

CRIMINAL APPELLATE

Present:

The Hon'ble Justice Debiprasad Sengupta

And

The Hon'ble Justice Prabhat Kumar Dey

C.R.A. No. 47 of 1999**TARUN BURMAN & ANOTHER****Versus****STATE OF WEST BENGAL**

Judgement on: 11.01.2010

Point:

DELAY.: Delay of one day in sending the FIR to the Magistrate- Whether justify the conclusion that the investigation was tainted - The Code of Criminal Procedure, 1973.

Fact: The accused/appellants preferred the instant appeal against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge whereby they were convicted under Section 304 Part I read with Section 34 of the Indian Penal Code.

Held: Where the FIR was recorded without delay and investigation started on the basis of such FIR, the delay of one day in sending the FIR to the Magistrate cannot by itself justify the conclusion that the investigation was tainted. Paragraph -18

Cases:

A. AIR 1976 SC 2423 (Ishwar Singh Vs State of U.P.)

B. AIR 2004 SC 797 (State of Madhya Pradesh Vs Ghudan)

For the Appellants : Mr. Biplab Mitra,
Mr. Sunirmal Nag,
Mr. Arindam Sen,
Ms. Trina Mitra,

For the State : Ms. Minoti Gomes

The Court:

1. This appeal is directed against the judgment and order of conviction and sentence dated 16.01.1999 passed by the learned Additional Sessions Judge, Second Court, Krishnanagar, Nadia in Sessions Trial No. III (IX) 98 (Sessions Case No. 28(9) 97) thereby convicting the accused appellants, namely, Tarun Burman and Sanjay Biswas under Section 304 Part I read with Section 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 9 years and to pay a fine of Rs.1,000/- each, in default to suffer S. I. for a further period of six months.

2. Five accused persons were put up on trial and out of them the present two appellants were convicted as aforesaid and three others were acquitted of the charge framed against them.

The prosecution case, in short, was that on the basis of a complaint lodged by P.W. 1 a case was registered with Ranaghat Police Station being Ranaghat P.S. Case No. 122 of 1997 Dated 4.6.1997 under Section 304/34 of the Indian Penal Code against all the five accused persons. In the First Information Report it was alleged that on 3.6.1997 at about 10.30 / 11.00 P.M. the accused appellants along with three others assaulted one Nepu, his wife and children. After such assault by the said accused persons they came to the house of the informant and requested his mother, Dali Das to help them by giving Rs.10/- as they wanted to proceed towards the hospital. The mother of the informant gave Rs.10/- to Nepu. The accused appellants along with three others, when they came to know that the mother of the informant helped Nepu by giving Rs.10/-, rushed to the house of the informant and threatened his mother Dali Das. It was further alleged that the mother of the informant then went out of the house for going to the local police station for lodging a complaint against the said accused persons. On the way to local police station near the house of one Tarit

Dutta the said accused persons surrounded Dali Das and assaulted her with sharp cutting weapons as a result of which the mother of the informant sustained severe bleeding injuries. Dali Das, mother of the informant, was taken to the hospital where she was declared dead.

3. To prove its case, the prosecution examined as many as 17 witnesses including the Investigating Officer and the Autopsy Surgeon and none was examined on behalf of the defence. The defence was a plea of innocence and of false implication.

P.W. 1, Kamal Das was the son of the victim lady, Dali Das and he was the informant in the present case. He stated in his evidence that on the relevant date he was at his house and at about 9.00 / 9.30 P.M. one Nepu and his wife, who were the residents of the same locality, came to their house and requested his mother Dali Das to help them by giving Rs.10/- as they were assaulted by the accused persons and they would go to hospital. His mother gave Rs.10/- and thereafter Nepu left for the hospital. On the same night at about 10.30 / 11.00 P.M. the present appellants along with three others came to their house and asked his mother as to why she gave Rs.10/- to Nepu. They were assaulted by the said accused persons with fists and blows and their mother Dali Das went out of the house for going to the local police station for lodging a complaint. When their mother reached near the house of one Tarit Karmakar, the said accused persons surrounded her and after hearing the shout of their mother, they came out of the house and found that all the accused persons had encircled their mother and out of them two were assaulting their mother. It was also alleged that accused Tarun Burman was found striking their mother with a big axe and accused Buro @ Babu Biswas @ Sanjib had been assaulting their mother with a dao. This witness further stated that he saw the incident of assault in the electric light of the municipal street. When this

witness and other inmates of the house raised alarm the accused persons fled away. They called a rickshaw van and took their mother to the hospital where she was declared dead by the doctor.

