

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 537 of 2016
with
CRAN 3 of 2021

Ayub Ali

-Vs-

State of West Bengal

For the Appellant : Mr. Avinaba Patra, Adv.

For the State : Mr. Prasun Kr. Dutta, learned APP
Mr. S. D. Ray, Adv.

Heard on : 23.12.2021

Judgment on : 23.12.2021

Joymalya Bagchi, J. :-

Appeal is directed against the judgement and order dated 28th April, 2016 and 29th April, 2016 respectively in Sessions Case No. 45(7) of 2010 and Sessions Trial No. 3 (12) of 2010 convicting the appellant for commission of offence punishable under Sections 394 and 397 of the Indian Penal Code and sentencing the appellant to suffer rigorous life imprisonment for 20

years and to pay fine of Rs. 20,000/-, in default to suffer rigorous imprisonment for two years for offence punishable under Section 394 IPC and to suffer rigorous imprisonment for seven years for the offence punishable under Section 397 I.P.C. Both the sentences to run concurrently.

Prosecution case alleged against the appellant is to the effect that on 26.01.2010 at 8.45 P.M. four unknown miscreants came to the petrol pump named and styled as “Sunny Fuel Services” riding on two motor cycles. On the pretence of buying oil, they tried to snatch cash from the cash box. One of the employees, Tapasi Saha (Chanda), P.W.4 resisted them. One of the miscreants shot at her. She suffered bullet injury. Thereupon, the miscreants fled from the spot. Tapasi was treated for bullet wounds at AMRI Hospital, Dhakuria.

P.W.1, husband of the owner of the petrol pump, lodged First Information Report. In the course of investigation, P.W. 16, Rameswar Ojha, second investigating officer, upon receiving information with regard to involvement of the appellant in the crime had interrogated him while he was in custody in connection with Sonarpur P.S. case No.67 of 2010 dated 08.02.2010. Thereupon, appellant was shown arrested in connection with the present case. On further interrogation, a motor cycle bearing No. WB 24D 9216 which was already seized in the other case was resealed in the present case. In the course of T.I. Parade, injured witness P.W. 4 and others identified the appellant as one of the miscreants. In conclusion of investigation charge sheet was filed against the appellant. Charges were framed against the appellant under Sections 394 and 397 of the Indian Penal

Code. He pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 16 witnesses and exhibited a number of documents.

Defence of the appellant was one of innocence and false implications. In conclusion of trial, Trial Judge convicted and sentenced the appellant, as aforesaid.

Learned Counsel appearing for the appellant argues that the appellant has been falsely implicated in the instant case. Weapon of offence had not been seized. There is no evidence to show that the appellant had fired at the victim. He accordingly prays for acquittal.

Mr. Dutta, learned Additional Public Prosecutor for the State submits that appellant was one of the miscreants who committed robbery at the petrol pump. He has been identified by the injured eyewitness, P.W. 4 as well as P.Ws. 3, 5 and 6 during the course of T.I. parade as well as in court. Motor cycle used for committing robbery was also seized on his statement. Injury on the victim has been proved by the evidence of P.Ws. 9 and 11. He accordingly prays for dismissal of the appeal.

P.W. 1 is the de-facto complainant. He lodged the First Information Report. He deposed that his wife is the owner of the petrol pump. He admitted that he was not present at the place of occurrence. He proved the written complaint.

P.W.2 is an independent witness who was present at the petrol pump when the incident occurred. She deposed some unknown persons came to the petrol pump and opened fire causing injury to Tapasi Saha (Chanda),

P.W.4 who was taken to hospital. She, however, did not identify the appellant in court.

P.W. 3, Debasish Singha Roy is the brother of P.W.1. He was present at the petrol pump. He heard the sounds of firing and came out of his office. He found Tapasi was lying injured. He arranged for shifting Tapasi to hospital. He attended T.I. parade and identified the appellant.

P.W. 4 is the injured eyewitness and star witness of the case. She deposed on 26.01.2010 between 8.30 p.m. to 9.00 p.m. the appellant along with another came on a motor cycle. On the pretence of purchasing oil, he came to the cash counter and tried to snatch money from the cash counter. When she protested, the appellant shot her in the shoulder. She suffered injuries and was shifted to Hospital. She identified the appellant both in the course of T.I. parade and in court. Her deposition remained unshaken during cross-examination.

P.W.5, Tumpa Saha is another employee of the petrol pump. She corroborated the evidence of P.W.4.

P.W. 6 is an independent witness. He was standing near the petrol pump when the incident occurred. He deposed two persons came on a motor cycle. Face of one of the persons was covered with cloth. Appellant was sitting in the pillion of the motor cycle. He fired at Tapasi Chanda who suffered injuries. Initially she was taken to Peerless hospital thereafter to AMRI Hospital. He identified the appellant in the course of T.I. parade as well as in court.

P.Ws. 9 & 11 are the medical witnesses.

P.W. 9 deposed she was attached to AMRI Hospital at Dhakuria as O.T. nurse. Tapasi Chanda was admitted in the hospital and in the course of operation bullet head was found in her body. Bullet head was handed over to the administrative officer of the hospital. She identified the bullet head. She also proved her signature in her report.

