

(2004) 12 CAL CK 0004

Calcutta High Court

Case No: C.R.A. No's. 340 and 341 of 1998

Subrata Naskar and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Dec. 22, 2004**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 307, 34

Citation: (2005) 3 CHN 410**Hon'ble Judges:** Bhaskar Bhattacharya, J; Arun Kumar Bhattacharya, J**Bench:** Division Bench**Advocate:** Sekhar Basu and Debasish Roy, for the Appellant; Kazi Safiullah, Rebaty Ranjan Biswas and Sofia Begum, for the Respondent**Final Decision:** Dismissed

Judgement

Bhaskar Bhattacharya, J.

These two appeals are at the instance of the convicted persons and are directed against order dated 28th October, 1998 passed by the learned Additional Sessions Judge, 6th Court, Alipur, Dist-24-Parganas (South) in Sessions Trial No. 4(ii) of 1995 thereby convicting each of the appellants to suffer life imprisonment for offence u/s 302/34 of the Indian Penal Code and further rigorous imprisonment for seven years for the offence punishable u/s 307/34 of the Indian Penal Code.

2. The learned Trial Judge further directed the appellants to pay a fine of Rs. 5,000/- each, for committing offence u/s 307/34 of the Indian Penal Code. In default of payment, they were ordered to suffer further imprisonment for six months each. Such sentences were, however, directed to run concurrently.

3. The prosecution case is based on an FIR lodged by P.W.I, the brother-in-law of one Amar Sardar, the P.W. 4, at 10:50 p.m. on June 26, 1992. The case made out in the said written complaint may be summarised thus.

4. At about 5 a.m. on that day, a disturbance started at Y/2/95, Satghara Lane, between Amar Sardar and the members of his family in one hand and his neighbour, viz. Motilal Naskar, and his sons on the other, over a dispute relating to land. According to the said complaint, Motilal Naskar and his four sons namely, Swapan Naskar, Susanta Naskar, Sukanta Naskar and Subrata Naskar collectively assaulted Amar Sardar and his sisters' sons Bablu Naskar, Khokon Naskar and Samir Naskar with sticks, iron-rods, gupti and injured them severely. The neighbours took them in injured condition to Bangur Hospital but due to seriousness of injuries, they were taken out of the said hospital and readmitted to the Calcutta Medical Research Hospital. According to the said complaint, those persons were at that time fighting with death.

5. It appears from the evidence on record that on the self-same night, Samir Naskar died in the Calcutta Medical Research Institute. Amar Sardar was, however, released after a fortnight or so. In view of death of Samir Naskar and severe injury inflicted on Amar Sardar, all the five accused, namely, Motilal Naskar and his four sons were charged u/s 302 of the Indian Penal Code for causing death of Samir Naskar and u/s 307/34 for the offence against Amar Sardar. Further charge u/s 307/34 was framed for causing severe injury to Bablu Naskar.

6. At the time of trial, prosecution examined twenty-one witnesses but the accused persons did not adduce any evidence in support of their respective defences. The Court, however, examined a witness for the purpose of proving two general diaries lodged earlier on the self-same day. The accused persons were, however, examined u/s 313 of the Code of Criminal Procedure.

7. As indicated earlier, the learned Sessions Judge found all the appellants guilty of the charges framed against them and consequently, the sentences mentioned above were imposed upon the appellants.

8. Being dissatisfied, the appellants have come up with these two separate appeals, one filed by Motilal and his three sons and the other by Subrata, the youngest son.

9. Mr. Sekhar Basu, the learned Advocate appearing on behalf of the appellants has severely criticized the order impugned herein and has contended that the entire prosecution case is based on suppression of the material facts. The contentions of Mr. Basu may be formulated thus :

(1) The FIR lodged by the brother-in-law of Amar Sardar cannot be treated as such, in view of the fact that in the early morning on the self-same day, two other general diaries, one at the instance of Motilal Naskar, one of the accused persons and the other, by the P.W. 2 had already been lodged. According to Mr. Basu; the injured persons having been referred to Bangur Hospital pursuant to those two G.Ds, the investigation, based on a subsequent complaint, lodged subsequently in the night, should be held to be illegal.

