

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.A (DB) 4 of 2022

With

CRAN 1 of 2022

Anupam Banerjee

Vs

The State of West Bengal

For the appellant

:Mr. Jayanta Narayan Chatterjee, Advocate
Mr. Apalak Basu, Advocate
Ms. Moumita Pandit, Advocate
Mr. Nazir Ahmed, Advocate
Ms. Jayashree Patra, Advocate
Ms. Sreeparna Ghosh, Advocate
Mr. Riteshree Banerjee, Advocate
Mr. S. Koley, Advocate
Mr. Dipanwita Das, Advocate

For the State

:Mr. Saibal Bapuli, Advocate
: Mr. Bibaswan Bhattacharya, Advocate

Heard on

: July 25, 2022

Judgment on

: September 09, 2022

Bibhas Ranjan De, J.:-

1. This appeal is directed against the judgment and order of conviction dated 22.12.2021 and 23.12.2021 passed by Ld. Additional Sessions Judge, Special Court (EC Act), Alipur, South 24 Parganas in connection with Sessions trial no. 209 of 2001 arising out of Sessions case no. 71 (01) 2001 corresponding to Chitpore Police Station Case no. 324/99 dated 30.09.1999 whereby Ld. Judge convicted the appellant and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default he was further sentenced to suffer simple imprisonment for a period of 6 months for the offence punishable under section 302 Indian Penal Code (for short IPC).

Prosecution Case :

2. On 29.09.1999 at about 23:05/ 23:15 hours one Narayan Chandra Roy (Constable no. 7042), after his duty hours, boarded on a Double Dacker Trolley Bus bearing no. WB- 04/2145 of route L-9A for reaching his destination at Dunlop Police quarter, from

Shayambazar crossing. After boarding he noticed altercation between some passengers including the appellant and Surendra Prasad Gupta (victim) who is also a co-resident of Shaymbazaar Police Quarter. He also noticed that those passengers were trying to assault victim and complainant tried to resist them. Those passengers along with the appellant assaulted both of them and abused in filthy languages. Ultimately appellant kicked the victim standing on the steps, with force and as a result of which both the complainant and victim fell down from the running bus. Victim sustained severe head injuries and he was taken to R. G. Kar Medical College and Hospital, Kolkata. Victim was admitted there for treatment and complainant was discharged after primary treatment.

- 3.** Complainant Narayan Chandra Roy visited Chitpore Police Station and narrated all the incident to one Sub Inspector, Kanchan Garai attached to the Police Station recorded his statement and started Chitpore PS Case No. 324/99 dated 30.09.1999 under 307/34 IPC. The then officer in charge of the Police Station

endorsed the said case to the Sub Inspector of Police, Kanchan Garai, for investigation.

4. Immediately after assuming investigation Investigating Officer (for short I.O) visited R. G. Kar Medical College and Hospital but he could not record the statement of victim who remained unconscious and ultimately succumbed to his injuries on 30.09.1999 at about 2:45 a.m. After demise of victim the case was converted to the offence punishable under Section 302/34 IPC. In the midst of investigation the case was transfer to Detective Department Lalbazar. One sub Inspector Jayanta Chakraborty attached to that department took up investigation of this case and the case diary was handed over to him.

5. On completion of investigation charge sheet was submitted against accused/ appellants under Section 302/307/326/34 of IPC. Ld. Additional Chief Judicial Magistrate, Sealdah committed the case to the Court of Ld. Session Judge, South 24 Praganas, on 29.12.2000. Ld. Sessions Judge, thereafter,

transferred the case to the Court of Ld. Additional Sessions Judge, Special Court (EC Act) for trial. Trial began.

Findings of the Learned Judge:

6. On receipt of record Ld. Judge framed charge for the offence punishable under Section 302 IPC against the appellant and upon hearing the contents of the said charge appellant pleaded not guilty and claimed to be tried.
7. During trial 13 witnesses including complainant, Narayan Chandra Roy, were examined on behalf of the prosecution and a good number of documents were admitted in evidence as exhibit 1 to 20. On completion of evidence accused/ appellant was examined under section 313 Code of Criminal Procedure (for short Cr.P.C) where he pleaded his innocence.
8. After appreciation the evidence available on record and perusing the exhibited documents Ld. Judge returned his finding of conviction of the accused/appellant for the offence punishable under

Section 302 of IPC and sentenced him to suffer rigorous imprisonment for life and also to pay a fine of Rs. 10,000/- in default to suffer further simple imprisonment for a term of six (6) months.

9. Being aggrieved by and dissatisfied with the said judgment and order of conviction the instant appeal has been preferred by the appellants, Anupam Banerjee.

