

**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**

C.R.A. 294 OF 2020

**Dipankar Ghosh @ Dipu
VS.**

The State of West Bengal

For the Appellant : Mr. Mrityunjay Chatterjee
Mr. Prabir Adhya
Mr. Debapriya Majumder

For the State : Ms. Anasuya Sinha
Mr. Pinak Kumar Mitra

Heard on : February 2, 2023

Judgment on : February 2, 2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated December 18, 2019 and the order of sentence dated December 19, 2019 passed by the learned Additional District and Sessions Judge, 1st Court, Katwa in Sessions Trial No.2/08 arising out of Sessions Case No.51/07.

2. By the impugned judgment of conviction, the learned Trial Judge convicted the appellant under Section 302 of the

Indian Penal Code, 1860 and by the impugned order of sentence dated December 19, 2019, the learned Judge sentenced the appellant to suffer life imprisonment and to pay a fine of Rs.10,000/- in default to suffer simple imprisonment for one year for the offence punishable under Section 302 of the Indian Penal Code, 1860.

3. Learned Advocate appearing for the appellant submits that, the prosecution could not prove the charge against the appellant beyond reasonable doubt. He refers to the narration of events by the prosecution. He submits that, the prosecution claimed that the incident occurred on December 6, 2005 at about 8 PM although the dead body of the victim was lying on the road just in front of the house of the victim for a considerable period of time till at least 7 AM in the next morning.

4. Learned Advocate appearing for the appellant submits that neither prosecution witness no.1 nor prosecution witness no.2 can be said to be eye-witnesses to the alleged incident. He refers to the deposition of both the prosecution witnesses. He submits that, P.W.2 did not say that P.W.1 was present at

the locale when the incident occurred. Neither P.W.1 said that P.W.2 was present at the place of occurrence. Therefore, the veracity of the depositions of such two witnesses are suspect. No reliance should be placed on the oral testimonies of such witnesses.

5. Learned Advocate appearing for the appellant refers to the post-mortem report of the victim. He submits that, post-mortem was not conducted by an autopsy surgeon. He refers to the deposition of the post-mortem doctor, P.W.7. He submits that P.W.7 claimed himself to be a child specialist.

6. Learned Advocate appearing for the appellant submits that the alleged murder weapon was not recovered pursuant to the leading statement made by the appellant. The so-called leading statement was not marked as exhibit at the trial.

7. Learned Advocate appearing for the appellant submits that, no forensic report was produced at the trial to establish the alleged nexus between the appellant and the victim.

8. Learned Advocate appearing for the appellant submits that, the death of the victim was likely to be due to accident. In support of such contention, he relies upon the nature of

injures found in the post-mortem report and the testimony of P.W.7.

9. Learned Advocate appearing for the appellant refers to the recording of the statement made by the appellant under Section 313 of the Code of Criminal Procedure and in particular to the reply to question no.5. He submits that, the examination was done mechanically and, therefore, the appellant lost the statutory right of explaining his conduct. Therefore, the appellant was prejudiced at the trial.

10. Learned Advocate appearing for the State submits that, the prosecution was able to prove the charge as against the appellant beyond reasonable doubt. She refers to the deposition of the prosecution witnesses. She submits that prosecution witness nos.1,2 and 3 are eye-witnesses to the incident. Taking the deposition of these three witnesses together with or even individually, the case of the prosecution stands established beyond reasonable doubt.

11. So far as the post-mortem is concerned, learned Advocate appearing for the State submits that, P.W.7 is a doctor. He performed the post-mortem on the dead body of the victim.

The defence could not elicit anything favourable after cross-examination of such doctor.

12. So far as the contention with regard to the examination under Section 313 of the Code of Criminal Procedure of the appellant is concerned, learned Advocate appearing for the State submits that, all relevant evidences put forward by the prosecution as against the appellant at trial were put across to the appellant. His attention was drawn to such evidences and response of the appellant was sought. The response to question no.5, apparently, is a typographical error. Instead of looking at the response to question no.5 individually only the Court should also take into consideration the entirety of the examination under Section 313 of the Code of Criminal Procedure. She submits that such examination was sufficiently detailed so as to cause no prejudice to the appellant. Answers to several other questions are not being challenged to be incorrectly recorded. One formal error should not vitiate the entire examination.

