

**(2012) 06 CAL CK 0028****Calcutta High Court****Case No:** C.R.A. No. 98 of 1999

Mohitosh Mondal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

**Date of Decision:** June 20, 2012**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302

**Citation:** (2012) 4 CHN 446**Hon'ble Judges:** Asim Kumar Ray, J; Ashim Kumar Roy, J**Bench:** Division Bench**Advocate:** Shamim Ahmed, for the Appellant; Debasish Roy, Ld. P.P. and Ms. Sreyashee Biswas, for the Respondent**Final Decision:** Allowed

### **Judgement**

Asim Kumar Ray, J.

This appeal is directed against the judgment and order dated 17/19-3-1999 passed in Sessions Trial No. 1(11) of 1998 which arose out of Nodakhali Police Station case No. 49 dated 15-5-1994 by learned Additional Sessions Judge, 2nd Court, Alipore. Factual matrix is that on 15th May, 1994 at about 12.20 p.m. on being attracted by a hue and cry of the victim, the de facto complainant rushed to the P.O. The complainant raised alarm and on hearing such alarm the people of neighbourhood and the youths of Pragati Sangha Club arrived at the place of occurrence. On arriving at the place of occurrence the complainant found his father lying in bleeding condition on the land of his uncle Kartick Monal and was saying that that appellant had assaulted him with Hasua and thereby caused his such condition. The victim was removed to Birlapur Hospital for treatment and as per advice of the doctor of the said hospital he was shifted to Calcutta Hospital where he was administered saline and oxygen. They were asked to shift the victim to some other hospital as they did not have sufficient fund. They took the victim towards Vidyasagar Hospital by a taxi but on the way near Ajanta cinema hall, within the

jurisdiction of Behala Police station the victim succumbed to his injuries. Inquest over the dead body of the victim was done by the police of Behala Police Station. FIR was lodged by Paritosh Mondal/P.W.1 the youngest son of deceased at Paita and the same was subsequently received by police of Nodakhali police station and the case was registered against the appellant u/s 302 of Indian Penal Code.

2. The investigation was taken up and on completion of the same charge sheet alleging commission of offence punishable u/s 302 of IPC filed against the appellant. The learned Chief Judicial Magistrate, Alipore, 24-Parganas (South) took cognizance of the offence and on completion of the necessary formalities committed the case to the learned Court of Sessions. The case was registered as Sessions Case No. 22(2) of 1998 before the Court of learned Sessions Judge, 24 Parganas (South) at Alipore. It was subsequently transferred to the file of learned Additional Sessions Judge, 2nd Court, Alipore for trial. Charge was framed against the appellant for his alleged involvement in the commission of the offence punishable u/s 302 of IPC to which he pleaded not guilty and claimed to be tried.

3. In order to prove the case the prosecution has examined in all 18 witnesses and in course of examination of prosecution witnesses FIR, inquest report, Post Mortem report, seizure list, sketch map etc. were exhibited. Appellant took a case of denial and his innocence.

4. The learned Additional Sessions Judge by the judgment and order impugned held the appellant guilty for committing offence punishable u/s 302 of IPC and sentenced him to suffer rigorous imprisonment for life and to pay a fine of Rs. 3,000/- in default to suffer rigorous imprisonment for one year more.

5. Learned counsel appearing for the appellant has contended that according to the prosecution there are three eye witnesses, namely, P.W. 1, P.W.7 and P.W.10. P.W.1 and P.W.7 cannot be treated as eye witnesses as P.W.10 has stated that she did not find any person to assemble at the P.O. before she became unconscious. He has further contended that P.W.1, P.W.7 and P.W. 10 are not trustworthy witnesses. P.W. 10 is a chance witness and she is not at all reliable. It is his further contention that prosecution withheld certain materials specially the FIR claimed to have been lodged by prosecution witness No. 1 at Nodakhali P.S. and the FIR lodged by prosecution witness No. 13 at Behala Police Station. The evidence of prosecution witness No. 14 i.e. Autopsy Surgeon shows that the victim should not have been in such state who can speak after receiving as many as 14 injuries on his person. Therefore, the statement which the victim alleged to have been made at the time of incident is not believable. The learned Court below without assessing the evidence on record in its proper perspective has arrived at a conclusion and passed the order of conviction and sentence. The same may be set aside.

