

(2014) 09 CAL CK 0065

Calcutta High Court

Case No: CRA 573 of 2008

Ranajit Mondal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: Sept. 11, 2014**Acts Referred:**

- Arms Act, 1959 - Section 25, 27
- Penal Code, 1860 (IPC) - Section 307, 320, 326, 34

Citation: (2014) 4 CALLT 171 : (2015) 2 Crimes 38**Hon'ble Judges:** S. Chatterjee, J; Nishita Mhatre, J**Bench:** Division Bench**Advocate:** P.S. Bhattacharyya, Advocate for the Appellant; Manjit Sing, Public Prosecutor, Anand Keshri and Pawan Gupta, Advocate for the Respondent

Judgement

Nishita Mhatre, J.

The appeal is directed against the judgment and order of the Additional Sessions Judge, 1st Fast Track Court, Lalbag, Murshidabad, in Sessions Trial No. 2 of January, 2004. The appellants were charged u/s 326 read with Section 34 of the IPC and Section 307 read with Section 34 of the IPC and under Sections 25 and 27 of the Arms Act. They have been acquitted of the charges under Sections 25 and 27 of the Arms Act. However, they have been convicted and sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs. 2000/- (Rupees two thousand only) each and in default of payment of which to suffer simple imprisonment for further period of one year for the offences u/s 307 read with Section 34 of the IPC. The sentence of three years and a fine of Rs. 1000/- (Rupees one thousand only) for the conviction u/s 326 read with Section 34 of the IPC is directed to run concurrently.

2. The complainant Abhijit Mondal lodged a complaint on 9th February, 2002 at 7:45 a.m. stating that at 6 a.m. on that day when his father Bhusan Mondal was on his way to their field, the appellants shot him with unauthorized fire-arms. The

complainant Abhijit Mondal and his brother Indrajit Mondal were picking brinjals from their land when they heard the shot being fired and their father's shouts. They saw the appellants flee away through the fields carrying the unauthorized firearms. Their father had sustained a bullet wound which was bleeding. He was taken to Lalbag Hospital and thereafter referred to Berhampore Hospital. According to the prosecution, the appellants had fired shots at the victim with the intention to kill him. After their arrest, the case was committed for trial to the Sessions Court. Charges were framed under four heads for offences punishable u/s 326 read with Section 34 of the IPC and Section 307 read with Section 34 of the IPC and Sections 25 and 27 of the Arms Act.

3. The prosecution has mainly relied on the testimony of the two sons of the victim and the victim himself. PW 1 Abhijit Mondal has reiterated in his deposition the contents of his complaint. He has stated that the accused Ranajit Mondal, i.e., appellant No. 1 shot his father on the upper right side of his back with a pistol. Appellant No. 2 Nato Mondal shot him on his head with a pipe gun. Appellant No. 3 shot the victim on his left hand just above the wrist with the pipe gun. The witness has stated that when he and his brother, Indrajit rushed to aid their father, the appellants fled away. He claimed that his father's right hand had been permanently incapacitated due to that injury. This witness has admitted that he, his brother and his father are all accused in a case where the appellant are the complainants.

4. PW 2 is the brother of PW 1. He has narrated the incident almost verbatim. He has conceded in his cross-examination that the Investigating Officer of the case did not examine him after the incident. According to this witness, on hearing the firing he and his brother rushed to the spot and found their father lying injured on the ground. They first took their father to their residence and soon thereafter he was taken to Lalbag Hospital and later to Berhampore Hospital after being referred there. The witness has stated that his father had become unconscious when he was being taken to their house and he regained consciousness only the next day in the Berhampore Hospital. The witness has admitted that the clothes worn by him and his brother had become blood stained but were not seized by the police.

5. PW 3 is a neighbour of the victim. He is a post-occurrence witness. He has described the incident which was narrated to him by the victim's sons.

6. PW 4 is another post-occurrence witness and a relative of the victim. He claims that he heard of the incident and rushed to the field when he heard the sound of the shots being fired. According to him, other villagers also rushed to the same field. This witness has stated that he saw PWs 1 and 2 carrying their father who had sustained bleeding injuries.

