IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

APPELLATE SIDE

CRA 436 of 2015
With
CRAN 2 of 2016 (Old CRAN 195 of 2016)
With
CRAN 3 of 2018 (Old CRAN 203 of 2018)
Md. Sonu @ Sandrey Alam @ Sonu Ansari
Vs.
The State of West Bengal
With
CRA 443 of 2015
With
CRAN 1 of 2015 (Old CRAN 2957 of 2015)
Ali Asgar @ Lasgari
Vs.
The State of West Bengal

Before: The Hon'ble Justice Rajarshi Bharadwaj
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellants	:	Mr. Fazlur Rahman, Adv. Md. Babul Hussain, Adv. Ms. Mousumi Sarkar, Adv. Ms. Mihinuri Hossain, Adv.
For the State	:	Ms. Anasuya Sinha, Ld. APP Mr. Samarjit Balial, Adv.
CAV On	:	02.07.2025
Judgment On	:	17.07.2025

Apurba Sinha Ray, J. :-

1. Being aggrieved by and dissatisfied with the judgment and order of conviction dated 29.06.2015 and 30.06.2015 passed by the Learned Additional Sessions Judge (In-Charge), Fast Track, 4th Court, (Barrackpore) in Sessions Trial No. 2(2) of 2010 [arising out of Sessions Case No. 413 of 2009] convicting the appellants under Section 302/34 of the Indian Penal Code, the instant criminal appeal has been preferred on the grounds, inter alia, that the Learned Trial Judge did not consider the evidence on record in its proper perspective and further the learned Trial Judge did not consider the fact that though there was no whisper in the FIR and inquest report regarding dying declaration of the victim, the Learned Judge has relied upon an afterthought oral dying declaration of the victim beyond authority. The PW1, the defacto-complainant is an interested witness and he was in custody in connection with another case for murdering one Mahendra Chowdhury and, therefore, reliance upon the evidence of PW1 by the Learned Trial Judge, is a misplaced one. The deposition of PW2, an alleged eye witness, cannot be relied upon in view of contradiction taken in the deposition of the investigating officer. Though there was sufficient departure from the initial case in the FIR and subsequent material improvement in the prosecution case, the Learned Trial Judge did not consider the anomalies. There are sufficient vital witnesses who ought to have been examined but actually they were kept outside the process of investigation and trial of the case. Therefore, for non-production of such vital witnesses, adverse

presumption is to be drawn against the prosecution case. There are multiple laches in investigation and further, there are ample deficiencies in the prosecution case and, therefore, the judgment and order of conviction as aforesaid is liable to be set aside. Mr. Rahman, learned counsel for the appellants has further submitted that PW3 Babujan Ansari who allegedly took the victim with bleeding injuries to hospital was unable to show that his wearing apparels were blood stained at the relevant time. Moreover, the concerned auto driver in whose auto the victim was allegedly taken to hospital was not examined. The doctor who examined the victim first was also not called on as a witness.

2. The learned counsel Mr. Rahman has also submitted that recovery of the offending weapon is doubtful. No local persons were made seizure list witnesses at the time of recovery of such offending instruments. The learned counsel has also submitted that from the materials on record, it is found that such alleged offending weapon was recovered from places accessible to the general public and, therefore, in view of the settled judicial decisions of the Apex Court such recovery in presence of the witnesses who are close to the de-facto complainant cannot be relied upon. Further recovery of weapons from a public place casts a serious doubt over the process of such recovery. In support of his contention Mr. Rahaman has referred to **(2023) 6 SCC 605 (Nikhil Chandra Mondal Vs. State of West Bengal) [relevant paragraph 20], 2023 SCC OnLine SC 1421 (Manju nath & Ors. Vs. State of Karnataka) [relevant paragraph 27]; (2021) 13 SCC**

716, Jaikam Khan Vs. State of UP, (2025) SCC OnLine SC 453, Abdul Wahid & Anr. Vs. State of Rajasthan (1993) 3 SCC 282, (2019) 2 SCC 303, State of UP Vs.Wasif Haider & Ors.).

3. The learned counsel for the State, Mrs. Sinha has submitted that although there are some minor omissions, contradictions in the versions of the prosecution witnesses in connection with the depiction of the convicts' role in the crime, version relating to the role played by and participation of, the appellants had been well established and the prosecution witnesses withstood during their cross-examination and therefore the prosecution case could not be falsified.

