

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

Present:

The Hon'ble Justice Debangsu Basak

&

The Hon'ble Justice Rai Chattopadhyay

C.R.A (DB) 31 of 2022

Rakesh Barman @ Chhote

Vs.

The State of West Bengal

Amicus Curiae

: Mr. Mrityunjoy Chatterjee.

For the State

: Mr. Partha Sarathi Das,

: Mrs. Manasi Roy.

Hearing concluded on: 24/04/2023

Judgment on: 17/05/2023

Rai Chattopadhyay, J.

1) Gruesome murder of the person, namely, Saurav Chowdury @ Ghantu, had resulted into lodging of the FIR dated 05.7.20014, in Dattapukur Police Station, having been registered as Dattapukur Police Station case No. 528/14 dated 05.7.2014, under sections 364, 302, 201 and 120B of the IPC. Allegations were made in the said FIR against the following persons:

- i) "Shyamal Karmakar";
- ii) "Anup Talukder";
- iii) "Liton Talukder" and
- iv) Four or five other persons.

- 2) After completion of investigation, charge sheet was submitted against the following 13 (thirteen) persons, all of whom faced trial:

- i) Somnath Sardar,
- ii) **Rakesh Barman @ Chhote**,
- iii) Tapash Biswas,
- iv) Ratan Samadder,
- v) Suman Sarkar,
- vi) Suman Das @ Bhuban,
- vii) Ratan Das @ Tofa,
- viii) Tarak Das,
- ix) Amal barui @ Kuche,
- x) Shyamal Karmakar,
- xi) Arup Talukder,
- xii) Sisir Kumar Mukherjee,
- xiii) Poly Maity.

- 3) The instant appeal has been preferred by one of such accused persons, who faced trial namely, **Rakesh Barman @ Chhote**. Additional Sessions Judge 7th Court at Barasat 24pgns(North), delivered judgment and order of conviction dated 15.4.2016, 16.4.2016 and 19.4.2016, respectively, in which, so far as the present appellant is concerned, the Court found his guilt and convicted him under section 302, read with section 34 of the IPC. The appellant was sentenced to suffer *“rigorous imprisonment for life with fine of Rs.20,000/- and in default of payment of fine, rigorous imprisonment for a further period of two years”*, for the said offence.

- 4) The said judgment and order of conviction dated 15.4.2016, 16.4.2016 and 19.4.2016, respectively, passed in Sessions trial No. 02(09)/2014, is under challenge, in this appeal. This appeal is only with respect to the appellant/convict namely, **Rakesh Barman @ Chhote**. Since none represented the appellant in this case, the Court appointed Mr. Mrityunjay Chatterjee, Advocate, as the Amicus Curiae, to assist the Court to dispose of the appeal. The Court expresses satisfaction and appreciation for the able assistance extended by Ld. Amicus Curiae.

5) Before entering into the merits of this case, it is necessary that the trail of events, after delivery of judgment by the trial court as mentioned above, be discussed in a nutshell. One FIR named accused person, namely, Uttam Sikari, became “*approver*” in this case. He was granted pardon in terms of section 307 of the CRPC and was tried separately. Another accused person namely, Anup Talukder @ Arup was acquitted by the court. Thus, from amongst the total 14 accused persons named in the chargesheet amongst whom the 13 persons who were made to stand for trial, the Court awarded death penalty to 8 of them, namely, (i) Shyamal Karmakar, (ii) Suman Sarkar, (iii) Suman Das @ Bhuban, (iv) Amal Barui @ Kuche, (v) Tarak Das, (vi) Somnath Sardar, (vii) Ratan Samaddar, (viii) Tapas Biswas. 3 of them namely, (i) Poly Maity, (ii) Ratan Das @ Tota @ Tofa, (iii) Sisir Kumar Mukhopadhyay @ Sanku Mukhopadhyay, were granted sentence of rigorous imprisonment for 5 years and fine. The present appellant was awarded sentence of rigorous imprisonment for life and a fine of ₹ 20,000/-, for the offence under section 302 read with section 34 of the IPC. The death reference and the appeals preferred by the other accused persons, excepting the present appellant, were heard together by this court and disposed of by a common judgment dated 9.02.2018. This Court converted death sentence for all the concerned convicts, in the following manner:

