

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 244 of 2016

**Sudal Roy & Anr.
Vs.
State of West Bengal**

For the Appellant : Mr. Arkadeb Bhattacharjee, Adv.

**For the State : Ms. Faria Hossain, Adv.,
Mr. Anand Keshari, Adv.**

Heard on : 02.05.2022, 06.05.2022, 10.05.2022.

Judgment On : 10.05.2022.

Bibek Chaudhuri, J.

The appellants have assailed the judgement and order of conviction passed in Sessions Trial No. 65 of 2013 arising out of Sessions Case No. 40 of 2009 for the offence punishable under Sections 324/34 of the Indian Penal Code and Section 304 II/34 of the Indian Penal Code. The learned Trial Judge handed down sentence to the appellants for the

offence punishable under Sections 324/34 of the Indian Penal Code for rigorous imprisonment for a period of two years along with fine of Rs.1,000/-, in default to suffer simple imprisonment for further two months. He also handed down sentence for the offence punishable under Sections 304 II/34 of the Indian Penal Code against the appellants to suffer rigorous imprisonment for seven years along with fine of Rs.50,000/- each, in default to suffer simple imprisonment for six months each. A sum of Rs.90,000/- was directed to be paid to the family member of the victim towards compensation, if realised.

The fact of the case as disclosed from the FIR is that on 19th September, 2006 at about 12.30 p.m. one Suresh Roy, since deceased and his brothers, namely, Badal Roy and Sudal Roy trespassed into the house of the de facto complainant and started abusing them with filthy language. Hearing such abusing words, the elder brother of de facto complainant, namely, Jyotish Sarkar came out of his room. Seeing him, the accused persons started assaulting the elder brother of the de facto complainant on the allegation that a cow belonging to the family of the de facto complainant was grazing in the land of the said Suresh. In course of altercation, Suresh assaulted Jyotish Sarkar, elder brother of the de facto complainant with the sharp end of a crowbar on his head. On being assaulted as such, the elder brother of the de facto complainant fell down on the ground then Sudal Roy assaulted the elder

brother of the de facto complainant on his chest with the help of a bamboo. The wife of the elder brother of the de facto complainant rushed to the place of occurrence raising hue and cry saying "bancho bancho". At that time the accused Badal Roy assaulted the wife of the elder brother of the de facto complainant with the help of a "dao" on his hand causing bleeding injury. The sons of Jyotish Sarkar, namely, Babulal and Manik rushed to the spot and saved their parents from the hands of the accused persons but they were also assaulted to death. Hearing hue and cry of the injured persons, local people and the de facto complainant reached the place of occurrence and shocked that the elder brother of the de facto complainant was lying on the ground almost in unconscious state. Habitually he and his wife were sent to Moynaguri Hospital where the attending doctor examined them and the elder brother of the de facto complainant was declared a dead.

On the basis of the said complaint, police registered Moynaguri Police Station Case No. 182 of 2006 under Sections 447/324/325/304/34 of the Indian Penal Code and took up the investigation of the case. The investigation concluded with filing of the charge-sheet against three above named accused persons before the jurisdictional Magistrate. Since the offence under Section 304 of the IPC is exclusively triable by the Court of Sessions, the case was committed to the court of the learned Sessions Judge, Jalpaiguri. Subsequently it was transferred to the 2nd

Fast Track Court of the learned Additional Sessions Judge for Trial and disposal.

It is pertinent to mention here that during the pendency of the trial accused, Suresh Roy died and the case against Suresh Roy, since deceased, was filed forever. The remaining two accused persons who are appellants before this Court suffered an order of conviction and sentence. Hence, the instant appeal.

Since the filing appellants failed to take any step because of the fact that the appellants are languishing in correctional home to serve sentence passed by the Trial Court and there is nobody to look after the instant appeal on behalf of the appellants in jail, this Court requested Mr. Arkadeb Bhattacharjee, Learned Advocate to act as an *Amicus Curiae* on behalf of the appellants and help the Court to decide the appeal on merit. Mr. Bhattacharjee readily accepted the proposal made to him by this Court and he submits on behalf of the appellants with all his vigour and diligence.