4. It is further contended that the ocular version is wholly corroborated by medical evidence. Moreover, the learned Trial Judge has very rightly taken into consideration the earlier incident of threat and assault upon the victim by the accused. Although in the FIR minute details are not required to be included but immediately after the incident the inquest over the dead body was done by the concerned police personnel and all relevant facts and incidents including the ones prior to the date of incident have been taken into consideration. Moreover, the seizure of the iron rod at the behest of the accused, Sonu also supports the incident of assault depicted by the prosecution witnesses.

5. The learned counsel of the State has drawn the attention of this court to the deposition of PW10 Dr. Avijit Ghoshal, who found multiple injuries

including Chop wound, lacerated wound, puncture wound, fractured wound and they are completely in consonance with the eye witness's version. PW2 and PW3 Anup Kumar Verma and Babujan Ansari were the eyewitnesses who saw the accused to inflict injuries upon the victim with the offending weapons. The cross-examination of PW13 could not discredit the version of the prosecution witnesses. The deposition of PW1, Md. Lal Babu to the effect that the victim verbally intimated him about the names of the assailants was not denied in his cross-examination and therefore, this piece of evidence should be taken into consideration by the court.

6. Lastly, Mrs. Sinha, learned counsel for the State, has submitted that there is no scope for this court to set aside the impugned judgment and order of conviction and sentence.

7. We have considered the rival contentions of the parties and I have further taken into consideration the relevant judicial decisions as referred to by the learned counsel of the defence/ appellants.

8. At the very outset, we would like to say that the observation of the Learned Trial Judge that the instant case was of circumstantial evidence is not at all correct. In fact, the prosecution relies upon some direct evidence of certain witnesses namely, PW1, Lalbabu, PW2 Anup Kumar Verma and PW3 Babujan. Furthermore, recovery of the offending instrument was done allegedly in presence of PW9 Dinesh Gupta and PW12 Manjur Alam.

9. Admittedly, PW1 Lalbabu, the defacto-complainant was not present at the spot when the offence took place. However, according to him, he along with others shifted the victim to a nearby hospital from the place of occurrence in an auto rickshaw, and at that time the victim narrated to him the names of his assailants.

10. However, these vital facts of shifting the victim to the hospital by Lalbabu, the PW1, along with others and disclosure of the names of assailants to the complainant by the victim were not mentioned in the FIR at all. The omission to narrate the vital facts may change the colour of the case of the prosecution instantaneously, if such omissions are not made believable with other cogent material evidence on record.

11. There may be an omission to disclose some relevant facts in the FIR and such omission may not turn out to be fatal in all sorts of cases, since it is an established principle that FIR cannot be an encyclopedia of events. But that does not mean that the prosecution or its witnesses can improve the initial prosecution case at their own sweet will. To understand that the alleged omission is really an omission and not an attempt to improve the case, the court should scrutinize the other material evidence brought on record.

12. Now, in this case, there may be an omission on the part of the defacto-complainant to narrate those vital facts in the FIR since, in all probabilities, he was in a state of shock at that point of time. But the bed

head tickets and other hospital records could have shown the names of the persons who actually brought the victim to the hospital along with history of assault. This is the procedure maintained by the hospitals. But the I.O. did not seize the said bed head tickets or other hospital records for the reasons best known to him. If such hospital records were produced, this court could have understood that PW1, PW2 and PW3 were the persons who brought the victim to the hospital and during the course of journey the victim had the opportunity to disclose the names of his assailants and unfortunately the PW1 being in a state of shock somehow missed to state these relevant facts in the FIR. Therefore, in the absence of such statements in the F.I.R alongwith non-production of initial medical records, it is very difficult to hold that those omissions are mere omissions and not an attempt to improve the case.

13. In this case, the auto rickshaw driver was also not examined to lend support to the prosecution case that the victim was taken to hospital by Lalbabu and others in his auto and the victim was not dead at that point of time. The I.O. has deposed that at the time of inquest he came to know that the local people took the victim to the hospital. During the inquest, Lalbabu was present at the relevant place of inquest but he did not report to the I.O. that he took the victim to hospital along with the others. The PW2, PW3 did not state directly that they overheard that the victim was telling the names of the assailants to the PW1 when he was being taken to hospital in an auto rickshaw. They did not depose anything in this regard except that at that time the victim was telling something to the defacto-complainant being the

PW1. During cross-examination of the I.O., though PW 3's deposition was contradicted by the I.O. when he stated that PW-3 Babujan Ansari did not tell him that the victim Nasir was alive while they were travelling in auto. However, no contradiction was taken to discredit PW2's deposition that when they were taking the victim to the hospital in an auto rickshaw the victim was talking with his brother Lalbabu. There was no challenge from the side of the defence regarding the deposition of PW1 Lalbabu, to the effect that "on the way to hospital my elder brother told us that Ali Asgar, Sonu and Mahendra Chowdhury assaulted him". The same was not contradicted through the cross-examination of PW 13, the investigating officer.

