

## Nitya Sen vs State Of West Bengal on 14 December, 1977

**Equivalent citations: AIR1978SC383, 1978CRILJ481, (1978)2SCC382, 1978(10)UJ123(SC), AIR 1978 SUPREME COURT 383, (1978) 2 SC C 382, 1978 SCC(CRI) 191, 1978 SC CRI R 63, 1978 UJ (SC) 123**

**Bench: P.K. Goswami, P.N. Shinghal**

### JUDGMENT

P.N. Shinghal, J.

1. petition for special leave to appeal to this Court was filed Baidyanath Ghosh, Dharam Ghosh and Nitya Sen against the 'appellate judgment of the Calcutta High Court dated March 3, 1975, upholding their conviction for an offence under Section 302/34 I.P.C. and the sentence of rigorous imprisonment for life. When the matter came up before this Court on December 13, 1976, special leave was granted only to the appellant Nitya Sen and the petition in so far as it related to Baidyanath Ghosh and Dharam Ghosh, was dismissed. We have therefore heard argument of the counsel for the appellant.

2. It is not in dispute that Chintamoni Ghosh and appellant Nitya Sen belonged to the same village Chintamoni Ghosh was serving in the Thermal Power Plant at Tribeni in the Hooghly district. He used to come to his village Dadupur (within the jurisdiction of police station Nakaspara) on every Saturday, to meet his mother, wife and brothers. It is alleged that when he came to his house on November 13, 1971, which was a Saturday at about 8.30 p.m. he knocked at the 'khirki' of his house. It was opened by his brothers Nabjiban Ghosh P.W. 1 and Patan Ghosh P.W. 2. They saw that their brother Chintamoni Ghosh was being assaulted by Nitya Sen and others and was being dragged towards a bamboo grove in the east, where they saw him being struck with "hensua", "dao" and daggers. When Nabjiban Ghosh and Patan Ghosh tried to go to the help of their brother Chintamoni Ghosh, it is alleged that appellant Nitya Sen, who was standing with a pistol in his hand threatened them. It has been alleged further that the accused dealt a number of blows on the person of Chintamoni Ghosh after dragging him towards the bamboo grove, at a distance of about 10 or 15 cubits from the 'khirki' of his houses, and left him there. Thereafter appellant Nitya Sen is said to have fired his pistol once and the assailants left the place shouting that they had killed the "police agent" and offering "red saluted to Naxalbari". Nabjiban Ghosh P.W. 1 and Patan Ghosh P.W. 2 immediately rushed to the place where Chintamoni Ghosh was lying, and found that he had died. They brought the death body to the verandah of their house. Nabjiban Ghosh P.W. 1 left for police station Nakaspara, on foot, which was at a distance of some 12 km. and lodged the first information report (Ex. 1/2) there at about 3.45 a.m.. The entire incident including the names of the three accused Baidyanath Ghosh, Dharam Ghosh and appellant Nitya Sen was mentioned in the report along with the names of the two eye witnesses Nabjiban Ghosh P.W. 1 and Patan Ghosh P.W. 2 Dr.

P.N Chatterji P.W. 16 performed the post mortem examination on the body Chintamani Ghosh. He found eleven incised and other injuries including the following three injuries which were jointly and severally sufficient to cause the death of the deceased and were ail ante mortem:

1. Cut throat wound over the entire lateral aspect of neck right side of 8"  $\times$  1 1/2 up to vertebral column starting from 2" away from the angle of mouth and 1" below right ear cutting all the structures up to the bone.
2. Incised wound 2"  $\times$  1" muscle deep starting from right side of chin and communicated with the first wound.
3. Incised wound 3"  $\times$  1" over the posterior aspect of right shoulder joint cutting all structures and exposing the joint cavity.

3. All the accused were found absconding and could be arrested only after September 10, 1912 when proclamations were issued to compel their surrender. They were committed to the Court of Session and were convicted and sentenced by the Additional Sessions Judge of Madian of the offence under Section 302/34 I.P.C. and sentenced to imprisonment for life as aforesaid.

