

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. 72 of 2006

With
IA No: CRAN 1 of 2006 (Old No. CRAN 450 of 2006)
With
IA No: CRAN 4 of 2008 (Old No. CRAN 2440 of 2008)
With
IA No: CRAN 5 of 2010 (Old No. CRAN 2044 of 2010)

Unush Mondal

-Versus-

The State of West Bengal

For the Appellant:	Mr. Himanshu De, Sr. Adv. Mr. Navanil De, Adv. Mr. Rajeshwar Chakraborty , Adv. Mr. Srinjan Ghosh , Adv. Mr. Subhrajit Dey, Adv.
For the State	: Mr. Mr. Prasun Kumar Datta , Adv. Ms. Z. N. Khan, Adv. Mr. Md. Kutubuddin , Adv. Mr. Santanu Deb Roy, Adv.

Last Heard on : **04.01.2023**

Judgment on : **18.01.2023**

PARTHA SARATHI SEN, J. : -

1. The instant appeal arises out of the judgement and order of conviction dated 23.12.2005, as passed by the Learned Additional Sessions Judge, 4th Court, Krishnanagar, Nadia, in Sessions Trial No.III of June 2003, arising out of Sessions Case no.37(12)/01 whereby and whereunder the present appellant was convicted by the said trial court under Section 302 of the Indian Penal Code and thus sentenced to suffer R.I for life and to pay a fine of Rs.5000/- i.d to suffer further R.I for six months for the commission of the offence of murder.

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

3. For effective adjudication of the instant appeal, the facts leading to initiation of the aforesaid Sessions trial is narrated hereinbelow in short.

4. One Abdul Sk. of Village Saheb Nagar, P.S Nabadwip lodged a written complaint dated 30.05.2001 with the I.C. Nabadwip P.S stating, inter alia, that his second son Abu Jamal had to reside at his in-laws' home on account of previous enmity with some of the villagers of the self same village. It has been reported by him that on the previous night the said miscreants were of impression that his second son Abu Zamal had come to village Saheb Nagar and on account of such perception, they started hurling bombs at about 10 p.m as a result whereof four villagers suffered slight injuries. After getting the information of such hurling of bombs, the informant's second son Abu Jamal came to Village Saheb Nagar and at that time with the leadership of Musa Mondal,

Horshed Mondal and Iskender Mondal some miscreants namely; Yunus Mondal armed with Ram dao, Tajem Sk. armed with musket, Taimuj Sk. armed with musket, Nazrul Mondal armed with musket , Sahajan Sk. armed with bomb, Pantosh Sk. armed with dao, Sakabat Sk. armed with bomb, Daud Mondal armed with ram dao, Mainuddin Mondal armed with ramdao, Ershed Mondal armed with ramdao, Choto Mondal armed with bomb, Jubbar Mondal armed with musket, Ichhaque Mondal armed with musket, Jikir Mondal armed with musket, Attr Mondal armed with fala , Onimuddin Mondal and Boga Mondal armed with bomb, Kalo Mondal, taib Mondal, Asker Mondal and Anur Momdal armed with bomd, Sanur Mondal armed with bomb, Asraf Mondal, Jiarul Mondal armed with bomb, Morshed Mondal, Masad Mondal, Jagir Mondal , Jiyar Mondal, Soifikul Mondal, Ardin Mondal and many others started hurling bombs and chased his said son. It is the further version of the informant that in order to save his life his said son Abu Jamal took shelter in a mosque and at that time Yeeahoo Sk., Hyder Ali Sk., Alem Ali Sk. Abunachar Sk. Faijul Sk, Ohadali Sk. Taju Mondal, Asimuddin Sk. , Rahaman Sk. , Monjur Ali Sk. Chattar Sk. and many others reached at the said mosque to save his son and at that time he noticed that one Daud Mondal assaulted one Jamin Sk. by a sharp cutting weapon and Jubbar Mondal, Tajem Sk, Taimuj Sk. and Najrul Mondal fired towards his said son. It is the further version of the de facto complainant that one Choto Mondal and Murshed Mondal also hurled bomb towards the informant as well as at his associates and at that time his said son was dragged outside the

gate of the said mosque by Ershed Mondal and Mainuddin Mondal where the accused Unush Mondal, Daud Mondal , Mainuddin and Ershed started assaulting his said son by using Ram dao and as a result of such severe injuries his said son at about 7 a.m died at the spot and thereafter the said accused persons fled away after hurling bombs.

