

## Dhiren Byadh and Others Vs State of West Bengal

**Court:** Calcutta High Court

**Date of Decision:** Aug. 22, 2008

**Acts Referred:** Penal Code, 1860 (IPC) â€” Section 302, 34, 448

**Hon'ble Judges:** Kishore Kumar Prasad, J; Girish Chandra Gupta, J

**Bench:** Division Bench

**Advocate:** C.S. Bag, C.R. Bag Jasojit Mukherjee, for the Appellant; Biplab Mitra, Amajit De, for the Respondent

**Final Decision:** Dismissed

### Judgement

Girish Chandra Gupta, J.

The Judgment of the Court was delivered by:

1. This appeal is directed against a judgment dated 10th October 2001 passed by the learned Special Judge cum Additional Sessions Judge,

Coochbehar in Sessions Trial No. 5(9) of 2000 arising out of Sessions Case No. 85/98 convicting the appellants for offences punishable u/s 302

read with section 34 and u/s 448 read with section 34 of the Indian Penal Code and an order dated 11th October 2001 by which the accused

Dhiren Byadh, Fulchand Roy and Kalu Byadh were sentenced to imprisonment for life as also to pay a fine of Rs. 5000/- each, in default to suffer

further rigorous imprisonment for a period of two years for the offence punishable u/s 302 read with section 34 IPC. They were also sentenced to

suffer rigorous imprisonment for one year each for the offence punishable u/s 448 read with section 34 IPC. The sentences awarded to the

appellants were ordered to run concurrently. The convicts have come up in appeal.

2. Briefly stated the facts and circumstances of this case are as follows:-

On 17th November 1996 at about 11 P.M. in the night when everyone in the house was asleep except for the children who had gone to watch

theatrical performance in the neighbouring village the accused Dhiren, Phoolchand, Hagu and Kalu accompanied by three unknown persons armed

with lethal weapons broke into the house of Ramgopal Dev Adhikari since deceased. There were four rooms in the house of the deceased

Ramgopal. The deceased was sleeping in the northern room. His wife was sleeping in the eastern room and his wife's sister Bhabani was sleeping

in the room adjacent to the room occupied by her sister namely Manodini the wife of the victim. A lantern was burning in the bedroom of

Ramgopal. At about 11 P.M. Bhairabi, de facto complainant, heard a knocking at the door of the bedroom of the deceased. The deceased called

out Bhairabi requesting her to respond since someone was knocking at the door. By the time Bhabani arose from the bed Dhiren, Fulchand, Hagu

and Kalu had already entered into the bedroom of the deceased Ramgopal. Ramgopal prayed for mercy calling out the names of his assailants.

Bhairabi peeped through the door and saw the aforesaid four accused persons assaulting her brother-in-law. Fear stricken Bhairabi sought to

escape from the place of occurrence when to her dismay she found another three persons guarding on the door armed with lethal weapons

standing near the door of the room occupied by her sister Manodini. Bhairabi screamed Kumu Barman came running. By that time the assailants

had escaped and the dead body of Ramgopal was lying near the Alna of the said room. The wife of the victim fainted seeing her husband dead.

After the children of the deceased returned home Bhairabi narrated the incident to them. In the morning at about 7.15 A.M. a written complaint

was lodged with the police. The three unknown persons on the guard were subsequently identified by Bhairabi during the T.I. Parade. After

investigation eight persons were charged for offences under sections 302/448 read with section 34 IPC. The accused Hagu died during the

pendency of the trial. Four of them were acquitted and the rest three were convicted and sentenced as more fully indicated hereinabove.

3. Before we consider the submissions advanced by Mr. Bag, learned Senior Advocate, appearing in support of the appeal we would like to

discuss the evidence on the record briefly.

4. During her cross-examination the P.W.1 Bhairabi admitted that one Sushil Beria of Siliguri had purchased many plots of land of the village. The

deceased Ramgopal in the aforesaid deal had acted as a negotiator and had earned wrath of some of the villagers. She admitted that she was a

member of the CPI(M) party. She also admitted that the miscreants paraded for test identification were already known to her by reason of the fact

that she had been living in the village with the family of the deceased for the last 18-20 years. She was suggested that the accused were supporters

of Congress Party and out of grudge she had identified them during the test identification parade which she denied. She was also suggested that

there was no hurricane burning in the room of the deceased when the assault took place which she also denied.

