

**(2006) 07 CAL CK 0004**

**Calcutta High Court**

**Case No:** C.R.A. No. 543 of 2003

Basir Sk., Harun Rashid, Sk.  
Manjur Ali, Sk. Ajid and Nazrul  
Islam

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** July 18, 2006

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164(5)
- Explosives Act, 1884 - Section 9B(1)
- Penal Code, 1860 (IPC) - Section 302, 34

**Citation:** (2006) 4 CHN 111

**Hon'ble Judges:** Tapas Kumar Giri, J; Alok Kumar Basu, J

**Bench:** Division Bench

**Advocate:** Sekhar Basu and Tapas Ghosh, for the Appellant; Kazi Safiullah, Joy Sengupta and Bhaswati Pal, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Alok Kumar Basu, J.

Five appellants in all being convicted u/s 302/34 of the IPC and also u/s 9B(1)(b) of the Indian Explosives Act by the learned Additional Sessions Judge, Fast Track Court, Bolpur in the district of Birbhum in connection with Sessions Trial No. 3 of January, 2003 corresponding to Sessions Case No. 123 of 2002 have preferred this appeal challenging the said conviction order.

2. The prosecution case in brief was that on 6th February, 2001 at about 10.30 p.m. when Sk. Sariat of village Lagosha under P.S. Labpur was returning home after closing video hall at Tarulia Hat, the present appellants in furtherance of their common intention encircled him and Sk. Basir and Manjur charged two bombs targeting him near the southern side of the road near Laghosa Primary School. Sk.

Sariat being charged with one of the bombs on his back fell down with serious bleeding injuries and hearing his alarm Sk. Asgar Ali and other relatives came on the spot and soon thereafter Sk. Sariat was shifted to hospital where he was pronounced dead. Sk. Sariat on his way to hospital disclosed the name of the present appellants as his assailants.

3. Sk. Asgar Ali lodged the written complaint relating to the occurrence at Labpur P.S. and thereafter Labpur P.S. started the case against the present appellants.

4. In course of investigation, police collected post-mortem report of the victim and also arranged for recording statement of P.W.2 Maniruddin Sk. by a learned Judicial Magistrate and thereafter on completion of investigation and finding a strong prima facie case against all the five appellants, charge-sheet was submitted against all of them u/s 302/34 of the IPC and also u/s 9B(1)(b) of the Indian Explosives Act.

5. The learned Additional Sessions Judge after framing charges against the appellants on the basis of police papers explained the charges to the appellants and all of them pleaded not guilty and claimed for trial. Prosecution at the time of trial examined 14 witnesses in all including P.W.1 Asgar Ali, P.W.2 Maniruddin Sk., P.W.3 Akema Bibi, P.W.4 Sk. Yusuf, P.W.5 Abdul Hakim, P.W.6 Sk. Najamuddin, P.W.7 Rajia Bibi, P.W.11 Sri S.R. Roy, Judicial Magistrate, P.W.13 Dr. Manojit Kr. Das and P.W.14 Falguni Majhi who conducted the investigation and submitted the chargesheet.

6. The learned Additional Sessions Judge, mainly relying on the deposition of P.W.2 Maniruddin Sk. and his statement recorded u/s 164(5) of the Cr. PC by the learned Magistrate, came to the conclusion that all the five appellants were present at the place of occurrence sharing a common intention to kill Sk. Sariat due to their previous enmity and at the place of occurrence out of the five appellants, Sk. Basir and Manjur threw bombs targeting Sk. Sariat and Sk. Sariat receiving bomb injury ultimately expired at the hasped. The learned Additional Sessions Judge apart from the statement of P.W.2 who claimed himself to be an eye-witness of the occurrence also relied on the statement of P.W.1 Asgar Ali, P.W.3 Akema Bibi, P.W.5 Abdul Hakim, P.W.6 Sk. Najamuddin and P.W.7 Rajia Bibi who also deposed during trial that all of them came to know from the victim himself the name of the present appellants as his assailants. Thus, the learned Additional Sessions Judge, with reference to the FIR lodged by P.W. 1 and with reference to the evidence of P.W. 1 to P.W. 7 and the medical opinion regarding the cause of death of the victim, found all the appellants guilty of the offence both u/s 302/34 of the IPC as well as u/s 9B(1)(b) of the Indian Explosives Act and all the appellants were accordingly convicted and they were sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 2000/- each, in default to suffer rigorous imprisonment for two months each for the offence u/s 302/34 of the IPC and Sk. Basir and Manjur Ali were sentenced to suffer rigorous imprisonment for one year each for the offence u/s 9B(1)(b) of the Indian Explosives Act.

7. Mr. Basu, appearing in support of the appeal has seriously challenged the conviction order as well as the consequential order of sentence as recorded by the learned Additional Sessions Judge against all the five appellants. Mr. Basu contends that from the cross-examination of P.W.1 Asgar Ali it is very much clear that he was the mastermind behind lodging this false case against the present appellants out of his previous enmity towards appellants.

