

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Siddhartha Roy Chowdhury

C.R.A. 555 of 2014

Rafique Khan

-Vs-

The State of West Bengal

For the Appellant : Mr. Navanil De, Adv.
For the State : Mr. Rudradipta Nandy, Id APP
Mrs. Sonali Das, Adv.
Heard on : 8th December, 2022.
Judgment on : 8th December, 2022.

Joymalya Bagchi, J. :-

1. Appeal is directed against the judgment and order dated 21.06.2014 passed by the learned Additional Sessions Judge, 12th Court, Alipur, South 24 Parganas in Sessions Trial No.04(09)2006 arising out of Sessions Case No.47(06) 2006 convicting the appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 40,000/-, in default, to suffer simple imprisonment for one year more.

2. Prosecution case as alleged against the appellant is to the effect that on 26th January 2006 around 4.30 a.m there was an altercation between the appellant and one Alauddin (the deceased herein) over distribution of prawns at Padmapukur More in front of Majumder tailors. Alauddin hit the appellant with a 'sabol'. Thereupon the appellant went to his residence. Thereafter, along with his mother he went to the residence of Alaudin and enquired about him. They threatened to murder Alauddin. Thereafter, appellant proceeded to Padmapukur More in search of Alaudin. At Padmapukur More, he assaulted Alauddin with a knife on various parts of the body. Alauddin was removed to Baruipur hospital where he was declared dead.

3. PW 1 heard the incident from mother of Alauddin i.e Saina Bibi PW 2 and lodged written complaint at police station. FIR was drawn up and Baruipur PS Casae no. 19 dated 16.1.2006 under section 302 IPC was registered for investigation. During investigation appellant was arrested. On his showing offending weapon i.e. knife was recovered.

4. Charge-sheet was filed and charge was framed under section 302 IPC against the appellant. In course of trial, prosecution examined 17 witnesses and exhibited a number of documents. Defence of the appellant was one of innocence and false implication. In conclusion of trial, trial Judge by the impugned judgment and order convicted and sentenced the appellant, as aforesaid.

5. Nobody appears for the appellant. Mr. Navanil De, learned Advocate empanelled with the High Court Legal Services Authority is

requested to represent the appellant. Secretary, High Court Legal Services Authority shall regularize his appointment.

6. Mr. De submits prosecution case has not been proved. PWs 2 and 5 stated for the first time in court that the appellant had come to their residence and searched for Alauddin. Their presence at Padmapukur More is improbabilised by PW 8 Hannan Gazi. PW 8, the other eye witness was examined after two months of the incident. Appellant had been assaulted by the victim Alauddin. He had suffered head injury. Hence, conviction under section 302 IPC is not sustainable.

7. Mr. Nandy, learned APP for the State submits PW 8 is a natural witness. His deposition is corroborated by PWs 2 and 5, mother and wife of the victim. Post mortem doctor (PW 12) corroborates the version of the eye-witnesses. Hence, prosecution case is proved beyond doubt.

8. PW 1 Khatib Ali Mistry is the de facto complainant. He was not present at the place of occurrence. He is a reported witness. He heard the incident from mother of the victim (PW 2).

9. PWs 2, 5 and 8 claimed to be eye-witnesses.

10. P.W 2 is the mother of the victim. She deposed appellant and her mother came to her residence in the late hours of night and searched for Alauddin. Appellant threatened to kill Alauddin. Thereafter they left the place. She and her daughter-in-law followed them and saw the incident. Victim was taken to Baruipur hospital.

11. PW 5, wife of the victim stated in the early morning appellant and his family members came to their house searching for Alauddin.

They threatened to murder her husband. She and her mother-in-law followed them and saw the incident at Padmapukur More. Her husband was shifted to hospital in a van. At the hospital he expired. Both the witnesses stated Hannan Gazi was present at the place of occurrence.

12. PW 8 Hannan Gazi deposed at 4.30 a.m there was a quarrel between the appellant and Alauddin over consumption of prawns. Incident occurred at Padmapukur More in front of Majumder tailors Alauddin assaulted the appellant with a 'sabol' on the head. Appellant went to his house. Thereafter he returned with a knife and stabbed Alauddin on his chest and abdomen. PW 8 was sitting at a nearby tea stall and he rushed to the spot. Mother and wife of Alauddin arrived at the spot and requested him to save Alauddin. Alauddin was taken to Baruipur hospital in a rickshaw. He made statement before the Magistrate.