5. P.W.4 Sasadhar Roy deposed about a conspiracy hatched by the appellants amongst others and his evidence in that regard is as follows:-

About 5/6 days prior to the date of incident, I was passing by the road in front of the house of Sirish Barman. I found that a discussion was going

on in between 10/12 persons in the house of Sirish Barman. From the voice, I identified Hagu, Fulchand, Dhiren Byadh, Dinabandhu Byadh as the

persons present there. In the discussion, there was an allegation against Ramgopal Dey Adhikary on the ground that he arranged for purchase of

land by one Sushil Beria by which the people of said area became landless, Ramgopal Dev Adhikary gave information to the police that those

persons consumed goose of another etc. During said discussion, one of them proposed to murder Ramgopal Dev Adhikary and Sirish Barman told

them that he had persons for doing said act. Later I cautioned Ramgopal Dev Adhikari and told him about the said discussion.

6. P.W.5, the widow of the deceased deposed that her deceased husband had a dispute with the accused persons because he was instrumental in

the sale of various plots of land of the village to Sushil Beria.

7. P.W.7 Dharmanath, son of the deceased, corroborated the evidence of his mother the P.W.5.

8. P.W.8 Basanti, a neighbour, deposed that about 10/12 days prior to the incident Sirish Roy had told her that Ramgopal was not likely to survive

and he should be given whatever he wanted to eat. Sirish Roy is the person in whose house the conspiracy to kill Ramgopal, according to the

P.W.4, was hatched. Sirish Roy was not interrogated by the investigating agency which fact was admitted by the I.O. (P.W.10).

9. From the evidence discussed above the fact that the deceased had earned wrath of some of the villagers is well established. The fact that the

appellants were inimical to the deceased is also established.

10. Bhairabi is the sole eyewitness in this case whereas Bhairabi and her sister Manodini are the ear witnesses. The evidence of the P.W.1

Bhairabi pertaining to the incident in question is as follows:-

Around 11 P.M. at night some miscreants forcibly knocked the door of north viti room of Ramgopal. Hearing the sound he raised an alarm and

called me. Hearing said call I came out from my room very silently and peeped into the room of Ramgopal and found that the door of his room

was wide open and one hurricane was burning inside the room. I found Fulchand Roy, Kalu Byadh, Dhiren Byadh and Hagu Roy to assault

Ramgopal with lathi. I found only those persons inside the said room. I also found some sharp cutting weapons in their hands, Ramgopal shouted

by calling the names of those persons and prayed for mercy for his life. On fear I retreated and found that there were unknown persons standing in

front of the door of east viti room in which my sister was staying. I noticed their faces carefully. My sister could not come out from her room. Then

I went out from our house by breaking Patkari Bera and raised alarm. But no villager came forward at first. Then Kumu Roy came and I told him

that those four miscreants (named) were assaulting Ramgopal. On returning I found that accused persons already left by breaking the northern

fencing of the room. At that time the hurricane was found to be off. I found that Ramgopal was lying near Alna on the southern side of said north

viti room. I also found bleeding injuries on his person. Then I and Kumu took up Ramgopal to the varandah of the north viti room. I found one

penetrating wound of dagger in the left rib and one penetrating wound of ballam in the right side of the body. At that time Ramgopal was found

already dead. The daughters and son of Ramgopal returned home around 3 at night. I narrated the incident to them also.

11. Within hours after the incident from the house of the deceased controlled and bloodstained earth, broken fencing material, two lathis, a

hurricane and some other articles were seized. The seizure list has been marked ext.2.

12. P.W.5 Manodini corroborated the evidence of the P.W.1 that the deceased during the assault prayed for mercy calling out the names of the

assailants. Her evidence to be precise is as follows:-

In that night around 12 at night, I heard a cry of my husband that some persons attacked him and hearing the sound, when I tried to come out from

my room, I was obstructed by some persons standing in front of my room. I heard that my husband was telling Kalu, Dhiren, Hagu and Fulchand

please spare me. Then I also raised alarm in my room but none came there as most of the villagers went to witness a Yatra. When the miscreants

fled away by breaking the fencing and the hearing of my husband also stopped.

