

**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. 665 of 2016
CRAN 1 of 2019 (Old CRAN No. 4261 of 2019)**

Mamon Sk. @ Mondal

-Vs-

State of West Bengal

For the Appellant : Mrs. Nasra Ali Rahman, Adv.
Mr. Fazlur Rahman, Adv.

For the State : Mr. Swapan Banerjee, Adv.
Mr. Suman De, Adv.

Heard on : 24.11.2021

Judgment on : 24.11.2021

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 11th August, 2016/17th August, 2016 passed by the learned Additional Sessions Judge, 3rd Court, Krishnanagar, Nadia in Sessions Case No. 60(12) 15 convicting the appellant for commission of offence

punishable under Section 302 of the Indian Penal Code and Section 14 of the Foreigners Act and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer further imprisonment for six months more for the offence punishable under Section 302 IPC and to suffer rigorous imprisonment for five years and to pay fine of Rs.2,000/, in default, to suffer further imprisonment for two months more for the offence punishable under Section 14 of the Foreigners Act; both the sentences to run concurrently.

The instant case was registered on basis of a written complaint lodged by one Sahajamal Mondal alleging over the issue of clearing of water closing the entrance of the house of the deceased Samiul Mondal, an altercation arose on 25th July, 2015 at midnight between the deceased and the appellant. In the course of altercation, the appellant hit the deceased on the head with a crowbar. The deceased was initially shifted to Chapra Primary Health Centre and thereafter to District Hospital, Nadia and he finally expired at NRS Hospital at Calcutta on 29th July, 2015. While the deceased was gasping for his life at NRS Hospital at Calcutta, a further complaint was lodged by Marjina Bibi (PW4) alleging that the altercation had taken place not only with the appellant but also one Babu Mondal, Salam Mondal, Kuljan Mondal and Tanuja Mondal. She further alleged that Babu Mondal had brought the crowbar in his hand and the

appellant had suddenly snatched the crowbar and dealt blow on the head of her husband.

In conclusion of investigation, however, charge-sheet was filed against the appellant alone and upon commitment to the court of sessions, the case was transferred to the Court of the learned Additional Sessions Judge, 3rd Court, Krishnanagar, Nadia who framed charges under Section 302 IPC and under Section 14 of the Foreigners Act against the appellant. The appellant pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined 14 witnesses and exhibited a number of documents. In conclusion of trial, the trial Judge by the impugned judgment and order dated 11th August, 2016/17th August, 2016 convicted and sentenced the appellant, as aforesaid.

Learned counsel appearing for the appellant submits that the prosecution case is inconsistent and unreliable. While in the initial report lodged by PW1, appellant is said to be the sole miscreant, subsequent report of PW4 to police as well as the depositions of PW4 and PW6 show that other persons had also participated in the assault of the deceased. The said persons have not been arrayed as accused in the present case. It is further submitted that the appellant did not have any prior enmity with the deceased and the incident occurred in the course of a sudden altercation. The deceased was alive for about four days. Hence, the conviction under Section 302 of the Indian Penal

Code is wholly unjustified. He, however, did not challenge the conviction under Section 14 of the Foreigners Act.

Learned counsel appearing for the State submits that the appellant was the principal assailant and had hit the deceased with a spade on the head. Ocular version of PW4 and PW6 is supported by the medical evidence of PW7, PW8 and PW10. Hence, the prosecution case is proved beyond doubt.

PW4 and PW6 are the wife and son respectively of the deceased. They are also the eyewitnesses.

PW4, Marjina Bibi deposed on the fateful night rain water had accumulated in their house. There was a passage for exit of rain water between their house and the house of Salam. Her husband, Salam and his son Babu were clearing the accumulated rain water through the passage. At that time, Salam, Babu and the appellant restrained the flow of water. Her husband along with herself and her son, Rabiul removed the obstruction on the road and there was an altercation between her husband on one side and Babu and Salam on the other side. Wife of Babu namely, Tanuja called Maman Seikh who came to the spot. Maman came to the spot with a spade and assaulted on the head of her husband who fell down in the water. She called her *vasur* Sahajamal Mondal (PW1). They took the victim to Chapra Primary Health Centre, thereafter to Shaktigarh Hospital, Krishnanagar and on the next day to NRS Hospital where her husband expired. She was unhappy why name of Babu and Salam were omitted from the charge-

sheet. She also sent a letter to I.O., Chapra P.S. where she proved the Exhibit 1. Maman Seikh is a Bangladeshi national and had married daughter of Salam.

PW6, Rabiul Mondal corroborated the evidence of her mother. He deposed that the incident occurred over clearing of rain water between his father on the one hand and one Babu and Salam on the other hand. On being summoned by the wife of Babu, the appellant had come to the spot, Babu and Salam caught hold of his father and the appellant assaulted with a spade on his head. Father died after two days in the hospital.

