

(2014) 08 CAL CK 0074

Calcutta High Court

Case No: C.R.A. 255 of 2006

Praveen Kumar

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Aug. 21, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 313
- Penal Code, 1860 (IPC) - Section 302, 307

**Citation:** (2015) 2 CHN 101 : (2014) 4 Crimes 100**Hon'ble Judges:** Subhro Kamal Mukherjee, J; Shib Sadhan Sadhu, J**Bench:** Division Bench**Advocate:** Y.Z. Dastoor, Susanta Kumar Mukherjee, Prabir Majumdar and Sonali Bhar, Advocate for the Appellant; Manjit Singh and Pawan Kumar Gupta, Advocate for the Respondent

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**Judgement**

Shib Sadhan Sadhu, J.

The instant Criminal Appeal is directed against the judgment and order of conviction passed in Sessions Trial No. 24(10) 2005 arising out of Sessions Case No. 13(9) 2005 by the Learned Additional Sessions Judge, Basirhat, North 24-Parganas, dated 15.03.2006 and 16.03.2006 respectively holding the appellant guilty of the offence under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 5,000/-, in default to suffer further Rigorous Imprisonment for six months. A brief resume of the prosecution case emerging from the F.I.R. and evidence is that on 03.05.2005 at about 2.15 p.m. the de-facto complainant, Gopal Sarkar, was standing in front of the main gate of the Customs Office at Ghoadanga in connection with his export-import business. At that time he saw a "jawan" of Ghoadanga B.S.F. camp with a S.L.R. in one hand was dragging a woman with his other hand towards the B.S.F. camp abusing the woman in filthy languages. He then asked one Prakash Ghosh to look into the matter. Prakash Ghosh requested the B.S.F. "jawan" to release the woman and told him that

he (Prakash) would take that woman, who was Kiran Das, wife of Sukumar Das, to the camp. The "jawan" did not pay any heed to such request and dragged the woman to the main gate of the B.S.F. Camp and felled her on the Pucca Road, caught hold of her hairlock and assaulted her by kicks. The woman began to raise shout. Within a short while, the said "jawan" fired at the woman from his Self Loading Rifle (S.L.R.) on her belly. The said woman fell flat in front of the main gate of the B.S.F. Camp in bleeding condition. I.N.T. Inspector of that camp snatched the S.L.R. from that "jawan" and took him inside the camp. So many persons including the de-facto complainant witnessed the incident as "kirtangan" was going on in a pandal about 50 cubits away from the place of occurrence. The local people arranged for shifting the injured woman to Basirhat S.D. Hospital. The name of the guilty B.S.F. "jawan" is Constable Praveen Kumar of Battalion No. 106.

2. The de-facto complainant, thereafter, lodged written complaint on the basis of which Basirhat P.S. Case No. 124 dated 03.05.2005 under Sections 302/ 307 I.P.C. was registered. That case was investigated into. During the course of investigation, on the prayer of the Investigating Officer, the charge was altered under Section 302 I.P.C. and after completion of investigation, charge sheet was submitted under Section 302 I.P.C. against the accused/appellant.

3. Thereafter, the case was placed for trial before the Learned Additional Sessions Judge, Basirhat, North 24-Parganas, who framed charge under Section 302 of the Indian Penal Code against the present appellant and, after conclusion of trial, held the appellant guilty and convicted him as aforesaid.

4. Prosecution examined as many as 20 witnesses in order to prove the charge levelled against the appellant. On the other hand, the defence adduce no evidence.

