

Criminal Appeal

Present : The Hon'ble Mr. Justice Ashim Kumar Banerjee And The Hon'ble

Mr. Justice Raghunath Ray

Judgment on : August 23, 2010.

C.R.A. No.152 of 2007

Md. Sekendar Ali Mondal

-VS-

The State of West Bengal

Points:

Procedure for Trial- Offence under Section 302 Indian Penal Code-What are the principles to be followed for trial-Indian Penal Code- S 302

Facts:

On May 3, 2000 at about 8.00 p.m. one Alera Bibi aged about thirty years wife of Akbar Ali Molla of village Sahabajpur under Kumarganj Police Station of Dakshin Dinajpur made a verbal complaint to the police which was reduced to writing and duly attested by Alera Bibi by putting her Left Thumb Impression. According to Alera, at about 3.00 O'clock in the afternoon on the said day his brother in-law Usuf Ali Molla and her husband Akbar Ali Molla were going to the paddy field in order to harvest. While they were proceeding to the paddy field their cousins namely Abed Ali Molla and Ahed Ali Molla restrained both of them. Sekendar Ali Mondal hurt Usuf in different places like neck, chest and other places with a knife in his hand. Abed and Ahed also hurt Usuf with a sharp knife and dagger. When Akbar tried to resist them Sekendar also hurt Akbar with a knife in his hand. On hearing hue and cry their elder brother Irfan came out of the house. Sekendar also attacked him with a knife. During attack Jainar Bibi instigated the accused. Akbar was present at the spot and she was following her

husband and brother in-law. Usuf died on the spot. Akbar and Ichhaque were taken to the hospital by the villagers. Abdur Rahaman Mondal, Abdus Samad Mondal, Hazi Mohammad Moslemuddin Mondal witnessed the incident.

Held:

Court laid down the well-settled principles to be followed in cases of the like nature when accused is accused of committing offence inter alia under Section 302 :-

a) When the prosecution fails to explain the injuries on the person of an accused any of the three results may follow :-

i) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.

ii) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.

iii) It does not affect the prosecution case at all.

b) When injuries of the accused remained unexplained two results should follow :-

i) That the evidence of the prosecution witness is untrue and

ii) That the injuries probabalise the plea taken by the accused.

c) Non-explanation of the injuries on the person of the accused by the prosecution, is a material factor to be considered in a criminal trial of the like nature.

d) The relevant factor for criminal trial leading to acquittal are inter alia inherent improbabilities, the serious omissions and infirmities, the interested or inimical nature of the evidence.

e) Relationship per se is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person.

f) The statement made before the Police Officer under Section 161 can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided in Section 162. An accused in a criminal trial has the right to make use of the previous statements of a witness including the statements made before the investigating officer for the purpose of establishing a contradiction or to discredit a witness.

g) In a murder case, the non-explanation of the injuries sustained by the accused at the time of occurrence or in the course of altercation is a very important circumstance leading to the following inferences :-

i) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

iii) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

iii) non-explanation of the injuries would however not affect the prosecution case where the injuries were minor or superficial or the evidence is so clear and cogent and so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission. Para 10

Cases cited:

1975 Supreme Court Cases (Criminal)-384 (State of Gujarat –VS- Bai Fatima & Another); 1976 Supreme Court Cases (Criminal) 671 (Lakshmi

Singh & Others –VS- State of Bihar); All India Reporter 1999 Supreme Court 2161 (State of Kerala –VS- Babu & Others); 2007 Volume-I Supreme Court Cases 699 (Salim Sahab –VS-State of Madhya Pradesh); 2008 Volume-XI Supreme Court Cases 131 (Shaikh Majid & Another –VS- State of Maharashtra & Others); 2009 Volume-II All India Criminal Law Reporter 5 (Arun –VS- State by Inspector of Police, Tamil Nadu)

For the Appellant : Mr. Partha Sarathi Bhattacharya

Mr. Ranjit Kumar Sanyal

Mrs. Sukla Das Chandra

For the State : Ms. Minoti Gomes

ASHIM KUMAR BANERJEE.J:

