

Keshab Naskar and Others Vs. State

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Court : Kolkata

Decided On : Sep-04-2012

Judge : Toufique Uddin

Appeal No. : C.R.A. No. 257 of 1997

Appellant : Keshab Naskar and Others

Respondent : State

Judgement :

Toufique Uddin, J.

1. This appeal was directed against the judgment passed by learned Additional District and Sessions Judge, 13th Court, Alipore, South 24 Paraganas on 15.7.97 convicting accused Keshab Naskar and three other for offence under Section 326/34 IPC and sentencing to suffer R.I. for six years and to pay a fine of Rs. 1500/- each for such offence with default clause.

2. In the background of this appeal the prosecution case in a nutshell is that one defacto-complainant Sri Dashupada Mondal lodged a written complaint on 21.7.87 at 9.45 hours before the O.C. Joynagar P.S. to the effect that on 20.8.87 at about 7.00 A.M. while the accused persons tried to cultivate the land forcibly situated by the side of the vegetable garden of the de-facto complainant, his brother's wife Brihaspati Mondal @ Savitri raised protest and the nephew of the defacto-complainant viz. Rabi Mondal and Dulal Mondal sons of Kunti Mondal rushed to

the place and then accused Palan Naskar and his sons viz. Shambhu Naskar, Kanai Naskar, Keshab Naskar, Tarak Naskar and Panchanan Naskar and other inmates of their house being armed with lathi and other deadly weapons attacked Rabi, Dulal and Savitri and assaulted them causing bleeding injury to Dulal and Rabi, Savitri also sustained swelling injury. Rabi was sent to Padmerhat Hospital for treatment, Dulal and Savitri were sent to the P.S. where Savitri Mondal lodged a G.D. Entry no. 877 dated 20.8.87. They were referred to Nimpith Hospital for treatment from the Joynagar P.S. But Dulal was referred to N.R.S. Hospital where he succumbed to his injuries.

3. On the basis of the written complaint, Joynagar P.S. case no. 14 of 1987 dated 21.8.87 was registered against accused Palan Naskar, Shambhu Naskar, Kanai Naskar, Tarak Naskar, Keshab Naskar and Panchanan Naskar. After investigation the Police submitted charge-sheet against such accused persons Palan Naskar, Shambhu Naskar, Tarak Naskar, Keshab Naskar and Panchanan Naskar. But the accused Kanai Naskar was discharged as he was not sent up by the I.O. Later, the case against Palan Naskar was filed because he died.

4. After commitment of the case, on consideration of materials on record charge under Section 302/34 IPC was framed by the trial court against the accused Shambhu Naskar, Keshab Naskar, Tarak Naskar and Panchanan Naskar and the contents of the charges were read over and explained to them when they pleaded not guilty and claimed to be tried.

5. The prosecution examined 10 witnesses while none was examined on the side of the defence. However, the accused persons were examined under Section 313 of the Code of Criminal Procedure when they took the plea of innocence and denial of offence.

6. The learned counsel for the appellants/convicts submitted that there were a good number of inconsistencies in the evidence of the prosecution witnesses and as such the charges could not be sustained against them.

7. On the other hand, the learned Public Prosecutor contended that the totality of the materials on record will suggest that the commission of offence was complete

and the findings of the learned court below does not deserve any interference.

8. Now it has to be seen if the judgment of the court below is sustainable or not.

9. It was contended by the learned counsel for the appellant that the FIR shows the institution of GD Entry No. 877 on 20.8.87 and as such the FIR (Ext. 4) is hit by Section 162 of the Code of Criminal Procedure. The position is that on 20.8.87 when the G.D. was lodged, Dulal was not dead but the FIR lodged on 21.8.87 shows that Dulal was dead. Therefore, it cannot be said that the FIR is hit by Section 162 of the Code of Criminal Procedure.

10. The learned counsel for the appellant contented that there were discrepancies over the P.O., non-examination of some witnesses viz. JLRO, nonproduction of offending weapons, non-seizure of blood-soaked wearing apparels non-preparation of sketch map, non-examination of doctor of N.R.S. Hospital where Dulal died etc. But careful examination of the judgment of the court below reveals that all these questions were covered there and such piece of arguments is not destroying the very root of the case. The main fabric of the case has been intact. Moreso, some eye witnesses are rustic ones and it is quite natural that minor discrepancies may creep in. Reliance may be put on the decisions, reported in AIR 1973 SC 337; 1994 CrLJ1980 (SC) and AIR 1973 SC 2622.