Evidence:-

10. Prosecution to bring home charge examined following witnesses:-

Prosecution witness no.	Name & Identification of the witness
PW-1	Partha Roy (constable) who prepared the rough sketch map through a mechanical process (exhibit 1 series)
PW-2	Narayan Chandra Roy (ASI) who sustained injury and lodged complain before police.
PW-3	Sushanta Kumar Misra (Inspector of Police) who being a traffic sergeant was posted at shaymbazar traffic guard on the alleged dated of incident.
PW-4	Snehangsu Chakraborty being an employee of Techni. Colour Studio put signatures (exhibit 4 /4/ 1) on the seizure list
PW-5	Sanjiv Dey being an employee of Techni. Colour Studio, put his

	signature (exhibit 4/2) on the seizure list
PW-6	Dr. Achinta Gaiyan, Medical Officer attached R.G. Kar Medical College and Hospital, treated victim on 29.09.1999 at 11.30 p.m.
PW-7	Dulal Mukherjee being ward master attached to Kolkata Police Hospital put his signature (exhibit 7/1) on the seizure list (exhibit-10) of bed head tickets in respect of PW-2.
PW-8	Nimai Pal being constable attached to Bhabanipur Police Station, put signature (exhibit 9) on the seizure list of duty register of Police Station.
PW-9	Utpal Saha being an employee of Calcutta electric supply corporation Limited, proved a letter dated 3.12.1999 issued by the then manger, system control of CSC Ltd.
PW-10	Sri Monjit Singh, the then Judicial Magistrate 6 th Court Sealdaha, attached to conducted TI parade of the suspect (appellant) in the Alipur Central Correctional Home.
PW-11	Dr. Tapas kr. Bose, professor doctor, forensic medicine attached with NRS medical College and Hospital performed Post Mortem examination of the victim on 30.09.1999.
PW-12	Kanchan Garai, the then sub Inspector of Police attached to Chitpore Police Station initially took up investigation prior to

	transfer of the case to CID
PW-13	Jayanta Chakraborty, the then SI of Police, attached to Homicide Squad, Electric department, Lalbazar, took up further investigation of this case.

Argument:-

11. Mr. Jayanta Narayan Chatterjee, Ld. Advocate appearing on behalf of the appellant has placed following argument before this court:-

- Entire allegation, even if it is proved, the offence will come within the purview of exception to Section 300 of IPC. Though there was an allegation of scuffling but evidence available on record did not suggest any requisite knowledge as well as culpable intention to commit murder.
- During investigation no effort was taken by the investigating agency to examine any witness who was present in the attached Double Dacker Trolley Bus at the relevant point of time as alleged.
- Considering the medical evidence it cannot be understood that victim expired due to injuries sustained on his person.

- In view of the evidence of prosecution witness (for short PW) no. 2, 3 and 13 there is nothing to establish participation of the appellant in any crime alleged in this case. Though PW-2 and PW-3 claimed themselves to be witness to the occurrence but PW-3 could not identify the appellant during test identification parade unlike PW-2.
- Alleged brown colour bag was not seized by a seizure list (exhibit 17) from the alleged bus. That bag was seized from depot. There is no evidence to link the chain between the bag and the appellant.
- In support of his contention Mr. Chatterjee has relied on the following authority:-
- **(2009) 14 Supreme Court Cases 541**
(Mussauddin Ahmed v. State of Assam)

12. Mr. Saibal Bapuli, Ld. Advocate on behalf of the State has referred to the evidence of PW-2 and submitted that there is hardly any scope to disbelieve the evidence of an injured witness (PW-2) and his evidence was further corroborated by Prosecution witness no. 3 and other medical evidence (PW-6, PW-

10 & PW-11). Accordingly Mr. Bapuli supported the impugned judgment and submitted that conviction of the appellant was strictly in accordance with law and did not suffer from any illegality warranting inference by this Court.

Evaluation:-

- 13.** From the evidence of PW-2 it appears that on 19.09.1999 at about 10.45 p.m. he boarded on a Double Decker Bus of route L/9. Thereafter, he noticed altercation between a group of passengers including the appellants and the victim, Surendra Prasad Gupta who was a resident of Dunlop Police Quarter. PW-2 being resident of same quarter intervened as those passengers were abusing in slang languages towards Police Department. As a result two passengers and appellant assaulted him and victim Surendra Prasad Gupta by first and blows. He then came down from first floor of the bus and standing on steps and victim was standing on the steps. In the meantime appellant kicked the victim out of the bus. Victim tried to catch hold of T-shirt of the witness and

both of them fell down from the bus. Immediately he took the victim to R.G. Kar Medical College & Hospital by a taxi, for treatment. He identified his signature (exhibit 2/1 & 2/2) on the complaint (exhibit-2).

