CRIMINAL APPEAL

Present:The Hon'ble Justice Debiprasad Sengupta
And
The Hon'ble Justice Prabhat Kumar Dey

Judgment on: 24.03.2010

C.R.A. No. 111 of 2000

MOKAB ALI & OTHERS

Versus

STATE OF WEST BENGAL

POINTS:

REASONABLE DOUBT -Inquest held before registration of FIR-FIR received by the Learned Magistrate three days after its registration-Ocular version of the eyewitnesses not fit in with the medical evidence-Only one simple natured incise wound found on the victim-Contradictory statements by eyewitnesses- Prosecution case whether proved beyond reasonable doubt - Indian Penal Code, 1860 Ss. 148,149,302,342

FACTS:

The accused appellants being armed with lathi, tangi, bomb, sword and bhojali thereby forming an unlawful assembly attacked the victim and started beating by tying him with a napkin. He was tied with a rope with the babla tree and was assaulted with the deadly weapons by the appellants. The victim died at about 10 A.M. due to such injury and thereafter the accused persons fled away.

The defence case was of false implication out of enmity and that this case was filed as a counter blast of civil suit and that there was a free fight between the two groups. In the present case, 14 witnesses were examined by the prosecution to prove its case and none was examined on behalf of the defence.

The Medical Officer attached to Suri Sadar Hospital held post mortem examination over the dead body and according to his opinion, death was due to the effect of head injury and assault injuries ante-mortem and homicidal in nature.

This appeal is preferred against the judgment and order of conviction and sentence dated passed by the learned Additional Sessions Judge, Third Court, Suri, Birbhum in Sessions Trial thereby convicting the accused appellants.

HELD:

Inquest in the present case was held before the registration of FIR and there was no explanation from the side of the prosecution as to why such Inquest was held before the registration of the FIR. The FIR was received by the learned Magistrate three days after its registration and there was no explanation for such delay. When the Inquest was held over the dead body of the victim in presence of alleged eyewitnesses, nobody came forward and stated before the Investigating Officer that he had seen the occurrence. Except Siraj, names of other accused persons are not appearing in the Inquest report although the eyewitnesses specifically mentioned their names while deposing in court. This is a case in which the ocular version of the eyewitnesses does not fit in with the medical evidence. If a person is assaulted by 10 / 12 accused persons with sharp-cutting weapons like sword, bhojali, axe, lathi etc., it is expected that there would be number of injuries on the body of the victim, but the Court found that there was only one incise wound and that too was simple in nature. When so many persons assaulted the victim with sharp-cutting weapons and when such assault continued for three hours, as per the evidence of eyewitnesses, there cannot be only one incise wound on the body of the victim. As regards the inconsistency between the ocular evidence and medical evidence, it will be extremely unsafe to maintain the conviction of the appellants on such evidence.

During cross-examination the alleged eyewitnesses were confronted with their previous statement recorded under Section 161 Cr. P.C. by the Investigating Officer of the case to indicate that they did not make such statement as eyewitnesses while examined by the Investigating Officer. Though each of the said witnesses denied such suggestion, the Investigating Officer in his cross-examination has admitted that none of those witnesses had stated before him about seeing the assault or attack by the accused persons. The prosecution case has not been proved beyond reasonable doubt. Para-32&34

CASES CITED:

Bachhu Narain Singh Vs Naresh Yadav & Others 2005 SCC (Cri) 805
Motilal & Another Vs State of Rajasthan (2009) 3 SCC (Cri) 444

Ramesh Baburao Devaskar & Others Vs State of Maharashtra (2009) 1 SCC (Cri) 212

Balaka Singh & Others Vs The State of Punjab AIR 1975 SC 1962

Sri Niwas Vs Ram Bharosey & Others (1994) Cri L.J. 1385

Syed Ibrahim Vs State of Andhra Pradesh,JT 2006 (6) SC 597

For the Appellants	:	Mr. Sekhar Basu, Mr. Debabrata Roy, Mr. Ayan Basu, Mr. Antarikhya Basu,
For the State	:	Mr. A. Goswami, Mr. Subir Ganguly,

THE COURT:

1)This appeal is preferred against the judgment and order of conviction and sentence dated 15.03.2000 and 16.03.2000 respectively passed by the learned Additional Sessions Judge, Third Court, Suri, Birbhum in Sessions Trial No. 1 of March, 1998 thereby convicting the accused appellants under Section 148/302 read with Section 149 of the Indian Penal Code and sentencing each of them to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/- each, in default to suffer rigorous imprisonment for a further period of three months for the offence under Section 302 read with Section 149 of the Indian Penal Code. No separate sentence under Section 148 of the Indian Penal Code was passed.

