

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

AND

The Hon'ble Justice Bibhas Ranjan De

CRA 11 of 2021

with

CRAN 1 of 2021

Sahaban Sk.

-vs-

The State of West Bengal

For the appellant : **Mr. Tapan Dutta Gupta, Advocate**
Mr. P. Anam, Advocate

For the State : **Mr. N. Ahmed, Ld. APP**
Mr. Iqubal Kabir, Advocate
Ms. Trina Mitra, Advocate

Hearing concluded on : **August 25, 2022**
Judgment on : **August 25, 2022**

Debangsu Basak, J.:-

1. The appeal is directed against the judgment of conviction dated October 15, 2020 and the order of sentence dated October 16, 2020 passed by the learned Additional District & Sessions Judge, 4th Court Berhampore, in Sessions Trial Case no. 02 (7) of 2005 arising out of Domkal Police Station case no. 71/95 dated August 14, 1995 under Section 302 of the Indian Penal Code, 1860.

2. Briefly stated, the case of the prosecution is that, on August 14, 1995 at about 2.30 p.m., Mohur Biswas, son of late Bharesh Biswas was murdered by the appellant. There was an altercation between the appellant and Mohur Biswas, subsequent to which the incident took place. PW-1, Soleman Biswas lodged a written complaint with the police upon which a police case was registered being police case no. 71/95 dated August 14, 1995 under Section 302 of the IPC.
3. Police investigated the written complaint after registration of the First Information Report (FIR). On conclusion of the investigation, the police submitted the charge sheet. Charges were framed against the appellant on July 21, 2005. The appellant pleaded not guilty and claimed to be tried.
4. At the trial, the prosecution examined 7 witnesses. The prosecution tendered 6 documents as exhibits, which were marked as Exhibits 1-6. The prosecution also tendered material exhibits which were marked as exhibits 1, 1/1 and 1/2. At the conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Cr.P.C. He pleaded his innocence in such statement and declined to adduce any defence witness.
5. By the impugned judgment of conviction the appellant was found guilty of murder of Mohur Biswas. The appellant was sentenced

to suffer rigorous imprisonment and to pay a fine of Rs.50,000/- and in default to suffer further rigorous imprisonment for another 5 years.

6. Learned advocate appearing for the appellant submits that, the prosecution failed to prove the charge against the appellant beyond reasonable doubt. He submitted that, the charge framed as against the appellant is vague. In support of such contention, he refers to the charge framed. He submits that the charge is not in consonance with the requirements of Section 212 of the Criminal Procedure Code. He relies upon **2014 (1) C Cr LR (Cal) 171 (Rebati Baidya & Ors. -vs- State of West Bengal)** in support of such contention.
7. Learned advocate appearing for the appellant draws the attention of the Court to the evidence led by the prosecution. He submits that, the prosecution did not prove the case beyond reasonable doubts. He refers to the evidence of PW-1. He submits that, there was an altercation with regard to a fencing dispute upon which the incident occurred. He contends that the appellant did not have any premeditation to kill the victim.
8. Learned advocate appearing for the appellant relies upon **2000 SCC (Cri) 1230 (Bhera-vs- State of Rajasthan), 2020 Volume 12 SCC 564 (Sakanath Prasad -vs- State of Uttar Pradesh), 2002 volume 3 Supreme Court Cases 327 (Sukhbir Singh -vs-**

State of Haryana), 2019 volume 5 Supreme Court Cases 224 (Nandlal –vs- State of Maharashtra), 2020 volume 1 Calcutta Criminal Law Reporter (Calcutta) 120 (Ranjan Karmakar –vs- State of West Bengal) and 2021 volume 10 Supreme Court Cases 744 (Kala Singh –vs- State of Punjab) in support of his contention that, the appellant in the facts and circumstances of the present case, can at best be convicted under Section 304 part II of the Indian Penal Code, 1860.

9. Learned Advocate for the appellant submits that, the appellant should be acquitted on the ground of the prosecution failing to prove its case beyond reasonable doubt and the charge framed being vague. Alternatively and without prejudice to the contention of acquittal, the appellant at best can be convicted under Section 304 part II of the Indian Penal Code, 1860 as the offence is under Section 30D Exception 4.
10. Learned Additional Public Prosecutor appearing for the State submits that the prosecution proved the case beyond reasonable doubt and the judgment of conviction and the order of sentence should be upheld. Referring to the facts and circumstances of the case, learned Additional Public Prosecutor submits that, the murder weapon used was a “*hasua*”. He points out to that, a “*hasua*” is usually used to cut grass or crops. He contends that in order to cut grass by the “*hasua*” which was used in the

murder, one is required not only to deal a forward blow but also take the “*hasua*” back in order to complete the action of cutting. In the facts and circumstances of the case, he submits that the blow was not once but it must be at least coupled with the “*hasua*” being taken back in order to decapitate the victim. The victim was decapitated.

