(2006) 03 CAL CK 0005

Calcutta High Court

Case No: Criminal A. No. 228 of 1996

Birsa Oraon @ Lute		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: March 10, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 304, 326

Hon'ble Judges: Sankar Prasad Mitra, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Sauvik Mitra, for the Appellant; A. Goswami and K.J. Ahmed, for the Respondent

Final Decision: Dismissed

Judgement

Sankar Prasad Mitra, J.

This criminal appeal is directed against the judgment dated 29th March, 1996, passed by the lea rned Additional Sessions Judge, Jalpaiguri in Sessions Case No. 5 of 1993, whereby the appellant was convicted and sentenced u/s 304 Part II of IPC to suffer rigorous imprisonment for ten years and also to pay a fine of Rs. 10,000/- and in default to suffer rigorous imprisonment three years more.

2. The prosecution''s case in brief is that the de facto complainant, Kalam Sekh, P.W. 1 lodged a written complaint at Khargram Police Station alleging that on 15th April, 1992 at about 10 p.m. while the victim, Subol with his wife P.W.4 and others were returning home from the factory, at that time near the house of Subol the accused/appellant Birsa attacked him on road from behind and struck him with an arrow which pierced the neck of the victim and, as a result, the victim Subol sustained bleeding injury and the appellant fled away from the place. The relations of the victim took Subol to Sankosh Tea Garden Hospital for immediate treatment and thereafter the victim was sent to Alipurduar S.D. Hospital for better treatment.

The appellant had a family dispute with the victim prior to the incident and as a result the appellant struck the victim, Subol with an arrow. On receiving the complaint the O.C. Khargram Police Station registered Khargram P.S. Case No. 60 of 1992 u/s 326 of IPC. (Exhibit 5 series) dated 16th April, 1992 at 15.25 hrs. and endorsed the case to S.I., S.S. Ali, P.W.10, for causing investigation. Accordingly investigation of the case was taken up by P.W. 10, however, in the meantime the victim was sent to Alipurduar S.D. Hospital and he expired there on 16th April, 1992 at 12.50 hrs. On the basis of the information sent by Dr. S.A. Chanda, Superintendent, Alipurduar S.D. Hospital, Alipurduar P.S. U.D. Case No. 71 of 1992 dated 16th April, 1992 was started and S.I. S.C. Roy Barman held inquest in respect of the deadbody of the victim (Subol) vide Exhibit 8 and also sent the deadbody of the victim to Alipurduar S.D. Hospital Morg through constable No. 922, Answar Ali, P. W. 7 for P.M. examination under deadbody challan (Exhibit 5 series). The 1.0. during the investigation visited the P.O., prepared sketch map with index vide (Exhibit 6 series), examined the witnesses, recorded their statement u/s 161 Cr. PC. He also seized the arrow under a seizure list vide Exhibit 7 and arrested the accused. The injury report (Exhibit 2) in respect of the victim at first produced at Sankosh Tea Garden Hospital was prepared by Dr. O.P. Prasad, P.W. 6. The I.O. on 17th April, 1992 through R.T. Message received the death news of the victim and as such he made prayer to the Court for adding Section 304 of IPC and thereafter on being transferred he made over the case record to O.C. on 12th July, 1992. The S.I. C.R. Senapati to whom the case was subsequently endorsed for further investigation, collected P.M. report and after obtaining opinion of the P.P., submitted chargesheet against the accused u/s 304 of IPC. In the Court below the appellant was charged u/s 304 Part II of IPC and in answer to the charge the accused pleaded not guilty and claimed to be tried. The defence of the appellant as appearing from the trend of cross-examination as well as his examination u/s 313 of Cr. PC is that he is innocent and he did not kill the victim (Subol).

3. In this case the prosecution has examined as many as 10 witnesses including the doctor who held the P.M. examination of the victim. That apart the prosecution has exhibited several documents viz. Exhibits 1 to 8 and the seized arrow material Exhibit 1. On the other hand, no defence witness was examined from the side of the appellant in the Court below.