14. It is a well settled principle of law that a relevant fact is to be proved by the best piece of evidence. The prosecution has tried to prove the case on the basis of two sorts of evidence, first, the version of the victim himself through his alleged dying declaration which he allegedly made to his brother, PW1 Lalbabu and secondly on the basis of direct evidence of assault upon the victim with the help of deposition of PW2 Anup Kumar Verma, PW3 Babujan Ansari. In support of such direct evidence the prosecution has also relied upon the deposition of PW9 Dinesh Gupta and PW12 Manjur Alam who witnessed the recovery of the offending instrument at the instance of the accused Sonu.

15. The question whether the victim actually narrated the names of his assailants to PW1, is doubtful since there is no documentary evidence to the effect that soon after the incident the victim was taken to the hospital by

PW1. The best piece of evidence in this regard is the hospital records which usually records the name of the person who brings the victim to the hospital. The history of assault is usually recorded at the time of admission. In this case, the best evidence is lacking and further there is no material showing that the wearing apparels of the PW-1 got bloodstained when he was allegedly taking the victim to the hospital. The alleged oral dying declaration of the victim, which is a vital fact, does not find place in the FIR nor in the inquest report. Therefore, the prosecution was unable to prove beyond all reasonable doubt that the victim had disclosed the names of his assailants to the PW1. As such, the prosecution cannot succeed on the basis of the alleged oral dying declaration of the victim.

16. However, according to the prosecution there were eyewitnesses to the incident. Now let us see whether deposition of such eyewitnesses can be relied upon or not. The PW2 namely, Anup Kumar Varma has specifically stated that on 05.05.2009 he saw a crowd at Circus More and he further saw three persons namely Ali Asgar, Sonu and Mahendra Chowdhury threatening the victim Nasir Ansari that they will kill him. After a few minutes they began to assault Nasir by Bhujali, Chopper and iron rod etc. They were also threatening the people gathered there. Nasir fell on earth. Thereafter the assailant left the place. Then Lalbabu and one Babujan arrived there. Thereafter they took the victim to Bhatpara General State Hospital by a hired auto rickshaw. After coming back to the place of occurrence from the hospital he signed one seizure list and he identifies his signature on the said seizure list and has specifically stated that the police

collected bloodstained earth from the place of occurrence and obtained his signature. In his cross-examination the deposition of PW-2 that the accused began to assault Nasir by Bhujali, Chopper and iron rod etc. was not denied. The exhibit 3/1 shows that blood stained mud and ordinary mud of the place of occurrence were seized by such seizure list and Mr. Anup Kumar Varma being PW2 has not only identified his signature but has also rightly deposed about the contents of the said seizure list. This lends credence to the prosecution case that the PW2 was a witness to the seizure of such articles. But whether the claim of the prosecution that he was an eyewitness to the incident has any basis or not, we shall discuss the same after a while.

17. Now, if we scan the evidence of PW13 the investigating officer Mr. Mrinal Pal we shall find that during his cross-examination it is found that though PW2 Anup Kumar Varma did not tell him that three persons namely, Ali Asgar, Md. Sonu and Mahendra Chowdhury were threatening Nasir that they will kill him but he told the investigating officer only that he saw Ali Asgar, Sonu and Mahendra Chowdhury were standing with Bhujali, Chopper and iron rod etc. There is a dilemma as to why he did not tell the I.O. that “after a few minutes the accused began to assault Nasir by Bhujali, chopper and iron rod etc.” However, PW3 Babujan has stated in his deposition that on 05.05.2009 he was waiting at Circus More with his rickshaw around 1:30 PM. Sonu, Ali Asgar and Mahendra Chowdhury were standing there. The victim Nasir was returning from somewhere. Sonu attacked Nasir with a chopper. This statement of PW3 was not contradicted