Mr. Bhattacharjee has criticized the impugned order of conviction on the following grounds:-

- (a) The prosecution has failed to prove the place of occurrence;
- (b) As per the prosecution case, accused Suresh, since deceased, Sudal and Badal assaulted the deceased with 'dao' and 'lathi'. As per the FIR accused Suresh Roy assaulted the

deceased on his head, while Badal Roy assaulted the wife of the victim with a sharp cutting chopper and Sudal Roy assaulted the victim on his chest with the help of a piece of bamboo. The FIR story was not subsequently substantiated by the witnesses. P.W. 1, Anil Sarkar is the brother of the deceased. Though he corroborated the FIR story that Suresh gave a blow on the head of the victim with 'dao' but stated that accused Badal assaulted the victim on his chest by a wooden bottom. Again he stated that accused Sudal Roy assaulted the deceased on his head with a 'dao'. He also stated that Sudal gave a blow on the left hand of the victim's wife. P.W. 2, Paban Sarkar stated in his evidence that he saw a 'dao' in the hand of Suresh, he also saw bleeding injury on the head of Jyotish Sarkar. It is also stated by him that accused Sudal assaulted Jyotish on his chest with a stick. P.W. 3, Supriya Sarkar made a general statement in his evidence to the effect that Badal, Sudal and Suresh assaulted the deceased on his head twice with 'dao' and they also assaulted him with a wooden bottom on his chest. It is also narrated by P.W. 3, Supriya Sarkar that accused persons assaulted the wife of the victim, Chinu Sarkar on his head. P.W. 4, Manik Sarkar was absolutely silent in respect

of the role of accused Suresh Roy, since deceased. From his evidence it is ascertained that Badal assaulted the deceased on his chest with a piece of wood and Sudal hit the victim on his head twice. Sudal also assaulted the wife of the deceased on his head and all the accused persons assaulted Manik Sarkar and Babulal Sarkar. P.W. 5, Rinu Sarkar stated that all the accused persons assaulted Manik and Babulal. Badal Roy also assaulted the witness on her hand with a 'dao' and Sudal gave two blows by his 'dao' on the head of deceased Jyotish Sarkar. Then P.W. 8, Babulal Sarkar stated on oath that Suresh Roy assaulted the deceased on his head by a 'lathi'. Badal Roy assaulted the deceased on his head with 'dao' and Sudal Roy assaulted the victim on his chest with wooden part of the plough. P.W. 9 and 10, namely, Malati Sarkar and Biren Sarkar stated that all the accused persons murdered the deceased with 'lathi' and 'dao'.

Thus, it is submitted by Mr. Bhattacharjee that from the evidence of the witnesses it can be easily ascertained that deceased Jyotish Sarkar received multiple blows on his head. But the Autopsy Surgeon (P.W. 6) only found one deep inside wound measuring about 4" X 2" X 1" over the left side of occiput with blood clot in and around the wound. Apart from the above wound, the Autopsy surgeon did not find any other

injury on the head of the deceased. Superficially he found beside the above mentioned head injury, one abrasion at the region of hypocondrium i.e., on the upper part of the abdomen. Thus, it is contended by Mr. Bhattacharya that from the evidence on record it cannot be ascertained as to who gave the fatal blow to the deceased. In view of such discrepancy in evidence on record it is submitted by the learned amicus curiae that when the witnesses stated differently about the role of each of the accused persons, they ought to have been entitled to benefit of doubt. It is further submitted by the learned amicus curiae that the FIR narrates a story where the accused persons allegedly abused the elder brother of the de facto complainant on 9th September, 2016 at about 12.30 P.M. When his elder brother came out of his room, the accused persons assaulted him entering into his room. Therefore, as per the FIR, the place of occurrence is inside the house of the deceased Jyotish Sarkar. During investigation statements of Babulal Sarkar and Paban Sarkar were recorded. From their statement it is found that accused Suresh Roy, since deceased, wrapped a napkin (gamcha) around the neck of Jyotish Sarkar and pulled him to the land situated by the side of a well belonging to Jyotish Sarkar and his family. Then Suresh assaulted his father with the help of a 'Dao'. Jyotish fell down on the ground receiving the said blow. Then Sudal assaulted him with a piece of wooden 'bottom'. Subsequently, Badal assaulted his

