
(1997) 01 CAL CK 0024

Calcutta High Court

Case No: Criminal Appeal No. 75 of 1991

Gulam Murtaja @ Patal

APPELLANT

Vs

The State of West
Bengal

RESPONDENT

Date of Decision: Jan. 3, 1997

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 313
- Penal Code, 1860 (IPC) - Section 300, 302, 304, 323, 324

Hon'ble Judges: S.K. Mookherjee, C.J; R. Bhattacharyya, J

Bench: Division Bench

Advocate: Balai Roy, Ashim Roy and P. Mazumdar, for the Appellant; Ranjan Kr. Roy, for the Respondent

Judgement

S.K. Mukherjee, C.J.

1. This criminal appeal is directed against the order of conviction and sentence passed by the learned Trial Court in Session Case No. 142 of 1988/Session Trial No. 4th of April 1990 against the accused Gulam Murtaja @ Patal for having committed offences under Sections 302 and 324 of the Indian Penal Code and convicted him accordingly sentencing Gulam Murtaja to suffer imprisonment for life as the learned Trial Court found Murtaja @ Patal as the author of causing the death of one Dil Rohman of village Hazipur, PS Mayureswar on 26.7.1937. The other accused Sure Rohman though tried u/s 302 read with Section 34 of the Indian Penal Code for committing the murder of the said Dil Rehman yet, he was exonerated from the charges by the reason of the failure of the prosecution to ground any of the charges framed against him, about which, there is no sore of the State in the appeal.

2. The appeal has now spiraled up to this Court by the aggrieved Gulam. The profile of the prosecution case has a chequered career as the parities are related to each other who became the slaves of chronic land dispute. The land dispute tore the relationship and

snapped the life of Dil Rehman for mere possession of 7 1/2 Catus of land received by the deceased by way of his share. Both the accused were tilling the land in the fateful morning on 26.7.87 when nobody knew that the sword of Democles was hanging on the prosecuting party as Dil Rehman became the target of macabre assault of which Gulam Murtaja was the architect. They were caught up in wordy duel. In consequence of the sequel, Dil Rehman suffered Koncha blows dealt by Gulam. Rejak and Rejaul Hak, both sons of the deceased were not spared even by the accused. The co-cultivators in the meadow immediately came to their aid but the die was cast and all was over, since Dil Rehman breathed his last.

3. The incident was immediately relayed to the PS Mayureswar at about 8.30 a. m. which gave rise to Mayureswar PS Case No. 14 dated 26.7.87.

4. The investigation was activated by the police which examined the witnesses, held inquest over the dead body to be the dead body of Dil Rehman, afforded treatment to the injured in the hospital and forwarded some of the witnesses to the Magistrate to record the statements u/s 164 Cr.P.C. On receipt of post-mortem report, the charge-sheet was submitted against the accused persons u/s 302/34, 323 & 324 of the Indian Penal Code by PW-12 S.I.A. Kabir.

5. The learned court below found the offences triable by the Court of Sessions and, accordingly, he committed the case and the accused to the Court of Sessions to take their trial.

6. The trial court framed charges against the accused Gulam u/s 302 of the Indian Penal Code and, thereafter, also framed charge u/s 324 against him to which he pleaded not guilty and claimed to be tried.

7. The accused Sure was also charged u/s 302/34 of the Indian Penal Code and, thereafter, further charges were framed u/s 323 and 324 of the IPC to which he pleaded not guilty and claimed to be tried after all the charges were read over and explained to each of the accused. The prosecution examined as many as 18 witnesses and the defence cited two witnesses and filed some documents. The learned trial court, upon due consideration of the evidence on record of the parties and explanation furnished by the accused during their examination, passed the order of conviction and sentence hereinbefore mentioned in the preface of the judgment.

8. The defence of the accused to get rid of the charges is of bare innocence. They also gave a silver lining to their defence that the prosecution is not the votary of truth which distorted the prosecution case to its advantages.

The questions that survive for consideration of this Court in this appeal are :

1. Did the accused Gulam cause the death of Dil Rehman?

2. Did the prosecution succeed in grounding the charge against Gulam @ Patal?

Decisions

Points 1 & 2

9. We take up both the points together for the sake of convenience because they are over-lapping. The question of committing the death of Dil Rehman is inextricably connected with the question of identification, and presence of the accused and authorship of the crime in this or that position.