5. On the basis of such written complaint Nabadwip P.S case No.52/2001 dated 30.05.2001 under Sections 147/148/149/326/302/427/341 IPC and 9(b) I.E Act, $\frac{3}{4}$ E.S Act 1908 and under Sections 25/27 Arms Act was started.

6. Investigation was taken up and on completion of the same charge sheet under Sections 147/148/149/325/326/427/302/34 IPC, 9(b) of the Indian Explosive Act and 3 and 4 of the Explosive Substances Act was submitted against 26 accused persons including the present appellant. After commitment the trial court record was transferred to the learned trial court for trial and disposal. Trial Court Record reveals further that on consideration of the entire materials as placed before him learned trial court framed charges under Sections 148,326/34 and 302/34 of the IPC against the accused persons in separate sets.

7. In course of trial the prosecution has examined 20 witnesses in all and several documents has been exhibited on their behalf. Though the accused persons did not adduce any evidence but from the trend of cross examination and answers as given by the accused persons in course of their examinations under Section 313 Cr.P.C it transpires to us that the defence case is of clear denial and false implication.

8. In considered view of us for arriving at a logical conclusion of the instant appeal the oral evidence of the prosecution witnesses are to be looked into and those are discussed in a nutshell hereinbelow.

9. PW4 being the informant and father of the victim Abu Jamal Sk. in course of his examination-in-chief stated that he is an eye witness to the alleged incident and in course of his examination in chief he stated elaborately as to how the assailants chased his said son and thereafter entered into the mosque, started firing, broke open the door and window, dragged his son in front of the gate of the mosque by pulling his legs and thereafter chopped him by Ram dao at random. It appears to us that his version in his examination-in-chief are almost similar to his version as made out in the written complaint. He further stated that on the relevant day at about 6:30 a.m he came out from his house after hearing hue and cry and thereafter saw the entire incident.

He was extensively cross-examined by the defence. He stated that the written complaint as lodged by him was scribed by PW5 as per his instruction. Interestingly he had stated in his cross-examination that he did not witness the incident on the relevant day and hour since he was at home.

10. According to the prosecution PW5 is the scribe of the written complaint of the said incident. In course of his examination-in-chief he has duly proved the said written complaint. He also stated that such written complaint was written by him as per instruction of PW4 but in his cross-examination he stated that he was not examined by the I.O. He

further stated that at the end portion of the written complaint he voluntarily wrote that the F.I.R was written as per instructions of PW4 and he scribed such written complaint which was read over and explained to PW4 since PW4 was an illiterate person.

11. According to the prosecution PW6 is another ocular witness of the alleged incident. In his examination-in-chief PW6 stated that on the relevant day at about 6:30/7 p.m he came out of his house and noticed that many villagers were chasing after Abu Jamal Sk., the deceased and he also noticed that the said victim entered into the mosque while the assailants chased him. In his examination-in-chief he disclosed the names of the said assailants and their respective actions. He further stated that he witnessed the said incident by standing in the front of the mosque. According to him the said mosque is bounded by walls on four sides up to the height of waist of a person. In his cross-examination he stated that he was examined by the I.O before whom he stated that he witnessed the said incident standing in front of the mosque.

12. PW7 also claimed to be an eye witness of the incident and in his examination-in-chief he also stated that on the relevant day at about 6:30/6:45 a.m he heard hue and cry and thus came out from his house and noticed that 30/40 persons were chasing after the victim and thereafter he narrated the entire incidents in detail as stated by PW4 and PW6 in their respective examination-in-chief.

PW7 also disclosed the name of the assailants and their respective actions on the relevant day and hour. It is his version that his house is situated on the southern side of the mosque after a few houses.

PW7 was extensively cross-examined by the defence where he stated that he did not state to the I.O that Daud Mondal , Mainuddin , Ershed and Unush Mondal (the appellant herein) chopped Abu Jamal Sk. He denied that no such incident took place at the P.O as stated by him.

13. PW8 is the brother of the victim who in his examination-in-chief disclosed that on the relevant day at about 6:30 /7 a.m he came out from his room after hearing hue and cry and noticed that the miscreants including the present appellant were chasing the victim and thereafter he narrated entire incident of murder of his bother which is in the same line to the versions of PW4 and PW6 and PW7. He further stated that he witnessed the entire incident from his house as the P.O is visible from his said house.

