(2004) 12 CAL CK 0028

Calcutta High Court

Case No: C.R.A. No. 137 of 1997

Bablu Mahanto		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: Dec. 9, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Evidence Act, 1872 - Section 27, 3, 32
- Penal Code, 1860 (IPC) - Section 302

Citation: (2005) 1 CHN 305

Hon'ble Judges: Pravendu Narayan Sinha, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Partha Sarathi Bhattacharya, for the Appellant;Sasanka Ghosh and Bhaswati Pal, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.

This appeal is at the instance of a convicted person charged u/s 302 of the Indian Penal Code and is directed against order dated 27th February, 1997 passed by the Additional Sessions Judge, Second Court, Siliguri, District-Darjeeling in Sessions Case No. 2(S) of 1996 (Sessions Trial No. 9 of 1996) thereby holding the appellant guilty and sentencing him to life imprisonment.

2. The prosecution case is based on FIR dated 21th September, 1995 lodged by the father of the victim, a girl studying in Class-VIII, who had suffered multiples stabs by knife on that day at about 1:30 p.m. while she was coming back from school along with her two classmates. In the said complaint, it was alleged that the accused, while the victim was coming from school, started pulling her hand which she opposed and suddenly, the accused bought out a knife and made repeated assaults on her body. As a result, the victim was taken to the local hospital in a seriously injured condition.

3. Subsequently, on 23rd September, 1995 the victim succumbed to the injuries.

4. On the basis of the aforesaid allegation, the appellant was charged u/s 302 of the Indian Penal Code.

5. The prosecution has examined 38 witnesses in support of its case. On behalf of the accused, one witness was examined. The Court examined the accused u/s 313 of the Code of Criminal Procedure.

6. As indicated earlier, the learned Sessions Judge has found the appellant guilty and sentenced him to life imprisonment.

7. While arriving at conclusion that the appellant was guilty of murder, the learned Sessions Judge has relied upon the evidence of three eye-witnesses to the incident. Apart from the aforesaid three eye-witnesses, the learned Trial Judge has also taken into consideration a dying declaration alleged to have been given by the victim prior to her death before a Deputy Magistrate.

8. It further appears from the materials on record that soon after the alleged stabbing in broad day-light on the public road, the accused was apprehended by the local people and in the process, was injured. He was rescued from the mob and was arrested in injured condition. The learned Sessions Judge also took into consideration the aforesaid fact indicating that the appellant was very much involved in the incident. It further appears from the record that the police recovered the knife alleged to have been used by the appellant for stabbing on the basis of confession made by the accused in police custody. Apart from those facts, medical evidence were also produced showing that stabbing was the cause of death and that there were as many as fourteen marks of stabbing. The prosecution brought witnesses to prove that the accused was the brother of a tenant in the house of the victim and was unsuccessful in wooing the victim and the refusal on the part of the victim to respond to the supposed love of the accused resulted in anger which prompted the accused to take the extreme step as an outcome of frustration.

9. Being dissatisfied, the appellant has come up with the present appeal.

10. Mr. Bhattacharya, the learned Counsel appearing on behalf of the appellant has made four-fold submission before this Court.

11. First, he has contended that the learned Trial Judge erred in law in relying upon the alleged dying declaration recorded by the P.W. 8 inasmuch as, it will appear from his evidence that before recording such dying declaration, no permission was taken from the doctor nor was the same recorded in the presence of any doctor. It is further contended that it will appear from the evidence adduced by P.W. 8 that the formalities required for recording a dying declaration was not at all complied with. He, thus, contends that this Court should exclude the said dying declaration from consideration.

12. Mr. Bhattacharya next contends that the identification of the deceased by the two alleged eye-witnesses is also doubtful. He submits that Identification Parade was made on lst November, 1995 long 40 days after the incident but in the meantime the accused was produced before the Court and it appears from record that these two witnesses had occasion to see the accused person earlier in Court. He further contends that it was specifically submitted by the accused during his examination u/s 313 of the Code that of all the persons appeared at the time of Identification Parade, he was the only person having bandage on his head and thus, it was easy for the alleged eye-witness to identify him. In support of this allegation, the defence has examined the only witness namely the doctor of the jail to establish the fact that the accused had bandage on his head even in the month of November, 1995.

13. Bhattacharya next contends that the two alleged eye-witnesses should be disbelieved as their statement u/s 164 of the Code of Criminal Procedure was earlier taken after long forty days from the date of incident just before the Identification Parade. Such fact, Mr. Bhattacharya submits, indicates that those eye-witnesses are not trustworthy. Mr. Bhattacharya further contends that the evidence adduced by the two alleged eye-witnesses show that those are conflicting. He further contends that no material has been placed before the Court showing that those two girls were really classmates of the victim or that they went to school on that day.

