- vi. The Learned Judge completely over looked the fact that as per the evidence of PW-1 she went to P.S. in the night for giving information regarding the aforesaid incident and one Swapan Goswami allegedly wrote the F.I.R., as per her instruction, whereas from the evidence of PW-8, the then Sub-Inspector of Police of Hili P.S. it appears that one Narayan Chandra Karmakar of Baikunthapur, Hili, wrote the original complaint and PW-1 put her L.T.I., on the said complaint and he specifically stated in his cross-examination that he did not get the F.I.R., written by Swapan Goswami as told by PW-1 which goes to show that there must have been another information which was deliberately suppressed by the prosecution and curiously enough neither Swapan Goswami nor Narayan Chandra Karmakar came forward to depose in the present case.
- vii. The Learned Judge also did not take into consideration that the place of occurrence as described by PW-1 did not find support from the evidence of other witness namely PW-2 who described a different place where the alleged incident took place.
- viii. The Learned Judge also failed to consider the evidence of PW-2 wherein no motive was mentioned as to the alleged assaulted by

the appellants on the victims and on the date of the alleged incident she along with her husband and her son was invited to the house of the de facto complainant but they were also not produced before court during trial.

- ix. The Learned Judge erred in not taking into consideration the evidence of the hostile witnesses namely PW-3, PW-5, PW-6 and PW-9 deposed in unequivocal terms regarding the actual incident happened on the particular day and which fully supports the defence case but their evidence were not confronted with their earlier statements as stated before Investigating Officer, PW-10 which goes into the very root of the prosecution case.
- x. The Learned Judge did not consider the evidence of the PW-4, PW-1 to the effect that the dispute between him and PW-1 started over cooking of meat and when his son Bipul Sarkar separated them from the dispute an altercation ensued between Bipul Sarkar and the appellants which ultimately culminated into alleged assault on deceased which was altogether a different story as to what had been stated by PW-1 in her deposition during trial.
- xi. The Learned Judge also overlooked that the time of the alleged incident as mentioned by PW-4 did not tally with the evidence of the PW-1, moreover he stated that he was inside the room during the alleged incident which indicates that he could not had seen the incident as alleged.
- xii. The Learned Judge ought to had given a thoughtful consideration to the fact that Dr. Pabitra Biswas, the autopsy surgeon who

allegedly examined the dead body as per post-mortem report was not cited as a witness by the prosecution to prove the purported post-mortem report, as such the factum of injury pertaining to alleged assault by the appellant no.1 had not been proved during trial. Moreover it appears from the said report that no external injury was detected which was highly suspicious and contrary to the story as alleged by the prosecution that the deceased was hit on his head by appellant no.1 with the help of a Khata which in normal condition should leave behind marks of injury.

- xiii. The Learned Judge erred in relying upon the evidence of PW-1, PW-2 and PW-4 who were highly interested witnesses and completely ignored the vital aspect that the most vital witnesses i.e., the injured Bipul Sarkar, Narayan Chandra Karmakar and Dr. Pabitra Biswas, who alleged held post-mortem besides other co-villagers being the independent witnesses were not examined during trial to support the prosecution case and no explanation was offered for their non-examination, which goes into the very root of the prosecution case.
- xiv. The Learned Judge also erred in convicting the appellants under Section 304 (Part – II) of the Indian Penal Code simpliciter in absence of specific charge to that effect when the Learned Judge was pleased to acquit the other two accused persons of the charge under Section 304/34 of the Indian Penal Code having found that there was no common intention amongst the accused persons to commit murder. Moreover, the appellant no.2 also

could not be held liable for the alleged offence as there was no evidence that he allegedly inflicted the fatal blow on the deceased.

- xv. In absence of legally sufficient evidence, the Learned Judge erred in convicting the appellants without considering the evidence and materials on record which justify that the prosecution had miserably failed to prove the case against the appellants beyond all reasonable doubt.
 - xvi. The Learned Judge ought not to have convicted the appellants on the basis of the evidence of only 3 interested witnesses when the major portion of the witnesses who were independent and disinterested were declared hostile by the prosecution and fully supported the defence version and their deposition during trial were not even confronted with their earlier statements before investigating officer, if at all.
8. Considered the rival contention of the Learned Amicus Curiae representing the appellant and the Learned Advocate representing the State.
9. A circumspection of the prosecution witnesses revealed as follows:-
- i. PW-1 deposed that on 28.03.94 on the occasion of Holi at about 01:00/01:30 p.m., there was an altercation between herself and her father. The appellants intervened and without any rhyme and reason stuck at the head of the deceased with a bamboo stick. No plausible explanation was given by the prosecution that when an altercation was taking place between the PW-1 and PW-4, why the present appellants intervened and without any reason assaulted her son, though she had claimed to be an eye witness.

