(2014) 11 CAL CK 0092

Calcutta High Court

Case No: CRA 524 of 2005

Prabir Kayal		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: Nov. 12, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 304, 307, 323, 325, 34

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

Bench: Division Bench

Advocate: Amitava Chowdhuri and Aloke Cahtterjee, Advocate for the Appellant; Manjit Singh and Pawan Kr. Gupta, Advocate for the Respondent

Judgement

Nishita Mhatre, J.

The appellants are aggrieved by the decision of the Additional District and Sessions Judge, 1st Fast Track Court, Howrah, dated 16th July, 2005 in Sessions Trial Case No. 366/04. The Sessions Court has convicted the appellants under Section 304 Part-I read with Section 34 of the Indian Penal Code. The accused persons have not been found guilty of the charges framed under Section 325 read with Section 34 and Section 341 read with Section 35 of the Indian Penal Code. The appellants have been sentenced to suffer rigorous imprisonment for ten years each and to pay a fine of Rs. 500/- (Rupees Five Hundred only) each; in the event of failure to pay the fine the appellants have been directed to undergo simple imprisonment for a period of one month.

2. The complainant Jayanta Bagani submitted his complaint on 26th February, 2004 complaining that at 6.00 a.m. that morning, his son Ganesh aged about 16 years, had been struck on his head with a wooden staff (buttam). He has mentioned in his complaint that the victim was held by Pradip while Prabir Kayal struck him on his head. Ganesh, the victim suffered a severe bleeding injury. On hearing a noise the complainant''s wife Sonali

rushed and tried to rescue her son. However, Prabir, his wife Archana and his three brothers Pranab, Pradeep and Pratap beat up Sonali and dumped her in a drain. Ganesh was admitted into a hospital in Howrah. Thereafter, he was shifted to another hospital, Medical College, Kolkata where he died two days later.

3. Liluah P.S. Case No. 34 of 2004 was started on 26th February, 2004 under sections 341/ 325/ 34 IPC. Ganesh died on 28th February after he was referred to Medical College, Kolkata.

4. The appellants were arrested on different dates and claimed to be tried. A charge under section 304/ 34 was also framed against the appellants as the victim had died. Evidence of 15 witnesses was recorded before the Trial Court on the basis of which the appellants have been convicted and sentenced as above.

5. PW 1 is the father of the victim, Ganesh. He has stated that on 26th February, 2004 he awoke on hearing a hue and cry. He saw Prabir on the Panchayat Road behind his house grabbing the victim. Archana Koyal handed over a wooden staff to Prabir who struck Ganesh on the head. He also mentioned that Prabir had caught hold of Ganesh while Prabir struck him on the head. This witness has spoken about Archana tying a saree around the neck of his wife, Sonali and the fact that Pranab and Pratap gave Sonali fist blows and kicked her, causing her to fall in the drain. The witness claims to have picked up his bleeding son and taken him to Howrah District Hospital in a car. He reported the incident on the night of 26th February, 2004 to the Police Station. The FIR was scribed according to his dictation by Jagannath Sarkar, that is, PW 14. This witness has further mentioned that Ganesh was shifted to Medical College, Kolkata at 2.00 a.m., that same night and he died at about 4.00 p.m. on 28th February, 2004 in that hospital. According to this witness, Ganesh was attacked because of a prior quarrel over plucking of plums from a tree on 23rd February, 2014. The witness mentioned in his cross-examination that he could not recollect whether Prabir had struck Ganesh with the wooden staff. He has further stated that he reached the place of occurrence when the accused persons were fleeing away after people gathered over there. According to him, Sonali was treated in a private hospital for the injuries sustained by her.

6. PW 2 is the victim''s mother, Sonali. She has corroborated the testimony of her husband PW 1. However, from her evidence it is apparent that she reached the place of occurrence a little before her husband. She has described the manner in which she was assaulted by the appellants before her husband and other people from the locality arrived on the scene. She has mentioned the names of PWs 3 and 4 as persons present at the scene of offence. According to this witness, she had met the police on 25th February, 2004 about the quarrel which occurred for plucking of plums on that day.