13. From the evidence of PW 8 it appears that mother and wife of Alauddin arrived at the spot immediately after the incident. In all probability they were not eye-witnesses. I am prompted to come to this conclusion as none of the witnesses stated to police that appellant and others had come to their house in the early hours of 16.01.2006 and searched for Alauddin and threatened to kill him. This is an embellishment and is stated for the first time in court. If the aforesaid incident had not taken place, it is improbable that PWs 2 and 5 would not have left their residence and followed the appellant to Padmapukur More. Hence, I am not inclined to treat PWs 2 and 5 as eye-witnesses.

14. However, prosecution case is squarely established through the evidence of PW 8. He deals in unloading of stonechips from trucks at Padmapukur More. In connection with his business he was present at the spot. His presence at the place of occurrence is most probable. He saw the initial incident of skirmish between the appellant and Alauddin. Thereafter, appellant left the spot and returned armed with a knife. Then he assaulted Alauddin on his chest and stomach resulting in latter's death.

15. PW 8 is an independent witness. His presence at the place of occurrence is wholly established. Mother and wife of the appellant (PWs 2 and 5) who arrived at the spot noted the presence of PW 8.

16. Deposition of PW 8 is corroborated by the medical evidence on record. Post mortem doctor (PW 12) found the following injuries:-

- a. one stab wound over left infra scapula region measuring $\frac{1}{2}$ " x 1" x 1", convergent in nature one stab wound over left infra scapula region measuring $\frac{1}{2}$ " x 1" x 1", convergent in nature*
- b. two stab wounds over the left shoulder below the shoulder blade each $\frac{1}{2}$ " x $\frac{1}{2}$ " x 4" deep*
- c. one stab wound below left shoulder blade measuring 1" x 1" x 6" deep*
- d. one stab wound over outer border of left axilla measuring $1\frac{1}{2}$ " x $1\frac{1}{2}$ " x 2" deep*
- e. one stab wound over the right flank measuring 1" x 1" x 6"-intercostals space between 11th and 12th ribs perforated-lever rupture*
- f. One stab wound over the suprasternal neck measuring 1" x 1" x 3"- trachea cut- 2nd and 3rd cervical vertebra found cut.*

17. PW 12 deposed death was due to the effect of injuries, ante mortem and homicidal in nature. All the injuries were sufficient to cause death in the usual course. He proved the post mortem report Ext 1.

18. Truthfulness of PW 8 is further reinforced by the presence of injury on the head of the appellant as noted in the arrest memo prepared by PW 16 investigating officer Ext 10. Investigating officer further deposed appellant made disclosure statement (Ext 13). Pursuant to such statement the offending weapon i.e knife was recovered near the place of occurrence. He proved the seizure list Ext 3/3. Evidence of the investigating officer PW 16 with regard to recovery is corroborated by PWs 1, 7 and 10.

19. The aforesaid evidence on record clearly shows that the appellant had struck repeated blows with a knife on the chest and stomach of the victim resulting in his death.

20. Finally, it is argued that the victim had assaulted the appellant first. Due to such provocation appellant assaulted the victim. Hence, conviction may be altered to culpable homicide not amounting to murder. I would have otherwise accepted such submission but for the fact that assault on the deceased did not occur in the course of the same transaction. Appellant initially assaulted the victim with a 'sabol'. Thereafter, victim rushed to his residence and returned armed with a knife. Then he stabbed the victim repeatedly on vital parts of the body i.e chest and stomach. Injuries were sufficient in ordinary course of nature to cause death. Assault had not been committed in the course of a sudden quarrel but with premeditation and appellant intended to cause death of the victim.

21. For the aforesaid reasons, I uphold the conviction and sentence of the appellant.

22. Appeal is, accordingly, dismissed.

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

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

25. 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.

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

I agree.

(Siddhartha Roy Chowdhury, J.)

(Joymalya Bagchi, J.)