

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 58 of 2022

Saheb Murmu & Anr

Vs.

The State of West Bengal & Ors

For the Appellants : Mr. Sudip Ghosh Chowdhury, Adv.

For the State : Mr. Neguive Ahmed, Ld. APP
Ms. Manasi Roy, Adv.
Ms. Trina Mitra, Adv.

Hearing Concluded on : April 27, 2023

Judgement on : May 4, 2023

DEBANGSU BASAK, J.:-

1. Pandua police station had received a written complaint from prosecution witness (PW) 1 on October 23, 2013 with regard to an incident of assault occurring on October 21, 2013 in which her son, the victim suffered grievous hurt at the hands of the appellants and was hospitalised.
2. Such written complaint had been registered as First Information Report bearing No. 454/13 dated October 23, 2013 under Sections 448/324 of the Indian Penal Code, 1860.
3. The victim had died on November 14, 2013. On November 16, 2013, police had prayed for adding Section 304 of the Indian Penal Code, 1860 before the jurisdictional Court

which was allowed. Police had submitted charge sheet against the appellant on February 31, 2014 under Section 448/324/325/326/304/34 of the Indian Penal Code, 1860 against the appellants.

4. Charges as against the appellants under Sections 448/326/304 (i)/34 of the Indian Penal Code, 1860 had been framed against the appellants on January 10, 2018. The appellants had pleaded not guilty and claimed to be tried.

5. At the trial, the case of the prosecution was that, on October 21, 2013, at about 3 PM, the appellants had committed house trespass by entering into the house in the possession of Suraj Murmu and used as a human dwelling house with intent to commit murder. The appellants had on the same date, time and place voluntarily caused grievous hurt to Suraj and the victim by means of sharp cutting weapon and iron rod. The appellants on the same date, time and place committed culpable homicide not amounting to murder by causing the death of the victim.

6. In order to prove the charges as against the appellants, the prosecution had examined 13 witnesses and relied upon various documentary evidences. On conclusion of the evidence of the prosecution, the appellants had been examined under

Section 313 of the Criminal Procedure Code where they claimed to be innocent and falsely implicated.

7. By the impugned judgement of conviction dated February 29, 2022, the learned judge had found the appellants not guilty for the offence punishable under Section 448 of the Indian Penal Code, 1860 and acquitted both of them of such charge. The learned judge had however found the appellants guilty for the offences punishable under Section 304 part I and Section 326 of the Indian Penal Code, 1860.

8. By the impugned order of sentence dated February 20, 2022, the learned judge had convicted the appellants to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs. 2000 each and in default to suffer simple imprisonment for further 6 months for the offence punishable under Section 304 part I of the Indian Penal Code, 1860. The appellants had been sentenced to suffer rigorous imprisonment for 3 years and also to pay a fine of Rs. 500 each and in default to suffer simple imprisonment for further 2 months only for offence punishable under Section 326 of the Indian Penal Code, 1860. Both the sentences had been directed to run concurrently.

9. The appellants have assailed the judgement of conviction and the order of sentence passed against them by the learned Additional Sessions Judge, 3rd Court, Chinsurah, Hooghly in Sessions Trial No. 01 (01) 2018 arising out of Sessions Case No. 127 of 2017 in the present appeal.

10. Learned advocate appearing for the appellants has submitted that, both the appellants are innocent. He has referred to the deposition of the various prosecution witnesses. He has contended that, from the deposition of PW 2 it is clear that the appellant No. 1 had assaulted the victim by kicking the victim in his abdomen. The prosecution had failed to prove that appellant No. 1 had any knowledge or intention to commit an act of murder. According to him, Section 304 part I of the Indian Penal Code, 1860 has no manner of applications in the facts and circumstances of the present case. He has relied upon **1993 Suppl (1) Supreme Court Cases 642 (Kedar Prasad and others versus State of Madhya Pradesh)** and **2011 volume 11 Supreme Court Cases 367 (Veeran and others versus State of Madhya Pradesh)** in support of his contentions. Moreover, no sharp weapon had been used in the assault. Accordingly, conviction

under Section 326 of the Indian Penal Code, 1860 was also not maintainable.

11. Learned advocate appearing for the appellants has submitted that, none of the prosecution witnesses had ascribed any specific role of the appellant No. 2 in the incident of assault. None of the doctors examining the victim had noted the name of the appellant No. 2 as a person involved in the incident of assault on the victim.