4. The learned Trial Judge relied upon the testimonies of witnesses, namely, P.W.3, Sanichar Oraon, brother of the accused, P.W. 4, Smt. Gangi Kumari, wife of the victim and sister of the appellant and P.W. 5, Ram Kumar, son of the victim, to whom the appellant was related as maternal uncle. P.W. 8, Dr. Aunp Roy, who held P.M. examination on the deadbody of the victim who saw seized arrow and opined that the death was due to injuries on the body of the victim caused by throwing arrow and the death was result of such injury which was anti-mortem and homicidal in nature. He also opined that there is no possibility of the deceased to survive with such injuries, the details of which were noted by him in the P.M. report vide Exhibit 4

and also the evidence of I.O., P.W. 10 S.S. Ali. The Trial Judge considering the evidence-on-record found that though the appellant was related to P.W. 3, P.W. 4 and P.W, 5, the prior existence of dispute amongst them with regard to indecent proposal made by the appellant to keep the wife of P.W. 3 with him as concubine which was protested by the victim which infuriated the appellant and he struck the victim with an arrow when the victim along with P.W. 3, P.W.4 and P.W. 5 were returning home from the house of P.W. 2. Since the victim died because the arrow thrown by the appellant ultimately killed him, the Trial Court found the appellant guilty and convicted him and sentenced him as indicated above.

5. Let us now consider whether we should sustain the judgment dated 29th March, 1996 passed by the Additional Sessions Judge, Jalpaiguri or not?

6. Learned Advocate Mr. Souvik Mitra appearing as amicus curiae submitted before us that the appellant already suffered sentence imposed upon him. However, he pointed out that there was delay in lodging the FIR to the extent of 18 hrs. and in this connection he pointed out the FIR written complaint, Exhibit 1, formal FIR. Exhibit 5 series, deposition of P.W. 1 Kalam Sekh and other materials-on-record. According to him the incident occurred on 15th April, 1992 at about 10.00 p.m. (22 hrs.) in the night and the matter was reported to Khargram P.S. by P.W. 1 on 16th April, 1992 at about 15.25 hrs. It is therefore submitted by him that the prosecution could not explain the delay and as such, the prosecution''s case should be disbelieved by this Court and the appellant should be acquitted.

7. Mr. A. Goswami, learned Additional P.P., appearing on behalf of the State with Mr. K.J. Ahmed drawing our attention to Exhibit 1, Exhibit 5 series, Exhibit 2, injury report, deposition of P.W. 1 and other witnesses, including deadbody challans vide Exhibit 3 series and inquest report, Exhibit. 8, submitted that it is true that the P.W. 1 did not witness the incident and he somehow came to know about the incident of killing and he went to P.S. and lodged written complaint (Exhibit 1 series), written by I.O. But the oral and documentary evidence on record go to show that the victim after he was struck with an arrow on his neck was at first taken to Sankosh Tea Garden Hospital where he was treated by P.W. 6, Dr. O.P. Prasad and since the injury was grievous in nature, the victim was sent to Alipurduar S.D. Hospital for better treatment. However, on 16th April, 1992 the victim expired and doctor of the said hospital, i.e. S.A. Chandra, Superintendent, Alipurduar S.D. Hospital reported the matter to Alipurduar P.S. which started Alipurduar P.S. Case No. 71 of 1992 dated 16th April, 1992, on the basis of which an inquest was held by S.I. Mr. Barman, (Exhibit 8), The deadbody of the victim was sent to Alipurduar S.D. Hospital through P.W. 7, Constable No. 922, Answar Ali, under a deadbody challans vide Exhibit 3 series and in the meantime, the FIR was lodged and I.O. took up the investigation of the case. So, in fact, the matter was brought to the notice of Alipurduar S.D. Hospital much before the lodging of FIR at P.S. and perhaps, for better treatment of the victim his relations were engaged in the matter and the appellant being their