- (i) *Shyamal Karmakar: death sentence was converted to a sentence of rigorous imprisonment for a period not less than 30 years;*
- (ii) *Suman Sarkar : death sentence was converted to a sentence of rigorous imprisonment for life;*
- (iii) *Tarak Das : death sentence was converted to a sentence of rigorous imprisonment for life;*
- (iv) *Somnath Sardar : death sentence was converted to a sentence of rigorous imprisonment for life;*

- (v) *Ratan Samaddar : death sentence was converted to a sentence of rigorous imprisonment for life;*
- (vi) *Tapas Biswas : death sentence was converted to a sentence of rigorous imprisonment for life;*
- (vii) *Amal Barui @ Kuche: death sentence was converted to acquittal; and*
- (viii) *Suman Das @ Bhuban: death sentence was converted to acquittal.*

6) The other appeals preferred by convicts Poly Maity and Sisir Kumar Mukhopadhyay @ Sanku, were dismissed.

7) In this appeal, Ld. Amicus Curiae has pointed out to certain discrepancies, which he says, are apparent from the evidence of witnesses. According to him those circumstances would not be in favour of the prosecution, so far as this appellant is concerned, but would rather vitiate prosecution's case. He has indicated firstly, that the appellant was not named in the FIR. He has also pointed out that witness nos. 6,7,8 have not identified him in Court. By referring to the evidence in the trial, it has also been pointed out that there are discrepancies as regards the statements of witnesses with that of the 'approver', so far as the specific role of the present appellant, in commission of the alleged crime, is concerned. The Court has been assisted with the fact that none of the appellant's statement have led to discovery of anything incriminating, nor any injury or mark or blood stain of the appellant was recovered from the place of occurrence, to justify prosecution's claim of the appellant being involved in the crime as alleged. According to the Ld. Amicus Curiae, in view of such discrepancies in the evidence, conviction of the appellant on the basis of the said evidence may stand to be not maintainable and vitiable for the reason that doubts arise on the basis of the circumstances as

above and allegations against the appellant cannot be said to have been proved, in conformity with the standard of proof beyond all reasonable doubts.

- 8)** State is obviously opposing such contention of Id. Amicus Curiae as regards the merits of this case. According to Mr. Partha Sarathi Das, appearing for the State, the evidence in the case has already been tested by this Court in the death reference as well as in the appeals filed by other accused persons. That, those are clinching and undeniable. According to him the infirmities pointed out by the Ld. Amicus Curiae has already been made to stand the test of consideration by a Co-ordinate bench of this Court. As a matter of fact, he says that in its judgment dated 09.02.2018, the Division Bench has considered the merits as regards the case of the present appellant also and has already recorded its decision regarding him, i.e., has already noted confirmation regarding the conviction and sentence granted to the present appellant. On merits, Mr. Das has submitted that in its elaborate judgment, the trial Court has duly dealt with every nook and corner and each circumstance brought out through the prosecution's evidence and cross-examination of the witnesses, thereby leaving no scope of doubt regarding the proper consideration of the evidence on record by it. Only upon such indepth scrutiny of the evidence and materials on record, the trial Court has noted its findings, which is reasonable, conceivable and justifiable. Accordingly it is urged, that the Court, in this appeal, may not interfere with the findings of the trial Court as regards the conviction and sentence of the present appellant.
- 9)** Prosecution's case started with lodging of FIR on 05.07.2014, at 12:25 hours. The elder brother of the victim namely Sandip Chowdhury was the informant. He has stated in the FIR that the date and time of occurrence was 04.07.2014 (Friday), at around 11:00 to 11:10 p.m. The victim was making conversation over mobile phone (at Banerjee