13. The wife of the victim lodged a police complaint dated December 6, 2005. In such complaint, she stated that around

8.30 in the evening, her husband, the victim herein, was returning from a shop. At that point of time, just before entering his house, the appellant who resides in the locality due to his past acrimony hit the victim on different parts of the body with the sharp weapon which the appellant was carrying in his hand. Hearing the loud sound, she and some members of her family and some other neighbours came outside of their home and saw the appellant was still assaulting her husband with a sharp weapon. She recognized the appellant under the light of her house. Seeing her as well as others, the appellant fled away through the edges of a pond lying west to her home.

14. On the basis of such written complaint, police registered the First Information Report on December 7, 2005 and conducted an investigation therein. Police submitted charge sheet against the appellant.

15. On January 15, 2008, the Court framed charge against the appellant under Section 302 of the Indian Penal Code, 1860. The appellant pleaded not guilty and claimed to be tried. At the trial, the prosecution relied upon seventeen

witnesses and documentary and material evidences to bring the charge against the appellant. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Code of Criminal Procedure where, the appellant claimed to be not guilty and innocent. He declined to adduce any defence evidence.

16. P.W-1 is the wife of the victim. She lodged the police complaint. She stated in her evidence that, on the night of December 06, 2005 at about 8.30 p.m. when the victim was returning from the shop, the appellant being armed with a sharp weapon assaulted him repeatedly. The victim raised alarm shouting 'save me' 'save me'. Hearing his voice, she came out from her house. Her father-in-law also followed her. Under the electric light, she identified the appellant. At that time, she saw that the victim was lying on the ground and the appellant was assaulting the victim with a weapon on the head of the victim. She described the place of occurrence. She stated that, she raised a hue and cry when she saw the appellant assaulting her husband. Neighbouring persons came in. The appellant fled away through the back of pond towards

West of her house. At that time, she saw P.W-2 whose house was towards the North of the place of occurrence.

17. In her deposition, she stated that, on the following morning at about 7 a.m., the police called her to the Police Station. Police held inquest over the dead body of her husband and prepared a report. She identified her signature on the inquest report. She described how the police collected blood sample and seized various articles. She identified the wearing apparel of her husband. She identified the appellant in Court.

18. P.W.-1 was cross-examined at length on behalf of the appellant. In cross-examination, she stated that, she was interrogated by the Investigating Officer after about 2 and ½ months of the incident.

19. P.W.-2 is a relative of the deceased. He stated that, on December 6, 2005, about 8.30 p.m., the incident took place on the road near his house. At the time of incident, he was returning from the shop. He saw two persons enter the lane between his house and the house of Radha Gobinda Ghosh. He also saw the appellant approaching the victim from behind the victim armed with a large chopping instrument. He saw

the appellant assaulting the victim with such weapon. Witnessing the same, he screened himself between the house and witnessed the scene of assault from a hidden place. He witnessed that the victim took an attempt to catch hold of the appellant and that he could not catch hold the wrapper of the appellant. The appellant caught his wrapper and took it out of the grip of the victim. He stated that, he witnessed the incident under electric light. After the departure of the appellant, he went to the place of occurrence whereupon P.W.1 and her father-in-law came to the spot from the house, shouting the name of the victim. He identified the appellant in Court.

20. P.W. 2 was also cross-examined in great details on behalf of the appellant. In cross-examination, he stated that there was profuse blood at the place of occurrence.

21. P.W-3 is the father of the victim. He stated that, the victim was his eldest son. He identified the appellant in Court. He stated that, the appellant murdered the victim on December 6, 2005 at about 8/8.30 p.m. He corroborated the deposition of P.W.-1. He was cross-examined.

22. P.W.-4 is the constable who was instrumental in seizing articles. He identified his signature on the seizure list.

23. P.W-5 is a police constable who was on duty on February 7, 2005. He brought the wearing apparel from the Katwa hospital and produced the same before the Assistant Sub-Inspector of Police who seized the same. He identified his signature on the seizure list.

24. P.W.-6 is a witness to the seizure of the murder weapon. He identified his signature on the seizure list. He also identified the murder weapon which was marked as material exhibit.

25. The Doctor who conducted the postmortem on the dead body of the victim disposed as P.W.-7. He described the injuries found on the dead body. He opined that the cause of death was the cumulative effect of injuries. He stated that such type of injuries may be caused by the murder weapon being marked Exhibit-3 shown to him at the trial. He stated that, the death was homicidal in nature.