14. Mr. Bhattacharya lastly contends that the recovery of the knife alleged to have been used while stabbing should be disbelieved, inasmuch as the statement of the accused leading to such discovery has not been placed before this Court. He, thus, contends that if all the aforesaid circumstances are taken into consideration while appreciating the evidence on record, it will be abundantly clear that the prosecution has failed to prove that the appellant was really involved in the said incident.

15. Mr. Bhattacharya also contends that, even if, it is assumed for the sake of argument that the appellant was involved in the incident, he should be at the most held guilty not for murder but for committing offence u/s 304 of the Indian Penal Code. He, thus, prays for setting aside the order of conviction.

16. The aforesaid contentions of Mr. Bhattacharya have been seriously disputed by Mr. Ghosh, the learned Counsel appearing on behalf of the State-respondent.

17. Mr. Ghosh contends that a Deputy Magistrate having recorded the dying declaration of the victim by going to a Government Hospital in the presence of a matron, there is no justification of disbelieving such dying declaration. Mr. Ghosh also contends that in this case there is no conceivable cause of falsely implicating the accused person and there was no reason why the victim, a girl of Class-VIII, should make false statement against the victim.

18. As regards the alleged defective identification, Mr. Ghosh contends that the learned Judicial Magistrate before whom the Identification Parade was held was not

given any suggestion that his statement that the accused had no bandage over his head was a false statement. In the absence of any such suggestion, Mr. Ghosh contends, the appellant cannot take such plea and cast any doubt as regards the mode of identification.

19. Mr. Ghosh further contends that in this case the two classmates of the victim have specifically identified the accused in open Court and have also made statement u/s 164 of the Code of Criminal Procedure and such statement is corroborated by the evidence of another eye-witnesses namely P.W. 29 who has also witnessed the incident, although, partially. Mr. Ghosh contends that no ground has been shown by the appellant for disbelieving those three eye-witnesses.

20. Mr. Ghosh further contends that merely because the statement of the accused leading to recovery of weapon has not been produced before the Court, for that reason, the recovery of the weapon cannot be disbelieved. Mr. Ghosh points out that in this case the witness to the seizure has been examined followed by production of the material Ext. itself and thus, there is no ground for disbelieving such recovery.

21. Mr. Ghosh lastly contends that in this case the fact that the appellant was apprehended by the local people and handed over to the police soon after the incident justifies the conclusion that the eye-witnesses were speaking the truth and but instead of explaining why the local people apprehended him from the spot soon after the incident, the accused in his statement u/s 313 of the Code took a false plea that he was arrested by the police at 11 p.m. on the date of incident and it was the police who caused the injury. Mr. Ghosh, thus, prays for dismissal of the appeal.

22. After hearing the learned Counsel for the parties and after going through the materials on record we find that apart from the alleged dying declaration given by the victim before her death, there are three eye-witnesses to the incident, viz. P.W. 2, P.W. 3 and P.W. 29. There is also evidence to show that soon after the incident, the accused was detained by the local people near the place of occurrence and was injured and the police rescued the accused from the public and arrested in injured condition. Subsequently, the knife alleged to have been used for stabbing was recovered from a place near the place of incident at the instance of the accused person while he was in police custody. The fact that the injuries arising out of stabbing were the cause of death has been well-established from medical evidence adduced in this case.

23. We, therefore, proceed to examine the evidence on records to see whether the conviction and the sentence imposed by the learned Sessions Judge can be upheld in this case.

24. At the very outset, we propose to consider whether the alleged dying declaration recorded by the P.W. 8 can really be taken as such for the purpose of coming to the conclusion that the accused committed the crime.

25. Ext. 3 is the alleged dying declaration recorded by P.W. 8, a Deputy Magistrate at the direction of the local S. D. O. in a Government Hospital. Such declaration was recorded in "question answer" form. In Ext. 3, the name of one Sanat Tudu, the P.W. 14 has been shown as witness. The time of taking such declaration does not appear from the said Ext. 3. One Anita Bhattacharya, a matron, has also come forward to give evidence as P.W. 7 claiming to be present at the time of taking such declaration. She specifically stated that as the condition of the patient was serious, none else among the duty nurses, or G. D. A. or patients or doctors was present when the declaration was taken. She stated that she could not hear what the girl had said as she was speaking in a low voice. She did not even mention the presence of P.W. 14 at the time of taking the alleged declaration. The P.W. 8, the Deputy Magistrate, has admitted in his evidence that he did not take any permission from the doctor before taking the declaration. The time of recording the declaration is also not available from the materials on record. He admitted that he did not write in the same language which was uttered by the victim.

