

(2016) 09 CAL CK 0033

CALCUTTA HIGH COURT

Case No: C.R.A. No. 705 of 2005

Nuruddin Sk.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Sept. 6, 2016**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 154
- Penal Code, 1860 (IPC) - Section 302, Section 307

Citation: (2016) 168 AIC 591**Hon'ble Judges:** Debasish Kar Gupta and Md. Mumtaz Khan, JJ.**Bench:** Division Bench**Advocate:** Mr. Jayanta Narayan Chatterjee, Amicus Curiae, Mr. Manjit Singh, Ld. Public Prosecutor, Mr. Ranabir Roy Chowdhury, Advocate, for the State**Final Decision:** Dismissed

Judgement

Debasish Kar Gupta, J. - This appeal is arising out of the order of conviction of the appellant for commission of offence punishable under Sections 302/307 of the Indian Penal Code (hereinafter referred to as the I.P.C.) and sentence to suffer imprisonment for life for commission of offence punishable under Section 302 of the I.P.C. and rigorous imprisonment for a period of 4 years and a fine of Rs.4000/- in default to suffer rigorous imprisonment for a further period of six months for commission of offence punishable under Section 307 of the I.P.C. passed by the learned Additional Sessions Judge, Fast Track Court-IV, Alipore, South 24-Parganas in S.T. No.3 (2) 04 arising out of S.C. No.38 (6) 02. There was direction for running the aforesaid sentences concurrently and for setting off of detention of the appellant in jail custody during investigation and trial from substantive imprisonment under Section 428 of the Cr.P.C. Another accused person namely, Mannan Molla was acquitted giving him benefit of doubt.

2. The backdrop of the prosecution case in a nutshell is as under:-

(i) On December 11, 2001 one Entaj Ali Molla (PW 1) and his family members namely, Nuri Bibi (his deceased wife), Nur Mohammad Molla (his deceased second son), Fuli Bibi (wife of the aforesaid deceased second son), Jahir Ali Molla (his younger son) and Moksuda Khatun (his daughter) were sleeping in different places of their residential house situated at village-Kankura, Masat, P.O.-Masat, Police Station-Diamond Harbour, District-South 24-Parganas. The third son of the aforesaid PW 1 namely, Jahir Ali Molla (PW 2) was sleeping in his bedroom with his wife. At 01.00 hours he found after awakening that 3/4 persons got upon his body and one of them was trying to slash knife on his throat. He managed to snatch that knife and moved under the cot. The accused persons started firing aiming at him. He further found that out the aforesaid miscreants Raju Sk (since deceased) caught hold of his second brother Nur Mohammad Molla (since deceased) and brought him inside the room. The appellant opened fire from his gun aiming at his aforesaid second elder brother. He fell down. Accused Nur Mohammad Sk. cut the neck of his aforesaid second elder brother. Nuri Bibi (the deceased wife of PW 1) was sleeping at the verandah of the above house with her daughter Moksuda Khatun. Accused Raju Sk. (since deceased) shoot on the side of her forehead. Nuri Bibi fell down on the floor of the verandah near the door of PW 2. The accused Nur Mohammad Sk. cut the throat of the aforesaid Nuri Bibi (since deceased).

(ii) The PW 2 ran out of his room and threw the knife on the courtyard. Some of the accused persons chased him. He jumped in a pond and the accused persons started shooting towards him. He sustained bullet injury on the right side of lower abdomen. After crossing the pond he started running towards the house of one Sajahan Sk, their next door neighbor. One of the accused opened fire aiming at him. The PW 2 was removed to Diamond Harbour Hospital with injuries sustained on his body. A statement of PW 2 was recorded by Sri P.K. Mallik, Executive Magistrate, Diamond Harbour (PW 14) at the above hospital on the same day in presence of PW 15 and PW 19.

(iii) The PW 1 started running to save himself and some how managed to escape from the attack of the accused persons. After coming back to home he found his wife was lying dead on the courtyard and his second son was lying dead inside the bed room of PW 2.

(iv) PW 20, Sub-Inspector of Diamond Harbour Police at the material point of time, received the above information at the police station at 09.05 hours over telephone from an unknown person on the same day i.e. December 11, 2001. He reached the place of occurrence 09.30 hours. He prepared rough sketch map of the place of occurrence and seized blood stained mud, plain mud, two blood stained knives with wooden handles from the place of occurrence. He received a written complaint from PW 1 on the place of occurrence and forwarded the same to Diamond Harbour Police Station. Formal FIR bearing Diamond Harbour P.S. Case No.246 dated December 11, 2001 was initiated against accused Nur Mohammad Sk., Raju Sk.

