

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 12 of 2021

With

CRAN 1 of 2021

Surojit Mistry @ Papai

Vs.

The State of West Bengal

For the Appellants	: Mr. Apalak Basu, Adv. Ms. Pritha Bhaumik, Adv.
For the De Facto Complainant	: Mr. Dipanjan Chatterjee, Adv.
For the State	: Mr. Sudip Ghosh, Adv. Mr. Bitoshak Banerjee, Adv.
Hearing Concluded on	: February 20, 2023
Judgement on	: February 20, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgement of conviction dated December 17, 2020 and the order of sentence dated December 18, 2020 passed by the Additional District and Sessions Judge, Kalyani, Nadia in Session Trial No. 06 (06)/2018 arising out of Sessions Case No. 09 (02) 2018.
2. By the impugned judgement of conviction, the learned Judge convicted the appellant for the offences punishable

under Section 302 of the Indian Penal Code, 1860 and under Section 25/27 of the Arms Act. By the impugned order of conviction dated December 18, 2020, the learned Trial Judge sentenced the appellant to suffer imprisonment for life and to pay a fine of Rs. 50,000 for committing the offence of murder punishable under Section 302 of the Indian Penal Code, 1860 and in default of payment of fine amount, to undergo further imprisonment for 6 months. The learned Trial Judge also sentenced the appellant to suffer imprisonment for 3 years and to pay a fine of Rs. 20,000 for committing the offence punishable under Section 25/27 of the Arms Act and in default to undergo further imprisonment for 6 months.

3. The case of the prosecution at the trial was that, on October 21, 2017 at about 11 PM, the appellant murdered the victim in front of New Rising Club at Parari Dakshinpara under police station Chakdaha.

4. Police received a written complaint dated October 22, 2017 from PW 1 on the basis of which, a formal First Information Report dated October 22, 2017 was drawn up. The police conducted an investigation with regard thereto and submitted a charge sheet.

5. Charges under Section 302 of the Indian Penal Code, 1860 and under Section 25/27 of the Arms Act were framed as against the appellant on June 12, 2018. The appellant pleaded not guilty and claimed to be tried. At the trial, the prosecution examined 10 witnesses. The prosecution also relied upon various documentary and Material Exhibits to bring home the charges as against the appellant.

6. Learned advocate appearing for the appellant contends that, there are exaggerations and embellishments in the deposition of prosecution witnesses. It is contended that, although 5 persons were claimed by the prosecution to be eyewitnesses, the oral testimony of the 5 prosecution witnesses demonstrate that, all 5 were not eyewitnesses to the incident. In particular, PW 4 stated in his deposition that, he did not witness the incident.

7. Learned advocate appearing for the appellant submits that, the motive of the murder was not established, the place where the murder took place was not established, the time of the murder was also not established. In such circumstances, given the wide variance between the testimonies of the prosecution witnesses, it cannot be said with certainty that, the appellant committed the murder.

8. Learned advocate appearing for the appellant refers to the deposition of PW 1, PW 2, PW 3 and PW 4. It is contended on behalf of the appellant that these are discrepancies in the versions of such eyewitnesses. Therefore, their evidences are unreliable.

9. Learned advocate appearing for the appellant contends that, the deposition of PW 5 demolishes the case of the prosecution.

10. Learned advocate appearing for the appellant contends that the prosecution did not bring any cogent medical or scientific evidence to prove the charge. Relying upon the forensic report being Exhibit 6, it was contended that, the firing of the bullet was not conclusively established. Finger impression of the appellant was not matched with the seized firearm. In Exhibit 5, being the post-mortem report, the police station case number was not mentioned.

11. Referring to Exhibit 3, it is contended on behalf of the appellant that, the date of the police station case number does not match. The fire arm was not discovered in terms of a leading statement which is admissible in evidence under Section 27 of the Indian Evidence Act, 1872. Reliance is placed on **2015 volume 17 Supreme Court cases 488 (Ajai**

Singh versus State of Maharashtra) in support of such contention.