10. After the court is assured about the presence or otherwise of this or that accused person, it would be for the court to infer whether the accused person was the perpetrator of the crime. Thus the two questions are interlinked and the evidence is also over-lapping. The important question at the very outset is regarding the presence of the accused person in this scenario.

11. And here also we propose to take tip the position of the accused person in the background of the state of affairs because there is a same evidence, deposed to by the same witnesses, in the same breath.

12. The witnesses can be classified into several categories. The evidence of PW-11 Rajak Ali, PW-2 Rejaul Hak PW-3 Sanarul Seikh, PW-5 Kalu Mirjas PW-11 Moniruddin is one class because they are the direct witnesses about the assault on Dil Rehman, the deceased and his sons.

13. In the second class come the witnesses who did not see the thing themselves, but who came to the scenario shortly after, the occurrence and heard that the accused person and another were the culprits. They also found Dil Rehman dead. Then come PW-4 Sukchand Mallick, PW-6 Saukat Seikh, PW-8 Nasiruddin PW-9 Murtaja Seth, who did not testify to the actual assault, but according to them, they were posted with the occurrence and the authorship of the crime. Then comes PW-10 Wad Seikh who became vocal about the settlement over the land dispute. Then comes PW-12 The S.I.A. Kabir, PW-16 Gurudas Mandal, the Constable and PW-18 Dilip Mukherjee who were the flesh and bones of investigation. After them comes another class PW-13 T.K. Mukherjee, the Judicial Magistrate who recorded statements of the witnesses u/s 164 of the Cr. P.C. Then come PW-14 Dr. A.K. Ghosh who held the autopsy on the deadbody of Dil Rehman and PW-15 Dr. Anwar Ali who examined Rejaal and Rajak Ali both sons of Dil Rehman. The above witnesses formed a distinguished and different class as distinguished from other classes of witnesses.

14. The last witness in the row is PW-17 Md. Jalaluddin who attested the seizure disassociated from the other classes of witnesses.

15. The accused person examined two witnesses namely DW-1 Dr. Pulak Dev the Medical Officer and DW-2 Manmothonath Mandal who proved the deed.

16. The trial court accepted the testimony of the witnesses holding that they gave a consistent version in regard to participation of the accused in attacking the deceased and agreed with the evidence that the appellant Gulam was responsible for inflicting the injuries on the deceased. But the trial court coming to the offence in question perpetrated on the two other injured namely the sons of the deceased, could not agree with the evidence and set Sure Rehman free as the prosecution could not hold the ground against him.

17. The Learned Counsel, appearing in support of the appeal, has submitted with much emphasis that a thorough and strict scrutiny of the evidence furnished by the eye-witnesses and the post-occurrence witnesses shows that the entire prosecution story is concocted, fanciful, incredible, torn from the context and as such, the findings of the learned trial court have no moorings and they deserve to be rejected with much scorn. The Learned Counsel is also vocal in his submission that the learned trial court has completely pretermitted all the pit-falls in the prosecution and has summarily disposed of the case without subjecting the evidence to the usual test of scrutiny and due appreciation. The contradictions have been highlighted in the argument to knock down the bottom of the prosecution case and has argued with force that the prosecution has given a coloured version to its case.

18. The state on the other hand borrows inspiration from the evidence on record which assures without any hold, the commission of crime by Gulam on Dil Rehman who was done to death.

19. Now we will begin with the evidence of the eye-witnesses who have assiduously claimed that Gulam, the appellant, was the architect of the murder of Dil Rehman. The whole case stands on the evidence of the eye-witnesses who have claimed to be the direct witnesses to the occurrence. If they are disbelieved the whole case fails for the other witnesses coming to prove the statements of the witnesses cannot improve matters as they cannot be called corroborative witnesses, because one cannot corroborate himself.

20. PW-1 Rajak Ali. PW-2 Rejaul Hak, PW-3 Sanarul Sekh, PW-5 Kalu Mirja & PW-11 Maniruddin gave a full account of the occurrence of 26.7.87, about which the minor wear and tear in their testimonies does not affect the core of the prosecution case.

21. However, proceeding in seriatim, we give a brief account of the evidence, the object being to find out their trustworthiness.

