

Sadre Alam Mullick Vs. State

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Court : Kolkata

Decided On : Mar-13-1997

Reported in : 1997CriLJ2441

Judge : Nure Alam Chowdhary and ;D.P. Sarkar-II, JJ.

Acts : Indian Panel Code, 1860 - Sections 34, 149, 211, 302, 302, 302, 304, 307, 364, 380, 457 and 511; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 154, 162, 294 and 313

Appeal No. : Criminal Appeal No. 21 of 1991

Appellant : Sadre Alam Mullick

Respondent : State

Advocate for Def. : R.N. Basu and ;Ranjit Ghoshal, Advs.

Advocate for Pet/Ap. : Sekhar Bose and ;Ashoke Biswas, Advs.

Judgement :

D.P. Sarkar-II, J.

1. This Criminal Appeal is directed against the judgment and the Order of conviction and setnence passed by the Additional Sessions Judge, 1st Court, Bankura in Sessions Trial No. 1 of May, 1988 under Section 302 of the Indian

Penal Code arising out of Indus P.S. Case No. 19 of 1981.

2. The facts, in short, leading to this case are as follows: --

The deceased Abu Bakkar was the husband of the informant viz. Sahara Begum. The deceased had amorous relationship with the 1st wife of the convict-appellant - Sadre Alam Mullick. On 30-8-1981 at about 9.00 p.m. after taking the night meal the deceased -- Abu Bakkar came out of his house when the convict-appellant with the help of the other accused persons forcibly abducted him in presence of the informant and took the deceased to the house of the convict-appellant. The informant called her brothers-in-law and the father-in-law. The brothers-in-law went to the house of the convict-appellant and found that the deceased was being assaulted with sharp cutting weapon. On being afraid they could not interfere and silently they came back and reported the incident to the informant. The informant raised alarm and at that time she heard the sound of two firings. The villagers also were attracted and they went to the house of the convict-appellant where they also found the dead body of Abu Bakkar with multiple bleeding injuries on his person lying on the ground.

3. Another important aspect to this incident of murder appeared from the evidence of the police officer. According to that police officer viz. Sri D.K. Chanda, on 31-8-1981 at about 6.30 a.m. one of the accused persons viz. Aminul Haque son of accused Abdul Gani called at the police station, Indus and informed that a burglary was being committed in the house of the convict-appellant Sadre Alam Mullick on the previous night and the owner of the house assaulted the thief with a cutlery and the thief expired as a result. On the basis of this information Indus Police Station Case No. 18 dated 31-8-81 was started, under Sections 457/380/307 and 511 of the Indian Penal Code. On the basis of that information when the police reached the village they found the dead body of Abu Bakkar in the house of the convict-appellant - Sadre Alam Mullick and they also recorded the statement of the widow of the deceased on the spot which was treated as First Information Report and the formal FIR was drawn up on its basis starting Indus P.S. Case No. 19 dated 31-8-81 and investigation was started. Ultimately, according to the police officer, the Indus P.S. Case No. 18 dated 31-8-81 ended, in a final report with the

prayer for stalling a case against the informant under Section 211 of the I.P.C. and the present case viz. Indus P.S. Case No. 19 dated 31-8-81 ended in charge sheet against five accused persons under Sections 304/34 and 302/34 of the I.P.C.

4. The Id. Trial Court at the conclusion of the trial was pleased to find all the accused persons except the convict appellant-- Sadre Alam Mullick not guilty for the charge under Section 302/34 of the I.P.C. and all the accused persons including Sadre Alam Mullick not guilty under Section 364/ 34 of the I.P.C.

5. The convict appellant-Sadre Alam Mullick was, however, found guilty to the charge under Section 302 of the I.P.C. for committing the murder of Abu Bakkar by causing multiple fatal injuries on his person and accordingly he was convicted and sentenced to suffer Rigorous Imprisonment for life.

6. On being aggrieved by such judgment, Order of conviction and sentence the convict-appellant - Sadre Alam Mullick has preferred the present Appeal, inter alia, on the ground that the Id. Trial Court totally has failed to evaluate the evidence in its proper light and the Id. Trial Court has passed its order of conviction on the evidence which suffers from inconsistency and contradiction at large.