12. Learned advocate appearing for the appellants has submitted that, the victim survived from October 21, 2013 till November 14, 2013. At no point of time, the victim had implicated any of the appellants in any incident of culpable homicide.

13. Learned advocate appearing for the appellants has submitted that, the appellants should be acquitted of the charges.

14. Learned advocate appearing for the State has contended that, the prosecution proved all the charges against both the appellants beyond reasonable doubt. He has drawn the attention of the Court to the deposition of the prosecution witnesses. He has submitted that, prosecution witnesses had implicated both the appellants in the incident of assault. PW 2

had seen the appellants to kick the victim at the abdomen. The victim had to undergo an operation at the abdomen immediately after he was hospitalised. A wooden baton had been used in the incident of assault on the victim by the appellants. Post-mortem Doctor had opined that, the injuries suffered by the victim were sufficient to cause death. Both the appellants had participated in the incident of assault on the victim. Consequently, both of them should be held responsible for the death caused to the victim. He has relied upon **1958 Supreme Court Reports 1495 (Virsa Singh versus State of Punjab)** in support of his contentions. He has submitted that, the impugned judgement of conviction and the order of sentence should be upheld.

15. The mother of the victim had deposed as PW 1. She had stated that, the appellants were selling country liquor at their house. The appellants had come to her house and assaulted her son, the victim, on his stomach and other parts of the body with a wooden baton and iron rod as a result of which, the victim had sustained injuries. Local people had come to her house and the victim was taken the Pandua Rural Hospital and therefrom the victim was referred to the district hospital where he was operated. The victim had been referred

to Kolkata where he died. She had stated that, PW 2 and PW 3 along with another person were present at the house at that time. The appellants had assaulted the victim as the victim raised objection against the selling of country liquor by the appellants. She had identified the appellants in Court. She had lodged the written complaint and subscribed her left thumb impression on it.

16. PW 2 had stated that, on October 21, 2013 at about 3 PM, he suddenly heard a hue and cry from the house of the neighbours. He had come out from his house and saw that the appellants were assaulting the victim. When he had asked the appellants why they were assaulting the victim, he saw the appellant No. 1 to give a blow by his leg on the victim as a result of which the victim fell down. PW 1 had told him that the appellants came to their house and abused them with filthy language and when the victim protested the appellants assaulted them. He had named 3 other persons assembled at the place of occurrence. After seeing such persons at the place of occurrence, the appellants had fled away. He had identified the appellants in Court. He has stated that the victim was taken to the local hospital and thereafter referred to the district hospital for his treatment where he was admitted for

15/16 days. Thereafter, the victim had been referred to Kolkata hospital where he was admitted and thereafter he died. He had said that, the victim and his mother protested against the selling of country liquor by the appellants and as such the appellants assaulted the victim and PW 1.

17. The daughter-in-law of PW 1 had deposed as PW 3. She had stated that, she went out for a job and after returning to her house she saw both the appellants assaulting the victim. She had seen the appellant No. 1 to give a blow on the abdomen of the victim with his leg as a result of which the victim fell down on the ground. The victim had protested against the selling of country liquor by the appellants and as such the appellants assaulted the victim. She had identified the appellants in Court. In cross examination also, she had stated that she saw the appellant No. 1 to give a blow on the abdomen of the victim with his leg.

18. An acquaintance of the appellants and the victim had deposed as PW 4. He has stated that, he went out for a job and on returning, heard from the local people that appellant No. 1 assaulted the victim on his abdomen with his leg.

19. The sister of the victim had deposed as PW 5. She had heard from the local people that the appellants had assaulted the victim as a result of which he died.

20. The scribe of the written complaint had deposed as PW 6. He had tendered the written complaint which was marked as Exhibit 1 and his signature as Exhibit 1/1.

21. The sub- inspector of police who had conducted the inquest over the dead body of the victim had deposed as PW 7. He had tendered the inquest report which was marked as Exhibit 2. He had stated that the dead body was sent to the NRS Hospital for post-mortem examination.

22. The police personnel who had filled up the formal First Information Report had deposed as PW 8. He had tendered the formal First Information Report which was marked as Exhibit 8.

