

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 772 of 2009
With
IA No. CRAN 3 of 2022

Madhusudan Mondal
-Versus-
The State of West Bengal

For the Appellant : Mr. Dipanjan Chatterjee , Adv.
Mr. Avinaba Patra , Adv.
Ms. Souraja De, Adv.
Ms. Richa Pramanick, Adv.

For the State : Mr. Prasun Kr. Dutta, APP
Mr. Md. Kutubuddin, Adv.
Mr. Santanu Deb Roy, Adv.

Last Heard on : **16.12.2022**

Judgment on : **21.12.2022**

PARTHA SARATHI SEN, J. : –

1. The instant Criminal Appeal arises out of the judgement and order of sentence dated 10.11.2009 and 13.11.2009 as passed in S.T No. 109 of 2003 arising out of S.T. No. 39 of 2002 by the Ld. Additional Sessions Judge, 2nd Court, Malda whereby and whereunder the said court found the present appellant guilty under Section 302 I.P.C and thus sentenced

him to suffer imprisonment for life and to pay fine of Rs.5000/- i.d to suffer S.I for six months more.

2. The convict felt aggrieved and thus preferred the instant appeal.

3. For effective disposal of the instant appeal, the facts leading to initiation of S.T No.109 of 2003 are required to be discussed in a nutshell.

4. On 14.10.1997, one Shankari Saha wife of Chandra Saha of Rampur (Modipukur), P.S. Bamongola, District Malda lodged a written complaint with the O.C , Bamongola P.S stating inter alia that in the intervening night of 13/14.10.1997 when she, her daughter Bharati and son Santosh were sleeping in the eastern side room of their homestead and her husband was sleeping in the western side verandah, the miscreants namely; Modhu Mondal, Sajal Sil, Bablu Mondal, Bipad Saha, Gouri Mondal along with 2/3 other persons entered into her bedroom. Noticing the abovementioned incident, the de facto complainant and her other family members raised alarm and thus the said miscreants started fleeing away. It is further disclosed in the said written complaint that when her husband caught hold of accused Modhu Mondal from his back, the said miscreant Modhu by a sharp cutting weapon assaulted her husband on his chest and then fled away. It was her further version that on account of such assault her husband sustained bleeding injury and subsequently he succumbed to such injury. It has been stated further by the de facto complainant that she could identify the accused persons in moonlight. The de facto complainant stated further that one Avilash Pal started mingling with her said daughter with an assurance to marry her

but subsequently it revealed that he was previously married and thus her husband refrained the said Avilash from mixing with his daughter to which the said Avilash threatened her husband (deceased) to murder him. It has been disclosed further by the de facto complainant that for the aforesaid reason she had strong suspicion that the said Avilash might be involved in the crime.

5. On the basis of such written complaint, Bemongola P.S case NO.37 of 1997 dated 14.10.1997 was started. Investigation was taken up and on completion of the same, charge sheet was submitted.

6. Trial Court Record reveal that charge under Sections 302/34 I.P.C was framed against the present appellant and six others. It further reveals that in order to bring home the charge as framed against the accused persons, the prosecution has examined 12 witnesses in all and some documents have been exhibited on their behalf. Ld. Trial Court on perusal and consideration of the evidence, both oral and documentary passed the impugned judgement giving rise to the instant appeal.

7. Learned advocate for the appellant in course of his argument took us to the evidence of the prosecution witnesses. It is submitted by him that the evidence of the alleged three ocular witnesses namely; PW5, PW7 and PW12 have not been properly assessed by the learned trial court. It is further argued by him that the impugned judgement suffers from conjectures and surmises. It is however submitted that in the event that this Appellate Court holds that the evidence as adduced by the prosecution witnesses are otherwise convincing, the conviction of the

present appellant may be converted to a punishment under Section 304, Part II I.P.C since from the evidence of the prosecution witnesses, it would reveal that there was no pre-mediation and the incident occurred all on a sudden. Learned advocate for the appellant thus submits that it is a fit case for allowing the instant appeal by setting aside the impugned judgement and order.

8. Learned advocate for the appellant in course of his argument places his reliance upon the following three reported decisions:-

i. Kulwant Rai vs. State of Punjab reported in (1981)4 SCC 245;

ii. Gurmail Singh and Ors. vs. State of Punjab reported in 1982 (3) SCC 185;

iii. Jagtar Singh vs. State of Punjab reported in 1983 (2) SCC 342.