relation, they must have given second thought in the matter and waiting for survival of the victim. It is evidently clear that at the first instance the Alipurduar Case No. 16 of 1992 was registered u/s 326 of IPC and the said P.S. was situated at a distance of 8 kilometers from the P.O. That apart, there are eye-witnesses to the incident. The oral testimonies of P.W. 10 shows that he received the news of death of the victim during investigation on 17th April, 1992 through R.T. message and the injured (victim) expired on 16th April, 1992 at about 12.50 hrs. Therefore considering the entire evidence-on-record and attending circumstances of the case it can be definitely concluded that the delay in lodging the FIR has been well explained by the prosecution. That apart in a case reported in 2006 SCW 298 (Rabindra Nath Mahato and Ors. v. State of Jharkhand) it has been observed by Their Lordships that the mere delay in recording of an FIR and sending the same to Magistrate is not the circumstances to discard the prosecution case in its entirety if the prosecution had produced the reliable evidence to prove the guilt of the accused. In the instant case the prosecution had produced at least three eye-witnesses to prove the guilt of the accused and that apart they have sufficiently explained the reason for delay in lodging the FIR. Thus, we are of the view that there was no delay in lodging the FIR. Accordingly, we are unable to accept the contention of the defence in this respect.

8. The next argument of Mr. Mitra is that the prosecution, in this case, could not prove beyond any shadow of doubt as to where the incident actually occurred. It is submitted by him that if the evidence of P.W. 1, P.W.2, P.W.3, P.W.4 and P.W.5 are read together then it would show shifting of P.O. According to him if the evidence of P.W. 1 is believed then it would show that the incident occurred in the house of the victim. On the other hand if the testimonies of P.W.3, P.W.4 and P.W.5 are believed then it would show that the incident occurred on road. It is therefore submitted by him that since the prosecution could not definitely establish the place where the incident occurred, the entire case of the prosecution should be doubted and the accused should be acquitted.

9. Learned Prosecutor Mr. Ahmed appearing on behalf of the State drawing our attention to the deposition of P.W. 1 to P.W, 5 submitted that P.W, 1 is simply lodged the FIR scribed by the I.O. and he did not know about the incident, therefore his evidence to the effect that the incident occurred in the house of the victim and it was the outcome of the fighting between the appellant and the victim should not be accepted as true in view of the evidence laid by P.W.2 to P.W.5. According to him there was a dispute between the appellant and the victim and P.W.3. Both of them raised protest when the appellant proposed to keep the wife of his brother P.W.3 as concubine. They went to the house of P.W.2, T. Toppa known as Tara Master being the Union Leader of Sankosh Tea Garden on 15th April, 1992 to lodge complaint against the appellant in this regard and when they were returning to their house the appellant struck the victim with an arrow on his neck on road near his house and as he sustained bleeding injury he was taken to Snnkosh Tea Garden Hospital for treatment and wherefrom he was referred to Alipurduar S.D. Hospital for better

