

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 204 of 2015

Binoy Kumar Sah @ Saw @ Sow

-Vs-

The State of West Bengal

For the Appellant : Mr. Debasis Kar, Adv.
Mr. Husen Mustafi, Adv.
Mr. Subhojit Chowdhury, Adv.
Mr. Arka Tilak Bhadra, Adv.

For the State : Mr. Parthapratim Das, Adv.
Ms. Trina Mitra, Adv.

Heard on : 26.07.2022 & 27.07.2022

Judgment on : 27.07.2022

Joymalya Bagchi, J. :-

Appeal is directed against judgment and order dated 24.03.2015 & 25.03.2015 passed by learned Additional Sessions Judge, Durgapur, in Sessions Trial No. 29 of 2011 arising out of Sessions Case No. 56 of 2011 convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and Sections 25(1B)(a)/27(1) of the Arms Act and sentencing him to suffer imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer

further imprisonment for one year more for the offence punishable under Section 302 of the Indian Penal Code; to suffer imprisonment for one year and to pay fine of Rs. 1,000/-, in default, to suffer further imprisonment for three months more for the offence punishable under Section 25(1B)(a) of the Arms Act and to suffer imprisonment for three years and to pay fine of Rs.1,000/-, in default, to suffer further imprisonment for six months more for the offence punishable under Section 27(1) of the Arms Act. All the sentences shall run concurrently.

Prosecution case as alleged against the appellant is to the effect that on 23.01.2011 at 9.00 P.M. one Md. Salim Ali and his uncle Nazir Ali (the deceased herein) had come to purchase betel leaf from the stall of Karan Barnwal (PW3). At that time the appellant in an intoxicated condition threatened Karan stating '*if I loot your shop then what you will do*'. His uncle Nazir intervened and asked him not to behave in this fashion. Thereupon, appellant threatened Nazir. Nazir told the appellant why he was abusing him. At that juncture, the appellant took out a gun and shot Nazir on the chest. Nazir fell down on the ground. Appellant was reloading the gun when Salim ran away from the spot and informed others. Subsequently, police came to the spot and took the victim to hospital. On the same day, the victim died. On the written complaint of Salim (PW1), Pandabeswar Police Station Case No. 06 of 2011 dated 23.01.2011 under Sections 326/307 of the Indian Penal Code and Sections 25(1b)(a)/27 of the Arms Act was registered. At the hospital victim was declared dead and Section 302 IPC was added. In course of

investigation, on the showing of the appellant, fire arm and live ammunitions were recovered. Opinion of ballistic expert show fire arm was used to fire the bullet which was recovered from the body of the deceased. Charge-sheet was filed against the appellant and charge under Section 302 of the Indian Penal Code was framed. In course of trial, charge was amended and Sections 25(1b)(a)/27 of the Arms Act was added. In course of trial, prosecution examined 15 witnesses to prove its case. Defence of the appellant was one of innocence and false implication. In conclusion of trial, learned trial judge by the impugned judgment and order dated 24.03.2015 & 25.03.2015 convicted and sentenced the appellant, as aforesaid.

Mr. Debasis Kar, learned advocate for the appellant submits evidence of PW1 is not reliable. Other witnesses have turned hostile. Oral dying declaration made before PWs 2 and 3 are stated for the first time in Court and ought not to be believed. Recovery of fire arm is doubtful. Independent witnesses have not supported the case. Hence, prosecution case has not been proved beyond doubt. In the alternative, he submits the incident occurred in course of a sudden quarrel and without premeditation. Appellant had no motive to commit the crime. Hence, the offence may be converted to Section 304 IPC.

Ms. Trina Mitra, learned advocate for the State submits PW1 is an eyewitness. He was present at the place of occurrence. His deposition is corroborated by post-mortem doctor who found that the victim had died due to gunshot injury. On the showing of the appellant, firearm was

recovered. Ballistic Expert (PW14) opined fire arm (Ext.A) was in working condition and the bullet was fired from the said firearm. Prosecution case is, therefore, proved beyond doubt. She further submits the appellant was a dangerous person who was carrying a firearm. There was no provocation from the end of the deceased who merely requested the appellant not to abuse him. Appellant fired at point blank range at the chest of the deceased. Hence, conviction of the appellant ought not to be converted to Section 304 IPC.