11. It was also contended that PWs 1, 2, 3, 6 and 7 being relatives of the deceased Dulal, are interested witnesses. But it is well settled that such interested witnesses will not implicate innocent persons and let off real culprits. The evidence of PW 1 is of clear and unimpeachable character. No contradiction was taken in respect of his evidence from the I.O. PW 1 stated in his evidence that some of them (accused persons) struck him (Dulal) on the chest by lathi, made of palm stick and some assaulted him with crowbar. That evidence remained unchallenged as there was no cross-examination specifically on such evidence. In cross-examination PW 1 stated that Dulal was assaulted on chest by stick and with crowbar with force and he bled through the nose. PW 2 stated that Rabi was assaulted by the sons of Palan at the time of quarrel over possession of an orchard. Dulal fled away from the P.O. but after the quarrel settled he came back after sometime to the spot and then the sons of Palan caught him and some of

them assaulted him with bamboo, lathi, palm stick and also crower. In cross-examination, she stated that Dulal was assaulted on the head and chest and was vomiting blood. It is very difficult to wipe out these pieces of evidence.

12. Contradictions about the evidence of some witnesses were attempted to be brought to my notice. A few of those contradictions are worth mentioning here. It was stated by the I.O. that PW 6 Anadi Haldar did not state before him that he witnessed the occurrence. But PW 6 in cross-examination stated that he could not remember if he told Police about witnessing of the incident. The practical position is that Police asked witnesses at the time of examination under Section 161 of the Code of Criminal Procedure questions. Sometime it may not be possible to give point to point or minute to minute vivid description of an incident by a rustic villager who naturally might be not so fluent and specific. Moreso, the defence side did not put any specific suggestion to PW 6 that he did not know the incident at all. Quite natural is PW 7's evidence who is also a rustic lady. Her evidence inspired confidence. There is no cross-examination that she did not see the incident. She gave a good account of the incident. The material point of evidence of another eye-witness Pari Haldar, PW 3 is also cogent and trustworthy. It has been stated by the Hon'ble Apex Court in good number of cases that in case of truthful witnesses there may be some minor discrepancies occurring here and there and omission of certain facts. But the broader aspect has to be considered. It may be that PWs 3, 6 and 7 gave some contradictory statements to the I.O. when examined under Section 161 of the Code of Criminal Procedure. But totality of their evidence corroborates prosecution case. The substance of evidence of PWs 1, 2, 3 and 7 was that following the quarrel the accused person assaulted Savitri Mondal and Rabi Mondal and their injuries were not so serious but later the accused persons assaulted Dulal indiscriminately all over his body. The nature of injuries inflicted on the person of Dulal has been well corroborated and reflected by the autopsy surgeon, PW 9 who held postmortem examination of deceased Dulal. Rabi Mondal was also assaulted. The I.O. stated that he examined Rabi but did not record his statement. Why Rabi was not examined, I fail to understand as he is a vital witness. So, evidence of this type of I.O. has to be taken with a grain of salt. Nowhere it is available that PWs 1, 2, 3 and 7 are hearsay witnesses or they were not present at the P.O. Non-mentioning of some facts of a particular

eyewitness does not render his evidence invalid when on the whole his evidence is trustworthy. It has been held in AIR 2003 SC 282 that if a witness did not state material fact to the I.O. under Section 161 of the Code of Criminal Procedure but stated it on oath at the trial his evidence on that aspect should not be rejected merely on such ground if the evidence is otherwise credit worthy and acceptable. It is also settled principle of law that marginal variations in the statement of informant recorded under Section 161 of the Code of Criminal Procedure would not be treated as improvements vide (2000) 10 SCC 582. Therefore, there is no point to reject the evidence given on oath by the aforesaid witnesses notwithstanding contradiction taken from the evidence of I.O. because the main factum of incident of assault has been proved by such witnesses. In Alamgir vs. State [(2003) 1 SCC 21] the statement of one of the prosecution witness in court did not find place in the statement recorded under Section 161. In this context, the Apex Court raised the question does it take away the nature and character of the evidence in the event there is some omission on the part of the police official? Would that be taken recourse to as amounting to rejection of an otherwise creditworthy and acceptable evidence? Giving the answers, it has been held that the “answers cannot but be in the negative”. It may so happen that there was no omission on the part of the police and in fact, the witness did not make any such statement before the police. What a witness says on oath is evidence and not what he stated before Police in case of investigation. Of course, one thing has to be borne in mind that the nature of evidence given by a witness in dock should not be of such improvement as totally renders his evidence unacceptable. There might be omission of the Police Officer even. But such omission cannot take away the nature and character of the evidence. If the evidence of PW 6 is excluded to the extent that he did not see the occurrence of assault; still rest part of his evidence gets support from other materials on record and medical report furnished by the doctor who performed autopsy on the dead body of Dulal. The opinion of autopsy surgeon PW 9 shows the patient was drowsy and haemoptysis was present and there was injury over scalp measuring 1.5 cm/1 cm deep lacerated wound and the P.M. Report (Ext.2) shows that death was due to injuries mentioned therein and the death was homicidal in nature. Over land dispute the parties were at loggerheads for a long time and on the fateful day in the beginning of the incident the accused persons,

according to the prosecution witnesses, assaulted first PW 2 Brihaspati and then Rabi and thereafter the appellants attacked Dulal and assaulted him. Dulal subsequently, was admitted to NRS Hospital where he breathed his last.