6. Learned counsel appearing for the State has submitted that the Court may peruse the evidence on record to arrive at a just conclusion.

7. Out of 18 prosecution witnesses P.W. No. 1, Paritosh Kumar Mondal, FIR maker, P.W. No. 7, Manotosh Mondal and P.W. No. 10, Manjari Mondal claimed to be the eye witnesses. P.W. No. 2 Sushil Mondal, P.W. No. 3 Prafulla Mondal, P.W. No. 4 Sujit Kumar Mondal, P.W. 8 Kajallata Mondal and P.W.9 Palan Mondal are post occurrence witnesses. P.W. 5 Subhash Ghosh is an ASI of Police of Nodakhali police station who received the FIR and drew formal FIR. P.W. No. 6, Nishit Basu is a S.I. of Behala Police Station who held inquest over the dead body of victim Bharat Mondal. P.W. No. 11, Saraj Kumar Mondal is a quack who wrote the FIR as per dictation of Paritosh Mondal, P.W.1. P.W. No. 12 Siblal Mondal and P.W.13 Anup Dutta Gupta are the witnesses of inquest conducted over the dead body of victim Bharat Mondal. P.W.14 is Autopsy Surgeon Dr. Dilip Kumar Basu. P.W.15 is Arun Kumar Patra, Sub-Inspector of Nodakhali P.S., P.W.17 is Swadesh Ranjan Chanda, Sub-Inspector of Nodakhali P.S. and P.W.18 Prabir Das is Sub-Inspector of Nodakhali P.S are the I.Os of this case.

8. Paritosh Kumar Mondal, the FIR maker has stated in his evidence that on 15-5-1994 at about 12/12.30 noon being attracted by cry of his father he along with other rushed to the spot and found from a distance that his elder brother Monotosh was striking his father with Hasua on his person. His father told him that "Auro Amaka Hasua diye Kupiache". Auro is the nick name of accused. He removed his father to the Birlapur Hospital with the assistance of his neighbouring persons. His father was not admitted in that hospital and was taken to Calcutta Hospital where injection was administered and oxygen was given to him. The hospital authority demanded money which they could not meet and they were compelled to remove his father to Vidyasagar Hospital. On the way to Vidyasagar Hospital near Ajanta Cinema house his father succumbed to his injuries. He was subjected to cross-examine and in course of his cross-examination he has stated that there is a doctor named Swaroj Kumar Mondal in their village. They did not call him after the occurrence. They did not try to catch hold of Mohitosh. He reached the spot at first and then Sushil, Prafulla and Sujit and his followers reached the spot. He himself and his second brother Monotosh did not touch the body of his father. Sushil, Prafulla and Sujit catch hold of his father. Wearing apparel of Prafulla and Sujit were stained with blood but the same were not seized by police officer. His father was removed by riskhaw van from the place of occurrence to Bishalaxmitala more adjacent to Birlapur Road. He cannot say the nature of conveyance by which his father was removed to hospital from there. He went Nodakhali P.S. 25-30 minutes after removal of his father from the place of occurrence. He lodged FIR within 1-30 p.m. Subsequently he had been to Muchisa Primary Health Centre as the said health centre is near to their house and on reaching there he came to know that his father was not taken to that P.H.C. But he subsequently stated that Birlapur Hospital is nearer to their house than Muchisa P.H.C. From Muchisa P.H.C. he went towards Thakurpukur which took one hour and at Thakurpukur around 4.30/5 p.m. he came to know the whereabouts of his father. He did not try to see his father. Monotosh

also did not go there. His neighbour removed his father and he knew the whereabouts of his father from his neighbour. Around 6.30/7.00 p.m. he returned to his house and saw police personnel there. His neighbour Prafulla Mondal and Sujit Mondal returned home along with him. He has also stated that his father is financially sound and they had capacity to incur medical expenses of his father. He did not go towards Ajanta Cinema House to see the dead body of his father.