treatment and the victim ultimately expired there on 16th April, 1992. According to Mr. Ahmed the incident occurred on road near the P.O. which has been well explained by these witnesses as also P.W.10. The I.O. prepared sketch map of the P.O. with index vide Exhibit 6 showing ''A'' as place of occurrence. Therefore, it is submitted by him that the P.O. has been sufficiently explained in this case by the prosecution witnesses beyond any shadow of doubt and therefore the contention of the learned Advocate for the appellant should not be accepted by this Court and the judgment passed against the appellant should be upheld. It is true that the appellant, P.W.3, P.W.4, P.W.5 are closely and the appellant wanted to keep the wife of his brother PW.3 as concubine which was not accepted by the victim and P.W.3. It transpired from the oral testimonies of P.W.2 to P.W.5 that on 15th April, 1992 P.W.3, P.W.4 and P.W.5 and the victim went to the house of P.W.2 and complained against the appellant over the issue and P.W.2 assured them to settle the matter on next day however when P.W. 3 along with P.W.4 and P.W.5 and the victim were returning home from the house of P.W.2 the appellant struck the victim (Subol) with an arrow on his neck and then fled away. This evidence finds corroboration from P.W.4, Gangi Kumari, wife of the victim who saw the incident of attack upon her husband, victim by the appellant with an arrow which struck his neck, the son of the victim P.W.5 Ram Kumar also saw the appellant to struck his father with an arrow on his neck and P.W.3 brother of the appellant. From their testimonies it further appears that the incident occurred near the house of the victim on road and P.W. 10 who prepared the sketch map vide Exhibit 6 as pointed out ''A'' as P.O. It transpires from the testimonies of prosecution witnesses that the victim was taken at first Sankosh Tea Garden Hospital for treatment and thereafter he was shifted to Alipurduar for better treatment where he expired on 16th April, 1992 due to injuries sustained. P.W. 8 Dr. Anup Roy who held P.M. examination of the victim in respect of Alipurduar U.D. Case No. 71 of 1992 being identified by constable No. 922, P.W. 7, found one sharp-cut injury over the front to right side of the neck, placed horizontally of size 11/2 x1/2 at the level of upper border of thyroid cartilage starting from anterior midline with injury sharp-cut to right common carotid artery and internal jubular vein with extravasations of blood in the surrounding soft tissue along with injury to deeper soft tissue. He further opined that the death of the deceased was due to severe irreversible shock and haemorrhage as a result of abovementioned injuries which was anti-mortem and homicidal in nature. It is also opined by him that such an injury can be caused by throwing of an arrow and his evidence shows that the seized arrow was shown to him. The P.W.8 has proved P.M. report vide Exhibit 4 and the oral and documentary evidence on record which also includes inquest report have sufficiently proved beyond any shadow of doubt that the appellant struck the victim (Subol) with an arrow on his neck near his house on road when the victim along with witnesses referred to above were returning home from the house of P.W. 2.

10. In the circumstances, we are of the view, that the prosecution in this case has sufficiently proved the P.O. and the killing of the victim by the accused with an arrow as he was infuriated for non-acceptance of indecent proposal by the victim and P.W. 3.

11. It is submitted by Mr. Mitra that the offending weapon was not identified by P.W. 5 because the seized arrow, Material Exhibit (1) was not the arrow shown to P.W. 5 during his examination. It is therefore submitted by him that in the absence of any explanation from the side of the prosecution it cannot be said that the appellant killed the victim with the arrow seized by the I. 0, In the circumstances, he further submitted that the conviction and sentence imposed upon the appellant should be set aside by this Court.

12. Learned Prosecutor, Mr. Ahmed, drawing our attention to the deposition of P.W.4, wife of the victim and P.W. 5 son of the victim as also the evidence of P.W. 8, who held the P.M. examination and I.O. P.W. 10, submitted that the weapon used for killing the victim was seized as produced by P.W. 5 and the said weapon was handed over to P.W.5 by the victim soon after the incident and the doctor, who held P.M. examination identified the same during his examination. It is also submitted by him that the eye-witnesses confirm in their evidence that the victim was killed by the appellant as he threw arrow which struck the neck of the victim. Therefore, considering the oral testimonies of eye-witnesses including the doctor, who held P.M. examination, P.W. 8, and I.O., we find that although the seized arrow was not pasted with label by the I.O. in the P.M. examination of the victim, P.W. 8 found injury on the neck and according to him death caused by throwing of an arrow and he identified the said seized arrow when it was shown to him during his examination. It is true, that at the time of examination of P.W. 5, the prosecution could not produce the seized arrow. And as such, while confirming assault upon the victim by an arrow, P.W, 5 could not identify the same as he could not remember the shape of the arrow at that time. Be that as it may, the eye-witnesses have clearly confirmed in their evidence that the victim was struck with an arrow by the appellant and the opinion of P.W. 8 shows that the injury sustained by the victim could be caused by an arrow. In the circumstances, failure on the part of the prosecution to produce the seized arrow before P.W. 5 during his examination will not change the complexion of the case. On the contrary on perusal of oral and documentary evidence on record, we are of the view, that the offending weapon used for killing the victim by the appellant was an arrow.

13. Thus, considering the entire evidence on record and the attending circumstances of the case, we find that the learned Trial Court had rightly convicted the accused and sentenced him accordingly.

14. Therefore, the judgment passed by the learned Trial Court does not call for interference by this Court, We therefore find no merit in the appeal and is accordingly dismissed.

Amit Talukdar, J.

15. I agree.