Bagan More). He has suddenly been attacked by accused Shyamal Karmakar, Anup Talukdar and Liton Talukder and four or five other accused persons. Shyamal Karmakar was heading the group. All of them forcefully took away the victim namely Saurav Chowdhury @ Ghantu with them. He has further said that his father immediately informed the matter to the police station over telephone. Thereafter the informant writes that on the next date that is 05.07.2014 at 8:00 a.m. in the morning they were informed about the dead body of the victim to have been discovered on the railway track. He said to have immediately rushed to the spot to find the victim having been assassinated by way of brutal stabbing, one hand and a leg of the victim were found separated from body. Thus on the allegation of murder the said FIR was lodged and registered as Duttapukur Police Station Case No. 528/2014 dated 05.07.2014 under Sections 364/302/201/120B IPC.

- 10) After completion of investigation police submitted charge sheet against the fourteen accused persons as named above. Accused Uttam Sikari having been granted pardon in terms of Section 307 of the Cr.P.C, the trial Court framed charges against the rest thirteen accused persons under Section 364/302/201/120B/352/212/34 IPC and Sections 25 and 27 of Arms Act. Uttam Sikari made his confessional statement before the Magistrate. Later on, after grant of pardon, he was cited as a prosecution witness (P.W.3), in the trial.
- 11) Forty witnesses were examined by prosecution, whereas as many as 160 documents were exhibited and proved. The prosecution has proved 48 material exhibits including ammunitions, 8 documents were also exhibited at the instance of the defence, on admission.
- 12) On the basis of all these ocular and other evidence, the Court has come to a finding as regards guilt of the present appellant in its

judgment, as mentioned above. Consequently the appellant was convicted and was sentenced for the terms as mentioned above.

- 13)** The appellant not being named in the FIR, may be considered as the first point in defence. According to section 154 of the CrPC, the FIR is the information of the cognizable offence, in this case alleged murder of the victim named above, lodged with the concerned police station, which ought to and has in this case, set the criminal justice system in motion. The law is well settled that the FIR is not a substantive but a corroborative piece of evidence. In the case of *Superintendent of Police CBI vs Tapan Kumar Singh (2003) 6 SCC 175*, the Supreme Court observed that, *"It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details, he must find out those details in the course of investigation and collect all the necessary evidence."* Court also held that *"An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eye witness so*

as to be able to disclose in great details all aspects of the offence committed.”

This is the settled law to hold the field. Hence, appellant's name having not been mentioned in the FIR, shall not jeopardise the prosecution's case in any way, if it is found that there are sufficient evidence to implicate and find guilt of the appellant during the course of investigation and the trial, which we will examine in due course.

- 14)** So far as the finding of the trial Court regarding commission of the alleged offence of murder, for which the present appellant along with the other accused persons were charged and faced trial, the same has already been upheld by the Co-ordinate Bench of this Court, while hearing the death reference case. We have perused the judgment of the Co-ordinate Bench in the said death reference case and are in concurrence with the findings thereof. It would not be out of place and shall suffice to mention that on the basis of the DNA test report (Exhibit 60) and evidence of P.W 34 and also from examination of the teeth and blood samples, the dead body was specifically and clinically identified to be that of Saurav's. The evidence of autopsy surgeon has proved that victim Saurav Chowdhury was murdered by stab injuries. He has proved that death of the person occurred due to those stab injuries and also that post-mortem injuries were found on the body, having caused on railway track. The evidence of the experts as above have been duly corroborated with the ocular evidence of the witnesses, that is the expert witnesses and also that of P.W 3 (approver), to lead to the specific conclusion by the Court regarding the cause of the death. By the evidence of experts, supported by the adequate corroborative documentary and other evidences, a proper conclusion has been arrived at as regards existence of ante-mortem stab injuries over the body of the victim, which has caused his death and also post-mortem injuries to segregate his body parts. Finding as above, of the Court cannot be flawed.

