

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

Before: Hon'ble Justice Sugato Majumdar

CRA 203 of 2011

Anil Das & Ors.

Vs.

The State of West Bengal

For the Appellants : **Mr. Subir Ganguly,
Mr. Sumanta Ganguly.**

For the State : **Ms. Faria Hossain,
Mr. Anand Keshri,
Ms. Mamta Jana.**

Hearing concluded on : **12/08/2022**

Judgment on : **18/08/2022**

Sugato Majumdar, J.:-

The instant criminal appeal is directed against the Judgment dated 12/04/2011 and Order of sentence dated 13/04/2011 passed by the Additional Sessions Judge, Fast Tract 1st Court, Alipore, in Sessions Trial No. 01 (10) 2006 whereby the Appellants were convicted of offence under Section 304 of the Indian Penal Code.

The de-facto complainant is the mother of the deceased Subhas Sribastab. The deceased Subhas Sribastab was a private tutor. The Appellant No. 2 Swapan Das was his old friend. The deceased was private tutor of the son of the Appellant No. 2 and 3. A love-affair developed between the Appellant No. 3 and the deceased also it is in the allegation that all the Appellants black-mailed the deceased and extorted lump-sum amount from him. On the fateful day namely 12/01/2004, the deceased Subhas left his residence at 10:30 A.M. for the residence of the Appellants. At about 3:10 P.M., the Appellant No. 2 came to the residence of the de-

facto complainant and informed that Subhas consumed poison. He was taken to a doctor's chamber. On hearing this the de-facto complainant rushed to the doctor's chamber where Subhas was found lying on a bench. Thereafter he was taken to S.S.K.M. Hospital where he was admitted as in-patient. After few hours Subhas expired. Hospital report showed that cause of death was poisoning. Because of such unnatural death, the matter was reported to Bhowanipore Police Station and entry was made in the General Diary. It is alleged by the de-facto complainant that the Officer-in-Charge of Rabindra Nagar Police Station refused to register her complaint. Subsequently the matter was brought to the notice of the same police station by a letter sent by registered post on 27/02/2004. On 13/01/2004 the Officer-in-Charge of Bhowanipore Police Station sent a requisition for report of unnatural death to Metiabruz Police Station. Thereafter, Metiabruz Police Station sent all the papers to the Officer-in-Charge, Rabindra Nagar Police Station. Knocking the doors of different authorities in futile, she finally approached Rabindra Nagar Police Station in terms of her written complaint dated 01/03/2005. The case was registered as Rabindra Nagar Police Station Case No. 13 dated 01/03/2005 under Section 304/34 of the Indian Penal Code against the accused persons.

The Investigating Officer, on being so entrusted with, began investigation, in course of which he examined available witnesses, collected post-mortem examination report, seized treatment papers and hospital bed-head tickets took necessary and incidental steps for conduct of such investigation. On conclusion of the investigation filed charge sheet under Section 304/34 of the Indian Penal Code. Since the matter was exclusively triable by a Court of Sessions, the same was committed to the Sessions Judge from where the matter was transferred to the Trial Court.

Charges were framed under Section 304/34 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried.

In course of trial fourteen witnesses were examined and various documents were exhibited in evidence, including the written complaint, formal F.I.R., hospital treatment papers, post-mortem report.

The accused persons were examined under Section 313 of the Code of Criminal Procedure 1973. Defense of the accused persons was false implication.

The Trial Court convicted the accused persons under Section 304/34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonments of seven years and fine of Rs. 2000/- in default rigorous imprisonment for another six months.

On being aggrieved and dissatisfied the instant appeal is preferred.

During pendency of the appeal the Appellant No. 1 expired. So the appeal abated against him.