14. PW-3 in his evidence spoke of an incident of altercation. On the relevant date he was Sergeant posted at Shyambazar Traffic Guard. PW-2 also claimed himself as Constable posted at Shyambazar Traffic Guard. PW-3 testified that after hearing about a disturbance at Shyambazar involving a Double Decker bus he rushed to spot and noticed altercation among the passengers and the bus was standing due to traffic jam and that was the reason for annoyance of passengers including 5/6 young persons who were debating themselves. But he could not identify either PW-1 or the victim as employee of Police Traffic Guard.

15. From the evidence of PW-10 along with PW-2 & 3 it is seen that the appellant was identified by the witnesses i.e PW-2 & PW-3 in the Test Identification parade held by learned Magistrate (PW-10). From the

evidence of PW-3 it appears he saw the altercation among the passengers of a Double Decker bus at Shyambazar crossing in same tune of PW-2 who also stated about the subsequent incident of kicking victim out of the bus at Chunibabur bazaar, by the appellant. PW-10 proved the memo of Test Identification Parade (exhibit -10).

16. Therefore, evidence of PW-2, PW-3 and PW-10 clearly established the place and time of altercation alleged in this case and participation of appellant as well.

17. PW-2 (complainant) has deposed that the appellant kicked victim out of the bus and as a result both PW-2 and victim fell down from the bus. Both of them sustained injury. PW-2 sustained injury on his leg and victim on his head. Then PW-2 took the victim immediately to R.G. Kar Medical College and Hospital by a taxi.

18. PW-6 (doctor) squarely corroborated the evidence of PW-2. PW-6 accurately stated the incident as narrated by the PW-2 regarding assault and kick out

of a bus of route L/9. On 29.09.1999 PW-6 attended injured at R. G. Kar Medical College and Hospital at 11.30 p.m. He treated both the victim and PW-2. His reports in respect of two injured persons were admitted as (exhibit 5& 6). From the evidence of PW-6 and injury report (exhibit -5) show that victim was unconscious and he was referred to operation theater due to his serious head injury. Ultimately the victim succumbed to his injury and dead body was Post Mortem by PW-11 who opined that death was caused by head injuries found in course of Post Mortem. Cross-examination of PW-11 has further fortified the alleged incident of falling on the road from the running bus. That apart, evidence of PW-7 shows seizure of bed head tickets under a seizure list (exhibit-7) from Kolkata Police Hospital. PW-7 being an employee of that hospital put his signature (exhibit-8)

- 19.** PW-8 deposed that I.O (PW-12) seized duty register of Bhowanipore Police Station in his presence he put his signature on the seizure list (exhibit-9).

20. PW-12 (First I.O of this case) has deposed he visited R.G. Kar Medical College and Hospital to record statement of victim but could not as he remained unconscious and ultimately succumbed to his injuries. He conducted inquest (exhibit-13) over the dead body of Surendra Prasad Gupta (victim of this case). He recorded statement of available witness under Section 161 Cr.P.C. He seized wearing apparels of injured (PW-2) under a seizure list (exhibit 3/1). He collected death certificate (exhibit 14) of the victim.

21. Thereafter, this case was transferred to C.I.D West Bengal for further investigation PW-13 took up further investigation of this case on 07.10.1999. During investigation he visited place of occurrence and on 12.10.1999 sent requisition to R.G. Kar Medical College and Hospital wherefrom he collected bed head tickets of deceased Surendra Prasad Gupta and seized under a seizure list (exhibit 72 collectively). He seized duty register of Bhowanipore Police Station under a seizure list (exhibit-9). He collected photographs of involved bus and seized (exhibit 4

series). He seized one brown colour bag with some documents from Central Traffic Office at 45 Ganesh Ch. Avenue Kolkata -13, under a seizure list (exhibit 17 series) in presence of witnesses.

22. In fact following clue from those documents (exhibit-17) and from source information PW-13 could arrest the appellant on 02.11. 1999 at 14:30 hours under a memo of arrest (exhibit 19).

23. After rummaging through the entire evidence of witnesses such as PW-2, PW-3, PW-6, PW-10, PW-11, PW-12 and PW-13 we find hardly any substantial contradiction to create any reasonable doubt in the mind of this Court with regard to commission of crime by the involvement of the appellant.

24. Mr. Chatterjee raised the issue of latches on the part of Investigating Officer (PW-12 & PW-13) who could not examine the conductor of the bus who is the best witness of this case and the documents alleged to have been recovered by the seizure list (exhibit-17) have not ever been produced in course of trial to prove the proximity between the appellant and

the offence alleged in this case. Thereby Mr. Chatterjee has persuaded this Court to take assistance of adverse inference within the meaning of Section 114 Illustration (g) of the Evidence Act 1872 by virtue of ratio of **Mussaiddin Ahmed** (supra).