PW1, Sahajamal Mondal is a post occurrence witness. He came to the spot on being summoned by the wife and son of the deceased. He took the deceased to the hospital. He lodged the First Information Report which was scribed by PW14.

PW2, Parvina Bibi and PW5, Nuhunabi Mondal are neighbours who are also post occurrence witnesses. They were informed of the incident by PW4.

PW7 treated the victim at Chapra B.P.C.H. He found one incised wound in the middle of scalp measuring about 3 inches x 1 inch with touching bones and deep cut injury, which is grievous in nature. He referred the patient to the Nadia District Hospital. P.W.8 deposed that the condition of the patient was very grave and he referred him to the N.R.S. Hospital, Calcutta.

PW10, Dr. Anindya Kr. Goswami is the autopsy surgeon who proved the post mortem report (Exhibit 6) and opined death was due to the effects of the injuries mentioned in the report and ante mortem in nature.

PW13, SI Laltu Ghosh is the investigating officer of the case. During investigation, he seized one spade under seizure list which was witnessed by P.W.9.

On an analysis of the evidence on record, particularly, that of P.W.4 and P.W.6, I note initially an altercation had commenced between the deceased on the one hand and Babu and Salam on the other hand over clearing of rain water through a passage. While Babu and Salam set upon an obstruction in the passage hindering such clearance, the deceased forcibly removed obstruction. In the course of the altercation, Tanuja, wife of Babu called for the appellant who is the son-in-law of Babu. The appellant came to the spot and hit the victim on the head with a spade.

Victim was moved to Chapra B.P.C.H., thereafter to District Hospital, Nadia and finally expired on 29.7.2015 at N.R.S. Hospital.

It is argued that the victim had been assaulted conjointly by the appellant as well as others, namely, Babu and Salam, P.W. 4 in the subsequent complaint (Exhibit 1) had implicated the said miscreants. However, they have not been arrayed as accused in the prosecution. Even though it is true that P.W.4 and P.W.6 have deposed that initial altercation took place between the deceased on the one hand and Babu

and Salam on the other, the fatal blow on the head of the deceased had been struck by the appellant with a spade. This fact has not only been consistently stated by the P.W.4 and P.W.6 in their respective depositions but also finds place in her complaint letter dated 15.10.2015 being Exhibit 1.

Hence, I am of the opinion non-arraignment of other persons in the present case did not prejudice the appellant, who is the principal assailant.

Moreover, the ocular versions of P.W.4 and P.W.6 are corroborated by the medical evidence of P.W.s 7, 8 and 10. All the medical witnesses unequivocally have spoken of incised wound on the middle of the scalp of the deceased which resulted in his death.

In view of the aforesaid evidence on record, I have no doubt in my mind that the death of the deceased was caused due to the blow dealt by the appellant with the spade on his head.

Finally, it has been argued that the conviction may be altered from one under Section 302 IPC to Section 304 (1) of the Indian Penal Code.

In support of his contention, learned counsel argued that the incident occurred in the course of altercation and the appellant did not have any intention to murder.

On the other hand learned counsel for the State submit that the appellant dealt a severe blow with a spade on the head of the victim, hence, the conviction ought not to be altered.

The evidence on record shows that the appellant did not have any prior enmity with the deceased. He was even not present at the spot at the beginning of the altercation. He was summoned later by Tanuja, wife of Babu. Although P.W. 4 claimed that the appellant came armed with the spade but from her letter Exhibit 1, it appears that the appellant had come to the spot unarmed and in the course of altercation in a fit of passion had taken the spade from the hand of Salam, who was present at the spot, and hit the deceased.

In view of the aforesaid facts, I am of the opinion that the appellant did not have any intention to commit the murder of the deceased and the incident occurred on the spur of the moment in the course of a sudden altercation. It is unclear whether the appellant had come to the spot armed with the spade. The appellant also had not acted in a cruel or unusual manner. Deceased was alive for about four days.

Under such circumstances, I am inclined to hold that the instant case falls within the exception 4 of Section 300 of the Indian Penal Code. Hence, the conviction of the appellant is altered from Section 302 to one under Section 304 Part I of the Indian Penal Code. Sentence of the appellant is accordingly converted from life imprisonment to rigorous imprisonment for ten years along with a fine of Rs.10,000/-, in default, to suffer further imprisonment for six months more for the offence under Section 304 of the Indian Penal Code. As evidence on record shows that the appellant is a Bangladeshi

national and the appellant also does not challenge such finding, his conviction and sentence under Section 14 of the Foreigners Act is upheld.

The appeal is allowed to the aforesaid extent.

In view of disposal of the appeal, the connected application being CRAN 1 of 2019 (Old CRAN No. 4261 of 2019) also stands 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.

Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)