11. Learned Additional Public Prosecutor submits that the victim was not armed. The appellant was in a better position at least, so far as arms is concerned. The appellant acted with the intention of severing the neck from the body, as will appear from the action of the appellant in choosing that part of the body of the victim only. He draws the attention of the Court to the fact that, at trial no evidence was led to prove that the appellant suffered any injury. There was no exchange of blows between the appellant and the victim. According to him there was no free fight between the appellant and the victim for the appellant to be provoked and deal the blow on the victim.
12. On the aspect of what free fight means, learned Additional Public Prosecutor relies on **(1978) 3 SCC 330 (Bhagwan Munjaji Pawade -vs- State of Maharashtra)**.
13. He relies on **(2019) 10 SCC 323 (Awadesh Kumar -vs- State of Uttar Pradesh & Anr.)** and submits that in the facts

and circumstances of the present case, the appellant should be held guilty of murder.

14. Learned Additional Public Prosecutor refers to the statement of the appellant recorded under Section 313 of the Cr.P.C.. He submits that in such statement, the appellant states that he removed the body from the spot. Therefore, the presence of the appellant at the spot is proved. Moreover, his action of removing the body demonstrates that the appellant did not show any signs of remorse after the incident.
15. Referring to Section 304 of the Indian Penal Code, 1860 learned Additional Public Prosecutor submits that four conditions must be fulfilled in order to attract the same. In the facts and circumstances of the present case, at least two of such conditions are missing. Therefore, according to him, the judgment of conviction and the order of sentence should be upheld.
16. In reply, learned advocate for the appellant submits that the appellant and the victim both were armed with "*hasua*". He refers to the cross examination of PW-1 to contend that the victim and the appellant both were armed with "*hasua*". The appellant did not take any advantage of the victim.
17. The appellant was charged with murder of Mohur Biswas. Charge was framed against the appellant on July 21, 2005.

Charge states that on August 14, 1995 at about 14.30 hours at Laskarpur, Domkal Police Station, District Murshidabad, the appellant committed murder intentionally causing death of Mohur Biswas.

18. It is contended on behalf of the appellant that, the incident occurred at the house belonging to Mohur while he was making fencing. The charge does not describe the locale at where the incident occurred and, therefore, is vague. In support of such contention, reliance is placed on Rebati Baidya (Supra).
19. In Rebati Baidya (Supra), charges were modified twice after the first framing of the charges. The last of the modifications was after the conclusion of the evidence of the prosecution, the recording of the statement of the accused under Section 313 of the Cr.P.C. and the conclusion of the arguments. Not only was the charge re-framed in such circumstances but also one of the accused was deleted and substituted by another person. In such factual scenario, it was held that the charge was defective and resulted in an unfair trial against the accused. The factual scenario in the present case is different. The charge initially framed on July 21, 2005 was never altered. None of the accused was replaced or substituted. There was only one accused, that is, the appellant. The appellant was well aware of the place of

occurrence as his reply to a question no. 16 put to him under Section 313 of the Criminal Procedure Code establishes.

20. The appellant is unable to say that the appellant suffered any prejudice by the nature of the description of the incident as appearing in the charge. The charge said that, the incident occurred on August 14, 1995. The date of the occurrence is also specified in the charge. Time of the occurrence is specified. There is a description of the locale where the incident occurred. The awareness of the appellant as to the place of occurrence will appear from his reply to question no. 16 in his statement recorded under Section 313 of the Criminal Procedure Code. The appellant was not prejudiced by the nature of charge as framed at the trial. Therefore, we are of the view that none of the provisions of Section 212 of the Cr.P.C. was violated.

21. PW-1 is an eye-witness. He is the brother of the victim. He states in his evidence that on August 14, 1995 at about 14.30 hours, while Mohur was fencing their house, an altercation took place between Mohur and the appellant. In course of such altercation, the appellant brought out a "*hasua*" and inflicted the same on the neck of Mohur as a result of which Mohur fell down and died at the spot. PW-1 continues to say that he went to the police station and lodged a written complaint. He states that he was present at the spot. His complaint was marked as exhibit-1.