2)The prosecution case, in short, was that on the basis of a complaint lodged by one Bilat Sk, the father of the deceased Abdur Rahaman, a case was registered with Labpur Police Station being P.S. Case No. 6 Dated 31.10.1983 alleging that in the morning of 31.10.1983, while Abdur Rahaman was ploughing his land, the accused appellants being armed with lathi, tangi, bomb, sword and bhojali thereby forming an unlawful assembly attacked Abdur Rahaman and started beating by tying him with a napkin. Abdur Rahaman was tied with a rope with the babla tree and was assaulted with the deadly weapons by the appellants. It was further alleged that Abdur Rahaman died at about 10 A.M. due to such injury and thereafter the accused persons fled away. The defacto-complainant along with others rushed to the place of occurrence and found several injuries on his person.

3)Charge was framed under Sections 148/342/149/302 of the Indian Penal Code and under Section 9B(ii) of the Indian Explosive Act against the accused appellants. The appellants were acquitted of the charge under Section 9B(ii) of the Indian Explosive Act, but was convicted under the sections as aforesaid.

4) The defence case was of false implication out of enmity and that this case was filed as a counter blast of civil suit. It was the further defence that there was a free fight between the two groups headed by one Sahamat.

5) In the present case, 14 witnesses were examined by the prosecution to prove its case and none was examined on behalf of the defence.

6) P.W. 1, Fazlur Haque was the brother of the deceased and he stated in his evidence that he was ploughing the land adjacent to the land where Abdur Rahaman (deceased) was also ploughing. On hearing the shout he noticed that the accused appellants surrounded his brother Abdur Rahaman and started assaulting him. This witness after seeing such assault came back to his house and informed the matter to his family members. This witness along with his family members found that his brother was being assaulted. He along with his family members tried to approach to rescue his brother, but the accused persons threatened them by brandishing sword and bomb. He further stated that he went to Mayureswar Police Station from where he went to Labpur Police Station by bus. He again came to the place along with the police where the deadbody of Abdur Rahaman was kept. He also proved the signature of his father in the complaint on the basis of which the first information was lodged.

7) P.W. 2 was a seizure list witness in respect of the seizure of weapons from the house of the appellant, Siraj.

8) P.W. 3 is the sister of deceased Abdur Rahaman and she deposed that on the date of incident in the morning she heard a sound of bomb and she came out of her house and found that his brother Abdur Rahaman was tied with a rope with a babla tree. She also found that the appellants were assaulting his brother by sword, dagger, lathi, axe etc. causing bleeding injuries on his person.

9) P.W. 4 is another sister of the deceased Abdur Rahaman and she stated in her evidence that on being informed she came out of her house and found the accused persons assaulting her brother with blunt side of sword, dagger, axe, iron rod, sabals etc. after tying him with a babla tree.

10) P.W. 5 is the daughter of the deceased Abdur Rahaman and she stated in her evidence that she went to the field for giving tea to her father. In the morning she noticed that her father was being tied by a gamcha (napkin) by the accused appellants. She also found that her father was being taken away towards the east and he was being assaulted continuously. She returned to her home and informed the matter to her all family members. She further deposed that they all proceeded to the side of "kandar" and found that her father was taken to the school field and he was tied with a babla tree. The accused appellants started assaulting her father with the weapons as aforesaid.

11) P.W. 6 is the wife of the deceased Abdur Rahaman. She also corroborated P.Ws. 3, 4 and 5.

12) P.W. 7 was the scribe of the FIR and he proved the FIR as Exhibit 1.

13) P.W. 8 was the Medical Officer attached to Suri Sadar Hospital and he held post mortem examination over the deadbody of Abdur Rahaman. On examination, he found the following injuries :

"I. Multiple slight abrasions all over the body.