13. P.W.2 Shukla, the daughter of the deceased, P.W.3 Rina another daughter of the deceased, P.W.4 Sasadhar a neighbour, P.W.6 Dipali

another daughter of the deceased, deposed that the names of the assailants were disclosed to them by the P.W.1 Bhairabi immediately after the

incident when they had returned home after watching the theatrical performance. P.W.5 Manodini was at the place of occurrence in a separate

room. After the incident was over and she could come out of the room she at the first flash became senseless seeing her husband dead. After she

regained sense she was told the names of the assailants by Bhairabi (P.W.1).

14. The sketch map(ext.3) and the seizure list (ext.2) have together fixed the place of occurrence as regards which no one has raised any dispute.

The postmortem report marked ext.10 indicates both sharp cut and lacerated injury on the victim and the cause of death is stated to be

hemorrhage and perforation of the heart which was homicidal in nature. The inquest report marked ext.3 is in consonance with the postmortem

report. The FSL report establishes that the wearing apparel of the deceased contained human blood. From the statement of the witnesses present

during the inquest it was ascertained that the cause of death was murder which was committed due to enmity.

15. The evidence discussed above establishes the following circumstances:-

1) There was enmity between the deceased and the accused persons.

2) The appellants amongst others conspired to kill Ramgopal to feed their grudge.

3) The date of incident was suited for the purpose in as much as most of the villagers were not in their homes and had gone to watch the theatrical

performance in the neighboring village.

4) The appellant amongst others broke in upon the house of the deceased and mercilessly killed him. P.W.1 had watched the appellants assaulting

the deceased with lathis and sharp cutting weapons.

5) The deceased frantically prayed for mercy calling out the names of his assailants which was heard both by the P.Ws.1 and 5.

6) The written complaint was lodged at the earliest possible opportunity disclosing the names of the assailants.

7) During inquest the witnesses present told the police officer that the deceased had been murdered due to enmity.

16. Mr. Bag, learned Senior Advocate, made the following submissions:-

a) The victim, according to the evidence, was sleeping in his bedroom. But the dress of the victim seized by the police does not show that he was

at that point of time sleeping. The dress included underwear, sando gangee, full sleeve gangee, full sweater, and full sleeve kurta. He submitted that

it is difficult to believe that the victim with these dresses was sleeping in the room.

We are not impressed by this submission because it was the month of December. The place of incident is in the district of Coochbehar which is

very near the Himalayan range. The deceased was aged about 45 years and therefore we do not find anything unusual in the dressing pattern.

b) The articles seized by the police in particular the hurricane was not produced in Court.

The correctness of the seizure list has not been disputed by Mr. Bag. Therefore the fact that the hurricane was seized by the police is not in

dispute. The mere fact that it was not produced in Court does not, in our opinion, weaken the case of the prosecution rather the same goes to

show the carelessness on the part of the investigating agency.

c) The names of the assailants were not disclosed in the inquest.

The inquest was held at 8.30 A.M. whereas the written complaint had already been lodged at 7.15 A.M. Bhairabi, the defacto complainant, is also

a witness to the inquest report. The names of the assailants were already known to the I.O. who conducted the inquest. Therefore we do not think

that there was any necessity to reiterate the names of the accused persons in the inquest report. Moreover, the inquest report does not require any

mention of the names of the accused persons.

d) P.W.1 Bhairabi deposed that hearing her shout Kunu had reached the place of occurrence. P.W.3 deposed that when they came back from the

theatrical performance the incident was narrated to them by the P.W.1. Khitish and Kumu at that point of time were also there. Mr. Bag submitted

that neither Kunu nor Khitish were called to give evidence.

It is true that neither of them was called to give evidence but the fact remains that neither of them was an eyewitness nor was their evidence

essential for unfolding the case of the prosecution.

e) The FIR was subsequently inserted.

