

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

Present:

The Hon'ble Justice AnanyaBandyopadhyay

C.R.A. 33 of 2001

Samir Das

-Vs-

The State

For the Appellant : Mr. Sabir Ahmed
Mr. AbdurRakib
Mr. T. Ahmed
Ms. Suman Biswas
Mr. SohamChakraborty
Mr. Dhiman Banerjee

For the State : Mr. RudradiptaNandy
Ms. Sonali Das

Heard on : 13.09.2023, 14.09.2023, 18.12.2023

Judgment on : 22.12.2023.

AnanyaBandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 16th January, 2001 passed by the Additional Sessions Judge, 1st Court, Alipore in connection with S.T. No.1(12)98 convicting the appellant under Section 304 Part-II of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 1,000/- and in default to suffer rigorous imprisonment for 6 months.

2. The prosecution case emanated on the basis of a complaint lodged by the brother of the victim, inter alia, stating that his younger brother the victim along with his associates was on his way from his house riding a bicycle at about 9.45am. The bicycle of the victim bumped against another cycle rider namely the appellant on the road resulting in quarrel between the two which aggravated and his younger brother tried to settle the dispute whereby the appellant punched on his face resulting in the victim's fall on the concrete public road from the bicycle causing injury of his lip.
3. The victim became unconscious accompanied by Sri Prasanta Chatterjee, Subir Das, Srikanto Dey, Gopal Jana and Surya Naskar was taken to the doctor of Narendrapur Ashram Hospital who recommended his treatment elsewhere and consequently the victim was shifted to Calcutta Seva Pratisthan. Diary was lodged in Sonarpur P.S being no.127 dated 03.03.88.
4. The complainant prayed for necessary action to be taken with regard to the incident. On the basis of the said complaint Sonarpur P.S case no.127 dated 3.3.88 under Section 341/320 IPC was instituted. On completion of investigation charge-sheet was filed. Charges were framed against the appellant under Section 304 of the IPC to which the appellant pleaded not guilty and claimed to be tried.
5. The prosecution in order to prove its case cited 14 witnesses and exhibited certain documents.
6. The Learned Advocate for the appellant submitted that :-
 - i. When in a criminal case the alleged eye-witnesses to the occurrence do not disclose to the police about the incident the credibility of

such witnesses stands highly improbable and such evidence cannot be the basis of any order of conviction.

- ii. The PW-3 Srikanta Dey not been examined by the police during the course of investigation his evidence as an eye-witness to the incident is wholly unworthy of credit.
- iii. The appellant was not known to the PW-3 Srikanta Dey.
- iv. The PW-5 Gopal Jana an alleged eye-witness to the occurrence was not examined by the police and the witness not having disclosed his knowledge about the said incident although had claimed to attend the police station with others immediately after the incident accounted his evidence completely unworthy of credit.
- v. The alleged eye-witnesses to the occurrence PW-3 Srikanta Dey claimed to have seen the proceedings along with the deceased Sadhin being accompanied by PW-1 Prasanta, PW-2 Bishnupada, PW-6 Surya but none of them supported the allegations of PW-3.
- vi. According to the witness Gopal Jana PW-5 at the time of incident PW-6 Surya was on a cycle just before him but the PW-6 Surya did not support the prosecution case and the evidence of the PW-5 was highly unreliable.
- vii. None of the witnesses were allegedly present at the time of incident who did not support the prosecution case and were not declared hostile.
- viii. Before the Doctor namely PW-11 and Dr. Sudhir Sarkar and PW-12 Dr. ParthaMitra who examined the injured Sadhin there being no

disclosure of the alleged incident and the name of the appellant as the assailants, the impugned order of conviction and sentence was liable to be set aside.

- ix. The ocular account of assault being contrary the medical evidence the impugned order of conviction and sentence was liable to be set aside.
- x. There was no evidence that dead body was duly identified before the Post Mortem Doctor.
- xi. No witness was examined who were available in around the place of occurrence and prayed the instant appeal to be allowed.
- xii. The Learned Judge erroneously held that the PW-1, PW-2, PW-3 were eye-witness to the occurrence.