At the outset, Mr. Ganguly appearing for the Appellants submitted that the instant case is a glaring example of aberration of justice. According to Mr. Ganguly, charge was framed for culpable homicide not amounting to murder alleging that the Appellants applied force upon the victim to consume unknown poison. In contrast, the impugned Judgment was delivered convicting the Appellants on the ground that the Appellants caused head and other injuries to the person of the deceased resulting in his death. The Appellants were never informed of or given opportunity to set up defense in respect of the different set of facts allegedly constituting the crime, for which the Appellants were convicted. Neither any question was put nor any hints was given to the Appellants, in course of their examination under section 313 of the Code of Criminal Procedure, 1973 about the different set of facts and circumstances to be considered against them. According to Mr. Ganguly, this resulted in violation of natural justice, which itself is a good reason to set aside the order of conviction.

The next point argued by Mr. Ganguly is that there is no evidence to the effect that the deceased ever visited the residence of the Appellants or was seen with them except the Appellant No. 2 on the fateful day. Therefore, holding the Appellants as guilty of culpable homicide not amounting to murder is perverse as not based on any evidence. Such a finding is based on sheer surmise and conjecture throwing away all the principles of evidence.

The next point argued by Mr. Ganguly is that the Post-Mortem Examination Report was of some other person. The Inquest Report (Ext. 5) shows that the height of the deceased was 5 feet 3 inches. The Post Mortem Examination Report (Ext. 4) shows height of the dead body dissected was 5 feet 6 inches. P.W. 9, Dr. P.B. Das, who conducted post-mortem examination, found number of injuries on the body examined, whereas not a single witness stated that there were injuries of the nature described in the Post Mortem Examination Report, in the person of the deceased. In fact, according to him, question was put to P.W. 10, who prepared the Inquest Report, in cross-examination that a different dead body was sent for post-mortem examination. In such premises, the finding of the Trial Court is baseless and suffers from very grave and serious flaws. In nutshell, Mr. Ganguly argued that the impugned Judgment and Order of sentence suffers from serious flaw, misapplication of law for which the same is liable to be set aside.

Ms. Hossain appearing for the State submitted that the impugned Judgment was based on oral and documentary evidences adduced before the Trial court. However, Ms. Hossain candidly admitted that there are flaws in appreciation of evidence in coming to the conclusion, and the finding of the Trial Court is not unblemished.

I have heard rival submissions.

Charge in this case was framed under Section 304/34 of the Indian Penal Code as follow:

“That you, on or about the on 12/01/2004 in between 10:30 A.M. to 3:10 P.M. day of with same and common intention at your house i.e. at A/3/5A/522 Snagulli Pally P.S. Rabindra Nagar 24-Pgns (S) assaulted one Subhas Sribastab S/O Ram Chandra Sribastab and applied force upon him to take unknown poison and committed culpable homicide not amounting to murder by causing the death of said Subhas Sribastab and all of you and thereby committed an offence punishable under Section 304/34 of the I.P.C.”

The Appellants were convicted on finding.

“In this case on scrutiny of the evidence of P.W.s 9 find that this case has passed the above tests and it is proved beyond reasonable doubt that there was assault on the person of Subhas Sribastab causing head injury and other injuries on his person by the accused persons jointly at their house which resulted in his death and there is no escape from the conclusion that the crime was committed by the accused persons and not by any other persons. The offence of culpable homicide not amounting to murder is committed by the three accused persons in this case.”

The Trial Judge based his findings on circumstantial evidences.

Firstly, the de-facto complainant, the mother of the deceased Subhas Sribastab, who deposed as P.W. 1 and Dr. Ashim Chakraborty who deposed as P.W. 5 saw the deceased prior to his hospitalization. P.W. 1 stated in her evidence, on physical condition of the deceased, that she found swollen injury and bruises on the elbow of her son while he was in the chamber of P.W. 5. She also stated that her son was not in a position to speak as froth was coming out of his mouth. The P.W. 5 stated in his evidence that the deceased had been in a sinking and unbalanced condition. None of them reported any bruise, abrasion or head-injury

