

(2013) 04 CAL CK 0059

Calcutta High Court

Case No: C.R.A. No. 206 of 2009

Partha Halder

APPELLANT

Vs

State of W. Ben.

RESPONDENT

Date of Decision: April 24, 2013**Citation:** (2013) 3 CHN 659**Hon'ble Judges:** Nadira Patheriya, J; Asim Kumar Ray, J**Bench:** Division Bench**Advocate:** Milon Mukherjee, D.N. Ray, Saibal Mondal, Munmun Tewary and Rajesh Kumar Shah, for the Appellant; Saibal Bapuli and Shibaji Kumar Das, for the Respondent

Judgement

Asim Kumar Ray, J.

This appeal is directed against the judgment, order of conviction dated 20.01.2009 and sentence dated 21.01.2009 passed in Sessions Trial No. 29(10)05 arising out of Sessions Case No. 21(6)05 by the Learned Additional District & Sessions Judge, Fast Track Court-III Barrackpore thereby convicting the appellant Partha Halder to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 1000/-, in default to suffer further rigorous imprisonment for two months for the offence punishable u/s 326 I.P.C. and also to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 2000/- in default to suffer further rigorous imprisonment for four months for the offence punishable u/s 307 IPC. There is a direction that the said sentences shall run concurrently. Concisely stated, the case of the prosecution is that on 11.09.2004 around 8 P.M. the victim Rakhi Bhowmick was assaulted by the appellant/accused Partha Halder with a razor on her throat and hands and as a result she suffered cut injury. It is alleged that the accused/appellant had the intention to murder the victim.

2. The father of the victim Anil Chakraborty lodged a complaint with Noapara Police Station and on the basis of such complaint Noapara P.S. Case No. 144 dated 12.09.2004 u/s 326 IPC was started. The matter was investigated into. On closure of investigation a Charge sheet u/s 326 /307 IPC was submitted against the accused

person. On receipt of the Charge sheet the matter was committed to the Court of Sessions. The learned Court of Sessions on receipt of the case transferred it to the Learned Court below i.e. Additional District & Sessions Judge, Fast Track Court-III, Barrackpore for disposal.

3. On receipt of the case on transfer, the learned Court below framed charge against the accused/appellant Partha Halder u/s 326 and 307 of IPC It was read over and explained to him to which he pleaded not guilty and claimed to be tried.

4. In course of trial, 12 (twelve) witnesses were examined by the prosecution and besides the oral evidence some documents have been exhibited. On the contrary, no one was examined from the side of the defence. On completion of the recording of evidence the accused/appellant was examined u/s 313 Cr.PC.

5. On appreciation of the evidence on record, the learned Court below passed the judgment, order of conviction and sentence impugned. So this appeal.

6. Mr. Mukherjee, learned Senior Advocate appearing for the appellant has contended that the evidence on record will reflect that there were 3 (three) F.I.R. The original F.I.R. was not before the Court. There was delay in sending the F.I.R. to Court also. The aforesaid character of the F.I.R. will give an indication that there is fabrication in the F.I.R. He has contended further that the victim's evidence lacks credibility. She is not a truthful witness. She did not make any statement on 20th September, 2004 before the I.O. regarding the alleged incident, which she has stated for the first time before the Court. Therefore, the evidence of the victim is nothing but a developed one. It cannot be taken for consideration.

7. He has contended further that non-examination of the doctors of Ichapur Municipality Hospital and B.N. BOSE Hospital, non exhibitions of the documents of the hospitals draw inference in favour of the accused. If the doctors of those hospitals were examined and the documents of the hospitals were produced before the Court those would go in favour of the appellant.

8. The evidence of other witnesses cannot be taken for consideration. The other witnesses cannot be believed as they have claimed that they heard about the incident from the victim. The victim's evidence suffers from embellishment and that is why the evidence of the rest of the witnesses cannot be taken for consideration in connection with the case against the appellant.

9. He has further contended that the place and time of incident or occurrence differs. Doctor's evidence is bereft of the nature of injury and cannot be taken for consideration. To give support to his submissions Mr. Mukherjee has cited a decision reported in [Mamfru Chowdhury and Others Vs. King-Emperor](#),

10. To counter the submission of Mr. Mukherjee, Mr. Bapuli, learned counsel appearing for the State has contended that for defective investigation an accused cannot be held not guilty. Defective investigation cannot be treated as a ground for

acquittal. The victim is the best witness. She has stated about the incident in details naming the appellant and also the date and time of incident.

11. Doctor's evidence lends support to the evidence of the victim as the doctor has stated in course of his evidence that the victim sustained sharp cut injury on her persons.

12. He has contended further that the daughter of the victim/P.W. 3 has corroborated the evidence of the victim. She has witnessed the incident and has stated so in course of her evidence. He has supported the judgment, order of conviction and sentence. To support his contention he has cited a decision reported in [C. Muniappan and Others Vs. State of Tamil Nadu](#),

13. We have meticulously perused the evidence on record and taken stock of the argument advanced by the learned counsels of the parties.

14. The case of the prosecution has rolled out on the basis of the F.I.R. lodged by the prosecution witness No. 1. He is the father of the victim. His evidence is very vital. He has stated in his evidence that "In the next morning I went to Noapara P.S. to lodge a complaint. In the afternoon of the following day I went to R.G. Kar Hospital to see my daughter."

15. He has also stated in his evidence that "At about 8 a.m. on 12.09.04, I went to Noapara P.S. and lodged a complaint."

16. It is now pertinent to have a glance on the formal F.I.R. which has been marked as Exhibit. It is seen from the formal F.I.R. that the written complaint was received at the Noapara Police Station on 12.09.2004 around 1.05 hours. If we now place this formal F.I.R. besides the evidence of the F.I.R. maker, then we find that there is a tussle between the evidence of the F.I.R. maker and the F.I.R. itself regarding the date and time of lodging the F.I.R. These tussles breed doubts and in our opinion it is unsafe to place any reliance on it/F.I.R.