She had admitted in her examination-in-chief that after hearing hue and cry, she rushed to the spot wherein her brother had disclosed that the accused persons had assaulted her son, negated her being an eye witness. PW-1 stated her brother and father being intoxicated assaulted one handicapped person of the village namely Sunil Mondal, as a result of which the local residents being enraged chased and assaulted the family members of the deceased which resulted in the death of the victim. Her suggestion was corroborated by the other prosecution witnesses.

- ii. During her cross-examination she stated there was a single blow at the ear of the deceased and no blood oozed out due to such injury, coupled with the fact that the Officer who held the inquest had not found any external injury clearly indicated the injury resulting in the death was accidental. The witnesses had admitted that none of the adjacent neighbours who were present at the time of alleged occurrence were examined, an adverse inference under Section 114(g) of the Indian Evidence Act for withholding such vital witnesses during the course of trial, could have been drawn by the Learned Trial Judge.

The witness had improved and introduced a story that PW-2 and her husband were the invitee at the occasion of Holi on the relevant date and they had also witnessed the entire incident. PW-2 however did not utter anything about the presence of those witnesses in her complaint, which probalised the introduction

of the names of Kulo Das and her husband had been an after-thought.

- iii. PW-2 deposed that she was present when the altercation took place between PW-1 and PW-4 and subsequently between the PW-1 and the villagers. She had further deposed that suddenly Sasti Das handed over a bamboo stick to his son Suranjan who thereafter stuck with the same. She had admitted in her cross-examination that on the occasion of Holi the villagers were intoxicated and the dispute cropped up between PW-1 and PW-4 regarding fixation of menu. However she disclosed the fact of alleged incident before any authority prior to her deposition in Court. She had further admitted that when the alleged incident took place she could not see anything as she was at a distance of 50/60 cubits from the P.O. The witness had also corroborated the evidence of PW-1 that there was a single stroke upon the victim and no blood oozed out due to such assault. The alleged offending weapon khata, a kind of bamboo stick were not recovered.
- iv. PW-3, PW-5, PW-6 and PW-9 were declared hostile by the prosecution.
- v. PW-4 deposed that an altercation had taken place between himself and PW-1 over cooking. He had also stated that subsequently an altercation took place between his son Bipul Sarkar who was not examined and the appellants and their family members. Though no explanation was given as to why without any reason the appellants would intervene and assault his grandchild. PW-4 admitted to have stated the facts for the first

time during the course of trial. He had further stated that the incident took place between 11 pm-12 pm which did not coincide with the complaint. He had deposed that at the relevant point of time when the incident took place he was inside his room, therefore he had not witnessed the incident. He had further admitted that there was an inimical relationship between their family and the family of the appellants, which could be a reason to falsely implicate the present appellants.

- vi. PW-7 deposed to be an inquest witness. He had identified S.I. Santigopal Saha's handwriting on the dead body challan which was marked as Exbt.-1, Exbt.-2 and Exbt.-2/1. During his cross-examination stated that he had no personal knowledge regarding the incident.
- vii. PW-8 deposed that one Kanchan Das, PW-1 filed a complaint. He had registered the F.I.R., which was marked as Exbt.-3 and Exbt.-3/1.
- viii. During his cross-examination stated that he started the case at 08:05 p.m., night. He did not get the F.I.R., written by Swapan Goswami about which had been stated by Kanchan. On 29.03.94 he received the news of death of the deceased from Balurghat P.S. As Balurghat P.S. conducted the inquest, the U.D. case had been started. He forwarded the accused on 30.03.94.
- ix. PW-10 deposed that he submitted the charge-sheet under Section 341/448/323/304 of the Indian Penal Code. He prepared sketch map with index of the P.O. which was marked as Exbt.-5 & Exbt.-

5/1. During his cross-examination stated that after receiving the C.D. he did not examine any witness.