P.W. 11 is the doctor who treated Tapasi at AMRI Hospital at Dhakuria. He deposed Tapasi was admitted in the hospital with gun shot injury by two miscreants while working in the petrol pump. She had sustained gun shot injury on right side of her neck. On 28.01.2010 he performed surgical procedure for removal of the bullet head. The bullet head removed from the body of the patient was kept in a packet. It was identified by the witness in court. He also proved the bed head ticket (Exhibit 5), OT note (Exhibit 6) as well as the discharge certificate dated 05.02.2010, (Exhibit 7).

P.W. 10 is a security guard of the hospital who signed the seizure list under which various articles were seized by the police from the hospital. He identified his signature on the seizure list. He also identified the bullet head.

P.Ws. 15 and 16 are the investigating officer of the case.

P.W.15 was posted at Baishnabghata Patuli I/C under Jadavpur P.S. On 27.01.2010, he received written complaint from P.W.1. Prabir Kumar Roy, I/C Jadavpur PS drew up formal First Information Report (Exhibit 11) and he commenced investigation. He visited P. O., recorded statements of witnesses, prepared rough sketch of suspects as per description given by the

witnesses. He visited the injured in the hospital. He interrogated her on various dates.

P.W. 16 is the second investigating officer. He interrogated accused Mark Josef. Certain articles were recovered from accused Josef under a seizure list (Exhibit 2). Upon receipt of intelligence, P.W. 8 S.I. Somnath Das was instructed to interrogate the appellant who was detained at Sonarpur P.S. in connection with another case. P.W. 8 interrogated him. Thereafter, prayer was made to show the appellant arrested in the present case. He made prayer for T.I. parade examination of the appellant. T.I. parade was conducted where the witnesses identified the appellant. During police custody, the appellant on interrogation disclosed that the motor cycle which was seized in connection with Sonarpur P.S. case No.67 of 2010 was used to commit the crime. Accordingly, the motor cycle was resealed in presence of witnesses. He seized the bullet head and other articles from AMRI Hospital.

From the aforesaid evidence, it appears role of the appellant as one of the miscreants who had come to the petrol pump to commit dacoity and had fired at the injured witness, P.W. 4 is well-established. P.W. 4 has identified the appellant in Court as also in the course of T.I. parade as her assailant. Her identification of the appellant is unblemished. Her evidence is corroborated by other witnesses namely, P.Ws. 3, 5 and 6. It is argued P.W. 3 could not have seen the incident as he came out of the office after hearing the sound of fire. It is also argued P.W. 5 had admitted in cross-examination stated that she had been shown the appellant in the police station.

I have considered the evidence of P.W. 3. He deposed upon hearing the firing he came out and saw the miscreants at the spot. The incident occurred in a petrol pump which was on the main road. There was ample light at the place of occurrence and the witness had seen the miscreants in close range. Hence, identification of the appellant by P.W. 3, in my considered opinion, cannot be doubted. Although there is some doubt whether the appellant had been shown to P.W. 5 in the police station, in view of the reliable evidence of P.W. 4 the injured witness which is corroborated by other witnesses as well as the medical evidence on record, I am of the opinion presence of the appellant as one of the miscreants who came to the petrol pump to commit dacoity and fired at P.W.4 is proved beyond doubt. Conviction of the appellant is, accordingly, upheld.

Coming to the issue of sentence, I note with deep concern the Trial Judge has imposed a sentence of life imprisonment for 20 years. Imprisonment of life under the Indian Penal Code means imprisonment till the end of natural life of the convict. Awarding a sentence of life imprisonment for 20 years is beyond the scheme of the Indian Penal Code and is wholly perverse. An error of such nature is not expected from a judge who is assigned to conduct a session trial. Section 394 of the Indian Penal Code prescribes a sentence either of life imprisonment or for a term of 10 years and fine. No other punishment apart from imprisonment for life, that is till the end of the natural life of the convict or for a term of 10 years can be awarded. Hence, sentence awarded by the trial Court, that is, a sentence of life imprisonment for 20 years is not a valid and lawful sentence in the eye of law. A sentence of

imprisonment for life would mean imprisonment till the last breath of the convict unless the same is remitted by the appropriate authority under law. It is not within the domain of the trial Court to circumscribe a life imprisonment to a finite period of time, that is, 20 years. Trial Court exceeded its jurisdiction in prescribing a fixed term as life imprisonment. A court of law cannot invent a new sentence and is under a bounden duty to award a sentence which is prescribed by law and nothing more. Trial Judge completely lost sight of such limitation and proceeded to award an illegal sentence in the present case.

As to what would be a just and proper sentence in the present case, I note though the offence is a grave one, no cash had been stolen and appellant has no prior conviction. Balancing the aggravating and mitigating circumstances, I modify the sentence awarded upon the appellant and direct he shall suffer rigorous imprisonment for 10 years and pay a fine of Rs. 20,000/-.

The appeal is, accordingly, disposed of.

Period of detention, if any, undergone by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure. In view of dismissal of the appeal, connected application being CRAN 3 of 2021 is also disposed of.

Copy of the judgment along with lower court records be sent down to the trial court at once for necessary compliance.

Department is also directed to communicate a copy of this judgment of the judge concerned who delivered the verdict for the purpose of making him aware that a sentence for life imprisonment for 20 years is unwarranted in law and could not have been awarded in the present case.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)

cm/PA