22. In cross examination, he states that, his brother was also armed with the *hasua* at the time of fencing.
23. Learned advocate appearing for the appellant draws the attention of the Court to the cross examination of PW-1 and submits that there was a discussion as to who should be the accused in the murder case. Such discussion took place at the village after the incident. PW-1 admits the same in the cross examination. Therefore, such evidence in cross examination read with the statement of the appellant recorded under Section 313 of the Cr.P.C., where the appellant claims that the appellant removed the body of the victim, establishes that the appellant was not involved in the murder, rather it was somebody else. The appellant, at best removed the body. The appellant was falsely implicated.
24. With deepest respect, we are unable to subscribe to such contention of the appellant. There is overwhelming evidence of the eye witness being the PW-1, implicating the appellant in the incident. The eye witness describes how the appellant dealt the blow and how the incident took place. The death of the victim as described by PW-1 in his evidence stands corroborated by the post mortem report of the victim being exhibit-4 as also the evidence of the post mortem doctor being PW-6.

25. P.W. 2 is another witness who in his depositions states that he saw the appellant dealing with the blow. He corroborates the evidence of P.W.1. He states that after inflicting the blow the appellant fled away from the place of occurrence. In cross-examination, he narrates that there was an altercation between the appellant and the victim. He further states in his cross-examination that he is giving evidence for the first time in Court with regard to the incident.

26. With regard to the evidence of P.W.2, learned Advocate for the appellant contended that, the appellant claimed to be of 18 years of age at the time of giving the evidence. The incident occurred ten years back. Therefore, it was impossible for an eight year old child to remember the details of the incident and depose as to the same and that too for the first time in Court.

27. P.W.2 claims himself to be an eye-witness. Going by the materials-on-record, he was eight years old at the time when the incident occurred. The incident is of murder. He deposed at the trial at the age of 18 when he was sufficiently matured. We do not find any ground to discredit P.W.2 simply on the ground of his age when he narrates the incident and when there is no deviation between the evidence of P.W.1 and his evidence.

28. More surprisingly, in cross-examination, the appellant could not elicit anything favourable to them from the evidence of P.W.2 as to discredit the evidence of PW-2.
29. P.W.3 is a post-occurrence witness. P.W.3 states that on hearing the cry of P.W.2, he went to the spot and found the deceased dead. P.W.3 corroborates the presence of P.W.2 at the place of occurrence. Again in cross-examination, nothing favourable was elicited from P.W.3 by the appellant.
30. P.W.4 is the scribe of the written complaint lodged by the P.W.1 being Exhibit-1. P.W.5 is the post-occurrence witness who was present at the inquest examination of the victim and at the time of the seizure.
31. P.W.6 is the Medical Officer performing the post-mortem examination of the dead body of the victim. He tendered the post-mortem report which was marked as Exhibit-4. In his opinion, the death was homicidal and ante-mortem in nature. He explained the opinion that he gave by mistake in the post-mortem report which states that the death was accidental and ante-mortem in nature. He states that if sharp-cutting weapon like a '*Hasua*' is inflicted in force, then the injury as suffered by the victim can be caused resulting in death of the victim.

32. Only one question is put in cross-examination to the post-mortem doctor. Nothing favourable to the appellant was elicited from the post-mortem doctor.
33. P.W.7 was the Officer-in-Charge of Domkal Police Station who received the complaint from P.W.1. He was the Investigating Officer. He narrates the steps he took in the investigations. Again nothing favourable was elicited from P.W.7 on behalf of the appellant.
34. In his examination in 313 of the Code of Criminal Procedure, the appellant claimed that he was at his home. At 9 a.m. on the day of the occurrence he heard that the victim was murdered in Jute field. On hearing the same, he saw the body of the victim picked it up and placed it in another place. The police came and picked him away. He is innocent. He was falsely implicated.
35. The evidence produced in Court at the trial establishes the following facts:
- (i) Mohur Biswas died out of injury suffered at the neck resulting in decapitation, homicidal and ante-mortem in nature. This is established by the post-mortem report of Mohur Biswas being Exhibit-4 and the evidence of P.W.6, being the doctor who conducted the post-mortem;

- (ii) P.W.1 and 2 established that the appellant dealt the blow on the neck of the victim with a "*hasua*";
- (iii) The post-mortem report being Exhibit-4 does not show that the victim suffered any other injuries apart from him being decapitated.
- (iv) '*Hasua*' being used by the appellant in the incident is established by the evidences of PW-1 and PW-2. PW-6 who is the doctor who conducted the post mortem stated in his evidence that, if sharp cutting weapon like a "*hasua*" is inflicted in force, then the injury suffered by the victim can be caused resulting in death of the victim.
- (v) There was an altercation between the appellant and the victim on the issue of fencing at the house of the victim on August 14, 1995 at about 14.30 hours.
- (vi) The prosecution witnesses corroborated each other in their evidences. P.W.1 and 2 corroborated each other. P.W.3 corroborated the presence of the P.W.2. P.W.2 and 1 corroborated each other with regard to their presence at the place of occurrence.

