

**(2012) 07 CAL CK 0198**

**Calcutta High Court**

**Case No:** CRA No. 581 of 2009

Budhibal Subba @ Bhaichung  
and Raj Rai

APPELLANT

Vs

The State Of West Bengal

RESPONDENT

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**Date of Decision:** July 25, 2012

**Acts Referred:**

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

**Citation:** (2012) 4 CALLT 352 : (2013) 1 CHN 257

**Hon'ble Judges:** Tapen Sen, J; Dipak Saha Ray, J

**Bench:** Division Bench

**Advocate:** Partha Sarathi Bhattacharya, for the Appellant; Debasish Roy, Ld. Public Prosecutor, Mr. Navanil De, for the State, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Tapen Sen, J.

This appeal is directed against the judgement and order dated 22/23.02.2005 passed by the learned Additional Sessions Judge, 2nd Court, Darjeeling in Sessions Trial No. 13/2004 arising out of Sessions Case no. 11/2004 convicting the appellants under Sections 302/34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for life with fine of Rs.3,000/- each and, in default of payment of fine, to undergo further R. I. for one year. The period of detention in jail custody, as under trial prisoners, was directed to be set off. On 23/4/2004 at about 8.05 am, one Nirmala Thapa (stated to be the sister of the deceased) made a written report before the Inspector-in-Charge, Sadar Police Station, Darjeeling against the appellants herein alleging, inter alia, as follows:

Yesterday on 22/4/2003 at about 10.30 p.m., I heard some commotion/quarrel which made me come out to investigate. Our co-villager Budhibal Subba was seen shouting. I also heard my brother Sudarshan uttering "AI Raj". My sister-in-law also

came out to find out what had happened. In the meantime, I went to the house of Raj and heard him uttering loudly that he was not afraid. Prior to the incident, my sister-in-law had seen from her window that Budhibal (appellant no.1) had entered and then gone out of the house. I then went to the street to take my brother from the road. He had sustained bleeding injuries caused by sharp cutting weapon. Raj Rai (appellant no.2) had killed him. The Doctor declared him dead in the hospital.

2. On the basis of the aforementioned written report, the concerned police instituted Darjeeling Sadar P.S. case No. 32 of 2003 dated 23/4/2003 u/s 302 of the Indian Penal Code and took up investigation. Charge sheet was submitted against the appellants and the case was committed to the Court of the learned Sessions Judge, Darjeeling whereafter it was transferred to the Court of the learned Additional Sessions Judge, 2nd Court, Darjeeling for trial and disposal. After receiving the records, charges were framed under Sections 302/34 of the Indian Penal Code against the appellants who pleaded not guilty and prayed for being tried. Finally, after exhausting the procedure laid down in the Code of Criminal Procedure, the impugned judgment was passed, convicting the appellants and sentencing them, as aforesaid.

3. P.W. 1 is one Dhoma Thapa, who claimed to have known the appellants. She has stated that she had "heard" that Sudarshan Thapa had been murdered and, on the day of the murder, the accused Raj Rai had gone to her house and had her paid a sum of Rs.60/- being the value of nails which he had purchased from her on an earlier occasion. After receiving the money from Raj Rai, this witness along with her husband had gone off to sleep and Raj had also left her house but on the next morning, D. Gurung, Upa Pradhan, of the locality had come to their house and had told them that Sudarshan had been murdered. This therefore, is a witness who is a mere hearsay witness and is not an eye witness.

4. P.W. 2 is Susmita Rai. She was declared hostile.

5. P.W. 3 is one Dhiraj Rai who is a relative of the deceased and who claimed to have known the appellants. He said that he had "known" that Sudarshan had died and that Sudarshan was his brother-in-law. He also said that about one-and-a half years ago, Sudarshan had been murdered and that some days later, the police had come to his village and had asked him to put his signature on a blank sheet of paper. He identified his signature but, according to this Court, this witness can hardly be said to be sufficient for purposes of establishing the charges against the appellants.

6. P.W. 4 is one Bikram Rai. He has stated that he knew the deceased Sudarshan who used to reside near his house and that Sudarshan had died a year back. He however, could not say as to how Sudarshan had died. In fact, he goes on to say that seven days after the death of Sudarshan, police had come to his residence and had taken his signature on a blank sheet of paper. He identified his signature.

