

(2008) 09 CAL CK 0003

Calcutta High Court

Case No: F.M.A. No. 734 of 2007

Sukumar Halder and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Sept. 26, 2008**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 304, 394, 397

Hon'ble Judges: Tapas Kumar Giri, J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Subir Chowdhury, soma Panda, Tapas Kumar Dey and Goutam Banik, for the Appellant; Pronati goswami, Bhaswati Pal and Mala Mitra, for the Respondent**Final Decision:** Dismissed

Judgement

Ashim Kumar Banerjee, J.

The Judgment of the Court was delivered by:

1. On December 27, 1985 Brindaban Das, victim along with his two friends Sri Pradip Dey PW-2 and one Suvankar Patra were sitting at Kalyanswar Club at J.K. Mitra Road, Belgachia, Calcutta when Gopal who was subsequently described as Chor Gopal came to the spot along with two other persons and identified Brindaban to his companions. Brindaban immediately got up and rushed to Gopal. There had been an altercation between them. The persons left the place by threatening Brindaban with dire consequence. The accomplice of Gopal were subsequently identified as Madan Das and Sukumar Halder, the appellants above named. On the same day evening Brindaban, Pradip along with one of their friends Ashim Acharya, PW-3 were walking through Dum Dum Road. When they reached the crossing of Dum Dum Road and Northern Avenue Gopal along with three others including those two persons who accompanied Gopal in the morning, got hold of them. Gopal shouted at Brindaban and asked his accomplice to kill him. Gopal caught hold of Brindaban by his neck. Another miscreant gave a blow with Bamboo Club (Bans Mugur) on the

head of Brindaban. Brindaban fell on the road. At that time another miscreant chased Pradip and Ashim with a chopper in his hand. Out of fear Ashim ran away towards Northern Avenue. Pradip hid himself in a quarter nearby wherefrom he watched that the miscreants left the place of occurrence. After they had left the place Pradip came out and took Brindaban in a rickshaw to his house at Raja Manindra Road, Calcutta. He noticed that HMT wrist watch and one silver chain containing a cross locket with the mark "Raju" were missing from Brindaban's possession. He narrated the incident to the elder brother of Brindaban, Dayal, PW-8 who immediately took Brindaban to hospital. Pradip then came back to his house. On the next day morning he was called by Dayal. He came to know that Brindaban had succumbed to injury. He went to Chitpur Police Station and lodged the FIR. Pradip identified the wristwatch and the silver chain recovered by the Police. The Police subsequently arrested the accused. Both Pradip and Ashim identified the miscreants in TI parade. The accused faced trial. The learned Judge held all of them guilty of the offence u/s 304, Part - I of Indian Penal Code. The learned Judge sentenced Gopal, Manik and Madan for eight years rigorous imprisonment together with fine of Rs. 2,000.00 each, in default to suffer one year further imprisonment. The learned Judge sentenced Sukumar six years rigorous imprisonment with fine of Rs. 1000.00 in default to suffer six months rigorous imprisonment.

2. Sukumar and Madan filed the above appeal. We are told that other accused have also filed appeal. The learned counsel could not give particulars of the said appeal. As such we could not hear the other appeal, if any, filed by the other accused. Hence, we are to consider the conviction of Sukumar and Madan and the sentence imposed on them by the learned Judge.

3. The prosecution examined altogether eighteen witnesses. PW-2, Pradip Dey the informant deposed that he was present in the morning with Brindaban and Subhankar at Kalyanswar Club at J.K. Mitra Road, Belgachia, Calcutta. He witnessed the altercation between Gopal and Brindaban. He also accompanied Brindaban in the evening along with Ashim. He witnessed the unfortunate incident. He took the victim in a rickshaw to his house and narrated the entire incident to his elder brother, Dayal. He identified Manik who caught hold of the neck of the victim. He also identified Madan who assaulted the victim with Bans Mugur. He also identified Sukumar who chased them with a chopper. Earlier he identified the accused in the TI parade in the presence of the learned Magistrate. In the next day morning he accompanied Dayal to the Chitpur Police Station and lodged the FIR. He also deposed that he made oral statement to the Police Officer. The Police then wrote it down. He signed the complaint. He identified the wrist watch and silver chain belonging to the victim. PW-3 Ashim Acharya almost in the same line corroborated what had been stated by Pradip. PW-6 was the learned Magistrate who held TI parade. He described in detail how the TI parade was conducted. PW-7 was the Doctor who held postmortem examination. He opined that the death was caused due to shock and hemorrhage as a result of injuries described in the postmortem