during the cross-examination of the I.O., the PW-13. The record shows that the PW3, Babujan has also stated that police collected blood stained earth from the place of occurrence and he put his LTI on some documents at the request of the police officer. PW13, the investigating officer, has also deposed that he prepared the seizure list on 05.05.2009 and by such seizure list blood stained earth and controlled earth were seized. This tends to show that the PW3 was also present at the place of occurrence at the time of such seizure. The deposition of PW3 that Sonu attacked Nasir with a chopper and Mahendra assaulted Nasir with a stick (pointed iron rod) was not contradicted during the cross-examination of PW-13, the investigating officer. It is true that during his cross-examination, the PW-3 Babujan has stated that he had seen Nasir's dead body on road after his death but the post mortem report disclosed that the victim died at about 2:10 P.M. as per the report of the police. Whether a person is dead or not can be ascertained by the medical personnel. One may become senseless due to serious injuries and a layman not being a medical personnel may be unable to understand whether he is dead or not. Only the medical personnel can declare a person dead. Therefore, even the PW3 deposed that he had seen Nasir's dead body on the road after his death; such deposition cannot be considered as final opinion about the death of the victim Nasir. In view of the post mortem report, he died at 2:10 p.m. in the hospital but the same was recorded in the post mortem report on the basis of a report of the police personnel. Considering all aspects of the matter, we do find that the evidence of PW2 and PW3 regarding assault upon the victim almost remained unshaken

during their cross-examination. The postmortem report also lends support to such deposition regarding the manner of assault by chopper, pointed iron road etc. But inspite of such deposition of PW2 and PW3 this court finds that such depositions are also not free from blemishes and doubt. It is not understandable as to why the prosecution has relied upon only the witnesses who have come from Mominpara, Jagaddal and not from the local witnesses of Circus more where the incident actually occurred. It is also astonishing that the seizure list witnesses in connection with the recovery of an iron rod upon which the prosecution has heavily relied upon, also hail from the said place of Mominpara, Jagaddal. It is further astonishing that the I.O. did not examine the meat shop of owner Altaf Kureshi in connection with the seizure of the iron rod from a place near to his meat shop. On the other hand, such a seizure list was prepared in presence of two witnesses namely Dinesh Gupta and Manjur Alam who hail from Mominpara, that is, the locality of PW1 and the deceased. The recovery statement of the accused Sonu was not exhibited for the reasons best known to the I.O. It is also found that such an iron rod was recovered from a drain which is a public place. In the case of **Manju Nath & Ors. Vs. State of Kerala reported in 2023 SCC OnLine SC 1421** the Hon'ble Apex Court in paragraph 26 has discussed the requirements of Section 27 of the Indian Evidence Act. The relevant paragraph is quoted herein below:-

> *"**26**. Further discovery made, to be one satisfying the requirements of Section 27, Indian Evidence Act it must be a fact that is discovered as a consequence of information received from a*

> *person in custody. The conditions have been discussed by the Privy Council in Pulukuri Kotayya v. King Emperor and the position was reiterated by this Court in Mohd. Inayatullah v. State of Maharashtra, in the following terms:—*
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> *"12…It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery…"*

18. From the above, it is transpired that such conditions were not complied with in the case in hand. In the case **Nikhil Chandra Mondal Vs.**

State of West Bengal reported in (2023) 6 SCC 605 the recovery from places accessible to public has been seriously doubted and placing reliance upon such recoveries is held to be an incorrect approach from the part of the trial court.

19. In the case of **Abdul Wahid & Anr. Vs. State of Rajasthan reported in 2025 SCC OnLine SC 453**, the Hon'ble Apex Court has been pleased to observe that it is for the prosecution to connect the accused to the murder of the deceased by producing credible and legally admissible evidence. If there is no credible evidence at all to connect the accused persons with the homicidal death of the victim, the accused are entitled to the benefit of doubt.

20. In the case of **State of UP Vs. Wasif Haider & Ors. reported in (2019) 2 SCC 303** the Hon'ble Supreme Court has been pleased to hold that defective or faulty investigation fortifies the presumption of innocence in favour of the accused and in such cases the benefit of doubt arising out of a faulty investigation accrues in favour of the accused. In the case of **Ram Kumar Pandey Vs. State of M.P reported in (1975) 3 SCC 815** the Hon'ble Apex Court has been pleased to hold that failure to mention about the existence of dying declaration in the FIR is proved to be fatal for the prosecution.