II. One incise wound 1" x ½" on right elbow joint on dorsal aspect.

III. Fracture of four to seven ribs on the right side and

IV. Four to six ribs of the left side.

V. Fracture of right lateral aspect on the frontal bone.

VI. Right lung rapture.

VII. Liver rapture. "

14) According to his opinion, death was due to the effect of head injury and assault injuries ante-mortem and homicidal in nature.

15) P.W. 9 was the S.I. of Police, who conducted the first part of the investigation. P.Ws. 10 to 12 are the formal witnesses. P.W. 13 was the S.I. of Police, who took over the charge of the case and submitted charge sheet.

16) P. W. 14 was the Investigating Officer of the case. He proved the G.D. Entry No. 878 Dated 31.10.1983 with regard to a telephonic message from Babar Ali from Officer-in-Charge, Mayureswar Police Station at about 10.15 Hours (Exhibit 7). On receipt of such information he along with force had been to the village Mirbandh and found the deadbody of Abdur Rahaman in the field of Dwarka High School. He recorded the statements of witnesses and recovered weapons from the house of accused Siraj.

17) Mr. Sekhar Bose, learned Advocate appearing for the appellants submitted that in the present case preparation of Inquest over the deadbody preceded the lodging of FIR. FIR was registered on 31.10.1983 at 12.45 Hours, but the Inquest was held at 11.30 A.M. i.e.

prior to the registration of the FIR. It was pointed out by Mr. Bose, learned Advocate that the particulars of the case was mentioned at the top of the Inquest report although at that point of time there was no existence of such case. The Investigating Officer did not claim to have received the particulars of the case from the police station while he was preparing Inquest report nor did he say that he mentioned the particulars of the case after the case was registered. It is also the contention of Mr. Bose, learned Advocate that although the case was registered on 31.10.1983, the same was received by the learned Magistrate on 3.11.1983 i.e. three days after the registration of such FIR. No explanation was offered from the side of the prosecution regarding such delay. In such circumstances, it was the contention of the learned Advocate, there was sufficient reason to accept the defence version that such FIR was registered much later than the given date and hour giving sufficient time to the prosecution party, who are inimical to the accused, to setup a distorted version of the occurrence.

18) It was the further contention of Mr. Bose, learned Advocate that Inquest was held in presence of the relations of the deceased which included the eyewitnesses, but surprisingly the name of only Siraj Sk was mentioned as an accused in the said inquest report. Mr. Bose pointed out that it was really surprising as to why the P.Ws. 1, 3, 4, 5 and 6, who claimed themselves to be the eyewitnesses, did not mention the names of the assailants before the Investigating Officer of the case, who was holding the Inquest over the deadbody. According to the learned Advocate, there is a serious doubt about the presence of the eyewitnesses at the place of occurrence when the Investigating Officer

came to the place and this also casts a serious doubt as to their presence at the time when the occurrence took place.

19) Mr. Bose, learned Advocate relied upon a judgment of the Hon'ble Supreme Court reported in **2005 SCC (Cri) 805 (Bachhu Narain Singh Vs Naresh Yadav & Others).** From a reading of the said judgment, it appears that challenging an order of acquittal by the High Court reversing the judgment of the Trial Court, an appeal was preferred before the Hon'ble Apex Court. In the said case eyewitnesses were ten in number. Though the Investigating Officer prepared Inquest report at the spot for more than one hour, no one came forward before him claiming to be an eyewitness. FIR was lodged by one of the alleged eyewitnesses after more than 1 & ½ hours subsequent to the arrival of the Investigating Officer at the place of occurrence. In such circumstances, it was held by the Hon'ble Apex Court that presence of the alleged eyewitnesses at the time of occurrence was doubtful and their evidence did not inspire confidence.

