

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 640 of 2005

Latif Ansary @ Latib Ansary

-Vs-

The State

Amicus Curiae : Mr. Arnab Chatterjee

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 24.03.2023, 07.08.2023.

Judgment on : 27.09.2023.

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order of conviction dated 19.05.2004 & 20.05.2004 passed by Learned Additional Sessions Judge, Fast Track Court No. 2, Purulia in Sessions Trial No. 4A of 2003 arising out of Sessions Case No. 45 of 1997 convicting the appellant under Section 326 of the Indian Penal Code and sentencing the appellant to suffer rigorous imprisonment for five years and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for six months more for committing the offence punishable under Section 326 of the Indian Penal Code. The period of detention of the appellant already undergone during pendency of the case

since inception till date of delivery of the judgment be set off under Section 428 Cr.P.C.

2. The prosecution case is that on 29.10.1992 at about 8 a.m. altercation took place in front of the House of Tufani Ansari between Aswini Ansari, since deceased and one Manju Ansari being PW-2 regarding shifting of earth of a pond. Appellant/Latif @ Latib Ansary was standing near to the place of the incident. At that time the victim Mukshed Ansari @ Mokshed Ansary appears there at the spot and intervened in stopping the quarreling/altercation. Then it was alleged that Aswini Ansari, since deceased instructed the appellant to shoot Mukshed and accordingly the appellant took out one pipe-gun and fired aiming Mukshed and made him sustain bullet injury on his left thigh with profuse bleeding. The appellant allegedly fled the spot, Mukshed was taken to Purulia Sadar Hospital wherefrom he was transferred to Bankura Sammilani M.C.H. He was treated there as indoor patient upto 27.11.1992 thereafter he was admitted in a Nursing Home. Ultimately the victim Mukshed died on 22.12.1992.
3. A written information treated as F.I.R. was filed in Purulia Police Station by one Md. Ainul Ansari @ Ansary on 29.10.1992 at 9.45 a.m., with regard to the alleged occurrence. A case was started in Purulia P.S. against the two accused persons namely the appellant and Aswini Ansari, since deceased under Sections 307/109 of the Indian Penal Code and under Sections 25/27 of the Arms Act.
4. On receiving the charge-sheet Learned S.D.J.M, Purulia took cognizance of the offences punishable under Sections 302/109 of the Indian Penal Code.

Copy was supplied to accused under Section 207 Cr.P.C. and thereafter the case was committed under Section 207 Cr.P.C. During pendency of the case accused Aswini Ansari died and the case against him has been dropped as abated. In the Court of Learned Additional Sessions Judge, Purulia charge under Section 302 of I.P.C. was only framed against the appellant/Latif @ Latib Ansary and the said charge was read over and explained to the appellant who pleaded not guilty and claimed to be tried.

5. The appellant was exonerated from the charge under Section 302 of Indian Penal Code but was convicted under Section 326 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000/- with the setting of his pre-trial detention period.

6. Learned Advocate for the appellant submitted that:-

- i. The order of conviction passed by the Learned Judge under Section 326 of the I.P.C. was wholly based on surmise and conjectures without any evidentiary value.
- ii. The mere fact that only the accused fired from his gun at the instigation of one Aswini Ansari, since deceased and the accused was charged for offence under Section 326 of the I.P.C. This incident will not ipso facto warrant a conclusion that the conviction of the appellant for that offence is sustainable in law.
- iii. The order of conviction passed by the Learned Judge is completely relied upon the oral evidences of PW-1, PW-2, PW-3 and PW-4 who are the interested persons and interlinked with one another to give evidence in identically consorted manner even in identical language

to give rise to the strong suspicion of having given concocted evidence, on which the conviction is by far illegal and irrational.

- iv. The order of conviction passed by the Learned Judge is in infirmity as it was allegedly stated that the appellant shot the victim with a gun. But to that effect no seizure which would incriminate the appellant, was made by the prosecution. Hence the offence of voluntarily causing grievous hurt was not at all proved on evidence beyond any reasonable doubt.
- v. The prosecution could neither recover any fire arms from the possession of the appellant, as it was established from the evidence itself, nor the victim Mukshed Ansari was examined by the Investigating Officer during his lifetime, which was not less than 54 days from the day of the alleged offence. Hence the order of conviction passed by the Learned Additional Sessions Judge has been seriously deficient in material evidence to justify the sentence.
- vi. The order of conviction was passed by the Learned Court, having left a serious flaw of the prosecution unnoticed, which was the most important testimony of Mukshed Ansari who attended the police station at the time of lodging F.I.R. and who was alive for 54/55 days after the occurrence of alleged incident, was not at all examined by the Investigating Officer as to the alleged shooting incident. In absence of his evidence, offence cannot be proved against the appellant, beyond any reasoned doubt.

