

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Mr. Justice Joymalya Bagchi

And

The Hon'ble Mr. Justice Bivas Pattanayak

CRA 531 of 2015

Motiyar Rahaman & Anr.

VS

The State of West Bengal

For the Appellants : Mr. Mritunjoy Chatterjee, Adv.
Mr. Debapriya Majumder, Adv.
Mrs. Manasi Roy, Adv.

For the State : Mr. Partha Pratim Das, Adv.
Md. Kutub Uddin, Adv.

Heard on : 24.02.2022 & 02.03.2022

Judgment on : 02.03.2022

Joymalya Bagchi, J. :-

Appellants have assailed the impugned judgment and order dated 23.04.2015 and 27.04.2015 passed by learned Additional District and Sessions Judge, Fast Track 1st Court, Basirhat, North 24 Parganas, in Sessions Trial No. 4(2)04 arising out of Sessions Case No. 12(12)02 convicting the appellants for commission of offence punishable under Section 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life for 20 years each and to pay a fine of Rs.10,000/- each, in default to suffer simple imprisonment for six months more.

The appellants along with one Abdar Rahaman Gazi (since deceased) and Joynab Bibi, acquitted accused, were called upon to answer the following charge:-

“That on 11.09.2000 at 19 hours at Safirabad High School in furtherance of common intention of all, you committed murder by intentionally causing death of one Atiyar Gazi.”

To prove the aforesaid charge prosecution examined eleven witnesses. Defence of the appellants was innocence and false implication. In the course of trial, Abdar Rahaman Gazi expired.

In conclusion of trial, learned trial Judge by the impugned judgment and order dated 23.04.2015 and 27.04.2015 convicted and sentenced the appellants, as aforesaid. Co-accused Joynab Bibi was acquitted of the charge levelled against her. Hence, the present appeal.

Mr. Chatterjee, learned Counsel appearing for the appellants submits that P.W. 1, son of the deceased, Robiul Gazi, was not an eye-witness. He claimed his father was hit on the head and suffered fracture injury. He also suffered fracture in his hand. His evidence is contradicted by his mother (P.W. 6) and his brother-in-law (P.W. 8) as well as post mortem doctor, P.W. 9. No medical papers relating to injury of P.W 1 is also produced in Court. It is further argued P.W. 3 is a chance witness and could not state the person from whom he had come to collect money. P.Ws. 6 and 8 have given a different version with regard to the manner of assault and had not implicated appellant No. 2, Khalil Gazi, therein. Hence, the appellants may be acquitted. Alternatively, it is argued the incident occurred in the course

of a sudden quarrel and the appellants did not intend to kill the deceased. Thus, conviction may be altered from one under Section 302 of the Indian Penal Code to Section 304 of the Indian Penal Code.

Learned Counsel appearing for the State argues that the evidence of the eye-witnesses namely P.Ws. 1, 2, 3, 6 and 8 clearly establishes role of the appellants along with one Abdar Rahaman Gazi in the assault of the deceased. He suffered multiple injuries resulting in his death as appearing from the evidence of the post mortem doctor, P.W. 9. It is further argued variation in the depositions of the witnesses are minor and do not affect the credibility of the prosecution case. Hence, appeal may be dismissed.

P.W. 1, Robiul Gazi, is the son and informant. He deposed on the fateful day there was quarrel between his father, Atiyar Gazi and appellant No. 2, Khalil Gazi. Khalil hit Atiyar on the head in front of Safidabad High School. Thereafter, Abdar Rahaman Gazi, since deceased, threw a brick on the face of his father. As a result, his father fell down and Motiyar and Khalil assaulted his father with lathi. He tried to save his father and was also assaulted. P.W. 1 lodged written complaint which was scribed by Anarul Gazi. He was medically treated at Sibhati Hospital. He signed on the inquest report. In cross-examination, he stated due to assault on the head his father, the latter suffered fracture injury in his head.

P.W. 2 (Abdul Kalam Molla) and P.W. 3 (Fazer Ali Gazi) are the independent witnesses who supported the prosecution case.

P.W. 2 stated Khalil and Abdar Rahaman Gazi @ Dubraj assaulted Atiyar. P.W. 1 tried to resist them and was also assaulted. Witness, however, admitted he had not been examined by the police.

Another independent witness, P.W. 3, stated he had come in front of Safidabad High School to collect money. When he was purchasing mustard oil he heard sound of assault. He found Abdar and Khalil were assaulting Atiyar with a brick. As a result, Atiyar fell down on the ground and thereafter Motiyar and Khalil assaulted Atiyar with bamboo on his back. He along with others shifted the victim to Shibati Hospital. Immediately on arrival at the hospital Atiyar was declared dead. He was examined by the police on the same night.

Other independent witnesses namely P.Ws. 4 and 5 were declared hostile and were confronted with their earlier statements. However, they admitted victim died in front of Safidabad High School.

P.W. 6, Rup Chand, is the wife of the deceased. She deposed that a dispute took place between her husband and Khalil over money. Her husband was assaulted with a brick. As a result her husband fell down. Motiyar and Khalil assaulted her husband with lathi and bricks. Joynab Bibi was standing beside Motiyar Gazi. Her son, P.W. 1, tried to rescue him. He was assaulted resulting in fracture and bleeding.

P.W. 8, Khalil Gazi, son-in-law of the deceased has corroborated the evidence of P.W. 6.