7. The first submission of the Id. Advocate for the appellant is that what is treated as FIR in the present case is not the FIR within the meaning of Section 154 of the Cr. P.C. because he refers to the evidence of PW-9 and PW-10 the two brothers of the deceased Abu Bakkar. Both of them have stated that they met the police officer on their way to the police station and made a statement about the incident to the police. According to the Id. Advocate, such statement made to the police was made prior to the statement of Shana Begum was recorded and as such the police ought to have treated the statement of either of these two brothers as the FIR in the case as it was prior in time and which contained an information about the commission of a cognizable offence. If this argument is accepted even then it does not make much difference in the prosecution case because the subsequent statement which was treated as FIR would then only be hit by Section 162, Cr. P.C. and can be used for limited purpose.

8. The learned Advocate, further, submits that the original FIR is not there on the record. It has been replaced by the present one. In fact, we do not find any convincing material on record which may compel us to share such views regarding substituted FIR. It may be mentioned, in this connection, that FIR is not a condition precedent for setting in motion of criminal investigation; but if there is a written FIR that should form the basis of the prosecution case. In *Apren Joseph v. State of Kerala* reported in : 1973 CriLJ185 , the Supreme Court has also supported this view.

9. The broad fact remains that in the night of 30-8-81 there was a homicide in the house of the convict -- Sadre Alam Mullick According to PW-18 - Sri D.K. Chanda S.I. of police, Indus P.S. Case No. 18 dated 31-8-81 was started on the ground that a thief was murdered with Katari at the house of the convict - Sadre Alam Mullick. And in connection with that case, police came to the village namely Goyala, Pushkarni and recorded the statement of Sahana Begum, then it was revealed that her husband - Abu Bakkar was murdered at the house of the convict- Sadre Alam Mullick and the police started Indus P.S. Case No. 19 dated 31-8-81 under Sections 364/34 and 302/ 34,1.P.C. treating the statement of Sahana Begum as an FIR. Thus, the victim in both the police cases, as mentioned above, was the identical person i.e. Abu Bakkar. As such the broad fact stands that the dead body of Abu Bakkar was found in the house of the convict - Sadre Alam Mullick in the fateful night with multiple bleeding injuries.

10. It is admitted by Sadre Alam Mullick during his examination under Section 313 of the Cr. P.C. that his first wife had an amorous relationship with the victim - Abu Bakkar. Thus, whether Abu Bakkar was murdered as a thief or as a paramour of the first wife of Sadre Alam Mullick that would not make much difference in the broad fact that Abu Bakkar met his unnatural death in the house of Sadre Alam Mullick. Against such background, we are to find out the author of such crime. The medical evidence viz. the P.M. report, Exhibit - supports the prosecution case that Abu Bakkar's death was caused due to the multiple injuries found on his person which were homicidal and ante-mortem in nature.

11. The witnesses in this case except the police witnesses are all village people. The incident took place in the month of August, 1981 and the trial was completed at the end of 1990. So, due to the lapse of long nine years discrepancies or some sort of inconsistencies may creep into the statements of those witnesses and it is nothing surprising. We cannot expect computerised precision in the narration of the incident by the witnesses and that also after a gap of long nine years. The Apex Court in its decision reported in the case of *Fakira v. State of U.P.* in AIR 1976 1976 (sic), has made it clear that minor discrepancies guarantee that the witnesses are not tutored.

12. That apart, the Apex Court has also laid down the guideline regarding the assessment of the probative value of the rustic witnesses in a decision reported in, : 1973 CriLJ1783 . It is laid down 'variances on the fringes, discrepancies in details, contradictions in narrations; and embellishments in inessential parts cannot militate against the veracity of the core of testimonies provided there is impress of truth and conformity to probability in substantial fabric of the testimonies delivered.

13. In the light of the aforesaid guideline as laid down by the Apex court, we should examine, if the prosecution could have established the broad and the substantial fabric of the prosecution case.

14. It is already discussed that hardly there is any scope for doubt that Abu Bakkar - the victim was murdered in night of 30- 8-81 with a sharp cutting weapon and that his body bore marks of large number of incised bleeding injuries which according to the medical evidence was the cause of his death. Against this broad fact, another fact is well established by the evidence of the witnesses as well as the police officer who held the inquest that the said dead body of Abu Bakkar was found in the house of the convict-appellant -Sadre Alam Mullick. the prosecution case was that Abu Bakkar was abducted with the intent to murder him, but the Id. Trial Court could not find convincing evidence in support of the charge under Section.364/34 of the I.P.C. regarding abduction by all the accused persons including the convict-appellant who faced the trial and accordingly all the accused persons including the appellant were acquitted of that charge. So, if the story of

the abduction goes away, the question arises as to how Abu Bakkar- the victim found his way to the house of the convict appellant-Sadre Alam Mullick in that fateful night. We should not ignore the evidence of the police officer i.e. PW-18 who stated that Indus P.S. Case No. 18 was started on 31-8-81 at 6.00 a.m. on the allegation that a thief was murdered at the house of Sadre Alam Mullick. But after investigation that story of 'thief' could not be substantiated. Accordingly, we cannot also accept that the victim went to the house of Sadre Alam in that night to commit theft.

