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**(2014) 09 CAL CK 0058**

**Calcutta High Court**

**Case No:** CRA 767 of 2005 and 633 of 2006

Mahima Naskar

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 9, 2014

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 302, 304, 34

**Citation:** (2014) 4 CALLT 127

**Hon'ble Judges:** S. Chatterjee, J; Nishita Mhatre, J

**Bench:** Division Bench

**Advocate:** Siladitya Sanyal and Sujan Chatterjee, Advocate for the Appellant; Saibal Bapuli, Advocate for the Respondent

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**Judgement**

Nishita Mhatre, J.

By the Appeal No. CRA 767 of 2005 the appellants have challenged their conviction and sentence imposed by the Additional District and Sessions Judge, Fast Track Court, 6th Court, Alipore, South 24 Parganas. The appellants have been convicted u/s 302 read with Section 34 of the IPC. They have been sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 2000/- (Rupees two thousand only) each, in default of payment of fine, the appellants have been directed to undergo a period of simple imprisonment for three months.

2. Subalendu Roy Mondal, PW 1, submitted a written complaint on 19th April, 2004 at 6.05 p.m. to the Jaynagar Police Station informing the police that his father-in-law Panchuram Naskar was killed on 19th April, 2004 between 10.45 a.m. and 11 a.m. while he was cooking on the veranda of his house. He mentioned in his complaint that the appellants who are the daughter-in-law and grandson of Panchuram Naskar had a grudge against the victim and after quarrelling bitterly with him, struck him with sharp edged weapons causing bloody injuries. He has stated in his

complaint that the appellants fled from the spot. This complaint has been treated as the FIR in the present case. Jaynagar Police Station case No. 86 of 2004 dated 19th April, 2004 was started against the appellants.

3. An inquest was held at about 5.30 p.m. on 19th April, 2004. The appellants were arrested immediately thereafter. The case against them was committed to the Sessions Court. A charge was framed against them. They pleaded not guilty and claimed to be tried.

4. The prosecution relied on the testimony of 16 witnesses in order to prove its case. Out of the 16 witnesses PWs 2, 4 and 15 claimed to be eye-witnesses. PW 2 was a neighbour of Panchuram. He has stated that between 10.30 a.m. and 11 a.m., he saw the appellant No. 1 strike the victim with a chopper on the head causing bleeding injuries. According to this witness appellant No. 2 then assaulted the deceased with a crowbar causing an injury on his chest. The entire incident occurred on the verandah of the house of the deceased. The witness has stated that the deceased succumbed to the injuries before he could be removed to any hospital. He has signed the inquest report prepared by the police and identified the crowbar and the chopper which were marked as material Ext. 1 and 2. According to him he could see the incident because at the relevant point of time he was standing on the road in front of his house which was a 11/2 minutes" walk from the house of the deceased. He has admitted the existence of trees and the house of Nitai Naskar, the nephew the deceased, between his own house and that of the deceased. He has spoken about the arrival of the police on the date of the incident at the spot at about 1.10 p.m. and the presence of PW 1 who came to the spot first.

5. PW 4 is another neighbour of the deceased. He claims to have heard a commotion emanating from the house of Panchuram while he was working in a house which was close to that of the deceased. He rushed to Panchuram's house and found him lying dead with bleeding injuries.

6. PW 15 is the other eye-witness whose testimony has been relied on by the prosecution. This witness was the nephew of the deceased. His statement was recorded u/s 164 of the Cr.P.C. by the learned Magistrate who has been examined as PW 13. He claims that he heard a hue and cry and somebody shout "save me", originating from the house of Panchuram. He went there immediately and found the appellant no. 1, Mahima Naskar striking Panchuram with a chopper and causing bleeding injuries on his head. Panchuram fell to the ground. After which appellant no. 2, Debaprasad Naskar assaulted him with a crowbar, causing bleeding injuries on his chest. The witness claims to have raised an alarm on seeing the incident. According to him, other people rushed to the spot on hearing his alarm. The place of occurrence, as per this witness, is the verandah of the house of the deceased. The witness claims that Panchuram cried out on being assaulted and succumbed to the injuries within a few minutes. His body was removed from the spot in a van rickshaw. The witness claims that he lost his senses after seeing the attack. In his

cross-examination he admitted that he had come to the Court to depose directly from the police station. He volunteered the information that he went to the police station on the previous night to ascertain whether any warrant of arrest was issued against him in connection with the case as he had not attended the Court on the earlier date. Since the police asked him to depose in connection with the case, he decided to stay at the police station instead of returning home. He came to the Court accompanied by the Investigating Officer of the case. This witness has stated in his cross-examination that he regained his senses soon after the incident. He was known to PW 1, the informant, obviously because they were related to each other.