1.FACTS :-

On May 3, 2000 at about 8.00 p.m. one Alera Bibi aged about thirty years wife of Akbar Ali Molla of village Sahabajpur under Kumarganj Police Station of Dakshin Dinajpur made a verbal complaint to the police which was reduced to writing and duly attested by Alera Bibi by putting her Left Thumb Impression. According to Alera, at about 3.00 O'clock in the afternoon on the said day his brother in-law Usuf Ali Molla and her husband Akbar Ali Molla were going to the paddy field in order to harvest. While they were proceeding to the paddy field their cousins namely Abed Ali Molla and Ahed Ali Molla restrained both of them. Sekendar Ali Mondal hurt Usuf in different places like neck, chest and other places with a knife in his hand. Abed and Ahed also hurt Usuf with a sharp knife and dagger. When Akbar tried to resist them Sekendar also hurt Akbar with a knife in his hand. On hearing hue and cry their elder brother Irfan came out of the house.

Sekendar also attacked him with a knife. During attack Jainar Bibi instigated the accused. Akbar was present at the spot and she was following her husband and brother in-law. Usuf died on the spot. Akbar and Ichhaque were taken to the hospital by the villagers. Abdur Rahaman Mondal, Abdus Samad Mondal, Hazi Mohammad Moslemuddin Mondal witnessed the incident.

2. INQUEST :-

Shri Gobinda Barman, the Sub-inspector of the Police made the inquest that would appear from page 4 of the paper book. He also recorded that in preliminary investigation he had come to know that Sekendar had committed the crime. He also recorded that the two groups had a history of animosity on the issue of sale of a pond. The post mortem doctor opined that the death was caused due to haemorrhage caused by the multiple injuries, anti mortem and homicidal in nature.

3. CHARGE :-

The learned Additional District and Sessions Judge, Fast Track Court, Dakshin Dinajpur framed charges as against Sekender Ali Mondal, JaynabBibi, Abed Ali Molla and Ahed Ali Molla inter alia for committing offence under Section 302 and 307 read with Section 34 of the Indian Penal Code.

4. EVIDENCE :-

PW-1 (Aleara Bibi) :-

Aleara was the wife of Akbar who was also injured in the incident. She narrated in detail the incident that occurred on May 3, 2000. She was consistent with her earlier statement made before the Police and treated as a written complaint made by her referred to above.

PW-2 (Imrul Sarkar) :-

Imrul was the nephew of Akbar and Usuf. He also narrated the incident and corroborated PW-1 Alera. He also deposed that Hazi Mahammad, Mosleuddin, Samad and Serajul as also Akbar saw the offence being committed. In cross-examination he admitted that there had been a dispute over sale of pond. The victim group paid rupees ten thousand to the accused Ohed for purchase of the pond. However the accused did not register the pond in the name of Saleha Bibi belonging to the victim group and a dispute occurred on that score. The unfortunate incident was a fall out.

PW-3 (Abdur Rahaman Mondal) :-

Abdur also reiterated what had been said by Alera and Imrul. He deposed that the accused persons fled away from the spot after seeing Usuf falling down and then succumbed to the injury.

PW-4 (Md. Sirajul Mondal) :-

Sirajul also witnessed the incident. He also reiterated the incident what had been narrated by the earlier witnesses.

PW-5 (Aklima Bibi) :-

Aklima was also consistent corroborating the earlier witnesses.

PW-6 & 7 (Akbar Ali Molla & Ichahaque Ali Molla) :-

PW-6 was also injured in the incident, so was PW-7, Ichahaque Ali Molla. They were also consistent about the dealing of pond between the two groups. He also deposed that a sum of rupees ten thousand was paid to the accused group for the delay.

PW-8 & 9 (Dr. Uttam Kr. Saha & Dr. Prosenjit Kr. Bose) :-

The witness (PW-8) conducted the post mortem examination whereas Dr. Prosenjit Kr. Bose being PW-9 treated the injured Ichahaque Molla and Akbar Ali Molla. According to PW-8 all the injuries mentioned in the Post

Mortem Report caused due to haemorrhage and shock which led to the death of the victim that was anti mortem and homicidal in nature.

PW-10 (Gobinda Barman) :-

The witness was the Sub-inspector who carried out the investigation. He gave details of the investigation which found corroboration from the witnesses discussed before.