- vii. The implicity of the appellant has never been proved beyond any reasonable doubt in the alleged offence under Section 326 of the Indian Penal Code from the evidences of the PW-1 to PW-5 because the basic questions of "*mens rea*" of committing offence under Section 326 of the Indian Penal Code has not been proved against the appellant.
- viii. The order of conviction was passed without considering the impeachability of the evidence of PW-1 to PW-5 because they had been interested parties by virtue of being closed relation of the victim Mukshed Ansari, which invariably had rendered the evidence intrinsically unreliable and by far doubtful and motivated to justify the conviction under Section 326 of the Indian Penal Code.
- ix. In passing order of conviction thereby questions of the appellant's presence in the P.O. was never established on evidence save and except the oral evidence of the PW-1 to PW-5 being interested witnesses.
- x. In delivering the judgment and order of by the Learned Judge, as of the evidence of the prosecution witness left a missing link as to the presence and involvement of the appellant in the alleged offence which indicates there is no evidence to show that the appellant had given the fatal blow, which might cause grievous hurt.
- xi. The order passed by the Learned Additional Sessions Judge is otherwise bad in law and thus same is liable to be dismissed.

7. The Learned Advocate for the State submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses supported by the medical evidence and the appeal shall be dismissed.

8. A circumspection of the prosecution evidence reveals that:-

- i. PW-1/Ainul Ansary @ Ansari stated in his deposition that he witnessed an altercation regarding the earth of a doba between Majnu Ansary, PW-2 and Aswini Ansary on 29.10.92 at 8am. This incident occurred “on our village path in between house of Majnu Ansary which is towards north of the path and the house of Aswini Ansary which is towards south of that path.”

PW-1 observed that the appellant was standing at a close range. He further stated that when one Mukshed Ansari @ Mokshed Ansary went to intervene and stop the said altercation, then Aswini Ansary instructed the appellant to “shooting down Mokshed”. PW-1 witnessed that the appellant drew a concealed fire-arm and shot at Mukshed Ansari @ Mokshed Ansary with the said weapon. The victim sustained a gunshot wound to his left thigh, causing profuse bleeding, and he fell to the ground. Both the appellant and Aswini Ansary fled the scene. PW-1 and other witnesses refrained from apprehending the appellant due to the presence of the weapon. The victim was transported to Purulia (M) P.S. via rickshaw at 9:45 am. PW-1 narrated this incident to the O.C. Ramgopal Mondal, PW-12. Subsequently, the complainant lodged an FIR marked as Ext. 1.

PW-1 testified that the injured victim was then taken to the hospital. Upon examination, the doctor determined that the bullet needed to be extracted from the wound. Given the seriousness of the injury, the victim was admitted to Bankura Sanmilani Medical College and Hospital by PW-5 and Ramjan Ansary, where he remained hospitalized for one month. He was later transferred to City Nursing Home on the advice of doctors, where he stayed for 25 to 26 days. Thereafter, the victim succumbed to his injury.

Initially, there were two accused persons, namely, the appellant, Latif Ansary, and Aswini Ansary. However, Aswini Ansary is no longer alive.

- ii. PW-1 in his cross-examination stated that PW-1 stated that the distance between village Bandhgarh and Purulia (M) P.S. was 11/12 km. He identified the victim, Mukshed @ Mokshed, as his uncle. He described the village path running east to west, with approximately 30-32 houses on both sides. The disputed doba was located to the south of the village path, and on the opposite side of the path, the houses of Tufani Ansary and Piyali Ansary were situated. PW-1's house was located to the west of those houses. The appellant's house was situated to the south of the village path, approximately 400 yards away from the disputed doba.

The house of the victim was west of PW-1's house, and further west was the house of PW-2. PW-2 had another house separated by the village path from the disputed doba. PW-1 stated that PW-2's house,

near the victim's house, was more than 100 yards away from the disputed doba.

PW-1 recounted that when he came out of his house at 8 am, he observed 7/8 individuals gathered near the location of an altercation between Aswini Ansary and PW-2. He witnessed the altercation after leaving his house. The victim was already present at the place of occurrence before PW-1 arrived. Upon leaving his house, PW-1 noticed that the victim was attempting to intervene and stop the altercation. During this time, Aswini Ansary instructed the appellant to shoot the victim. At that moment, Aswini Ansary, PW-2, the victim, and 7/8 others were present at the place of occurrence.

The victim sustained a gunshot injury while facing west, and he was wearing a lungi at the time. He fell to the ground at the same location and received the injury from the front. Due to the sound of the gunshot, the villagers did not immediately rush to the scene out of fear. Except for PW-1 and the aforementioned 7/8 individuals, no one else reached the spot while the victim lay injured on the road. The victim was shot with a firearm from a distance of 15/16 cubits.

