

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT :

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 297 of 2020

CRAN 2 of 2021

**BISWANATH MALIK
-VERSUS-
STATE OF WEST BENGAL**

For the Petitioner : Mr. Sabir Ahmed, Adv.
Mr. Suman Chakraborty, Adv.

For the Opposite Party : Ms. Anusua Sinha, Adv.
Mr. Pinak Kumar Mitra, Adv.

Heard & Judgement on : 23rd November, 2022

Siddhartha Roy, Chowdhury, J.:

Challenge in this appeal is to the judgment and order of conviction passed by learned Additional District and Sessions Judge, Fast Track, 1st Court, Hooghly in Sessions Case No. 133 of 2019 and Sessions Trial No. 38 of 2019.

Briefly stated Sri Rasu Malik of Jagulia within P.S. Balagarh , District Hooghly set the criminal administration of justice into motion by informing the Officer-in-charge of Balagarh P.S. , inter alia that on 10th February, 2019 at about 7.20 p.m. his elder son Biswanath Malik

stabbed his younger son Lob with a knife, with an intention to kill him. Lob sustained injuries. He was taken to Ahmednagar Rural Hospital. The attending doctor declared him dead. As the information since disclosed offense cognizable in nature Balagarh P.S. case No. 23 of 1990 was registered under Section 302 of the Indian Penal Code. Police took up investigation and submitted charge sheet against the accused Biswanth Malik.

Charge was framed under Section 302 of the Indian Penal Code and pleading his innocence to the charge Biswanath Malik stood trial.

To crown success prosecution examined 9 witnesses. The informant Rasu Malik as PW 1 while adducing evidence on oath stated that 8 to 9 months ago his younger son Lob died an unnatural death. On the fateful day in the evening his elder son Biswanath Malik brought one cock he wanted to cook. He was cutting the bird on the courtyard, as there was dearth of cooking oil, he started shouting and picked up quarrel with his wife, slapped her. Scuffling started between the man and wife, when Lob, the other son intervened and somehow tumbled on the boty (a sharp cutting weapon) and sustained bleeding injury. He was taken to Jirat Hospital and Doctor declared him dead. He informed the police in writing but without understanding the content of the paper.

Prosecution examined him in the light of Section 154 of the Evidence Act and he denied the suggestions put to him by the learned Public Prosecutor. During cross-examination he stated that while

Biswanath was cutting cock on the courtyard with a boty Lob was at home, being attracted by hue and cry Lob came out of the room and 'slipped on the body'. He sustained bleeding injury on his leg. He was taken to hospital by Biswanath, his wife and other neighbours.

PW 2 Pinky Malik was the widow of Lob Malik and she said that ten months ago at about 7 p.m. Biswanath Malik came back home and picked up quarrel with his wife. Her husband, a riskhaw van puller was in his room. Biswanath made an attempt to assault his with a lathi when Mithu Malik, the wife of Biswanath took refuge in the room of PW 2. Her father in law forbade Biswanath from doing such thing. Biswanath missiled abusive language, threatened his father and Biswanath made an attempt to assault him. Lob came to save his father. Infuriated Biswanath stabbed the thigh of Lob Malik with a knife who sustained bleeding injury. He was shifted to hospital but Lob succumbed to injury.

PW 2, however, stated that Lob was assaulted as he made an attempt to save his father. During cross-examination she stated that she did not tell the Investigating Officer that wife of Biswanath took shelter in her room. She further stated that her mother-in-law and sister-in-law requested her to suppress the material fact and not to disclose the truth to the doctor. She did not tell the I.O. that her husband came forward to save his father when Biswanath slapped him. She further stated that Biswanath consumed the flesh of cock after cooking it by himself on

that very date. She further admitted that quarrel started between Biswanath and his wife when the lady disclosed that there was no oil in the home for cooking.

Anjali Malik, PW 3 is the mother of both the convict and the victim who stated that 10 months ago at about 6.30 p.m. his son was cutting the cock on the courtyard of her house there was no oil. She went to buy some oil. His son Biswanath became angry; her husband and younger son Lob asked Biswanath not to shout over the issue. While Lob was proceeding towards Biswanath, his leg slipped and he fell down on the boty and sustained injury. He was taken to hospital where he succumbed to injuries. She further stated that there was enough light and everything was visible on the courtyard. She was examined by the prosecution in the light of Section 154 of the Indian Penal Code and during such examination she admitted that she went out to buy some oil as there was not a drop of cooking oil in the house she denied all other suggestions put to her. During cross-examination she stated that her son Lob sustained bleeding injury by accident. Police took blood stained soil from the place of occurrence and she put her signature on a paper. PW 4 Subrata Das did not have any direct knowledge about the incident. PW 5 Dr. S.Mondal is a witness to the inquest. Her signature on the carbon impression of inquest report is admitted at Ext. 2/1.