15. The third alternative that remains, in the story of amorous relationship of the victim with the first wife of the convict-appellant. This fact is admitted by the wife of the victim in the FIR i.e. the Exhibit. This fact is admitted by the convict appellant himself during his examination under Section 313 of the Cr. P.C. Against question No. 4 the convict-appellant - Sadre Alam Mullick admitted that his first wife - Hasina Bibi had love affairs with the deceased Abu Bakkar. Against question No. 8 the convict admitted that some persons used to say about the relationship between his first wife and Abu Bakkar and that he was ashamed for it. That apart, during cross-examination by the Id. Advocate for the defence, different witnesses for the prosecution tried to push that story of amorous relationship between the first wife of the convict and the deceased - Abu Bakkar. Such suggestion was given by the Id. Advocate for the defence to PW-2 Kalipada Rana, PW-4 Shah Alam Mullick, PW-5 Rousan Mullick, PW-9 Abu Taher and PW-10 Abu Khalek etc. Against such background, the probability, that the victim - Abu went out in that night from his house to the house of Sadre Alam Mullick for tryst with the first wife of the convict but ultimately he had tryst with his destiny i.e. death, cannot be ruled out.

16. The dead body of Abu Bakkar was found in the house of the convict-Sadre Alam Mullick. This fact is also admitted by the convict in his answer to the question No. 8 during his examination under Section 313 of the Cr. P.C. According to the convict on hearing the sound of gun-shot and hallah he came down from upstairs and found Abu Bakkar was lying in mutilated condition on the verandah. When the dead body of the murdered person was found in the house of the convict, the convict cannot avoid his legal responsibility to explain how the dead body came

there. According to the Id. Advocate for the appellant, the dead body was on the verandah and the verandah was accessible to all. So, anybody could throw the dead body there. But the statement of the convict against question No. 8, as I have mentioned above, makes the story of throwing the dead body on the verandah by some unknown persons appears improbable because the convict did not see anybody to throw the dead body of Abu Bakkar on the verandah rather according to him he came down hearing hallah and sound of gun-shot and found the mutilated body of Abu bakkar on the verandah. The time gap is too short to accommodate the story of planting the dead body of Abu by someone else on the verandah of Sadre Alam.

17. In addition to such circumstance, it is well established by the evidence that the blood stained katari was found by the side of the dead body. If it was done by any unknown outsider, definitely the weapon used for commission of the offence would (not) have been left behind by the side of the dead body.

18. That apart, we find from the evidence of PW-9 and PW-10 the brothers of the victim that when they went to the house of Sadre Alam they found Sadre Alam to assault Abu with a katari inside the room. This evidence is also supported by some other witnesses. We find also from the evidence that there is a room on one part of the verandah and the ghar and the verandah were convered by one roof and the dead body was found inside the room on the verandah. Accordingly, there may not be any inconsistency to say that the dead body was inside the room on the part of the verandah or to speak loosely that it was on the varandah. It appears from the statement of the witness that a lantern was burning near the feet of the dead body, definitely, unknown assailant would not come with a lantern to leave the dead body on the verandah of the convict-appellant and also to leave behind the said lantern by the side of the dead body. Once more, we find that the dead body of Abu did not bear any mark of bullet injury.

19. So far as PW-9 and PW-10 are concerned, they claim that they saw the convict - Sadre Alam to assault Abu with a katari. PW-12 also saw the blood stained katari by the side of the dead body, PW-2, PW-3, PW-4, PW-5, PW-6 have all stated that they found the dead body of Abu Bakkar with multiple injuries inside

the ghar. PW 4 and PW-6 went a step further. Accordingly to them, the convict declared that he had killed one person and according to PW-6, Sadre Alam stated that he had killed Abu Bakkar and according to PW-12 Sadre Alam announced that three dacoits fled away and one dacoit was killed by him. The prosecution tried to use such statement of PW-4, PW-6 and PW-12 as extra-judicial confession but unfortunately, we find that this alleged extra-judicial confession made by the convict-appellant has not been put to him during his examination under Section 313 of the Cr. P.C. Thus, according to the principle of Criminal Justice, without giving the convict-appellant a chance of explaining the incriminating piece of evidence against him, such evidence should not be admitted or relied upon by the Court.