We are unable to accept this submission. On the basis of the written complaint, the formal FIR bearing No. 100 of 1996 marked ext.5 was

prepared and on that basis a police case was started which has been reflected in the inquest report and the seizure list prepared shortly after the

written complaint was lodged. We are under the circumstances unable to accept the submission that the FIR was subsequently inserted.

f) The evidence of the P.W.1 that she could identify the assailants by mere peeping in the illumination of hurricane is not believable according to

Mr. Bag.

We do not think that there is any substance in the submission because the rural people are accustomed to doing their works in the illumination of

hurricane. Hurricane, as a matter of fact, is the only source of illumination in the night in some parts of the rural Bengal even today. In the light of

hurricane all the works including study is carried out in the rural areas. It is difficult to follow why Bhairabi being an inhabitant of the village could

not have identified the assailants in the illumination of hurricane more particularly when the assailants were all known to her.

g) P.W.1 deposed that the door of the northern room was broken which was also corroborated by the evidence of the P.W.7. But the P.W.5,

widow of the deceased, deposed that the door of the room of her husband was intact. Mr. Bag submitted that this discrepancy as to the door of

the room of the deceased is very material and makes the evidence of the so-called eye and ear witnesses conflicting to each other. He also drew

our attention to the evidence of the I.O. who in his cross-examination deposed that he did not notice the door of the northern room broken. Mr.

Bag therefore submitted that this is a singular circumstance which renders the evidence of the prosecution witnesses suspect.

We however are unable to attach the amount of importance which Mr. Bag wants us to do. The widow (P.W.5) had lost her husband. Whether

the door was broken or not broken was a matter of least significance to her. She is not a person engaged with the investigation activities. She may

not have concerned herself to see whether the door was broken or not broken. The mere fact that the I.O. deposed that he did not find the door

of the northern room broken also does not militate against veracity of the evidence of the P.Ws.1 and 7. Sight cannot be lost of the fact that the

trial took place almost 5 years after the incident. The I.O. gave his evidence on the basis of the records made by him. It is possible that the

attention of the I.O. was not drawn to the broken door or that he did not keep any record about the same in his diary. Moreover by the expression

that the door was broken we cannot visualise what or which part of the door was broken. By the expression that the door was broken we cannot

proceed on the basis that the door must have been lying on the floor. We are therefore not prepared to attach any importance to this circumstance

highlighted by Mr. Bag.

h) Mr. Bag drew our attention to the evidence of the I.O. where he deposed that he did not make any note as to the room from where the

hurricane was seized by him. Mr. Bag wanted us to proceed on the basis that the recovery of the seizure of the hurricane is not of much

significance.

The I.O. may not have recorded as to the room from which the hurricane was seized but one has to admit the fact that during investigation the

hurricane was seized. Had the hurricane seized by the police been lying in some other room the police was not likely to have seized the same. It

was seized because it had some relevance. It was not recorded in the seizure list that the hurricane was seized from the room of the deceased

because the I.O. proceeded on the basis that it could not have been otherwise and was obvious.

i) Mr. Bag submitted that the evidence of the prosecution witnesses become further suspect when we find that no attempt was made to inform

the children who at the relevant point of time watching the theatrical performance.

We fail to see who was there in the house to give this information to the children. The only male member was lying dead. His widow the P.W.5

became unconscious and the only other inmate was the P.W.1. It was the dead part of the night during the season of winter in the month of

December. Villagers were by and large engaged in watching the theatrical performance in the neighboring village.

j) Mr. Bag then commented that the seized articles were not produced in Court.

The seizure of these articles has not been disputed by him. The mere fact that they were not produced during the trial does not really militate

against the case of the prosecution.

k) Mr. Bag submitted that the Autopsy Surgeon has not been examined. It is true that the Autopsy Surgeon has not been examined but from the

order dated 24th July 2001 it appears that attempts were made to bring the Autopsy Surgeon but he was not available and the postmortem report

was tendered and marked exhibit by consent. We are therefore unable to attach great importance to the absence of the Autopsy Surgeon from the

witness box.

l) It was then contended by Mr. Bag that the conduct of the P.W.1 Bhairabi was contrary to human conduct and therefore her evidence is not

believable. Mr. Bag dilated by saying that Bhairabi was expected to rush to the children to inform them about the incident which had happened.

