(2005) 11 CAL CK 0022

Calcutta High Court

Case No: Criminal Appeal No. 004 of 2006

State		APPELLANT
	Vs	
Alexius Tirkey		RESPONDENT

Date of Decision: Nov. 23, 2005

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 34, 449

Citation: (2006) 3 CHN 508 : (2006) 1 ILR (Cal) 33

Hon'ble Judges: P.N. Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: S.K. Mondal, for the Appellant;Arul Prasanth, for the Respondent

Final Decision: Allowed

Judgement

P.N. Sinha, J.

This appeal preferred by the State is directed against the judgment and order of acquittal passed by the learned Sessions Judge dated 28th July, 2005 in Sessions Case No. 24 of 2003 thereby acquitting the respondent/ accused from the charges under Sections 302 and 449 of the Indian Penal Code (in short IPC). Being aggrieved by, and dissatisfied with, the order of acquittal the State has moved this Court in this appeal.

2. The prosecution story, in a nutshell, is that Smt, Jaseenta Minj (P.W. 5) was living with her elder sister Smt. Josani Minj and brother-in-law Shri Lachu Tigga at Louki Nallah No. 3. P.W. 5 was married with one Mr. John and thereafter she had second marriage with one Robert Lakra. When Robert Lakra left her at Diglipur, she came to her elder sister''s house and was staying at Louki Nallah. Her elder sister''s daughter Kumari Ajita Tigga (P.W. 6) and one Asan Sai (deceased) were also staying at Louki Nallah for the last 5/6 years from the date of incident. About 2 lA years back from incident, Lahku Majhi and her elder sister brought a man named Alexius Tirkey alias Bakchandu (respondent) for cultivation and he was staying and fooding with them.

The respondent stayed in their house for about 5/6 months and at that time her elder sister disclosed her intention to give marriage of P.W. 5 with the respondent. Subsequently, her elder sister P. W. 6 and Asan Sai denied to make marriage negotiation of P.W. 5 with the respondent/accused. Sometimes thereafter Asan Sai started to work in a stone quarry at Korang Nallah and began to stay there in some Bengali''s house. P.W. 5 sometimes used to go to him and the accused/respondent also used to come to see P.W. 5 and Ors. with foods. On 21" April, 2003 at about 8/9 hours the respondent came to their house and asked P.W. 5 whether she will marry him or not. Asan Sai and elder sister of P.W. 5, who were present there denied to give marriage of P.W. 5 with respondent Alexius. The respondent thereafter returned to the village at about 2.00 p.m. The elder sister of P.W. 5 and brother-in-law went to Betapur. P.W. 5, P.W. 6 and the deceased Asan Sai remained in their house at Louki Nallah. At about 7/7.30 p.m. the respondent/accused came there with shouting saying that he would kill Asan Sai and saying this he came to the door of the hut of the elder sister of P.W. 5 and entered into the hut. P.W. 5 and P.W. 6 were sleepless and the old man Asan Sai was sleeping on the floor on a tarpaulin. P.W. 5 saw a torch in the left hand of respondent Alexius and a thick stick (danda balli) in his right hand and he was wearing only a towel. P.W. 5 and P.W. 6 out of fear went out of the hut through back door and concealed themselves behind a bush. One earthen lamp was burning in the hut and in the light of the said lamp P.W. 5 saw that the respondent/accused was beating on the head of Asan Sai with thick stick and was saying that Asan Sai was not agreeable to allow him to marry P.W. 5, Jaseenta Minj. There was no sound from the mouth of Asan Sai and staying there for some time, the respondent left the hut. When P.W. 5 was confident that respondent had left the hut, she and her elder sister''s daughter P.W. 6 came to the hut and found that deceased Asan Sai was lying on the tarpaulin in the midst of profuse bleeding. P.W. 5 shook the hand of Asan Sai and found that he was already dead. P.W. 5 lodged First Information Keport (in short FIR) at Police Booth of Billiground on 22.4.203 at 7.15 a.m. On the basis of such FIR (Ext. 9) Rangat P.S. Case No. 150 dated 22.4.2003 u/s 302 IPC was started against the respondent/accused. After completing investigation the Investigating Officer (IO) submitted chargesheet under Sections 302/449 IPC against the accused. After commitment of the case to the Court of Sessions which was registered as Sessions Case No. 24 of 2003 in the trial the learned Sessions Judge, A and N Islands by order dated 28th July, 2005 acquitted the respondent/accused from the charges and he was set at liberty.