4. P.W. 2, Shyamal Das was the younger brother of P.W. 1. He corroborated the evidence of P.W. 1 and stated that at about 9.30 / 10.00 P.M. after taking his dinner he was washing his hand and at that time the accused appellants along with three others came to their house and asked their mother as to why she had given Rs.10/- to Nepu. Those accused persons also assaulted the inmates of the house and their mother went out of the house for the police station for lodging a complaint. The accused persons also went out of the house instantaneously after their mother left the house for the police station. After sometime, he heard the shouting of his mother and coming from the house he saw in the electric light of the municipal street that the accused Tarun Burman was striking on the body of their mother with an axe and accused Chhay Angul Babu was striking their mother with a dao and other three accused persons surrounded their mother. In his cross-examination he stated that he stated before the police that he saw the accused persons striking on the body of their mother with an axe and a dao and that other accused persons surrounded their mother.

5. P.W. 3, Durga Nandy was the married daughter of the victim Dali Das. She was also an eyewitness. She also corroborated the evidence of P.Ws. 1 and 2. She had stated that on seeing the assault by the accused persons her mother went out of the house for the local police station for lodging a complaint and the accused persons also followed her mother. After a while they heard a shout and she along with her brother went out of the house and found that the accused persons were assaulting their mother as a result of which her mother sustained serious bleeding injuries on her person. She identified all the accused persons in court.

6. P.W. 4 was the wife of P.W. 2. She was not an eyewitness to the incident but she corroborated the evidence of P.Ws. 1, 2 and 3 as regards the first part of the incident i.e. assault by the accused persons on her mother-in-law and other inmates of the house with fists and blows. She also stated that her mother-in-law went out of the house for local police station for lodging a complaint. She also stated that after hearing the noise she came out of the house and found that her mother-in-law was lying in front of the house of one Tarit Dutta with injuries and she found all the five accused persons were rushing to the house of accused Bisu.

7. P.W. 6, Sanjay Nandy was the grandson of the victim lady Dali Das and son of the P.W. 3. He was an eyewitness to the incident of assault and he also corroborated the evidence of P.Ws. 1, 2 and 3 on all vital aspects.

P.Ws. 7 to 11 and P.W. 15 were declared hostile by the prosecution. P.W. 12, A.S.I. Subal Chandra Das held inquest over the deadbody of Dali Das. P.W. 13, Tapan Ghosh was a witness to the seizure of weapon of assault, namely, the axe. P.W. 14, A.S.I. Ganesh Chandra Dhar drew up the formal FIR.

P.W. 16, Dr. Sarajit Chakraborty was the Autopsy Surgeon and he held post mortem over the deadbody of Dali Das. On examination, P.W. 16 found the following injuries :

- “ (1) Bone deep wound (6” x ½”) over left cheek and left ear.
- (2) Bone deep wound (5” x ½”) over right parital region of

the skull.

(3) Bone deep wound (4" x ½") over left side of chest.

(4) Deep cut wound (1 ½" x ½") over right eye.

In injury No. 3 multiple bruises were present.”

8. P.W. 16 further opined that the death was due to severe shock and cardiac respiratory failure and haemorrhage due to multiple injuries and such death was ante mortem and homicidal in nature. His further opinion was that such type of injuries was sufficient for causing death instantaneously of any person.

9. P.W. 17 was S.I. Raj Kumar Malakar and he was the Investigating Officer of the case. He visited the place of occurrence, interrogated and recorded the statement of witnesses and on completion of investigation submitted the charge sheet against the accused persons.

