

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

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.A No. 204 of 2011

**Nitu Das @ Arindam Das
Vs.**

The State of West Bengal

Amicus curiae

: Ms. Sibangi Chattopadhyay.

For the State

: Mr. Pravash Bhattacharyya,
: Mr. Mirza Firoj Ahmed Begg.

Hearing concluded on: 16/02/2023

Judgment on: 19/07/2023

Rai Chattopadhyay, J.

1. The appellant is the sole convicted person, from amongst the four accused persons, in Sessions Trial No. 3(1)/2008, in the Court of Additional Sessions Judge, Fast Track, 3rd Court at Malda. The appellant has been convicted for an offence punishable under Section 304-II IPC and Section 324 IPC. He has been awarded sentence to suffer rigorous imprisonment for six years and also for payment of fine Rs. 2,000/- in default of which he has to suffer rigorous imprisonment for a further period of two months, for commission of offence under Section 304-II of the IPC. Simultaneously, the Court has awarded him sentence to suffer rigorous imprisonment for six months and Rs. 1,000/- as fine for the offence under Section 324 IPC, in default of which he has to suffer a further period of rigorous imprisonment for one month.

2. The appellant, in this appeal has challenged the legality and propriety of the said judgment of the trial Court and the order of conviction dated March 18, 2011 and March 22, 2011 respectively.
3. In spite of the mater being a fairly old one, i.e, pertaining to the year 2011 and the appellant having been provided with sufficient opportunity to represent in this case, he has not been represented. Under such circumstances the Court appointed *Ld. Amicus Curiae* to assist to dispose of this appeal. State is represented through Mr. Pravash Bhattacharyya, *ld. Advocate*.
4. The case against the appellant and other accused persons germane with filing of the FIR on July 16, 2006, in English Bazar Police Station at Malda. The informant was one Menoka Gupta of Maheshpur, Ghoshpara village. According to the FIR, at about 8:30 a.m on the same date, that is, July 16, 2006, the younger son of the informant namely Arijit Gupta (Rana) was assaulted by all the accused persons, on the road in front of the house of the said accused persons. Allegedly the appellant, with an intention of murdering the victim hurled a fatal blow on the head of the said victim, with a sharp cut weapon called 'Ramda'. Also allegedly the other accused persons apprehended and caught hold of the said victim when the present appellant was executing the assault. It is further stated that upon hearing the victim shouting, the elder son of the informant namely, Sumit Gupta moved out from their house and rushed to the place of occurrence to save his brother. Allegedly at that time the present appellant assaulted him also with the said sharp cut weapon and injured his hand with sharp cut blow. The informant says that at the time of lodging of the FIR, i.e, at 12:25 hours on the same date, both of her sons were undergoing treatments in hospital, the condition of victim Arijit Gupta (Rana) being very serious.

5. The FIR was registered as English Bazar Police Station Case No. 302/06 dated 16.07.2006 under Sections 341/326/34 IPC and investigation was initiated.
6. Subsequently on July 27, 2006 the said victim Arijit Gupta (Rana) died and an offence under Section 304 IPC has been added on August 14, 2006 against the appellant and other accused persons in the case. Charge sheet was submitted on November 30, 2006 under Sections 304/341/326/34 IPC and subsequently trial commenced after framing of charge by the Sessions Judge, on January 13, 2009.
7. Prosecution has examined thirteen witnesses in this trial. They may be categorised as mentioned herein below:-

Sl. No.		Witness nos.
1.	Neighbouring people who have either being declared hostile or declined cross-examination.	P.W 1, P.W 2, P.W 3, P.W 6 and P.W 8
2.	Witnesses supporting prosecution case.	P.W 4, P.W 5, P.W 7 and P.W 11
3.	Scribe of the FIR/neighbour	P.W 9
4.	Investigation Officer	P.W 10
5.	Doctors	P.W 12 & P.W 13