36. The trial court returned a finding of murder as against the appellant and convicted the appellant under Section 302 of the Indian Penal code, 1860. The evidence on record leads us to hold that the appellant was responsible for the death of Mohur

Biswas. As to whether the death was culpable homicide amounting to murder or not amounting to murder is the issue which requires consideration.

37. In other words, since the appellant contends that the Exception 4 of Section 300 is altercated, The issue before us is whether the conviction under Section 302 of the Indian Penal Code and the order of sentence consequent thereto should be upheld or that the appellant should be convicted under Section 304 and commensurate sentence imposed or not.

38. In Sukhbir Singh (Supra) on appreciation of the evidence it was, held that, the infliction of the injuries and their nature proves the intention of the accused but causing of such two injuries could not be termed to be either in cruel or unusual manner. It was noted that, all fatal injuries resulting in death cannot be termed as cruel or unusual for the purposes of not availing the benefit of Exception 4 of Section 300 of the Indian Penal Code, 1860. In the facts of the present case, the punishment under Section 302 of the Indian Penal Code, 1860 was set aside. The accused was held guilty for the commission of offence of culpable homicide not amounting to murder punishable under Section 304 (Part I) of the Indian Penal Code, 1860 and sentenced to undergo rigorous imprisonment for ten years and to pay fine.

39. In Sankath Prasad (supra), the Supreme Court in the facts of that case found that, the intention was to kill PW 1 therein. However, the son of the PW 1 was killed. In such circumstances, conviction under Section 302 of the Indian Penal Code, 1860 was converted to one under Section 304 Part I of the Indian Penal Code, 1860.

40. In Ranjan Karmakar (supra), the Division Bench of this Hon'ble Court found that, the accused was provoked by the victim by saying in a demeaning manner that the accused could do whatever he wanted to and that the victim did not care. The Division Bench also found that, on a preponderance of probabilities on the basis of the evidence on record, the possibility of the accused being provoked by the victim could not be ruled out. In such circumstances, the Division Bench converted the conviction under Section 302 of the Indian Penal Code, 1860 to Section 304 thereof.

41. In Nandlal (Supra), the Supreme Court observed as follows:

“13. In order to bring the case within Exception 4 to Section 300 IPC, the following conditions enumerated therein must be satisfied: (i) The act must be committed without premeditation in a sudden fight in the heat of passion; (ii) upon a sudden quarrel; (iii) without the offenders having taken undue advantage; and (iv) the accused had not acted in a cruel or unusual manner.

14. Even if the fight is unpremeditated and sudden, if the weapon or manner of retaliation is

disproportionate to the offence and if the accused had taken undue advantage of the deceased, the accused cannot be protected under Exception 4 to Section 300 IPC. Considering the scope of Exception 4 to Section 300 IPC, in *Sridhar Bhuyan v. State of Orissa*, this Court held as under: (SCC pp. 396-97, paras 7-8)

“7. For bringing in operation of Exception 4 to Section 300 IPC, it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner.

8. The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. ... There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused: (a) without premeditation; (b) in a sudden fight; (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the “fight” occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not

sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression “undue advantage” as used in the provision means “unfair advantage”.”

(emphasis supplied)

The same principle was reiterated in *Pappu v. State of M.P.* [*Pappu v. State of M.P.*, (2006) 7 SCC 391 : (2006) 3 SCC (Cri) 283] and in *Surain Singh v. State of Punjab* [*Surain Singh v. State of Punjab*, (2017) 5 SCC 796 : (2017) 3 SCC (Cri) 461] where the conviction under Section 302 IPC was modified under Section 304 Part II IPC.

42. In light of the discussion of the law as noted above, the Supreme Court in *Nandlal* (supra) found that, there was an altercation and fight. PW 1 gave a stick-blow on the head of the accused. It was thereafter, the accused went to his house and returned armed with ‘gupti’ and inflicted injury with ‘gupti’ on the left armpit of the victim. The above incident happened only after the exchange of abuse and the stick-blow given by the P.W. 1 on the head of the appellant.