20) Next judgment relied upon by Mr. Bose is reported in **(2009) 3 SCC (Cri) 444 (Motilal & Another Vs State of Rajasthan).** In the said case the FIR was received by the Magistrate after four days and such delay was not explained although it was required to be explained by the Investigating Officer by plausible evidence on record. It was also not explained as to how the Inquest was undertaken at a point of time when the FIR was not in existence. Mr. Bose relied upon paragraphs 5, 6, 10 and 11 of the said judgment, which are quoted below :

"5. In appeal, the stand basically taken was that there was ante-dating of the first information report. The report was purportedly lodged on 11.11.1993 at about 10.50 a.m. The llaqa Magistrate received it on 16.11.1993. The delay has not been explained. Apart from that the place of incident has been shifted. It was also pointed out that the ante-dating of the FIR is evident from the fact that the admitted case of the prosecution is that the FIR was lodged on 11.11.1993 at 10.50 a.m., but strangely, the inquest report shows that the inquest was started at 10.30 a.m.

6. The stand of the State before the High Court was that merely because there was delay in dispatch of the FIR to the llaqa Magistrate that cannot throw any doubt on the credibility of the prosecution version. There were two injured witnesses. Even if there was a discrepancy between the time indicated in the FIR and the inquest, that was a lapse on the part of the investigating officer and it cannot be a factor in favour of the accused persons. The High Court accepted the stand of the State and recorded the conviction as aforenoted.

* *

10. Apart from that, the unexplained discrepancy in the timings as recorded in the inquest report and the FIR has to be kept in view. It is the prosecution version that the FIR was lodged at 10.50 a.m. If that was so, it was required to be explained by the investigating officer by plausible evidence on record, as to how the inquest was undertaken at 10.30 a.m. at a point of time when the FIR was not in existence. The High Court has lightly brushed aside the plea of the appellants that it may be the lapse on the part of the investigating officer.

11. It is true that a faulty investigation cannot be a determinative factor and would not be sufficient to throw out a credible prosecution version. But in the instant case there is no explanation offered even to explain the discrepancies. "

21) The next judgment of the Hon'ble Apex Court relied upon by the learned Advocate of the appellants is reported in **(2009) 1 SCC (Cri) 212 (Ramesh Baburao Devaskar & Others Vs State of Maharashtra).** In the said judgment it was held by the Hon'ble Apex Court that a first information report cannot be lodged in a murder case after the Inquest has been held.

22) The learned Advocate of the appellants also relied upon a judgment of the Hon'ble Apex Court reported in **AIR 1975 SC 1962 (Balaka Singh & Others Vs The State of Punjab).** From a reading of the said judgment it appears that challenging an order of conviction and sentence appeal was preferred by nine accused persons and the High Court acquitted four of the accused persons because of the omission of their names in the body of the Inquest report. In the said case the delay in sending copy of FIR to the Magistrate also remained unexplained. The prosecution party was also inimical to the accused. FIR was found to have been written after the Inquest report was prepared by the police. On appeal by the five convicted accused persons, out of nine, it was held by the Hon'ble Apex Court as follows :

"In these circumstances, therefore, we are satisfied that in view of the finding of the High Court that the F.I.R. was a belated document having come into existence much later than the time it is said to have been recorded

and which adds the names of the four accused against whom the prosecution case is absolutely identical with the appellants, the case of the appellants cannot at all be distinguished from that of the four accused in any respect. If the case against the four accused fails, then the entire prosecution will have to be discarded and it will not be possible for this Court to make out a new case to convict the appellants as has been done by the High Court. "

23) Referring to the evidence of the eyewitnesses, it was submitted by the learned Advocate of the appellants that P.W. 1 was wholly unreliable witness and he falsely claimed to be an eyewitness. He was examined by police on 7.11.1983 i. e. seven days after the incident. According to P.W. 1 blunt side of Bhojali was used for assault and not other weapons. He denied the suggestion that there was a fight between his brother's group and the anti group. The articles, which were allegedly seized from the house of the accused Siraj, were neither labeled nor the signatures of the witnesses were taken on the label. The learned Advocate further points out that deposition of P.W. 2 clearly indicates that he signed the seizure list in the school field where the articles were brought and this means that the seizure list was not prepared at the place of seizure.

24) The evidence of P.Ws. 3 and 4 is also not reliable. P.W. 3, although she was standing at a distance of 10 cubits from the place of assault and bombs were thrown to them, yet none received any injury and none retreated. She did not state before the Investigating Officer that she heard explosion of bombs and rushed to the place of occurrence. She stated that police seized the remnants of bombs, which was a claim not supported by the Investigating Officer of the case. P.W. 4 stated that she was informed by "hut people" that her brother was being assaulted. She further stated that such assault

continued for three hours. She got the information about assault at 9.30 A.M. whereas P.W. 1 saw the occurrence at 6.30 A.M.