8. So far as occasion of death of the victim as a result of the injury suffered over his head is concerned, that has been proved through the ocular as well as documentary evidence produced during trial. For this one may

resort to the ocular evidence of P.W 12, who is a medical officer on the particular date at Malda District Hospital. He examined and treated the victim (now deceased), on July 16, 2006, his findings as regards the patient may be noted down as follows:-

“On examination of the aforesaid patient I found – that there was a history of assault at Maheshpur and on examination I found that patient was conscious, one sharp cut injury over scalp measuring by 2 inches/1 inches/ ¼ inches bleeding actively, C.T. scan was done and which indicates that there was left parietal lobe intra perial haemorrhage 32 ml. approx, left parietal bone scalp fracture, intra cranial detach boney fragments.

In my opinion that the injury no.1 and 2 is simple in nature and injury no.3 is greivous in nature. I also referred the case for neoro surgery department in any teaching institution”

9. The witness has proved the injury report being prepared and signed by him, which were marked as exhibit 4 and 4/1.
10. According to P.W 13 who is the autopsy surgeon. The following were found:-

- “1. All the scalp tissue was twist;*
- 2. Colour of bruish was brownish red*
- 3. There was fracture at the parietal bone of scalp in an area of 2 inch x 2 inches*
- 4. At the right wrist there of bruish 1 inch x ½ inch reddish brown in colour.*

All the injuries show evidence of vital reaction. Moreover in brain I found sodoal/haematoma 3 inches x 2 inches.

In my opinion death was due to the effect of head injury, ante mortem and homicidal in nature.”

- 11.** The witness has indentified and proved the post-mortem report being prepared and signed by him, which were marked as exhibit 6 and 6/1. The other valuable evidence of P.W 13 is his assertion that the injuries as marked by him during autopsy were sufficient for causing death of a person, in ordinary course.
- 12.** From the cross-examination of P.W 12 and P.W 13, there is virtually no challenge being found to have been advanced regarding veracity of the substantive evidence of these witnesses. Nor any challenge has been put forth, so far as the truthfulness of the documents these two witnesses have proved in the trial. Accordingly victim Arijit Gupta's death due to the head injury, has been proved in this trial beyond scope of any doubt.
- 13.** Similar would be the finding of the Court regarding injury suffered by the other victim, namely, Sumit Gupta regarding whom P.W 12 has found as follows :-

"1. Patient was found conscious and one cut injury over the ventral aspect of left hand measuring 1 inch x ½ inch x ½ inch. There was bleeding.

In my opinion the injury was in simple in nature and may caused by sharp weapon and it is also recent in origin."

- 14.** In his cross-examination regarding victim Sumit Gupta and his injury, there is virtually no challenge.
- 15.** Upon proof of the fact regarding sustaining fatal injuries by both the victims and one having died due to the said injury, it is now required that necessary scrutiny as regards the evidence may be done to see if the prosecution have been able to bring home the charges against the present appellant regarding his involvement in causing the culpable act as above.

16. In this regard attention may first be drawn to the evidence of P.W 11 who is the other injured person, i.e, brother of the victim (now deceased), who has also suffered injury by himself. It is pertinent to mention here that the investigating authority has neither interrogated this witness and recorded his statement under Section 161 (1) Cr.P.C, nor has cited him as a charge sheeted witness. In the facts and circumstances of the present case this appears to be a blatant and gross oversight by the police authority, as much as to the verge of intentional inaction. As a consequence the trial Court had to espouse its power under Section 311 of the Cr.P.C and summon the said witness/victim to be present in Court as a prosecution witness, vide order dated May 29, 2009, by invoking its power as aforestated. As a matter of fact P.W 11 is the sole eye witness of the entire incident. From his evidence the following points emerged:-

- Over an issue of theft of ornament of his daughter, his family and the family of the present appellant were involved in quarrel.
- Dispute occurred on June 15, 2006.
- On the following morning, i.e, in the morning of June 16, 2006, that continued. He came out of his house and saw man handling of his brother Arijit Gupta by all the accused persons.
- He witnessed the present appellant to have brought out one 'hasua' from his house and hurling a fatal blow over the head of the victim Arijit Gupta with the said 'hasua'.
- As he run to safeguard his brother he was also assaulted by a blow of 'hasua', by the present appellant, which injured his left hand, precisely palm of the left hand.
- His injury was treated by eight stitches on his left palm at Malda Sadar Hospital.

