

(1995) 07 CAL CK 0030

Calcutta High Court

Case No: Criminal Application No. 165 of 1984

Dilip Kumar Ghosh and Others

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: July 12, 1995**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 148, 149, 304, 323, 324

Citation: 99 CWN 1109**Hon'ble Judges:** Ram Prakash Gupta, J**Bench:** Single Bench**Advocate:** Dipak Kumar Mukherjee and Ujjal Kumar Dutta, for the Appellant; R.R. Biswas, for the Respondent**Final Decision:** Allowed

Judgement

Ram Prakash Gupta, J.

This appeal by three convicts has been directed against judgment dated 31st March. 1984 whereby, the learned Additional Sessions Judge, 3rd Court. Murshidabad convicted the appellants Dilip Ghosh. Mahadeb Ghosh and Jaydeb Ghosh and acquitted two other accused Sanat Kr. Ghosh and Shvamapada Ghosh. They were tried for an offence under Sections 148. 304 read with 149. 304 read with 34. 323 read with 149. 324 read with 149 I.P.C. The incident which resulted in the death of Ratan Ghosh, a sixteen year old boy due to head injury and in which two others, namely. Santosh and Gopal Ghosh suffered simple injuries, Santosh by sharp light weapon and Gopal by blunt weapon, took place at 7-30 P.M. on 30th day of December. 1992 at Village Baruipara in the house of Santosh Ghosh.

2. The learned Additional Sessions Judge convicted the appellants as under:

1) Dilip Ghosh : u/s 304 para 2 IPC

2) Joydeb Ghosh : u/s 324 IPC

3) Mahadeb Ghosh : u/s 323 IPC

Dilip was sentenced to Rigorous Imprisonment for seven years and Joydeb to Rigorous Imprisonment for two years while Mahadeb was given Rigorous Imprisonment for the year.

3. During the trial, the prosecution had examined six eye-witnesses, namely. P.W.1 injured Santosh Ghosh who had also given the F.I.R.. P.W. 3 who is the neighbour P.W. 4 Madhu Ghosh, who is the brother of Santosh and P.W.7 Sunil Ghosh. Resident of the Village P.W.10 Sachidananda. resident of the same village. P.W.2 Laxmi mother of Santosh was also an eye-witnesses. The other evidence produced during the trial consisted of medical evidence which consisted of the statements of Autopsy Surgeon Dr. Sushil Haldar P.W. 11 at Baharan S.H.C. Murshidabad. The Investigating Officer appeared in the trial as P.W. 14. The other witnesses are formal police witnesses or other formal witnesses.

4. The learned Additional Sessions Judge in reaching his conclusion of guilt of the accused who were convicted observed that the statements of eye-witnesses were consistent and believable and the testimony was unshaken in cross-examination and bore the right of truth. He observed that according to their evidence Dilip had assaulted by Joydeb with a spear while Gopal P.W.5 was hit by Mahadeb Ghosh with a lathi. The learned Additional Sessions Judge discarded the plea of private defence raised by the accused person. The learned Additional Sessions Judge noticed that accused Dilip and Mahadeb were treated for their injuries at Baharen Public Health Centre on the date of incident itself. But he observed that the nature of their injury and gravity was not known and that mere presence of some injuries does not indicate that the accused persons were permitted to inflict vital injuries on-the other side in exercise of the right of private defence. He observed that there were no circumstances justifying right of private defence to the extent Of causing culpable homicide. The Id. Additional Sessions Judge held that the accused persons went to the house of Santosh with lethal weapon and asked for milk. At the same time, the Id. Additional Sessions Judge observed that there was insufficient evidence against Sanat Ghosh and Shyamapada Ghosh and that it was doubtful that they were present and so the charges of unlawful assembly were not upheld as proved.

5. I have heard the Id. Counsel Mr. Dipak Kr. Mukherjee appearing with Mr. Ujjal Kumar Dutta for the Appellant and Mr. R. R. Biswas for the State of West Bengal. I have gone through the evidence of the witnesses, that is eye-witnesses medical evidence and the Investigating Officer's evidence. I have considered all the circumstances, the background of the incident and the conduct of parties. It is apparent that, to certain vital aspects, the Id. Additional Sessions Judge has not adverted, to analyse the evidence. Three vital features of this case which have been pressed by the Id. counsel for the appellants are :

(1) Delay in lodging FIR 60 hours after the incident. R was lodged after or just before; the death of Ratan in a Sadar Hospital

(2) "Non-disclosure of the factum of injuries of two of the accused and how those injuries were caused and non-investigation of the said fact by Investigating Officer.