7. The Learned Advocate for the State submitted that the eye witnesses in the instant case being PW-5 had identified the appellant on dock and submitted to be trustworthy.

8. The Learned Advocate for the State stated that the complainant and other member of the family were not known to the appellant and scope of accusation to have been implicated on the ground of enmity and grudge due to past rivalry had been ruled out. The prosecution was able to prove its case on the basis of the medical evidence of the doctor namely PW-10 who stated about one hematoma over left cheek measuring 2" x 2" with bruises underneath. One hematoma over left eye measuring 1½" x 1½" with bruises in the corneal. One hematoma over right temporal and parietal region measuring 4"x4" with bruises underneath. One crack fracture over

left side frontal bone to back right parietal bone than occipital bone on the right side 10" in length.

9. The evidence of the eye witness corroborating with the medical report was sufficient to prove of the guilt of the appellant and accordingly the instant appeal shall be dismissed.
10. The assessment of the evidence of the prosecution witness precisely denotes PW1's evidence to be based on hearsay. He was a post occurrence witness who stated to have known the accused by face however could not identify him on dock.
11. PW-2 recalled the incident which took place in the month of March 1988 involving a clash of cycles with a distinct group of people at about 10 to 10.30 a.m. He stated that the victim was lying on the ground beyond a group in unconscious condition. PW-2 along with Gopal Jana, Srikanta Dey and Prasanta Chatterjee had taken the victim to Ramkrishna Seva Pratishthan. PW-2 deposed to have not known the appellant.
12. PW-3 stated to have noticed a commotion on his way towards Jagadal and the witness PW-1 Bisnupada to be on one side of the appellant and then to be on the other side the victim was followed by the group to attack him on his face resulting in his fall. He stated to have accompanied PW-1 and PW-2 as aforesaid for the purpose of medical treatment of the victim. During his cross examination PW-3 stated to have learnt the name of the appellant and could not mention as to the source of the same. PW-3 was not interrogated by the police. PW4 reiterated the evidence of PW-1, PW-2 and PW-3 and identified his signature on the complaint lodged by him as Ext.1. During his

cross examination PW-4 stated to have lodged the complaint on the basis of heresay.

13. PW-5 another brother of the victim identified appellant who was on dock and stated that the victim was killed by the appellant inflicting blows on his face which resulted in his fall from the bicycle and thereafter caused his death. During his cross examination PW-5 stated that the police did not interrogate him. Thereafter, he stated that he could not state the name of the said security guard posted then. There were six cycles at the P.O. Before him Srikanta Dey was cycling. He could not state who were riding behind him on the cycles. He found that the cycle fell down on the belly portion of the deceased when he fell down from the cycle at the P.O. The persons who were out at the P.O. on the date of incident for playing doll were acquainted with each other. He did not visit Seva Protisthan at all.
14. PW-6 deposed that he got down from the cycle and found that Sadhin Jana was lying on the ground with his body facing sky. He did not witness who assaulted the victim as there was a commotion.
15. PW-7 stated that he did not know how his brother died.
16. PW-11 is the Medical Officer of Ramkrishana Mission Hospital at Narendrapur on his examination had found the following injuries-

“Patient was unconscious. No outside injury was noticed. Pulse rate 52 per minute. Respiration normal. Blood pressure 110/65 m.m of mercury.”
17. PW-12 was the Senior Medical Officer in Special Security Bureau, Government of India stated as following-

“On that day I examined Sadhin Jana s/o. Dulal Jana of NarendrapurKarmir Quarter, P.O Sonarpur and I did not find any external injury on the patient on examination at 10 A.M. This is my report prepared and signed by me (exbt.5). The said patient came to me on the basis of an occurrence at Elachi. Said patient died on 03.03.88 at 11.10 pm”