5. Mr. Y.Z. Dastoor, Learned Senior Counsel, appearing for the appellant has advanced the following arguments while impugning the judgment under appeal:-

i) In the present case, there is neither any eye witness nor the prosecution has proved the complete chain of circumstances. Although P.W. 10 Rabin Das alleged to have seen the incident but his narration does not find place in his previous statement made before the I.O. under Section 161 Cr.P.C., which gets confirmation from the deposition of the I.O. P.W. 20, who in his deposition has clearly stated that what was stated by the P.W. 10 before the Court was not stated before him.

ii) None of the witnesses knew the accused Praveen Kumar and none of them has named or identified him in Court except P.W. 10, who only identified the accused on dock without naming him. So T.I. Parade was badly necessary for identification of the accused, but no such T.I. Parade was held.

iii) The most vital witnesses, who could have unfolded the actual incident have not been examined. Also, no independent witness has been examined. Even the I.N.T. Inspector, who grabbed the S.L.R. was not examined.

iv) Evidence of P.W. 15 Gopal Chakraborty, the Arms Expert and that of P.W. 16 Madan Ghosh, Head Constable of 106 B.N., B.S.F. show that there was no firing from the seized gun. At least it is not established beyond doubt since there was firing in Border in the month of April, 2005 and in absence of presence of smoke in the barrel of the gun.

v) There is no evidence that the bullets were not returned or that there was shortage of bullets. P.W. 15 did not state that any bullet was missing. Therefore, there is no evidence to establish that there was shortage of bullets.

vi) It is recorded in the Bed Head Ticket (Ext. 10) that the general condition of the patient was very very poor. P.W. 19, Dr. Tapan Kumar Bhattacharya, who attended the patient stated that Decadron injection and Calmpose injection were given to the patient. Also, P.W. 7 Sanjib Roy stated that she could not speak at that time. So it remains a wonder how could she make any statement at all.

vii) P.W. 14 Dr. Bikash Chandra Mondal, who conducted the post mortem examination stated that the injury might have been caused by bomb splinter. He further stated that the measurement of the injury was 6" x 4". So, such injury is not possible by bullet. Further admission by the I.O. that no mark of tearing or perforation was found in the wearing apparels of the deceased shows that there was no gunshot at all.

viii) In a case based on circumstantial evidence, motive has greater relevancy and it assumes great importance and its absence may be fatal. Like any other circumstantial evidence proof of existence of motive is necessary. But in the present case, the prosecution has hopelessly failed to spell out any motive far to speak of establishing the same.

He, therefore, emphatically contended that the prosecution has miserably failed to establish the chain of circumstances so as to make it complete and unerringly fixing the appellant with the alleged offence of murder of the deceased Kiran Das. So, the conviction cannot be sustained and the appellant is entitled to an order of acquittal by setting aside the impugned judgment and order. He relied on the decisions reported in [Raghav Prapanna Tripathi Vs. The State of Uttar Pradesh](#), ; [Sawal Das Vs. State of Bihar](#), ; [Ishwar Singh Vs. State of U.P.](#), ; [Mayur Panabhai Shah Vs. State of Gujarat](#), and [Bhagwan Dass Vs. State of Haryana](#), in support of his contention.

6. Mr. Manjit Singh, Learned Counsel appearing for the State of West Bengal, on the other hand, has vehemently opposed the appeal contending that the appellant had been found guilty of committing brutal and cold-blooded murder of a hapless woman, who was the wife of a poor rickshaw puller. The informant Gopal Sarkar (P.W. 1), who lodged the FIR has admitted his presence at the place of occurrence and that he saw the appellant to drag the victim woman and to shot her dead by his S.L.R. He, however, resized from his FIR version in his evidence and denied the involvement of the appellant in the crime. The other witnesses although saw the