9. P.W. No. 7 is the brother of de facto complainant who has stated that on 15-5-1994 his elder brother Mohitosh Mondal @ Auro murdered his father with Hasua in his presence. Police seized blood stained earth from the place of occurrence under seizure list and he signed the seizure list. He was interrogated by police but his statement was not recorded.

10. P.W.10 Manjari Mondal has stated that she had been to the field to make her kid to drink water when she heard hue and cry and found the appellant assaulting his father. She asked him not to do so and was rushing to the spot when being hit by brick, she fell down and she became unconscious. In her cross-examination she has stated that she is married to one Kanan Mondal and her husband resides at a considerable distance from village Paita but she resides with her mamsasuri. It is not clear as to where her mamsasuri resides and it seems to us that she is nothing but a chance witness.

11. On plain perusal of the afore-placed oral evidence of three witnesses it appears that Paritosh and Monotosh, sons of victim Bharat did not remove their father though noticed him in bleeding condition. Their neighbour removed their father from the P.O. so that the treatment may be given to him. The evidence of Paritosh is contradictory. He has stated in his chief that he himself and his neighbour removed his father from the place of occurrence to Birlapur Hospital but in cross-examination he has categorically stated he cannot say the nature of conveyance by which his father was removed to hospital from the place of occurrence. It is most unnatural on their part not to touch their father even at the time of his such badly injured condition. They did not take step for removal of his injured father to hospital for treatment but it was the neighbouring people who removed the victim to the hospital. The evidence speaks that after lodging the complaint the de facto complainant went towards Thakurpukur around 4.30/5 p.m. On reaching Thakurpukur he came to know the whereabouts of his father but neither he nor his brother P.W.7 went to the place where his father was or his dead body was lying. He returned home around 6.30/7 p.m. and saw police at his residence. He was accompanied with Prafulla Mondal and Sujit Mondal. The financial condition of his father was sound and had the capacity to incur medical expenses even then he was removed from Calcutta Medical Hospital to Vidyasagar Hospital and on the way to Vidyasagar Hospital his father succumbed to his injury.

12. The FIR which has been marked as Ext. 1 indicates that the same was received on 15-5-1994 at about 7.30 p.m. at police camp situated at village Paita and the same

was forwarded to Officer-in-Charge, Nodakhali P.S. through Homeguard 2691 Kartick Chandra Dey. But it is the specific evidence of the FIR maker that he had been to Nodakhali P.S. within 25-30 minutes after removal of his father from the place of occurrence and lodged FIR. P.W.11 has also stated that he went to Nodakhali P.S. and on the request of Paritosh Mondal wrote the FIR in the police station as per his dictation. The FIR which is before us appears to be another FIR but not the FIR which was lodged with the Nodakhali P.S.

13. P.W. 1, P.W.7 and P.W.10 claimed to be the eye witnesses to the occurrence. The manner in which P.W.1 and P.W.7 have acted is contrary to normal human conduct. Both P.W.1 and P.W.7 had been to the place of occurrence immediately and in fact they claimed that they have seen the appellant assaulting the victim. P.W.1 has stated specifically that they did not even though the body of his father, far less to speak for arranging any treatment to him. P.W.11, scribe of the first information report is a quack of the village but his service for providing treatment to the victim was not asked for by P.W.1 and P.W.7. They did not take step for removing of his injured father to the hospital for treatment but it was the neighbouring people who removed the victim to hospital. The victim was financially sound as stated by his son P.W.1 and had the capacity to incur medical expense even then he was not given such medical assistance at Calcutta hospital. The evidence of P.W.1, P.W.7 and P.W.10 does not inspire confidence. They are not trustworthy witnesses.