22. PW-1 Rajak Ali gave an account of the state of affairs and the prelude to the actual occurrence. He is emphatic that on the day of incident. Sure Rehman was tilling the land and the appellant stood by the Plot No. 185. He asked Rejaul and Sanarul to convey the

message to his father who came to the place of occurrence and suffered assault at the hand of the appellant with the aid of a khoncha. The blow was dealt on the umbilical region of his father who fell on the Southern Side of the Aile. He also spoke of assault by the reverse of the Tungi. He also was subjected to a grueling cross-examination, but never withered away and held the ground.

23. PW-2 is Rejaul Hak who accused patal in his evidence as the author of the crime and fully recounted the assault on his father and the brothers.

24. The three brothers came down on the land when in the mean time Patal hit my father on the chest with the Khoncha. My father fell on the Southern Side of the land. Patal took out the Khoncha from the chest and pierced it on my father"s belly. Sure Rehman attempted to assault me with Part Tungi. My elder brother tried to save me with the Panchan. There was scuffle between my father and Sure Rehman. Sure fell on the ground. Patal hit my older brother on the back and hand with khoncha" and my dada released Sure then".

25. The evidence extracted above, does not spin out any embellishment" who gave a faithful account of the occurrence.

26. PW-3 is Sanarul the sons of the deceased whose evidence does not suffer any dissent about the mode and manner of assault, although the defence tried hard to break him in vain.

27. PW-5 is Kalu Mirja who gave an unimpeachable evidence about the assault by the appellant @ Patal and the accused Sure. There may be a few contradictions in his evidence which does not project any unnatural shadow about his presence to the place of occurrence and the assault, witnessed by him.

28. The last eye-witness PW-11 Maniruddin who gave a history of assault in his evidence witnessed by him. He did not import any extraneous evidence to enrich the prosecution case. The endeavour made by the defence to make the contradictions as capital did not succeed. But according to us, they fell on different premises regarding assault by the appellant on Dil Rehman, his evidence never tilts.

29. Thus, in the background of the above noted evidence on record, it becomes invulnerable that their presence to the scene of occurrence on 26.7.87 was not only highly assured but also their witnessing the assault by the accused on the prosecuting party was ensured apart from the above, the injuries sustained by the prosecuting party are in aid to the prosecution case for being amply corroborated by the evidence of the Doctor PW-14 Dr. A.K. Ghosh who held the autopsy and the examination of the injured (PW-1 & PW-2) by PW-15, Dr. Anwar Ali.

30. The Learned Counsel for the defence made endeavor to develop animosity between the prosecuting party and the accused. But there is no evidence on record that the

injuries were self-inflicted or caused by any other means or by any other person. There is no shred of obscurity of such evidence on record.

31. Over and above, there could be no reason for the injured witnesses to substitute an innocent in place of a real assailant as the Injured knows best who is the assailant. The mode and manner of infliction of assault, and causing of injuries on the sons of the deceased are amply corroborated by the medical evidence adds fuel to the case of the prosecution.

32. A faint attempt has been made by the Counsel of the appellant that on the basis of the admission made about the dispute relating to land, a suggestion had been addressed that the accused persons were hauled up after much deliberation. But it is difficult to accept such contention for the intrinsic and extrinsic trustworthy evidence on record.

33. One other submission has been made by the Learned Counsel for the appellant that the venue has not been fixed. But if we walk through the corridors of the evidence both oral and documentary, it leads to an irresistible conclusion that the occurrence took place on the land, the venue was never shifted to such a distant which makes the evidence of the direct witnesses fatal. The deceased fell on the Southern side of the Aile as deposed to by the" direct witnesses does not smack of embellishment.

34. To buttress the claim of the prosecution about the veracity and the version of its case, the evidence of the eye-witnesses further gathers assurance, if we turn ourselves to the sketch map, exhibit-6 drawn by the Investigating Officer who found the dead body on the land about which, the cross-examination is ailment. It has not been suggested by the Id. -Counsel that the incident took place elsewhere and, thereafter, the body was dragged on the plot in dispute for a moment.

35. Yet it is manifest from the evidence of the investigating agency, in view of the absence of suggestion that it gave any twist to the sketch map. The silence of the defence is conspicuous about the sketch map, exhibit-6, relating to its genuineness and accuracy.

36. Thus, the contention of the Id. Counsel for the appellant that the change of venue in evidence has made an encroachment on the case of the prosecution is totally unacceptable for the unimpeachable evidence on record about the assault on the prosecuting party and its aftermath.