incident, but did not name the appellant and stated that some B.S.F. Personnel fired the gunshot killing the victim woman. In such a fact-situation, where all the witnesses had stood by the appellant for reasons best known to them, the case otherwise stood proved by the circumstantial evidence. He further contended that T.I. Parade was not held since the accused was named in the F.I.R. The offending gun was with the accused from the time of occurrence till the time of seizure. So, it was within his special knowledge as to where the missing cartridge was. Further, P.W. 15 Gopal Chakraborty, who examined the seized S.L.R. found it in working condition and also found marks of firing inside its barrel. So, there can be no doubt that the gun was used in firing the victim. He contended yet further that the Doctor P.W. 14 found both entry and exit point of the wound which falsifies the theory of bomb blast injury. Referring to Chapter XII on Injuries by Mechanical Violence of the book of Modi's Medical Jurisprudence And Toxicology, 21st Edition Edited By C.A. Franklin, he further submitted that bullet of S.L.R. being a large bullet such huge injury is possible from close range. His yet further contention was that the case history was recorded by the Doctor P.W. 19 at the time of admission of the patient into the hospital. So such statement of the patient can be accepted as her dying declaration. Further, all relevant questions had been put to the appellant under Section 313 Cr.P.C., but he could not give any explanation. Thus, according to him, the case of the prosecution has duly been supported by the medical evidence as well as other material collected by the Investigating Officer during the investigation. The Learned Court below has rightly convicted the appellant. The appeal lacks merit and is liable to be dismissed.

7. We have perused the record and proceedings in the context of the rival submissions made by the Learned Counsels for the parties. We have also gone through the decisions placed and meticulously scrutinized the evidence adduced by the prosecution - both oral as well as documentary.

8. P.W. 10 Rabin Das, brother of the deceased woman Kiran Das, although claimed that he had witnessed the incident of assault and shooting the deceased by the appellant with his rifle, but we find that P.W. 20, S.I. Prabir Das (I.O.), being confronted with the statements of P.W. 10 disclosed that the said witness P.W. 10 did not narrate such incident to him. Hence, this is material omission. Also P.W. 11 Sukumar Das, husband of the deceased, stated that P.W. 10 did not come to their house on the fateful day. Therefore, implicit reliance cannot be placed on the evidence of P.W. 10. Further P.W. 1, Gopal Sarkar although lodged the F.I.R. as an eye witness to the occurrence, but in evidence he did not involve the appellant in the crime. Therefore, the case turns out to be a case of circumstantial evidence.

9. In a plethora of decisions, the Supreme Court of India has laid down the guidelines for appreciation of evidence in a case of circumstantial evidence. In the case of [Sharad Birdhichand Sarda Vs. State of Maharashtra](#), the Apex Court observed that it is well-settled that the Prosecution's case must stand or fall on its

own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete. The Apex Court, also, discussed the nature, character and essential proof required in a Criminal Case which rests on circumstantial evidence and held as under:

- i) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
- ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty.
- iii) The circumstances should be of a conclusive nature and tendency;
- iv) They should exclude every possible hypothesis except the one to be proved; and
- v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

10. There can be no dispute that the deceased Kiran Das had died due to haemorrhage and shock caused by ante-mortem gunshot injury.

11. P.W. 14 Dr. Bikash Chandra Mondal conducted post mortem examination over the dead body of Kiran Das on 4th May, 2005 and he proved the post mortem report prepared and signed by him with official seal. The post mortem report (Ext. 5) reads as under:

- i) One small oval shaped (almost round shaped) deep penetrating injury over outer side of left thigh upper part with charred margin (2 c.m. x 1 1/2 c.m.).
- ii) One lacerated injury 3" x 2" very deep over back of abdomen (ic) spinal chord L3 and L4 region with irregular margin and lacerating the sheath, muscles of back of L3 and L4 vertebrae.

More detailed description of the injury is recorded as a deep penetrating injury direction upwards and backwards from the left thigh upper and outer part fracturing of pelvic bones and fracturing of spinal bones of L3/L4 region with a opening point at back of spine L3/L4 region as mentioned above. Opinion: The death is due to haemorrhage and shock caused by gunshot injury.

12. Let us now assess the evidence on record in the perspective of the aforesaid guidelines of the Supreme Court of India.