14. P.W.2 Sushil Mondal, who is neighbour of de facto complainant had stated that the victim was taken to Birlapur Hospital thereafter to Calcutta Medical Hospital and subsequently towards Vidyasagar Hospital for treatment. The victim died on the way to Vidyasagar Hospital. He has stated further that the deceased expire on the way while he was being removed to Vidyasagar Hospital by taxi. The taxi driver refused to take back dead body to the village and instead had put it on a matador van near Ajanta Cinema. People surrounded them. He went to Behala Police Station keeping Prafulla, P.W.3 there where the dead body was lying. He returned from Behala P.S. and did not found Prafulla there. The dead body was kept by the side of the road. He was detained in the Behala P.S. on the date of occurrence and released on the following day around 10 a.m. His wearing napkin and jangia were stained with blood of the deceased but police did not seize the same.

15. P.W.2 is immediate post occurrence witness who claimed that he heard the dying declaration made by the victim implicating the appellant. The evidence of P.W.14 may be read now wherein it has been stated by P.W.14 Autopsy Surgeon that the injuries received by the victim were sufficient to cause instantaneous death and it was his opinion that the victim having received such injury will have no power to speak. P.W.2 in his evidence has stated that he had been to Behala P.S. to give information about the incident keeping the dead body in the custody of P.W.3 Prafulla Mondal. He came to the place of occurrence along with police but did not find Prafulla there. Police personnel attached to Behala P.S. held inquest over the

dead body and he was a witness to that inquest. Although he knew how the incident took place. He did not inform the Behala P.S. about the same. It is P.W.6 who has stated that on 16-5-1994 at about 9.15 hours they came to know about a specific case started at Nodakhali P.S. and P.W.2 was released. Contrary to the evidence of P.W.2, P.W.6 stated that P.W.2 never lodged any complaint with Behala P.S. and such complaint was lodged by P.W.13. The complaint which was either lodged by P.W.2 or by P.W.13 was not brought on record from the side of the prosecution. Taking the afore-placed evidence of P.W.2 in judicious mind it appears to us that the same does not inspire confidence.

16. P.W. 3 Prafulla Mondal is a van puller rushed towards the garden of Bharat hearing hue and cry "Bharatke Kete Feleche". Some neighbours asked him to bring his van and accordingly he brought it. He along with other carried the injured Bharat to Bishalaxmitala more by his said van then the injured was removed by auto riskhaw. As requested by Sushil he accompanied him in the auto riskhaw and injured was taken to Birlapur Hospital by said auto riskhaw. As per advise of Birlapur Hospital the injured was taken to Calcutta Hospital. Calcutta Hospital was reluctant to get the injured admitted in that hospital and demanded money. On their request oxygen was given to the injured. As their men did not return with money they were advised by Calcutta Hospital to take the injured to other hospital. They were removing the victim to Vidyasagar Hospital by taxi and the injured succumbed to his injuries near Majherhat bridge. They requested the taxi driver to take back the victim to their home but the taxi driver refused. Then the dead body was kept in a matador. The driver of the matador van also refused to take the dead body and kept the dead body by the side of the road. He has stated that he cannot say who murdered Bharat. He was declared hostile.

17. P.W.4 Sujit Kumar Mondal accompanied P.W. 2 and P.W.3 to the hospital when the victim was removed to the hospital and came back home for arranging of fund for the treatment of victim. He coming back to the village changed his dress, took his meal, talked with his family members as usual and went to bed. He neither informed the house of P.W.1 that fund are required for the treatment of victim nor he himself took any step for collection of fund and proceed towards Calcutta Hospital. His conduct is questionable. He is not a witness to be relied on.

