IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

The Hon'ble Justice Nishita Mhatre
And
The Hon'ble Justice Samapti Chatterjee

CRA 40 of 2008

Nripen Das
... Appellant

Vs.

State of West Bengal
... Respondent

For the Appellants : Mr. Subir Ganguly
Mr. Jayanta Banerjee
Ms. Ruxmini Basu Roy

For the State : Mr. Pawan Gupta

Heard on : 28.08.2014

Judgment on : 08.09.2014

Nishita Mhatre, J.:

1. The shoddiness and callousness of the State machinery in the Administration of Criminal Justice is writ large in this case. The Executive Magistrate who has allegedly recorded a dying declaration has done so without any knowledge of law. The perfunctory job done by the Investigating Agency is apparent from the lack of cohesiveness and the failure to recover the weapon of assault. The time of death of the victim has not been ascertained. The Trial Court while recording the statement

of the appellant under Section 313 of the Cr.P.C. has not made him aware of his rights available under Section 313 of the Cr.P.C.

2. The case of the prosecution is that the appellant entered the house of the deceased while he was having his dinner at about 10.30 p.m. and assaulted him with a sharp edged weapon. The mother of the deceased was present and she raised a hue and cry due to which the brother of deceased and other villagers rushed to the spot. They learnt of the incident from the mother of the deceased. The victim who was injured was immediately admitted to a hospital in Jalpaiguri. He was treated there and died 24 days after he was assaulted. The so-called dying declaration of the victim has been recorded by the Executive Magistrate. On his death in the hospital, an inquest report was prepared. The appellant was absconding initially and surrendered before the Court on 22.11.1999. The appellant was charged for having murdered the victim, Paritosh Debnath. As the appellant claimed to be tried, the Sessions Court tried the case against him.

3. The prosecution relied on the testimony of 12 witnesses in order to prove its case against the appellant. PW 3, the mother of the victim, is the only eye-witness to the incident. She has stated that the appellant who was her neighbour stabbed her son on his left side with a dagger. This happened when she was serving dinner to her son. She raised a hue and cry and her son Sushil Debnath, PW 1, reached the spot. According to her, the assault occurred just before PW 1 entered and the

appellant managed to flee away. She has also mentioned that others rushed to the spot. Thereafter her son was admitted to the hospital where he died 24 days later. In her cross-examination, she has admitted that she could not remember whether there was a supply of electricity in her village at the relevant time. She has mentioned that the police, who arrived on the spot, seized the blood-stained earth and the utensils which were used for cooking.

4. PW 1, the son of PW 3 and the brother of the victim, has spoken about the incident as narrated to him by his mother. However, he has stated that he saw the appellant fleeing away with a dagger in his hand. This witness could not remember the exact date of death of his brother but stated that he died 24 days after he was assaulted. PW 1 submitted a written complaint in respect of the assault which was received by PW 2. On the basis of the complaint he filled the formal FIR. Surprisingly, the date, time and hour of occurrence have been deleted in the formal FIR.

5. PW 4 is a villager who has been declared hostile.

6. PW 5 is another villager who has stated that having learnt of the assault of Paritosh, he accompanied the victim to the hospital. This witness has admitted in his cross-examination that the Investigating Officer did not interrogate him at any point of time.

7. PW 6 is the constable who took the dead-body for post-mortem.

8. PW 7 is the owner of a rice mill which is situated near the victim's house. He claimed that he heard Paritosh's mother crying out that her son had been killed. According to him she uttered the name of the appellant as the assailant. He has stated that he saw the appellant leave the victim's house with a dagger in his hand. In his cross-examination the witness has stated that he was interrogated by the police when the inquest was conducted. However, he has admitted that he did not mention to the police the point of time that he saw the appellant coming out of the victim's house with a dagger in his hand.

9. PW 8 accompanied the victim to the hospital. He also stated that he heard the victim's mother shout out that her son had been killed, due to which he rushed to the spot along with others. He is a witness to the inquest report. He has admitted in his cross-examination that he was never interrogated by the police.

10. PW 9 was a witness to the seizure of some clothes. But he did not know anything further in the matter. He admitted that the deceased's clothes were not in Court on the day he deposed.

11. PW 10 is the Executive Magistrate who recorded the dying declaration of the victim in 1988. He claimed that at the relevant point of time his right hand was injured and therefore he dictated the relevant material to some other person and later signed the report. He has

admitted that the document alleged to be a dying declaration did not mention the date or the time when it was recorded or the ward of the hospital or the bed number where the declaration was recorded. He has also admitted that so-called declaration does not indicate the case number in connection with which the dying declaration was being recorded. This witness did not take the trouble to ascertain whether the patient was mentally fit and physically alert to make the declaration. The witness further admitted that he had not mentioned that the statement of the victim was voluntary, nor had he obtained his thumb impression or signature on the document. The attending nurses and doctors were also not asked to certify that the victim was in a fit condition to declare the reasons for his death.

12. PW 11 is the doctor who conducted the autopsy. He has stated that he found one surgically stitched injury over the left side of chest, vertically 6 cms. in length. According to him, there was a tear in the left lobe of the liver which was 3 cms. in size. He has opined that the death was due to the injuries described by him and was ante mortem and homicidal in nature. However, he was unable to indicate the weapon which could have been used for the assault. The witness has stated that he did not mention the time of death before conducting the post-mortem.