10. Mr. Biplab Mitra, learned Advocate appearing for the appellants submitted that the inmates of the house came to the place of occurrence after the incident of assault was over. There was no evidence to show that the eyewitnesses followed Dali Das when she left the house for the police station. When the incident of assault took place, it is submitted by Mr. Mitra, the eyewitnesses, namely, P.Ws. 1, 2, 3 and 6 were inside the house and so their presence at the place of occurrence was doubtful. But we are unable to accept such contention as we find from the evidence on record that the said witnesses never said that they followed the victim Dali Das when she left her house for going to the police station. After hearing the shout of victim Dali Das the

said witnesses came out of their house and saw the incident of assault. So, in our considered view, their presence at the place of occurrence cannot be said to be doubtful.

11. Next submission made by the learned Advocate of the appellants was that there was no reference of P.S. Case Number in the inquest report. This also, in our view, does not affect the prosecution case in any way because we find that U. D. Case Number was given in the inquest report.

12. Mr. Mitra next argued that the story of taking the victim to the hospital by P.W. 1 by a rickshaw van cannot be believed inasmuch as rickshaw puller was not examined and rickshaw van was not seized by the police. Mr. Mitra further points out that there is no hospital record that the victim was taken to the hospital by P. W. 1. But in our considered view, this argument also does not have any merit. Only because of non-examination of the rickshaw puller or non-seizure of the rickshaw van, the prosecution case cannot be disbelieved. Non-examination of any particular witness cannot affect the prosecution case if the witnesses already examined are sufficient to prove the case.

13. As regards the identification of the accused in the electric light of the municipal road, it is submitted by Mr. Mitra, learned Advocate that nothing was stated in the FIR that the informant saw the incident of assault in the electric light of the municipal road. This argument also does not have any merit inasmuch as FIR is not supposed to disclose all the particulars. The accused appellants were known to the witnesses and their identification in the electric light of the municipal road cannot be disbelieved only on the ground that it was not mentioned in the FIR, but by P.W. 1.

14. It was the further submission of Mr. Mitra, learned Advocate of the appellants that presence of P.W. 2 at the place of occurrence was also doubtful and he cannot be said to be an eyewitness. P.W. 2 never stated before the Investigating Officer that the accused appellants struck his mother with the weapons in their hands, but in the cross-examination of P.W. 17, the Investigating Officer of the case, we find that P.W. 2 stated before the Investigating Officer that after coming out of the house he found his mother lying on the ground receiving bleeding injuries on her neck and head.

15. Referring to the evidence of P.W. 3 it was submitted by Mr. Mitra, learned Advocate that she came out of the house after the incident of assault was over and so presence of P.W. 3 at the place of occurrence was also doubtful. From the cross-examination of the said witness we find that she heard the shouting and after coming out from her house, she found that her mother was lying with bleeding injuries. She also stated before the police that she saw deep cut injuries on the neck and head of her mother.

16. Referring to the evidence of P.W. 6, Sanjay Nandy, it was submitted by Mr. Mitra, learned Advocate of the appellants that P.W. 6 also cannot claim himself to be an eyewitness to the incident of assault inasmuch as he never stated before the police that the accused appellants were assaulting the victim Dali Das with the weapons in their hands.

17. Mr. Mitra next points out the conduct of P.Ws. 1, 2, 3 and 6 in not taking the victim to the hospital. It was also submitted by Mr. Mitra that seizure of weapon was also doubtful and

weapon was never seized pursuant to the confessional statement of the accused. Referring to the evidence of the Investigating Officer of the case (P.W. 17), the learned Advocate of the appellants submitted that in his re-examination by the prosecution the Investigating Officer stated that he recorded the statement of the accused after the recovery of the axe. After going through the judgment of the learned Trial Court, we also find that the learned Trial Judge also did not accept such recovery of weapon as a recovery under Section 27 of the Evidence Act.