- P.W 11 has identified all the accused persons in Court.

17. His cross-examination is as follows:-

“I was not cited as prosecution witness in the charge sheet. Police did not pen down my statement u/s 161 Cr.P.C.

I am deposing for the first time before this Court.

The incident took place being the consequence of both family quarrel.

It is not a fact that accused Nitu did not give blow of hasua on the head of my brother nor further blow of hasua to me and as a result of which I sustained injury on the left hand palm of mine.

It is not a fact that I was not present at the time of incident in question.”

18. So far as the other witnesses who have supported prosecution case, i.e, P.W 4 and P.W 5 are concerned, they have duly corroborated the substantive evidence given by P.W 11 as above. P.W 4 is the de facto complainant whose evidence has also been duly corroborated, not only with that of P.W 11 and P.W 5 but also with the FIR, i.e, exhibit 1, in the trial. It is a fact that neither P.W 4, P.W 5 and P.W 7 are the eye witnesses. But all are post occurrence witnesses who have personally witnessed the scene of occurrence immediately after the incident. Both P.W 4 and P.W 5, i.e, the mother and sister-in-law of the victim (now deceased) were inside the house who rushed out consequent to the bustle on road, only to witness fatal bleeding injuries having been executed to the victims.

19. The scribe has proved the FIR and so far as its veracity is concerned there is no challenge from the defence.

20. The defence has tried to bring on record case of previous animosity between the parties over certain familial matter. However this, in this

trial has not been able to question the credibility of evidence on record which would otherwise show that the charges against the present appellant have been proved beyond scope of any reasonable doubt.

- 21.** While indicating all these points as discussed above, *Id. Amicus Curiae* has also pointed out to certain apparent infirmities in this trial. Like, the victim who died after some days of the fatal incident, was not interrogated by police to collect his statement. Secondly, that the police has not seized any blood stained cloth or controlled earth, during investigation. It has been pointed out that P.W 11 who is only eye witness of the case was deposing before the trial Court only for the first time and neither his statement was recorded under Section 161 Cr.P.C, nor he was cited as a witness in the charge sheet in this case.
- 22.** Thus, *Id. Amicus Curiae* has assisted this Court in assessing the pros and cons of the evidence on record in the trial, in a very appropriate and able manner, which is noted.
- 23.** The state represented by Mr. Bhattacharyya, has however supported prosecution evidence and the judgment of this trial Court. It has been submitted that the evidence on record are qualitatively sufficient to prove the guilt of the offender beyond scope of any reasonable doubt. Accordingly the trial Court has proceeded in the impugned judgment only in accordance with law and in proper appreciation of the evidence. It has been submitted that there is no infirmity or illegality as regards the finding of the trial Court, so far as the present appellant is concerned and it has been urged that there may be no interference by this Court to the judgment and sentence of the trial Court in this case.
- 24.** In this trial, on the basis of the evidence on record both oral, documentary as well as material, the prosecution, if at all, has been able to prove the offence as alleged to have been committed by the present

appellant, to the standard of beyond scope of all reasonable doubt, no cause of action for the appellant would survive. In doing so the prosecution has relied upon evidence of P.W 4, P.W 5, P.W 7 and P.W 11. Amongst them P.W 11 is the eye witness of the alleged occurrence. Regarding him the only point available to the defence is that the witness was deposing in the Court for the first time and therefore his deposition cannot be taken into consideration on the ground of probable concoction. This point as regards P.W 11 is however refutable.

