

Criminal Appeal

Present :

**The Hon'ble Mr. Justice Ashim Kumar Banerjee**

**And**

**The Hon'ble Mr. Justice Raghunath Ray**

Judgment on : August 20, 2010.

**C.R.A. No.416 of 2004**

**Shyamapada Bauri**

**-VS-**

**The State of West Bengal**

Points:

Murder- Ocular evidence supported the prosecution case-whether the mens rea is important-Initially police was informed verbally, subsequently written complaint lodged-Police whether can treat the verbal information as F.I.R.-Accused a close member of the family-Insufficiency of light whether could hinder identification-Accused did not abscond-whether per se lead to an order of acquittal- Indian Penal Code-S.302

Facts:

Accused was chargesheeted with the allagation of committing offence murdering Baru and injuring others as above. He was chargesheeted under Section 302 read with Section 326 of the Indian Penal Code. Accused pleaded innocence and opted to be tried. Trial Court held the accused guilty of offence.

Held:

When ocular evidence supported the prosecution story the mens rea was not important Para 8(b)

Dipak initially informed the Police verbally. The detailed written complaint was subsequently lodged. Even if the Police treated the verbal information as FIR the subsequent complaint could not vitiate the entire investigation.

Para 8(b)

When the accused was a close member of the family and was known to the witnesses insufficiency of light could not hinder identification of the accused. Moreover, on a sum total of the evidence it is clear that Shyamapada was there for some time and caused injury not only to the victim who succumbed to the injury but also to the other prosecution witnesses. Hence, there was no difficulty in identifying him. Para 8(c)

Mere fact that the accused did not abscond cannot per se lead to an order of acquittal passed in his favour. Para 8(d)

For the Appellant : Mr. Samir Chatterjee  
Mr. Jayanta Narayan Chatterjee

For the State : Mr. R. K. Ghosal  
Ms. Minoti Gomes

**ASHIM KUMAR BANERJEE.J:**

**1.FACTS :-**

On July 19, 1992 Naru Bauri, PW-1 lodged a complaint with the Kashipur Police Station under the District of Purulia to the effect that at about 8.30 p.m. on the said day when he was sitting on a cot in the courtyard of his house after coming back from his workplace he saw Shyamapada Bauri son in-law of Baru Bauri, his second elder brother passed in front of his house on a bicycle and entered the house of Baru Bauri. He was carrying a folded umbrella at the back of his cycle. Almost on everyday Shyamapada used to visit Sadhana (his wife) at her parental place. Just a short while after Shyamapada had entered, Naru heard a hue and cry of Sadhana. She was crying by saying "*he is killing my father*". Naru rushed to the house of Baru with a stick and found Baru lying on the floor inside the room with bleeding injury. Sadhana, Sadhana's sister Mamata and their mother Moni as well as complainant's elder brother Tarapada were also lying with bleeding injury in front of the house of Baru and crying severely. Complainant tried to stop Shyamapada and when Shyamapada tried to cause injury to him on his neck with the sword he had in his hand, complainant tried to stop with his left hand after throwing the stick and thereby suffered cut injury on his left thumb. He fell on the ground with bleeding injury, taking advantage Shyamapada fled with his bicycle. The people of the locality rushed to the place of occurrence and took the injured to Kalloli Hospital. Baru succumbed

to the injury. The others however got cured within a span of time. Shyamapada was absconding for some time until he was arrested. He was chargesheeted with the allagation of committing offence murdering Baru and injuring others as above. He was chargesheeted under Section 302 read with Section 326 of the Indian Penal Code. Shyamapada pleaded innocence and opted to be tried.