7. PW 3 Namita Naskar has described the incident which took place according to her at 6.00 a.m. on 26th February, 2004. She has corroborated the version of PWs 1 and 2 that Pradip held Ganesh while Prabir struck him on the head with a wooden staff. She has

also described the assault on PW 2 by Archana, Pratap and Pranab. However, in her cross-examination she has admitted that she did not see PW 1 and 2 at the place of occurrence and stated that she had perhaps left before them arrived on the scene. Her testimony regarding the assault on the victim is unshaken in the cross-examination. She has denied the suggestion of the defence that Ganesh was injured when he fell off the plum tree.

8. PW 4 also speaks about the assault on Ganesh by Prabir and by the others on Sonali PW 2. She claims that she witnessed the assault while on her way to a factory where she was employed. The witness has conceded in her cross-examination that she did not know the names of Prabir''s brothers. She has also stated that she was not aware whether there was any enmity between the two families. According to her, she was at in the scene of offence for about 30 minutes. She denied the suggestion that Ganesh''s family has tutored her to depose in a particular way.

9. PW 5 is the Judicial Magistrate who recorded the statements of PWs 3 and 4 under Section 164 of the Cr.P.C.

10. PW 6 is the uncle of the victim. He claimed that the incident occurred at 5.00 a.m. on 26th February, 2004. He heard the hue and cry and rushed from his house and found Prabir repeatedly striking Ganesh on the head with a wooden staff. He has mentioned that PW 2 tried to rescue her son. According to him, he rushed to the place of occurrence to help Sonali who had been attacked by the accused and on seeing him, the accused fled away. The witness has stated that PW 1 arrived at the scene thereafter. His testimony has not been shaken in the cross-examination.

11. PW 7 is a villager who resided opposite the victim. He has spoken about the incident and the persons of PWs 3 and 4 at the scene of offence. He has also mentioned that he saw the assault on the victim and when he shouted, the appellants ran away from the scene of offence. The victim claims that he called out to PW 1 who then rushed to the spot which was behind the house of PW 1. He claims to have heard PWs 3 and 4 shouting out that Ganesh had been killed after which he rushed to the scene of offence.

12. PW 8 was the Executive Magistrate who conducted the inquest on the victim''s body. He has described the injuries on the body of the victim, namely, an abrasions on the forehead.

13. PW 9 is the doctor who conducted the post-mortem. He has described the injuries sustained by the victim in great detail. According to him there were 7 injuries, all of which were inflicted on the vital part of the body. The doctor opined that these injuries have caused the death of the victim. He has also stated that such injuries could be caused if a person was struck indiscriminately with a wooden staff and that such injuries were sufficient in the normal course to cause death. In his cross-examination he has conceded that a person could suffer abrasions if fell off a tree, from one branch to another.

14. PWs 10 and 12 are witnesses to the seizure of a Bed Head Ticket from the hospital attached to the Medical College, Kolkata.

15. PW 11 is the ASI of Police, who received the complaint of PW 1 on 26th February, 2004 which was written by PW 14. The formal FIR was lodged and a case was started under Sections 341/ 325/ 34 of the IPC by this witness.

16. PW 13 is the doctor who was present when the victim was admitted in the Medical College Hospital for emergency treatment. He has mentioned that the victim was unconscious when he was admitted and had sustained a lacerated injury over the left fronto parietal region. He has stated that he administered the treatment to the victim in the emergency ward.

17. PW 15 is the Investigating Officer in this case. He has mentioned that Pranab was arrested on 27th February, 2004 at Liluah. He arrested Pradip and Prabir on 2nd March 2004 at Jagadishpur. On the next day Pratap and Archana were arrested at Bally. The witness has conceded that he was not able to recover the wooden staff pursuant to the statements made by Prabir and Pradip. The charge-sheet was submitted by this Officer against the appellants under Sections 325/ 341/ 323/ 307/ 304 read with Section 34 of the IPC. Certain contradictions have been brought out in the depositions of the other witnesses through this witness with respect to the alleged assault by Archana on PW 2.

