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JamiruddIn Molla Vs. the State and ors.

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Court : Kolkata

Decided On : Apr-05-1990

Reported in : 1991CriLJ356

Judge : Ajit Kumar Sengupta and ;Manabendra Nath Ray, JJ.

Acts : Evidence Act - Section 32; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 161, 162 and 162(2); ;Indian Penal Code (IPC), 1860 - Sections 34, 147, 148, 149, 304 and 326

Appeal No. : C.A. No. 209 of 1982

Appellant : JamiruddIn Molla

Respondent : The State and ors.

Advocate for Def. : D.P. Sengupta, Adv.

Advocate for Pet/Ap. : M.G. Mukherjee and ;B.N. Mukherjee, Advs.

Disposition : Appeal allowed

Judgement :

Ajit Kumar Sengupta, J.

1. This appeal is directed against the conviction and sentence of the appellant under Section 304, Part II for which he was sentenced to rigorous imprisonment

for five years and to pay a fine of Rs. 1,000/- in default to suffer rigorous imprisonment for six months.

2. Shortly stated the prosecution is that on 30th Asar 1388 B.S. corresponding to 15th July, 1981 in the evening at about 7/7-30 p.m. the accused persons were sitting at a tea-stall belonging to P.W. 1 Kishori Mohan Dey situated by the side of Arindapara Road, Khairamari. At that time a quarrel was going on between Tajer and Khairul. In course of such quarrel the deceased Khalil came to the tea-stall from the field. As soon as Khalil came to the tea-stall, Khairul asked his associates, namely, the other accused persons of this case, to assault Khalil, Khalil started fleeing away, but he was chased by the accused persons and caught hold of. He was brought to the tea-stall and tied up with a rope and then the accused persons started assaulting him with deadly weapons. In course of such assault accused, Jamaruddin assaulted Khalil with a sword on his abdomen and as a result thereof he sustained a severe incised injury on his abdomen and he fell down on the ground. He was removed to Berhampore Hospital and was admitted there for treatment. On 4-8-81 he succumbed to his injuries, In the meantime, Aklema Khatun, neice of the deceased, lodged an F.I.R. alleging the incident and on the basis of that F.I.R. a case under Sections 147/148/149 and 326, I.P.C. was started against the accused persons. After the victim died in the hospital, Section 304, I.P.C. was added into this case. Investigation of the case was taken up by the Police forthwith and after investigation of the case the police submitted charge-sheet against all the accused persons under section amongst other Sections 304/34, I.P.C. After the case was committed to this Court for trial a charge Under Sections 304/34, I.P.C. was framed against all the accused persons to which they pleaded not guilty and claimed to be tried.

3. These persons were charged under Sections 304/34, I.P.C. but apart from the appellant before us all these persons were found not guilty and were acquitted.

4. At the hearing the learned Counsel for the appellant has assailed the judgment under appeal. He has drawn our attention to the prosecution witnesses and submitted that there is no evidence at all which can sustain the conviction in this case. He has pointed out that firstly the informant was not examined; secondly the

witnesses have been examined long after the occurrence; thirdly the alleged dying declaration on which the prosecution relied upon is hit by the provision of Section 162 of the Criminal Procedure Code and lastly the only witness P.W. 3 could not be relied upon as he had enmity with the brother of the accused.

5. We have considered the contentions.

6. Aklema Khatun is the neice of the victim, Khalil Sk. She was the informant. No explanation has been given why she was not examined in this case.

7. P.W. 1 is a post occurrence witness. In his cross-examination he said that besides the two persons named by him, no other person was present at the tea-stall at the time of the occurrence. He did not name the appellant.

8. The other witness is P.W. 3. His evidence is that at that time he was taking tea at the tea-stall of Kishori Mohan Dey. At that time Khairul and Tajar who were in the stall were quarrelling. Then Khalil came to the tea stall from the side of the field. Jahapan, Bhola, Majarul, Ahachand, Jamir were asked by Kharul to assault Khalil and then Khalil started fleeing away. Ahchand, Jamir and Majarul then chased him and brought him to the tea-stall. They all started 'marpit'. In course of 'marpit' Jamir assaulted Karim with a sword on his abdomen. Khairul fell down in front of the tea-stall. Thereafter, he left the place. All the accused persons named were on the dock. The incident continued for about an hour. Kishori left his tea stall before Khalil was assaulted. Thereafter he did not see Kishori coming back to the tea stall. Khalil was lying there. After Khalil was brought back to the tea stall by the three accused persons, his hands were tied with a rope. He did not see any injury on the person of Karim. He was an accused in a case in which Karim is a victim of assault. That case was committed to the Court of Sessions. Karim is the brother of Jamiruddin.

9. This evidence on which the learned Judge has placed reliance in convicting the appellant cannot be accepted. Firstly, there is inherent improbability in his evidence. He said 'marpit' was started and it continued for an hour which on the face of it seems to be absurd. It is not believable when such fight continued others would not come to separate them. It appears that everybody was watching the

accused persons.

10. Secondly, his evidence is contrary to the evidence of P.W. 1 who stated that he did not find the appellant at the place of occurrence if such occurrence according to P.W. 3 continued for an hour.

11. Thirdly, in the cross-examination P.W. 3 stated that Karim, the brother of the accused Jamiruddin, is a victim of assault where P.W. 3 was an accused. That case was committed to the Court of Sessions. This would indicate the motive of P.W. 3. It is therefore natural that he would try to implicate the appellant.