report and narrated by him in his deposition. PW-8 the elder brother of the victim identified the wristwatch and the silver chain belonging to the victim. He deposed that he took the victim to R.G. Kar Hospital. The victim was then referred to SSKM Hospital where the victim died on the next day morning. PW-9 was witness to the seizure list. PW-10 was the goldsmith who sold the silver chain to the victim. PW-13 another Doctor attended the victim in SSKM Hospital. He also corroborated the injuries sustained by the victim so came out in the postmortem report. PW-17, the Police Officer investigated the case. On a sum total of the evidence it is clear that two witnesses being PW-2 and PW-3 were present at the time of commission of crime. Both of them identified the accused. Both the witnesses corroborated each other during trial. The two Doctors proved cause of death. The witnesses also proved recovery of the articles belonging to the victim.

4. Mr. Subir Chowdhury, learned counsel appearing in support of the appeal raised a preliminary issue to the extent that since the accused were twenty years old at the time of commission of crime as appears from the record the learned Judge should have ascertained their age to find out whether they were minors at the time of commission of crime. In support of his contention he relied on Apex Court decisions in the case of Gopinath Ghosh vs. State of West Bengal reported in All India Reporter, 1984, Supreme Court, Page 237 and in the case o [Pratap Singh Vs. State of Jharkhand and Another](#), . Citing above two Apex Court decisions Mr. Chowdhury further contended that since the accused were minors at the time of commission of crime they should have been proceeded with under the provisions of West Bengal Children Act, 1959. Since the procedure laid down under the said Act of 1959 was not followed by the learned Judge the entire trial and the result there from were vitiated by illegality.

5. On merits Mr. Chowdhury contended that there were serious discrepancies in prosecution evidence. On a combined reading of the deposition such discrepancies should have raised doubt in the mind of the Court and the learned Judge should not have held the accused guilty of the offence. He further contended that no charge was framed either u/s 394 or u/s 397 for alleged snatching of wristwatch and silver chain.

6. To elaborate his argument Mr. Chowdhury took us to the depositions to demonstrate the discrepancies. According to him, the witnesses were not definite about the timing of the incident. The charge so framed by the learned Magistrate against the accused was ambiguous. Hence, it was a fit case for remand. He further contended that PW-2 and PW-3 were interested witnesses. Alleged incident occurred in the evening on a busy road at Calcutta. Even then the prosecution did not make any attempt to produce any independent witness to support the prosecution case.

7. On the issue of FIR Mr. Chowdhury contended that there had been considerable delay in lodging the FIR. The prosecution did not explain such delay.

8. On motive, Mr. Chowdhury contended that the motive was not at all clear. Alleged threatening of Gopal made in the morning to the extent that he would finish Brindaban, did not per se prove the prosecution case as such statement was occasionally uttered by persons involved in altercation. Hence, such statement should not be taken so seriously to implicate Gopal and the other accused.

9. He also commented on the conduct of the Investigating Officer as he failed to examine the relatives of the victim. He also commented about the failure on the part of the prosecution to examine Suvankar who was an eye witness to the morning incident. Mr. Chowdhury further contended that when Ashim said to have witnessed the incident it was natural that he would inform the Police or the members of the victim family. He did not do so. This itself, according to Mr. Chowdhury, should have raised doubt in the mind of the Court. He also contended that in the FIR Gopal was not described as Chor Gopal. Hence, it was not clear that whether the accused Gopal was the same Gopal named in the FIR or not.

10. In support of his contention Mr. Chowdhury relied on the following decisions:-

(i) [State of U.P. and Another Vs. Jaggo alias Jagdish and Others,](#)

(ii) [Balaka Singh and Others Vs. The State of Punjab,](#)

11. Opposing the appeal Ms. Pranati Goswami, learned counsel appearing for the prosecution contended that there was no delay in lodging of the FIR. Hence, no explanation was required to be offered. According to her, since incident occurred at 7.30 in the evening the family members were busy with the victim for his treatment. Next day morning when the victim succumbed to the injury FIR was lodged by Dayal through Pradip. On motive Ms. Goswami contended that it came out in evidence that there had been an earlier dispute between Brindaban and Gopal on an incident of theft in Patipukur Fish Market. Hence, the motive was clear.

12. Ms. Goswami also contended that despite recovery of the wrist watch and silver chain the prosecution could not charge the accused for dacoity as only four persons were involved in the incident.