26. The alleged witness mentioned in the recorded dying declaration is one Sanat Tudu, a staff nurse who appeared before the Court as P.W. 14. In examination-in-chief she has merely proved her signature appearing on Ext 3. In cross-examination, she stated that she had not brought the register to show that she had duty in the hospital on that day. She has further stated that she alone was on duty on that day in the female surgical ward. She has further admitted that none of the doctors had given her any certificate of fitness or unfitness of the patient before recording her statement by the Magistrate. She has further stated that the patient was "unconscious" from the very beginning. She has further stated that she signed Ext. 3 by sitting at a place at a distance of eight to ten cubits from the bed of the patient.

27. From the aforesaid materials it is very difficult to believe that without taking consent of any doctor, any such dying declaration could be taken. Even no doctor was present at the time of taking such declaration and the time of taking such declaration was not specified by any of the aforesaid three witnesses. The admission of P.W. 14 in cross-examination that the patient was unconscious from the very beginning makes it clear that she was not in a position to give any dying declaration. Moreover, we have already indicated that the P.W. 8 has not written the exact language uttered by the patient and in such a case, we are unable to treat the Ext. 3 as a dying declaration.

28. In our view, the learned Sessions Judge erred in law in taking Ext. 3 into consideration as a dying declaration. We, therefore, purpose to exclude Ext. 3 from our consideration for the purpose of scrutinizing the materials on record.

29. The next question is whether the evidence given by the two eye-witnesses, namely, P.W. 2 and P.W. 3 can be discarded simply because they were earlier examined u/s 164 of the Code of Criminal Procedure. It is now settled position of law

that if a witness is examined u/s 164 of the Code of Criminal Procedure, that fact alone cannot be a ground for discarding the evidence given at the time of trial. But the Court while appreciating the evidence given by such witness should be cautious, inasmuch as, the prosecution tried to bind such witness by examining the witness u/s 164. In this connection, it will be profitable to refer to the decision of the Supreme Court in the case of Ram Charan and Others Vs. State of U.P., , where the Apex Court approved the following observations of Subba Rao, CJ. in the case of In Re: Gopisetti Chinna Venkata Subbaiah and Others, , while His Lordship was the Chief Justice of that High Court:

"We are of the opinion that if a statement of a witness is previously recorded u/s 164, Criminal Procedure Code, it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded u/s 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon."

30. Keeping in mind the aforesaid principles laid down by the Supreme Court, we now propose to consider the evidence given by P.W. 2 and P.W. 3.

31. Although, Mr. Bhattacharya, the learned Advocate appearing on behalf of the appellant tried to convince us that we should not take into consideration of the evidence adduced by those two witnesses on the ground that prosecution failed to produce document showing that they were really the students of the said school, we are not at all impressed by such submission. In this case, the Headmistress of the school and an accountant have figured as witnesses on behalf of the prosecution and they have in no uncertain terms stated before the Court that those two witnesses were the students of the said school. The defence did not give any suggestion to the contrary disputing the aforesaid fact. Under such circumstances, there was no necessity of producing the documentary evidence showing that P.W. 2 and P.W. 3 were really the students of the said school.

32. It appears from the evidence given by those two persons that P.W. 2 identified the accused person at the Identification Parade but P.W. 3 could not. P.W. 3 in her evidence has stated that although she saw the accused in jail but could not identify him as many other persons were standing with him and she was frightened at the sight. The Judicial Magistrate, in whose presence the T. I. Parade was held specifically stated that at the time of Identification Parade there was no bandage on the head of the accused and in cross-examination no suggestion had been given to him that his statement was wrong. We are also unable to place any reliance on the statement of DW 1 that at that time the accused had any bandage on his head because of her statement in cross-examination that she saw him for the first time in first part of the month of October, 1995 and the first time when she saw him, there was no bandage on his head but there were some stitches on his head. Then she

volunteered that the accused used to tie clothes on his head to protect him from flies. She however conceded that such covering of scalp by a cloth did not mean bandage in the medical term. It may be mentioned here that the T. I. Parade was held on October 31,1995 and thus, if the accused had no bandage even in the first part of October, on the date of Identification Parade there cannot be any bandage on his head. We find no reason to disbelieve the Judicial Magistrate on this question.