3. Mr. S.K. Mandal, learned Public Prosecutor appearing for the State submitted that the learned Sessions Judge has eared both in law and in fact. Learned Sessions Judge proceeded in a wrong angle by observing that prosecution case depends upon circumstantial evidence, whereas, the prosecution case is based on direct evidence of two eye-witnesses, namely, P.W. 5 and P.W. 6 and other corroborating evidence including the evidence of P.W. 2, P.W. 3, the evidence of Post-mortem Surgeon, P.W. 10, the 10 (P.W. 12). The learned Sessions Judge disbelieved the

eye-witnesses without any reason and made wrong appreciation of evidence by observing that the prosecution story is unbelievable. He disbelieved the witnesses as they stated that after the incident the accused left the place with singing and, the learned Judge disbelieved the prosecution story by observing that after murder an accused cannot sing.

4. Mr. Mandal further submitted that the learned Sessions Judge also made mistake by observing that there was no mens rea or motive behind the incident. The motive was clear from the FIR and evidence as deceased Asan Sai did not allow marriage negotiation of accused with informant P.W. 5 which enraged the accused and before the incident, the respondent disclosed by shouting that he would kill Asan Sai and all. This part of evidence has been corroborated by P.W. 2 and P.W. 3. There was no ground to disbelieve the prosecution witnesses. There was sufficient and cogent evidence against the accused and there were sufficient materials for conviction of the accused. Accordingly, the order of acquittal may be set aside and the respondent/accused may be held guilty.

5. On the contrary, Mr. Arul Prasanth, learned Advocate appearing for the respondent submitted that the learned Sessions Judge rightly appreciated the evidence and acquitted the accused. The prosecution story of identification of accused in committing the murder of Asan Sai is not believable. The evidence of P.W. 5 and P.W. 6 revealed that they left their hut and took shelter behind a bush which was about 7/8 ft. away from the door of the hut. From the evidence of the witnesses including 10 it has been transpired that the night was dark. In a dark night it was not possible for P.W. 5 and P.W. 6 to identify the respondent/accused as the person who committed murder of deceased Asan Sai. The prosecution story that the witnesses identified the accused by the light of earthen lamp is not believable and such a story is totally belied from the evidence of P. W. 12, who in cross-examination stated that "Dibri Batti'' marked as material Ext. IV produced in Court was found empty and without any kerosene. It proves that the lamp produced in Court was not the lamp which was burning in the hut of the P.W. 5. P.W. 5 also stated that the accused had a torch in his hand but the said torch was not seized.

6. Mr. Prasanth further submitted that the ''danda'' or the stick with which the deceased was allegedly hit on the head was not identified by P. W. 5 in Court. P.W. 5 in her evidence stated that the ''danda'' shown to her in Court is not the ''danda'' by which accused committed the offence. Evidence of P.W. 12 reveals that in the site plan he did not mention who was owner of the house. Accordingly, the prosecution has failed to connect the involvement of the respondent/accused in the incident of murder of Asan Sai. The learned Sessions Judge accordingly made no mistake by observing that there was no sufficient evidence to come to the conclusion relating to guilt of the accused. The order of acquittal passed by the learned Sessions Judge requires no interference in the appeal and it should be dismissed.

7. We have carefully perused the evidence and materials-on-record and considered the submissions made by the learned Advocates for the State and the respondent/accused. It is clear from materials-on-record that in order to prove its case the prosecution has examined in all 12 witnesses viz. P.W.I Amrit Lai Mistri. P.W. 2 Prem Lai Dung Dung, P.W. 3 Ajit Lakra, P.W. 4 Ajay Haider, P.W. 5 Smt. Jaseenta Minj (the informant), P.W. 6 Ajeeta Tigga, P.W. 7 Shyamlal, P.W. 8 Smt, Josani Minj, P.W. 9 D. Prakashan, P.W. 10 Dr. P. Lai, P.W. 11 Prem Chand Singh and P.W. 12 M.A. Naushad. Out of these 12 witnesses P.W. 5 and P.W. 6 are the eye-witnesses of the incident. P.W. 10 is the Postmortem Surgeon who held post-mortem examination on the body of the deceased Asan Sai. P.W. 12 is the 10 who made investigation in this case and submitted chargesheet. P.W. 2 and P.W. 3 are two corroborating witnesses as their evidence reveals that on 21.4.2003 the respondent/accused came to their house in a very angry mood and disclosed before them that he would kill Asan Sai and his companions. The evidence of P.W. 2 reveals that thereafter accused left his house leaving hawai chappal, whereas, evidence of P.W. 3 reveals that after such disclosure the accused left his house leaving his shirt in his house.