21. From the above discussion it is found that there are several lapses in the investigation as already mentioned above. The iron rod was allegedly

recovered from a public place and the I.O. did not examine the local witnesses of the alleged place of occurrence and place of seizure rather he relied upon witnesses who hail from the locality of the defacto-complainant and the victim. The recovery statement was not brought on record as evidence. The prosecution has relied upon only the witnesses who belonged to the locality of the victim although the place of occurrence was at Circus more which was a faraway place from the locality of the victim. The Pw 2 in his cross examination has said that it would take 20/25 minutes' walk from his residence at Mominpara to reach Circus More. Moreover, the alleged recovery of the iron rod was done also from a distant place from the locality of the victim's residence and also from the place of occurrence and astonishingly, the witnesses of such seizure list were also from the locality of the victim. There are no medical papers showing that the victim was taken to hospital by the PW1, PW2 and PW3 and not by the local people of Circus more. Another aspect which raises a doubt in the mind of the court that though the factum of dying declaration was not mentioned in the FIR and the inquest report, why such improvement was done by the prosecution with the help of PW1, PW2 and PW3 who belonged to the same locality although the death of the victim took place at Circus more and no witness of the locality at Circus more has supported the prosecution case. It has also added more confusion and doubt as to why recovery of the iron rod was shown to be done in presence of Dinesh Gupta and Manjur Alam who were also the residents of the victim's locality. PW9 Dinesh Gupta and PW1 Md. Lalbaba were involved in the murder of Mahendra Chowdhury who was also

an accused in the instant case. Therefore, there is a serious doubt in the mind of the court that the factum of dying declaration may be an afterthought of the prosecution witnesses and improvement of the case was done by the prosecution including the recovery of iron rod with the help of PW9 Dinesh Gupta and PW12 Manjur Alam who were also the residents of the locality of PW1 the defacto-complainant. This vital aspect was not properly considered by the Learned Trial Judge. In fact the Learned Trial Judge has wrongly mentioned that "though it has conclusively not been proved but it is evident that on refusal to pay Hapta Money Nasir Mia was being assaulted by the accused person with the help of chopper/knife, cabab stick/pointed sik (pointed iron rod)".

22. It appears that the Learned Trial Judge has made such an observation without any supporting and corroborative evidence, which is, in our view, not at all a correct approach. It is also found that the examination of the accused under Section 313 of Cr.P.C. was also not done properly. All the relevant incriminating materials and statements of the witnesses were clubbed together and thereafter they were put to the accused during examination which is again not a correct approach adopted by the Learned Trial Judge. In this regard, I would like to recollect the relevant judicial decisions of the Hon'ble Apex Court **Naval Kishore Singh Vs. State of Bihar reported in (2004) 7 Supreme Court Cases 502** and **Tara Singh Vs. State reported in 1951 Supreme Court Cases 903**.

23. In **Naval Kishore Singh** (supra) the Hon'ble Supreme Court has been pleased to observe as hereunder:-

> *Under Section 313 CrPC the accused should have been given an opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given the opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a*

position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence. In various decisions of this Court, the importance of questioning the accused under Section 313 CrPC was given due emphasis, e.g. Ram Shankar Singh v. State of W.B., Bhalinder Singh v. State of Punjab, State of Maharashtra v. Sukhdev Singh and Lallu Manjhi v. State of Jharkhand. (emphasis added)

24. In **Tara Singh** (supra) the Hon'ble Supreme Court has been pleased to observe as hereunder:-

"The whole object of Section 342 (Sec. 313 Code of 1973) (emphasis added) is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and

understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of the opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned." (Emphasis added)

25. Considering all aspects, we find that prosecution has not been able to prove the case against the appellants beyond all sorts of reasonable doubt and in view of the above discussion, the instant appeal is allowed on contest. The appellants namely, Md. Sonu @ Sandrey Alam @ Sonu Ansari and Ali Asgar @ Lasgari are acquitted from the charges and be set at liberty at once, if not wanted in any other case. The judgment and order of

conviction dated 29.06.2015 and 30.06.2015 passed by the Learned Additional Sessions Judge (In-Charge), Fast Track, 4th Court, (Barrackpore) in Sessions Trial No. 2(2) of 2010 [arising out of Sessions Case No. 413 of 2009] are hereby set aside. The trial court record be sent to the concerned court at once.

26. Thus, CRA 436 of 2015 with CRAN 2 of 2016 (Old CRAN 195 of 2016) and CRA 443 of 2015 with CRAN 1 of 2015 (Old CRAN 2957 of 2015) are accordingly disposed of. CRAN 3 of 2018 (Old CRAN 203 of 2018) has already been dismissed vide order dated 19.01.2021.

27. Urgent photostat certified copies of this Judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree

(RAJARSHI BHARADWAJ, J)

(APURBA SINHA RAY, J.)