25) P.W. 5 was Rousona, the daughter of the deceased. She did not say about throwing of bombs and her description of the incident suggests that sharp-cutting weapons were used for assaulting her father. She also stated that such assault continued for three hours. P.W. 6 did not say anything about hurling of bombs. She was examined on the following day and she also stated that the incident continued for three hours.

26) Referring to the aforesaid discrepancies, it was submitted by Mr. Bose, learned Advocate of the appellants that the evidence of the eyewitnesses, namely, P.Ws. 1, 3, 4, 5 and 6, who claimed to have seen the incident of assault, was not at all reliable and their presence at the place of occurrence was quite doubtful.

27) The learned Advocate of the appellants next argued that the evidence of the Autopsy Surgeon casts a serious doubt about the reliability of the prosecution case. He found only one incise wound at the right elbow joint, which was a simple injury and might have been caused by sharp edged substance like broken glass or stone. He further stated that injury no. 1 may be caused by scratching over rough surface and there will be number of external injuries if a person is assaulted by 10 / 12 persons with swords, dagger etc. Absence of incise wound or wounds corresponding to fractural wound goes against use of sharp-cutting weapons. This witness further opined that such injuries are expected in a case of free fight between two groups. The Autopsy Surgeon, it was pointed out by the

learned Advocate of the appellants, did not opine that the injuries were sufficient in the ordinary course of nature to cause death. It was the contention of Mr. Bose that in view of this glaring inconsistency between the ocular and medical evidence, it would be extremely unsafe to maintain the conviction of the appellants on such evidence.

28) Mr. Bose next relied upon a judgment reported in **1994 Cri L.J. 1385 (Sri Niwas Vs Ram Bharosey & Others).** In the said judgment oral testimony of witnesses was in conflict with the medical evidence. It was held by the Hon'ble Apex Court that true picture of occurrence was not placed by the prosecution before court and accordingly, the accused was entitled to benefit of doubt.

29) Mr. Bose, learned Advocate next argued that the Investigating Officer might have found the deadbody on the field of the school, but that place was not the place of occurrence. It is in the evidence of the Investigating Officer that before leaving the police station he had no idea as to the place where he had to go and none of the villagers took the police party to the place of occurrence. There is no exact description of the place and no specific reference of babla tree in the seizure list. The Investigating Officer did not examine any independent person for ascertaining actual state of affair. He did not try to ascertain from the local villagers as to the exact location of the place where the incident took place. Since the Investigating Officer could not ascertain the place of occurrence with exactitude, the sketch map disappeared from the case diary. Referring to the judgment of the Hon'ble Apex Court reported in **JT 2006 (6) SC 597 (Syed Ibrahim Vs State of Andhra Pradesh),** it was submitted by the learned Advocate of the

appellants that when the place of occurrence itself has not been established, it would not be proper to accept the prosecution version.

30) Mr. Goswami, learned Public Prosecutor submitted that technically Inquest cannot be held before registration of FIR, but normally this is done in so many cases. According to him, this sort of technical defect should be ignored when no prejudice was caused to the defence. It was further submitted by the learned Public Prosecutor that when the prosecution witnesses were deposing after so many years, it was quite natural that there would be some discrepancies in their evidence. According to Mr. Goswami, although the Investigating Officer could not fix up the place of occurrence, the prosecution case cannot be disbelieved only on that ground.

31) It was further submitted by the learned Public Prosecutor that this was a case of brutal murder in front of so many eyewitnesses and there was no reason to disbelieve the said eyewitnesses although they were near relations of the victim. Although the ocular version of the eyewitnesses does not fit in with the medical evidence, the entire prosecution case should not be disbelieved only on that ground.