7. Mr. Siladitya Sanyal, the learned Counsel appearing for the appellants, has submitted that the testimonies of the eye witnesses do not bear out their claim that they had witnessed the attack on the deceased. He pointed out that PW 2 could not have seen the incident from his residence as he had mentioned that there were trees and Nitai Naskar's house between his own house and that of the deceased. The learned Counsel also submitted that it would be impossible for PW 2 to have seen the incident and the assailants of the deceased from a distance, especially when there were so many obstacles in line with his vision. The learned Counsel then submitted that although PW 15 claims that he heard the victim shout out "save me", PW 2 has not spoken of this alarm being raised by the victim. He also submitted that none of the other witnesses, who claimed to have arrived at the scene of offence soon after the incident occurred, have heard the victim shout out "save me". The learned Counsel also submitted that PW 15 was a tutored witness which was evident from the fact that he was made to sit in the police overnight before he deposed in the Court. All these factors, according to the learned Counsel, indicate that they were not eye-witnesses to the incident.

8. The learned Counsel for the State has submitted that there is no reason to disbelieve PWs 2 and 15 who have truthfully narrated the incident. According to him, both the witnesses have corroborated each other and the minor discrepancies would not necessarily lead to the inference that they were not eye-witnesses. The learned Counsel has pointed out the judgment of the Supreme Court in the case of [Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Another](#), The Supreme Court has held in this case that minor discrepancies are not to be given undue emphasis. The test is whether such evidence inspires confidence. It is only if an omission or discrepancy goes to the root of the matter and ushers in incongruities, can the defence take advantage of such inconsistencies.

9. PW 1 who is the complainant is the son-in-law of the deceased. He has stated that though the deceased and the appellants live separately, they stayed under the same roof. According to him, the appellants and the deceased had disputes regarding property. The appellants struck the deceased with sharp edged weapons resulting in his death. The witness has stated that the deceased received multiple injuries. He learnt of this incident from one Sanjay Naskar, Panchuram's nephew, who resided

adjacent to the deceased. Surprisingly Sanjay has not been examined in this case by the prosecution. The witness himself lived at a distance of 11/2 kilometre away from Panchuram's house. According to him the police arrived on this spot at about 12.30 p.m. The witness has stated that his complaint was written by one Debaprasad Sarkar, a local teacher, as per his instructions. He has identified the handwriting and signature of the scribe. The witness claims that he signed the written complaint after being satisfied with its contents. He was a witness to both the inquest as well as the seizure of a blood-stained crowbar and an iron chopper which had no butt. Although this witness has stated that the chopper was rusted, the seizure list which is exhibited as Ext. 3/1 does not describe it as rusted. He has identified the weapons used in the assault in the Court.

10. PW 3 is a neighbour of the deceased. He is a witness to the inquest report. In his cross-examination, he has stated that immediately after the incident occurred and he heard of it, he went to the house of the deceased and found the deceased lying on the verandah with bleeding injuries. He claims that the appellants confessed to him about their assault on the deceased.

11. PWs 4, 7 and 9 who are the residents in the same locality as the deceased, have also spoken about the extra-judicial confession being made by the appellants. PW 9 claims that he found the people of the locality had apprehended the appellants who confessed that they committed the crime. This witness admittedly had not been interrogated earlier by the police.

12. The evidence of these 4 witnesses, namely, PWs 3, 4, 7 and 9 who claimed that they heard the appellants' confession that they had committed the murder is believable. Mr. Sanyal, the learned Counsel for the appellants, points out that the accused persons were manhandled as stated by Investigating Officer in his deposition. However, there is no evidence to suggest that the appellants were injured.