- 15)** In this appeal therefore this Court is specifically to look into the aspect of involvement of the present appellant in commission of the alleged crime vis-à-vis the order of conviction and sentence granted to him and assess the propriety and legality of the same. Appellant's involvement transpires from the evidence of P.W.s 3,7 and 8. Also 'exhibit-6' is the document, proved in the trial, which speaks of his specific role. P.W 7 and P.W 8, both of whom have asserted that the principal accused person Shyamal Karmakar disclosed before them, on the next morning of the fateful night, that he being accompanied with the other accused persons including the present appellant, has murdered the victim Saurav. So far as evidence of P.W.s 7 and 8 are concerned, extra-judicial confessional statement of a co-accused person about the appellant, which they say to have been told before them, shall have no credence, in the eye of law, in the facts and circumstances of the present case. Hence, those are kept out of periphery of our discussions.
- 16)** Appellant's name was not mentioned in the FIR. His name has transpired for the first time from the evidence of P.W 3, who has been transmitted to be a witnesses/approver from the status of an accused person in the case, after extension of pardon to him under Section 307 Cr.P.C.
- 17)** From the examination of P.W 3 the following would emerge:-
1. He was arrested by police in connection with this case on 07.07.2014.
 2. On 08.07.2014 he was produced in Court and was committed to police custody for 14 days.
 3. Then on the next date of production he was taken to the Magistrate. He expressed there, his desire to state the actual truth regarding the incident. He was made aware by the Magistrate of the possible consequences of his making statement as per his desire.

4. On the next date, i.e, 23.07.2014 he was again produced before the Magistrate and was allowed further time to settle his mind regarding making of any confessional statement as he desired.
5. Ultimately on 28.07.2014 he made statement before the Magistrate regarding the 'actual fact' leading to the offence.
6. He said that, on 04.07.2014 at about 11:00 p.m.,he along with accused Shyamal Karmakar, Suman Sarkar, Tapas Biswas, Ratan Sammadar, Bhuban, Amal @ Kuche were together and coming from 'Bamangachi Chowmatha' to find victim at 'Banerjee Bagan More', making conversation over mobile phone. All of them caught hold of the victim together.
7. Shyamal Karmakar brought 'machine'(fire arm) from his waist to put the same on the forehead of the victim and uttered certain abusive language. Thereafter Shyamal Karmakar snatched away the mobile phone from the victim and kept the same in his pocket.
8. All the above named accused persons assaulted the victim and dragged him through 'dhalai road'. After reaching the place namely, 'Natunbazar', Bhuban and Amal @ Kuche assaulted the victim by bamboo stick. After sometime they left the place. Thereafter Shyamal Karmakar also left the place and came back with the present appellant, Tarak Das and Somnath Sardar. At this point appellant's name was revealed for the first time.
9. The persons so called on and brought on the spot by Shyamal Karmakar, including the present appellant, joined with the persons, who were already present on spot.They assaulted the victim thereafter, with the aid of stones lying over the railway track.
10. Having perceived the possible homicide to happen, the victim scuffled with Shyamal Karmakar as well as Suman Sarkar.
11. The witness says that, due to scuffling the pocket of the shirt of Shyamal Karmakar and that of the barmuda (pant) of Suman Sarkar was torned off.

