

CRA 6 of 1995

04.01.2023

MI. 28

Court No.12

Sourav/

Suvayan

In the matter of: **Md. Aziz**

....Appellant.

Mr. Jayanta Narayan Chatterjee

Ms. Jayashree Patra

Ms. Sreeparna Ghosh

Ms. Pritha Sinha

... for the appellant.

Ms. Faria Hossain

Mr. Asif Dewan

... for the State.

1. Heard Mr. J. N. Chatterjee, learned *amicus curiae* appearing for the appellant and Ms. Faria Hossain being assisted by Mr. Asif Dewan, learned Counsel appearing for the State.

2. A compendium of the prosecution case is that the occurrence happened at 8.20 p.m. in 12, Bedford Lane of Calcutta City.

3. P.W.1 is the informant. It is alleged that the informant found deceased Akbar lying with bleeding injury on his right leg in front of Premises No. 12, Bedford Lane. She took him to Ripon Street by a rickshaw and, thereafter, to Chittaranjan Hospital by a taxi. While undergoing treatment, the aforesaid Akbar succumbed to the injury on the same day and the FIR came to be lodged before the jurisdictional police station on the same night by P.W.1.

4. P.W. 12 being the I.O. registered the FIR and took up investigation, examined the witnesses, made incriminating seizures and on completion of investigation, filed charge-sheet against the appellant under Section 302 IPC.

5. The prosecution has examined 13 witnesses to bring to

home the charge against the appellant. Out of whom P.W.1 is the informant and post occurrence witness, P.W. 2 is the witness, is testified to have accompanied injured Akbar to the hospital and before whom and others injured Akbar is testified to have disclosed that Gora (present appellant) had struck him. P.W.s. 3 and 4 are witnesses to seizure, P.W.5 has been declared hostile and nothing incriminatory against the appellant could be elicited from him. P.W. 6 is the Medical Officer who treated injured Akbar at Calcutta National Medical College and Hospital. P.W. 7 is the Medical Officer who conducted Post Mortem on the dead body of the deceased. P.W. 8 also testified that Akbar stated that he was stabbed by Gora with a knife. P.W. 9 is the immediate post occurrence witness before whom deceased Akbar is asserted to have made declaration to the effect that Gora had struck him with a big knife. P.W. 10 is a Police Officer who has prepared the rough sketch map. P.W. 11 is the photographer of police department. P.W. 12 is the I.O., P.W. 13 is a resident surgeon who has proved the death certificate of the deceased.

Defence plea is one of complete denial and false implication.

6. Learned court below relying on the evidence of P.W.s. 2, 8 and 9 returned the finding of guilt against the appellant under Section 302 IPC.

7. Learned Counsel for the appellant with vehemence, submits that if evidence of P.W.s. 2, 8 and 9 are appreciated in the totality of circumstance, it will be found that P.W. 1 who is testified to have taken injured Akbar to hospital has not testified about the presence of any other persons with him. It is further submitted by him that P.W. 2 who is very much relied on by learned trial court,

has testified that the deceased made the declaration before him when he was being taken to the hospital. P.W. 8 has testified that immediately after the occurrence Akbar stated before him that he was stabbed by Gora with a knife. Same is the evidence of P.W. 9.

From the evidence of P.W.s. 2, 8 and 9 there is a doubt regarding the place where the declaration was made by the appellant and whether they should be disbelieved to the hilt on the question of complicity of the appellant.

Learned Counsel for the State on the other hand submits that learned court below has rightly and justifiably relied on evidence of P.W.s. 2, 8 and 9 on the question of oral dying declaration and the evidence of Medical Officers of P.W.s 6 and 7 regarding the nature of injury and cause of death and the finding returned by learned trial court is to be affirmed and the appeal is to be dismissed.

8. Conjoint reading of evidence of P.W.s. 2, 8 and 9 shows that P.W. 9 came to the spot immediately on hearing the sound 'bachao, bachao'. He saw injured Akbar lying on the ground. He found blood oozing out from his right thigh. He further testified that Akbar stated to him that Gora had struck him with a big knife. Maqsud Alam, P.W. 8 asked him (P.W. 9) to bring one cloth. He brought one 'gaamchha' from para man and Maqsud Alam (P.W. 8) bandaged the wound tightly. P.W. 8 is, however, silent about the fact as to how he was attracted towards the spot where injured Akbar was lying. He was present in the para at 12, Bedford lane and Akbar stated that he was stabbed by Gora with a knife. He has specifically testified thus: "we two persons were there". If evidence of P.W.s. 8 and 9 are read together, it is found that P.W. 9 on being alerted by sound of 'bachao, bachao' ran towards the spot and

found the deceased lying there with bleeding injury. Before him the deceased stated that Gora had stabbed him with a big knife. He also testified about the presence of Maqsud Alam (P.W. 8) at that time, but there is nothing on record to show whether he arrived first or Maqsud Alam arrived first at the spot.