7. From a bare reading of his evidence, we are of the view that this witness cannot be said to be competent for purposes of establishing the charges against the appellants.
8. P.W. 5 - Smt. Rosi Thapa is the wife of the deceased. She is the only witness who has to be looked into with an element of seriousness because she is the person who has said that she knew the appellants. She has also given a description of the manner in which she "came to know" about the incident and about what the deceased had told her. She has stated that on 22/4/2003 at about 10.30 p.m. the sister of the deceased, namely, Nirmala Thapa (informant-cum-P.W. 17) informed her that there was a quarrel going on below her house. She opened the window of her house and heard her husband saying with "Raj ..... Raj". She then, came out of her house and found Buddhibal returning and she saw her husband lying on the road with grievous bleeding injuries on his chest, ear, neck and hand. On query, her husband Sudarshan told her that Buddhibal Subba alias Rai had caught hold of him and the other accused, namely, Raj Rai had assaulted him by a sharp double-edged weapon, namely, Chuppi. Thereafter, he became unconscious and, on being taken to the hospital, was declared dead.
9. In cross-examination, this witness has stated that there are several houses in and around the place of occurrence and that the houses are of (i) J. Rai; (ii) P. Nachal and (iii) Maila (Teacher). All of them are said to be residing in their houses with their families.
10. It is relevant to point out, at this stage itself, that none of these persons who are named, being J. Rai, P. Nachal and Maila (Teacher) were examined by the prosecution.
11. This witness has further stated that during her examination, she had told the Investigating Officer that Nirmala had informed her that there was a quarrel going on below her house, and that when she had gone to the place of occurrence, she had met Buddhibal who was also returning towards their locality. She has also reiterated what she had stated in her examination-in-chief.
12. We have considered the aforementioned statements made by this lady (i.e. P.W. 5) Rosi Thapa, being the wife of the deceased, but unfortunately, we are compelled to discard her evidence because we find, from the cross-examination of P.W. 17 (Investigating Officer of this case), that she had not stated before him that her husband had sustained severe bleeding injuries on his chest, neck, ear and hand. He has further stated that she had also not stated before him that her husband had told her that the appellants had assaulted him by a "Chuppi" or that he had caught hold of him.
13. Under these circumstances, whatever she had stated in the Court must be deemed to be an embellishment or an afterthought.

14. P.W. 6 is Robert Rai, who is a neighbour and a seizure list witness. He has merely stated that the police officer had come and asked him to put his signature on the seizure list.
15. P.W. 7 is one Anmol Rai, who is also a neighbour. He along with Robert Rai had put their signatures on the seizure list. He stated that the knife or something like that, was covered in a plastic but the police did not show the knife to him by opening the plastic cover.
16. P.W. 8 is Anil Bahadur Gurung, another neighbour, who is also not an eye witness to the occurrence.
17. P.W. 9 is the Sub-Inspector D. D. Gazner. He is also a seizure list witness as well as witness to the blood stained earth.
18. P.W. 10 is Ambar Thapa who is also a neighbour and a teacher of a primary school. This witness said that he was watching Television with his wife when Raj Rai came to his house and called his wife. His wife came out of the house and Raj paid his wife the cost of the nails which was purchased by him earlier.
19. We do not find anything in his evidence, which inspires confidence in us for purposes of convicting and sentencing the appellants.
20. P.W. 11 is Leena Rai. She is a labourer who merely put her signature on a paper which was given to her by the police and on their instructions, she had put her signature.
21. P.W. 12 is Uttam Gurung, another neighbour, who is also not an eye witness but, on request of Nirmala Thapa, had helped her to remove the deceased to the Darjeeling Sadar Hospital.
22. P.W. 13 is Homeguard Phurba Tamang, who escorted the dead body.
23. P.W. 14 is Dr. Asish Banerjee, who conducted the post mortem.
24. P.W. 15 is one Kanya Thapa, a relative to the deceased. He has stated that the deceased was his own younger brother. We do not find that he had any knowledge about the incident.
25. P.W. 16 is Sub-Inspector Goutam Paul, who is also the Investigating Officer of the case. In his cross-examination he made the statements, which we have noticed above and his cross-examination clearly established that the statements of the wife of the deceased cannot be given weightage at all.
26. P.W. 17 is one Nirmala Thapa, who is the complainant. She has also stated whatever she came to learn from Rosi Thapa, wife of the deceased.
27. We do not find any particular statement in her evidence for purposes of inspiring confidence in us for convicting and sentencing the appellants.

28. Having considered the aforementioned facts and circumstances and having also considered the judgment passed by the learned Court below, we are of the view that in the face of such evidences, the only picture that emanates, is that this is a case of no evidence at all. This has not been considered and on the contrary, the learned Court below having misconstrued the evidences, proceeded to pass the impugned judgment. Having given our anxious consideration to the facts and circumstances involved in this case, we are therefore of the view that the impugned judgment cannot be sustained. It is, accordingly, set aside.

29. The appeal is allowed. The appellants are acquitted and are ordered to be discharged from their bail bonds.

30. There will be no Order as to Costs.

31. A copy of this judgement along with the Lower Court Records be sent down to the court below immediately. If certified copy of this Judgment, is applied for by the parties, the same should be given expeditiously.

I agree,

Dipak Saha Ray, J.