In his cross examination he stated that he disclosed to the I.O that the miscreants chased his elder brother up to the mosque and entered therein. It is his further version that the said incident took place for about 10 minutes and at that time his father i.e. PW4 was standing 10 cubits away from him. He denied all other suggestions as given to him by the learned advocate for the defence.

14. PW 9 in his examination-in-chief adduced the same line of evidence as testified by PW4, PW6, PW7 and PW8. It is his version in his examination-in-chief that on the relevant day at about 6/6:30 am he

heard hue and cry and thus he came out to the courtyard of his house and noticed as to how the victim was chased, dragged and murdered by the assailants including the present appellant.

In his cross-examination, he had also stated that for the first time he was disclosing the said incident in court and that he no talk with anybody during and after the said incident.

15. PW10 is the grandfather of the deceased. In course of his examination in chief, he testified that on the relevant day in between 06.30 AM and 7AM while he was in the verandah of his house, he heard hue and cry. He thus came out from his house and found that the miscreants including the present appellant were chasing the victim. It is his further testimony that when the victim was surrounded by the miscreants, he went to save him and at that time, one of the miscreants viz; Daud Sk. chopped on his left hand and a bomb was hurled upon him by the said miscreants for which he lost his sense.

In his cross examination, he however stated that he did not disclose the names of the offenders to the I.O.

16. PW11 being the wife of the victim is a post occurrence witness and in our estimation, her deposition is much not vital and thus her evidence is not discussed here.

17. PW13 being another eye witness in his examination in chief deposed in the same line as have been deposed by the other eye witnesses as discussed above. In his chief he also disclosed the name and role of the present appellant as one of the assailants.

In his cross examination, he however stated that he cannot recollect as to whether he was examined by the I.O. or not and he did not discuss about the said incident with anybody prior to the day of his deposition.

18. According to the prosecution PW14 is another ocular witness who in his examination in chief stated that on the relevant day he heard hue and cry and thus came out from his home and noticed the incidents of chasing, dragging and assaulting and /or chopping of the victim at the instance of the assailants including the present appellant. According to him, all the assailants are his co-villagers.

In his cross examination, he however stated that he was interrogated by the I.O. at 11 A.M. on the relevant day though such deposition gets no support from the testimony of I.O(PW29).

19. PW15 in his examination in chief testified that on the relevant day and hour, he heard a sound of bomb and thus ran towards mosque and found many assailants including the present appellant are assaulting the victim in front of the gate of the mosque.

In his cross examination, he however stated that he did not state the incident to the I.O.

20. PW18 being the mother of the victim in her examination in chief testified that she had seen the entire incident as happened on the relevant day and hour in her village. She also testified that her victim son was chopped at random by the assailants including the present appellant.

In her cross examination she stated that on the day of her deposition, she was disclosing the incident before the Court for the first

time. She stated that she was examined by the I.O. but she could not recollect as to what she stated to the I.O.

21. PW22 in his examination in chief testified that on the relevant day and hour, he after hearing hue and cry as well as the sound of hurling of bomb came out of his home and found many assailants including the present appellant are assaulting and chopping the victim in front of the gate of the mosque.

In his cross examination, he however stated that he did not state the incident to the I.O. and for the first time he is disclosing the incident before the Court.

22. PW27 is the autopsy surgeon who conducted post mortem over the dead body of the deceased. In course of his examination in chief he stated that in course of Post Mortem over the dead body of Abu Jamal Sk., he noticed the following injuries :-

- i. Three sharp cut injuries over the right side of the neck from above downwards (a) 5" x 2"x bone cut, (b) 7"x2"x bone cut & (c) 3"x2"x bone cut.*
- ii. One sharp cut injury over the right cheek 3"x2"x bone cut.*
- iii. One sharp cut injury over the right elbow joint front side 2"x1"x muscle deep.*
- iv. Four sharp cut injuries over the right flanks from above downwards (a) 8"x2"x bone cut, (b) 1"x2"x bone cut, (c) 1"x1/2"x muscle deep, (d) 3"x1"x muscle deep.*
- v. One sharp cut injury over the right thigh, lower thigh 3"x2" muscle deep.*
- vi. One penetrated injury over the right side of the front of the chest-1" below the right nipple, 1" diameter with superficially skin burn i.e.; bomb blasting injury.*
- vii. One penetrated injury situated 1" medial from the injury no.6 1/2" diameter with superficial skin burn i.e.; also bomb blasting injury. Two metallic pellets and blood sample were handed over to the Escort."*

In his opinion, the death was due to shock and haemorrhage of the injuries mentioned above which were ante mortem and homicidal in nature.