9. P.W. 8 in his evidence has clearly testified that he, Shamim (not examined), Sk. Chand (P.W. 9), Imtiaz took injured Akbar to the hospital. He has not stated that Md. Suleman (P.W. 2) also accompanied them. So the evidence of P.W. 2 to the effect that while taking to the hospital, injured Akbar made declaration before him to the effect that the appellant stabbed him is not believable. Perhaps there is some typographical mistake in recording the name of Shamim as deposed by P.W. 8. May be Sk. Shamim was wrongly recorded as Sk. Saminu in the deposition Form but evidence of P.W. 1 if read with the evidence of P.W. 8, it is clear that P.W. 1 is the person who was there with injured Akbar when he was being taken to the hospital. P.W.1 is also silent about any declaration being made by the deceased, when he was being taken to the hospital.

10. From the aforesaid discussion, it is found that whatever declaration was made by injured Akbar was made at the spot in presence of P.W. 9 and no declaration has been made while he was being taken to the hospital as asserted by P.W. 2.

11. We find that P.W. 9 is corroborated in material particular by P.W. 8 so far as his presence at spot is concerned and the declaration has been made by injured Akbar immediately after the occurrence before P.W. 9. There is nothing on record to impeach the credit of P.W. 9 though a solitary witness to the dying declaration. Therefore, evidence of P.W. 9 is to be accepted to prove complicity of

the appellant in the offence alleged.

12. Now it is to be found out if the appellant has stabbed or attacked the deceased by a knife what offence is made out from his acts. Evidence of P.W. 6 the Medical Officer is clearly to the effect that one deep incise wound was there on right upper one-third and lateral part of thigh with profuse bleeding. According to him the general condition of the patient was precarious, pulse nil, blood pressure could not be recordable. All the aforesaid signs speaks of shock owing to profuse bleeding. It is also clear that the assault was aimed at the thigh of the deceased which is not a vital part of the body. From the evidence of P.W. 7, the Medical Officer who conducted post mortem it is found that he has found the same injury as found by P.W. 6 and it was found that the artery was partially cut 1/10" E.V.C. and the injury was fresh.

13. To find out the question of culpability of the appellant, we have to fall back on Section 300 IPC. The assault being mounted on right thigh of the deceased, intention and knowledge of death on the part of the appellant is clearly ruled out. Had the appellant been actuated by any intention or knowledge to cause death, he could have mounted the assault on a vital part or non-vital part like belly as he was armed with a big knife according to P.W. 9 as stated to him by the deceased in his declaration. Therefore, the act of the appellant cannot be brought under clause firstly or thirdly of Section 300 IPC.

14. Clause secondly of Section 300 IPC spells out thus: "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." If the section is analyzed from the

medical angle, it is not known to all that popliteal artery is present on the anterior aspect of the thigh and knee running toward the feet. That is a special knowledge on the part of an expert and it is further beneficial to say here that any cut injury to popliteal artery completely drains out the body of blood if not treated immediately and the patient may slip to shock causing his death. Here in the present case from the sole testimony of P.W. 9, such a special knowledge as outlined in clause secondly of Section 300 IPC cannot be attributed to the appellant. Therefore, the appellant having caused injury by sharp cutting weapon his acts falls under Section 324 IPC.

15. This is an appeal of the year 1995, there is no knowledge on the part of the Bar or this Court regarding whereabouts of the appellant and whether he is dead or alive. The Counsel originally engaged having not appeared several time, we engaged Mr. J. N. Chatterjee as *amicus curiae* who assisted us in reaching the finding. It is not known as to for how many years the appellant was in jail but it is fairly submitted by Mr. J. N. Chatterjee, learned *amicus curiae* that during trial, he was on bail.

16. Regard being had to the aforesaid discussion and submission by Mr. Chatterjee, learned *amicus curiae* , we modify the conviction of the appellant from one under Section 302 IPC to one under Section 324 IPC and confine his sentence to period already undergone. The appellant be discharged of the bail bond executed in the appeal.

17. The LCR be sent down to the trial court with a copy of this order.

18. Accordingly, the appeal being **CRA 6 of 1995** is disposed of.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