12. Referring to the examination of the appellant under Section 313 of the Criminal Procedure Code and on **2007 volume 12 Supreme Court cases 341 (Mangal Singh versus the remainder and another)** it is contended that, corrects version of the alleged incriminating materials were not put to the appellant in order to allow the appellant to give a reasonable answer thereto. In such circumstances, it is contended that, the order of conviction should be reversed.

13. Learned advocate appearing for the State submits that, prosecution witnesses No. 1, 2, 3 and 5 are eyewitnesses to the incident. He submits that the minor discrepancies in the depositions of such eyewitnesses are not fatal to the case of the prosecution. All the eyewitnesses saw the appellant fire a firearm at the victim. He submits that the forensic and medical evidence corroborated the version of the eyewitnesses. The victim died out of gunshot injury.

14. Learned advocate appearing for the State draws the attention of the Court to the testimony of PW 10. He submits that, there are overwhelming scientific evidence to establish the charges as against the appellant. Consequently, he

submits that, the impugned judgement of conviction and the order of sentence need not be interfered with.

15. Learned advocate appearing for the de facto complainant adopts the submissions made on behalf of the State. According to him, there are more than sufficient material made available on record to hold the appellant guilty of the charge.

16. PW 1 is an eyewitness to the incident and brother of the victim. He stated that, the incident happened on October 21, 2017 at about 11 PM. He stated that his elder brother, the victim was standing by the side of the Kali Puja Pandel in front of New Rising Club when suddenly, the appellant brought out a revolver from his pocket of his pant and opened fire at the victim. The victim sustained serious bullet injury on his head and ear and fell on the ground. Appellant fled away. He was present at the spot and the incident happened in his presence. He stated that, PW 2, PW 3, PW 4 and many other persons saw the incident. They took the victim to the hospital where the victim was declared dead.

17. PW 1 stated that the inquest was carried out over the dead body of the victim by the police at the hospital. He was present during the inquest. Thereafter, he lodged the First

Information Report. He identified his signature on the seizure list after seizure of the firearms. He identified the written complaint. He identified his signature on the inquest report.

18. PW 1 stated that, there was previous rivalry between the victim and the appellant. Victim did not agree to the proposal of the appellant that the Kali Puja should be held at the land of the victim. Appellant demanded a sum of Rs. 10,000 from the victim and the victim refused to pay such subscription. So the appellant and the victim quarrelled over the issue. Appellant threatened the victim with dire consequences if the victim did not agree to pay the subscription of Rs. 10,000. He stated that, the appellant also bore a grudge against the victim as both were in the business of betel nut. The business of the victim flourished whereas the appellant was suffering loss in his business. He identified the firearms seized by the police in his presence. He identified the appellant in Court.

19. A resident of the locality deposed as PW 2. He stated that the incident took place on October 21, 2017 at about 11 PM at New Rising Star Club. He stated that he along with others were present at the place of occurrence. On that date, the appellant shot firearm at the victim near his left ear.

Thereafter, the victim was taken to the hospital where the doctors declared him dead. Thereafter, he and others went to the police station where PW 1 lodged the written complaint over the incident. Such written complaint was written by him as per the instructions and statement of PW 1. Thereafter, PW 1 went through the complaint and knowing the contents as truly recorded signed the same. He also signed the complaint as a scribe thereof. He identified the complaint which was tendered in evidence and marked as exhibit. He identified the appellant in Court.

20. Another resident of the locality deposed as PW 3. He stated that, the incident took place on October 21, 2017 at about 11 PM. He stated that, there was a land belonging to the victim near the club. There was a dispute regarding organising of Puja on the land of the victim in between the victim and the appellant. The appellant shot the victim on October 21, 2017 at 11 PM on the ear of the victim in respect of such dispute. Thereafter, the victim was taken to the hospital where doctors declared him brought dead. He identified the appellant in Court.

21. Another resident of the locality deposed as PW 4. He is a hearsay witness with regard to the firing of the firearm. He

stated that he heard from the public present that the appellant fired a gun on the victim. Thereafter he rushed to the spot and saw the victim lying on the ground with bleeding injury. He identified the appellant in Court.

