(2012) 09 CAL CK 0025

Calcutta High Court

Case No: CRA. No. 146 of 2010

Ayub Ali Molla @ Ayef Molla		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: Sept. 21, 2012

Acts Referred:

- Arms Act, 1959 - Section 25(1)(a), 27
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 120B, 302, 34

Citation: (2013) 1 CALLT 447 : (2013) 1 CHN 366

Hon'ble Judges: Tapen Sen, J; Dipak Saha Ray, J

Bench: Division Bench

Advocate: Sekhar Kumar Basu, Mr. Rajdeep Mazumder, Mr. Kusal Kumar Mukherjee in CRA. 195 and 268 of 2010, Mr. Milon Mukherjee, Mrs. Anasua Sinha in CRA. 261 of 2010 and Mr. Somnath Banerjee, Mr. Ranadeb Sengupta in CRA. 146 of 2010, for the Appellant; Siladitya Sanyal, Ld. , Assistant Public Prosecutor and Mr. Sandip Chakraborty for the State, for the Respondent

Judgement

Dipak Saha Ray, J.

A common Judgment and order of conviction and sentence have been assailed in four criminal appeals. For the sake of convenience of discussion and arriving at a just decision, all the four appeals viz. CRA. No. 146/195/261/268 of 2010 are taken up together. The aforesaid three appeals are directed against the Judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track, 5th Court, Barasat, North 24 Parganas, in Sessions Trial No. 4(3) of 2008, arising out of Sessions Case No. 15(8) of 2007 u/s 302/120B/34 of the Indian Penal Code.

2. The said case was started on the basis of a written complaint filed by one Sirajul Islam Molla, on 18.12.2002 before the Officer-in-Charge, Sandesh Khali Police Station., North 24 Parganas. The defacto complainant in his written complaint has alleged that on 18.12.2002 at about 7.30 p.m. he started proceeding towards the house of Haripada Ghosh from Bayarmari More after picking up Haripada Ghosh on his bike. At 7.30 p.m. suddenly three persons riding on a Motorbike came at a distance of half kilometer from Ghoshpara More and after overtaking their Motorcycle stopped in front of their Bike and kicked both of them. As a result, both of them fell on the ground along with the Motorcycle. Thereafter the said three miscreants shot at Haripada Ghosh thrice and fled away from the spot along Ghoshpara road which runs by the side of the house of Haripada Ghosh. It is further contended in the said written complaint that on hearing the cry of the defacto complainant, local people came at the spot and they took Haripada to Minakhan Hospital where the doctor declared him "brought dead". On the basis of the said written complaint, Sandesh Khali Police Station Case No. 110 of 2002 dated 18.12.2002 u/s 302/120B/34 of the Indian Penal Code and Section 25(1)(a)/27 of the Arms Act was started.

3. Police investigated the case and after completion of investigation submitted charge sheet against four accused persons namely Ayub Ali Molla, Sirajul Islam Molla, Julfikar Jamadar and Jaherul Haque @ Boromia u/s 302/120B/34 of the Indian Penal Code.

4. On the basis of the aforesaid allegations and other relevant materials, the aforesaid four accused persons were tried for the offences punishable u/s 302/120B/34 of the Indian Penal Code. All the accused persons, however, pleaded not guilty and claimed to be tried when the said charges were read over and explained to them.

5. As against this, the defence case, as it appears from the trend on cross-examinations and the statements made during examination of the accused persons u/s 313 of the Code of Criminal procedure, was denial of the prosecution allegations and plea of innocence.

6. The prosecution, in order to discharge the burden of establishing the guilt of the accused persons, examined as many as 19 witnesses.

7. After taking into consideration all relevant facts and circumstances and the evidence on record, the learned Trial Court found the accused persons guilty for the offences punishable u/s 302/120B/34 of the Indian Penal Code and they were convicted accordingly.

8. Being aggrieved by and dissatisfied with the impugned Judgment and Order of conviction and sentence, the aforesaid four convicts namely Ayub Ali Molla, Sirajul Islam Molla, Julfikar Jamadar and Jaherul Haque @ Boromia as appellants have preferred three separate appeals which have been registered as C.R.A. No. 146 of 2010; C.R.A. No. 195 of 2010, C.R.A. No. 261 of 2010 and CRA. No. 268 of 2010 respectively.

9. The grievances of the appellants may be capsulated in a few sentences as follows:

The learned Trial Court has failed to appreciate the evidence on record on its proper perspective and approached the case from a wrong angle and this has resulted in failure of justice. The learned Trial Court has failed to take note of the fact of the other inconsistencies and contradictions of the evidence on record and as such has come to an erroneous decision. It is further alleged that the impugned Judgment and Order of conviction and sentence are based on surmises and conjectures and in the circumstances, the present appeals have been filed praying for setting aside the said Judgment and Order of conviction and sentence.

10. After taking into consideration all relevant facts and circumstances and materials on record and giving due regard to the submissions made by the Learned Counsels for both the parties, we think that the only point requiring adjudication in this case is whether or not the impugned judgment and order of conviction and sentence passed by the learned Trial Court are liable to be set aside.