37. The medico-legal testimony is sound rendered by PW-14 Dr. A.K. Ghosh and PW-15 Dr. Anwar Ali.

38. PW-14 has affirmed in his evidence that the injuries found on the person of the deceased may be caused by Khoncha assault about which the defence did not raise any finger of protest. No suggestion has been addressed to PW. 14 that the injuries found on the person of the deceased could be caused by other than the khoncha. The Dr. had

been cross examined extraneous to the case.

39. PW-15 Dr. Anwar Ali proved the injuries on Rejaul Hak PW-1 and Rajak Ali PW-2.

40 It is curious to find from the cross-examination of PW-15 Dr. Anwar Ali that a peculiar suggestion was given to him that he examined persons other than the injured.

41. PW-12, PW-16 & PW-18 are the police witnesses, the defence could not extract any material worth the to disburst their testimonies.

42. PW-13 is the Judicial Magistrate who recorded the statements of Kalu Mirja and Maniruddin. The contradictions in the evidence of Kalu Mirja and Maniruddin are not metarial contradictions as the injured gave a trustworthy evidence Immediately preceding the assault. This is all about the evidence.

43. We find, upon making assessment of the evidence both oral and documentary that the direct witnesses and the post-occurrence witnesses never demonstrated their cold foot to the case of the prosecution during the trial. The contradictions are not many, but a few which never affected the main strand of truth.

44. The Id trial court examined all aspects of the evidence and took a correct view of the testimonies on record which is free from embellishment as found by him and also by us. We cannot reject his view about the appreciation of evidence and its acceptance. The reasonings adopted by the trial court, in our opinion, is not perverse and it would not be legitimate to take any other view by the court of appeal to upset the finding and arrive at an independent conclusion. The conclusion of the learned trial court is fully supported by the evidence on record. The evidence of the defence witnesses the DWs- is of no consequence as Dr. DW-1 Dr. Pulak Deb could not make any improvement of the defence case.

45. PW-2 Manmothonath Mandal has proved the deed exhibit-A. But we make it clear that the criminal court is not concerned with the question of title of the land as the criminal court is saddled with an obligation to try the offence but not the offender. If the offence is proved and the authorship of the offence is fixed, it is not permitted under the law to take a different view of the evidence. The conclusion, thus, is inescapable that it is the appellant and the appellant alone who was responsible for the murder of Dil Rehman.

46. We have taken into account the examination of the accused recorded u/s 313 of the Cr. I.C. which does not register the success of the case of defence. We are also aware of the position of law since settled by a legion of precedents that the failure of the defence case does not render any unfailing assurance to the case of the prosecution as the prosecution is to prove its own case which the prosecution, in the instant case, has successfully proved against the appellant. Therefore, the result of the examination of the accused appellant does not fetch any value to the case of defence. We therefore, do not see any merit in the contention advanced on behalf of the appellant that the conviction is

wrong.

47. We, however, agree with the Id. Counsel for the appellant without agreeing with the submission of the stage that on the basis of the facts proved the offence according to us is not murder punishable u/s 302, IPC and that the act of the appellant as proved would fall only u/s 304 Part-II of the IPC.

48. It is opposite to mention for the overwhelming evidence on record that the attack was not premeditated nor there was any preconceived plan or design to commit the murder of Dil Rehman who sustained assault leading to his death in course of altercation and scuffle. The evidence amply established that the whole incident was a sudden development and that the appellant had acted at the spur of the moment and without any premeditation.

49. In our view that the injury was inflicted in the sudden quarrel in the heat of passion on the deceased without being accompanied by the intention to cause death, but the appellant had the knowledge that such act was likely to cause the death of the deceased.

50. In our view, the act perpetrated by the appellant squarely and fairly verges on Exception 4 to Section 300. IPC and the appellant is liable to be convicted only u/s 304 Part-II IPC.

51. We, accordingly, alter the conviction to one u/s 304 part-II, IPC. We have been informed that the appellant had already undergone imprisonment shortly over 6 years. The accused was 33 years of age as on the date of judgment and has already undergone imprisonment for more than 6 years.

52. To meet the ends of justice, we direct the appellant to pay a sum of Rs. 3000/- in addition to the term of imprisonment he has already suffered. We, thus, modify this sentence awarded by the trial court. We also direct that the fine if realised, shall be paid to the wife of the deceased alone if alive, and other legal heirs in her absence. In case of default committed by the appellant in payment of fine the appellant shall undergo further imprisonment for one year.

The appeal is thus allowed in part.

R. Bhattacharyya, J.

I agree.