22. The father of the victim deposed as PW 5. He stated that, on October 21, 2017 the incident occurred at about 11 PM. He was watching a dance performance with his granddaughter participating in such a performance. He stated that, the victim was present there. He asked the victim to take his daughter home. When the victim was leaving the place at that time, the appellant fired a shot by a gun on the victim and thereby the victim sustained bullet injury near left ear and fell down on the ground. Thereafter huge public gathered thereat and they sent him home. Thereafter, the victim was taken to the hospital where he was declared dead

23. PW 5 stated that on October 27, 2017 police came to the house and took him to the house of the appellant. Thereafter the house of the appellant was searched. At the time of searching, the appellant himself brought out one pistol and handed over the same to the police. Police seized the same and obtained his signature on some documents. At that time, police also obtained the signature of his second son on

the document. He identified his signature on the document. He also identified the firearm which was seized by the police from the house of the appellant. He identified the appellant in Court.

24. A police constable deposed as PW 6. He took the dead body of the victim to the hospital morgue for post-mortem examination. He was a witness to a seized list. He identified his signature on the seizure list. He also identified the bullet head which was recovered from the body of the victim. He identified the wearing apparels of the victim.

25. The doctor working at the hospital on October 21, 2017 deposed as PW 7. He stated that, the victim was brought at the emergency ward at about 11:50 PM in the night. After examining the victim he found that he was brought dead to the hospital. Thereafter, he informed the jurisdictional police station about the dead body and also sent the same for post-mortem examination. He informed the inspector in charge of the police station about the dead body of the victim in writing.

26. The doctor who conducted the post-mortem on the body of the victim deposed as PW 8. He tendered the post-mortem report of the victim in evidence which was marked as Exhibit 5. He stated that during post-mortem examination, he

recovered one bullet head from the brain left cerebral hemisphere. After recovery of such bullet head, he kept the same in a small container, labelled the same and handed over the same to PW 6. He identified the container and the bullet recovered from the dead body of the victim in Court.

27. The forensic expert deposed as PW 9. He stated that, on November 7, 2017, his office received four sealed paper cover cardboard cases marked as C, D, E and F duly forwarded by the learned additional Chief judicial Magistrate in connection with the police case. All the 4 sealed paper cover cardboard cases were opened by him in the laboratory for examination. Upon examination, he arrived at the following conclusions: –

- i. the improvised firearm exhibit D was previously fired and was tested to be in a working order
- ii. exhibit C and exhibit F were fired from exhibit D
- iii. exhibit E was tested by him and found in live condition
- iv. exhibit C, D, E and F came under the purview of the Arms Act.

28. PW 9 tendered his report which was marked as Exhibit 6. He identified the material exhibits in Court.

29. The investigating officer deposed as PW 10. He narrated about the course of investigations. He stated that on October 23, 2017, he arrested the appellant and forwarded the appellant to Court and took for 4 days police custody. During police custody, the appellant led to the recovery of the weapon used in the offence from the back side of the house of the appellant. Such recovery was made on October 27, 2017.

30. PW 10 stated in his evidence that the weapon of offence was a pistol containing magazine with one bullet and there was another empty cartridge in the barrel of the pistol. The firearm was shown and identified by the appellant before him and then as per the identification of the appellant, he seized the firearm under a seizure list in presence of the appellant and in presence of witnesses. He tendered such seizure list which was marked as Exhibit 3.

31. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code. The appellant in such examination claimed that he was innocent. He stated that he would adduce evidence in his defence.

32. DW 1 is a priest who used to perform Kali Puja. He stated that, Kali Puja was performed on October 19, 2017 and

that Bhai Phota (a celebration of siblings) was observed on October 21, 2017.

33. The victim died out of gunshot injury. This was established by the prosecution by the post-mortem report of the victim being Exhibit 5. The post-mortem doctor being PW 8 stated that, the death was due to the gun shot injury, ante mortem and homicidal in nature. Therefore, the prosecution was able to establish that, the victim was murdered.

34. PW 1, 2, 3 and 5 stated in their oral testimonies that, they were present at the place of occurrence and saw the appellant to fire a firearm as against the victim. The victims succumbed to the injuries suffered out of the gunshot.