7. PW 5 is another neighbour of the victim. He heard the sound of shots being fired and like many villagers who had raised the alarm he rushed towards the field from where the sound originated. The witness claims that he was informed by PWs 1 and

2 that the victim was shot. He claims he had seen PWs 1 and 2 helping the victim across the field. However, according to him neither of the two brothers had blood-stains on their clothes though the victim did have blood on his body. This statement is contrary to the version of PWs 1 and 2 who stated that their clothes were blood-stained and that the victim had suffered bleeding injuries.

8. PW 6 is the younger brother of the victim who learnt of the incident about 4 or 5 days later, when he returned home.

9. The star witness PW 7 is the victim in this case. He has stated that he was shot by appellant No. 1 in his back near the right shoulder. The bullet was surgically removed from his body. He then claimed that appellant No. 2 shot him and the bullet hit his head. Appellant No. 3 shot him from a close range and the bullet hit him on his left finger. He claimed that after being shot he raised an alarm and fell down with bleeding injuries. According to this witness, his sons Abhijit and Indrajit rushed to the place of occurrence. He has stated that PWs 3, 4 and one Tentul Mondal also rushed to the scene of offence on hearing his cries. The appellants fled away with their fire-arms. The witness claims that he spoke of the incident to those who were present. He claims that he was shot because the appellants had a grudge against him. He has spoken about being admitted to the Lalbag Hospital and Berhampore Hospital. This witness has admitted that he was an accused in a case where the allegation was that he had shot the appellants in this case. He has also admitted that the case filed against him related to the attempted murder of appellant No. 1 by shooting him with an unlicensed fire-arm.

10. PW 8 is another villager who reached the field where the incident occurred on hearing three shots being fired. He claimed that he saw three persons fleeing away carrying a pipe gun machine. This witness has stated that he saw three gunshot wounds on the victim which were on his back, his head and his left hand. This witness is the younger brother of the victim. He has spoken about the presence of PWs 1, 2, 3, 4, and Tentul Mondal in the victim's house after the incident. According to this witness the Investigating Officer had examined him in the house but there were no blood stains there at that point of time.

11. PW 9 is the doctor who was posted at Berhampore N.G. Hospital. He has stated in his deposition that he treated one Bhusan Mondal after he was admitted to the hospital on 19th December, 2002 till he was discharged on 2nd January, 2003. According to the doctor, the patient suffered from a lacerated scalp injury and one bullet injury. The bullet entered from the back and was removed from the right supra clavicular region. The witness has claimed that after the bullet was removed it was preserved so that it could be seen for forensic examination. He has produced the injury report which has been exhibited as Exhibit 2 by the Trial Court. The doctor admitted that neither the patient nor the members of his family or anybody accompanying him produced any document to substantiate the identification of the patient as Bhusan Mondal. The police personnel had also not identified this patient

as Bhusan Mondal.

12. PW 10 is the scribe of the complainant which PW 1 submitted. He, however, had no personal knowledge of the incident. He has admitted that he and PW 1 belonged to the same political party.

13. PW 11 is the Investigating Officer of this case. He has admitted that he had seized some fire-arms and cartridges. When questioned whether the seizure of the fire-arms related to the present case, the Investigating Officer stated that the seizure of those fire-arms was in respect of the present case as well as another case. Although he claimed that the seized articles had been sealed and labelled, he was unable to find any label on the body of the fire-arms and the ammunition.

14. The learned Counsel for the appellants has submitted that the perfunctory investigation in this case and the manner in which the Trial Court had weighed the evidence had led to great injustice to the appellants. He submitted that all the witnesses who claimed to be eyewitnesses were related to the victim and, therefore, were interested witnesses. He had further submitted that the doctor, in this case, has treated the victim in the hospital for several days, despite which the Investigating Officer did not care to seize the medical reports and other relevant documents including the bed head ticket and produce them in Court. The learned Counsel further submitted that the injury report which has been accepted by the Trial Court does not reflect that the injuries described by the witnesses had been sustained by the person who was admitted in hospital. He, therefore, urged that PW 7 was not really the victim in this case, as he was never identified as being admitted to the hospital. The learned Counsel then submitted that the Trial Court had erred in finding the appellants' guilty of charges both u/s 326 read with Section 34 of the IPC as well as Section 307 read with Section 34 of the IPC. According to him, the two Sections, Section 326 and 307 are mutually exclusive and, therefore, a conviction under both heads cannot be sustained.