## **2. PROSECUTION WITNESS :-**

### **PW-1 (Naru Bauri) :-**

Naru had three brothers namely Taru, Baru and Haru. They lived in a separate mess within a same courtyard. Sadhana, daughter of Baru was married to Shyamapada who was identified at the dock. Incident took place on 29<sup>th</sup> Ashar at about 8.30 p.m. in the night. Naru was sitting in a varandah when Shyamapada came to him and enquired about Sadhana. He told him that she was with her father. He heard the voice of Sadhana and went to the place and found her lying on the floor in a pool of blood. He also found Baru, mother of Sadhana, his brother Taru lying on the floor with bleeding injury. He raised objection and tried to stop Shyamapada and sustained injury in his left hand. Baru died on the spot. Dipak Das informed the incident to the Police Station. Police then came. O.C. took all the injured to Kalloli Primary

Health Centre. The complaint was written by one Rashbehari Roy and Naru put his Left Thumb Impression. In cross-examination the witness disclosed that he was a cultivator. He was illiterate. He did not remember the exact date of marriage between Sadhana and Shyamapada. The Police came being informed by Dipak. He narrated the incident and with the help of the villagers took the injured to the hospital. The place of occurrence was visited by Dipak, Jiten, Bholanath, Bhuban. He denied the suggestion that Sadhana was not married to Shyamapada or that no incident took place.

**PW-2 (Rash Behari Roy) :-**

The witness was the scribe to the FIR. He wrote as per the instruction of Naru. He read over and explained the contents to Naru when he put his Left Thumb Impression.

**PW-3 (Dipak Das) :-**

The witness knew Naru and Baru. Sadhana was married to Shyamapada who was identified at the dock. The incident occurred ten years before in the month of Ashar. At about 8.00 at night after closing his shop he was going to his house. He saw a gathering in front of the house of Baru. He heard that Baru had died. His son in-law had killed him. He visited Kashipur Police Station and informed the Police.

**PW-4 (Bhuban Bouri) :-**

Baru was his elder brother (cousin). Eleven years ago the incident took place. He heard that his brother Baru had been murdered. On hearing the news he visited the house of Baru and saw him lying dead. He came to know from the widow of Baru that Shyamapada had murdered him by inflicting injury. Tarapada also sustained injury, so was the widow of the deceased. Shyamapada was married to Sadhana. He was however unaware of the reason for discord between the couple.

**PW-5 (Nachan Bouri) :-**

The witness was the wife of Tarapada, PW-11 and sister in-law of the deceased victim. According to the witness she was taking meal with her husband. When Shyamapada visited the house of Baru she heard wife of Baru crying. Her husband rushed to the place of occurrence when the accused gave a stroke on his body. The witness saw the incident. Naru came to the spot and tried to stop the accused when he also sustained injury. She identified Shyamapada on dock. According to her, Shyamapada was married to Sadhana. In cross-examination the witness deposed that she had seen the accused giving blow by sword. She reported the incident to the villagers, however the villagers did not assemble.

**PW-6 (Jiten Das) :-**

He also knew that Baru had been murdered by son in-law which he heard from the neighbours. He did not see the incident.

**PW-7 (Haru Barui) :-**

The witness was a younger brother of the victim. The complainant Naru was also a brother younger to the witness. The witness deposed that Shyamapada killed Baru with the help of a sword about eleven years ago at about 8.00 p.m. at night. He was sitting on the courtyard. Shyamapada was married to Sadhana. After assault, Shyamapada fled away. There was hue and cry. He rushed to the place of occurrence and saw Baru lying dead in a pool of blood. He also saw Taru and his wife having sustained injury. He identified Shyamapada at the dock. In cross-examination he deposed that he narrated the incident to the Police. He also stated to the Police that due to fear he could not go in front of the room.

**PW-8 (Sadhana Bauri) :-**

Sadhana was earlier married. After he lost her husband she was given marriage with Shyamapada. Shyamapada used to work at Durgapur. She also had been to Durgapur. She used to visit her maternal uncle's house at

Daserdanga with Shyamapada. Shyamapada asked her to fetch two buckets of water which she denied. He abused and assaulted her causing burn injury on her thigh. After scolding her Shyamapada left the place and did not come back to take her. Baru then took her to his own house from her maternal uncle's house. Shyamapada killed her father eleven years ago. She witnessed the incident. Baru was taking rice at that time when Shyamapada with the help of sword assaulted him and inflicted cut injury. Her mother, her sister Mamata were also assaulted. He also inflicted injury on Sadhana's left arm and on the left side of the pelvic region. The witness showed the injury to the Court. According to her, her uncle also sustained injury, so was Naru. In cross-examination she deposed that the accused had given three/four strokes of sword on the body of the victim.