17. Let us now go to the evidence of the victim. She is prosecution witness No. 2. She has stated about the incident in details in course of her evidence stating "After getting down from the Rickshaw in front of the gate of my house I paid fare to the Rickshaw puller and when he went away Partho came there and taking out a razor from his pocket he declared that he would kill me. I tried to resist him and as a result my two fingers of my right hand and one finger of left hand became injured. Second and third finger of the right hand and the second finger of left hand became injured. At that time I raised hue and cry then Partho attacked me and hit my throat with the razor twice. Hearing hue and cry my Bhasur and the said neighbour Ila Saha came out and Partho fled away."

18. If we now go through the evidence of the prosecution witness No. 12/I.O. then it will be attracted to our sight that the victim Rakhi Bhowmick has not stated all the aforementioned facts at the time of her examination by the I.O. Therefore, we may safely

express that the evidence of the victim Rakhi Bhowmick is nothing but an improved one. It suffers from embellishment. It cannot be taken for consideration as a piece of evidence to arrive at a decision against the appellant.

19. It has been rightly pointed out by Mr. Mukherjee that the evidence of other witnesses is practically based on the information given by the victim to those witnesses and the same may be at best treated as hearsay evidence, which has no value in the eye of law.

20. On scrutiny of the record it appears that doctors of the Ichapur Municipal Hospital and B.N. Bose Hospital where the victim was taken for the first time from her house for treatment have not been examined as prosecution witnesses.

21. A step was taken from the side of the prosecution to produce those vital witnesses before the Court by filing an application u/s 311 Cr.PC. The Court considered that application and allowed it by the order dated 21.2.2007. But the prosecution did not venture to produce those witnesses. The documents of the aforesaid hospitals were produced before the Court as called for at the instance of the prosecution and even then those documents have not been taken in the record as documentary evidence. No effort was made from the side of the prosecution to cause exhibition of those documents to give a clear picture about the incident and the resultant injury of the victim at the instance of the appellant as alleged. The non-production of those witnesses and the hospital records tells upon the prosecution case heavily and it is beyond repair.

22. Prosecution witness No. 9 is the doctor of R.G. Kar Hospital. He has stated in his evidence that he examined the victim at 11.55 P.M. at Emergency Unit. She was brought by Bikramjit Bhowmick, elder brother of patient's husband (Prosecution witness No. 4). On examination he found:

1. Sharp cutting injury in front of the neck involving skin, platyama with bleeding; and

2. Cut injuries over both hands, fingers mainly on index and middle finger.

As there was profused bleeding he referred the injured to Casualty Block OT (CBOT).

23. He has also stated that the injury was cut injury caused by sharp cutting weapon. The patient stated before him that she was injured with a sharp razor blade by Partho Halder S/o Late Ksitish Halder of East land quarter, Ichapore.

The doctor has stated that he has not treated the patient.

24. Prosecution witness No. 6 is the brother of the victim who has stated in his evidence that the victim was senseless at the time of taking her to hospital. Therefore, the history of assault as recorded by the doctor appears to be not at the instance of the victim herself.

25. On perusal of the evidence of doctor and exhibit-4 we do not find the nature of wounds sustained by the victim. It is not coming out from the evidence that as to whether the victim's wound was stitched or not. It is not coming out further as to whether it was a grievous injury or otherwise.

26. There is no evidence to the effect that the injury was sufficient to cause the death of the victim.

27. Section 320. Grievous hurt.--The following kinds of hurt only are designated as "grievous":-

First.- Emasculation.

Eighthly.- Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

The record is silent about the evidence that the hurt sustained by the victim endangered her life or she was in severe bodily pain for 20 days or unable to follow her ordinary pursuits. We do not find that the case fulfils the requirement of law to come within the fold of section 326 IPC.

28. The point of defective investigation raised by the learned counsel for the State was not taken before the learned lower Court. On going through the evidence of I.O. (P.W. 12) we find that statement of the witnesses were recorded by one Nakul Sarkar as per his instructions. It was not taken from the side of the prosecution during trial that as the statement of the witnesses were recorded by Nakul Sarkar, the investigation was defective. Therefore, we can not give much importance to this argument advanced by the learned counsel for the State.

29. The injured is the best witness in the eye of law but the victim's evidence does not inspire our confidence. There is no substantive evidence wherefrom it will come out that the appellant had the intention to kill the victim. We are saying so as the statement of the victim as recorded by the I.O. tells upon her own evidence. The evidence of the daughter suffers from self-contradiction. Sometimes she has stated that being attracted by hue and cry of her mother she rushed to the spot and witnessed the appellant to flee away therefrom, but that part of evidence has been demolished by substantive cross-examination wherein she has stated that when she arrived at the spot she found none there. The evidence of the daughter is not of any assistance to the prosecution.

30. There is no iota of evidence to say that the injury was sufficient to cause the death of the victim.

Therefore, we do not find that the preliminary demand of section 307 has been fulfilled through the evidence on record.

31. Going by the aforesaid discussions, we are of the opinion that the judgment and order of conviction dated 20.01.2009 and sentence dated 21.01.2009 cannot be sustained in the eye of law. It is set aside.

32. In the result, the Appeal is allowed and the matter stands disposed of.

33. The appellant Parha Halder be released forthwith if not wanted in any other case.

34. Let this order be communicated to the Superintendent of the Central Correctional Home, Dum Dum for compliance. Urgent certified photocopy of this order, if applied for, be given to the parties upon compliance with all requisite formalities.

Nadira Patherya, J.

I agree.