12. P.W. 3 was examined on 30-8-81 whereas the incident took place on 15-7-81. It may also be mentioned that F.I.R. was lodged long after the incident. No explanation was given by the prosecution for not examining P.W. 3 immediately after the incident occurred. But the learned Judge found certain explanation for the lapse of the Investigating Officer. He stated that although the Investigating Officer has not given any explanation as to why P.W. 3 was examined after 1 1/2 months but since he was implicated in a criminal case arising out of the assault of the brother of the appellant 'naturally therefore the witnesses would not venture to appear before the Investigating Officer to make statement'. In our view, it was for the prosecution to offer explanation. It was not for the learned Judge to make out a case for the prosecution. It was for the Investigating Officer to find out likely witnesses in course of investigation. The witnesses would not come voluntarily to the Investigating Officer for making statement. In our view the learned Judge misdirected himself in trying to offer explanation for the prosecution.

13. The only other piece of evidence which has been relied on by the prosecution is alleged dying declaration. The Investigating Officer in his evidence has stated that on 18-7-81 he had been to Berhampore Hospital and examined the injured and recorded his statement under Section 161 of the Criminal Procedure Code. He stated that he recorded the statement of the injured correctly and the injured made the statement while he was mentally alert. The statement was recorded on 18-7-81, i.e. three days after the incident took place. The victim died on 4-8-81. It appears that from the said statement which was recorded by the Investigating Officer that not only the appellant assaulted with a sword but others also assaulted

with lathis . The story of the victim that he was assaulted with the lathis is inconsistent with the evidence of P.W. 3 who only said that Jamiruddin assaulted with a sword in the abdomen of the victim. The evidence will also indicate that there was an injury and that injury was caused by sword in the abdomen. The question is whether at the material time when the victim alleged to make the statement regarding the injury he was in a position to do so. The deposition of P.W. 2, the doctor is that after sustaining such injury the patient would remain in a comatic condition. Neither the doctor nor was the Nurse present when such statement was obtained by the Investigating Officer. The statement was not corroborated by any other person of the hospital. No explanation was given why the doctor or the Nurse was not brought at the time when such statement was obtained. The deceased was alive till 4-8-81. No Executive Magistrate was called for the purpose of recording any statement. Even after 18-7-81 until his death there was sufficient time for obtaining a statement which would have been admissible in evidence. That was not done. No explanation has been offered by the prosecution why due compliance was not made to record the statement in presence of doctor or the Nurse or the Magistrate. In our view therefore in such a case it is difficult to rely on the statement of the Investigating Officer, even assuming such statement is otherwise admissible in evidence. Our attention has been drawn to a decision of the Supreme Court in the case of Mannu Raja v. The State of Madhya Pradesh, reported in AIR 1976 SC 2199 : (1976 Cri LJ 1718). In that case also a dying declaration was said to have been made by the deceased in the hospital. There the Investigating Officer recorded that statement after taking precaution of keeping a doctor present. It also appears that some of the friends and relations of the deceased were also present at the time when the statement was recorded. But even then the Supreme Court excluded the said dying declaration from consideration. The Supreme Court observed as follows at page 2201 of 1976 AIR SC :

'But if the Investigating Officer thought that Bahadur Sing was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration. Investigating Officer are naturally interested in the success of the investigation and the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encouraged.

We have therefore excluded from our consideration the dying declaration. Ex. P-2, recorded in the hospital.'

14. Our attention has also been drawn to a decision in the ease of Dalip Singh v. State of Punjab, reported in AIR 1979 SC 1173 : (1979 Cri LJ 700). There also a dying declaration was recorded by the Sub-Inspector of Police during the investigation. There the Supreme Court observed as follows at page 1176 of AIR 1979 SC :

'Although a dying declaration recorded by a Police Officer during the course of the investigation is admissible under Section 32 of the Indian Evidence Act in view of the exception provided in Sub-section (2) of Section 162 of the Code of Criminal Procedure 1973, it is better to leave such dying declarations out of consideration until and unless the prosecution satisfies the Court as to why it was not recorded by a Magistrate or by a Doctor. As observed by this Court in Munnu Raja v. State of Madhya Pradesh (1976) 2 SCR 764 : (1976 Cri LJ 1718) : AIR 1976 SC 2199) the practice of the Investigating Officer himself recording a dying declaration during the course of investigation ought not to be encourged. We do not mean to suggest that such dying declarations are always untrustworthy, but what we want to emphasise is that better and more reliable methods of recording a dying declaration of an injured person should be taken recourse to and the one recorded by the Police Officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.'

15. Apart from the fact that the formalities as required under the law were not complied with in recording the dying declaration but it was not known whether the patient was in a position to make such statement being in a comatic condition as stated by the Medical Officer.

16. On a consideration of the material on record and the circumstances of this case we are of the view that there was no material before the learned Judge to convict the appellant. That apart six accused persons were charged under Sections 304/34. Five of them having been acquitted, unless there was conclusive evidence to show it was the appellant who struck the blow which resulted in the death of the victim, the accused cannot be proceeded with under Section 304 and

for that matter under Section 304, Part II either.

17. In the result, this appeal is allowed. The order of conviction and sentence is set aside. The appellant is discharged from the bail bond.

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