13. Mr. Saibal Bapuli, on the other hand, submitted for the State that the extra-judicial confession was voluntary and must be given its due weightage. He has relied on the judgment of the Supreme Court in the case of [State of Rajasthan Vs. Raja Ram](#), The Supreme Court has observed in this case that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court. However, such a confession has to be proved like any other fact. The value of such evidence depends on the veracity of the witness to whom the extra-judicial confession has been made. The Supreme Court has observed that it was not open for the Court to start with a presumption that extra-judicial confession is a weak type of evidence. This is because it depends on the nature of the circumstances, the time when the confession was made and the credibility of the witness who speaks of such a confession. A conviction can be founded on such evidence, if the evidence of the confession is of a witness who is unbiased and not even remotely inimical to the accused. The Court observed that only after subjecting

the evidence of the witness to a rigorous test on the touchstone of credibility, an extra-judicial confession can be accepted and made on the basis of a conviction. Mr. Bapuli submitted that there was no reason to doubt the veracity of the evidence of PWs 3, 4, 7 and 9, and therefore the appellants can be convicted on the basis of the extra-judicial confession made by them. This submission of the learned Counsel must be accepted. There is no evidence on record even remotely suggesting that these witnesses had any animus towards the appellants due to which they had no qualms about implicating them.

14. PW 5 is a grandson of the deceased. He claims to have arrived at the spot about 40 minutes after the assault. On reaching there he found that about a 100 to 150 people had gathered and the body of the deceased had been covered with a sheet. He has stated that he heard from the people in the gathering that the appellants had murdered Panchuram. PW 5 is a witness to the inquest report although he has admitted that he did not know the contents of the inquest report.

15. PW 6 is the resident of the same village as the deceased. He claims that he arrived at the scene of offence two hours after the incident and found about 200 people had gathered at the spot.

16. PW 7 is also a resident of the same village. However, he has not witnessed the incident. PW 8 is a relative of the deceased and lives adjacent to his house. However, she had no knowledge of the incident.

17. PW 10 is the autopsy surgeon who conducted the post-mortem examination of the corpse. The injuries that he found were as under:

1. One incised wound over lateral border of right thumb, measuring about 1" x 1/2" x muscle deep.
2. One transverse scratch mark over right cheek, measuring about 3" x 1/3" which was placed 2 1/2" away of midline to the right side, and 1 1/2" about the right angle of mandible.
3. One transverse lacerated injury, measuring about 1" x 1/2" muscle deep, which was placed 1" above the injury No. 2.
4. One abrasion over lateral aspect of right arm, measuring about 1" x 1/2" over lateral side of the arm.
5. One lacerated wound over front of chest wall over mid line slightly to the left, measuring about 3 1/2" x 1 1/2", thoracic cavity, and it was placed above 48.5" of the left heel.
6. An oblique incised wound right parital to left occipital region of scalp, measuring about 4 1/2" x 1/2" bone deep.

He has opined that the injuries sustained by the deceased could be caused by moderately heavy sharp cutting weapon or a blunt weapon like a chopper or a crowbar.

18. PW 11 is the constable who identified the dead body for PW 10 who conducted the autopsy.

19. PW 12 was the doctor on duty when the deceased was brought to the hospital. He sent the body for post-mortem examination.

20. PW 14 received the complaint at the Jaynagar Police Station from PW 1 and started the case against the appellants.

21. PW 16 is the Investigating Officer of the case. He has candidly stated that he recovered the weapons used for the assault on the deceased. Mahima Naskar, appellant No. 1, pointed out the chopper while Debprasad Naskar, appellant No. 2, pointed out crowbar which were used to kill the victim. The seizure list indicates that these weapons were seized from the kitchen of the deceased at about 6.35 p.m. on 19th April, 2004. In his cross-examination, the Investigating Officer has admitted that he visited the scene of offence prior to being authorised by the Officer-in-Charge of the police station to conduct the investigation in the case. He has stated that when he visited the spot, he learnt that the appellants were manhandled and that the victim was shifted to the hospital. He has stated that the locality was tensed at that point of time. The arrest-cum-inspection memo prepared by him mentions that the arrest was made at 6.25 p.m. on 19th April, 2004. This witness has also admitted that he did not bother to send the weapons which were seized to the Forensic Science Laboratory (hereinafter referred to as "FSL") in order to ascertain whether the finger prints of the appellants were present on the weapons. He did not send the seized weapons which admittedly were blood-stained to the FSL to determine whether the blood-group on the weapons matched that of the victim.