20. Whatever it may be, it is clear from the total evidence on record that the evidence of the witnesses of facts as to the cause of the death of Abu Bakkar is supported by the medical evidence as transpires from the post-mortem report which has been admitted into evidence by the Id. Trial Court under Section 294 of the Cr. P.C. as it was tendered by the prosecution and its genuineness was not objected to by the defence. It appears from the petition which is part of the record, filed by the Id. Public Prosecutor-in-Charge of this case before the Id. Trial Court under Section 294 of the Cr. P.C. that in spite of repeated efforts the whereabouts of the doctor who held the postmortem examination could not be traced out.

21. The Id. Advocate for the convict-appellant submits that although there is provision for admitting into evidence the post-mortem report under Section 294 of the Cr. P.C. yet its contents cannot be relied upon as it is not substantive evidence, unless the Autopsy Surgeon is examined. In support of his contention he has referred to a decision of the Bombay High Court reported in 1960 Cr LJ 1827. But I feel constrained to hold that this provision has been introduced in new Code of Criminal Procedure of 1973. So, the decision of Bombay High Court was prior to 1973 and as such it cannot be applied to the present case, the Id. Advocate has also referred another decision of the Rajasthan High Court reported in 1971 Cr LJ 1656 and a decision of this High Court reported in 87 Cal WN 565 : (1984 Cri L.J 559), on the point that the post-mortem report although can be admitted into evidence under Section 294 of the Cr. P.C. yet, unless the doctor is examined

its contents cannot be treated as substantive evidence. The Id. Advocate has finally referred to us a decision of the Allahabad High Court (Lucknow Bench) in the case of, Jagdeo Singh v. State reported in 1070 Cr U 236. It is the decision of a Division Bench and the Id. Advocate has relied much on this decision. But with due deference, we like to differ with the views taken by the Lucknow Bench of the Allahabad High Court; because we do not find any justification as to what would be the purpose and effect of admitting the postmortem report or the injury report into evidence under Section 294 of the Cr. P.C. unless its contents can be used as evidence during trial. Speedy trial is a fundamental right as decided by the Apex Court and in order to ensure the speedy trial this provision under Section 294 of the Cr. P.C. has been incorporated in the new Code. Sometimes the doctor who held the post-mortem examination can hardly be traced out or attend Court resulting in delay in disposal of the case. The legislature intended to avoid this problem by introducing the provision of Section 294 of the Cr. P.C. Therefore, with the consent of the defence, when the post-mortem report or injury report is admitted into evidence the purpose is not ornamentation of the record, but to use the contents of those reports into evidence without waiting indefinitely for the appearance of the doctor concerned before the Id. Trial Court. Accordingly, the views taken by the Allahabad High Court can hardly be accepted in this connection. It is proper to mention that a Full Bench of the Allahabad High Court in its decision in the case of Saddiquev. State of U.P. reported in 1981 Cr.L.J. 379 was pleased to discuss this point at length and hold that post-mortem report or injury report becomes substantive evidence where genuineness of such report is not disputed by the defence and by this decision of the Full Bench the decision of the Lucknow Bench in the case of Jagdeo Singh v. State reported in 1979 Cr. LJ 236 (All) has been overruled.

22. Accordingly, in view of the discussion made above, we can safely hold that the prosecution has been able to prove the broad facts constituting the essential fabric of the prosecution case with the statements of the PWs corroborated by the medical evidence.

23. It is submitted by the Id. Advocate for the appellant that when the appellant was charged along with other accused persons who were acquitted after trial, for

the offence under Section 302/34, I.P.C, his conviction under Section 302 of the I.P.C. alone is not maintainable in the eye of law. Because according to the Id. Advocate for the appellant when the original charge was framed under Section 302/34 of the I.P.C. and if the common intention under Section 34 is not proved the proper course for the Id. Trial Court was to frame a separate independent charge under Section 302 of the I.P.C. against the appellant. In support of his submission he has referred to us a decision reported in : 1955 CriLJ721 . After going through that decision I find that it mainly dealt with his distinction between Section 34 I.P.C. and .Section 149, I.P.C. and it is also held that when a person is charged under Section 302/149, I.P.C. such persons cannot be convicted for the offence under under Section 302, I.P.C. when the charge under Section 149, I.P.C. fails, It is laid down in ihai decision that the convict was not prepared to lace the charge of murder under Section 302. I.P.C directly. He was facing the trial for the charge under Section.302/149, I.P.C. So, a separate independent charge is necessary to be framed.for conviction under Section 302, I.P.C. 1 find there is some difference in the facts of the present case and the facts contained in the reported decision. Moreover, the decision referred to us is a decision of 1955. After 1955 in course of so many years radical changes have taken place in the administration of justice, in the interpretation of the Statute. The decision under reference is a decision under the old Code. The 1973 with the purpose of replacing the old archaic procedural law by a dynamic statute according to the need of the changing society, keeping pace with the growingsocial and economic aspiration of the nation.