15. The learned Counsel for the State drew our attention to the evidence on record and submitted that the eye-witnesses PWs 1 and 2 have reiterated what was stated in the FIR. He also pointed out that the victim's version of the incident is the same as his sons. Therefore, according to the learned Counsel, there is no need to disbelieve the ocular evidence on record. The learned Counsel further submitted that the medical report produced by the doctor and the evidence of the doctor, PW 9 proved that Bhusan Mondal had sustained two injuries, one of them being a bullet wound on his right shoulder while the other was the lacerated scalp injuries.

16. We have scrutinized the evidence on record as also the judgment which has been impugned in this appeal. In our opinion, the Trial Court has erred in convicting the appellants u/s 326 read with Section 34 of the IPC and Section 307 read with Section 34 of the IPC. While Section 326 of the IPC speaks about the punishment for voluntarily causing grievous hurt by dangerous weapon, Section 307 of the IPC

relates to an attempt to murder, an offence which is more serious in nature. These two sections cannot be used simultaneously to convict a person. Although the punishment under both Sections is similar the offence is not the same. Section 326 of the IPC speaks about causing grievous hurt, which is defined u/s 320 of the IPC, by means of an instrument for shooting, stabbing or cutting or any instrument which used as weapon of an offence is likely to cause death. Now in the present case, it is true that the offence related to the victim being shot in the right shoulder. He was hospitalized for about 20 days and, therefore, if at all, the appellants would be guilty of having caused grievous hurt with a dangerous weapon. There was no attempt at all to murder the victim. Mens rea has not been established by the prosecution.

17. Moreover, the identity of the victim has not been established in this case. The doctor has stated that a patient known as Bhusan Mondal was brought to the hospital and that neither the relatives nor the police had produced any identification for the victim. The police personnel had not identified the patient as Bhusan Mondal to the doctor. Therefore, it has not been established beyond doubt that the patient in this case who was treated by PW 9 was, in fact, PW 7. The prosecution has not been able to establish beyond reasonable doubt that PW 7 was, in fact, the victim.

18. Moreover, the so called eye-witnesses and PW 7 have all stated that he had received three bullet injuries. However, the medical evidence on record indicates that the patient who was treated by the doctor had received only one bullet injury and the bullet was removed from the right supra clavicular region. The point of entry of the bullet was on his back. The other injury, sustained by the patient who was treated in the hospital, was a scalp injury, which was a lacerated wound. Therefore, the evidence of PWs 1, 2 and 7 where they have stated that PW 7 sustained bullet wounds on the right upper side of his back, on his head and on his left hand just above the wrist is not credible. It is well-settled that in a case where the ocular evidence and the medical evidence on record do not tally, the ocular evidence would be preferred unless the medical evidence is such as would make it impossible to accept the ocular evidence on record. In the present case, although the ocular evidence speaks about three bullet wounds, the medical evidence on record describes only one bullet injury. Therefore, it is not possible to accept the ocular evidence on record in this case in respect of the number of injuries.

19. The learned Counsel for the State has submitted that Exhibit 2 is not an injury report but is a discharge certificate. However, the doctor has produced Exhibit 2 as an injury report. He has written the same and signed it. Surprisingly this document does not indicate whether it related to any police case being started in respect of the injury sustained by the patient. The FIR reveals that the incident had occurred at around 6 o'clock in the morning and that the FIR was received in the police station at 7:45 a.m. The police case was registered immediately thereafter when the patient who had sustained the bullet injury was admitted to hospital. The relevant police

registration case would have been mentioned in the injury report. The Investigating Officer has not bothered to seize the bed-head ticket and other medical papers relating to the injuries sustained by the patient. Therefore, considering the evidence on record it is difficult to accept that PW 7 was the patient who was treated in the hospital or that he had sustained injuries due to shots fired by the appellants.

20. Apart from this, the PW 7 has admitted that he has been accused of an attempt to murder Appellant No. 1 and that the case against him is still pending trial. The possibility of PW 7 implicating him falsely because of this cannot be ruled out.

21. In these circumstances, the conviction and sentence imposed by the Trial Court is set aside. The appellants are acquitted. They shall be set free immediately if not required to be detained in any other case.