8. P.W. 1 is the Sarpanch of Gram Panchayat Harinagar and he is a witness of seizure of a blood-stained towel produced by the accused and handed over to police. He was also witness of seizure of the blood-stained Articles including khanta, turpaulin, some mud stained with blood, controlled blood, lamp etc. seized from place of occurrence. He was a witness of inquest also. He was also witness of seizure of the hawai chappal of the accused from the house of P.W. 2 and shirt of accused from the house of P.W. 3. P.W. 4 is a witness of seizure of wearing apparel of deceased. P.W. 7 was Head Constable of Betapur who carried FIR from Police Booth Billiground to P.S. Rangat for starting the case and registration of FIR. P.W. 8 is the elder sister of the informant P.W. 5. P.W. 9 is Head Constable of Rangat P.S. who recorded the formal FIR marked Ext. 9/2. The evidence of these witnesses do not require thorough discussion as their evidence is not of great importance.

9. In this case the evidence of P.W. 5, P.W. 6, P.W. 10 and P.W. 12 are important and to some extent the evidence of P.W. 2 and P.W. 3, and evidence of these witnesses would throw light in the instant case. After going through the evidence of P.W. 5 and P.W. 6 we find that the prosecution case was not based on circumstantial evidence but, the prosecution story is based on direct evidence and ocular version of these two eye-witnesses. Evidence of P.W. 5 and P.W. 6 reveal that on 21.4.2003 at about 7.30 p.m. while they were in their hut they heard the accused Alexius Tirkey entering into their hut raising sound that he would kill Asan Sai and all. Their evidence reveals that they were not sleeping but the deceased Asan Sai was sleeping on the floor on a tarpaulin. A lamp was burning in their hut and they found a torch in one hand of accused and a stick (danda) in the other hand. Out of fear they left the hut and concealed themselves behind a bush which was about 7/8 ft. away from their hut. They categorically stated that they found the respondent/accused hit the deceased

Asan Sai with that stick and thereafter the respondent left that place by singing. P.W. 5 stated that accused had thrown away the ''danda'' outside the house before leaving.

10. The arguments advanced before us by the learned Advocate for the respondent that identity of the accused in committing the incident is not believable and was not proved, is not acceptable to us. Evidence of P.W. 5 and P.W. 6 reveals that one lamp was burning and they were not at a great distance. They saw the entire incident from a distance of about 6-8 ft. The lamp was produced before the 10 in Court on 05.7.2005, i.e. more than two years and two months after the incident. The empty lamp shown to the 10 during his evidence on 05.7.2005 cannot throw the prosecution case out of Court. It is well-known that kerosene evaporates gradually and we are well aware about the condition of Thana Malkhana and Court Malkhana. If after two years the lamp was found full with kerosene, doubt would have been raised regarding genuineness of the prosecution case as production of the lamp full with kerosene oil in Court two years after incident would have made the story improbable. It is more probable that after such gap of two years the lamp would be without kerosene, and in this case rightly so happened when the 10 saw the lamp in Court, it was without kerosene. In our opinion this is the probable version of prosecution story and there is no ground to disbelieve the prosecution story by observing that as the lamp was without kerosene after two years the prosecution story is unbelievable.

11. Non-production of torch of the accused is not vital at all. At the same time evidence of P.W. 5 that the ''danda'' produced before her is not the ''danda'' used by the accused in hitting deceased is not so vital and fatal as to disbelieve the prosecution case. The evidence is to be read in whole and one single or stray line cannot be used to appreciate the evidence. It is true that P.W. 5 stated that the ''danda'' shown to her is not the ''danda'' by which the accused committed the offence. But in the very next line, she stated that the ''danda'' used by the accused has been marked as material Ext: VII. Therefore, it is not a case that she totally denied the '' danda'' produced before her as the offending weapon. The law is that non-production of the offending weapon is not always fatal. If the Court finds that the witnesses are reliable and trustworthy and evidence of eye- witnesses gets corroboration from other corroborating witnesses including seizure witnesses and doctor, the Court can place reliance on such evidence. In this connection we like to refer a decision which would make it clear that non-recovery of weapon of attack is not always fatal and cannot throw out prosecution case of murder or assault. Such a view was expressed by the Orissa High Court in the case of Tunu Vs. State of Orissa,
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12. We find no substance in the submission of the learned Advocate for the respondent that it was not possible for P.W. 5 and P. W. 6 to recognize the accused from behind the bush as the person who committed murder in a dark night. It is