8. Mr. Basu submits that on careful examination of the prosecution witnesses it is very much clear that prosecution really relied on the deposition of P.W.2 who was an alleged eye-witness of the occurrence and also on the deposition of P.W.1, P.W.3 and P.W.5 to P.W.7 who being close relatives of the victim disclosed that all of them came to know from the victim himself the name of the present appellants as his assailants.

9. Mr. Basu submits that although P.W.2 claimed himself to be an alleged eye-witness and he gave his statement even before the learned Judicial Magistrate u/s 164(5) of the Cr. PC as an eye-witness, strangely enough, his name did not figure in the FIR lodged by P.W.1 soon after the occurrence. Mr. Basu contends that even in the deposition of P.W.1 during trial, there was no mention regarding presence of P.W.2 at the time of occurrence. Mr. Basu submits that other prosecution witnesses also did not mention that P.W.2 was found on the place of occurrence and he was with the victim at the time of occurrence.

10. Mr. Basu contends that P.W.1 and so also P.W.3 and P.W.5 to P.W.7 were all the relatives of the victim and all of them stated before the Trial Court that they came on the place of occurrence hearing the sound of blasting of bombs and only from the injured victim they came to learn the name of the appellants as his assailants. Mr. Basu contends that the real question for serious consideration would be as to whether the victim was in a condition to speak out and to mention the name of the assailants on receipt of serious injuries as a result of bomb blasting. Mr. Basu in this context has referred to the statement of the doctor P.W.13 who conducted post-mortem examination of the dead body of the victim and submits with sufficient force that in the cross-examination doctor clearly stated that in view of the seriousness of the injuries received by the victim it was not physically possible for him to talk with anybody and, in fact, from the statement of P.W. 1 and other witnesses it is clear that victim was pronounced dead soon he was brought to the hospital. Mr. Basu contends that P.W.1, P.W.3 and P.W.5 to P.W.7 are all near relatives of the victim and the only independent witness examined by investigating officer was P.W.4 and this P.W. did not support the prosecution case that victim was in a position to speak.

11. Mr. Basu contends that there is no denying of the fact that victim Sariat received bomb injuries and he died as a result of such bomb injury, but, the question is whether prosecution really succeeded in proving its case that the present appellants were responsible for the homicidal death of the victim and in particular appellants

Basir and Manjur were responsible for charging of bombs targeting the victim on the place of occurrence and according to Mr. Basu prosecution evidence was not at all satisfactory to prove the charges against any of the appellants facing the trial and hence, Mr. Basu submits that the learned Additional Sessions Judge totally misdirected himself in the matter of appreciation of evidence and thereby he recorded an illegal order convicting the present appellants and such order must be set aside in the interest of justice and fair trial.

12. Mr. Joy Sengupta representing the State respondent has strongly opposed the submissions of Mr. Basu contending inter alia that prosecution evidence was both satisfactory and convincing and on the basis of prosecution evidence, the learned Judge rightly recorded the conviction order against all the appellants.

13. Mr. Sengupta contends that FIR was lodged within a shortest possible time and in the body of FIR name of all the appellants was mentioned as gathered by the FIR maker P.W. 1 and subsequently during trial prosecution witnesses namely P.W.3 and P.W.5 to P.W.7 corroborated the contents of the FIR as well as the statement of FIR maker as P.W.1 that all of them along with P.W. 1 came to learn from the victim the name of the appellants as his assailants.

14. Mr. Sengupta submits that P.W.2 was an eye-witness of the prosecution and this P.W. during investigation gave a statement before the learned Judicial Magistrate u/s 164(5) of the Cr. PC and there is no reason to disbelieve the statement of P.W.2 as an eye-witness.

15. Mr. Sengupta submits that the prosecution case that the victim suffered bomb injuries and died out of such injuries gets full corroboration both from the post-mortem report as well as from the statement of the doctor as P.W.13 and when from the deposition of P.W.2 as eye-witness and also from the deposition of P.W.1, P.W.3 and P.W.5 to P.W.7 we get that all of them came to learn name of the appellants directly from the victim himself, the learned Judge made no mistake either in fact or in law in convicting the appellants u/s 302/34 of the IPC and u/s 9B(1)(b) of the Indian Explosives Act.

16. We have heard and considered submissions of both Mr. Basu and Mr. Sengupta and we have also examined the prosecution evidence on record. There is no denying of the fact that Sariat Sk. received bomb injuries on 6th February, 2001 while returning home after closing his video hall and Sariat Sk. was pronounced dead when he was brought to hospital from the place of occurrence. The prosecution allegation against the present appellants is very specific and clear to the effect that the present appellants encircling Sariat, Sk. near the primary school intended to kill him and, in fact, appellants Basir and Manjur threw two bombs and the bomb thrown by Basir caused serious injuries on the person of Sariat resulting his death subsequently.

17. Prosecution in order to prove the case against the appellants mainly relied on examined seven witnesses in all and they are P.W.1 to P.W.7.

18. On the examination of the statement of P.W.1 along with the FIR lodged by him, apparently it was made clear that he was the man who saw the occurrence with his own eyes, but, on proper examination of both the FIR and the statement of P.W. 1 given before the Trial Court it is clear that he was not present at the place of occurrence and only after hearing the sound of bomb explosion he came from his house along with P.W.3 to P.W.7 and thereafter all of them came to learn from victim Sariat that the appellants were present at the place of occurrence and appellants Basir and Manjur threw bombs at him.