18. The learned Counsel for the appellants submitted that the evidence on record does not prove the prosecution''s case. He has pointed out the contradictions in the testimonies of the witnesses. While PWs 3 and 4 stated that they did not see the parents of the victim at the scene of offence, PWs 1 and 2 had mentioned that they were present when the victim was assaulted. The learned Counsel has also submitted that it is unbelievable that PW 4, who is residing in the same village, would not know the names of the brothers of Prabir as stated by her in her cross-examination. He, therefore, urged that the entire story is concocted by the prosecution. The learned Counsel pointed out that if the testimony of PW 6 is to be believed then PWs 1 and 2 cannot be considered as eye-witnesses to the offence and, therefore, their evidence is not credible. The learned Counsel further submitted that the victim could have been injured when he fell off the plum tree. The abrasions on his body indicated that it was not an assault on him which had caused his death but his fall from a tree. The leaned Counsel drew our attention to the doctor''s testimony, namely, PW 9 who conceded that such multiple injuries and abrasions were possible if a person fell off a tree, from branch to branch. The learned Counsel then urged that all the appellants are young and, therefore, they should not be treated harshly.

19. Mr. Gupta, the leaned Counsel for the State argued that immediately after the incident which occurred on 26th February, 2004 all the appellants fled away. They were absconding for 2 to 3 days and only Pranab was arrested on the day after the incident, i.e., on 27th February, 2004 at Liluah. Learned Counsel pointed out that other appellants were arrested in Jagadishpur and Bally and not in the same village as they normally

resided. This, according to him, showed their complicity. Mr. Gupta while conceding that PWs 1 and 2 may not have been eye-witnesses to the incident, submitted that PWs 3 and 4 have witnessed the incident. Their statements were recorded under Section 164 of Cr.P.C. and, those statements corroborated their testimonies in Court. The learned Counsel further submitted that there was no need to doubt the oral evidence of the witnesses, as they had no reason to implicate the appellants. He pointed out that there was a quarrel on 25th February, 2004 over the plum tree which had been brought to the notice of the police by the victim''s mother on that date. The learned Counsel then pointed out that the life of the victim who was barely 15 years old had been snatched away because of the gruesome act of the appellants. He urged that the appellants were well-aware of the consequences of that act which caused the death of the victim. He further urged that there was no need for this Court to interfere with the decision of the Trial Court.

20. We have given our anxious consideration to the submissions of the learned Counsel. The evidence on record does not prove the assault on Sonali. There is no documentary evidence of treatment from any doctor or hospital to establish that she had been assaulted. The evidence on record does indicate that PW 1 was certainly not an eye-witness. PW 2 also reached a little after her son had been assaulted as is evident from the deposition of PWs 3 and 4. In fact, it was PWs 3 and 4 who were eyewitnesses to the incident. There is no reason to disbelieve their testimonies. Their presence at the spot has been mentioned by PW 7. They had no animus against the appellants. They resided in the same village as both the appellants and the victim. Their statements recorded under section 164 Cr.P.C. corroborate their versions in Court. We have, therefore, no difficulty in accepting their version of the incident.

21. The suggestion of the defence that the victim got injured, when he fell off the plum tree, is difficult to accept. It is true that the doctor, PW 9 has conceded that injuries such as the abrasions suffered by the victim could occur if a person fell from branch to branch of a tree. However, the Doctor has opined that the nature of injuries which included haematoma over the right temporal and parietal region in the scalp tissues and the fissure fracture over right temporal parietal region were sufficient to cause death in the normal course. These injuries were inflicted on the vital part of the body and had caused the death of the victim.

22. Considering the ocular testimony and the medical evidence on record, we have no doubt that the victim died due to the assault on him. However, the evidence establishes that Prabir struck him with a wooden staff. Pradip held the victim while he was struck on the head. The others though present had not participated in the assault on him. In any event, we are of the opinion that Prabir had no intention to cause death of the victim, although, he had the knowledge that the injury inflicted on the head of the victim with the wooden staff was likely to cause his death. Thus, the conviction of Pranab, Pratap, Archana and Pradip must be set aside. As regards Prabir, we find that he has committed an offence under Section 304 Part-II of the IPC.

23. Accordingly, this appeal is partly allowed. The appellants Pranab, Pratap, Archana and Pradip are acquitted of the offences for which they were charged. Prabir is convicted under Section 304 Part-II and sentenced to suffer imprisonment for five years and to pay a fine of Rs. 5,000/-(Rupees Five Thousand only). The sentence already undergone by him shall be set off.