12. Now the approver has disclosed about specific role of the present appellant in the whole scene of crime, that is, he himself and the other accused persons caught hold off the victim at that time.
13. Then he says that Shyamal Karmakar and Suman Sarkar murdered the victim by executing fatal blow with the help of a sharp cut weapon namely 'bhojali'.
14. Further specific overt act of the appellant have been suggested by the approver thereafter, that is, placing the victim over the railway track.
15. While proceeding further, this witness has pointed out to the further incriminating situation regarding involvement of the present appellant, that is, after the local train passed over the body of the victim through the railway track, he himself and the other persons present, i.e, including the present appellant, went to the place to find and confirm the death of the person due to segregation of body parts.
16. The witness has asserted that Shyamal Karmakar and Suman Sarkar were also injured by bhojali and the oozing blood was moped away with the handkerchief brought out by Shyamal Karmakar from his pocket Shyamal Karmakar did the similar thing to Suman Sarkar to wipe off his blood. The said handkerchief was left behind at the place of occurrence.
17. According to this witness Shyamal Karmakar informed about falling of the mobile phone of the victim, earlier snatched by him, on the ground, during scuffling. The witness also asserts about falling of his wallet at the place of occurrence due to scuffling. He asserts further that his original voter ID card was there inside the wallet.
18. The present appellant and also the other accused persons present there, left that place after this, P.W 3 said.

- 18)** This witness has identified the appellant in the accused dock.
- 19)** The evidence of P.W 3/approver has been accepted by the trial Court as genuine and unblemished. The trial Court categorically discussed its reasons for accepting approver's evidence as sacrosanct. The findings of the trial Court as above has been upheld in the death reference, being logical. The legality and propriety of the approver's statement has remained unshaken, the approver/P.W 3 having withstood the rigours of cross-examination in a successful manner. The truthfulness of the ocular evidence of the approver will also emerge, being duly corroborated with the other material evidences in the trial, due and detailed consideration of which has rendered the finding of the trial Court to be based on sufficient reasons.
- 20)** Judicial confessional statement of P.W.3, made before the Magistrate, has also been proved in this trial, being marked as 'exhibit-6'. Though it is a settled law that conviction can be based upon the evidence of the approver if the same espouses confidence of the Court, however for an abandon precaution this Court would look for certain corroboration and find that in the form of approver's statement made before the Magistrate and proved in the case as 'exhibit 6'.
- 21)** That the same stands to duly corroborate the evidence of the witness. Regarding voluntariness of such statement, no imperfection or any blotch may be noticed in the entire chain of circumstances. The judgment of the Supreme Court, of *Suresh Chandra Bahri vs. State of Bihar, 1995 Supp (1) SCC 80* may be mentioned where the Court has held that,

“43. The evidence of an approver does not differ from the evidence of any other witness except that his evidence is looked upon with great suspicion. Consequently in the event the suspicion which is attached to the evidence of an accomplice is not removed his evidence could not be acted upon unless corroborated in material particulars. But where the suspicion is removed and the evidence of an approver is found to be trustworthy and acceptable then that evidence may be acted upon even without corroboration and the conviction may be founded on such a witness.”

- 22)** Thus the truthfulness of the evidence of the witness can never be doubted by this Court, and challenge to the same is negated, in view of the evidence on record.
- 23)** On perusal of the exhibited document, being ‘exhibit 6’ in the trial, which is the statement of the approver/P.W. 3 recorded by the Magistrate, it is found that the substantive evidence of P.W 3 has been thoroughly and duly corroborated from the same. So far as the present appellant is concerned, his joining the group of assailants in the midst of assault by them, upon the victim, has been categorically stated. There approver/P.W 3 has also mentioned in specific terms regarding the overt act performed by the present appellant, to accomplish the crime, along with other co-accused persons. Due corroboration of the fact that the appellant stays there till confirmation by him and other accused persons of death of the victim being run over by the passing train, has also been found from ‘exhibit 6’ in the trial. Thus there appears to be no scope of any doubt and lacuna in accepting the said facts stated by the accomplice/P.W 3, as true. The trial Court has duly and rightly considered the evidentiary value of ‘exhibit 6’ as well as the substantive evidence of P.W 3, giving the same

adequate weightage and placed reliance on the same. There would be no ground for this Court to unsettle that the findings and the basis thereof as regards the same, of the trial Court.