clear from evidence that one lamp was burning in the hut. Besides that, scrutiny or appreciation of evidence of P.W. 5, P.W. 6 and P.W. 8 would reveal that the respondent/accused was living with them for the last 5/6 months and he also wanted to marry P.W. 5. Accused was thus very well-known to P.W. 5, P.W. 6 and P.W. 8 and they can recognize the accused by his movements, voice and other physical features. In this connection we like to refer a decision of the Hon�ble Apex Court in Shivraj Bapuray Jadhav and Others Vs. State of Karnataka, . In this reported case there was question relating to identity of the accused in the incident of murder and it was argued that the eye-witnesses could not have seen the occurrence in a night two days prior to new moon. Two days prior to new moon indicates that the night was dark like the present case where the night of incident was dark. The Supreme Court rejected the arguments made for the accused by observing that, such arguments are not tenable when parties are used to live in the midst of nature and accustomed to live without light. In the reported case the Supreme Court held that, the witnesses could have identified accused easily not only from voices but from the fact that they are known person and close relatives and living in the neighbouring huts. The incident occurred very near to hut of deceased and accused and presence of eye-witnesses at that time was normal and nothing strange. It was further indicated by the Supreme Court that dispute between accused and deceased over partition was sufficient to constitute motive. Accordingly, the Supreme Court set aside the order of acquittal and convicted the accused persons under Sections 302/34 IPC.

13. In the case of Rakesh Kumar alias Babli Vs. State of Haryana, , the Hon''ble Supreme Court rejected the plea that accused could not be identified by eye-witnesses due to insufficient light considering circumstances of the case.

14. The above stated decisions are squarely applicable in the present case. The respondent/accused was very well-known to P.W. 5, P.W. 6 and P.W. 8 as he stayed for last few months before incident in the hut of P.W. 5. These witnesses knew the accused very well not only from voice but, from other physical features. Besides that, the burning lamp in the hut was sufficient. It is also well-established that there was no electricity in the said village and the villagers who live in the village without electricity can see at night better than the persons who live in electricity. Accordingly, from the voice of accused, his movements and other features and from the burning lamp light it was possible for P.W. 5 and P.W. 6 to recognize the accused easily as the person who struck on the head of deceased Asan Sai. P.W. 5 was very close to accused and even stayed with him in a room as stated in FIR and she had visiting terms with accused and accused even wanted to marry her. P.W. 5 was the best person to identify or recognize accused from his voices, movements and close relation for last few months.

15. The motive behind the incident is also clear as from evidence it transpired that the respondent/accused stayed in the house of P.W. 5 and P.W. 8 for last few

months and he had a desire to marry P.W. 5. P.W. 5 and her elder sister P.W. 8 were initially agreeable to the marriage, but subsequently changed their mind and the deceased Asan Sai and P.W. 8 denied to give marriage of P.W. 5 with the accused. This enraged the accused and he became angry and decided to kill Asan Sai and Ors.. In the FIR lodged by P.W. 5 it was stated by her that the accused wanted to marry her but as her elder sister and Asan Sai did not want to give marriage of her with accused on that dispute the accused killed Asan Sai with stick. From evidence of these witnesses and from evidence of P.W. 2 and P.W. 3 it appears that the accused even disclosed before P.W. 2 and P.W. 3 that he would kill Asan Sai. The finding of the learned Sessions Judge that there was no motive or mens rea is not acceptable to us and the learned Sessions Judge failed to appreciate the evidence.

16. Evidence of Post-mortem Surgeon P.W. 10 clearly reveals that death of deceased was due to the effect of subdural haematoma and intra-cerabral haemorrhage caused by homicidal blunt trauma with lathi to skull. On examination of the body of the deceased P.W. 10 found injuries on the skull in the right occipital area, subdural haematoma over left frontal and left temporal lobe of brain, over intra-cerebral haemorrhage in the left frontal and in the left temporal lobe with fracture on left 3rd, 4th and 5th ribs on the anterior aspect. He also found lacerated wound 5 cm. x 3 cm. x bone deep situated on left side of forehead, lacerated wound 8 cm. x 5 cm. x bone deep over left tempero-occipital area of scalp. The underlying tempral bone was fractured. Lacerated wound measuring 3 cm. x 0.5 cm. x 0.5 cm. on left external ear, pattered contusion with parallel margins situated over left scapula measuring 10 cm. x 5 cm. with fracture of the underlying left scapula, bleeding from within the left ear, P. W. 10 denied the defence suggestion that such type of wound can be caused by fall on earth. The medical evidence has been well-corroborated by the ocular version of eye-witnesses.