(2) None of the injured witnesses ever disclosed before the doctor either in the Bangur Hospital or the Calcutta Medical Research Centre, the names of the assailants and as such, the complaint lodged at 10 p.m. on the date of incident at the instance of brother-in-law of Amar Sardar who is a police officer should be disbelieved.

(3) The P.W. 2 herself having lodged a G.D. at 7-10 a.m. on the date of incident but in that G.D. there being no mention of any stabbing or use of weapons, the prosecution story that the accused persons used iron-rod, gupti, knife, cycle-chain etc. brought out at the time of trial should be disbelieved. Mr. Basu specifically relies upon the G. D. made by P.W.- 2 where she merely mentioned the use of "Char, Kil, Ghunshi" among the parties.

(4) The prosecution witnesses, according to Mr. Basu, in this case should be disbelieved in view of their contradictory statements as regards the alleged use of weapons. According to Mr. Basu, the prosecution case should also be disbelieved, taking into consideration the fact that their ocular versions are totally contradictory to the medical reports submitted in this case as regards injuries on the persons, specially, of Amar Sardar.

(5) Absence of any seizure and search at the alleged place of occurrence, according to Mr. Basu, is fatal to the prosecution case. Mr. Basu points out that there is even no indication of the place of occurrence in the sketch map filed by the prosecution.

(6) Mr. Basu lastly contends that non-examination of D.P. Naskar, who allegedly brought the injured witnesses to the Bangur Hospital as also to the Calcutta Medical Research Institute, casts a doubt about the real incident, occurred at the time of occurrence.

10. Mr. Basu, thus, prays for setting aside the order of conviction and sentences.

11. The aforesaid contentions advanced by Mr. Basu have been seriously disputed by Mr. Biswas, the learned Advocate appearing on behalf of the prosecution. According to Mr. Biswas, merely because there are some minor contradictory statements amongst the eye-witnesses as regards nature of assault, such fact cannot vitiate the conviction if the evidence given by the injured eye-witnesses are believed. Mr. Biswas contends that there is no reason to disbelieve the statements of the seriously injured eye-witnesses as they are not likely to implicate wrong persons by letting loose the real culprits.

12. As regards suppression of the G. D. lodged by P.W.2 at the instance of the prosecution, Mr. Biswas submits that it was definitely a mistake on the part of the prosecution, but according to him, for the mistake on the part of Investigating Officer, the real wrongdoers should not be set free. Mr. Biswas, admits that there was also mistake on the part of the Investigating Officer in not preparing an appropriate sketch map disclosing the place of occurrence and it was also his duty

to have a search or seizure at the place of occurrence but he explains that as that was a rainy day as pointed out by the Investigating Officer in his evidence, no purpose would have been served by making any search or seizure at the late night particularly when the incident occurred in the early morning.

13. Mr. Biswas further contends that unquestionably a land-dispute is the root of the trouble. There is no reason to disbelieve the versions of the P. W. 4 who was admittedly injured at the place of occurrence. Mr. Biswas submits that it is absurd to suggest that some outsiders in the locality came at that point of time and injured all the witnesses notwithstanding the fact that the trouble started between the accused and the P.Ws. Mr. Biswas, thus, prays for dismissal of the appeals after ignoring the minor discrepancies in the evidence of P.Ws. and the defect in the process of investigation as the Investigating Officer himself admitted that the case was the first one of murder investigated by him.

14. Therefore, the only question that arises for determination in these appeals is whether in the facts of the present case the learned Sessions Judge was justified in finding the appellants guilty by believing the prosecution witnesses.

15. As indicated earlier twenty-one witnesses were examined on behalf of the prosecution but out of those witnesses, P.W.2, P.W. 3, P.W. 4, P.W. 5, P.W. 6 and P.W. 16 claimed to be the eye-witnesses of the incident. We, therefore, proceed to consider the evidence given by these witnesses.