**PW-9 (Moni Bouri) :-**

The witness was the unfortunate widow of the victim. She also corroborated the other witnesses discussed above including her daughter Sadhana.

**PW-10 & 11 (Mamata Bouri & Taru Bouri) :-**

The witness Mamata sister of Sadhana, also corroborated Sadhana and other witnesses as discussed above, so was Taru Bouri PW-11 the elder brother of the victim.



**PW-12 (Dr.Ajit Kr. Hazari) :-**

The witness was the Medical Officer at the Sadar Hospital. On the relevant date he conducted the post mortem. He supported his post mortem report and deposed that the victim had incised wound over lateral part of the left side of the neck as well as left arm and lower part of the right arm. The victim had injury on the right side of the frontal region as also right thigh. The witness opined that the cause of the death was homicidal in nature. However any particular injury could not be identified as the cause of the death.

**PW-13 (S.S. Das) :-**

S.S. Das accompanied the Officer in-charge at the time of raid.

**PW-14, 15 & 16 (Dr. Debananda Saha, Dr. Muralidhar Das & Dr. Prabir Kr. Saha ) :-**

The witnesses were the doctors who attended the injured and treated them. Dr. Debananda Saha (PW-14) proved the injuries sustained by the injured, so were Dr. Muralidhar Das being PW-15 and Dr. Prabir Kr. Saha being PW-16.

**PW- 17 (Pranab Kr. Mitra) :-**

The witness was the Investigating Officer. He narrated in detail how the investigation had been done.

The accused was examined under Section 313 of the Criminal Procedure code. He denied the incident. Each and every assertion of the prosecution witnesses were denied by him. Neither he adduced any evidence nor put any alibi in support of his alleged defence. In any event apart from a bare denial we also do not get any idea of the alleged defence and/or alibi taken by the accused to counteract the charges brought against him.

### **3. JUDGMENT :-**

Considering the evidence discussed above, the learned Additional District and Sessions Judge, Fast Track Court (IV), Raghunathpur held the accused guilty of the offence committed under Section 302 of the Indian Penal Code and imposed a punishment to suffer imprisonment for life as also to pay fine of rupees ten thousand and in default to suffer further one year rigorous imprisonment. The learned Judge however did not impose any separate sentence for the offence committed under Section 326 of the Indian Penal Code.

### **4. APPEAL :-**

Being aggrieved by the said decision of the Additional district and Session Judge, Fast Track Court, the appellant preferred the instant appeal. We heard the appeal on the above mentioned dates.

#### **5. CONTENTION OF THE APPELLANTS :-**

Mr. Jayanta Narayan Chatterjee, learned advocate appearing for the appellant placed the complaint, inquest as well as the evidence adduced by PW-1 to 17.

Mr. Samir Chatterjee, learned counsel leading Mr. Jayanta Narayan Chatterjee contended as follows :-

- i) The incident allegedly occurred at 8'Oclock in the night. It was in a house having a thatched roof and no electricity. Hence, with the help of the kerosene oil lamp it was not possible for the witnesses to identify the accused.
- ii) Since the thatched roof was generally low height the use of sword that too, on more than two, three occasions was rather improbable. In any event, the said weapon was not at all recovered.
- iii) The place of occurrence was not specific and consistent according to the prosecution witnesses.

- iv) As per the ocular evidence the PW-1 became senseless and as such it was difficult for him to recognize the accused.
- v) No mens rea was present, at least not came out in evidence. Hence, the alleged involvement of the accused in absence of any mens rea was doubtful.
- vi) Once Dipak had already informed the Police Station subsequent complaint lodged by Naru could not be treated as FIR and the proceeding initiated on such basis was vitiated by illegality.
- vii) The accused did not abscond. He was arrested from his place of work. Such factor should weigh in favour of the accused.
- viii) No independent witness came forward to support the prosecution story. The prosecution also failed to produce utensils and belongings of the victim seized on the date of incident.

Highlighting the above discrepancies Mr. Chatterjee contended that the accused was entitled to be acquitted and the learned Judge erroneously held him guilty and convicted him for the charges brought against him.