23. A doctor of the NRS Hospital had deposed as PW 9. He had stated that, the victim was admitted on November 12, 2013 and expired on November 14, 2013. The victim was in shock having abdominal injury operated at the district medical College and Hospital due to blunt trauma over abdomen. He had tendered the injury report which was marked as Exhibit 4. The death certificate issued by the

medical superintendent of the hospital had been tendered in evidence and marked as Exhibit 5.

24. The doctor who had attended to the victim at the rural hospital on October 21, 2013 deposed as PW 10. He had stated that, on October 21, 2013, the victim came to the rural hospital. He had described the injuries found on the victim. He had stated that the kind of injury found on the victim may occur if anybody is hit by a piece of wood and punched. He had tendered the injury report of the victim which was marked as Exhibit 6.

25. A doctor of the district hospital had deposed as PW 11. He had stated that on October 21, 2013, the victim was admitted at the district hospital after being referred from the rural hospital. On October 23, 2013, the victim had abdominal operation. On November 12, 2013 the victim had been discharged on referral discharge to any state medical College, Kolkata. He had tendered the bed head ticket of the victim along with the discharge certificate which were marked as Exhibit 7.

26. The autopsy surgeon who had conducted the post-mortem on the dead body of the victim deposed as PW 12. He had opined that the cause of death of the victim was

septicemia as a result of effects of blunt trauma of the abdomen. He had tendered the post-mortem report which was marked as Exhibit 8.

27. The investigating officer had deposed as PW 13. He had narrated about the course of investigations. He had tendered the rough sketch map along with index of the place of occurrence which was marked as Exhibit 9. He had submitted the charge sheet against the appellants.

28. On completion of the evidence of the prosecution, the appellants had been examined under Section 313 of the Criminal Procedure Code, where they claimed that they were innocent and falsely implicated. They had declined to adduce any defence witness.

29. Prosecution through the evidence of PW 1, 2, and 3 has been able to establish that, the appellants were involved in an incident of assault on the victim and PW 1 on October 21, 2013 being in front of the house of PW 1 at about 3 PM in the evening. Exhibit 9 being the rough sketch map of the place of occurrence has established that the incident of assault spoken of by the eye witnesses were in front of the house of the PW 1 and the victim. PWs 1, 2 and 3 had witnessed the incident of assault. PW 3 had categorically stated that,

appellant No. 1 had kicked the victim in the abdomen as a result of which the victim had fallen down.

30. Victim had suffered injuries during the assault on him and PW 1, by the appellants. Victim had to be removed to the rural hospital. The doctor attending the victim at the rural hospital on October 21, 2013 had stated that he found injuries on the victim and that such kind of injuries may occur if anybody was hit by a piece of wood and punched. Victim had been referred to the district hospital on October 21, 2013 itself.

31. Victim had undergone abdominal operation on October 23, 2013 at the district hospital. Victim had been referred to the state medical College Kolkata on November 12, 2013. Victim had expired on November 14, 2013.

32. PW 12, the autopsy surgeon who had conducted the post-mortem on the dead body of the victim, opined during his testimony that the cause of death was septicemia as a result of effects of blunt trauma of abdomen. The defence had failed to dislodge this opinion of the doctor during cross examination. The defence had suggested that the injury may have occurred if a person was a habitual drinker which was denied by PW 12. PW 12 had also stated that it was very

unlikely that such type of injuries will occur if any person fell down on a hard substance.

33. The learned trial judge had acquitted the appellants of the charge of house trespass on the ground that the prosecution witnesses stated in their deposition that the incident of assault took place in front of the house of the victim and not inside the house. No appeal against such portion of the finding of the learned trial judge has been preferred by the State. Exhibit 9 has established that the place of occurrence was in front of the house of PW 1. The view of the learned Trial Judge in this regard being plausible no interference with regard thereto is called for.

34. The appellants had been found guilty of the charge under Section 326 of the Indian Penal Code, 1860. The victim had been assaulted by the appellants on October 21, 2013 by reason of which, he was required to be hospitalised initially at the rural hospital and thereafter, referred to the district hospital and onward to the state Medical College at Kolkata. The victim had been hospitalized between October 21, 2013 i.e, the date of the assault till his death on November 14, 2013. The victim had died due to septicemia as a result of the effects of blunt trauma of abdomen.

35. Virsa Singh (supra) has elucidated on the 3rd clause of Section 300 of the Indian Penal Code, 1860. It has held as follows: –

“14. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 “thirdly”.

