

**IN THE HIGH COURT AT CALCUTTA
(Criminal Appellate Jurisdiction)
Appellate Side**

Present:

The Hon'ble Justice Rai Chattopadhyay

CRA 598 of 2010

Kesto Ghosh & Anr.

Vs.

The State of West Bengal

The Amicus Curiae

: Mr. Aniket Mitra

For the State

: Mr. P.K. Datta,
Id. APP.,
Mr. Pravash Bhattacharyya,
Mr. Santanu Debroy.

Hearing on

: **15.03.2023**

Judgment on

: **05.04.2023**

Rai Chattopadhyay,J.

1. Two appellants have faced trial in Sessions Trial No. 4(6)/2007 in the Court of Additional Sessions Judge, 2nd Court at Kandi, Murshidabad and have been convicted under the provisions of Section 304/34 & Part- I, Part- II of the Indian Penal Code respectively. They were directed to suffer sentence of rigorous imprisonment for seven years and five years respectively, with a further direction to pay fine to the tune of Rs.10000/- and Rs.5000

respectively. In default, the appellants were directed to serve rigorous imprisonment for a further period of one year and six months respectively.

2. The judgment as above was delivered by the Trial Court on 23rd August, 2010. Being aggrieved by and dissatisfied with the said impugned judgment both the appellants/convicts have preferred the present appeal in this Court.
3. At the outset, it may be mentioned that by filing a report dated 13th March, 2023 it has been informed that the appellants have already undergone the period of sentence in incarceration and ultimately were released on 18th August, 2017.
4. Be that as it may, let the appeal be considered on merit.
5. Mr. Mitra, learned Amicus curiae has categorically mentioned about the substantive evidence to be convincing and coherent including that of the eye-witnesses for which it is his opinion that in this case the prosecution case has duly proved the charges against the accused persons/appellants.
6. Mr. Mitra has further emphasized on the corroborating documentary evidence that is post mortem report, which suggests that the cause of death that the victim was due to sufferance of the injuries on his person.
7. Thus, according to Mr. Mitra, there is no scope for this Appeal Court to interfere in any manner with the impugned judgment.

8. The submissions made by Mr. Mitra, learned amicus curiae has been supported by Mr. Bhattacharyya, learned Advocate appearing for the State.
9. Mr. Bhattacharyya, learned Advocate for the State submits that by producing enough and clinching evidence, the prosecution has duly proved the charges against both the appellants.
10. It has also been pointed out that the Trial Court by delivering the judgment has duly considered the evidence and other materials on record. He has prayed for dismissal of the appeal.
11. It appears in this case that the same was started by lodging of FIR by one Bimal Ghosh on 15th June, 1998. The FIR was lodged against four persons namely,
 - i. Nayan Ghosh,
 - ii. Nitya Gopal Ghosh,
 - iii. Kesto Gopal Ghosh,
 - iv. Swetbarani Ghosh.
12. Allegedly all the FIR named accused persons jointly and collectively assaulted the victim, that is, the father of the defacto complainant with heavy and sharp-cutting weapon. The motive is alleged to be grudge of the accused persons over the victim regarding certain dispute relating to landed property. The defacto complainant further states that due to

assault by the accused persons, his father sustained multiple bleeding injuries on different parts of his body including the vital parts like head.

- 13.** He has further alleged that his mother, elder brother and he himself were also assaulted by the accused persons in the course of their endeavour to rescue their father.
- 14.** It is further stated that at the intervention of the other villagers who ultimately rushed into the place of occurrence, the accused persons were restrained and run away.
- 15.** Upon lodging the FIR as above, Kandi Police Station Case No. 76/1998 dated 15.06.1998 under Section 341/325/326/34 of the Indian Penal Code was registered. Police has conducted investigation and submitted charge-sheet.
- 16.** The trial started with framing of charge on June 6, 2007 under Section 304/34 of the Indian Penal Code against all the accused persons.
- 17.** Prosecution has examined ten witnesses in total in this trial.
- 18.** Amongst them PW 1 is the defacto complainant and one of the eye-witnesses of the alleged offence. He has stated in evidence the facts which he earlier lodged before the police in the FIR. Such evidence of PW 1 is duly corroborated by the two other eye-witnesses that is PW 4 and PW 8. PW 4

is the independent witness that is neighbour of the defacto complainant and the victim. PW 8 is the wife of the victim.