P.W. 9, Dr. Tamal Das, is the post mortem doctor. He found the following injuries on the deceased:-

- “1. Bluish at elbow lateral aspect and dislocation of left elbow joint.
2. bluish over the chest 10” x 1½” approximately on the anterior aspect which was part of the upper side and lower side of the chest.
3. cut injury of the upper limb on the right side 1½” of dimension with lacerated margin.
4. cut injury on the right side eye brow ½” dimension in the lateral margin.
5. fracture of the sternum part on the anterior of the chest at the label of 4 and 5 interpostal space.
6. multiple fracture on 3 and 6 ribs over right side anteriorly.
7. multiple fracture on 6 and 7 ribs on left side anteriorly.

I also found free extravasated blood in both the plural cavity of both sides.

In larynx haematoma was found over the thyroid cartilage with bluish.

In the right lung laceration was found in the anterior aspect.

In the left lung there was lacerated injury in the anterior aspect.

In pericardium there was bluish and lacerated injury on the anterior aspect.

In heart muscle there was lacerated injury.”

He opined death was due to lacerated injury of heart and lung and due to abovementioned injuries which were ante mortem in nature. He proved the post mortem report marked as Exhibit –6.

P.W. 10 (Sudip Ganguly) and P.W. 11(Subodh Chakraborty) are the investigating officers of the case.

P.W. 11 was initially entrusted with the investigation. He visited the place of occurrence, prepared sketch map and seized the articles under seizure list marked as Exhibit -7. He sent the body of Atiyar for post mortem examination. He visited Shibati B.P.H.C. where the injured as well as deceased were treated. P.W 11 collected post mortem report and submitted charge-sheet.

It is argued evidence of P.W. 1 with regard to assault upon his father on the head by Khalil is not supported by medical evidence. No injury report with regard to assault upon him has also been proved.

I have considered the evidence of the eye-witnesses namely P.W. 1, P.W. 2, P.W. 3, P.W. 6 and P.W. 8. While P.W. 1, P.W. 6 and P.W. 8 are the relations of the deceased, P.W. 2 and P.W. 3 are the independent witnesses.

Crux of the prosecution case transpiring from the evidence of the aforesaid witnesses is to the effect that there was a quarrel between Khalil and the deceased Atiyar over supply of bricks. Pursuant to the quarrel Abdar Gazi assaulted the victim on the face with a brick bat. As a result, he fell down. Thereafter, Motiyar and Kholil assaulted him with bricks and lathi. P.W. 1 also claimed his father was hit on the head with a lathi by Khalil resulting in extensive injuries. Genesis of the incident disclose sudden attack by a number of persons upon the victim, Atiyar. His son Rabiul was present and resisted the attack. In this melee, it is possible Rabiul was unable to note the exact place where the accuseds had struck

his father and incorrectly stated that he had been hit on the head. His presence at the place of occurrence is squarely established through the depositions of his mother P.W. 6 and brother in-law P.W. 8 as well as independent witness, P.W. 2. Thus, I am of the opinion evidence of PW 1 is truthful and can be relied upon.

It is argued P.W. 6 and P.W. 8 did not state Khalil had assaulted the victim with lathi. Presence of Khalil at the place of occurrence is noted by both the witnesses. He was quarrelling with the deceased. A number of persons conjointly assaulted the deceased. P.W. 6 was in her house and saw the incident from a distance. Hence, it is possible that she failed to notice the assault by Khalil on the deceased which however was noted by P.W. 1 who was beside his father when he was being assaulted. It is also relevant to note independent witness P.W. 3 has corroborated P.W. 2 with regard to assault by Motiyar and Khalil upon the victim. Presence of P.W. 3 at the place of occurrence has been proved. He deposed he had come to the place of occurrence to collect money and was purchasing mustard oil when the incident occurred. Mere failure to disclose the person from whom he had collected money does not improbabilise his presence at the place of occurrence.

Evidence of the ocular witnesses receive substantial corroboration from the post mortem doctor P.W. 9. He noted multiple injuries on the body of the deceased which caused extensive internal damage to heart and lungs of the victim. This proves indiscriminate assault upon him by the appellants.

Finally, I am unable to accept that the appellants did not intend to murder the deceased. The appellants along with Atiyar Gazi had struck multiple blows on the vital parts of the body of the victim resulting in extensive injuries which caused fracture on ribs and damaged vital organs like heart and lungs. These injuries noted by post mortem doctor are very grave and clearly disclose the intent of the appellants to commit murder. Repeated number of assaults and the extensive injuries caused clearly show their intention to commit murder. Hence I am unable to alter the conviction of the appellants from murder to culpable homicide not amounting to murder.

Conviction of appellants is accordingly upheld.

With regard to sentence, I note that the trial Judge had sentenced the appellants to suffer imprisonment for life for a period of 20 years. Sentence imposed by the trial Court is illegal. Sections 45 and 53 of the I.P.C. read together means life imprisonment shall be till the end of life of the convict. Section 57 of the I.P.C. only clarifies for the purpose of calculating fractions of terms of imprisonment for life shall be treated as imprisonment for 20 years. Thus, the aforesaid provision does not mean that life imprisonment is equivalent to 20 years. In this regard reference may be made to ***Union of India vs. Sriharan alias Murugan And Others.***¹

Thus, I clarify that the sentence imposed on the appellants shall be treated as life imprisonment till the end of their lives and not for 20 years. I further clarify appellants shall be at liberty to make application for

¹ (2016) 7 SCC 1

remission of sentence upon completion of 14 years of actual imprisonment in terms of section 433A Cr.P.C. In the event such application is made, the same shall be considered in accordance with law keeping in mind all relevant factors including their conduct in jail.

The appeal is, accordingly, dismissed.

In view of disposal of the appeal, connected applications, if any, also stand disposed of.

Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellants in terms of Section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial court as well as the Superintendent of Correctional Home for necessary compliance.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)