13. The witnesses Gopal Sarkar (P.W. 1) and Subhas Sardar (P.W. 4) in their respective depositions have admitted their presence at the place of incident at the material point of time. The incident took place at about 2.15 p.m. on 03.05.2005 and

F.I.R. had been lodged at about 6.05 p.m. before the In-charge of Ghojadanga Police Camp and the same was forwarded to the Duty Officer, Basirhat P.S. and, accordingly, the instant case was started. The complainant Gopal Sarkar (P.W. 1) admitted that the F.I.R. (Ext. 1) was lodged by him and the same was written by Tapan Roy (P.W. 2) in his presence and thereafter, he put his signature in it. He identified that written complaint and his signature appearing thereon. P.W. 2 also identified the written complaint (Ext. 1) and stated that it is in his handwriting and it bears his signature as scribe. P.W. 2 also stated that he put his signature in the seizure list as blood and some blood soaked earth were seized. He also heard that Kiranbala was shot at and suffered gunshot injury on her belly between 2 p.m. and 3 p.m. on that day and he saw that villagers gheoroed the B.S.F. Camp. In the F.I.R. (Ext. 1) P.W. 1 narrated the incident in details and stated that on 03.05.2005 at about 2.15 p.m. while he was standing in front of the Customs Office at Ghojadanga, he noticed a "jawan" of the B.S.F. with a S.L.R. in his hand was dragging a woman with his other hand towards B.S.F. camp hurling filthy languages to the woman. He then asked Prakash Ghosh (P.W. 6) to look into the matter. Accordingly, P.W. 6 went and requested the "jawan" to release the woman but the "jawan" did not pay any heed and dragged her in front of the B.S.F. camp and assaulted her on the road by kicks by catching hold of her hairlock. Within a while the said "jawan" fired at the woman from his S.L.R. (Self Loading Rifle) on her belly. B.S.F. Inspector snatched the S.L.R. from the "jawan" and took him inside the camp. In the F.I.R., P.W. 1 clearly mentioned the name of the victim woman as Kiran Das, wife of Sukumar Das of Ghojadanga, Majherpara and he also disclosed the name of the guilty B.S.F. "jawan" as Praveen Kumar of Battalion No. 106. In his deposition P.W. 1 stated that he was on the opposite side of the road near the Customs Office. He heard noise and hue and cry coming from the border point. Suddenly, he heard sound of gunshot and rushed to the B.S.F. point where about 1000/1500 people gathered and he found a woman was lying with bleeding injury on her person. He further stated that they went to the Immigration Check Post for bringing the matter to the notice of the administration. According to him the firing was done at a place twenty cubits from the Bannian tree standing at the four point crossing. He stated further that the B.S.F. camp is only five cubits from the road and that a "Nam Sankritan Ceremony" was going on beside the road. However, he did not state the name of the victim woman and also the name of the assailant B.S.F. "jawan" and denied that he had stated in the F.I.R. that the said woman was Smt. Kiran Das, wife of Sukumar Das of their village and that the name of the "jawan" is Praveen Kumar. Thus, it is seen that in his previous statement made in the F.I.R. P.W. 1 has admitted his presence at the place of incident and suffering of the gunshot injury by the victim woman at the hands of the appellant. It was at a later stage that he has denied any role of the appellant. His statement to that effect is not trustworthy for the simple reason that he failed to offer any explanation, for, why he assigned the said role to the appellant and why he had named the appellant while lodging the F.I.R. Therefore, it is evident that the said eye witness P.W. 1 has no regard for the truth and he concealed the

material facts from the Court only in order to protect the appellant, for the reasons best known to him.

14. P.W. 4 deposed that at the relevant time he was working in the office of P.W. 1. Hearing noise and hue and cry he came out of the office and found that one B.S.F. "jawan" was dragging a woman towards the B.S.F. camp. They came inside the office and were discussing as to the identity of the woman. At that time they heard sound of gun fire. Subsequently he came to learn that Kiranbala, wife of Sukumar Das, a van rickshaw puller of their village was shot at by one B.S.F. "jawan" in front of the B.S.F. camp. Thus it is evident that P.W. 4 witnessed the first part of the incident and corroborated its second part on the point of suffering gunshot injury by the victim woman at the hands of a B.S.F. "jawan".