(since deceased) and Nuruddin Sk. After making entry in the General Diary bearing No.7/6 at 10.05 hours on the above date under Sections 326/307/302/341 of the I.P.C. and Sections 25/27 of the Arms Act.

(v) The PW 20 conducted the inquest examination over the dead bodies of the aforesaid Nuri Bibi and Nur Mohammad Molla. The dead bodies were identified by the PW 3, PW 8, PW 9 and PW 10.

(vi) The PW 20 sent the aforesaid two dead bodies to the Diamond Harbour S.D. Hospital through PW 12 with challans. The post mortem examinations were conducted over the dead bodies of Nuri Bibi and Nur Mohammad Molla at Diamond Harbour General Hospital by the PW 16 on December 11, 2001 at 2.30 p.m. and 3 p.m. respectively. According to the opinion of PW 16, the cause of death of Nuri Bibi was shock and hemorrhage following injuries mentioned in the post mortem report and homicidal in nature. Similarly, according to the opinion of PW 16, the cause of death of Nur Mohammad Molla was the effect of gunshot injury and ante mortem in nature. PW 2 was treated at Diamond Harbour S.D. Hospital by PW 19. One small punctured wound with charred margin was detected at right side of the abdomen of PW 2, amongst other injuries.

(vii) The appellant was arrested on December 14, 2001. After obtaining bail he was absconding. Accused Raju Sk. (since deceased) was arrested on February 22, 2002.

(viii) After completion of investigation PW 20 submitted charge sheet dated May 18, 2002 against Nur Mohammad Sk, Raju Sk, Nuruddin Sk (the appellant) and Mannan Molla showing the aforesaid Nur Mohammad Sk., and Manan Molla as absconders.

(ix) Case was filed against accused Nur Mohammad Sk and Nurrudddin Sk (the appellant) on November 28, 2003, after issuing "warrant, proclamation and attachment".

(x) Accused Mannan Molla was arrested on November 20, 2002. On February 16, 2004, charge was framed against Raju Sk and Mannan Molla for commission of offence punishable under Section 302/34 of the I.P.C. as also under Section 307/34 of the I.P.C.

(xi) After re-arrest of the appellant on the strength of warrant of arrest on April 29, 2004, charge dated June 10, 2004 was framed against the him for commission of offence punishable under Section 302 read with Section 34 of the I.P.C. as also under Section 307/34 of the I.P.C.

(xii) The accused Raju Sk breathed his last on August 19, 2004.

3. After considering the evidence of twenty prosecution witnesses, documentary evidences as also the statements of the appellant and accused Mannan Molla were recorded under Section 313 of the Cr.P.C. the impugned judgment was passed.

4. It is submitted by Mr. Jayanta Narayan Chatterjee, learned amicus curiae, that the particular place of occurrence of murder of Nuri Bibi and her second elder son Nur Mohammad Molla inside their residential house were in dispute in view of the place of occurrence mentioned in the FIR and as evident from the evidence of PW 1, PW 2, PW 3, PW 4 and PW 5.

5. It is submitted by him that there was a delay of about nine (9) hours in lodging the FIR leading to doubt with regard to implication of the appellant for commissioning of murder of the aforesaid deceased persons.

6. According to him, PW 1 added new incidents in course of adducing evidence before the Court in addition to those stated in the FIR creating doubt about the involvement of the appellant in commission of offence under reference. It is also submitted by him that there was major contradiction in between the evidence of PW 1 and PW 10 with regard to his statement made before the PW 20 (I.O.). According to the evidence of PW 20, there was no addition in his above statement to those made in the FIR by PW 1.

7. According to him, PW 2 incorporated new facts in course of the adducing evidence to his earlier statements made before the Executive Magistrate, Diamond Harbour in hospital on the date of occurrence of murder of the aforesaid persons. According to him, no overt act was evident from the surathal report at the time of stating the fact on the basis of the preliminary enquiry by the I.O. According to him, there was contradiction in between the evidence of PW 2 and PW 19 (Medical Officer) with regard to sustaining bullet injury.

8. According to him, the commission of offence by the appellant was not proved beyond all reasonable doubts in view of the absence of independent witness before the Court and in absence of framing any charge for violation of the provisions of Arms Act against him.