22. It is true that the investigation in this case is perfunctory. However, in the case of [C. Muniappan and Others Vs. State of Tamil Nadu](#), the Supreme Court has observed that even though there may be a defective investigation that by itself cannot be a ground for acquittal. The Court has observed that where there is negligence on the part of the Investigating Agency or omissions which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the evidence is reliable or not and whether such lapses affect the object of finding out the truth.

23. The submission of Mr. Sanyal that PWs 2 and 15 could not be considered as eye-witnesses and their testimony should be disbelieved and is not possible to accept. It is true that the testimony of PW 15 must be regarded with circumspection especially since he spent the previous night in the police station before deposing in

the Court. He may have embellished his story by stating that the deceased cried out "save me" while he was being assaulted. However, that does not mean that his assertion that he saw the assault on the deceased is to be ignored completely. He is a natural witness, being the nephew of the deceased. His statement recorded u/s 164 of the Cr.P.C. by the learned Magistrate corroborates his testimony in Court.

24. PW 2 has stated that there were trees and the house of Nitai Naskar between his house and that of the deceased and therefore Mr. Sanyal has argued that he could not have seen the incident. The witness has deposed that he was standing on the road when the incident occurred. Obviously, he would have a better view of what was happening in the verandah of the house of the deceased especially when his house was only a minute's walk away. In our opinion, therefore, the assault by the appellants on the deceased has been proved beyond reasonable doubt. The Supreme Court in the case of [Sucha Singh and Another Vs. State of Punjab](#), has observed that a reasonable doubt is not an imaginary, trivial or merely a possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. Though proof beyond reasonable doubt is a guideline, it should not be a fetish. In our opinion, there is no room for any doubt in this case that the appellants did assault the deceased leading to his death. The veracity and credibility of the eye-witnesses is beyond reproach and therefore we have no reason to discard their version of the incident.

25. These depositions of the eye-witnesses are supported by the extra-judicial confessions made to PWs 3, 4, 7 and 9. It is true that PW 16, i.e., the I.O., has spoken about the accused being manhandled. However, there is no evidence that the appellants were injured. The evidence on record supports the case of the prosecution that it is the appellants who responsible for the assault on Panchuram.

26. The weapons seized have unfortunately not been sent to the FSL for analysis, though they were blood-stained. However, this by itself would not lead us to discard the entire case of the prosecution considering the other evidence on record.

27. Mr. Sanyal has submitted, in the alternative, that even assuming the appellants had inflicted the injuries, it was not a pre-meditated attack and therefore, the appellants should be awarded a lesser punishment especially because they had been incarcerated for the last 11 years.

28. The evidence on record undoubtedly points to the fact that there was a property dispute between the deceased and the appellants. The deceased was the father-in-law of the appellant No. 1 and grandfather of appellant No. 2. They were living under the same roof. There was a quarrel, according to one of the witnesses who is examined by the prosecution, before the appellants struck the deceased with a crowbar and a chopper. In our opinion, therefore, the evidence on record shows that the intention was to cause bodily injury which was likely to cause death. The appellants have already been in jail for the last 11 years. In our opinion this is a

sufficient sentence that they have undergone for the offence committed by them. Therefore, the conviction and sentence u/s 302 read with Section 34 of the IPC is set aside. Instead, the appellants are convicted u/s 304 Part I read with Section 34 of the IPC. They are sentenced to suffer imprisonment for the period already undergone by them in prison and to pay a fine of Rs. 2000/- (Rupees two thousand only) each and in default of payment of the fine to undergo simple imprisonment for 3 months.

29. The appeal CRA 767 of 2005 is allowed accordingly. Criminal Appeal No. 633 of 2006 has been filed by Mahima Naskar, the first appellant in CRA 767 of 2005, from the jail. This appeal is infructuous in view of the fact that CRA 767 of 2005 has been decided by us today.

30. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.