

(2014) 08 CAL CK 0089

Calcutta High Court

Case No: CRA 523 of 2008

Bablu Karmakar

APPELLANT

Vs

The State of West Bengal

RESPONDENT

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

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302, 304

Citation: (2014) 4 CALLT 337**Hon'ble Judges:** S. Chatterjee, J; Nishita Mhatre, J**Bench:** Division Bench**Advocate:** Moinak Bakshi, Advocate for the Appellant; Manjit Singh, Id. P.P. and Pawan Kumar Gupta, Advocate for the Respondent**Final Decision:** Disposed Off

Judgement

Nishita Mhatre, J.

The Appellant has filed the present Appeal against the judgment and order of the Additional District and Sessions Judge, Fast Track Court No. 4, Raghunathpur, Purulia in Sessions Trial No. 4 (6) 06. By the impugned judgment dated 11th June, 2008, the Appellant has been convicted u/s 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of the fine, to suffer rigorous imprisonment for a further period of six months.

2. The brief case of the prosecution is that one Raju Karmakar was decorating the club room for the Saraswati Puja on 12th February, 2005 when at about 8.30 p.m. he suddenly heard a hue and cry outside. He rushed out of the club room and he saw the Appellant quarrelling with one Dhiren Karmakar. Samir Karmakar, was repeatedly exhorting his father, the appellant, not to assault Dhiren. Raju Karmakar

saw the Appellant with a knife in his hand. He tried to stop the Appellant from using the knife when he was struck with the knife on the finger of his right hand. Raju stepped back in fear. The Appellant then stabbed Dhiren Karmakar, Raju's uncle on his belly with the knife. The Appellant then fled away into the darkness with the knife in his hand. Raju then bandaged his uncle's wound and took him to Talajuri P.H.C. in a rickshaw van. There were 10 to 12 other persons with him at that point of time. Since Dhiren Karmakar's condition was serious, they were advised by the Doctor at the Talajuri P.H.C., to shift him to Bankura Medical College Hospital without any delay. They therefore, hired an ambassador car and drove down to Bankura Medical College with Dhiren Karmakar. Besides Raju, his uncle, Biren Karmakar, accompanied the victim in the car. The victim was admitted to the Hospital. However, he succumbed to the injury on 12th February, 2005. Raju lodged the complaint and the F.I.R. was registered on 13th February, 2005 at 9.25 a.m. The Appellant was arrested and committed to the Sessions Court for trial. The charge sheet was filed against him alleging that he was liable to be punished for murdering Dhiren Karmakar u/s 302 of the Indian Penal Code on 9th of June, 2006.

3. The Prosecution has attempted to prove its case against the Appellant by examining 21 witnesses. Out of these witnesses, P.Ws. 1, 2, 4, 5 and 7 are eye witnesses. P.Ws. 8, 9, 11, 13 and 14 claim that the victim told them that the Appellant had assaulted him immediately prior to his death. The other witnesses are Doctors and the Police personnel, who were involved in the investigation of this case.

4. The P.W. 1, Raju Karmakar, who is the complainant, has reiterated what he has stated in his complaint. He had seen the Appellant stabbing Dhiren Karmakar in the stomach and twisting the knife after stabbing him. He has stated that he was struck on the palm of his right hand by the Appellant with the same knife before the victim was stabbed. He has spoken about the presence of Samir Karmakar at the place of the incident besides Sasti Mondal, P.W. 4. He has mentioned the manner in which he bandaged the victim's wound, took him to the PHC and later admitted him to the Bankura Medical Hospital on the medical advice of the doctor at the PHC. The witness has stated that he was accompanied by 10 to 12 other persons including his uncle Biren.

5. P.W. 2, Sanjoy Gorai, has stated that he saw Dhiren Karmakar chatting with one Tarun Deoghoria, P.W. 5. He has spoken about the Appellant arriving at the scene of offence and trying to attract Dhiren Karmakar's attention. As Dhiren Karmakar did not pay heed to him, it led to a sharp exchange of words between Dhiren Karmakar and the Appellant. The Appellant then stabbed Dhiren Karmakar in the stomach. Dhiren Karmakar cried out to P.W. 2, Sanjoy Gorai, that he was being assaulted with a knife by the Appellant. The witness has mentioned that P.W. 1, Raju Karmakar, then came to the scene of offence. He has stated that Dhiren Karmakar was then taken to the Hospital where he died. In his cross-examination he has denied seeing

anybody trying to restrain the Appellant at any point of time. This statement is contrary to the deposition of P.W. 1, Raju Karmakar, where he states that he had attempted to stop the Appellant from hurting anybody with the knife.