9. On the other hand, it is submitted by Mr. Ranabir Roy Chowdhury, learned State advocate that there was no doubt with regard to time of occurrence of the commission of murder inside the house of PW 1. The places of recovery of dead bodies as mentioned in the surathal reports of dead bodies of the deceased persons were described as places of occurrence of their murder by PW 2. It was corroborated by the evidence of eyewitnesses PW 1, PW 3, PW 4 and PW 5.

10. According to him, it was evident from the post mortem report that the causes of death of the aforesaid two deceased persons were gunshot injury. Two bullets were recovered from their bodies which were handed over to the police.

11. Mr. Roy Chowdhury submits, in his usual fairness, that the way the investigation officer (PW 20) conducted the investigation could not be said to be satisfactory so far as non-seizure of the empty bullets recovered from the dead bodies were concerned and non-sending of those bullets for obtaining forensic laboratory reports were

concerned. According to him, there was defect in seizure of weapon of offence (two knives) from the place of occurrence and non-production of the same as also the aforesaid bullets in Court. According to Mr. Roy Chowdhury, though the I.O. (PW 20) made statements in course of his examination-in-chief regarding recording of statements of the eyewitnesses at the place of occurrence on October 11, 2001. According to his deposition in course of cross-examination, he had not recorded any statement of the above prosecution witnesses. There was no scope for the prosecution for declaring him hostile at that point of time or for his further cross-examination by the prosecution counsel.

12. According to him, in spite of that faulty investigation and questionable role played by him in course of adducing evidence in cross-examination, the commission of offence by the appellant, amongst others, was proved in trial beyond any reasonable doubt.

13. Mr. Roy Chowdhury relies upon the decisions of **Sanjeev Kumar Gupta v. State of U.P., reported in AIR 2015 (SCW) 3151**; **Jodhan v. State of M.P., reported in AIR 2015 (SCW) 3589**; **State of U.P. v. Naresh, reported in 2011 (4) SCC 324** and **Alamgir v. State (NCT, Delhi), reported in 2003 (1) SCC 21** in support of his above submissions.

14. Having heard the learned Counsels appearing for the respective parties as also after considering the facts and circumstances of this case we find that the first contention of the appellant is this there was discrepancy in respect of a particular place of occurrence of murder of the deceased person in their residential house.

15. According to the settled proposition of law it has been settled by the Hon"ble Supreme Court time and again that there are bound to be some discrepancies between the narrations of different witnesses when they speak on details and unless the contradictions are of material dimensions, the same should not be used to jettison the evidence in its entirety. Reference may be made to the decision of **Leela Ram v. State of Haryana, reported in (1999) 9 SCC 525** and the relevant portion of the above decision is quoted below:-

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimensions, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. . . ."

16. From the materials on record we find that there is no dispute with regard to the time of occurrence of murder of the deceased persons. Admittedly, the murder of the aforesaid two deceased persons took place in the residential house of PW 1. From the inquest reports of the aforesaid deceased persons it was not in dispute that the dead body of Nuri Bibi was found lying adjacent to northern side of the east facing Varandah in front of the southern door of the east facing joint rooms of the aforesaid house. It was evident from the surathal report of the deceased Nur Mohammad Molla that his dead body was found lying almost 3 feet away from the north facing door of the room adjacent to the eastern wall and leaning towards the right side. The above places were mentioned by the eyewitness PW 2 as the places of occurrence of murder of the aforesaid two deceased persons. The above evidence was corroborating with those of PW 1, PW 3, PW 4 and PW 5. Therefore, the impugned judgment does not require our interference in this regard on the ground of minor discrepancies in the ocular evidence of the eyewitnesses in view of the settled principles of law.

17. The next contention of the appellant relates to alleged delay in lodging the FIR. The time of occurrence of murder of the aforesaid two deceased persons was not in dispute. It was on December 11, 2001 at 01.00 hours. From the evidence of PW 20 it was evident that he received the information at the police station of murder of the deceased persons at 09.05 hours over telephone by an unknown person on the same day. He reached the place of occurrence at 09.30 hours on the above day. A written complaint was handed over to him by PW 1 at 10.05 hours at the place of occurrence. The formal FIR bearing Diamond Harbour P.S. Case No.246 dated December 11, 2001 was drawn in the police station on the basis of G.D. Entry No.7/6 recorded on the same day. The fact of handing over the written complaint to PW 20 (I.O.) at the place of occurrence at the time mentioned herein above corroborated from the evidence of PW 1. Therefore, we do not find any substance in the allegation of delay in lodging the FIR.