5. TRIAL :-

All the accused pleaded innocence and faced trial. We are concerned with the Sekendar Ali Mondal the appellant above named. We find that the other accused were acquitted from the charges.

The appellant Sekendar Ali Mondal during his cross-examination under Section 313 of the Criminal Procedure Code made the following statement :-

“Yes, after the death of my aunt, a portion of a pond has been given to my mother and my two maternal uncles. Akbar, Ichhair and others intended to take it to which a fight between them started. I came to the Police Station and in the afternoon we again heard and saw that my uncle is unconscious and the other fled away. They assaulted us. On hearing our shouting villagers rushed the spot and I escaped from the place. Police caught me on the way and brought me in the Police Station.”

The accused produced one witness being Dr. Asok Biswas who treated the accused Joynab Bibi who allegedly sustained injury on the same day. The defence also produced another doctor Dr. Prosenjit Bose who also proved the injuries caused to Abed Ali Molla.

6. JUDGMENT :-

The learned Judge in his judgment and order dated February 14, 2003 and February 15, 2003 held Sekendar Ali Mondal, the appellant above named guilty of the offence under Section 302 and 324 of the Indian Penal Code.

The learned Judge sentenced Sekendar to suffer imprisonment for life and a fine of Rs.6000/- and in default to suffer further rigorous imprisonment for two years for committing offence under Section 302. The learned Judge imposed further punishment to suffer rigorous imprisonment for one year for committing offence under Section 324, however directed both the punishments to run concurrently. The learned Judge observed that the others were entitled to the benefit of doubt as sufficient materials did not come in evidence to implicate and co-relate them with the incident.

7.APPEAL :-

Being aggrieved by the judgment and order dated February 14 and 15 of 2003 the appellant preferred the instant appeal. We heard the appeal on the above mentioned dates.

8. CONTENTION OF THE APPELLANT :-

Mr. P.S. Bhattacharya, learned counsel appearing for the appellant placed the complaint, inquest and the evidence that came out during trial. Mr. Bhattacharya in support of his appeal tried to contend before us that the proceeding was vitiated by illegality as established norms and procedures for a criminal trial were performed in breach. According to him, there had been material inconsistency with regard to the time of occurrence and time of registration of the complaint at the Police Station. Alera Bibi categorically stated before the Police in her complaint that along with others Hazi Mahammad, Mosleuddin Samad and Serajul witnessed the incident. Hazi was never examined by the Police. He was also not called to adduce evidence at the time of trial.

Mr. Bhattacharya also highlighted the factum of injury that sustained by the accused as came out in evidence. From the statement of DW-1 and 2 Mr. Bhattacharya contended that the accused were sent for medical treatment by

the Police, even then the very fact that the accused had also sustained injury was concealed by the prosecution. Such deliberate omission and/or concealment would vitiate the trial. He also contended that the statement of the witnesses at the time of trial must have corroboration with their statements made before the Police at the time of the investigation. A new statement that came out during trial and not made to the Police, would have no consequence. Mr. Bhattacharya also contended that the witnesses were all interested as there had been a history of previous enmity. So question of false implication could not be brushed aside. Mr. Bhattacharya lastly contended that on the self-same issue the other three accused were acquitted. Hence, the appellant would also be entitled to the order of acquittal.

In support of his contention Mr. Bhattacharya cited the following decisions :-

- i) 1975 Supreme Court Cases (Criminal) Page-384 (State of Gujarat –VS- Bai Fatima & Another)
- ii) 1976 Supreme Court Cases (Criminal) Page-671 (Lakshmi Singh & Others –VS- State of Bihar)
- iii) All India Reporter 1999 Supreme Court Page-2161 (State of Kerala –VS- Babu & Others)
- iv) 2007 Volume-I Supreme Court Cases 699 (Salim Sahab –VS- State of Madhya Pradesh)
- v) 2008 Volume-XI Supreme Court Cases Page-131 (Shaikh Majid & Another –VS- State of Maharashtra & Others)
- vi) 2009 Volume-II All India Criminal Law Reporter Page-5 (Arun –VS- State by Inspector of Police, Tamil Nadu)