(3) Vital discrepancies in the evidence and first information regarding why the accused persons went to the house of the victim. According to the F.I.R. they had gone there because there was some prior bad-feeling between them or might be enmity due to cutting of paddy about ten days earlier. In evidence the eye witnesses' consistent statements are that the accused came there in order to ask for milk which sale of milk was declined by the complainant on some ground and this refusal was cause of assault. "One more feature made out is nowhere before the F.I.R. and to no authorities including medical authorities, name of any assailants was disclosed by the witnesses. The assertion of the Id. Counsel is that in these circumstances, there was much scope for manufacturing narrations and false implications and that in fact the incident did not occur in the manner stated by witnesses, in fact, the accused persons were assaulted. Their wounds had to be stitched. So, it is a fit case where right of private defence is disclosed as a distinct possibility which is sufficient to give benefit of doubt to the accused. The assertion is that the prosecution has to prove the guilt of the accused beyond reasonable doubt which standard of proof had not been achieved in this case.

6. The factual matrix is that after the incident the P.H.C. at village Baharan at 8-30 P.M. The three above mentioned injured who are prosecution witnesses and two accused, namely Dilip and Joydeb were treated and were discharged. One simple injury with sharp weapon was found on the arm of Santosh and one simple injury on the body of Gopal with blunt weapon. According to Dr. Rajendra Prasad Singh. P.W. 11 the above-mentioned two accused, namely. Dilip and Joydeb had injuries which had to be stitched. He had not brought the details of the nature of the injuries of those two accused nor it was called for. After the discharge from the P.H.C. Ratan was again taken to Sadar Hospital. Borhanpore on the next day. There he was admitted. P.W. 13 Dr. S. N. Basil, in that hospital, noticed only one injury, that is, head injury on his person. This injured Ratan expired on 2nd of January, 1983 at Sadar Hospital at about 2-30 P.M. The autopsy was performed by the autopsy surgeon. P.W.6 on the same day. The cause of death found was due to dot and hemorrhage as a result of injury no. 1. He found, regarding injury no. 1 during autopsy, that it was 4 in length on left fronto-temporal region. There was sign of clotted blood under-bone and above brain. There was no fracture of the skull bone. F.I.R. was lodged by Santosh at police station Hariharpara on 3rd January at 8 A.M.

7. In the FIR the narration is that there was prior enmity or some dispute between the parties and the accused person came armed attacked the complainant party in their house to cause injuries Of course it is narrated even in the FIR that Ratan was hit by Dilip, Santosh was hit by Mahadeb.

8. I will consider the criticism of the Id. Counsel for the appellant one by one. I, firstly, take up the point of delay in lodging FIR. Santosh had lodged the FIR. He was injured in the incident. There is no doubt about the injury His injury was simple by a sharp weapon. He was discharged from the PHC on the first date itself. The police station is stated to be about 16 kilometer from the place of occurrence. According to him even Ratan was discharged from PHC. Ratan was not taken to hospital on that very date. What was happening to Ratan after discharge from PHC till he was taken to hospital is not known or not disclosed by witnesses. Santosh and other P.W.s were not closely related to Ratan his parents were looking after him and had taken him into hospital. It is not a case where the P.W.s were busy looking after the injured for continuous period. No explanation has been given to why two injured namely Santosh and Gopal could not go to police Station 16 kilometers away before the expiry of 60 hours after the incident Such a delay in lodging FIR when an FIR is lodged on the date of death, raises possibility- of interpolations in prosecution's version and also possibility of roping in persons who were not actually involved. This has been held time and again in a catena of judgments by the Apex Court. The Id. Counsel for the appellants has cited before me one judgment reported in AIR 1976 SC 488 to support the proposition that delay in lodging FIR casts serious doubts on the prosecution version. So. this Court must keep in mind the factor of delay while assessing reliability of prosecution version. In this context, it is of importance that four of the accused are real brothers and one is their father.