The witness also mentioned several other houses along the village path, including those of Karim Ansary, Hajrat Ansary, Suleman Ansary, and Tarani Mahato, with Tarani Mahato's house situated near the disputed doba.

Regarding the transportation of the victim, PW-1 stated that Chhutu Bouri was the rickshaw puller who carried the victim to the police

station, having been called from Charra village, which was approximately 2 to 2 and a half km away from their village. Kalim Ansary, Ramjan Ansar, Aftar Ansary, PW-2, and PW-1 accompanied the victim to the police station. PW-1 noted that he was the first to inform the Officer-in-Charge about the incident.

He further mentioned writing Ext.-1 at the police station and clarified that he did not accompany the victim to Bankura Hospital on the day of admission. The police visited their village for investigation on the day of the incident. Although the witness went to Bankura Medical College and Hospital and City Nursing Home, he could not recall the exact dates. Subsequently, he did not update the O.C. or the Investigating Officer (I.O.) about the victim's physical condition. Lastly, he confirmed seeing the victim's dead body in their village but could not recall the specific date. He also expressed not knowing whether any excavation or other work was taking place at the disputed doba on the date of the alleged incident.

- iii. PW-2/Maznu Ansari @ Majnu Ansary stated in his deposition that he is a resident of Village-Bandhgarh under Purulia (M) P.S., and recounts an incident that occurred approximately 10/11 years ago on a Thursday in the 12th month of Karthik, at around 8 am.

At that time, PW-2 had two houses, with one of them facing a house belonging to Aswini Ansary, separated by a village path. An altercation between PW-2 and Aswini Ansary took place on this village path regarding the filling of a doba with earth.

During the altercation, the victim, who is now deceased, came out of his house and attempted to intervene and stop the quarrel. At this point, the appellant was standing nearby. Aswini Ansary then allegedly instructed the appellant to fire at the victim with a firearm.

Following this instruction, the appellant reportedly removed a small firearm from his waist and shot the victim. Subsequently, both Aswini Ansary and the appellant fled the scene. The victim sustained a gunshot injury to his left thigh, resulting in significant bleeding.

PW-2 and others transported the injured victim to Purulia (M) P.S., where PW-1 documented the incident. PW 2 left the police station, and PW-1 provided a document to them, instructing them to admit the victim to the hospital.

The victim was brought to the hospital and admitted due to the severity of the gunshot wound. Subsequently, doctors at the hospital referred the victim to Bankura Medical College and Hospital for further treatment. Unfortunately, after approximately two months, the victim's dead body was brought back to their village.

- iv. PW-2 in his cross-examination stated that the disputed doba belonged to Aswini Ansary, and PW-2 was leveling the earth on the road next to the doba, beginning their work at around 8 am. There were two paths running alongside the doba, one to the north and another to the east. Aswini Ansary approached PW-2 and initiated an altercation while he was working near their house, which was close to the doba. Several houses intervened between their house and the doba. During the

altercation between Aswini Ansary and PW-2, no neighbors gathered at the scene, and the argument continued for some time. The victim arrived during the altercation between PW-2 and Aswini Ansary, and the shooting incident occurred approximately 1/2 minutes after the victim's arrival. At the time of the shooting, PW-2 was about 2/3 cubits away from the victim, positioned in front of the victim, and Aswini Ansary was also in front of the victim, at a distance of about 5 cubits. Neighbors arrived at the scene after the victim was shot. On the same day as the incident, PW-2 repaired the ridge of the disputed doba, which led to an altercation with Aswini Ansary. PW-2 denies the fact that the victim came to the embankment of the doba during the altercation between them and Aswini Ansary. The I.O. questioned PW - 2 regarding the incident.

- v. PW-3/Kalimuddin Ansary stated in his deposition that the location of the occurrence was a village path, with Aswini Ansary's house on one side and the house of PW-2 on the other side. PW-3's dwelling house was situated nearby. Upon hearing a commotion, PW-3 exited their house and stood at the door. He observed an altercation taking place between PW-2 and Aswini Ansary. The victim, who is PW-3's uncle, arrived at the scene and attempted to mediate between the quarreling parties. During this altercation, Aswini Ansary, in a loud voice, allegedly instructed the appellant to shoot the victim. Following this instruction, the appellant reportedly produced a small firearm from a concealed location on their body and shot the victim in the left thigh,

causing the victim to fall and bleed. Subsequently, both Aswini Ansary and the appellant fled from the scene. PW-3 and others did not pursue them due to fear of the appellant's firearm. The victim was then transported on a rickshaw to Purulia (M) P.S., where PW-1 filed an F.I.R. The police officer provided a document to PW-3 and instructed them to admit the victim to the hospital. Accordingly, the victim was taken to Purulia Sadar Hospital and admitted. Later, the victim was referred to Bankura Medical College and Hospital for further treatment. After approximately 25/26 days of treatment at the said hospital, the victim was transferred to Bankura City Nursing Home. Unfortunately, the victim succumbed to his gunshot injury at the nursing home after a few days.