9. CONTENTION OF THE PROSECUTION :-

Opposing the appeal Ms. Minoti Gomes, learned counsel contended that the learned Judge had examined the evidence and came to a conclusion that there was no matching of mind amongst the accused and as such acquitted three others. However the specific overt act of the appellant consistently came out in evidence during trial. PW-1 categorically deposed that the appellant gave blow of knife to the victim. Such statement was corroborated by all other eye-witnesses. Such ocular evidence could not be brushed aside. According to Ms. Gomes the witnesses gave minute details of the incident. Such evidence was trustworthy and could not be shaken during cross-examination. According to Ms. Gomes the injury caused to the accused was within their special knowledge. They did not disclose the same. They also did not take the plea of self-defence earlier. Hence, the contention of Mr. Bhattacharya on that score had no basis. Ms. Minoti Gomes also relied on the Apex Court decision in the case of Laxmi Singh and Other (Supra) cited by Mr. P.S. Bhattacharya.

10. OUR VIEW :-

On a combined reading of the precedents may we jot down the well-settled principles to be followed in cases of the like nature when accused is accused of committing offence inter alia under Section 302 :-

- a) When the prosecution fails to explain the injuries on the person of an accused any of the three results may follow :-
 - i) That the accused had inflicted the injuries on the members of the prosecution party in exercise of the right of self-defence.
 - ii) It makes the prosecution version of the occurrence doubtful and the charge against the accused cannot be held to have been proved beyond reasonable doubt.
 - iii) It does not affect the prosecution case at all.

b) When injuries of the accused remained unexplained two results should follow :-

i) That the evidence of the prosecution witness is untrue and

ii) That the injuries probabalise the plea taken by the accused.

c) Non-explanation of the injuries on the person of the accused by the prosecution, is a material factor to be considered in a criminal trial of the like nature.

d) The relevant factor for criminal trial leading to acquittal are inter alia inherent improbabilities, the serious omissions and infirmities, the interested or inimical nature of the evidence.

e) Relationship per se is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person.

f) The statement made before the Police Officer under Section 161 can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided in Section 162. An accused in a criminal trial has the right to make use of the previous statements of a witness including the statements made before the investigating officer for the purpose of establishing a contradiction or to discredit a witness.

g) In a murder case, the non-explanation of the injuries sustained by the accused at the time of occurrence or in the course of altercation is a very important circumstance leading to the following inferences :-

i) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

iii) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

iii) non-explanation of the injuries would however not affect the prosecution case where the injuries were minor or superficial or the evidence is so clear and cogent and so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission.

Applying the aforesaid principles of law in the present case we find that the witnesses were definite on the overt act of Sekendar. They were consistent.

They could not be shaken in cross-examination. Even if we assume that the prosecution failed to discharge their duty to explain how the accused had sustained injuries the definite ocular evidence, in our view, would outweigh the alleged infirmities, if caused by such non-explanation.

From the evidence that came out during trial we find that the eye-witnesses were consistent. They gave minute details of the incident that found corroboration from each other. None of them could be shaken during cross-examination.

Such ocular evidence was more than sufficient to write the judgment of conviction. The learned Judge gave benefit of doubt in respect of three accused and signed the order of acquittal. On that score in absence of an appeal by the State we refrain from making any comment on the same.

We are concerned with the appeal of Sekender Ali. Sekender gave a blow to the victim who succumbed to the injury. Sekender also committed offence under Section 324 by causing injury to the other victims being PW-1, 6 and 7. We do not find any scope to interfere with the ultimate finding of the learned Judge in respect of Sekender and the punishment imposed upon him.

11. RESULT :-

The appeal fails and is hereby dismissed.

There would be no order as to costs.

12. DIRECTION :-

The appellant is now in jail. He is directed to serve out the remaining part of his sentence as awarded by the learned Trial Judge.

A copy of this judgment be sent to the correctional home, where the appellant is suffering his sentence, for his information.

Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

Urgent xerox certified copy will be given to the parties, if applied for.

Raghunath Ray, J:

I agree.

[ASHIM KUMAR BANERJEE,J.]

[RAGHUNATH RAY,J.]