6. P.W. 4, Sasti Mondal, has repeated the version of P.W. 2, Sanjoy Gorai, He has stated that he saw Dhiren Karmakar sitting with Tarun Deogharia, P.W. 5 under a banyan tree near the Harimandir. P.W. 4, Sasti Mondal, saw Sanjoy Gorai, P.W. 2, joining Dhiren Karmakar and Tarun Deogharia a little later. While the three of them were chatting, the Appellant came there and started clapping in front of Dhiren's face in order to draw his attention. This witness claims that the Appellant then clutched Dhiren Karmakar at the throat, and stabbed him in the stomach with a knife which was hidden under his shirt. He has also stated that after the attack, those who were working in the Pandal (Puja Mandap), rushed there and tried to grab the knife from the Appellant; in the process, P.W. 1, Raju Karmakar, sustained an injury on his finger. According to this witness, the Appellant fled away from the scene. Thereafter Dhiren Karmakar was taken to the Talajuri P.H.C. and later removed to the Bankura Medical College Hospital. This witness claims that he heard that Dhiren Karmakar died on that very night. The witness has stated that there was no light on the banyan tree and that he was not able to see Samir Karmakar, the Appellant's son, when he went close to the victim. He also denied having heard any sharp exchange taking place between the Appellant and the victim.

7. P.W. 5, Tarun Deoghoria, is another eye-witness. In his deposition, he has spoken about the presence of P.W. 2, Sanjoy Gorai, P.W. 4, Sasti Mondal and P.W. 7, Tapan Karmakar, at the scene of offence. He has mentioned that the Appellant tried to provoke the victim by clapping in front of latter's face. He has mentioned the heated exchange between the victim and the Appellant and then the fact that the Appellant caught Dhiren Karmakar by the throat with his right hand and stabbed him in the stomach with the knife. He stated that he heard Dhiren Karmakar crying out that the Appellant had assaulted him with a knife. He has spoken about P.W. 1, Raju Karmakar, coming out of the Puja Mandap on hearing the hue and cry and taking his uncle for treatment, first to the Talajuri P.H.C. and then the Bankura Medical College Hospital. He has stated that he heard Samir Karmakar, the Appellant's son, trying to exhort the Appellant not to kill Dhiren Karmakar.

8. Thus considering the testimonies of P.Ws. 2, 4, 5 and 7, who are all eye-witnesses and that of P.W. 1, who came running out of the club room after hearing the hue and cry, there is no doubt that the Appellant did stab the victim with a knife. All the eye-witnesses have corroborated each other's testimonies. There may be some minor discrepancies in their depositions. However, these are negligible and do not affect the credibility of the case of the prosecution. In our opinion, the prosecution has proved beyond doubt that the Appellant did stab the victim with a knife.

9. The involvement of the Appellant in assaulting the victim is borne out by the testimonies of P.Ws. 8, 9, 11, 13 and 14, each of whom have stated that they were

told by Dhiren Karmakar that he was stabbed by the Appellant. P.W. 8, Bela Karmakar, is a niece of Dhiren Karmakar. P.W. 9, Mathur Karmakar, is a brother of Dhiren and father of P.W. 1. P.W. 11, Bapi Chowdhury, who is a resident of Talajuri village, drove the rickshaw van with the victim to the Talajuri Hospital. P.W. 13, Biren Karmakar and P.W. 15, Shyam Chand Karmakar, had both accompanied Dhiren Karmakar to the Talajuri P.H.C. and then to the Bankura Medical College Hospital. All these witnesses claim that Dhiren told them that he was stabbed in the stomach with a knife by the Appellant. Dhiren Karmakar succumbed to his injuries soon thereafter.

10. The prosecution has used these statements made by these witnesses to implicate the Appellant as they have considered these statements as oral dying declarations made to the witnesses. However, there is no material on record to indicate that Dhiren Karmakar was in his senses after he was stabbed and that he was physically able to make a statement about the manner in which he was assaulted.

11. The knife was recovered, according to the prosecution, at the instance of the Appellant. However, that knife was not produced before the Court. The seizure list showing the seizure of the knife was exhibited. This seizure list indicates that the knife had a blade of 25" in length. The knife was recovered from a pond at the instance of the Appellant. This knife ought to have been produced in Court and the Doctor, who conducted the Post Mortem and was a witness in this trial, ought to have been questioned as to whether the knife could have caused the injuries which the victim had sustained and whether that injury was sufficient to cause death in a normal course.

12. The learned Counsel for the Appellant has harped on the fact that non-production of weapon of assault would be fatal for the prosecution case. He has relied on a judgment of the Supreme Court in the case of [Ishwar Singh Vs. State of U.P.](#), where the Supreme Court has held that the weapon of assault must be produced in Court. According to the learned Counsel, by not producing the knife, which was used to stab the victim, the prosecution had failed to prove that the knife could cause the injuries sustained by the victim and that these injuries could have led to the death of the victim in the normal course. He has relied on a judgment of the Supreme Court in the case of [Kartarey and Others Vs. The State of Uttar Pradesh](#). In this judgment the Supreme Court has observed that where injuries found on the body of the victim are forensically of the same species, i.e., stab wounds, the Court would have a problem before it as to whether all or any of the injuries could be caused with one or more than one weapon. The Court has observed that it is the duty of the prosecution as also the Trial Court to see that the alleged weapon of offence, if available, is shown to the medical witness and his opinion is invited as to whether all or any of the injuries on the victim could be caused with that weapon. The Court has further opined that a failure to do so could,

at times, cause an aberration in the course of justice.