PW1 (Md. Salim Ali) is the de-facto complainant and the most vital witness. He deposed on 23.01.2011 at 9:00 P.M. he along with his uncle had gone to the betel shop of Karan Barnwal for purchasing betel leaf. At that time appellant threatened Karan he would loot his shop and he would not be able to do anything. Nazir Ali courteously referred the appellant as '*bara bhai*' and requested him to cool down. Thereupon, the appellant abused him in filthy language. When Nazir protested, he threatened he would fire at him. Nazir enquired whether the appellant would seriously fire at him. Instantly, appellant fired at the chest of Nazir at close range. He also tried to shoot PW1. He somehow saved himself and ran away from the spot. He lodged written complaint which was scribed by Karan Barnwal (PW3). He proved his signature on the complaint. Police came to the spot. They collected blood stained earth and control earth from the place of occurrence. He signed on the seizure list. He made statement before Magistrate.

PW2 (Liakat Ali) is the younger brother of the deceased. He is a post-occurrence witness. Hearing the news from Md. Salim Ali (PW1), he rushed to the spot and found Nazir lying with bleeding injuries. Nazir stated Binoy Shaw had shot at him.

PW3 (Karan Barnwal), the betel shop owner was declared hostile. Nonetheless he stated Binoy had threatened to loot his shop and the *Irani* youths i.e. PW1 and the deceased had objected which resulted in a quarrel. Thereafter, he heard sound of firing and saw Nazir lying with bleeding injuries.

PW4 (Sekendar Sk.) who came to the shop to buy cigarettes was also declared hostile but he admitted there were talks between Binoy and *Irani* lads and he heard firing.

PW8 (Ali Akbar Ali) is the father of the deceased. He received information from PW1 about the incident. He came to the spot whereupon Nazir stated Binoy had shot at him with a firearm. A police vehicle arrived at the spot. Nazir was lifted in the police vehicle and was taken to SD Hospital, Durgapur. At the hospital Nazir was declared dead. He signed on the inquest report.

PW11 (Dhrubojyoti Mondal) was posted as ASI of Police at Pandaveswar Police Station. On 23.01.2011 he was on evening mobile duty. While proceeding towards Phoolbagan more from DVC, he found persons going towards Phoolbagan. There was a gathering. Reaching the spot he noticed a person lying with bleeding injuries. With the help of local people he removed the injured in a police vehicle to SD Hospital,

Durgapur. Doctor at the hospital declared the injured dead. On the way to the hospital he heard from the father and brother of the injured that Binoy had shot Nazir.

PW10 (Saroj Kumar Pati) held inquest over the body of the deceased at SD Hospital, Durgapur. He proved the inquest report (Ext.7). He sent the body for post-mortem examination.

PW9 (Dr. Swapan Kumar Saha) conducted the post-mortem examination of the deceased. He found the following injuries :-

“small wound which is inverted skin, scorching skin in the right side of interior chest wall, upper two inch lower from shoulder joint. Blood clot in the skin. He found a bullet in the postural aspect of the 6/7th thorax region. It ruptured the skin and muscle, right side of lung and fractured rib. He also found right sided six rib fracture and thorax full in blood. Pleura ruptured, lung ruptured. Heart was empty.”

He opined death was due to shock and injury arising out of the aforesaid injuries ante mortem and homicidal in nature. Bullet injury was the cause of death. He sent the bullet head for forensic examination.

PW15 (SI Sunil Baran Mukherjee) is the Investigating Officer. He deposed on 23.01.2011 he was in charge of Pandaveswar Police Station. He received one written complaint which was forwarded by the Officer-in-charge, Pandaveswar Police Station. He started Pandaveswar Police Station Case No.06 of 2011 dated 23.01.2011. He drew up formal FIR (Ext.13). He took up investigation of the case. He went to the place of occurrence and prepared rough sketch map. He seized blood stained earth and control earth from the place of occurrence. He examined

witnesses. In the intervening night of 23.01.2011 and 24.01.2011 he apprehended the appellant. During police custody he recorded the statement of the appellant who claimed that he would lead him to the spot where he had concealed arms and ammunitions. On the showing of the appellant he recovered one six chambered pipe gun and three live ammunitions kept in a black colour polythene bag. He prepared seizure list (Ext.5/2). He labelled the seized articles in presence of witnesses. He sent the seized articles for FSL examination. He submitted charge-sheet.

PW6 (Mithun Das) and PW7 (Safiq Khan) are the witnesses to the recovery of firearm and ammunitions on the showing of the appellant. Though PW6 was declared hostile, he admitted his signature on the seizure list.