43. In *Kala Singh alias Gurnam Singh* (Supra), it was found on appreciation of the evidence that, the incident was a result of a sudden fight, on the spur of the moment, and upon a sudden quarrel. It was also found that it was not a premeditated one with no intention on the part of the accused to cause death or cause such bodily injury as is likely to cause death. In such circumstances, the conviction was modified from Section 304 Part

I of the Indian Penal Code, 1860 to one under Section 304 Part II thereof.

44. Two of the authorities cited on behalf of the prosecution requires consideration. In *Bhagwan Munjaji Pawade* (supra), it was observed that, “Fight postulates a bilateral transaction in which blows are exchanged.” In the facts of that case, it was found that the deceased was unarmed. He did not cause any injury to the accused or his companion. Moreover, there were three fatal injuries, which were inflicted by the accused with a formidable weapon on the unarmed victim. In such circumstances, the Supreme Court found that the accused was not entitled to the benefit of Exception 4 to Section 300 of the Indian Penal Code.

45. In *Awadhesh Kumar* (supra), it was held that, the incident occurred after a considerably period of time elapsing from an altercation. In such circumstances, Their Lordships found that there was an error in applying Exception 4 to Section 300 of the Indian Penal Code, 1860 in the facts of that case.

46. P.W. 1 in his evidence stated that there was an altercation between the victim and the appellant. The evidence of P.W. 1 establishes that both the victim and the appellant were in possession of a ‘*hasua*’. *Hasua* is an instrument used by farmers

in rural Bengal for the purpose of cutting grass or crops. One side of the '*hasua*' is sharp.

47. The appellant here claims to come under Exception 4 of Section 300 of the Indian Penal Code, 1860. Nandlal (supra) notes that in order to prove the act to come within Exception 4 to Section 300 it must be satisfied that, the act was committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, without the offender taking undue advantage and the accused not acting in a cruel or unusual manner.

48. In Nandalal (supra), a blow with gupti on the left armpit was inflicted which ultimately pierced the upper end of the left arm and then entered the chest causing fracture of the fourth rib and reached till the lung causing rupture on the left lung vasculature. In such circumstances, it was found that there was no intention to murder.

49. In the facts of the present case, a '*hasua*' was used on the neck of the victim. The choice of the part of the body of the victim is significant. The choice of neck of the victim and the brutal force applied in the blow inflicted on the victim with a "*hasua*" decapitating him, are action which can be said that the appellant acted in a cruel and unusual manner. There was premeditation of murdering the victim based on the choice of the part of the body

to inflict the blow with such force. Part of the body chosen and the force applied to inflict the blow with a "*hasua*" are crucial in the facts and circumstances of the present case. The postmortem report of the victim as well as the evidence of P.W. 6 establishes that the neck of the victim was separated from his body by the blow inflicted by the appellant.

50. In our case even assuming that the provocation was grave and sudden, the cool and calculating conduct of the appellant, either before or immediately after the provocation, reveals that his acts were not the result of an uncontrollable impulse which overpowered him but were committed in pursuance of a plan to take revenge, and by such act the appellant can not invoke 'the law's benignity'. In the facts of the present case, the plea of grave and sudden provocation would fall due to an additional test, which is not whether the conduct of the appellant was reasonable but which requires that the appellant must be shown to be deprived of self-control when he committed homicide. There is no evidence to such effect.

51. Evidence of PW-1 and 2 does not suggest that there was a fight between the victim and the appellant in the sense that, the victim dealt any blow on the appellant. Appellant did not bring any evidence on record to suggest so. The manner or nature of the alleged grave provocation to the appellant so as to result in

the appellant losing self control is not established. In fact, at the trial it was never suggested, let alone established that, the appellant acted under grave and sudden provocation losing his self control due to it.

52. In view of the discussions above, we find no inference is required in the trial Court's order imposing the punishment under Section 302 against the appellant. We find no merit in the present appeal.

53. CRA 11 of 2021 is dismissed. CRAN 1 of 2021 is an application for grant of bail. In view of the dismissal of the appeal, no order can be passed in CRAN 1 of 2021 excepting dismissing the same. CRAN 1 of 2021 is also dismissed.

(Debangsu Basak, J.)

54. I Agree.

(Bibhas Ranjan De, J.)