26. In cross-examination, he stated that he was a Child Specialist Doctor working with the Katwa Sub-divisional

hospital and that on the date of performing the postmortem, there were many qualified surgeons available in such hospital. He denied the suggestion that he was not a qualified autopsy surgeon. In response to a question with regard to injuries suffered by the victim being caused by an accident, he stated that such type of injuries are possible in course of work in a saw mill accidentally.

27. P.W.-8 is a senior scientific officer who examined the visera. He tendered his report which was marked as Exhibit-9.

28. The scribe of the first information report deposed as P.W.9. He identified the appellant in Court. He stated that, he wrote the written complaint under the instructions of P.W.

1. After writing the same, he read over the written complaint to P.W. 1 and then P.W. 1 read the written complaint and then P.W.-1 signed the written complaint.

29. P.W.-10 is a post occurrence witness. He saw the appellant running through the embankment of the pond beside the poultry firm. He identified the said person running away as the appellant. He stated that he asked the appellant as to what happened when the appellant pushed him and ran

away. Thereafter, P.W.-10 went towards the house of the victim and found the victim with bleeding injuries lying on the road along with P.W.-1, P.W. 2 and P.W. 3.

30. P.W. 11 witnessed the seizure made on December 7, 2005. He identified the appellant in Court. He identified material exhibit shown to him as those belonging the appellant.

31. P.W.-12 is the shop owner from where, the victim went towards his house after plying cards on the fateful day. He stated that, the victim left his shop after playing cards at about 8.20/8.25 P.M. At about 8.30 P.M., he heard a hue and cry from the house of the victim. He rushed there and witnessed the dead body of the victim with bleeding injuries lying on the road. He saw P.W. 1, P.W.2 and P.W. 3 there. He stated that, during his lifetime, the victim told him that the appellant used to visit the house of Suchitra Ghosh which was not liked by the victim and there was an altercation between the appellant and the victim over such issue. He was cross-examined at great length by the defence.

32. The police Officer who was the part of the team arresting the appellant deposed as P.W. 13. He stated that the appellant was arrested on December 7, 2005. He identified the appellant in Court. He also was a witness to a seizure made.

33. The police official who drew up the formal first information report subsequent to the written complaint from the P.W. 1, deposed as P.W. 14.

34. The police constable who deposited the seized articles in the malkhana deposed as P.W. 15.

35. The second Investigating Officer deposed as P.W.-16. He narrated the course of investigations. P.W.-17 is the first Investigating Officer who recorded one statement under Section 161 of the Criminal Procedure Code.

36. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where, the appellant claimed to be not guilty, innocent and falsely implicated. He declined to adduce any defence witness.

37. The victim died on December 6, 2005. The postmortem of the victim was conducted on December 7, 2005 by P.W. 7. The postmortem report of the victim was marked as Exhibit-8 at the trial.

38. In his oral testimony, P.W.-7 identified seven injuries found on examination of the body of the victim. Such injuries referred to are as follows :-

“1) One incised looking wound over scalp, occipito paraital region left measuring $3\frac{1}{2}$ ” x $1\frac{1}{2}$ ” x $\frac{1}{2}$ ”.

2) *One incised looking wound measuring 8” x 1” into bone deep over right zygonatic arch extending backwards, bisecting ear lobule, neck muscle, like sterno. cledonastyid, big vessels both crotid arteries, jugular veins reaching almost midline in the back cutting through mandeable ramus zygomatic arch.*

3) *Incised looking right arm above elbow media size measuring 3” x 4” x 1”.*

4) *Right fore-arm few inches above wrist with incised looking wound measuring $2\frac{1}{2}$ ” x $\frac{1}{2}$ ” x $\frac{1}{2}$ ”.*

5) *Incised looking wound left ante-cubital-fossa measuring 5” x 2” x 1”.*

6) *Incised looking wound back of the neck right side measuring 1” x $\frac{1}{2}$ ”.*

In all incised looking wounds gaping present margine oedenatus slightly evated.”

39. In his testimony, P.W.-7 stated that, in his opinion, the cumulative effect of the injuries which he found may cause death of a person. In his opinion, the cause of death of the

victim was due to the injuries mentioned by him in Exhibit-8 and that the same were ante-mortem and homicidal in nature. He also stated in his evidence that, the injuries suffered by the victim were through a sharp cutting weapon.