15. First, it must establish, quite objectively, that a bodily injury is present.

16. Secondly, the nature of the injury must be proved; These are purely objective investigations.

17. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

18. Once these three elements are proved to be present, the enquiry proceeds further and.

19. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

20. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 “thirdly”. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real

distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.”

36. In ***Virsa Singh (supra)***, the accused had been convicted by the trial Court under Section 302 of the Indian Penal Code, 1860. His conviction had been upheld by the High Court and by the Supreme Court. In the facts of that case, the accused had thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and 3 coils of the intestines came out of the wound along with digested food.

37. ***Veeran (supra)*** has noted ***Virsa (supra)*** and other judgements of the Supreme Court. It has observed that, even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing

death, the offence would be murder. In the facts of that case, the post-mortem report of the deceased had shown that the deceased sustained. Eight injuries out of which 4 were incised wounds and that one of the injuries was sufficient to cause death. The Court did not find any premeditation on the part of the accused to commit the crime. It had occurred all of a sudden and at the spur of the moment. On the finding that the death caused by the accused was not premeditated and the injuries were not sufficient in the ordinary course of nature to have caused death, the accused was held guilty of commission of offences under Section 304 part I of the Indian Penal Code, 1860 and awarded the sentence of imprisonment already undergone.

38. In *Kedar Prasad and others (supra)*, the deceased had died on account of severe head injury causing multiple fracture of skull besides extradural hemorrhage. In the facts of that case, there was a dying declaration of the deceased attributing specific roles to the accused. The fatal injury had been attributed to one of the accused alone and his conviction under Section 304 part I was confirmed.

39. In the facts of the present case, the appellants have been held guilty under Section 304 part I of the Indian Penal

Code, 1860 by the learned trial judge and was awarded a punishment of rigorous imprisonment for 10 years along with fine. We have found no ground to disagree with the learned trial judge so far as the conviction of the appellants under Section 304 part I of the Indian Penal Code, 1860 is concerned. The appellants had assaulted the victim with punches and wooden piece. A blow received by the victim in the abdomen during such assault had ultimately turned fatal.

40. However, the quantum of sentence awarded needs to be considered in light of the mitigating circumstances that the learned trial judge had noted in the impugned order of sentence itself.

41. The appellants and the victim hail from a tribal community and belong to the lower economic strata. None of the appellants have been shown to be involved in any other police case. The incident had developed out of an altercation between the appellants on one part and the victim and PW 1 on the other. The victim had protested against the appellants selling country liquor upon which the appellants had abused the victim and PW 1. Thereafter, the incident of assault had developed. The learned trial judge had noted that there was paucity of education and sufficient facility to the community

to which the appellants and the victim belonged. The learned trial judge had recorded that he was showing leniency by awarding a sentence of rigorous imprisonment of 10 years to the appellants.

42. We are in agreement with the learned trial judge that the appellants should be shown leniency in view of the mitigating circumstances in favour of the appellants particularly the economic and social strata to which they belong. However, we are unable to agree with the quantum of sentences that the learned trial judge had awarded to the appellants as we find that premeditation to commit the crimes was absent.

43. Section 304 of the Indian Penal Code, 1860 has a bandwidth of awarding a sentence up to 10 years of either description or life imprisonment. In the facts and circumstances of the present case, the victim had died due to a blow he received on his abdomen in an incident of assault. Weapon of assault could not be recovered during the investigations. The first doctor who had attended to the victim at the rural hospital stated that the injuries were due to wooden stick and punches. No material had been produced at the trial to dislodge such opinion of the Doctor at the rural

hospital treating the victim. The victim had survived for over a month. The victim had been treated at the rural hospital, the district hospital and state medical College at Kolkata.

44. In such circumstances, we deem it appropriate to reduce the sentence awarded to the appellants under Section 304 part I and Section 326 of the Indian Penal Code, 1860 to the period served.

45. By an order May 6, 2022 the impugned order of sentence had been suspended. They are directed to be set at liberty forthwith, if not required in any other case. They shall, however, furnish a bail bond to the satisfaction of the Trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.

46. CRA (DB) 58 of 2022 is disposed of accordingly.

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

48. Urgent Photostat certified copy of this judgement in order be made available to the parties expeditiously on compliance of the formalities.

[DEBANGSU BASAK, J.]

49. I agree.

[MD. SHABBAR RASHIDI, J]