PW7 corroborated the prosecution case with regard to recovery but was not able to identify the appellant in court.

PW14 (Dr. Shampa Dhabal) is the senior scientific officer, Ballistic Department, Forensic Science Laboratory, Government of West Bengal. He deposed he received the fired bullet, firearm and ammunitions from the Investigating Officer. He opined as follows :-

“(1) the firearm Exhibit A was in working condition and it was fired previously; (2) The fired bullet Exhibit C1 was bullet used in 0.32 revolver ammunition fired through the firearm Exhibit A; (3) the ammunitions Exhibit B1 and B3 were live and the remaining ammunition B2 appeared to be in good condition. ”

PW13 proved the sanction order (Ext.11).

From the aforesaid evidence on record I find PW1 is the sole eyewitness. When a prosecution case is hinged on the version of a sole eyewitness, it is the duty of the court to test the evidence of the witness with due care and circumspection and be satisfied with regard to its intrinsic truth. In the event the deposition of the witness is found to be wholly reliable, the same can form the basis of corroboration. However, if parts of the evidence of the sole eyewitness is reliable while other parts are unreliable, it would be prudent to seek corroboration before relying on the version of the said eyewitness.

Bearing the aforesaid proposition of law in mind I have examined the evidence of PW1. PW1 stated he had come with his uncle Nazir to the betel shop of Karan Barnwal (PW3). They saw the appellant threatening Karan. His uncle Nazir intervened and requested the appellant to calm down. He even courteously referred to the appellant as '*bara bhai*'. Appellant abused him and threatened to fire at him. The victim out of sheer incredulity questioned the appellant whether he was serious in firing at him. At that juncture, the appellant brought out a gun and shot at point blank range on the chest of the victim. Deposition of PW1 is in consonance with the FIR registered by him soon after the incident. In addition thereto, other witnesses viz. PW2 (brother of the deceased) and PW8 (father) stated that PW1 rushed from the spot and informed them that the appellant had fired at the deceased. Even the hostile witnesses while being evasive with regard to who had fired the shot, admitted the attending circumstances leading to the murder. PW3 (Karan Barnwal)

claimed appellant was present at his betel shop. He admitted appellant had threatened him. Thereupon the *Irani* youths i.e. PW1 and the deceased had intervened. Then he heard a sound of firing. PW4, another hostile witness, also deposed in similar lines.

The aforesaid pieces of evidence of PWs.2, 3, 4 & 8, therefore, corroborate the version of the eyewitness that the appellant had threatened Karan Barnwal whereupon the deceased had intervened. This enraged the appellant who shot at the deceased at point blank range at his chest resulting in his death. Ocular version of PW1 also finds support from the medical evidence of post-mortem doctor (PW9) who found gun shot injury on the deceased. A bullet was also recovered from his body.

Offending weapon was recovered on the showing of the appellant. Investigating Officer (PW15) deposed he recorded the statement of the appellant during police custody. Thereafter, on his showing a firearm i.e. a six chambered pipe gun and live ammunitions kept in a blank polythene packet were recovered.

Mr. Kar has challenged the recovery on the ground that the independent witnesses have not supported the seizure. He submits PW6 was declared hostile and PW7 was unable to identify the appellant in court. Though PW6 was declared hostile, his signature on the seizure list has been proved. He was confronted with his previous statement before police and on a reading of his entire deposition it appears he had resiled from his earlier statement and is an unreliable witness.

PW7 stated he saw the police with the accused come near the bank of a pond and on the showing of the accused, firearm and live ammunitions were recovered. He proved his signature on the seizure list.

I have examined the seizure list (Ext.5/2) It bears the signature of the appellant. As PW7 had seen the appellant only for sometime at the time of recovery, it is possible he was unable to identify him in Court. But the deposition of the Investigating Officer (PW15) and contemporaneous document viz. seizure memo (Ext.5/2) and the signature of the appellant thereon would lend credence to the fact that the accused referred by PW7 in his deposition is none but the appellant. On his showing the Investigating Officer had recovered the offending firearm. Offending firearm, live ammunitions and the bullet head were sent for FSL examination. PW14, senior scientific officer, Ballistic Department examined the articles and stated the bullet head recovered from the body of the victim was fired from the firearm on the showing of the appellant.

Sanction order has also been proved.

These chain of circumstances lend credence to the version of the eyewitness (PW1) that it was the appellant who had fired at point blank range on the chest of Nazir resulting in his death.