25. Views of **Mussaiddin Ahmed** (supra) is as under:

“10. So far as the question of age of the prosecutrix is concerned, PW.1 Dr Pratap Ch. Sarma who had examined her, opined that she was 18 years of age. According to the prosecutrix she was only 13 years of age at the time of incident. PW.2 Abdul Hai Laskar, informant, deposed that prosecutrix was 13/14 years of age. However, PW.3 Mrs. Hasmat Ara Begum kept silence on this point. There is nothing on record to show as on basis, PW.2 Abdul Hai Laskar had given her age. It appears very unnatural as none of the family members of the prosecutrix comes to the scene. Her parents or either of them or any other family member could be most reliable and natural witness on the point of her age. PW.2 Abdul Hai Laskar, in his examination-in-chief stated as under: "Later the girl's mother came and took her away. At present she is staying with her parents."

Thus, it cannot be assumed that prosecutrix did not have parents or other family members. Prosecution for the reasons best known to it examined her employer PW.2 Abdul Hai Laskar and his wife PW.3

Hasmat Ara Begum but did not examine any of her family member on the point of age.

11. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such a material evidence is withheld, the Court may draw adverse inference under Section 114 illustration (g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & Ors., AIR 1968 SC 1413)."

26. In ***Mussaiddin Ahmed*** (supra) Hon'ble Apex Court came across an allegation of rape where determination of age of the prosecutrix was an issue to be determined. But prosecutrix could not produced any documents and also could not examine either parents of the prosecutrix or any of family members. In these circumstances, Hon'ble Court suggested drawing an adverse inference under Section 14 Illustration (g) of the Evidence Act.

27. Sorry, we are unable to draw any such presumption in our case where injured (PW-2) has given evidence and that evidence was further corroborated by other witnesses (PW-3, PW-6 and PW-

10 to PW 13). We have already discussed that evidence of injured (PW-2) remained unshaken.

28. Evidence of an injured, as per settled law, must be given due weightage being a stamped witness, thus, his presence at the scene of crime cannot be doubted. His statement is generally considered to be very reliable, and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. From that point of view appellants objection to procedural irregularities such as, in our view, non-examination of public witness and non production of any document to prove the link between recovered bag and the appellant, does not make any difference to the prosecution case. In fact the testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence.

29. In view of above, it is difficult to comprehend the circumstances in which the charge of killing Surendra Prasad Gupta (victim of this case) against the

accused/appellant cannot be leveled. Thus, learned Judge has rightly found the appellant guilty of killing Surendra Prasad Gupta.

Sentence:-

30. Mr. Chatterjee, alternatively, took the plea that it was a case of culpable homicide within the scope of Section 300 Exception V I.P.C for which the sentence of life imprisonment being maximum is disproportionate. It is submitted that the evidence available on record, at best, discloses a case of culpable homicide not amounting to murder.

31. Section 300 Exception IV IPC for ready reference is reproduced hereunder:-

“[s 300] Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

(Thirdly) —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly) —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is

likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid

Exception 1.- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following proviso:-

First.- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 3.- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice,

exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.- It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”

- 32.** In our case, there was an incident of altercation and assault between the appellant and victim. In course of altercation injured (PW-2) intervened but appellant assaulted both of them and ultimately kicked the victim to throw out of the bus. As a result both the injured and victim fell down from the bus

and victim succumbed to his head injuries on the next day at R.G. Kar Medical College and Hospital.

33. Therefore, fact before us does not lead us to any doubt that the appellant did have **knowledge** of the fatality of the injury after falling down from the running bus but the sudden provocation and fighting suppressed the element of **intention**. Thus, in our view, benefit of Section 304 part II ought to have been accorded by the learned trial Court.

34. For the reason recorded above, the conviction of the appellant under Section 302 of IPC is modified as conviction under Section 304 part II of IPC and substantive sentence of life imprisonment is reduced to sentence of rigorous imprisonment for 10 years and also to pay a fine of Rs. 50.000/- in default to suffer further rigorous imprisonment for one (1) year.

35. Fine amount, if realised, be given to the family of the victim.

36. Learned trial with issue modified jail warrant to the superintendent of Correctional Home where the appellant will be lodged.

- 37.** Let a copy of this judgment along with the trial Court record be transmitted back forthwith.
- 38.** All pending applications, if any, stand disposed of accordingly.
- 39.** Appellant, if on bail, shall surrender before the learned trial Court forthwith to serve sentence.
- 40.** All parties shall act on the server copies of this judgment duly downloaded from the official website of this Court.
- 41.** Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[BIBHAS RANJAN DE, J.]

- 42.** I Agree.

[DEBANGSU BASAK, J.]