19. Prosecution also examined P.W.2 as the only eye-witness who was present with Sk. Sariat, who saw the appellants present at the place of occurrence and he had also seen Basir and Manjur to throw bombs.

20. If the statement of P.W.2 along with statements of P.W.1, P.W.3 and P.W.5 to P.W.7 can be accepted as reliable and credible evidence, we find no difficulty to lend out support to the order of conviction and sentence recorded by the Trial Court. Now, the question for consideration is whether evidence given by P.W.1, P.W.2, P.W.3 and P.W.5 to P.W.7 can be accepted as trustworthy and reliable so as to support the conviction order of the learned Trial Judge.

21. We may start our discussion with P.W.2, because, according to prosecution case he is the eye-witness of the occurrence and he was very much present with the victim at the place of occurrence. Mr. Basu has submitted that this P.W. never disclosed his presence at the place of occurrence and identification of the appellants to the other witnesses including P.W.1 soon after the occurrence and this is very much clear from not mentioning his name as an eye-witness in the FIR itself which was lodged within a shortest possible time from the occurrence. Mr. Basu has also referred to the deposition of the I.O. as P.W. 14 wherefrom we find that only after two days from the occurrence I.O. met this witness and recorded his statement and at the same time, forwarded him for recording his statement u/s 164(5) of the Cr. PC by a learned Judicial Magistrate.

22. The delay in meeting P.W.2 by the I.O. and non-mentioning of his name in the FIR raises a serious question about the veracity of this witness and it is significant to note that this witness being relative of the victim ought to have mentioned the occurrence to the FIR maker and other relatives of the victim, but he has not done.

23. According to prosecution, apart from the statement of P.W.2 as eyewitness, P.W.1, P.W.3 and P.W.5 to P.W.7 came to learn about the involvement of the appellants from the victim himself. Mr. Basu submits that from the nature of injuries received by the victim as a result of bomb explosion and in view of specific statement of the doctor during cross-examination as P.W. 13, it is really a big question whether the victim had any physical capacity to speak when he was

pronounced dead as soon as he was brought to the hospital from the place of occurrence.

24. We find on analysis of the statement of all the P.Ws except P.W. 4 that those witnesses are close relations of the victim and when all those witnesses came out from their residence hearing the sound of bomb explosion, it is quite surprising to note that not a single witness from the village came to the spot to support the prosecution case that victim himself disclosed the name of the appellants. Again, from the statement of P.W.4 Yusuf Sk. we find that he was an independent witness and this Yusuf Sk. in his examination-in-chief did not support the prosecution case that victim gave any declaration although this witness has stated that he noticed presence of other P.Ws at the P.O. This witness has further stated that the condition of the victim was so serious that it was unbearable scene.

25. We have carefully examined the post-mortem report and also the statement of the doctor as P.W. 13 and from the statement of the doctor we find that victim received serious injuries on his person and the doctor clearly stated in his cross-examination that a person receiving such serious injuries generally cannot have any physical capacity to speak. Thus, when we find that save and except the relations of the victim no independent witness of the village came to support the prosecution case that victim really uttered the name of the appellants before his death and when we find from medical report and opinion of the doctor that victim had no physical capacity to speak, we are not inclined to accept the prosecution story that P.W.1, P.W.3 and P.W.5 to P.W.7 had any opportunity to gather the name of the appellants from the victim.

26. We have already discussed that P.W.1 did not mention the name of P.W.2 in the FIR which should have been a natural event, had the P.W. really been present at the place of occurrence and when P.W.2 was a near relation of the victim and also relation of P.W.1, we have enough doubt about credibility of this witness.

27. Thus, having regard to the prosecution evidence and the submissions made by the learned Advocate for the appellants and the learned Advocate for the State respondent, we are of the view that undoubtedly victim Sariat Sk. died out of bomb injuries, but, there is no reliable and trustworthy evidence from the side of prosecution to prove beyond reasonable doubt that appellants were present at the place of occurrence and out of them Basir Sk. and Manjur Sk. actually threw bombs targeting the victim and that being the factual position as available from record, we are not inclined to support the conviction order.

28. In the result, after careful analysis of the prosecution evidence we find merit in the present appeal and we are inclined to set aside the order of conviction and sentence recorded against the appellants both u/s 302/34 of the IPC as well as u/s 9B(1)(b) of the Indian Explosives Act.

29. We, therefore, allow the present appeal and the order of conviction and sentence are set aside and all the appellants are found not guilty of the charges framed against them and they stand acquitted accordingly.

30. We find from record that all the appellants are on bail and hence, they stand discharged from their respective bail bond with immediate effect.

31. Send a copy of this judgment along with LCR to the learned Trial Court for information and official record.

32. Urgent xerox certified copy of this judgment may be supplied as early as possible to the learned Advocate-on-record on making proper application and after complying with all legal formalities.

Tapas Kumar Giri, J.

33. I agree.