40. P.W. 1, P.W.2 and P.W. 3 saw the appellant assaulting the victim with a sharp cutting weapon. The P.W. 1, P.W.2 and P.W. 3 and other prosecution witnesses who came to the place of occurrence saw the victim lying with bleeding injuries.

41. The postmortem report being Exhibit-8 read with the oral testimony of P.W. 7, establishes beyond reasonable doubt, that the victim was murdered.

42. Appellant sought to doubt the professional capability of P.W. 7 in conducting the postmortem on the dead body and giving a definite opinion with regard to cause of death. Although, P.W.7 stated in cross-examination that he was a Child Specialist Doctor, he denied the suggestion that he was not a qualified autopsy surgeon.

43. P.W. 7 is, no doubt, a Doctor engaged by and working in a Government hospital. We find no reason to disbelieve Exhibit-8 or the testimony of P.W. 7 and his opinion with

regard to the cause of death of the victim as well as his testimony that the injuries found on the victim were inflicted by a sharp cutting weapon.

44. P.W. 1, P.W. 2 and P.W. 3 saw the appellant assaulting the victim. P.W. 1, P.W. 2 and P.W. 3 corroborated each other. It is contended on behalf of the appellant that neither P.W. 1 nor P.W. 2 or P.W. 3 were present at the locale or are eye-witnesses since P.W. 2 stated that he did not saw P.W. 1.

45. With the deepest of respect, the evidence of P.W. 1 and P.W. 2 are not contradictory to each other. P.W. 1 came out of her house immediately on hearing the shout for help from the victim when he was being assaulted by the victim. P.W. 3 accompanied her.

46. Immediately upon P.W.1 coming out of the house along with P.W. 3 they saw the appellant assaulting the victim with a sharp cutting weapon. P.W. 2 was also at the place of occurrence within the eyesight of the situation developing. He stated that, when he saw the appellant to assault the victim from behind and continue to assault the victim with a sharp

cutting weapon, he screened himself behind a house and continued to watch the developing situation.

47. Therefore, neither is there any contradiction between the ocular witnesses in their oral testimony nor is there any incongruity in their testimonies as sought to be contended on behalf of the appellant.

48. A sharp cutting weapon was recovered claiming it to be the murder weapon. The sharp cutting weapon recovered, however, was not on the leading statement made by the appellant. However, there are ocular witnesses implicating the appellant in the incident of assault and murder of the victim. We find no reason to disbelieve any of the oral testimonies of the prosecution witness nos. 1, 2 and 3. Therefore, absence of a statement leading to the recovery of the murder weapon is not fatal to the case of the prosecution, in the facts and circumstances of the present case.

49. The appellant contends that, the dead body of the victim was lying at the place of occurrence for a considerable period of time and, therefore, both the place of occurrence and the incident are suspect.

50. Again with deepest of respect we are unable to subscribe to such contention in the facts and circumstances of the present case. Apparently, the police visited the place of occurrence in the morning of the next day when the inquest was performed. The police also arrested the appellant on the next date of the incident.

51. Attention of the appellant was drawn to every bit of evidence that the prosecution brought against him at the trial, during the examination of the appellant under Section 313 of the Code of Criminal Procedure. He replied to all such queries. In aggregate, 27 questions were put to him. In response to query no. 5, his response was recorded to say that he was guilty. The recording of his answer may or may not be a typographical error. We need not dwell upon the same as that does not change the perspective of the case materially. We are to assess the evidence led by the prosecution and on assessment of which we are in agreement with the finding returned by the learned Trial Judge with regard to the complicity of the appellant in the incident of assault and murder of the victim.

52. Moreover, the appellant in course of the hearing of the appeal, failed to establish that any prejudice was caused to the appellant by the recording of the answer to query no. 5 put in examination under Section 313 of the Code of Criminal Procedure.

53. In view of the discussions above, CRA 294 of 2020 is dismissed.

54. Period of detention already undergone by the appellant be adjusted against the sentences awarded.

55. Trial Court records along with a copy of this judgement and order be sent down at once to the appropriate Court for necessary action.

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

(Debangsu Basak,J.)

57. I Agree.

(Md. Shabbar Rashidi, J.)