18. P.W.8, Smt. Kajallata Mondal is one of the post occurrence witnesses who has stated that she went to the pond to take bath and when she was causing her kid to drink water she being attracted by cry of a woman found accused running with a blood stained Hasua in his hand. On her query the accused did not reply. Subsequently on reaching the place of occurrence she heard that the appellant had assaulted the victim. Though the witness was a married lady and supposed to stay in her matrimonial home which is at a distance place did not disclose it and instead of that he disclosed that she is the daughter of Sadhan Chandra Mondal.

19. One of the I.Os /P.W. 17 has stated that Kajallata Mondal did not tell him that she went to cause her kid to drink water. During cross-examination Kajallata had stated that after the incident was over, she returned home and had her bath at her house. Therefore, if the evidence of this witness if read together with the evidence of P.W.17 then it appears to us that she is not a witness on whom reliance can be placed.

20. P.W. 9 Palan Mondal is another post occurrence witness who has stated that he had seen the appellant to flee away from the spot with Hasua. He rushed to the spot and found the victim lying with bleeding injuries. He has also stated that Bharat/victim asked them to remove him to hospital. He did not speak about the dying declaration claimed to have been made by the victim as stated by other witnesses that the appellant was the assailant. His evidence is in tussle with the evidence of the other witnesses of the prosecution who have claimed that the victim made a dying declaration alleging appellant was assailant. He is not a trustworthy witness.

21. P.W.5 is a police officer attached to Nodakhali P.S. He drew up the formal information report. P.W.6 is a police officer attached to Behala P.S. who held inquest over the dead body of the victim. He has stated in his cross-examination that Anup Dutta Gupta submitted a written complaint at Behala P.S. but Sushil Mondal did not lodge any information there. But P.W. 13 Anup Dutta Gupta has stated that he did not lodge any information at the police station. On the other hand Sushil Mondal has stated that he informed the police station about the incident. The information which was received by Behala P.S. submitted either by Anup Dutta Gupta or by Sushil are not before us like that of the FIR which was claimed to have been submitted at Nodakhali P.S. by the de facto complainant and the same was claimed to have been written by Swaraj Kumar Mondal, P.W.11.

22. P.W. No. 11 is the scribe of the FIR and also happens to be the quack who resides in the village of the victim. His service was not requisitioned by the sons/P.W.1 and P.W.7 to give even first aid to their father/victim.

23. P.W.12 and P.W.13 the witnesses to the inquest.

24. P.W.14 Dr. Dilip Kumar Basu who conducted post -mortem over the dead body of he victim. His evidence in part was dealt with at the time of analysis of the evidence of P.W.2. P.W.15 is one of the investigating officers of the case who had collected the U.D. case papers from Behala P.S. P.W.16 is a constable who carried the dead body of the victim for post-mortem examination.

25. P.W.17 is the first investigating officer of the case. He has stated as to how he has conducted the investigation. He visited Calcutta Medical Research Institute and Hospital and did not find any papers relating to this case. He only asked the doctor of the said hospital about the treatment of the patient but the said doctor told him that there was no treatment and he did not disclose his name. He did not examine

the hospital authority. He did not examine the auto riskhaw driver. He did not seize the wearing apparel of Sushil Mondal. He seized blood stained wearing apparel from the place of occurrence but the same was not sent to Forensic Science Laboratory for examination and report. The investigation conducted by him appears to be not sound. P.W.No. 18 is the third investigating officer of the case who submitted charge sheet in this case. He, in fact, did nothing.

26. We find reason to express that there is lacunae in the evidence. The order of conviction and sentence against the appellant cannot be sustained. The same is set aside.

27. The appeal stands allowed.

28. The appellant/ Mohitosh Mondal who is in custody be released at once, if not wanted in connection with any other case.

29. Send down the lower Court record. Criminal Section is directed to deliver urgent Photostat certified copy of this judgment, if applied for, as early as possible