16. Smt. Provabati Naskar is the P.W.2 who is a member of the family of the victim and Samir Naskar, the deceased, was her son. According to the said witness, on the date of incident, at about 5 a.m. he heard an uproar and after opening the door of her room found that Bijali Naskar and Tapan Naskar were lifting Amar Sardar on the verandah in seriously injured condition when he was profusely bleeding from his injuries. According to her statement, she then put a piece of cloth on his wound. Bablu Naskar and Samir Naskar at that time came out of their rooms. Tapan Naskar also followed them and she also went behind them. She found that the accused persons were severely assaulting Bablu Naskar, Samir Naskar, Tapan Naskar by stones, knife, gupti, iron-rod and cycle-chain. She further found that the accused persons were dragging her son Samir Naskar towards the jungle. Motilal Naskar dashed her, as a result, she fell down. She then started shouting. Thereafter, the neighbours came there and the accused persons fled away.

17. Ashoka Sardar, the wife of Amar Sardar has appeared as P.W. 3. She has stated that on the date of incident, at 5 a.m. when she along with her family members were sleeping in their room, she heard that wife of Motilal was lamenting with the request "not to do any harm". Hearing that, her husband opened the door and went outside and she also followed him. She found that all the accused persons were standing near the chalaghar with gupti, knife, iron-rod, stones and cycle-chain in their hands. Seeing her husband, Motilal shouted inviting the other accused to kill

her husband and thereafter Susanta, one of the accused assaulted her husband with gupti on his belly. As a result of that he sustained severe injury. Thereafter, Susanta again assaulted him by a knife on his back. At that time, Bijali Naskar and Tapan Naskar came there and they took him to the verandah of the house where P.W.2 tied a piece of cloth on the wound of her husband. According to this witness, after witnessing the incident, Bablu Naskar, Samir Naskar and Tapan Naskar went out of that house and Pravabati also followed them and subsequently she heard that they were also assaulted and as the neighbours came there, the accused persons fled away with the weapons in their hands. She further stated that the villagers took the injured to the hospital and she also accompanied them. According to her, first they were taken to Bangur Hospital but as the treatment in that hospital was not appropriate, they were taken to Calcutta Medical Hospital and Samir died at about 10 p.m. on that day.

18. Amar Sardar is the P.W. 4. He has also supported the statements of his wife that after hearing the bewail of wife of Motilal, he opened the door and went towards chalaghar and at that time, Motilal and his four sons ran towards them shouting that there would be none in their family to hold the candle. According to this witness, Motilal assaulted him with an iron-rod from behind and Susanta assaulted him severely on his belly by a gupti. Due to such injury, he sat down. When he tried to stand up, Susanta again struck him on his back by a knife. He was then taken to Calcutta Hospital and prior to that they were taken to Bangur Hospital. He has, however, admitted in his evidence that he did not state to the doctor the names of the assailants.

19. Bablu Naskar is P.W. 5. Amar Sardar is his maternal uncle and Tapan Naskar is his younger brother. He has also narrated the incident in tune with evidence given by P.W. 3 and P.W. 4. He has further stated that Subrata, one of the accused suddenly threw a piece of brick which hit him on his head and thereafter the accused persons started assaulting him with rod etc. As a result, he lost his sense and he regained his sense in Calcutta Hospital after four or five days.

20. Purabi Ray is the P.W.6. Amar Sardar is her maternal uncle. At the time of incident, she was unmarried and she stayed in the same house. According to her statement, at about 5 a.m., she woke up after hearing a noise, came out of her room and found that Amar Sardar was lying on the dalan with bleeding injuries on his person. She found Pravabati, Bijali and Tapan were placing clothes on the wound of Amar Sardar. According to her, she suddenly found Tapan, Bablu and Samir Naskar were running towards the chalaghar to enquire and find out the assailant of Amar. She and Pravabati also followed them and she found that Subrata, one of the accused assaulted Bablu Naskar by a piece of brick as a result, he fell down. Motilal had a rod in his hand and Susanta was carrying gupti and knife. She further alleged that Sukanta carried a rod and Swapan had cycle-chain in his hand. All those accused persons, according to her, participated in inflicting assaults. She also

confirmed that Motilal Naskar dashed Provabati, and consequently, she fell down.