9. In course of his argument, Ld. Advocate for the State however opposes the contention as raised by learned advocate for the appellant. It is argued by him that before the learned trial court the PW3, PW7 and PW12 being the ocular witnesses had adduced consistent and inspiring evidence and such evidence gets due support and corroboration from the autopsy surgeon being PW4. It is thus argued that learned trial court had not committed any error either of facts or of law in convicting the appellant based on such evidence of PWs as referred to above.

10. While passing this judgement, we have come across the entire materials as available in the trial court record including the impugned judgement. We have given due consideration upon the submissions as made by the learned advocate for the appellant and learned advocate for the State.

11. In considered view of us a look to the evidence of PW3 is necessary for effective disposal of the instant appeal.

12. In course of her examination-in-chief PW3 being the wife of the victim and the informant had vividly stated as to how, on the fateful night the miscreant including the present appellant entered into their house surreptitiously. She further disclosed in her chief at that time, she, her son (PW7) and her daughter (PW12) were sleeping in the western side room of the house while husband was sleeping on the eastern verandah. She also disclosed that after seeing the appellant and other accused persons (who have been acquitted by the trial court), they raised alarm and on such alarm the present appellant and his associates started fleeing away and at that time, her husband could be able to catch the present appellant from his back and thereafter the present appellant stabbed her husband at his chest with a sharp cutting weapon. It is her further version that on account of such stabbing her husband sustained bleeding injury and thereafter the present appellant fled away.

13. PW3 has been extensively cross-examined by the defence. However, in her cross-examination, nothing could be revealed to suggest that anything contrary had happened as stated by PW3 in her cross-examination.

14. At this stage, if we look to the evidence of PW7 i.e the son of the deceased and PW12 i.e the daughter of the victim, it reveals to us that both PW7 and PW12 in their respective examination-in-chiefs have given vivid description as to how on the fateful night the incident occurred at

the P.O. Both the PWs 7 and 12 have disclosed as to why and how their father was assaulted by a sharp cutting weapon on his chest by the present appellant. On comparative study of the evidence of PW Nos.3,7, and 12, it thus reveals to us that their evidence are very much consistent, coherent and corroborating in nature.

15. Since the evidence of PW4 i.e. the autopsy surgeon has a great importance in arriving a logical conclusion of the instant appeal, we propose to quote the examination –in-chief of PW4 in verbatim and the same is reproduced hereunder:-

“I am the Supdt. Of district hospital, Malda. On 15.10.1997 is I was posted in the same hospital in the same capacity. On that day I held P.M Examination over the dead body of Chanda Sahga, 60 years male Hindu brought and identified by constable 720 Ram NAgin Singh in connection with Bamangola P.S case No.37/97 dated 14-10-97.

On examination I found the following-

R.M –present,

On 11/2 “X1” X 3” (depth) penetrating wound over right upper chest cutting sternum on right side and right lung. No other injury – detected.

On dissection, Brain was found pale and right lungs was found inside Stomach contain half –digested rice, heart was found healthy and empty.

P.M Blood and wearing apparels of the deceased were handed over to the escort party.

In my opinion –cause of death was due to fatal injury as stated above, homicidal in nature. Nature of weapon-sharp cutting. Age of injury corresponds to inquest report. This is the P.M report prepared by me in carbon process. It bears my handwriting and signature (carbon impression) P.M Report is marked as Ext.1

Above injury may be caused if anyone stabs by sharp cutting weapon. Fact, the above injury is sufficient to cause death of a human being in ordinary course.

Fact, I did not mention the time of death of the deceased Chanda in my P.M Report”.

16. On perusal of the above evidence of PW4, it thus appears to us that the evidence of the three ocular witnesses as discussed above gets due corroboration from the oral testimony of PW4 as well as from his P.M report being Exbt.1.

17. In view of the discussion made hereinabove, we unhesitantly hold that the involvement of the present appellant in the alleged crime has been duly proved by the prosecution before the trial court.

18. In order to decide as to whether the learned trial court is at all justified in convicting the present appellant under Section 302 of the Indian Penal Code or not we propose to look to the relevant provisions of law in this regard.

*“300. **Murder.**—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

(Secondly) —If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

(Thirdly) —If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

(Fourthly) —If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

*“**When culpable homicide is not murder.**—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. The above exception is subject to the following provisos:—*

(First) —That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

(Secondly) —That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

(Thirdly) —That the provocation is not given by anything done in the lawful exercise of the right of private defence. Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact”.