25. P.W 11 was summoned to the Court as a material witness, by the Court, suo motu, in exercise of power under Section 311 Cr.P.C. Fairness is the essence of trial in a Court of law and fair trial entails the interests of the accused, the victim and the society at large. On consideration of this aspect, the legislature, according to its own wisdom, has promulgated provisions under Section 311 Cr.P.C to empower the Court in an appropriate case to summon material witness for the ends of justice and fair trial. As a matter of fact in this trial the police has not recorded statement of this witness under Section 161 Cr.P.C and also has not made him to show as a witness in the charge sheet. Under such circumstances and on the basis of the evidence already on record, the trial Court found it necessary for proper adjudication to summon this witness and there is no flaw in the same. It is pertinent to note that so far as the trial Court exercising power under Section 311 Cr.P.C is concerned, there is no objection to the same. This naturally leads to the consequence that P.W 11 would be examined in Court for the first time without being previously making statement before the police or being named in FIR. This would not be a cogent and sufficient ground to throw his deposition out of the purview of consideration in so far as it is comprehensible and is found reliable. According to P.W 4, P.W 5, P.W 7, P.W 11, after hearing his brother shouting, P.W 11, rushed out of the

house to reach to the spot to save his brother from the attack. This fact is well established from the evidence of all the four witnesses supporting prosecution's case. On careful perusal of the cross-examination of the said witnesses respectively, there can be found no serious challenge as to the said fact. Accordingly it can be conclusively held that the fact as above has been proved in this trial through evidence of the witnesses as mentioned above.

26. What P.W 11 has deposed in Court has been jotted down above. So far as the involvement of the present appellant in executing fatal blow either to the victim (now deceased) or to the witness himself, that has been put on record sufficiently by him. It is discussed earlier that death of the victim due to injury suffered by a sharp cut weapon has already been proved by the doctors. In such circumstances there would be no impediment in accepting the assertion made by P.W 11, that the appellant was the person involved in the offence as alleged. P.W 4, P.W 5 and P.W 7 are the post occurrence witnesses who were not there at the scene of occurrence right at the point of assault but had immediately reached there to find both the victims in a pool of blood. This would lead their evidence, to be cogent and reliable, more so when the same is duly corroborated with that of the eye witness/P.W 11. Their evidences have been tried to be nullified by way of bringing them to answer the questions regarding their old animosity with the appellant and others, in their cross-examinations. However no such circumstance is available to actually denude the prosecution from the benefit of being supported by consistent, coherent and cogent evidence on record.

27. Thus, the incontrovertible symphony, that emanates from the evidence of P.W 4, P.W 5, P.W 7, P.W 11, P.W 12 and P.W 13 suggesting towards appellant's involvement in the alleged offence cannot be brushed aside. On the discussion as above this Court is of the opinion that in this trial,

the prosecution has been successfully able to bring home the charges against the present appellant, for which he is to be convicted and sentenced.

- 28.** All these aspects have been elaborately and categorically discussed by the trial Court in its judgment as mentioned above. Therefore there would not be any cogent ground to interfere with the same. In the premises, this appeal merits no success.
- 29.** C.R.A 204 of 2011 is dismissed. The order of conviction and sentence passed by the trial Court in Sessions Trial No. 3(1)/2008, in the Court of Additional Sessions Judge, Fast Track, 3rd Court at Malda, vide judgment and order of conviction dated March 18, 2011 and March 22, 2011 respectively, is upheld. Let a copy of this order be immediately sent to the trial Court for implementation of the sentence.
- 30.** Before parting, the Court appreciates the able assistance put in by the Ld. Amicus Curie in this case. Let the High Court Legal Services Committee take necessary steps to pay fees to the learned Amicus Curiae in accordance with the scale applicable to “Category-A” lawyer in its panel. The same may be paid within a period of one month from the date. A copy of this order be immediately forwarded to the Secretary, High Court Legal Services Committee, for doing the needful.
- 31.** Urgent photostat certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

RAI
CHATTOP
ADHYAY

Digitally signed
by RAI
CHATTOPADHYAY
Date: 2023.07.19
10:08:16 +05'30'

(Rai Chattopadhyay,J.)