18. With regard to the third contention of the appellant of bringing new facts for the first time in Court by PW 1 and PW 2 while adducing evidence, it is the settled principles of law that the preliminary object of lodging the FIR is to set the criminal law into motion and may not be possible to give minute detail with unmistakable precision in the FIR. Reference may be made to the decision of **Jitender Kumar v. State of Haryana, reported in (2012) 6 SCC 204** and the relevant portion of the above decision is quoted below:-

"18. The court has also to consider the fact that the main purpose of the FIR is to satisfy the police officer as to the commission of a cognisable offence for him to conduct further investigation in accordance with law. The primary object is to set the criminal law into motion and it may not be possible to give every minute detail with unmistakable precision in the FIR. The FIR itself is not the proof of a case, but is a piece of evidence which could be used for corroborating the case of the prosecution.

The FIR need not be an encyclopaedia of all the facts and circumstances on which the prosecution relies. It only has to state the basic case. The attending circumstances of each case would further have considerable bearing on application of such principles to a given situation. Reference in this regard can be made to State of U.P. v. Krishna Master and Ranjit Singh v. State of M.P."

(Emphasis supplied)

19. In the FIR the name of the appellant, amongst other accused persons, was available. In the statement of PW 2 recorded before PW 14, the name of the appellant, amongst other accused persons, was available. In course of adducing evidence, the name of the appellant was mentioned. The evidences were in corroboration with each other. So, we do not find any substance in the statements made on the behalf of the appellants.

20. With regard to the next contention of the appellant, that no overt act of the appellant was disclosed, we find that in the FIR, the statement of PW 2 recorded in the hospital before the Executive Magistrate, Diamond Harbour (PW 14), the name of the appellant was evident. That apart, taking into consideration the settled principles of law, as stated herein above, that it may not be possible to give every minute detail with unmistakable precision in the FIR. The evidence of eyewitness PW 2 with regard to the role played by the appellant in commissioning the offence under reference which was in corroboration with the evidence of other eyewitnesses, namely, PW 1, PW 3, PW 4 and PW 5. We do not find any substance in the above submissions made on behalf of the appellant.

21. Regarding the next contention of the appellant that no charge was framed against the appellant for violation of the Arms Act. We are of the opinion that a case where the commission of offence punishable under Section 302 of the I.P.C. was proved, the conviction of the appellant cannot be set aside on the ground of non-framing of charge under the Arms Act and particularly in a case where the weapon of offence was not recovered. It will not be out of context to mention that a separate case was initiated under Section 25/27 of the Arms Act for recovery of arms from his custody which was not claimed to be the weapon of offence in the instant case.

22. Regarding the failure on the part of the investigating agency to send the seized articles for obtaining Forensic Serological Laboratory report or non-seizure of the bullets which had been recovered from the bodies of the deceased persons, those may be considered as fault in investigation but the same are not the grounds for interfering with the conviction of the appellant when the commission of offence of the appellant was proved from the evidence of eyewitnesses and corroborating with the documentary evidences.

23. In view of the discussions and observations made herein above, this appeal is dismissed.

24. Before parting with we would like to record our observations with regard to the fault and/or laches of the investigating officer as follows:-

(i) Though the blood stained mud, plain mud and two blood stained knives with wooden handles were seized from the place of occurrence, those were not sent for obtaining forensic laboratory report.

(ii) It was evident from the evidence of the Autopsy Surgeon (PW 16) that one conical bullet with rounded base (1" in length) had been recovered from the under surface of the frontal lobe of the dead body of deceased Nur Mohammad Molla and one similar bullet had been removed from the tract from scalp to durameter of the dead body of deceased Nuri Bibi and the same were handed over to the I.O. (PW 20). Those were neither seized and sent for obtaining ballistic report or matching of the same with the gun recovered from the appellant nor the same were produced before the Court at the time of adducing of evidence by the PW 16 for bringing the same on record.

25. We cannot ignore that the above fault on the part of the investigating officer.

26. Unless appropriate steps are taken against the aforesaid investigating officer by his Superior Authority in accordance with law to stop repetition of the above conduct, the trust and confidence of the public at large on the investigating agency will be shaken. So, let a copy of this judgment be sent to the Director General and Inspector General of Police with the hope and trust of taking appropriate steps in accordance with law against the aforesaid investigating officer namely, Debkumar Roy.

27. Let this judgment together with the Lower Court's records be sent back to the learned Court below expeditiously.

28. Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J. - I agree.