We are not prepared to accept this argument as already indicated. Ramgopal had died, his wife (P.W.5) was lying unconscious, Bhairabi was all

alone in the house. True it is Kunu had come but there was no urgency after the death to inform the children because they were likely to come

back shortly in any event.

m) Lastly Mr. Bag submitted that when the evidence of the P.W.1 is disbelieved by the learned Trial Judge insofar as three of the accused persons

were concerned there was no reason why her evidence should have been accepted for the rest of the accused persons.

17. We have to notice in this regard the finding of the learned Trial Judge which is as follows:-

De facto complainant Bhairabi Karmakar (P.W.1) identified accused Nishi Byadh and Rup Kumar Byadh as the miscreants of this case during a

T.I. Parade held in Mekhliganj sub-jail on first July, 1997. She also identified accused Dinabandhu Byadh and Isthia Byadh as other miscreants of

this case in a T.I. Parade held on 27th Day of January, 1997. Those T.I. Parade were held before Sri Tapan Kr. Das, Ld. J.M. Mekliganj. The

T.I. Parade sheets were marked Exts.9 and 11 respectively of this case. It appears from the T.I. Parade sheets that after over of T.I. Parade those

four accused persons complained before the Id. Magistrate that they were known to witness Bhairabi Karmakar (P.W.1) since long as they were

residents of same locality and that they were falsely implicated on account of dispute between the parties. Admittedly, save and except said

identification of those accused persons during T.I. Parades by witness Bhairabi Karmakar, there was no other evidence to connect them in this

case. During cross-examination of P.W.1 she admitted that all those accused persons were known to her for last 20/22 years. If that be the

position, then those accused persons, who were identified later on by said witness in T.I. Parade should have been identified by the witnesses in



the very night of occurrence. A person is expected to identify a known person at the time of occurrence. T.I. Parade are held only for the purpose

of identification of unknown persons, who were claimed to be seen by the witnesses at the time of occurrence. Identification of known person in

T.I. Parade has practically no value in the eye of law. Under the facts and circumstances I am of opinion that alleged identification of those four

accused persons by de facto complainant Bhairabi Karmakar (P.W.1) in T.I. Parade had practically no value as all of them were known to the

said witness for long as local persons. Accordingly, I find and hold that the prosecution has miserably failed to prove either of the charges against

these four accused persons namely, Dinabandhu Byadh, Isth Byadh, Nishi Byadh and Rup Kumar Byadh.

18. It did not occur to the learned Trial Judge that the evidence is that there was illumination in the bedroom of the deceased Ramgopal. The four

accused persons let-off by the learned Trial Judge were standing on guard outside the room occupied by the P.W.5 where there was no

illumination. These four persons had also stopped the P.W.5 from coming out of her room. There was no illumination. In the darkness it is possible

that Bhairabi (P.W.1) could not recognise them which she did at the time of the test identification parade. The P.W.1 (Bhairabi) was not cross

examined on this aspect of the matter with any amount of seriousness which further reinforces identification during the T.I. Parade. The learned

Trial Judge however chose to give benefit of doubt to those four persons and there is no appeal by the State against that part of the judgment but it

is difficult to hold that the evidence of the P.W.1 Bhairabi was disbelieved by the learned Trial Judge. His conscience was not satisfied as regards

the identification of those four persons and he has chosen to give them benefit of doubt which he was within his jurisdiction to do. The matter has

now become final. But that fact cannot influence insofar as the identification of the rest of the accused persons is concerned.

19. No other submission was advanced by Mr. Bag. We are of the view that on the basis of the evidence discussed above the learned trial Judge

took a reasonable view and there is no scope for any interference.

20. The appeal is, as such, dismissed. The appellants were enlarged on bail by an order dated 17th October 2004. Their bail-bonds are cancelled.

They are directed to surrender forthwith and to serve out the sentences awarded by the learned Trial Judge. Notice in that regard is also given

through the learned counsel appearing for the appellants.

21. Lower Court Records with a copy of this judgment be sent down to the learned Trial Court forthwith for information and necessary action.

22. Urgent xerox certified copy of this judgment be delivered to the learned Advocates for the parties, if applied for, upon compliance of usual

formalities.

Kishore Kumar Prasad, J.

23. I agree.