15. It is relevant to note in this connection that all other local witnesses namely P.W. 3 Subodh Roy, P.W. 5 Nepal Biswas, P.W. 6 Prakash Ghosh, P.W. 7 Sanjib Roy, P.W. 8 Yakub Ali Gazi, P.W. 9 Subrata Biswas and P.W. 13 Kartick Biswas have also deposed that they heard the victim woman Kiran Das was dragged towards B.S.F. camp and she had sustained gunshot injury on her belly and was lying on the ground in front of the B.S.F. Camp and that she was shot at by some B.S.F. "jawan. It is significant to note that the hearsay evidence of these P.W.s. has supported the prosecution version on the point of dragging of the deceased towards B.S.F. camp, that she was lying on the ground in front of B.S.F. camp sustaining gunshot injury and that she was shot at by some B.S.F. jawan. Added to it the medical evidence of P.W. 14 is also found to be consistent with the prosecution version of P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5, P.W. 6, P.W. 7, P.W. 8, P.W. 9 and P.W. 13.

16. The Doctor P.W. 14 categorically stated that the cause of death was due to haemorrhage and shock caused by the gunshot injury. He further opined that the injury was ante-mortem. He further stated that there was a entry point just above the left upper thigh and outer part of pelvic area with fracture of spinal bones that is, L3 and L4. The wound found on the back of the lumbar region was the exit point of the wound having upward and backward trajectory. The nature, position, and content of the injury clearly shows that it was a fire arm injury which could have been inflicted by a S.L.R. There was a wound of entrance and another of exit which could be only possible if the deceased was injured by a bullet. There is positive evidence of the P.W.s. that some B.S.F. "jawan" shot the victim woman Kiran Das on her belly. The S.L.R. was seized from the possession of the accused/appellant and it was sent to the Arms Expert for examination. The Arms Expert P.W. 15 Gopal Chakraborty was of opinion that the S.L.R. was in working condition and found marks of fire inside the barrel and he also found the magazine in working condition. These circumstances, therefore, speak volumes in support of the prosecution case.

17. Yet another circumstance which should not be lost sight of is that P.W. 16 Madan Ghosh, the Head Constable of 106 Battalion, B.S.F., "C"- Company, who was posted at Gobarda B.O.P., B.S.F. under Swarupnagar P.S. deposed that on 03.05.2005 at

5.30 a.m. he issued service S.L.R. bearing No. CS5313 with Butt No. 291/1 to Constable Praveen Kumar who was posted at Ghojadanga. Also the I.O. P.W. 20 deposed that he gave a requisition to the Company Commander, B.S.F., Ghojadanga B.O.P. for production of Constable Praveen Kumar and his arms and on being produced by B.S.F. said Praveen Kumar was arrested on 03.05.2005 and his S.L.R. (rifle) bearing No. CS5313, Butt No. 291/1 was seized from his possession under a seizure list.

18. Another fact is required to be addressed to. Though all the incriminating circumstances which point to the guilt of the accused had been put to him, yet he chose not to give any explanation under Section 313 Cr.P.C., except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. In the case at hand, though number of circumstances were put to the accused, yet he has made a bald denial and did not offer any explanation whatsoever. Even he denied the seizure of the offending weapon S.L.R. from his possession under a seizure list. When such circumstance was put to him he replied that it is false and nothing was seized from him. Thus, it is also a circumstance that goes against him.

19. Deliberating on the contention raised by the Learned Counsel for the appellant that no T.I. Parade was conducted for the P.W.s. to identify the appellant who was unknown to them, we would like to say that since the appellant was specifically named in the F.I.R., no T.I. Parade was necessary for the P.W.s. to identify the appellant. We think it appropriate to refer to the decision of the Supreme Court of India reported in [Amit Vs. State of Uttar Pradesh](#), on this score.