13. PW 12 is the Investigating Officer who has bungled this case. He has not bothered to seize the blood-stained earth and controlled earth from the place of occurrence. He has not recovered the weapon of

assault. He has admitted that while in the FIR the name of the accused was shown as Nripen Das son of Deben Das, the charge-sheet was submitted against Nripen Das son of Sridan Das. This witness did not bother to examine the Executive Magistrate, nor did he seize any documents to ascertain the ownership of the property to substantiate the charge under Section 445 of the IPC.

14. Despite all these lacunae in the investigation, the Trial Court has found the appellant guilty of the offence under Section 448 read with Section 302 of the IPC. The case was initially started under Section 448 read with Section 326 of the IPC. After the victim expired a charge was framed under Section 302 of the IPC.

15. Mr. Subir Ganguly, the learned Counsel appearing for the appellant, has submitted that the evidence led by the prosecution does not unmistakably point to the appellant having committed an offence under Section 302 of the IPC. According to him, PWs 1 and 3 have not corroborated each other's version of the incident. While PW 3 speaks about the appellant fleeing from the place of occurrence immediately after stabbing the victim, PW 1 who came a little later has stated that he saw the appellant fleeing away. The learned Counsel therefore submits that there is a contradiction in the accounts of PWs 1 and 3. Therefore, if one is believed, the other has to be disbelieved. PW 3 has said that the appellant fled away after he stabbed the victim, while PW 1 has stated that he rushed immediately after hearing his mother's alarm. When he

reached the spot he saw the appellant fleeing from there. In our opinion, there is no contradiction in these two versions. In fact both the witnesses have said that the appellant fled from the scene offence. There can be no doubt that PW 3, the mother of the victim, was an eye-witness to the incident. She saw the appellant stabbing the victim on the left side of his chest with a dagger. Therefore, the evidence on record does implicate the appellant.

16. The learned Counsel then submitted that while the FIR mentions the name of the assailant, the inquest report which was recorded 24 days later does not indicate that the assailant was the appellant. He pointed out that PW 1 who is the first informant is also a witness to the inquest and therefore ought to have mentioned the name of the assailant. According to the learned Counsel the failure to do so casts a doubt on the story of the prosecution that the appellant was involved in the crime.

17. This submission of the learned Counsel is not tenable. It is not necessary that the inquest report must record the name of the assailant. The inquest report is mainly about the manner in which the body of the victim was found which assists in the investigation of the crime.

18. The learned Counsel has then pointed out that the FIR does not mention the date and hour of the crime. However, in the facts and circumstances of the present case we do not find that this could be fatal to the prosecution in the present case. The complaint which forms part

of the FIR mentions the time and the date on which the incident occurred. It is true that the formal FIR should have also mentioned the date and time of occurrence. Though the details were filled in earlier, they have been deleted. The learned Counsel then submitted that FIR mentions that the victim was stabbed with a knife whereas PWs 1 and 3 in their depositions before the Court have stated that the dagger was used by the appellant. The weapon of assault has not been seized, which again is the fault of the Investigating Agency. However, this would not lead to the inference that the victim was not assaulted by the appellant.

19. As we have already mentioned the Executive Magistrate allegedly recorded a dying declaration. Apparently he did not have the basic knowledge as to how such a dying declaration is to be recorded and the caution with which it must be done. He has not bothered to note the time, the date and the place when the declaration was recorded, nor has he cared to ascertain from the doctors attending the victim whether he was mentally alert and physically sound in order to give a declaration. This declaration was not recorded by him personally as he had injured his right hand. He had dictated it to another person who has not been examined by the prosecution. This so-called dying declaration which has been exhibited has no evidentiary value at all. No reliance can be placed on the document to prove the case of the prosecution.

20. After considering all the evidence on record we find that there is no doubt that the appellant had stabbed the victim with a sharp edged

weapon, a dagger on the left side of his chest. The injury was vertically 6 cms. in length as seen from the doctor's evidence. The victim's left lung had collapsed and there was a tear in the left lobe of the liver which was 3 cms. in size. There is no indication about the nature of treatment given to the victim in the hospital for 24 days after the assault on him. It is true that the nature of treatment administered to him during this period of time ought to have been brought on record. The Investigating Officer has admittedly failed to seize the bed-head ticket and other relevant medical papers from the hospital authorities.

21. Taking into account the medical evidence on record and the evidence of PW 3, there can be no doubt that the death of the victim resulted due to the injuries sustained by him. However, there can be no doubt that the offence committed by the appellant is not one which is punishable under Section 302 of the IPC. The Trial Court has erred in convicting the appellant under Section 302 of the IPC. In our opinion, considering the nature of injury it was a grievous hurt caused by the appellant. The victim was hospitalized for 24 days after which he died. Therefore, the appellant is liable to be punished for causing grievous hurt with a dangerous weapon and liable to be punished for such offence. The appellant has already been in custody since 2nd December, 2007. In our opinion, he is liable to be punished for 7 years and to pay a fine of ₹2000/-.

22. Accordingly, the judgment and order of the Trial Court is set aside. The appellant is convicted for the offence punishable under Section 326 of the IPC and sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of ₹ 2,000/-, in default of payment of which he shall undergo further rigorous imprisonment for 3 months. The sentence undergone by the appellant shall be set off.

23. The appeal is allowed accordingly.

24. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

(Samapti Chatterjee, J.) **(Nishita Mhatre, J.)**