## **6. CONTENTION OF THE PROSECUTION :-**

Mr. R.K. Ghosal, learned counsel appearing for the prosecution being assisted by Ms. Minoti Gomes contended as follows :-

- i) Internal pages 4, 5 and 6 of the judgment would show that the learned Judge discussed each and every issue highlighted by Mr. Chatterjee.
- ii) No specific suggestion was put to the witness denying the involvement of the accused.
- iii) It was erroneous to contend that there had been discrepancy with regard to the place of occurrence as in the inquest report the place of occurrence was earmarked which got support from the prosecution witnesses.
- iv) Evidence of the injured taken together would complete the chain of events and would raise a pointer only to the accused and none else.
- v) It was difficult to disbelieve the injured specially when their injuries were supported by medical evidence.
- vi) The incident occurred at about 8.00/8.30 p.m. at night in a village when people already completed their day's work and either taking their meal or already gone to bed. Hence, it was not possible for them to witness the incident and the contention that no independent witness could be brought, had no basis whatsoever.

**7. REPLY :-**

Mr. Samir Chatterjee, learned counsel appearing for the appellant in reply contended that at best the injuries could be proved by the injured as well as doctors who treated them. Hence, the accused could at best be charged under Section 326 of the Indian Penal Code. The learned Judge erred in holding him guilty under Section 302 when there was no sufficient evidence on that score. He also contended that there could be no second FIR which was hit by Section 162 of the Criminal Procedure Code.

**8. OUR VIEW :-**

a) we have considered the rival contentions. We have also considered the evidence on record. We do not find any scope to hold it otherwise that what was held by the Court below.

b) The ocular evidence of PW-1 was consistent with his written complaint lodged contemporaneously. It got corroboration and support from the other prosecution witnesses including PW-3, 4, 5, 7, 8, 9, 10 and 11. The doctor being PW-12 who held the post mortem corroborated the factum of death of the victim. The other doctors being PW-14, 15 and 16 proved the injuries caused to the witnesses discussed above. When ocular evidence supported

the prosecution story the mens rea was not important and contention of Mr. Chatterjee on that score is of no consequence. On the issue of FIR we find that Dipak initially informed the Police verbally. The detailed written complaint was subsequently lodged. Even if the Police treated the verbal information as FIR the subsequent complaint could not vitiate the entire investigation as erroneously contended by Mr. Chatterjee.

c) On the issue of insufficient light or use of sword we are of the view that when the accused was a close member of the family and was known to the witnesses insufficiency of light could not hinder identification of the accused. Moreover, on a sum total of the evidence it is clear that Shyamapada was there for some time and caused injury not only to the victim who succumbed to the injury but also to the other prosecution witnesses. Hence, there was no difficulty in identifying him. It is true that use of sword would require some space for its movement. The incident occurred at the inner courtyard as would appear from the inquest report. Hence, there could be no difficulty in movement of the sword.

d) Mr. Chatterjee also contended that the accused was arrested from his place of work. His innocence was proved by his conduct as he did not

abscond. We are unable to accept. Mere fact that the accused did not abscond cannot per se lead to an order of acquittal passed in his favour.

e) Mr. Chatterjee also contended that utensils and belongings of the victim although seized and produced, were not identified. In our view, it was redundant.

f) On a sum total of the evidence so adduced by the prosecution witnesses discussed above and in absence of any plausible defence put forward by the accused we do not find any scope to discard the ultimate finding of the learned Judge.

### **9. RESULT :-**

The appeal fails and is hereby dismissed.

There would be no order as to costs.

### **10. DIRECTION :-**

The appellant is now in jail. He is directed to serve out the remaining part of his sentence as awarded by the learned Trial Judge.



A copy of this judgment be sent to the correctional home, where the appellant is suffering his sentence, for his information.

Let a copy of this judgment along with Lower Court Records be sent to the Court of learned Trial Judge for information and necessary action.

Urgent xerox certified copy will be given to the parties, if applied for.

**Raghunath Ray, J:**

I agree.

**[ASHIM KUMAR BANERJEE,J.]**

**[RAGHUNATH RAY,J.]**