13. Section 161 of the Code of Criminal Procedure needs to be looked into deeply. It reads “(1) Any Police Officer may examine orally any person ...”. The words “may examine orally any person” are extremely significant. Nowhere in the Code any specific format of asking question is stipulated. The Police Officer either asks the witness to say what he knows or the Police Officer asks some specific questions to which a rustic or nervous witness simply gives answer. As a result, total projection of the background of the incident may not come before the Police occasioning omission of some vital parts. It might be that either the witnesses forget to tell some facts or the Police does not ask further background to the witnesses. Therefore, omission of the same or improvement of anything may not be given undue importance if the totality of the evidence does not show that the witness is telling a lie.

14. Falsus in Uno, falsus is omnibus:

Such doctrine is dangerous one, especially in India. One hardly comes across a witness whose evidence does not contain a grain of untruth, or at any rate some exaggeration, embroideries and embellishment. Truth has to be extracted therefrom vide AIR 1981 SC 1390.

15. Although the charge was framed under Section 302/34 IPC but the sentence was passed for offence under Section 326/34 IPC. There is no iota of doubt that land dispute is very much germane in the instant case. The story of case and counter-case was also brought before the court and the plea of self-defence was taken by the appellants in the learned court below. Dulal and his associates were unarmed whereas the appellants were armed with crowbar, palm stick etc. Taking into consideration all such aspects the Court came to the finding under challenge.

16. The Hon'ble Supreme Court in Gurmukh Singh vs. State of Haryana (2009) 15 SCC 635: (2010) 2 SCC (Cri) 711 (paras 23 and 24) enumerated the various considerations which will be taken into account while determining the sentence

which read as under:

These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

- a) Motive or previous enmity;
- b) Whether the incident had taken place on the spur of the moment;
- c) The intention/knowledge of the accused while inflicting the blow or injury;
- d) Whether the death ensued instantaneously or the victim died after several days;
- e) The gravity, dimension and nature of injury;
- f) The age and general health condition of the accused;
- g) Whether the injury was caused without premeditation in a sudden fight;
- h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
- i) The criminal background and adverse history of the accused;
- j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;
- k) Number of other criminal cases pending against the accused;
- l) Incident occurred within the family members or close relations; and
- m) The conduct and behavior of the accused after the incident.

17. The conviction was passed to suffer R.I. for 6 years and fine with default clause for the offence under Section 326/34 IPC. Admittedly, no fact of previous conviction appears to have been brought on record. From the 313 Examination sheet, it is found that on the date of taking statement of the accused persons

under Section 313 of the Code of Criminal Procedure, in 1997 age of the accused Shambhu Naskar was 43 years, Keshab Naskar 45 years, Panchanan Naskar 48 years and Tarak Naskar was 31 years respectively. The learned court below did not mention anything about the treatment of such accused under provisions of any reformatory law.

18. A long period elapsed after 1987. During such protracted period the appellants might have suffered mental agony and anxiety which cannot be overlooked. Presently, two of the appellants are over the age of 60 or more. Also some mitigating circumstances come to play. The appellants are on bail. Nothing is forthcoming before the court that ever they misused the privilege of such bail.

19. It is well settled that so far as Section 326 IPC is concerned, corporal punishment of imprisonment is mandatory. A sentence of mere fine is not permissible. The pre-trial detention period being 14 days is insignificant. Moreover, the judgment was passed on 14.7.97 holding the appellants guilty and taking them in custody while sentence was passed on 15.7.91. Then appeal was preferred on 19.8.97 before the Hon'ble Court and on 26.8.97 the Hon'ble granted bail to the appellants. Though two of the appellants are just over 60 years of age yet severity of the offence must be taken into account notwithstanding the fact that 25 years elapsed in the meantime. I think that the ends of justice will be met if the corporal punishment is reduced to the period already undergone during pre-investigation and post-trial period and sentence of fine amount is increased.

20. The appeal is, therefore, allowed in part.

The conviction of the appellant is upheld but the sentence is modified to the extent that the substantive period of sentence (term imprisonment) be reduced to the period already undergone, as mentioned above and the appellants are directed to pay each a fine amount of Rs. 40,000/- in default to suffer R.I. for 1 year.

Out of total amount of such fine, if realised, 75% will go to the next kins of the deceased Dulal Mondal.

Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.

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