21. Tapan Naskar, P.W.16, is the other injured witness. He has substantially repeated the versions of the other alleged eye-witnesses. According to this witness, Sukanta had iron-rod in his hand, Subrata carried a half size brick, Susanta had a gupti in his hand and Swapan had iron rod in his hand. He made out a new case that Subrata assaulted Amar by a brick. He further stated that Motilal, Swapan and Sukanta assaulted Amar by iron-rod. He further stated that Susanta then assaulted by his knife. As Amar sustained severe injuries, he rushed towards him for his rescue and at that time Motilal, Swapan and Sukanta assaulted him by iron-rod.

22. P.W. 18 is the doctor of M. R. Bangur Hospital who examined the injured witnesses in the said hospital. It appears from his evidence that he has given in details the injuries sustained by the eye-witnesses as well as Swapan Naskar, one of the convicted person. From his evidence it appears that only Tapan Naskar disclosed the names of Motilal, Swapan, Sukanta, Susanta, Subrata as the assailants but no other injured witnesses mentioned the names of the assailants as would appear from the injury-report proved by this witness. It further appears that so far the injury report of Swapan Naskar, one of appellants is concerned, it is specifically reported that Amar Sardar in association with Samir Naskar, Bablu Naskar, Khokon Naskar, Provabati Naskar and Bijali Naskar and others injured him.

23. P.W. 19 is another doctor who performed post-mortem of Samir Naskar.

24. In this case, apart from the prosecution witnesses, at the instance of Court, an Assistant Sub-Inspector of Police has been examined, who at the relevant point of time was attached to Metiabruz Police Station. The said witness has proved two general diaries being Entry No. 1390 dated 26th June, 1992 at the instance of Motilal Naskar and a subsequent G. D. being G. D. No. 1394 on the self-same day at the instance of P.W. 2. The first diary was lodged at 5:30 a.m. wherein Motilal alleged that Swapan Naskar was injured at the instance of Amar Sardar and other injured prosecution witnesses. It further appears from the evidence of the said Court witness that on the basis of such G. D. He referred Swapan Naskar, the injured, who is one of the appellants before us to Bangur Hospital. The second G.D. was lodged at 7:10 a.m. by P.W. 2 where P.W. 2 alleged fight between the parties but she specifically mentioned use of "Kil, Char and Ghunshi" in the said assault. The said witness has further stated that he referred the injured witnesses namely, Amar Sardar, Bablu Naskar, Tapan Naskar to M.R. Bangur Hospital. The prosecution or the defence did not cross-examine the said Court witness.

25. After hearing the learned Counsel for the parties and after going through the aforesaid materials on record we find that there was a dispute over land and structure between Motilal Naskar and Amar Sardar who are adjoining owners of the property. It further appears that as the accused persons were raising structure, the injured witnesses objected to such illegal structure, for which there was altercation

and clash as a result, Swapan Naskar was injured. It further appears that Motilal Naskar, one of the appellants before us, first lodged a G. D. before the local police station at 5:30 a.m. on that day complaining the illegal action on the part of the injured witnesses and mentioning the assault on Swapan. Subsequently, at 7:10 a.m., Provabati, the P.W. 2, went to the police station and lodged a G.D. at the instance of injured persons but in that G.D. there was no reference of stabbing of Amar Sardar by the accused persons but it is mentioned that only "Kil, Char and Ghunshi" were used, and consequently, the prosecution witnesses were injured.