13. Ms. Goswami further contended that both the eye witnesses corroborated each other. They identified the accused during TI parade held following the legal procedure as proved by the learned Magistrate. The cause of death was proved through the doctors. On the preliminary issue raised by Mr. Chowdhury, Ms. Goswami contended that since the accused did not claim benefit under the said Act of 1959 during trial and since the accused themselves disclosed their age as twenty years no illegality was committed by the learned Judge. Ms. Goswami relied on a latest Apex Court decision in the case of Sudesh Kumar Vs. State of Uttarkhand reported in 2008 I, SCC (Cri) 634. Paragraph 25 of the said decision being relevant herein is quoted below:-

25. It is, no doubt, true that the provision is beneficial and benevolent in nature and no "technical" objection should be raised that such plea was not taken before the courts below (*Gopinath Ghosh V. State of W.B.*). But in my opinion, there must be credible and trustworthy evidence in support of such plea. In the present case, a certificate in the form of "scholar record and transfer certificate" is annexed wherein the date of birth of the appellant was shown as 28-6-1962. The certificate was not on record either before the trial court or before the High Court. From the "true copy", it is clear that it is purported to have been issued by the Principal only on 10-2-2007. Thus it cannot be said that there is "credible evidence" or "trustworthy material" that the appellant was less than 21 years of age at the time of commission of offence. In my considered opinion, such question cannot be permitted to be raised for the first time in this Court and I am in agreement with my learned Brother on that point.

14. We have considered the evidence in detail. We have also considered the rival contentions of the parties. The decision in the case of *Gopinath Ghosh (Supra)* was considered by the Apex Court in its latest decision in the case of *Sudesh Kumar (Supra)*. The Apex Court observed that such question could not be permitted to be raised for the first time before the Apex Court.

15. In course of hearing we asked Mr. Chowdhury to produce evidence in support of his contention that the accused were minors at the time of commission of crime. Mr. Chowdhury, however, was unable to produce any document. He, however, offered an explanation to the extent that since the accused did not read in school they did not have any evidence to support their age. In our view in case any doubt arises in the mind of the Court that the accused are minors the Court is empowered to direct medical examination to ascertain their age. This plea was never raised during the trial. The Court also did not feel it necessary to direct ascertainment of their age. We also gave opportunity to the appellants to produce adequate evidence before us to support their contention that they were minors at the time of commission of offence. They miserably failed to do so. Hence, such contention raised at the bar, in our view, was not sufficient enough to nullify the entire process of trial and the result there from. The contention of Mr. Chowdhury on that score is thus rejected.

16. Mr. Chowdhury relied on the Apex Court decision in the case of *State of U.P. (Supra)* to support his contention that the prosecution failed to produce independent witnesses. We are not oblivious of the fact that when heinous crime is committed common public feels scared to come forward and depose during trial to support the prosecution. It is well settled principle of criminal jurisprudence that the prosecution is free to choose its witnesses. Once the charge is proved through the witnesses mere non-production of any witness would not, in our view, vitiate the entire process. In paragraph 15 of the decision in the case of *State of U.P. (supra)* the Apex Court observed that it is important to notice that the witness whose evidence is essential to the unfolding of the narrative should be called. In the instant

case both the eye-witnesses deposed during trial. They proved commission of crime by the accused. Even if for the sake of argument if we accept Mr. Chowdhury's contention any resident of that locality could only supplement and/or support the evidence adduced by PW-2 and PW-3. In their absence we do not find any fact which remained unfolded. Hence, the said decision, in our view, has no application in the instant case.

17. On the issue of delay in lodging of FIR Mr. Chowdhury relied on the Apex Court decision in the case of Balaka Singh & Ors. (Supra) we are unable to appreciate how this judgment could be made applicable in the instant case when on factual matrix we are satisfied that no delay was caused in lodging of the FIR. As observed earlier, the incident happened at 7.30 P.M. in the evening. The victim was taken to the hospital where he succumbed to injury in the next day morning. Immediately the FIR was lodged.

18. On merits we are satisfied that two eye-witnesses being PW-2 and PW-3 corroborated each other. They could not be shaken during cross-examination. The cause of death was proved by two Doctors initially attending the victim and thereafter holding postmortem. The discrepancies so highlighted by Mr. Chowdhury are minor in nature and in any event were not sufficient enough to raise doubt in our mind. The learned Judge examined each and every evidence in detail and ultimately held the accused guilty of the offence. We do not find any scope of interference on that score.

19. The appeal fails and is hereby dismissed.

20. The bail bond is cancelled. Appellants are directed to surrender before the Court below. In default, sureties are directed to produce the accused in court.

21. Let the lower Court records be sent down along with a copy of the judgment.

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

Tapas Kumar Giri, J.