- 19.** After due consideration on the evidence of all the eye-witnesses of the case it is found that the same is amply sufficient and coherent and has duly withstood the cross-examination and remained unshaken in this case.
- 20.** In so far as the alleged offence is concerned, the evidence of the eye-witnesses as above, may be considered to be sufficient to have brought the charges against the appellants home, as the quality of the same appeared to be sacrosanct.
- 21.** Under such circumstances, in view of the provisions under Section 134 of the Indian Evidence Act, the Court would not proceed normally to look into the corroborative evidences though in this case for the ends of justice and fair trial the medical documents and doctor's deposition may be considered to find out if those have corroborated with the evidence of the witnesses as mentioned above.
- 22.** PW 5 is the Doctor who has conducted the autopsy examination of the dead body of the victim. The following is his findings:-

"1) One bruise over back of rt. Arm bluish in colour, 4"/2";

2) One lacerated injury over posterior aspect of rt. Parietal bone, 3"/1/2" bone deep seen after removal of 5 stitches on it;

3) Hemorrhage under scalp, covering frontal, both parietal bones and extending over occipital bone;

4) Fracture of skull present involving both tables of vault of skull, transversely disposed, extending from squamous part of temporal bone on the rt. To lower part of left parietal bone- measuring 9".

5) Profuse hemorrhage covering the surface of frontal, parietal and occipital lobes on both sides.

6) Hemorrhage present in Brain substance in both hemispheres at moiety places- inside Rt. Parietal lobe and also in both frontal and left parietal lobe.

7) Contusion over Rt. Parietal lobe, read in colour, 3"/2" in size.

The cause of death in my opinion is due to extensive intracranial injuries as stated above, resulting from trauma on head which is homicidal and ante-mortem in nature."

23. The findings of the doctor of the autopsy has not really been challenged in this trial. Therefore, there is no scope of any doubt regarding finding of the doctor that the death of the victim occurred due to injuries sustained by him and as described by the doctor in his report. The evidence of the witnesses as above being duly corroborated with that of the doctor as well as the documentary evidence like the post mortem report, there is left no possibility for the prosecution being flawed.

24. Such overwhelming and sufficient substantive evidence of the vital witnesses, been duly corroborated by that of the doctor as well as by the

documentary evidence in the trial, absence of the materials evidence like seized weapon etc. may not jeopardized the prosecution case. The evidence has otherwise been so overwhelming that production of the weapon of offence during trial by the prosecution shall not be considered to be any vital latches on its part to vitiate the trial. On the contrary, all as above which has strengthen the prosecution case in this trial should lead the Court to find guilt of the accused persons beyond all reasonable doubt, in this trial.

- 25.** Profitable would be to once consider the necessary ingredients of offence under Section 304/34 Part I and Part II of the Indian Penal Code respectively for this purpose, the provision is extracted as hereinbelow:-

“304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder shall be punished with 1[imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Section 300 IPC, Exception 1, has described “when culpable homicide is not murder”, that is, :-

“ Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.”

26. Accordingly, the ingredients of offence as regards the above stated provisions of law are found to be sufficiently brought on record by the prosecution in this trial. Hence, there remains no scope of any doubt that the charges against the present appellants have duly been proved in this case by the prosecution. The finding to that effect by the Trial Court is proper and would not warrant any interference thereto by this Appeal Court.

27. Hence, the impugned judgment is legible to be upheld, to the extent, of the finding of the Court regarding guilt of the present appellants as well as their conviction. There is no interference by this Trial Court to the said

judgment and order dated 23th August, 2010 and 25th August, 2010 respectively, to the extent as mentioned above.

28. As regards the question of sentence, the quantum of sentence granted to the appellants by the Trial Court has already been mentioned above. However, the appellants being in custody during pendency of the present appeal, the said period of time has already elapsed the appellants being in custody as under trial prisoners. The report submitted on behalf of the State suggests such a fact which is accepted in absence of any contrary material therefore.

29. Under such circumstances, this Court find it proper to interfere into the impugned judgment regarding the sentencing portion. The same shall be modified to the effect that the appellants shall be sentenced to suffer simple imprisonment for the period already undergone by them in custody as under trial prisoners.

30. Hence, the appeal succeeds in part.

31. CRA 598 of 2010 is allowed in part. The conviction of the appellants as directed by the Trial Court is upheld. However, the sentence as directed by the Trial Court to the appellants is modified to the extent as mentioned above.

32. Other directions if any, in the judgment remain as it is.

- 33.** With these observations, this appeal is disposed of.
- 34.** All pending applications, if any, are consequently disposed of.
- 35.** Finally before parting, this Court extends sincere appreciation for the assistance rendered by the Amicus Curiae, 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 the panel. The same may be paid within a period of one month from the date of this judgment. Let a copy of this judgment be forwarded to the Secretary, High Court Legal Services Committee, for doing as necessary.
- 36.** Certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

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(Rai Chattopadhyay, J.)