35. It is the contention of the appellant that, there are discrepancies and embellishments in between the oral testimonies of the so-called eyewitnesses. With the deepest of respect, we are unable to agree with such contention of the appellant. PW 1, 2, 3 and 5 were present at the place of occurrence. They corroborated each other with regard to the appellant shooting the victim at the place of occurrence and at the time of occurrence. We did not find any discrepancy with regard to the appellant firing the gun shot at the victim at the material point of time at the place of occurrence. We,

therefore, are not in a position to bring ourselves to hold that there are discrepancies and embellishment in the oral testimonies of PW 1, 2, 3 and 5.

36. The firearm was seized by the police on October 27, 2017 from the house of the appellant on the appellant showing the place where the firearm was kept hidden. The appellant was in police custody at that material point of time. He was arrested on October 23, 2017 and the jurisdictional Court allowed 4 days police custody to the police.

37. There is, however, no statement recorded under Section 161 of the Criminal Procedure Code of the appellant which was tendered in evidence and marked as an exhibit under Section 27 of the Indian Evidence Act, 1872 leading to the recovery of the firearm. However, the firearm was sent for forensic examination. A bullet head was recovered from the body of the victim. Such bullet was also sent for forensic examination.

38. From the forensic examination report being Exhibit 6 read with the oral testimony of the forensic examination being PW 9 it can be safely said that the firearm recovered from the house of the appellant was used for the purpose of shooting the bullet which was lodged in the body of the victim. PW 1, 2,

3 and 5 saw the appellant to shoot the victim by a firearm. Therefore, it can be said that the appellant was in possession of a firearm in violation of the Arms Act.

39. In *Mangal Singh (supra)* the Supreme Court found that the reversal of conviction on re-appreciation of the evidence was correct. In the facts of that case, there were large number of discrepancies which allowed the High Court to reverse the judgement of conviction. In such context, the Supreme Court observed that, under Section 27 of the Indian Evidence Act, 1872, it is not the material recovery which is to be proved but the disclosure based upon which the recovery was made.

40. It is contended on behalf of the appellant that, all circumstances incriminating to the appellant were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code. In particular, attention of the Court is drawn to question No. 3 put to the appellant in such examination.

41. In his examination under Section 313 of the Criminal Procedure Code, all incriminating circumstances were put to the appellant for his response. In question No. 3, it was stated that, the prosecution witnesses, a number of them, said at the

trial that they saw the appellant to fire the firearm. His response with regard thereto was sought. He understood the question and replied thereto. He claimed that such claim was false. He was not present at the place of occurrence.

42. There is nothing on record to suggest that the appellant was prejudiced by the questions put to him during his examination under Section 313 of the Criminal Procedure Code or that he did not understand any of the questions so put. He understood all the questions. He claimed that he was innocent. The claims made against him were false. He also set up a defence of alibi claiming that he was not present at the place of occurrence, a defence which he failed to substantiate.

43. In *Ajai Singh (supra)* the Supreme Court noted the purpose of Section 313 of the Criminal Procedure Code. It observed that the question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. It also observed that, the whole object of the Section is to afford the accused a fair and proper opportunity of explaining circumstances which appeared against him and that the questions must be fair and must be

couched in a form which an ignorant or illiterate person will be able to appreciate and understand.

44. As noted above, none of the questions put to the appellant in his examination under Section 313 of the Criminal Procedure Code can be said to deny him a fair and proper opportunity of explaining the circumstances which appeared against him. The questions cannot be said to be unfair or couched in a form which cannot be understood.

45. In such circumstances, we find no ground to reverse the impugned judgement of conviction and the order of sentence. We affirm the same.

46. Period of detention undergone by the appellant during investigation, trial and the pendency of the appeal be set off against the substantive sentences awarded as against him. All the sentences shall run concurrently.

47. Trial Court records along with a copy of this judgement and order be remitted to the appropriate Court expeditiously for necessary action.

48. CRA 12 of 2021 is dismissed. In view of the dismissal of the appeal, nothing survives in the interlocutory application and therefore, CRAN 1 of 2021 is also dismissed.

49. Urgent Photostat certified copy of this judgement and order, if applied for, be made over to the parties expeditiously, on compliance of all formalities.

[DEBANGSU BASAK, J.]

50. I agree.

[MD. SHABBAR RASHIDI, J]