PW 6 is the Autopsy Surgeon Dr. Anup Kumar Mishra who held post mortem examination over the dead body of Lob Malik with

reference to Balagarh P.S. UD Case No. 12 of 2019 dated 10th February, 2019. On examination he found one incised punctured wound. During cross-examination he stated that injury caused by sharp cutting weapon like boty could result into loss of blood. He found only one injury on the person of the deceased. He did not give any opinion as to whether the injury was accidental or homicidal. He was not interrogated by I.O. PW 7 was not a witness to the occurrence. He only heard the quarrel that was going on between Biswanath and Lob Malik.

PW 8 Bimal Kumar Chakraborty is the Investigating Officer who registered the FIR as well as made an endorsement on the information given by Rasu Malik in writing. Those documents are admitted into evidence as Ext.4/1 and Ext. 5. He further stated that Balagarh P.S. UD Case No. 12 of 1990 was registered on 10th February, 2019. He enquired into the UD case and prepared a report admitted as Ext. 2. He took up investigation recorded statement of witnesses under Section 161 of the Cr.P.C., prepared rough sketch map Ext. 7 and Ext. 7a. He seized blood stained earth from the place of occurrence after preparing the seizure list. He arrested the accused person on 11th February, 2019 and took him into custody with the authorisation of the learned Court. The accused persons made a statement under Section 161 of the Cr.P.C. which led to discovery of the incriminating weapon. The weapon was seized under seizure list Ext. 8. The relevant portion of the statement made by accused under Section 161 of the Cr P C is admitted as Ext.

10. He collected post mortem blood, nail, teeth, wearing apparel of the deceased and seized the same under seizure list, Ext. 9. He collected post mortem report and on completion of investigation he submitted charge sheet. He identified the seized knife admitted as Mat. Ext. 1. He stated that during examination Rasu Malik told him that Biswanath stabbed his younger son Lob with a knife causing bleeding injury. Anjali was also examined by him who told him about the quarrel and the aggression of Biswanath the accused, who even attempted to assault his father Rasu Malik; intervention of Lob to save his father and she further stated that enraged Biswanath then brought out knife and stabbed Lob. During Cross-examination he was confronted with the material Ext. I. the Knife and he admitted that no seal or label was there on the weapon. He denied the suggestion that no document was seized from the Ahmedpur B.P.H.C. He did not interrogate the constable. He did not receive the report from Forensic Science Laboratory. He did not seize any 'ash boty' from the house of the accused person. He denied other suggestions put to him in course of cross-examination.

Sk. Jalaluddin is the scribe of the information given by Rasu Malik and he stated that the said document was prepared under the instruction of Rasu Malik which was read over and explained to Rasu Malik. Thereafter Rasu put his L.T.I. The document was admitted as Ext. 4. During cross-examination he stated he was not acquainted with

the informant at any point of time before the incident. He had no personal knowledge about the alleged incident.

Mr. Sabir Ahmed, learned counsel representing the appellant vehemently submits that prosecution case cannot be said to have been proved beyond reasonable doubt. Apart from PW1, PW 2 and PW 3 none of the witnesses had knowledge about the incident. PW 1 is an illiterate person. He lent his LTI without understanding the content of the information admitted as Ext. 4. PW 1 and PW 3 the parents of the victim stated that the victim sustained injury due to accidental fall on a sharp cut weapon-Boty which was being used by the accused person for dressing a cock, he brought home and he intended to cook for the family. The evidence of these witnesses suggest that there was no oil sufficient to cook the flesh of the bird which infuriated Biswanath and he started shouting. PW 3 the mother of victim went to purchase some cooking oil but Biswanath could not control his anger and slapped his wife. Having found ill-tempered Biswanath Lob came out to intervene, had a fall on the boty and sustained bleeding injury. Accidental injury of Lob resulted into dissection veins and he succumbed such injury. Therefore, no cogent evidence is available on record to saddle the appellant/convict with any kind of criminal liability. Mr. Ahmed further argued that the investigating Officer himself conducted the inquest examination which is not permissible under the law. The over jealous Investigating Officer had the intention to get an order of conviction and

for such unscrupulous act of the investigating officer not only the convict but his old parents, wife and child all are suffering.

Mr. Ahmed submits that the convict appellant is now the only bread earner of the family who has been passing his days in the correctional home.

Learned trial Court, according to Mr. Ahmed, had no reason to record an order of conviction solely on the basis of the post mortem report , particularly when the possibility of his sustaining accidental injury was not ruled out by the Autopsy Surgeon .