4. It has been argued by counsel for appellant Nitya Sen that the entire prosecution story must be discredited because the incident took place in bamboo grove, towards the east of the house of the deceased, and that the two prosecution witnesses have falsely deposed that the deceased knocked at the 'khirki' of the home and they saw him being dragged towards the bamboo grove. It has been pointed out that there was no satisfactory evidence on the record to show that blood had fallen near the 'khirki', and that the bamboo grove where the dead body was found lying was separated by barbed wire fencing so that the deceased could not have been dragged there because of the obstruction. We have gone through the entire evidence which bears on this argument. We find that the High Court has examined it and has given satisfactory reasons why blood was not found near the 'khirki'. In fact both Nabjiban Ghosh P.W. 1 and Patan Ghosh P.W. 2 have stated that the deceased was assaulted with the lethal weapons in the bamboo grove, and that was why blood was found there. Moreover, as he was dragged away immediately on his knocking the door, there is nothing wrong with the view of the High Court that there was no time for the blood to ooze out and fall near the 'khirki'. As regards the barbed-wire fencing, we find that there is satisfactory evidence on the record to show that it was not in existence at the time of the incident. There is therefore no justification for the argument that the two eye witnesses on whom reliance has been placed by the trial court as well as the appellate court should be disbelieved for any such reason.

5. It has next been argued that the first information report (Ex. 1/2) was not admissible in evidence because Nabjiban Ghosh P.W. 1 had stated that the entrie "ejabar" had not been written when he signed it. This argument was also advanced in the High Court. The learned Judges have looked into the original document and found that the signature of Nabjiban Ghosh P.W. 1 appeared at the end of the "ejabar" and that they were satisfied that there was no justification for the criticism which was advanced about the admissibility of the report.

6. It has also been argued that it was quite dark at the time of the alleged incident and it was not possible for any one to identify the assailants. This argument has also been satisfactorily examined by the High Court. In fact Nabjiban Ghosh P.W. 1 has stated that he had a hurricane in his hand at the time of the incident and that the assailants and his brother Pabi were using torch light. We have no reason to think that the view taken by the High Court is vitiated for any reason whatsoever. On the other hand, it has to be remembered that the assailants were follow villagers, who were already known to the witnesses, and there could therefore be no difficulty in identifying them from a close distance. The fact that the first information report was lodged with all the necessary details, within a few hours, the same night, lends to the testimony of Nabjiban Ghosh and Ratan Ghosh on which reliance has been placed by the High Court.

7. An argument has also been advanced to the effect that there could be no motive for the murder as there was no enmity with the deceased. We find however that both the eye witnesses have stated that while leaving the dead body the assailants shouted that they had killed the "police agent" and proclaimed "red salute" to Naxalbari. It therefore appears that the motive for the murder of Chintamoni Ghosh was that he was suspected to be a police agent.

8. It has lastly argued that Section 34 of the Indian Penal Code could not possibly be invoked for the conviction of the appellant as there was no evidence of prior concert and there was nothing to show that they had the common intention of killing Chintamoni Ghosh. As the High Court has pointed out, this argument cannot also avail appellant Nitya Sen for the reason that he reached the place of occurrence along with the other accused who were all armed with deadly weapons. It has also to be remembered that they caught hold of the deceased as soon as he knocked at the 'khirki' of his house, dragged him to the bamboo grave & dealt as may as 11 blows including 3 fatal blows of great intensity. It has also been proved that appellant Nitya Sen was standing outside the house of the deceased with a pistol in his hand and held out threats in order to prevent the eye witnesses from coming to the help of their brother. There is also evidence to show that the assailants shouted that they had killed the "police agent" and appellant Nitya Sen fired one shot before they left the place of occurrence. It has therefore been proved beyond doubt that there was not only ample opportunity for a preconcert, but that the assailants, including the appellant, committed the murder of Chintamoni Ghosh in pursuance of a pre-concerted plan, in a cold blooded manner. The High Court therefore rightly held that the prosecution had succeeded in proving that the murder as committed in furtherance of the common intention of the three accused who have been convicted and sentenced by both the courts below.

9. There is thus no force in the arguments which have been advanced on behalf of the appellant. It may however be mentioned that we were deprived of the opportunity of hearing Mr. G.S. Chatterji, who appeared on behalf of the respondent State of West Bengal as he informed us that the only instructions he had were not to oppose the appeal. It may be that the State Government have reasons for giving such instructions, and it may be that they may have some, other way of dealing with the sentence of the appellant but, so far as we are concerned, we find no force in this appeal and it is hereby dismissed.