13. The learned Counsel, appearing for the State, has argued that the non-production of the weapon of assault is not fatal in this case as the eye-witnesses have all deposed that they saw the Appellant stabbing the victim in the stomach. The learned Counsel submitted that in such circumstances when the ocular evidence on record proved the prosecution case to the hilt, it mattered little whether the knife was produced in Court.

14. It is true that there are eye-witnesses. It may not be fatal if the weapon in question is not produced in Court. However, by the production of such weapon, it would not only be easy for the Court to determine but also for the prosecution to establish the intention of the assailant. In the present case there is a seizure report. It is evident that the blade of the knife was 20" long and the butt was 5". The injury sustained by the victim, as opined by the Doctor who conducted the autopsy, shows that it is an incised penetrating wound, placed vertically measuring 1.5" x 1/2" x abdominal cavity deep. The size of the injury would indicate that although the Appellant had a knife, which had a 20"

15. long blade, he had no intention to kill the victim. Had he harboured such an intention, he would certainly not have stopped at causing an injury which was only half an inch deep.

16. The learned Counsel for the Appellant has then criticized the judgment of the Trial Court by submitting that the statement of the accused (Appellant) leading to the recovery of the knife was not signed by him. Therefore, according to the learned Counsel, this recovery cannot be termed as relevant or admissible u/s 27 of the Evidence Act. He has relied on the judgment in the case of [Sattatiya @ Satish Rajanna Kartalla Vs. State of Maharashtra](#), in support of his contention that the recovery had not been properly made.

17. We have ascertained from the material on record that there was, in fact, no signature appended to the seizure report by the Appellant. Therefore the recovery of the weapon at the instance of the Appellant has not been proved.

18. The learned Counsel for the Appellant has then submitted that there was no motive for the Appellant to commit the crime and unless that is established, it is not proper to convict the Appellant for murder.

19. It is true that the evidence on record does not establish any motive on the part of the Appellant to kill the victim. It appears, instead from the evidence on record, that the Appellant desired to provoke the victim Dhiren Karmakar by clapping in front of his face after having a heated exchange of words.

20. The learned Counsel for the Appellant drew our attention to the testimony of the Doctor, P.W. 16, Dr. Swaraj Halder. He submitted that the Doctor has stated that the death occurred due to the effect of a stab injury. The learned Counsel submitted

that the Doctor has not opined whether the injury has been caused on a vital organ nor whether the injury had caused haemorrhaging, which led to the death of the victim. According to the learned Counsel, the Doctor's opinion is rendered in a mechanical way and does not indicate whether the knife could be the cause of the injuries.

21. As we have already noted, it would have been ideal to have the knife produced in Court at the time of the trial and to ascertain from the Doctor whether the injuries sustained by the victim could have been caused by the knife, which was supposedly recovered at the instance of the Appellant. Although the recovery of the knife at the instance of the appellant has not been proved, we do not think that this would be fatal to the prosecution's case that the attack by the Appellant on the victim had led to latter's death.

22. The learned Counsel for the Appellant has then relied on the judgment in the case of [Jhaptu Ram Vs. State of Himachal Pradesh](#), to submit that at best this was a case of culpable homicide not amounting to murder. He has also cited the judgment in the case of [Sarju Prasad Vs. State of Bihar](#), to contend that the prosecution must establish the intention of the Appellant to cause the injury.

23. We have considered the evidence on record and the judgments cited at the Bar. There can be no doubt that the Appellant did strike the victim with a knife by causing a stab injury in his stomach. However, we are not convinced that the Appellant had any intention to cause death of the victim. This is a case where the Appellant had committed culpable homicide not amounting to murder. The evidence on record amply implicates the Appellant. However, the prosecution has not been able to establish that the Appellant had any intention or the motive to cause the death of the victim. Moreover, though the stab injury is in the cavity of the abdomen, the Appellant did not attempt to hit it a vital organ of the victim although he had the opportunity to do so.

24. Therefore, the judgment and order passed by the Additional District and Sessions Judge, Fast Track Court IV, Raghunathpur, Purulia, in Sessions Trial No. 4 (6) 06, is set aside. The Appellant is convicted u/s 304 Part II of the Indian Penal Code instead of section 302 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for eight years. The period of detention undergone by the Appellant so far shall be set off in view of section 428 of the Code of Criminal Procedure.

25. The appeal stands disposed of accordingly.