20. Coming to the contention regarding non-examination of the vital witnesses, who could have unfolded the actual incident, it can be said that non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The Court is required first to assess the trustworthiness of the evidence available on record and if the Court finds the evidence adduced worthy of being relied On, then the testimony has to be accepted and acted upon though there may be other witnesses available which could also have been examined but were not examined. Thus when the other evidence on record are cogent, credible and meet the test of circumstantial evidence, there is no justification to come to hold that the prosecution has deliberately withheld a witness that creates a concavity in the concept of fair trial. We derive authority to make such observation from the decision of the Supreme Court of India reported in *Harivadan Babubhai Patel v. State of Gujarat* 2014 (1) AICLR 518.

21. The next contention urged by the Learned Counsel for the appellant is that no certificate was issued by the Doctor (P.W. 19) regarding the state of mind of the



deceased and her competence to make any such statement before such declaration was taken from her. To further buttress this argument, Learned Counsel took us through the medical case records (Ext. 10) and points out that the general condition of the patient was very poor and that she was administered Decadron and Calmose injection which would result in the sedation of the patient, thus making it further impossible for the declarant/patient to honestly and clearly narrate the cause of the injury. In this context it is pertinent that P.W. 19 who recorded Ext. 10 has specifically stated in cross-examination that the patient was conscious and alert goes to indicate that she was in a fit state of mind and was in a position to speak. Remarkably P.W. 19 was not questioned about possible sedation of the declarant. Also he was not questioned about possibility about the effect of administration of drugs noticed in the medical record. Therefore, the administration of the drugs by itself cannot lead to any adverse inference regarding the condition of the victim or her competence to make a declaration and no such circumstances was suggested to the Doctor.

22. Regarding the contention relating to non-recovery of the empty cartridge and the admission by the I.O. that no mark of tearing or perforation was found in the wearing apparels of the deceased which make the story of gunshot doubtful we find that the I.O. (P.W. 20) did not state that he found any empty cartridge on the spot or that he seized such cartridge. We further find that he also admitted the absence of mark of tearing or perforation in the wearing apparels of the deceased. P.W. 14 Dr. Bikash Chandra Mondal who carried out the post mortem, has described the gunshot wound of the deceased Kiran Das as ante-mortem injuries in the left upper thigh and outer part of pelvic area with fracture of spinal bones and has opined that the cause of her death is shock and haemorrhage caused by the gunshot injury. It is needless to say that the Doctor, who has examined the deceased and conducted the post mortem is the only competent witness to speak about the nature of injuries and the cause of death. Thus, there can be no doubt to accept that the deceased died suffering gunshot injury. Moreover the seizure of the wearing apparels of the deceased was not disputed during trial. In this context it is quite relevant to mention that the law is well settled on the point that remissness and inefficiency of the Investigating Agency should be no ground to acquit a person if there is enough evidence on record to establish his guilt beyond reasonable doubt vide [Kashinath Mondal Vs. State of West Bengal](#), .

23. Dealing with the last but not the least contention made by the Learned Counsel for the appellant on the score of absence of motive we would like to say that although in a case relating to circumstantial evidence motive does assume great importance but if the chain of circumstances proved clearly point to guilt of the accused, in that event absence of motive would not entitle the accused to acquittal (vide Vivek Kalra v. State of Rajasthan 013 Cr.L.J. 1524 (SC)).

24. Thus a threadbare analysis of the prosecution evidence in the perspective of the totality of the circumstances proved leads us to hold without hesitation that the prosecution has been able to prove the guilt against the accused to its hilt and the Learned Trial Court has rightly held that the guilt is proved against the appellant.

25. The sum total of the foregoing discussion is that the Learned Trial Court has properly appreciated the evidence on record and has held the appellant guilty. We do not find any merit in the appeal. No interference is called for in exercise of our appellate powers.

26. The appeal must fail and stands dismissed. The office is directed to send down the Lower Court Records at once.

Subhro Kamal Mukherjee, J.

I agree.