Section 302 is reproduced hereinbelow and the same is as under:-

“302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.”

Section 304 I.P.C is as under:-

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

19. As discussed above learned advocate for the appellant in course of his argument strenuously argued that at best the instant case falls under the category of Section 304, Part II in as much as from the evidence of the prosecution witnesses, it would reveal that there was no premeditation for committing the crime at the instance of the present appellant. In view of such submission we propose to look to the reported decision as cited from the bar. In the reported decision of **Jagtar Singh** (supra) the Hon’ble Court while dealing with the applicability of Sections 300/302 of the Indian Penal Code vis-a-vis Section 304 IPC expressed the following view:-

“7. Undoubtedly, P.W. 2 Dr. H.S. Gill opined that the blow on the chest pierced deep inside the chest cavity resulting in the injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. The question is whether in the circumstance in which the appellant gave a

blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal ? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no pre-meditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in Jagrup Singh v. State of Haryana . 2 It was subsequently followed in Randhir Singh @Dhire v. State of Punjab Decided on September 18, 1981 and Kulwant Rai v. State of Punjab Decided on August 7, 1981 (Criminal Appeal No. 630/81). Following the ratio of the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under Section 302 IPC and sentence of imprisonment for life are liable to be set aside.”

20. In this regard this Court considers that the view taken by the Hon’ble Supreme Court in the case of Atul Thakur vs. State of Himachal Pradesh reported in (2018) 1 C CrLR (SC) 229: (2018) 2 SCC 496 is also very much pertinent.

“For, it is a case of culpable homicide not amounting to murder inasmuch as the incident happened on account of sudden fight between the friends who had gathered for a drink party arranged at the behest of Hitesh Thakur. There was no pre-mediation and the act done by the appellant was in the heat of passion without the appellant taking any undue advantage or acted in a cruel manner. The number of wounds caused by the appellant, it is a well established position, by itself cannot be a decisive factor. The High Court committed manifest error in being influenced by the said fact. What is relevant is that the occurrence was sudden and not premeditated and the offender acted in the heat of passion. The evidence supports the case of the appellant in this behalf. The fact that the appellant used weapon such as knife, is also not a decisive factor to attract Section 302 of IPC. Neither the use of a knife in the commission of offence nor the factum of multiple

injuries given by the appellant would deny the appellant of the benefit of Exception 4.”

21. Keeping in mind the aforementioned proposition of law we propose to once again look to the evidence of the prosecution witnesses especially the evidence of PW3, PW7 and PW12. From the evidence of the aforesaid three ocular witnesses it reveals that they have unerringly pointed out the present appellant responsible for the crime but from their deposition as well as deposition of the other PWs it could not be established that the present appellant has any previous enmity with the deceased and/or with his family members and on account of such he has a premeditation to commit the murder of the present appellant. On conjoint perusal of the evidence of PWs 3, 7 and 12 it reveals to us that there was no malice in the mind of the present appellant towards the victim rather it appears to us that he stabbed the deceased just to have a free escape from the place of occurrence when aforesaid three PWs raised alarm after seeing the present appellant along with others in their room in the midnight. It thus appears to us that the incident of stabbing occurred all on a sudden and nothing could be established that the present appellant committed such crime for taking any undue advantage. It further appears to this Court that since the appellant used a sharp cutting weapon for commission of the crime that cannot be also decisive factor to attract Section 302 of the Indian Penal Code as held in the case of **Atul Thakur** (supra).

22. In view of the discussion made hereinabove we consider that learned trial court is not at all justified to convict the present appellant

under Section 302 IPC on the contrary the present appellant ought to have been convicted under Section 304, Part II of the Indian Penal Code.

23. Accordingly, this appeal is allowed in part. The conviction of the present appellant for the offence under Section 302 IPC and sentence of imprisonment for life are hereby set aside. The present appellant is convicted for having committed an offence under Section 304, Part II of the Indian Penal Code and is sentenced to suffer R.I for eight years with fine of Rs.5000/- i.d to suffer R.I for six months more.

24. Since the present appellant is in custody for more than 13 years he be released at once, if not wanted in connection with any other case.

25. Let a copy of this judgement along with LCR be sent down at once.

26. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)