26. The local police station referred the injured persons to the M. R. Bangur Hospital. It further appears on record that at about 8 a.m. all the injured prosecution witnesses as well as the injured Swapan Naskar, one of the accused went to Bangur Hospital and they were examined by the doctor and in the injury report specific reference of two general diaries mentioned above have been made. Swapan Naskar was, however, released on the self-same date but the injured witnesses were taken back from M.R. Bangur Hospital to Calcutta Medical Research Institute where one of the injured persons died and others were treated there.

27. Therefore, there is no dispute that the death of Samir and the injuries mentioned above were the outcome of the land dispute between the Amar Sardar's family and Motilal Naskar's family. We also find that Amar Sardar's family is the first aggressor and injury of the prosecution witnesses and death of one of the family members are the result of the counter-attack by the appellants.

28. It is true that as the incident occurred by 5:30 a.m. or 6 a.m., Provabati ought to have mentioned the incident of stabbing and use of dangerous weapons by the appellants in the G.D. lodged at 7:10 a.m. But for the reasons best known to her, such fact was not disclosed in the said G.D. But the fact remains that Amar Sardar was definitely stabbed between 5:30 a.m. and 7 a.m., otherwise, he could not be taken to M. R. Bangur Hospital from the place of occurrence by 8 a.m. It further appears that Samir Naskar, son of P.W.-2 was also injured and has died consequent to the aforesaid incident. All the prosecution witnesses, including the injured ones, in one voice have described the appellants as assailants.

29. Although, Mr. Basu appearing on behalf of the appellants strenuously contended that if the appellants were the real assailants their names ought to have been disclosed to the doctors, both at Bangur Hospital and the Calcutta Medical Research Institute and absence of their names makes it clear that the appellants have been falsely implicated, we are unable to accept such contention.

30. After going through the injury reports of the doctors, we find that one of the injured, viz. Tapan Naskar, has definitely mentioned the names of the appellants but in the injury report of others, their names are not mentioned. In view of such fact, we are unable to give any importance to the aforesaid contention of Mr. Basu that the absence of the names of the appellants in the injury reports given in the Bangur

Hospital falsifies the statement that they were involved in the incident. We are unable to accept the contention of Mr. Basu that as the injured witnesses severely assaulted Swapan Naskar, the local people injured Amar Sardar and killed Samir Naskar. When there is land dispute between the two families residing as adjoining owners and the injured witnesses first assaulted one of the appellants, it is absurd to suggest that some outsiders will kill Samir Naskar and injure Amar Sardar but the injured witnesses will not name those assailants who are local people and are all known.

31. In this case, there may be some discrepancies as regards nature of weapons, the number of the actual assailants upon Amar Sardar and other injured witnesses or the manner of assault, but all of them have in the same tune narrated the involvement of all the appellants in the incident. It is true that Provabati, P.W.-2 did not mention the use of gupti or knife at the first instance while lodging G. D., but for that reason we cannot conclude that gupti, iron-rod etc. were not used in the incident. From the post-mortem report of Samir and other injury reports it is apparent that those weapons were used. The injury of Amar Sardar also discloses that it was a stabbing injury on the belly. Although, apart from the said injury in the stomach, Amar did not sustain other injuries by knife on his back as described in evidence, for that reason, we cannot totally disbelieve the injured witnesses. It appears that the death and the injuries mentioned above are all the result of land dispute between the two families and in such a case, the witnesses while narrating incident may have exaggerated the roles played by the assailants so as to give a more credible look to the case.

32. At any rate, the presence of all the appellants at the time of incident has been established even by the G. D. lodged by P.W.-2 and even before the doctor at Bangur Hospital, the names of all the appellants were mentioned by one of the injured eye-witnesses. For the above reasons, most probably, the other injured witnesses did not repeat the names while their respective injuries were recorded by the doctor.

33. The fact that Samir Naskar had died in the said incident and Amar was injured by stabbing at the belly has not been disputed. The nature of injuries inflicted upon Amar Sardar and Samir Naskar are sufficient to conclude that the assailants knowing fully well that the effect of those assaults will be "death", committed the crime. Such intention is also apparent from the evidence of the prosecution witnesses that Motilal and his sons boastfully uttered that they would see that there will be no person in the family of the victims to lead the candle.

