(2012) 07 CAL CK 0228

Calcutta High Court

Case No: C.R.A. 212 of 2010

Sk. Ibrahim	APPELLANT
Vs	
The State of West Bengal	RESPONDENT

Date of Decision: July 13, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 6
- Penal Code, 1860 (IPC) - Section 304

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Sukdeb Chatterjee, for the Appellant;Sandip Chakraborty for the State, for the Respondent

Final Decision: Allowed

Judgement

Kanchan Chakraborty, J.

This appeal is directed against the judgment dated 8.2.2010 passed by the learned Additional District & Sessions Judge, Fast Track, Court No.II, Uluberia in Sessions Trial No.177 of 2008 thereby convicting the appellant Sk. Ibrahim for committing offence u/s 304 (Part II) of the I.P.C. and sentencing him to suffer R.I. for two years and to pay fine of Rs.1,000/-. On 28.3.2007 at about 7.00 A.M., the appellant brutally assaulted his son Rakesh @ Chottu aged about four years and left the home. Chottu sustained injury due to that. In the evening at about 6.30 P.M., Mina Khatoon reported Joynal Abedin that her brother was not responding. Joynal Abedin and others had been to the house of Sk. Ibrahim and found that Rakesh was lying on the floor and he was dead. At that time, Mina informed them that her father Sk. Ibrahim (appellant) off and on assaulted her brother Rakesh brutally knowing very well that he was a patient of Ricket. Joynal Abedin lodged one F.I.R. with Uluberia P.S. on 29.3.2007 over the issue and accordingly, Uluberia Police Station Case No.107 of 2007 dated 29.3.2007 was started against the appellant. The appellant was arrayed

to face charges u/s 304 of the I.P.C. He claimed to be innocence. Accordingly, the trial commenced.

2. Seven witnesses were examined in course of trial. Some documents were admitted into evidence and marked exhibits on behalf of the prosecution. The learned Trial Judge came to a conclusion that the appellant committed the offence u/s 304 Part II of the I.P.C. and accordingly, recorded his conviction and sentence which is impugned.

3. The appellant has come up with this appeal challenging the judgment, mainly, on the following grounds;

a) that the entire prosecution case is based on hearsay evidence which was not at all admissible in law; and

b) that there was no eye witnesses to the incident and the eye witnesses, if any, neither cited nor examined as witnesses by the prosecution.

4. Mr. Chatterjee, Learned Counsel appearing on behalf of the appellant contended that in the F.I.R lodged was marked Ext.1. It says clearly that the incident of assault had taken place at 7.00 A.M. and the lodger of the F.I.R., i.e., Joynal Abedin came to know about the incident at 6.30 P.M. from Meena Khatoon. It is needless to mention that according to the F.I.R., Joynal Abedin although lodged the F.I.R. was neither present at the time of occurrence nor soon thereafter. He had no direct knowledge of the incident also. Joynal Abedin was examined as P.W. 1. He has stated what has been canvassed in the F.I.R. was heard from Mina Khatoon. In his cross-examination, he has stated that he wrote the F.I.R. as per dictation of Mina Khatoon from whom he came to know about the incident.

5. P.W. 2 is the Scientific Officer of Forensic Department. He has examined the viscera of the accused and identified his report which was marked Ext.2.

6. P.W. 3, P.W. 4 and P.W. 5 are the people having houses in the same place where the appellant was having his house and living with his family consisting of two daughters and wife. The P.W. 3, P.W. 4 and P.W. 5 have stated that all of them heard about the incident from one Mina Khatoon. They came to know about the fact in the evening although the alleged incident of assault took place in the morning.

7. The question is who is Mina? The I.O. who has been examined as P.W. 7 stated that he did not interrogate Mina Khatoon or other family members of the appellant. He has not given any reason as to why he did not recorded statement of Mina Khatoon and the wife of the appellant. The appellant was having two other daughters excepting Rakesh which is clear from his statement u/s 313 of the Cr. P. C. It is not clear who were those two daughters and why they were not interrogated by police. In the instant case, the best witness would be Mina Khatoon. Witholding her evidence, in fact, created a great doubt in the prosecution case. According to the F.I.R., Mina Khatoon informed the P.Ws.1, 3, 4 and 5 about the incident. Neither of

them had any direct knowledge of the incident save and except the fact that they found Rakesh lying dead in side the house. None of them said also that they found mark of injuries on his body. Their evidence although relevant u/s 6 of the Evidence Act but cannot be admitted because it is hearsay evidence.

8. Besides, Mina Khatoon, there were other members in the house of the appellant. Interestingly and peculiarly enough, none of them was cited as witness of this case. The learned Trial Court basing on the hearsay evidence of the P.Ws.1, 3, 4 and 5 came to a conclusion that the appellant actually assaulted Rakesh mercilessly. The evidence of the I.O., if read minutely, suggests that there was no existence of Mina Khatoon at all. In fact, in course of trial, this question was raised by the learned defence Counsel but, the learned Trial Court neither attended this question nor assigned any reason at all. The said Mina Khatoon was not placed before any Magistrate also for getting her statement recorded. She did not come forward and file any F.I.R. The F.I.R. was lodged at her dictation by the P.W. 1 who was neither present at the time of incident nor soon after the incident but was told about the incident by Mina Khatoon long 12.00 hours after the alleged incident. There was no opportunity or scope for the learned Trial Court to accept the evidence of P.Ws.1, 3, 4 and 5.

9. It is admitted position that Rakesh was four years old and had been suffering from Ricket. It is not clear whether he was brutally assaulted to death. The report of the Post Mortem and the evidence of P.W. 6, the Doctor who conducted the Post Mortem shows that the death was due to manual strangulation. This fact does not support the prosecution case that Rakesh was beaten mercilessly as disclosed by Mina Khatoon 12.00 hours after the incident.

10. Mr. Chakraborty, Learned Counsel appearing on behalf of the respondent/State of West Bengal fairly conceded that the learned Judge was entirely wrong in accepting the evidence which is not admissible in law and taken a view basing on such inadmissible evidence which is entirely wrong and should be deprecated.

11. I find substance in the submissions of both the Learned Counsels appearing for the parties. It is true that there is no direct evidence or admissible evidence in support of the prosecution case. It is indeed painful that a four year boy suffering from Ricket died due to manual strangulation. But that fact alone does not necessarily imply that his father caused his death. To establish this act, the prosecution ought to have adduced sufficient and satisfactory evidence admissible in law. That was not done at all and the learned Judge was absolutely wrong on acing on such evidence and came to such a findings.

12. In view of the discussions above, I allow the appeal. The order impugned is set aside. Let the appellant be set at liberty at once and discharged from the bail bond. Let urgent photostat certified copy of this order, if applied for, be given to the learned advocates of the parties upon compliance of necessary formalities.