Refuting such contention of Mr. Sabir Ahmed, Ms. Anusua Sinha, learned counsel representing the State submits that the parents of the convict having lost their one son decided not to disclose the fact before the Court. But during their examination in the light of Section 154 of the Evidence Act both the witnesses stated that the incident took place on 10th February, 2019 on the courtyard of the house of Rasu Malik when quarrel broke out as there was dearth of cooking oil, Biswanath was looking for to prepare food. Angry Biswanath slapped his wife. PW 3 the mother of the victim also indicated that there was a quarrel over the issue of cooking oil and both her husband and younger son Lob requested Biswanath not to quarrel over that issue. Therafter both have stated that due to fall on the Boty a sharp cut weapon Lob sustained bleeding injury. P.W. 2 Pinky Malik stated that her husband Lob was stabbed as he tried to save his father who was

attacked by his elder brother Biswanath. Drawing my attention to Ext. 10 the statement made by the convict before the police Ms. Sinha submits that the incriminating weapon was recovered from the tile shed room of Biswanath Malik who led the I.O. and indicated the place where it was kept hidden. Ms. Sinha further adverted that Autopsy Surgeon, during post mortem examination detected one incised punctured wound, elliptical in shape, 1" x 1/2" over left thigh 6" below anterior superior iliac spine and on dissection he found femoral vessels below the stab wound dissected and autopsy surgeon ruled out the possibility of use of Banti being responsible for any such injury. PW 7 a neighbour though did not have any direct knowledge about the incident but he heard Biswanath and Lob to quarrel at the relevant point of time. According to Ms. Sinha this evidence led by prosecution witnesses unerringly indicate that Biswanath was responsible for the injury that caused death of his brother Lob. Therefore, the order of conviction and sentence imposed upon the convict do not warrant any interference.

True it is PW 1 Rasu Malik who set the criminal administration of justice into motion and his wife PW 3 drifted away from their statement made in the form of written information and before the I.O. respectively. Evidence of hostile witnesses can always be used if any part of such evidence lends support to the case of prosecution. The testimony of PW 1 and 3 are sufficient to hold that an untoward incident took place in

the house of Biswanth, who wanted to cook some food, became angry as he did not find any cooking oil. He abused his wife even his father was not spared. Lob came out being attracted by such noise. Thereafter, these two witnesses the parents of convict drifted away by saying Lob had an accidental slip on the sharp cut weapon call boty. PW 2, however, stated that her husband Lob was stabbed by his elder brother Biswanath on his thigh with a knife and Lob bled profusely. PW 2 stated that as Lob tried to save the wife of Biswanath from the wrath of Biswanath, he incurred the displeasure of his brother and angry Biswanath stabbed him. Evidence of PW 2 is getting support from the testimony of PW 6, the Autopsy Surgeon who found the stab injury, anti mortem in nature and according to PW 6 the cause of death might be due to a) hypotension, b) hemorrhagic shock due to excessive blood loss, c) neurogenic shock.

Though Mr. Ahmed submitted that the Autopsy Surgeon was influenced by the inquest report, such submission, however, does not appeal to my sense. Autopsy Surgeon is under obligation to consult the inquest report before starting the post mortem examination. The purpose of inquest report as laid down under Section 174 of the Criminal Procedure is to take note of apparant cause of death and the report should contain external features like mark of injury as may be found on the body, in what manner it was found, identity of the deceased etc. The inquest report is relevant to that extent only.

Therefore, the question of autopsy surgeon being influenced by such report does not arise.

Having considered the evidence on record I am of the view that the appellant has committed an offence by causing death of his younger brother which was not homicidal in nature but it was culpable homicide not amounting to murder within the meaning of Section 299 of the Indian Penal Code. Learned trial Court though framed charge under Section 302 of the Indian Penal Code but while passing sentence invoking the provision of Section 222 of Cr P C. recorded order of conviction under Section 301 Part -1 of the Indian Penal Code . There was no intention of the convict to commit murder. In a fit of anger he stabbed his brother. Therefore, in my humble opinion, though he has committed an offense within the meaning of Section 299 of the Indian Penal Code, he has made himself culpable for being punished under Part-II of Section 304 and not under of Part-I Of Section 304 of the Indian Penal Code as imposed upon him by the learned trial Court. In the light of aforesaid evidence conviction of the appellant is upheld.

Mr. Ahmed adverted that two persons were the bread earner of the family. Now with the death of the younger brother Biswanath Malik, the appellant is the only person who can earn bread for his old parents and girl child. So far widow of Lob Malik is concerned, as PW2 she has stated that she has moved further in her life by marrying another man. Therefore, she does not require any rehabilitation while the parents, wife

and child of the victim are in need of such support. It is submitted that the convict was taken into custody soon after the incident and he has been spending his days behind the bar for nearly four years.

Coming to sentence, I find that the appellant has suffered incarceration for nearly 4 years. He has no criminal antecedent.

Balancing the aggravating and mitigating factors, I am of the view that sentence imposed upon the appellant may be modified and it is directed that appellant shall suffer substantive sentence of imprisonment for the period already undergone and to pay fine of Rs. 2000/- in default to suffer imprisonment for one month.

With the aforesaid modification the appeal is disposed of. Application pending, if any, stands disposed of.

Urgent photostat certified copy of this judgement, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Sidhartha Roy Chowdhury, J.)