18. The learned Advocate of the appellants relies upon a judgement of the Hon'ble Apex Court reported in **AIR 1976 SC 2423 (Ishwar Singh Vs State of U.P.)**. In the said judgement, it was held by the Hon'ble Apex Court that the extraordinary delay in sending the FIR is a circumstance which provides a legitimate basis for suspecting that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. We have gone through the said judgment, but in our considered view, the said judgment does not have any manner of application in the present case as the facts and circumstances of the said case are totally different from the present one. In the present case we find that the occurrence took place on 3.6.1997 at about 22.30 / 23.00 Hrs and the information received by the police on 4.6.1997 at 00.45 Hrs. Accordingly, it is very much clear that there was no delay in lodging the FIR. The said FIR was forwarded to the S.D.J.M., Ranaghat on 5.6.1997. From the records we find that there was a delay in sending the FIR to the court, but in our view only because of such delay the entire prosecution case cannot be disbelieved when there are so many witnesses to prove the guilt of the accused. The mere fact that the copy of FIR was received by the Magistrate after a delay of 1 day, cannot create any doubt about the prompt lodging of FIR. In cases where there is some delay in

despatching the FIR to court, that alone can in no case be taken to be a ground for throwing out a prosecution case if otherwise the same is proved by unimpeachable evidence. In the facts and circumstances of the case, we find that there was no delay in lodging the FIR. Where the FIR was recorded without delay and investigation started on the basis of such FIR, the delay of one day in sending the FIR to the Magistrate cannot by itself justify the conclusion that the investigation was tainted.

19. The next judgment, relied upon by the learned Advocate of the appellants, is reported in **AIR 2004 SC 797 (State of Madhya Pradesh Vs Ghudan)**. The said judgment also does not apply in the present case where the facts and circumstances are totally different.

20. In the present case, we find that first part of the incident took place inside the house where the victim Dali Das and her sons were assaulted by the accused appellants along with their associates inside the house. The victim Dali Das thereafter expressed her desire to go to the police station and went out of her house for that purpose. She was followed by the accused appellants and their associates. After sometime, she was attacked by the accused appellants on the road and after hearing her shout P.Ws. 1, 2, 3 and 6 came out of their house and found the accused appellants assaulting the victim Dali Das with the weapons in their hands. After going through the evidence of the said witnesses we do not find any reason to disbelieve them. All the said witnesses, namely, P.Ws. 1, 2, 3 and 6 corroborated each other on the vital aspects and we do not find any reason to disbelieve them. They were also cross-examined at length but nothing infirm could be elicited from their evidence to cast even a slightest doubt on the veracity of such witnesses. After going

through the evidence of P.W. 16, Dr. Sarajit Chakraborty, who held post mortem over the deadbody of Dali Das, we find that the same is also corroborated by the evidence of P.Ws. 1, 2, 3 and 6.

21. After considering the totality of the evidence we are of the view that there is nothing wrong with the judgment and order of conviction passed by the learned Trial Judge. So far as the conviction under Section 304 Part I is concerned, we do not find anything wrong with the same and accordingly the same is affirmed. The accused appellants were sentenced to suffer rigorous imprisonment for nine years and it is submitted by the learned Advocate of the appellants, that they have already suffered detention for more than 3 years. Considering this aspect as also the fact that this is an incident, which took place in the year 1997, we are of the view that it will meet the ends of justice if the accused appellants are sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.2,000/- each for the offence under Section 304 Part I / 34 of the Indian Penal Code. Accordingly, we reduce the period of sentence of imprisonment to seven years and direct the accused appellants to surrender before the learned Trial Court within a period of 15 days from date to serve out the remaining period of their sentence.

22. The present appeal is accordingly disposed of.

23. A copy of this judgement along with LCR may be sent down to the court below immediately.

24. Urgent Xerox certified copy of this judgment and order may be supplied to the learned Advocates of the respective parties, if the same is applied for.

(DEBIPRASAD SENGUPTA, J.)

I agree,

(PRABHAT KUMAR DEY, J.)