10. PW-1, the mother of the deceased, PW-2, the alleged invitee and PW-4 the grandfather were the only witnesses who had supported the prosecution case. Though in their examination-in-chief they had claimed to be an eyewitness to the alleged incident, but from their cross-examination it had been elicited that none of them had actually witnessed the incident, which could be concluded from the following portions of the evidence of PW-1, PW-2 and PW-4. PW-1 had categorically stated on hearing the hue and cry he rushed to the P.O. wherein his brother (not examined) had informed her that the appellants had assaulted her son, therefore she was not an eyewitness.
11. Similarly, PW-2 had admitted in her cross-examination that at the time of altercation, she stood at a distance of 50-60 cubits following which she couldn't see anything, which disabled her to be an eyewitness to the incident.
12. PW-3 had stated in his cross-examination that the P.O. was about 50 cubits from his residence, subsequently he admitted that at the relevant point of time he was inside his room in his house. Such admission of PW-3 eradicated his claim to be an eyewitness as the incident as allegedly taken place beside the house of her daughter PW-1 and it could not have been possible for him to witness the incident.
13. In addition to the aforesaid argument PW-2 and PW-4 had categorically stated that whatever material facts they had stated during their examination-in-chief was for the first time and they had not stated about the same before any authority at any point of time raising considerable

doubt and possibility of implicating the present appellant at a later stage with mala-fide intention.

14. PW-3, PW-5, PW-6 and PW-9 local independent witnesses had not supported the prosecution case. In fact, they had unequivocally corroborated the defence version that on the occasion of Holi all the villagers including the entire family of the victim was intoxicated. Consequently after taking liquor, PW-1's father and brother assaulted one local resident namely one Sunil Mondal as a result of which the villagers being enraged chased the family members of the victim and assaulted him, which corroborated the fact that the dead body was found on the Pucca road of Hili which was about half kilometer from the house of the deceased and not on the Kuchha road just beside the house of the de-facto complainant as was claimed by the prosecution.
15. PW-3, PW-6 and PW-9 had stated in their evidence that they were never examined by the investigating agency and whatever they had deposed during the course of trial was for the first time.
16. From the depositions of most of the witnesses it emerged that on the relevant day there was a Holi celebration and on the occasion of the same, local villagers took liquor and were in an intoxicated state. In such backdrop the family members of the victim assaulted one handicap person namely Sunil Mondal, which enraged the villagers and as a result they chased and assaulted the victim and his family members. It was trite law and had been held on several occasions by the Hon'ble Apex Court that when two versions were possible, one favouring the accused should always be taken into consideration.

17. From the cross-examination of PW-8, the first I.O., an interesting fact emerges. He had categorically stated that he started the case at 08:05 p.m. The same F.I.R. was not written by Swapan Goswami as was claimed by PW-1, the de-facto complainant. The anomaly also got corroboration from the written complaint where it was found that the same was written by one Narayan Chandra Karmakar. The admission on the part of the Investigating Officer clearly pointed out to a conclusion that the complaint written by Swapan Goswami must have been withheld and later on the instant complaint case was lodged to deliberately implicate the present appellants.
18. Moreover the alleged offending weapon khata, a kind of bamboo stick was never recovered. In the absence of recovery of the offending weapon at the instance of the appellant coupled with the fact that none of the so-called eye witnesses had actually witnessed the incident inherently negated the prosecution case.
19. The inimical relation between the appellants and the deceased as suggested by PW-4 unequivocally indicated the mala fide intent to incriminate the appellants by fabricating false implications on them.
20. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal being CRA 103 of 2002 is allowed.
21. Under such facts and circumstances, the judgment dated 22.02.2002 passed by the Learned Additional Sessions Judge, 2nd Court, Dakshin Dinajpur at Balurghat in Sessions Trial No.19/2001 arising out of Sessions Case No.61/2001 is set aside.
22. There is no order as to costs.

23. I record my appreciation for the able assistance rendered by Learned Advocate Mr. Avishek Sinha as Amicus Curiae appearing for the appellants, in disposing of this appeal.
24. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
25. 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.)