mother with the help of a 'Dao'. The statement of witness Paban Sarkar is almost similar to that of Babulal's. It is urged by Mr. Bhattacharya that there is a big discrepancy in respect of the place of occurrence between the FIR and the statement of the above named witnesses recorded under Section 164 of the Code of Criminal Procedure. It is admitted by Mr. Bhattacharya that neither FIR nor the statement under Section 164 of the Code of Criminal Procedure can be treated as substantive evidence and they can only be used for the purpose of contradiction or corroboration. Thus, when the statements on oath of the witnesses are examined with their previous statements one would find glaring differences where the presence and role of each of the accused persons were differently stated by different witnesses. Mr. Bhattacharjee next draws my attention to the sketch map prepared by the Investigating Officer of this case. As per the sketch map the place of occurrence is on the land of Jyotish Sarkar. It also appears that there is a tree and a well on the said land. The house of Jyotish Sarkar is on the eastern side of the place of occurrence intervened by his cowshed and kitchen. If the Investigating Officer is to be believed then the FIR story as well as the evidence of the de facto complainant Anil Sarkar cannot be believed. Therefore, the evidence on record is not clear as to the place of occurrence and it is also doubtful as to whether the witnesses who claimed themselves to be the eye witnesses of the occurrence are really

eye witnesses or not. In view of the aforesaid lacuna the impugned order of conviction and sentence ought to be set aside.

Referring to a recent judgment of the Hon'ble Supreme Court in the case of **Viram alias Virma versus State of Madhya Pradesh** reported in **(2022) 1 SCC 341**, it is submitted by Mr. Bhattacharjee that the autopsy surgeon did not find more than one wound on the head of the deceased which was considered to be fatal for the deceased. In the above mentioned report it was observed by the Hon'ble Supreme Court that the medical report submitted therein established that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as alleged by a witness. Therefore, the evidence of the witness was found to be totally inconsistent with the medical evidence and that would be sufficient to discredit the entire prosecution case. Coming to the instant case, it is submitted by Mr. Bhattacharjee that evidence of so-called ocular witnesses is not only inconsistent with the medical evidence but they contradicted with each other about the role of the accused persons.

In view of such circumstances, the appellants are entitled to get benefit of doubt and the learned trial Judge failed to appreciate the evidence on record in its true and proper perspective.

Mr. Anand Keshari, learned P.P.-in-charge, on the other hand, submits that the evidence on record is consistent as to the injury of the victim. There may be some exaggeration or discrepancy in the evidence of the eye witnesses but for this reason entire evidence of the eye witnesses cannot be discredited. He invites the Court to consider a situation where a person was seriously injured in front of his house and it is natural that the family members and adjoining people would rush to the place of occurrence to see the incident. There may be some discrepancy as to the role of each of the accused. During passage of time the witnesses may forget the specific role attributed to the accused persons. Therefore, in the evidence there may be some discrepancies and contradictions, which ought to be accepted as minor contradictions. It is found from the entire evidence on record that the appellants were involved in committing culpable homicide not amounting to murder of deceased Jyotish Sarkar. Therefore, the accused persons were rightly convicted with the aid of Section 34 of the Indian Penal Code.

Having heard the learned advocates for the parties and on perusal of the entire evidence on record, it appears from the evidence of all the witnesses who claimed themselves to be the eye witnesses that the victim Jyotish Sarkar was attacked by Suresh since deceased, Sudal and Badal on 19th September, 2006 at 12.30 P.M. In the FIR the

de facto complainant stated that the accused persons illegally trespassed into the room of the deceased and assaulted them. However, in evidence he stated that the accused persons came running to their house and dragged his elder brother Jyotish Sarkar by wrapping a napkin (gamcha) around his neck to their agricultural land and thereafter they assaulted him. It is needless to say that FIR is not an encyclopaedia of the incident. The purpose of FIR is to set the criminal administration of justice in motion. The de facto complainant of course did not state that his elder brother was dragged to the agricultural land situated by the side of his house/room. This omission cannot be treated as substantial omission in view of the fact that the sketch map, statements of Babulal and Manik recorded under Section 164 of the Code of Criminal Procedure and the statement other witnesses recorded under Section 161 of the Code of Criminal Procedure led the Investigating Officer to pinpoint the place of occurrence which is on the land outside the house of Jyotish Sarkar.