34. As regards absence of search and seizure at the instance of Investigating Officer, we find substance in the contention of Mr. Basu that same was negligently done. It, however, appears from the evidence of the Investigating Officer that the said investigation was his first investigation of murder case. Although, Mr. Basu seriously contended that the FIR lodged at 10-50 in the night should not be given any

importance, in the case before us, in view of the admitted fact that the incident occurred due to land dispute between the parties, the lodging of FIR, at a belated stage has lost its importance. The fact that at 5:30 a.m. and 7:10 a.m. on the self-same morning, both the parties went to the police station to lodge G.D. disclosing injuries and the police themselves referred those injured persons to the hospital leaves no doubt about the presence of the accused at the time of occurrence.

35. We are quite alive to the position of law that merely because the investigation has been negligently done, for that reason the prosecution case cannot fail altogether, if there are eye-witnesses to the incident and if the Court believes the versions of the eye-witnesses. In this case, we have already pointed out that there are exaggerations in the statements made by the injured witnesses, but the fact that they were injured in the incident cannot be disputed and even no suggestion has been given by the defence that those injuries were self-inflicted injuries for the purpose of implicating the appellants. It is impossible to accept the extreme submission of Mr. Basu that in the dispute between two families some outsiders had killed Samir Naskar and stabbed Amar Sardar. We have already said that if such was the incident, the injured witnesses would have definitely named those persons. There is no reason to protect the real culprits at the instance of the injured.

36. As regards non-examination of one D. P. Naskar who took the injured witnesses to the hospital; although, a lot of arguments were advanced by Mr. Basu and he asked us to draw adverse inference, we do not find any such reason. We are of the view that the non-examination of D. P. Naskar has not affected the merit of the prosecution case when the occurrence of the incident and involvement of two families therein are admitted. We have already pointed out that one of the injured witnesses mentioned the names of the appellants before doctor as will appear from his injury report. Merely because no charge has been framed for injuring that particular witness, for that reason, we cannot exclude the said document from our consideration. The said doctor of the Bangur Hospital gave evidence and the report of injury is very much exhibited in this case and as such, the same can be taken into consideration in this case.

37. We, thus, find that it is fully established by the evidence given by the injured witnesses as well as the other prosecution witnesses beyond reasonable doubt that the appellants actively participated in the incident, as a result, Samir Naskar died and Amar Sardar was seriously injured. The weapons used in the incident leave no doubt that the intention of the appellants was to kill and not to cause mere injury. Although, the prosecution ought to have placed Ext.-6 and Ext.-6/1 at their instance, the aforesaid two documents rather support the prosecution case that incident really occurred at the relevant point of time at the said place and death of one and grievous injury of others are outcome of such incident. As regards non-mentioning of place of occurrence in the map prepared by the Investigating Officer, we find that

same has lost its significance in view of the fact that the happening of the incident at that place is admitted and involvements of the appellants as well as injured witnesses are also established.

38. On consideration of the entire materials on records, we are, thus, of the view that in this case it is clearly established that the injured witnesses sustained injuries at the instance of all the appellants as a counter-blast of the attack on Swapan Naskar for which a G.D. at 5:30 a.m. was lodged by Motilal Naskar and that the appellants actively participated in such incident. We do not find any ground to disbelieve the injured eye-witnesses.

39. We, thus, find no reason to interfere with the ultimate conclusion arrived at by learned Sessions Judge holding the appellants guilty and consequently, passing the sentences impugned herein. It appears that the learned Sessions Judge although convicted the appellants on the charge under Sections 302/34 of the Code, while imposing the sentences, he inadvertently failed to mention Section 34 of the Code. It should be under Sections 302/34 of the Code. The appeals are, thus, dismissed. The orders of conviction and sentence passed by the learned Court below are hereby affirmed with the aforesaid modification.

Arun Kumar Bhattacharya, J.

40. I agree.