11. Let us now deal with the evidence brought on record by the prosecution.

12. First we shall analyse and evaluate the testimony of two witnesses viz. PW-5 (Sefali Ghosh) wife of the deceased and PW-6 (Manasi Ghosh) daughter of the deceased who are said to be the eyewitnesses to the occurrence

13. PW-5 in her evidence has stated that while she was standing in front of the gate of their house she heard a sound of firing and accordingly she went towards the source of the sound, and according to her, her daughter (Manasi) also accompanied her at that time. She has further stated in her evidence that she noticed one bike with two passengers crossed her. Her evidence further goes to show that she recognized the said two passengers of the bike as Boro Mia and Ayub.

14. Her evidence further discloses that she found her husband lying in a pool of blood and Siraj was standing there. On her enquiry Siraj told that one bike came from behind and the riders of that motorcycle shot at her husband and fled away. She has further stated that Siraj told her that Boro Mia and Ayub fired at her husband. During cross-examination she has stated that the distance between the place of occurrence and her house is within 100 cubits. Now on perusal of the cross-examination of PW-19, Investigating Officer of this Case, it appears that during investigation this witness (P.W-5) in her statement before the Investigating Officer has not stated that she was standing in front of the gate and that one Motorcycle was crossing while she was standing in front of the gate and that her daughter (Manasi) followed her and that Ayub shot at her husband.

15. PW-6 in her evidence has stated that she heard the sound of firing and came out from the house along with her mother. Her evidence further goes to show that first her mother came out from the house and she followed her mother. This witness in her evidence has further stated that one Motorbike with three persons namely Boro Mia, Ayub and Julu crossed their house. From her evidence it further appears that on being interrogated Siraj

disclosed that Boro Mia, Ayub and Julu shot at her father to death. Now considering her evidence with reference to the cross-examination of PW-19, Investigating Officer (Ganesh Bhattacharya), a Sub-Inspector of Police, it appears that this witness in her statement before the Investigating Officer, recorded at the time of investigation, did not disclose that a Motorbike with three passengers namely Boro Mia, Ayub and Julu crossed their house and that she heard the sound of bullet firing and that her mother came out first and she followed her mother and that a Motorbike with three passengers namely Boro Mia, Ayub and Julu crossed their house and that Siraj was standing there and that on being insisted, Siraj told her that Boro Mia, Ayub and Julu killed her father.

16. PW- 7 (Prasanta Ghosh) is the nephew of the deceased. He has stated nothing significant in respect of the prosecution case. His cross-examination goes to show that the deadbody was lying before the house of Lalita Ghosh and the distance between the house of Haripada Ghosh and Lalita Ghosh is one and a half bighas.

17. In the instant case PW-1,2 have also stated nothing significant in respect of prosecution case.

18. PW-3, 4, 8, 9, 10, 11, 13, 16 and 18 were declared hostile.

19. PW-12 is a seizure witness who signed two seizure lists by which bloodstained earth and one Bajaj Motorcycle respectively were seized.

20. P.W-14 (Amal Chandra Roy) is a Police Officer who held inquest over the dead body of Haripada Ghosh on 18.12.2002, this witness has proved the inquest report which has been marked Ext. 4 and after completion of inquest report this witness sent the dead body to the Hospital along with challan by constable no. 2871, Paresh Debnath. He has also proved the challan which has been marked Ext. 5. He has also proved the seizure list by which nail, hair of the deceased and one sealed cover containing two bullets were seized under seizure list. Seizure list is marked Ext. 6.

21. PW- 15 (Paresh Chandra Debanth) brought the dead body along with viscera, nail, hair, one sealed packet containing head of the bullets and also wearing apparels to the Police Station.

22. P.W- 17 (Dr. Parimal Roy) is a Autopsy Surgeon who held post-mortem examination over the dead body of Haripada Ghosh. He after postmortem examination prepared the postmortem report. This witness has also proved the said report which has been marked Ext. 8. This witness after postmortem examination opined that the death was due to cardio respiratory failure in case of gun shot injury involving spleen and left kidney with profuse intra abdominal Haemorrhage which is ante mortem and homicidal in nature.

23. P.W. - 19 (Ganesh Bhattacharya) who is a Police Officer who investigated the case and after completion of investigation submitted charge sheet against four accused persons namely 1. Ayub Ali Molla @ Ayef Molla; 2. Sirajul Islam Molla; 3. Julfikar

Jamadar; and 4. Jaherul Haque @ Boromia u/s 302/120B/34 of the Indian Penal Code and this is all about the prosecution evidence in brief.

24. There had been no defence witness in this case.

25. The appellants at the time of their respective examinations u/s 313 of the Code of Criminal Procedure just pleaded not guilty.

26. The learned Trial Court after taking into consideration all relevant facts and materials and the evidence on record found the Convicts/Appellants guilty and convicted the present appellants u/s 302/120B/34 of the Indian Penal Code.