17. Evidence of P.W. 12 is in the nature of corroboration and his evidence reveals that he being the 10 seized the wearing apparels of deceased, the bloodstained Articles including blood-stained earth from place of occurrence. P.W. 5 mentioned in the FIR that accused was wearing a towel and evidence of P. W.I 2 reveals that accused produced before him a towel which was stained with blood which was seized. Besides that, he seized the hawai chappal of the accused from the house of P.W. 2 and a shirt of accused from the house of P.W. 3. He also seized the lamp which was burning in the hut of P.W. 5.

18. A question may arise as to whether the High Court should reappreciate evidence and come to a different finding from that of the learned Trial Court. The principle of law in this respect is clear and it is the settled law that High Court has full power to reappreciate evidence in order to remove miscarriage of justice. In Anil Kumar v. State of Uttar Pradesh reported in AIR 2004 SCW 5238, the Supreme Court observed that a duty is cast upon the High Court to reappreciate evidence-on-record to avoid miscarriage of justice.

19. In State of Uttar Pradesh Vs. Pappu alias Yunus and Another, , it was held by the Supreme Court that without indicating reasons Appeal Court should not interfere with the findings of Trial Court. In State of Karnataka Vs. Papanaika and Others, , it was held by the Supreme Court that High Court has full power to reappreciate evidence and come to a conclusion independently. In Shashidhar Purandhar Hegde and Another Vs. State of Karnataka, , the Supreme Court observed that:

There is no embargo on the Appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal.... The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the Appellate Court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. See Bhagwan Singh and Others Vs. State of Madhya Pradesh,]. The principle to be followed by the Appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so.

20. In the instant case, the learned Trial Court overlooked probative value of the evidence of the witnesses, particularly evidence of the eye-witnesses namely, P.W. 5 and P.W. 6 and also failed to consider the corroborating evidence of P.W. 2, P.W. 3, P.W. 10 andP.W. 12.

21. After appreciating the evidence of witnesses we find that there was sufficient, cogent and convincing evidence to establish the prosecution story that the respondent accused was the only person who struck with stick on the head and near the left ear of deceased Asan Sai resulting into his death. His intention to cause murder of Asan Sai has been well-established from the evidence of P.W. 2, P.W. 3, P.W. 5, P.W. 6 andP.W. 8. Evidence of these witnesses gets corroboration from other corroborating evidence and circumstantial evidence including the medical evidence. There is no material or evidence to show that P.W. 5 and P.W. 6 had any previous grudge or enmity to falsely implicate the respondent/accused in this case. The direct evidence, the corroborating evidence and the circumstances have convincingly and beyond all reasonable doubts established the charges levelled against the respondent/ accused. There was no ground at all to disbelieve the prosecution story and disbelieve the evidence of witnesses. The learned Sessions Judge committed error by disbelieving the evidence of the witnesses and failed to appreciate evidence properly and arrived at erroneous decision. The learned Sessions Judge was also in error by observing that prosecution case rested on circumstantial evidence and the evidence was not sufficient.

22. Considering the evidence, circumstances and materials-on-record we find that the prosecution has been able to bring home the charges u/s 302 as well as u/s 449 IPC against the respondent/accused. There was no proper cross-examination by defence relating to entry of respondent in the hut of P.W. 5 on the night of incident when he committed the crime. The respondent/accused is found guilty under Sections 302 and 449 IPC and convicted thereunder.

23. In the discussion made above by us the appeal filed by the State is allowed. The order of acquittal passed by the learned Sessions Judge being bad in law is set aside. The respondent/accused without any provocation intentionally caused murder of an innocent person namely Asan Sai when he was sleeping.

24. As it is a case of murder of an innocent person the respondent/accused is sentenced to suffer imprisonment for life for offence u/s 302 IPC. Considering that this is the main offence we do not like to impose separate sentence on the respondent/accused u/s 449 IPC though we have held him guilty under this Section also.

25. At the time of admission of appeal this Court directed arrest of the respondent/accused and for release on bail to the satisfaction of the learned Chief Judicial Magistrate. We are told by Mr. Mandal, learned Public Prosecutor, that after arrest bail was offered to the respondent/accused but he could not furnish bail bond and is in custody. Accordingly, the learned Sessions Judge would give necessary direction to the Superintendent of concerned jail or correctional home for production of the accused before him, and thereafter, would convey the sentence imposed on him and would send him to jail or correctional home to serve out the sentence along with jail warrant.

26. Send down the Lower Court Record along with a copy of judgment and order to the learned Sessions Judge forthwith for information and necessary action.

Ashim Kumar Banerjee , J.

27. I agree.