9. Next, I take up the fact that no witnesses has stated about the injury of the two accused. Injury of Dilip had to be stitched. It was imperative on the part of the Investigation Officer to investigate how these injuries were caused in the same incident. He has stated in court that he did not make any enquiries about it. That, shows he was really extremely negligent and investigation on his part was one-sided. The conduct of witnesses, who were present at incident, in concealing injuries of the accused person shows that they are giving part version in favour of prosecution. They could have disclosed if they also noticed any of the victims or others attacking the accused person and if so in what circumstances. They keep quiet. But there are six eye-witnesses. These eye witnesses in not disclosing injuries of accused: could possibly be concealing how actually the entire incident started and who was the first assailant. So the distinct possibility can be that prosecution evidence, in the light of these concealment, is not true.

10. Now. I take up the discrepancies about the genesis of the fight. I have already noticed that FIR speaks of sudden entry by the accused for attack with preparedness and the injured persons were just gossiping with each other when this happened. The accused persons are related to each other closely. Shyamapada is father while other four are sons of Shyamapada Ghosh. In the evidence the factor of demanding milk by accused from victims, has been mentioned by all the eye-witnesses. Story of sudden attack is not narrated. It is strange that the accused persons should go for milk armed with lethal weapons. That is unnatural. So the narration which is given in

evidence, will be considered as distinctly different from what is narrated in the FIR with regard to the circumstances, in which the accused reached the site of the incident, and their reasons for attack. So there are clear and wide discrepancies about why the accused reached there and why the assault occurred. This raises doubts as to who started the attack.

11. In this case the Police has not taken into possession anything whatsoever from the scene of occurrence nor from the body of the victims i.e. their clothing's. In fact, since the matter was reported on the 3rd day the Police may not have found anything worth taking up from the scene of occurrence. The suggestions to witnesses in cross-examination are that incident did not occur in the manner narrated by them. Suggestion was given to some other witnesses that in fact, they had attacked the accused persons. Dilip Ghosh in a statement u/s 313 of the Code of Criminal Procedure has stated that they were attacked and that they were innocent.

12. The necessary inference from the circumstances discussed by me above is that there are possibilities that the incident did not occur in the manner narrated by the witnesses, that the witnesses concealed the vital factor of injuries to the accused and there was a great chance or at least opportunity to make out a concocted case on the basis of preplanning as to who caused injury, how and where. When such is the situation, the caution for a criminal court is to look at the evidence with suspicion. Unless, definite evidence comes about how the incident occurred, and there are two possibilities, the criminal court will favour the accused by giving him benefit of doubt as the presumption of innocence can be rebutted only by proof, beyond doubt, of all the ingredients which constitute the offence.

13. The Id Advocate for the state has argued that the very fact that Dilip (accused) says that they were assaulted first. suggests that the accused were present at the spot and in these circumstances the narration of the witnesses as to how the incident occurred and how they suffered injuries, should be accepted. It is further argued that the injured persons and the witnesses must have been busy in looking after Ratan whose condition was very serious on 1st January. 1983. So the delay in lodging FIR was not unnatural.

14. After considering these assertions, and the facts and circumstances of the case and evidence on record. I am unable to accept the contention that there is sufficient explanation of delay in lodging FIR. The witnesses who were eye-witnesses were not at all involved with Ratan after his being discharged from PHC. At least they do not say so and they did nothing for two days. Ratan was being looked after by his parents. The Hospital Sadar was farther than 16 kilometers which was the distance of police station. May be these witnesses were planning as to what report they should lodge as the other party had also suffered injuries. The circumstances which I have discussed above, ease a deep doubt on prosecution story of the incident. Every case has to be judged on its own facts and circumstances in the light of evidence. The circumstances in his case are such that a deep doubt is cast on the

prosecution narration. Since the whole story given by prosecution witnesses, is surrounded with suspicion, there remains no scope for considering the question of exercise of right of private defence. The trial court has found that presence of two of five accused, was not fully proved, so that part of narration was also not true. It can't be said who caused injury to whom and if only 3 appellants had participated in the attack or there were others also. If the accused or some of them were attached 1st. then who of the persons present gave hits to complainants cannot be said with, certainly. So it does not appear proved beyond doubt as to which of accused hit on the head of Ratan with the required mens rea. The trial court has found that 5. 34 & 149 P.C. cannot be applied as necessary ingredient are not proved, although its reasoning is abrasive. The accused in this case are entitled to benefit of doubt. The judgment of conviction and of sentence against them is set aside. The appeal is accepted. They are set at liberty and the appellants are discharged from their respective bail bonds. Copies of this judgment be sent to trial court.