18. PW-13 S.I stated that on that day he took up charge for investigation of the case from the then O/C. Formal FIR was drawn up by ASI Debnath Bhattacharjee whose signature and hand writing he did not know. He drew up that formal FIR. He knew the hand writing and signature of the said officer (exbt.6). After taking up the investigation of the case he visited P.O i.e Elalchi Trunk Road after perusal of the complaint. He examined the witnesses under Section 161 of the Cr.P.C. He arrested the accused on 4.3.88. He collected P.M report including medical report also. He forwarded the accused on the next day with a prayer for adding 304 of IPC. After completion of his investigation he filed a charge sheet against the accused under Sections 341/325/304 of the IPC. The accused was identified on dock in the court whom he had arrested. He did not examine the persons surroundings of the P.O. He did not collect the viscera report. In an unnatural death case inquest is necessary. He did not get any complaint from Ramkrishna Mission Institution of Ramkrishna Mission Seva Prothisthan. He did not sketch any map of the P.O. PW-14 stated that to have written the complaint and identified his signature marked as ext.1/1 during his cross examination.

19. Section 304 of the Indian Penal Code stated as follows:

“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.

20. In **Jagriti Devi Vs. State of Himachal Pradesh**¹, the Hon’ble Supreme Court held as follows:

“27. Section 300 IPC, however, deals with murder although there is no clear definition of murder provided in Section 300 IPC. It has been repeatedly held by this Court that culpable homicide is the genus and murder is species and that all murders are culpable homicide but not vice versa.

28. Section 300 IPC further provides for the exceptions which will constitute culpable homicide not amounting to murder and punishable under Section 304. When and if there is intent and knowledge then the same would be a case of Section 304 Part I and

¹ (2009) 14 SCC 771

if it is only a case of knowledge and not the intention to cause murder and bodily injury, then the same would be a case of Section 304 Part II. The aforesaid distinction between an act amounting to murder and an act not amounting to murder has been brought out in the numerous decisions of this Court.

...

34. It is trite law that Section 304 Part II comes into play when the death is caused by doing an act with knowledge that it is likely to cause death but there is no intention on the part of the accused either to cause death or to cause such bodily injury as is likely to cause death.”

21. The evidence of PW-1, 2, 3, 4, PW-9 are based on hearsay who either failed to state the particulars of the incident or had been post occurrence witnesses. PW-7 being the brother of the victim stated that he did not know how his brother died. None of these prosecution witnesses were declared as hostile.
22. PW-5 Gopal Jana deposed to have seen the appellant assault his brother, i.e. the victim on his face by blows at a distance of 25/30 feet away from the p.o. He further stated that the victim fell on the ground from the bicycle and became unconscious. Thereafter, he along with Surya, Srikanta and others carried the victim to the nearby Mission Hospital at Narendrapur. Srikanta, i.e. PW-3, supposedly should have been present at the p.o. along with PW-5 who in his evidence stated that he later came to know that the assaulter was Samir Das. Surya was not examined. PW-5 during his cross-

examination stated that he was not interrogated by the police. During his cross-examination, he further stated that there were six cycles at the place of occurrence and before him, Srikanta Dey was on his cycle. He could not state who were the persons riding cycles behind him. He further found that the cycle fell down on the belly portion of the deceased when he fell down from the cycle at the place of occurrence. The persons who were out at the place of occurrence on the date of the incident playing Holi were acquainted with each other. There had been a major contradiction in the evidence of PW-5 who during his examination-in-chief deposed to have seen the appellant assault his brother, i.e. the victim. However, during his cross-examination, he stated to have seen the victim fall on the ground and the cycle to land on his stomach. He further stated there was no outsider present at the place of occurrence when the incident occurred. The prosecution failed to prove the intention, knowledge and act of the victim to cause certain injury to the victim culminating in his death. The presence of the appellant of the place of occurrence could not be concretely established.

23. This Court at time of preparing the judgment noticed the age of the appellant to be 15 years on the date of commission of the alleged offence as per his age mentioned as 27 years on record during his cross examination of the Cr.P.C.
24. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.

25. In view of the above discussions, the judgment and order dated 16th January, 2001 passed by the Additional Sessions Judge, 1st Court, Alipore in connection with S.T. No. 1(12)98 convicting the appellant under Section 304 Part-II of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs. 1,000/- and in default to suffer rigorous imprisonment for 6 months is set aside.
26. Accordingly, the instant criminal appeal being CRA 33 of 2001 stands disposed of.
27. There is no order as to cost.
28. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
29. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(AnanyaBandyopadhyay, J.)