It is true that there are exaggeration in the evidence of the witnesses. However, it is not in dispute that the present appellants were parties in assaulting the deceased and practically no cross-examination was made on behalf of the defence raising a doubt about their presence at the place of occurrence on the date and time of the

incident to create a doubt in the mind of the Court about their presence and participation in the offence.

Some of the witnesses stated that the victim suffered multiple blows on his head. However, the Medical Officer found only one deep incise looking lacerated wound on the head of the victim. It is probably lost sight of the learned amicus curiae that all the witnesses stated that the accused Sudal Roy assaulted the deceased on his chest and the autopsy surgeon found fractures of 10th and 11th ribs with extradural haemorrhage on the chest. He found bruise on the right side of hypo condrium i.e., upper part of the chest just below the chest ribs. The autopsy surgeon opined that the deceased died due to shock and haemorrhage following the above noted injuries. Therefore, fracture of 10th and 11th chest ribs with extradural haemorrhage is also a cause of death of the deceased beside the head injury.

Last but not the least the entire incident took place over an issue of grazing of a cattle and the accused persons claimed that a calf belonging to deceased Jyotish Sarkar entered into their agricultural land. Therefore, the reason behind incident can also be deciphered from the evidence on record.

In view of the above circumstances, I do not find any reason to interfere with the order of conviction passed by the learned Court below.

Now comes the question of sentence. The appellants were sentenced to suffer imprisonment for seven years with fine of Rs.50,000/- each, in default, to suffer six months simple imprisonment for the offence under Section 304II/34 of the Indian Penal Code. It is also directed that if the fine amount is paid by the appellants, a sum of Rs.90,000/- would be paid to the widow of the deceased Jyotish Sarkar. Section 357(1) of the Code of Criminal Procedure provides for four grounds where compensation can be granted. The aforesaid provision is quoted below:-

"357. Order to pay compensation. – (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied –

- (a) in defraying the expenses properly incurred in the prosecution;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation

is, in the opinion of the Court, recoverable by such person in a civil court;

- (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
- (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto."

In the instant case, compensation to the widow of the deceased can only be paid in defraying the expenses incurred by her during trial of the case. However, the trial of the case was conducted by the State. The widow of the deceased or

other witnesses did not spend any money to conduct the prosecution. Moreover, in respect of other grounds by such specific act of the appellants, neither the de facto complainant nor the widow of the deceased can claim compensation which is recoverable by such person in a Civil Court. Clause C and D deals with compensation in cases under the Fatal Accident Act and in respect of criminal misappropriation, criminal breach of trust or cheating.

In view of such circumstances, though I am of the view that substantial sentence of imprisonment should continue, however, the trial Court cannot direct to pay substantial portion of fine amount to the widow of the victim. In order to pay compensation to the victim the learned trial Judge imposed fine amount in an excessive high rate without considering the fact that the accused persons are agricultural labourers. Therefore, the sentence with regard to payment of fine is modified and the accused persons/appellants are sentenced to pay fine of Rs.5,000/- each, in default, to suffer simple imprisonment for one month each. The part of sentence with regard to fine passed by the trial Court is accordingly set aside and modified in the instant appeal.

Accordingly, the appeal is **allowed in part.**

Let a copy of this judgment be sent to the Court below along with the lower Court record.

Before I part with, I must express my sincere thanks to the learned amicus curiae for doing the case with great diligence and sincerity.

(Bibek Chaudhuri, J.)

pk, srimanta, suman, A.R.s (Court)