on the person of the deceased. Hospital treatment papers (Ext. 3 series) shows that the deceased was admitted into the hospital complaining rigor and spasm. According to hospital papers it was a case of organophosphorus poisoning. Death was due to cardio-respiratory failure in consequence of poisoning. Date of death was 12th January, 2004 at 6:35 P.M. in S.S.K.M. & I.P.M.M., E & R Hospital. P.W. 13 Govindalal Mondal who was a retired medical officer attached to S.S.K.M. Hospital produced the Injury Report (Ext.7) and stated that the patient was admitted with history of unknown poisoning. The Injury Report (Ext. 7) shows that the deceased Subhas was admitted in unconscious condition caused by unknown poison. The Inquest Report (Ext. 5) does not disclose any injury on the dead body. P.W. 10, Sub Inspector Lily Ganguly who held the inquest of the dead body stated in evidence that she did not find any external injury on the body of the deceased. She further stated and as appears from the Inquest Report (Ext. 5) that the height was 5 feet 3 inches and light check full pant and shirt was in the wearing of the dead body. The Post Mortem Examination Report is diametrically opposed to all these evidences. The height of the dead body is different. Multiple injuries were noted on the dead body including head injury causing death, none of which is in evidence, documentary as well as oral. The Post Mortem Report concluded that cause of death was head injury caused by hard blunt instrument. This contradicts the medical papers associated with treatment of the deceased. Post mortem examination might have been conducted on a different dead body other than that of Subhas. This suspicion is reinforced by the deposition of P.W. 9 Dr. P.B. Das who conducted post mortem examination and deposed that no poison was detected as per viscera report. Therefore, the Post Mortem Examination Report cannot be relied upon for coming to any conclusion on cause of death of the deceased Subhas Sribastab. Once the post mortem examination report is disregarded, the very basis of conviction becomes nugatory. There remains no basis of the finding that the Appellants assaulted and caused injury to the deceased resulting in his death. Yet some queer and unknown reasons prompted the Trial Court not only to base the

entire finding on the Post Mortem Examination Report but also to surmise and imagine a situation to sanctify an otherwise wrong report defenestrating all the cogent and trustworthy oral and documentary evidences, all canons of laws and all the reasons, prudence and rationalities.

Another aspect of the matter is there. Except with the Appellant No. 2, the deceased was not seen with the other Appellants by any of the witnesses. There is no evidence to connect the deceased with the Appellant no. 1 and the Appellant No. 3 on the fateful day inviting inference that those Appellants were instrumented to cause his death in whatever manner that may be. The Appellant No. 2 was seen with the deceased in the chamber of P.W. 5, the doctor. It is not understandable even by stretch of imagination, why a person in an attempt to commit homicide, would bring his victim to a doctor's chamber to save his life. Apart from serious flaws and infirmities in the findings there still remains another Achilles' heel. In Charges were framed referring to one set of facts which were read over and explained to the Appellants. The Appellants were convicted with reference to another set of facts, as noted above. The Judgment, delivered on the basis of a different set of facts of which the Appellants had hitherto been unaware of, undermines the principle of natural justice. I accept the submission of Mr. Ganguly in this regard.

It is not understandable why the Trial Court, in oblivious of ocular testimonies as well as documentary and other oral evidences solely relied upon the Post Mortem Report, and developed a story as if to sanctify a wrong report. In spite of absence of any evidence the Trial Court concluded that the Appellants assaulted and injured the deceased causing his death. The finding of the Trial Court, based on surmise and conjecture, is opposed to any reason, rationality, principles of evidence and natural justice. The impugned judgment is anathema to all rationality and reasoning. Such perverse findings should be seriously looked into.

The impugned Judgment, therefore, demands interference of this Court and justifies in all respects, setting aside of the same, for reasons, as aforesaid.

In nutshell, the instant appeal is allowed.

The impugned Judgment of conviction and Order of sentence is hereby set aside.

The Appellant No. 2 and the Appellant No. 3 are set at liberty and they are also released from their bail bonds.

The lower court record along with a copy of this Judgment be returned to the Trial Court.

(Sugato Majumdar, J.)