- 24) So far as the facts of the appellant joining the group of the assailants, catching hold the victim to facilitate fatal sharp cut blows with “bhojalt” by the two other accused persons, his involvement in moving the body of the victim to the railway track and lying it there and also his involvement in witnessing the mutilated dead body over the railway track, after the train has passed through same - have not been put to any serious challenge in the cross-examination. The witness has successfully withstood the cross-examination and the veil of suspicion, if any cast upon the evidence of the witness, as regards the role of the present appellant, has been successfully removed in this trial.
- 25) The appellant has been convicted for the offences under section 302 and also 34 of the Indian Penal Code. Before discussing any further, it can be mentioned that the offence of ‘murder’ has been provided under section 300 of the Code, in the following manner :

“300. Murder

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

Secondly- 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, or-

Thirdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-

Fourthly,- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death

or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid;”

Thus an act of murder or culpable homicide has to incorporate and be comprised with the essential components of ‘*actus reus*’ as well as ‘*mens rea*’, of the perpetrator, to find him guilty for the same. ‘*Mens rea*’ is the vital component to be followed by an overt act, to constitute a crime. It means guilty mind, a state of mind which indicates culpability.

26) Section 34 of the Code provides as follows :

“34. Acts done by several persons in furtherance of common intention

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

Therefore, under this provision, culpable intention of a person, being in unison with the intentions alike of the other accused persons, is the component factor to find guilt of any person under this provision of law. ‘Intention’ of a person and also ‘common intention’ to fuel the commission or omission of an injurious act, amounting to be a crime under the law, may be inferred from the act itself. The presumption relating to ‘intention’ is that every person is presumed to intend the natural consequences of his act. In an old case of 1956, (*Rawalpenta Venkalu vs State of Hyderabad reported in AIR 1956 SC 171*), the Supreme Court has been pleased to hold as to how the overt act of the accused may be considered to be the expressions of his intentions, for commission of the crime.

27) So far as the intention of the appellant is concerned, it can be stated that he has joined in the midst of an incident of assault and scuffling when one person was fighting against several persons to resist attack on his life. The position of the said person as well as the entire situation was well perceivable and appellant’s joining at that point of

time would render any reasonable person to conceive about his common intention with the other accused persons. No less important is the further role of the appellant, that is, his catching hold of a person who is being executed with fatal blows by heavy sharp cut weapon, most naturally to put an end to his life. From here till the time of confirming death of the victim on the railway track, voluntarily participation of this appellant indicates only his possessing common intention with the other accused persons in murdering the victim and cannot plausibly lead to any other conclusion.

- 28)** Therefore on the perusal of the entire evidence in the case, so far as the present appellant is concerned, his specific involvement in the crime as alleged, in furtherance of common intention with the other accused persons in murdering the victim has been proved beyond scope of all reasonable doubts. To this extent this appellate Court places undoubted concurrence with the finding of the trial Court and impugned judgment dated 09.02.2018 passed by the Additional Sessions Judge 7th Court at Barasat 24 Parganas (North). Hence, the judgment and order of conviction dated 15.4.2016, 16.4.2016 and 19.4.2016, is upheld to the extent the present appellant is concerned.
- 29)** Hence the order of conviction and sentence of appellant namely Rakesh Barman @ Chhote as granted by the Additional Sessions Judge 7th Court at Barasat 24 Parganas (North) in the judgment and order of conviction dated 15.4.2016, 16.4.2016 and 19.4.2016, is hereby affirmed.
- 30)** The appeal CRA (DB) 31 of 2022 stands dismissed.
- 31)** A copy of this judgment and order along with the trial Court records be remitted to the appropriate Court forthwith.

- 32)** Urgent certified Photostat copy of this judgment be given to the parties, if applied for, upon compliance of all the formalities, as per usual terms and conditions.

(Rai Chattopadhyay,J.)

- 33)** I Agree,

(Debangsu Basak,J.)