In his cross examination, the said P.M. doctor has stated that he examined the deceased at 2 p.m. on 31.05.2001 and as per his observation the death might have caused about 40 years back.

23. PW2 being the recording officer in course of his examination in chief had proved his endorsement on the written complaint and the formal FIR as drawn by him. He is however not cross examined by the defence.

24. PW29 being the first IO in course of his examination in chief stated that on 30.05.2001 at about 8.15 a.m. he got a telephone call from I.C. Nabadwip P.S who informed him that one Faijul Sk informed over telephone that huge miscreants armed with deadly weapons were chasing Abu Zamal Sk. The matter was diarised and thereafter he rushed to spot. On reaching there he received a written complaint from PW4 which was sent to P.S for lodging FIR. It is his further version that after taking charge of investigation he visited the P.O., prepared rough sketch map with index, made search and seizure, examined the witnesses under section 161 of the Cr P C, arrested some of the accused persons, collected P.M. report of the deceased and thereafter handed over the C.D. to his O.C. on account of his transfer.

In his cross examination, he denied all the suggestions as given to him by the defence counsel. In his cross examination on being asked, he gave detailed account as to what have not stated by the alleged eye

witnesses before him in course of their examinations under section 161 Cr.P.C.

25. PW30 is the second I.O. who in his chief stated that after making a prayer of proclamation of attachment and collecting an injury report, he submitted C.S. His cross examination in our estimation is not relevant.

26. In considered view of us the evidence of PWs. 1,3,12,16,17,19,20,21,23,24,25 and 26 are also not much vital and thus we do not feel it necessary to discuss their evidence in this judgement.

27. We have heard the Learned Counsels for the Appellant and for the State for and against the appeal. We have perused the entire materials as available in the trial Court record. We have also gone through the impugned judgement.

28. On perusal of the unchallenged testimony of PW27(Autopsy surgeon), we have no hesitation in mind that the death of the deceased is homicidal in nature. So far as the involvement of the present appellant is concerned in the said crime of murder, it appears to us that all most all the alleged eye witnesses to the said incident of murder have categorically stated in their respective examination in chief that the present appellant along with other assailants had chopped the victim in front of the gate of the mosque with deadly weapon like Ram Daw(a sharp cutting weapon). It is however pertinent to mention herein that all most all the aforesaid prosecution witness in their respective cross examinations stated that either they had not stated the said factum of manslaughter to the I.O. at the time of recording of their statements or their statements have not

been recorded by the I.O. at all. It is their further version that for the first time they are stating such facts at the time of recording of the testimonies before the Court.

29. At this juncture, we propose to look to Section 145 of the Evidence Act and also to Section 162 of Cr P C and those are reproduced hereunder:-

Section 145 of The Indian Evidence Act, 1872 is as under:-

“Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.¹¹⁴⁵ **Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

“ **Section 162 of The Code Of Criminal Procedure, 1973** is as under:-

162. Statements to police not to be signed: Use of statements in evidence.

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such

witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.

Explanation.- An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

30. On perusal of the aforesaid legislative provisions and the evidence of the ocular prosecution witnesses as discussed above, it appears to us that the omissions on the part of the said prosecution witnesses to mention the names of the assailants and/or their role in the commission of crime before the I.O. tantamounts to material and significant contradictions which are definitely affecting the veracity and credibility of the said eye witnesses. It is to be kept into mind that this is a case of faction ridden village dispute where the chance of false implication and/or exaggeration cannot be ruled out.

31. In view of such, we are of considered view that the present appellant is entitled to get benefit of doubt in this case and thus the present appeal is allowed on contest.

32. As a result, the judgement of conviction and order of sentence dated 23.12.2005 as passed in Sessions Trial No. III of June 2003 arising out of Sessions Case No. 37(12)/2001 by the Learned Additional Sessions Judge, 4th Court, Krishnanagar, Nadia is hereby set aside.

33. Appellant Unush Mondal is thus found not guilty under section 302 of the I.P.C.

34. Since the present appellant has already been enlarged on bail vide order dated 26.07.2010 as passed by this Hon'ble Court in CRAN 2645 of 2010 in this appeal, as evident from the photocopy of the certified copy of the said order which has been annexed by Learned Counsel for the Defence in his written notes of argument, he is discharged from his bail bond(s) with immediate effect.

35. Department is directed to send down the trial court record along a copy of this judgement at the earliest.

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

37. 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.)