32) We have heard the learned Advocates of the respective parties. We have scrutinized the entire evidence on record. Admittedly, Inquest in the present case was held before the registration of FIR and there was no explanation from the side of the prosecution as to why such Inquest was held before the registration of the FIR. The particulars of the case find place at the top of the Inquest report, which was prepared at 11.30 A.M. although at

that point of time there was no existence of the FIR. The FIR was received by the learned Magistrate three days after its registration and there was no explanation for such delay. When the Inquest was held over the deadbody of the victim in presence of alleged eyewitnesses, nobody came forward and stated before the Investigating Officer that he had seen the occurrence. Except Siraj, names of other accused persons are not appearing in the Inquest report although the eyewitnesses specifically mentioned their names while deposing in court. This is a case in which the ocular version of the eyewitnesses does not fit in with the medical evidence. If a person is assaulted by 10 / 12 accused persons with sharp-cutting weapons like sword, bhojali, axe, lathi etc., it is expected that there would be number of injuries on the body of the victim, but we find that there was only one incise wound and that too was simple in nature. When so many persons assaulted the victim with sharp-cutting weapons and when such assault continued for three hours, as per the evidence of eyewitnesses, there cannot be only one incise wound on the body of the victim. As regards the inconsistency between the ocular evidence and medical evidence, we find sufficient merit in the submission made by Mr. Bose, learned Advocate of the appellants and in view of such glaring inconsistency, it will be extremely unsafe to maintain the conviction of the appellants on such evidence.

33) During cross-examination the alleged eyewitnesses were confronted with their previous statement recorded under Section 161 Cr. P.C. by the Investigating Officer of the case to indicate that they did not make such statement as eyewitnesses while examined by the Investigating Officer. Though each of the said witnesses denied such suggestion, the Investigating Officer in his cross-examination has admitted that none of

those witnesses had stated before him about seeing the assault or attack by the accused persons.

34) In view of the discussion made above, we find sufficient merit in the submissions made by Mr. Bose, learned Advocate of the appellants. We are clearly of the opinion that the prosecution case has not been proved beyond reasonable doubt.

35) The appeal is accordingly allowed. The impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Third Court, Suri, Birbhum in Sessions Trial No. 1 of March, 1998 is hereby set aside. The appellants are acquitted of the charges framed against them. The appellants, who are on bail, will now be discharged from their respective bail bonds.

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

37) 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.)

38) I agree,

(PRABHAT KUMAR DEY, J.)

Mr. Amit Prakash L

Mr. Monire Alam.
…For the Petitioner.
Mr. Subrata Mukhopadhyay,
Mr. Mrinal Kanti Sardar.
…For the State.

This writ petition has been filed challenging the order dated 10th September, 2009 passed by the learned West Bengal Administrative Tribunal in case number O.A.775 of 2009 whereby and whereunder the said learned Tribunal finally disposed of the

application filed by the petitioner herein on merits. From the records, we find that the petitioner herein was convicted under Section 302 of the Indian Penal Code and sentenced to suffer life imprisonment. The petitioner thereafter preferred an appeal before this Court and was released on bail pending disposal of the said criminal appeal. The said petitioner prayed for release of his retiral benefits which was not allowed by the respondent authorities.

The learned Tribunal while finally disposing of the application specifically held that until and unless the petitioner is exonerated by this Court after final disposal of the appeal, no retrial benefits can be released to the said petitioner.

Mr. Lahiri, learned Counsel representing the petitioner submits that in terms of Rule 10 (2) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971, the petitioner is entitled to receive pensionary benefits since the appeal court has already suspended the sentence and enlarged the petitioner on bail.

We are unable to accept the aforesaid contention made on behalf of the petitioner. In terms of Rule 14 of the said Rules, if an employee is convicted on a criminal charge involving moral turpitude, he/she shall not be entitled to any pension.

In view of the aforesaid clear provision, the petitioner herein is, therefore, not entitled to claim any pension until and unless the order of conviction is set aside by the Appellate Court while finally deciding the pending appeal.

For the aforementioned reasons, we do not find any error and/or infirmity in the decision of the learned Tribunal.

This writ petition, therefore, stands dismissed since we do not find any merit in the same.

There will be no order as to costs.

Xerox plain copy of this order countersigned by the Assistant Registrar (Court) be given to the appearing parties on usual undertaking.

(Pranab Kumar Chattopadhyay, J.)

(Pranab Kumar Deb, J.)