- vi. In his cross-examination PW-3 deposed that he could not recall the date of the victim's release from Bankura Medical College and Hospital. He was not present during the transfer of the victim from the hospital to the nursing home. The victim's wife and youngest son were present at that time. PW-3's dwelling is located east of the victim's house. During the incident, several neighbors, including Ramjan Ansary, PW-5, PW-2, and PW-1, emerged from their houses upon hearing the commotion. PW-3 also came out of their house and remained near the scene for about an hour. While he was present at the scene for that hour, other individuals, including female residents, also arrived in the vicinity. PW-3 did not witness any altercation between Aswini Ansary and PW-2 near a doba. He did not see the

victim near such a doba either. PW-3 confirmed that he was interrogated by the Investigating Officer (I.O.) in this case.

- vii. PW-4's evidence was corroborated by PW-1, PW-2, PW-3 and PW-5.
- viii. PW-5/Akhtar Ansary stated in his deposition that his deceased father, Mukshed Ansari @ Mokshed Ansary, had been admitted as an indoor patient at Bankura Sanmilani Medical College and Hospital until 27.11.1992. Following this, the victim's treatment continued at Bankura City Nursing Home as an indoor patient until 22.12.1992. Subsequently, the victim succumbed to his injuries on the very same day, between 6:00 to 6:30 pm.

PW 5 further affirmed that the police had prepared an inquest report on 22/12/1992, denoted as Ext. 2/1, which bore his signature. This inquest report was meticulously compiled in the presence of PW 5 and his mother.

- ix. PW-6/Dr. Shambhunath Saraf, who held the position of Resident Medical Officer (R.M.O) at City Nursing Home in Rampur, Bankura, in his deposition could not recall the victim's name. He vaguely recollected a patient who had lodged a complaint regarding a gunshot injury and had been allocated an isolated cabin on the first floor of the City Nursing Home. This patient's admission had been supervised by Dr. S. Sorkhel. PW-6 further recollected that the patient had remained hospitalized for a duration of approximately 15 to 20 days, during which his health had progressively deteriorated. Additionally, a noxious odor had emanated from the patient's room. Ultimately, the

patient eventually succumbed to his injuries. PW 6 was considered hostile.

- x. PW-7/Sakti Prasad Sarkar, who operated a private clinic located in Natunchati, Bankura, on 27/11/1992, identified himself as a Radiologist. He reported that he had conducted an X-ray examination on the left hip of the victim. His findings revealed a fracture situated at the upper end of the left femur, encompassing both the upper end of the left femoral shaft and the trochanter. Notably, the X-ray depicted the presence of a bullet at the site of the fracture. In contrast, the left hip joint displayed no apparent abnormalities.
- xi. In his cross-examination, PW-7 confirmed that he maintains a patient register at his private clinic. However, he could not recollect whether the victim had been accompanied by anyone on the said date. Additionally, PW 7 noted that he routinely issues receipts for payments made by patients in his clinic. Furthermore, PW 7 indicated that the X-ray report did not contain a specific date reference.
- xii. PW-8/Dr. A.K. Das Dan, who held the position of a surgeon at Sadar Hospital in Purulia on 29.10.1992, identified the victim as a "Muslim Male" aged 50 years. PW-8 confirmed that he had issued a discharge cum refer certificate, identified as Ext. 3. Furthermore, PW-8 disclosed that Dr. Amalesh Mandal had conducted an examination of the victim and subsequently endorsed an injury report, which was marked as Ext. 4.

xiii. PW-9/S. J. Chowdhury, who was serving as the O.C. of police at Purulia (M) Police Station on 29/10/1992, affirmed that he had affixed his endorsement and signature on the written complaint, identified as Ext. 1/1. He stated that he had initiated the formal F.I.R. registered under Purulia (M) Police Station Case No. 206/92 and dated 29.10.1992. The charges brought forth in this F.I.R. were under Sections 307/109 of the Indian Penal Code and were read in conjunction with Section 25/27 of the Arms Act. The formal F.I.R. was marked as Ext. 3.

9. PW-1, PW-2, PW-3 and PW-4 are the eyewitnesses to the incident. PW-5 is an interested witness. They corroborated each other's evidence.

10. The medical evidence endorsed the bullet injury to have been fatal which subsequently claimed the life of the victim. The prosecution evidence is irrefutable and trustworthy.

11. In view of the above discussions, the instant criminal appeal is dismissed.

12. I record my appreciation for the able assistance rendered by Mr. Arnab Chatterjee, Learned Advocate, as amicus curiae in disposing of the appeal.

13. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

14. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)