27. Now, considering the above evidence of the witnesses with reference to the impugned Judgment it appears that the prosecution case is essentially based on the evidence of PW-5 and 6 who are the wife and daughter of the deceased. From their evidence it is evident that the occurrence took place about 100 cubits away from their house. The evidence of PW-5 further goes to show that she saw two persons crossing her by riding a motorcycle. On the other hand, PW-6 who was present by the side of PW-5, has stated that she saw three persons crossing her by riding the motorcycle. PW-5 in her evidence has stated that she came to know from Siraj that three persons namely Boro Mia, Ayub and Julu killed her father.

28. In the instant case, PW-7 who is nephew of the deceased, in his evidence has stated that the place of occurrence is situated in front of the house of Lolita Ghosh and that the house of Lolita Ghosh is situated about one and a half bighas away from the house of Haripada Ghosh.

29. Considering the evidence of PW-5 and 6 with reference to PW-7 it appears that the place of occurrence which has been disclosed in the evidence of PW-5 and 6 is not the same place which has been stated by PW-7 in his evidence.

30. From the discussion of the evidence of PW-5 and 6 made above it further appears that there is major inconsistencies and antagonistic contradictions in their evidence before the Court with reference to their earlier statements made before the Investigating Officer. So, we find that the defence has been able to elicit major contradictions in their cross-examination to discredit their testimony. Accordingly, their credibility has been seriously impeached and they stand thoroughly discredited. It has already been pointed out that PW-3, 4, 8, 9, 10, 11, 13, 16, and 18 have displayed unfriendly attitude towards the prosecution for which they have been declared hostile. The said witnesses have not supported the prosecution case at all and have resiled from their earlier statements altogether. So, their credibility have also been seriously impeached and they stand thoroughly discredited. Accordingly, their evidence is rejected in toto.

31. It has been argued by the Learned Counsel for the appellant namely Sirajul Islam Molla which has been adopted by the Learned Counsels for other convicts/appellants that

the motorcycle which was allegedly used at the time of commission of the crime by the convicts/appellants namely Ayub Ali Molla, Julfikar Jamadar and Jaherul Haque @ Boromia which was recovered as per the alleged statement of the accused/convict namely Sirajul Islam Molla was not produced before the witnesses for their identification of the same. So, it is not established that the said motorbike was actually used by the concerned convicts/appellants during commission of crime. It is also argued that the Investigating Officer during investigation neither took any information nor attempted to seize the papers of the said motorcycle to establish the ownership of the same. The learned Senior Counsel Mr. Sekhar Kumar Basu, has further argued which was also adopted by the counsels appearing for other appellants that the prosecution has failed to produce evidence either orally or documentary to establish that convicts/appellants Sirajul Islam Molla after entering into a criminal conspiracy with the other appellants of this case, committed the murder of the victim.

32. Now, on careful scrutiny of the evidence on record it appears that there is nothing on record to establish that the said motorcycle which was recovered as per the information of convict/appellant Sirajul Islam Molla, was produced before the Court during trial for identification of the same by the witnesses; nor has any paper of the said motorcycle been recovered/seized to establish the ownership of the same. The said lapse on the part of the prosecution creates an adverse presumption in respect of the prosecution case.

33. In the instant case, there is also no evidence that the used bullets which are said to have been recovered from the body of the deceased, were sent to forensic test.

34. Now, on careful scrutiny of the evidence on record it appears that none of the witnesses have stated in their testimonies that they saw Siraj with other convicts/appellants of this case at any point of time before the occurrence. No documentary evidence is also forthcoming to establish that Siraj was found with other appellants/convicts of this case before the occurrence.

35. Considering the above facts and circumstances, it appears that the prosecution has miserably failed to establish that there was a criminal conspiracy between the Siraj and other appellants for committing murder of the victim of this case.

36. After careful consideration of the evidence on record we are inclined to hold that there are inherent inconsistencies and antagonistic contradictions so as to raise doubt as regards the genuineness of the evidence on record. It is well settled that the prosecution is required to prove its case beyond all reasonable doubt. Unless, the evidence is good enough to warrant a clear finding as to the facts and as to the guilt of the accused, no conviction under these Sections can be arrived at.

37. From the above discussions, we hold that the prosecution has failed to establish the guilt of the convicts/accused persons u/s 302/120B/34 of the Indian Penal code beyond all reasonable doubt and to the satisfaction of the judicial conscience of the Court. So, the

impugned judgment and order of conviction and sentence, which have been sought to be assailed, call for and deserve interference.

38. So, these criminal appeals succeed.

39. Four criminal appeals viz. CRA No. 146 of 2010, CRA. No. 195 of 2010, CRA. No. 261 of 2010 and CRA. No. 268 of 2010 are, accordingly, allowed on contest. The Judgment and order of conviction and sentence passed by the learned Court below are hereby set aside.

40. Four convicts/appellants namely Ayub Ali Molla, Sirajul Islam Molla, Julfikar Jamadar and Jaherul Haque @ Boromia are found not guilty for the offences punishable u/s 302/120B/34 of the Indian Penal Code. They are acquitted accordingly. They be set at liberty and be released from their bail bonds forthwith.

41. Let a copy of this judgment alongwith the LCR be sent to the learned court below at once for information and necessary action. Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.

Tapen Sen, J.

I agree.