33. In our view, so far the P.W. 3 is concerned, the appellant cannot press too much for the inability of the P.W. 3 to identify the accused because in the cross-examination specific suggestion was given to her that the accused was very much known to her from before and that she herself, the P.W. 2 and the deceased along with the accused used to sit together and gossip together and had also occasion to visit cinema together. At any rate, if a girl studying in Class-VIII who witnessed murder of a classmate is frightened at the sight of the murderer at the time of T. I. Parade and due to nervousness, is unable to identify any body, for that reason we should not disbelieve the testimony of this witness when the same is corroborated by the other witnesses of the incident.

34. It further appears from the evidence given by P.W. 2 and P.W. 3 that they stated the incident with confidence and there was no variation from their earlier statements. Moreover, once it is established that they were her classmates, there was no reason why these two witnesses will falsely implicate the appellant when no suggestion of bearing any animosity against the accused has been given to these two witnesses. The accused was very near to those two persons at the time of stabbing and the victim also disclosed to them the identity of the accused being the brother of their tenant immediately before the incident. Moreover, the statements of P.W. 2 and P.W. 3 have been further corroborated by P.W. 29 who had also occasion to see a part of incident from the verandah of her house. Therefore, the evidence given by P.W. 2 and P.W. 3 are also corroborated by P.W. 29. We, thus, find that the learned Sessions Judge rightly believed the evidence adduced by the P.W. 2, P.W. 3 and P.W. 29 who were all eye-witnesses to the incident.

35. The fact that the appellant was chased by the local crowd immediately after the incident and was injured and the police rescued him from the public is a factor which should be taken into consideration as a corroborative circumstance justifying the credence of the statements of the eye-witnesses. In the examination u/s 313 of the Code of Criminal Procedure when the learned Sessions Judge drew attention of the accused to the aforesaid fact, the accused flatly denied such incident stating that he was arrested from his resident at 11 p.m. on the date of incident and the injury was caused in the hands of the police. We are unable to accept such explanation. It appears from the G. D. recorded at 2.10 p.m. that the local public apprehended the accused for killing the victim, as a result, the police party left for the place to rescue the appellant from the fury of public. The other local witnesses have also corroborated such fact and we do not find any reason to disbelieve their evidence.

The accused, thus, had deliberately told a lie in examination u/s 313 of the Code of Criminal Procedure. We are quite conscious of the proposition of law that the statement u/s 313 of the Code is not the evidence in the strict sense of the term and conviction cannot be based merely on the ground that the accused could not explain the circumstances. But once the prosecution has adduced evidence to bring home the charge, if the accused makes a deliberate false statement, the Court can reasonably conclude that the accused has left unexplained circumstances put to him. [See State of Punjab v. Karnail Singh reported in 2004 SCC (Cri) 135].

36. Over and above, in this case the police have also recovered the knife by which the appellant struck the victim and such knife was recovered from the drain under a transformer situated on the way to the place from which the appellant was rescued from the public. We are not at all impressed by the submission of learned Advocate for the appellant that merely because the actual statement made by the appellant leading to recovery of the seized articles has not come out in evidence, the fact of seizure cannot be considered.

37. Even in the absence of such statement, the Court can take into consideration the fact of seizure, when independent witnesses have come forward proving that in the presence of the appellant, police recovered the weapon and the signature and thumb impression of the witnesses and the accused taken at the time of seizure are there on the seizure memo. It is now settled law that mere non-recording of the disclosure statement does not vitiate Section 27 of the Evidence Act. (See Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh, . In this case, the Investigating Officer in clear terms has stated that while in custody, on September 29, 1995 the accused disclosed the place where he concealed the incriminating knife and on the basis of such information, the knife was recovered in the presence of the accused and the witnesses. Thus, the recovery of the knife was quite in conformity with the provision of Section 27 of the Evidence Act.

38. On consideration of the entire materials on record, we, thus, find that although dying declaration should not be taken into account but even after excluding the dying declaration, the prosecution in this case has proved by three independent eye-witnesses that the appellant stabbed the victim to death. The incident occurred in open day-light and the local public caught the appellant-red handed and in the process he was injured.

39. Although, Mr. Bhattacharya appearing on behalf of the appellant has strenuously contended that charge should have been framed u/s 304 and not u/s 302 of the Code, we are not at all impressed by such submission. We have already noticed that in this case there were as many as fourteen marks of stabbing and from the aforesaid circumstances the only conclusion that can be drawn is that the appellant had the intention of killing the victim after being refused while approaching her with the proposal of love.

40. We, thus, find no reason to interfere with the ultimate conclusion arrived at by the learned Sessions Judge holding that the appellant was guilty of murdering the victim although we do not approve the entire reasons assigned by the learned Sessions Judge:

41. The appeal is thus dismissed. The order of conviction and the sentence imposed upon to the appellant are affirmed.

Pravendu Narayan Sinha, J.

42. I agree.