Finally, Mr. Kar argued appellant was in an inebriated condition. Incident occurred in course of a sudden quarrel. Therefore, conviction may be altered from murder to culpable homicide not amounting to murder.

I am unable to accept such contention also. From the evidence on record I do not find any sudden and grave provocation given to the victim. On the other hand, the appellant was the aggressor who had threatened the helpless betel shop owner (PW3). Nazir courteously referred to the appellant as '*bara bhai*' and requested him to calm down. Such conduct of the victim by no stretch of imagination can be described as a sudden provocation for the appellant to fire at point blank range at the chest of the victim. Although some of the hostile witnesses stated there were talks between the parties, in the backdrop of clear and unequivocal evidence of PW1, I am convinced that such talks cannot qualify as a sudden quarrel or that the appellant had acted without pre-meditation to justify scaling down his culpability to Section 304 of the Indian Penal Code.

On the other hand, the appellant appears to be a dangerous person who was threatening a local shopkeeper. He was carrying a firearm with him. When the victim out of sheer incredulity questioned the appellant whether he was serious in firing at him, he fired back and killed the victim. He even tried to fire at PW1. These circumstances clearly establish the intention of the appellant to murder the victim.

Authorities relied upon on behalf of the appellant are factually distinguishable.

In ***Thankachan vs. State of Kerala***¹, there was a quarrel between the accused and his wife over serving of food. In course of

¹ (2005) 11 SCC 536

quarrel, the accused had struck his son with a chopper on the left leg below the knee. As a result, his son died.

In the present case, the appellant was the aggressor and had shot at the victim at point blank range on his chest i.e. a vital part of the body.

In ***Indrasan vs. State of U.P.***², the accused had struck a *lathi* blow in course of a village dispute.

In the present case, the appellant had a firearm and used it even when the victim had asked whether he was serious in firing at him. This aggressive and violent conduct of the appellant exposes his intention to murder the victim and distinguishes the present case from the cited one.

Similarly, in ***Gudu Ram vs. State of Himachal Pradesh***³, the accused had used a domestic article viz. '*Thapī*' i.e. a wooden article used for cleaning to assault the victim unlike the present case where the appellant was armed with a firearm and fired at the victim at his chest.

In ***Kulesh Mondal vs. The State of West Bengal***⁴, the accused had acted without pre-meditation in course of a sudden fight.

As discussed earlier, the victim had courteously referred to the appellant as '*bara bhai*' and requested him to calm down. This conduct by no stretch of imagination can be described as a sudden quarrel which would prompt the appellant to fire at the victim at point blank range.

² AIR 2009 SC 2760

³ (2013) 11 SCC 546

⁴ (2007) 8 SCC 578

In ***Litta Singh & Anr. vs. State of Rajasthan***⁵, appellant had struck *lathi* and *Gandasi* blows without pre-meditation in course of a quarrel.

The present case portrays a completely different picture. The appellant was the aggressor and it cannot be said that he did not intend to murder the victim as he had fired at the chest at point blank range. Thereafter, he tried to fire at PW1.

The other authorities relied upon by Mr. Kar viz. ***Kartick Hazra @ Srikanta @ Kartick Biswas vs. State of West Bengal***⁶, ***Nakul Mondal vs. State of West Bengal***⁷ & ***Pranit Shil @ Panit Shil @ Shill vs. State of West Bengal***⁸ by co-ordinate Benches of this Court were decided in the factual matrix of those cases and in none of the cases the appellant appears to be a dangerous person who had threatened local a shopkeeper and upon intervention by the victim had fired at him at point blank range.

Though the effort of the learned advocate of the appellant in bolstering his arguments with innumerable authorities show his earnestness, it may be apposite to recount the observation of the Apex Court in ***Megh Singh vs. State of Punjab***⁹ in the matter of precedents in criminal cases:-

“18. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases or between two accused in the same case. Each case depends on its own facts and a close

⁵ (2015) 15 SCC 327

⁶ 2008 (1) CalLJ 756

⁷ 2015 (3) AICLR 200

⁸ 2018 (183) AIC 676

⁹ (2003) 8 SCC 666

similarity between one case and another is not enough because a single significant detail may alter the entire aspect. It is more pronounced in criminal cases where the backbone of adjudication is fact-based.”

In the light of the aforesaid discussion, I hold prosecution has been able to prove its case beyond reasonable doubt. Conviction and sentence of the appellant is upheld.

Appeal is accordingly dismissed.

Period of detention suffered 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.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)