24. The Apex court unfailingly announced that the right to speedy justice is a fundamental right. Therefore, keeping in view this cardinal principle we are required to consider the problems before us. If the unpinned order of conviction under Section 302. I.P.C. is set aside only on the ground that the prosecution charged the convict for the offence under Section 302/34 of the I.P.C, but failed to prove the ingredients of Section 34 of the I.P.C. and if it is necessary again to frame at this stage a fresh independent charge under Section 302, I.P.C against the convict-appellant that will simply take the entire process back to square No. 1 and de novo trial would be necessary. Justice would br delayed, justice would be defeated. Thus, we shall face a paradox, in order to do justice we shall have to

defeat justice.

25. That apart from the language of Section 149 and 34, I.P.C. it is clear that these two sections are enabling sections of the Penal Code and in one sense create a vicarious liability for the members of the unlawful assembly who might not take part in the offence but who would be made equally responsible for the offence committed only by one of them. Section 149 borrows its strength and force from the substantive penal offence to which it is tagged. One of the members of the unlawful assembly may commit the offence, for example, the offence of murder. The other members would be equally liable for such offence if the prosecution could prove that they were members of that unlawful assembly, even in the absence of any overt act. But if the prosecution fails to prove the unlawful assembly the co-accused persons may get the benefit of such failure on the part of the prosecution. But would such failure on the part of the prosecution exonerate the principal offender, who actually committed the crime?

26. In the instant case, there is charge of murder against the convict-appellant. Other accused persons were roped in under Section 34 of the I.P.C. but they were acquitted. The evidence as we have discussed earlier unfailingly points to the convict-appellant that he committed the offence. How that those evidences could be obliterated and how the law could exonerate the convict-appellant from the charge of homicide only on the ground that the prosecution failed to bring home the auxiliary charge under Section 149 or 34 of the I.P.C. becomes infructuous. Therefore, considering the entire aspects of the case, I feel constrained to hold that in the context of modern system of administration of criminal justice the decision referred to us by the Id. Advocate for the convict-appellant does not fit in with the facts and circumstances of the present case. Accordingly, we do not find any adequate ground to interfere with the order of conviction.

27. The penalty-mate submission of the Id. Advocate for the convict-appellant is that the convict-appellant is an old man of 66 years at present and he has already undergone imprisonment for about six years. It appears from the evidence on record and the admission made by the convict appellant during his examination under Section 313 Cr. P.C. against questions Nos. 4 & 8 that his first wife had love

affairs with the victim and that the neighbours used to discuss that affair and he was ashamed of such relation between his first wife and the victim. Justice is not an ineffectual angel neither it is a wandering ghost. It has its root in the society at large, So. at the time of administering justice the social, psychological and the human aspect should not be given a good bye. In the instant case, the judicial body cannot keep its eyes shut on the psychological aspect of a husband, whose wife living in his house indulged in adulterous life with another man and which fact gave rise to bitter criticisms in the society around and ultimately caused so much indignified embarrassment and irritation in the mind of the unfortunate husband of an unchaste wife, that it was not unlikely for him to lose control over his self and to commit the offence. Thus, this aspect of the particular case compels us to hold that justice will not only be done but it will also be felt to have been done, if the conviction of the. convict-appellant is brought down from Section 302, I.P.C. to Section 304 (Part II) of the I.P.C.

28. Accordingly, the impugned order of conviction is modified. The convict-appellant stands convicted for the offence under Section 304 (Part-II), 1 PC. and the sentence of life imprisonment passed by the Id. Trial Court is hereby modified and reduced to rigorous imprisonment for 10 (ten) years and a fine of Rs. 10,000/- (Rupees ten thousand only) in default to suffer further rigorous imprisonment for 2 (two) years more. If the amount of fine is realised the entire amount should be paid to the widow of the victim viz. Abu Bakkar.

29. A modified Jail Warrant be issued.

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