

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
Criminal Application
Appellate Side**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 10 of 2023

In the matter of : **Sri Akash Munda and ors.**

For the appellants : Mr. Kalipada Das, Adv.

For the State : Mr. Arjun Chowdhury, Adv.

Heard on : November 28, 2023

Judgement on : December 19, 2023

Md. Shabbar Rashidi, J.:

1. The appeal is directed against a judgment of conviction dated December 22, 2022 and order of

sentence dated December 23, 2022 passed by learned Additional Sessions Judge, Alipurduar in Sessions Trial No. 10 of 2016 arising out of Sessions Case No. 41 of 2016.

2. By the impugned judgment of conviction and order of sentence, the appellants were found guilty of the offences punishable under Section 302/34 of the Indian Penal Code, 1860 and were sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 20,000/- in default to undergo simple imprisonment for a further period of six months.

3. According to the case made out by the prosecution, one Jhaman Kumar lodged a written complaint with Alipurduar Police Station stating inter alia that the appellants and others were torturing the father of the de-facto complainant for a year on the pretext of him being a wizard. On November 12, 2015 when the victim was returning back to his home through a road situated in front of the house of Ram Kumar, the

appellants took the father of the de-facto complainant to the house of Arbind Oraon. There the victim was brutally beaten by the appellants and thereafter, they left the victim at his house and fled away. In the following morning the victim was found dead.

4. On the basis of such written complaint, Alipurduar P.S. Case No. 453 dated November 13, 2015 under Sections 302/34 of the Indian Penal Code, was started against the appellants. The police took up investigation and on completion thereof submitted charge-sheet. Accordingly, charges under Section 302/34 of the Indian Penal Code, was framed against the appellants on March 29, 2016.

5. In order to substantiate the charges, the prosecution examined 14 witnesses. In addition, prosecution also adduced documentary evidences at the trial. On conclusion of the trial, the appellants were examined under Section 313 of the Code of Criminal Procedure where they pleaded to be innocent.

- 6.** Learned advocate for the appellants submitted that there was no eyewitness to the incident. The prosecution case is based on circumstantial evidence. The circumstances proved by the prosecution are not sufficient to prove a hypothesis pointing exclusively to the guilt of the appellants in the incident.
- 7.** It was further contended by learned advocate for the appellants that the death of the victim occurred one day after the alleged incident and the victim was never taken to a doctor for medical treatment.
- 8.** It was also argued that death of the victim occurred as a result of alleged assault by the appellants. The appellants could not be held guilty in so far as no offending weapon was recovered with which the alleged assault was perpetrated.
- 9.** Learned advocate for the appellants also submitted that appellant Akash Munda was not named in the First Information Report. He was later on, implicated in the case in the charge-sheet. It is submitted that there was

no evidence against such appellant. Such inclusion of the appellant Akash Munda in the charge-sheet and not naming him in the First Information Report renders the veracity of the prosecution case doubtful.

10. Learned advocate for the appellants also submits that PW1 and PW5 are the relatives of the victim. There are material contradictions in their testimonies and as such evidence of such witnesses cannot be believed. It is submitted that PW 6 and PW12 are independent witnesses relied on by the prosecution. Such witnesses turned hostile rendering the case of the prosecution unbelievable.

11. Learned advocate for the appellants also submit that the prosecution has failed to establish that the appellants assaulted the victim with an intention to kill him. In such view of the facts, the appellants cannot be held guilty of the offence punishable under Section 302 of the Indian Penal Code. At best, the appellants could be

held guilty of the offence punishable under Section 304 Part II of the Act of 1860.

12. Learned advocate representing the State, relying upon the evidence of the de-facto complainant (PW1) submitted that the prosecution has produced overwhelming evidence to prove the guilt of the appellants. Referring to the evidence of the prosecution, learned advocate for the State submitted that prosecution has been able to prove that the victim was assaulted by the appellants. Alleged offending weapon was also recovered at the behest of the appellant.

13. It was contended by learned advocate for the State that learned trial court rightly held the appellants guilty and as such, the impugned judgment of conviction and order of sentence deserves to be affirmed.

14. As noted above, in order to bring home the charges, prosecution examined 14 witnesses in all. The de-facto complainant himself deposed as PW1. He stated in his deposition that the deceased victim was his father. He

also stated that the appellants along with others blamed his father to be a witch. On November 12, 2015, while his father was returning home, he was taken to the house of Arbind Oraon by the appellants. He further stated that at the relevant point of time, he was proceeding behind his father. Thereafter, his father was assaulted by the appellants with a 'lathi'. After such assault, the appellants took the father of PW1 to his house and laid him down in the varandah. On the following morning, PW1 noticed that his father had expired.

- 15.** PW1 also stated that he lodged an FIR with the police, which was scribed by one Suresh Oraon as per his instructions, which was read over and explained to him to which he signed. He tendered the written complaint in evidence which was marked as Exhibit 1. He also stated that police conducted inquest over the dead body. PW1 proved his signature on the inquest report (Exhibit 2/1). Thereafter, the dead body was taken for post mortem examination. PW1 identified the appellants in court. PW1

was cross examined on behalf of the appellants at length, however, nothing favourable appears to have been elicited in such cross examination.

16. PW2 is a police officer. He had stated that he conducted inquest over the dead body of the victim on November 13, 2015 at Patkapara Tea Garden. He tendered such inquest report in evidence, prepared in his pen and signature which was marked as Exhibit 2. He also prepared a dead body challan (Exhibit 3) and sent the dead body for post mortem examination. PW2 also seized the wearing apparels of the victim under a seizure list (Exhibit 4). This witness was also cross examined by the defense.

17. The wife of the victim deposed as PW3. She stated that her husband died on the day of Kali Puja 2 years ago (examined on January 24, 2018). She further stated that on the date of incident, her husband was caught by the appellants from over the road and was taken somewhere. Subsequently, the appellants threw her husband at her

house in the night. On the following morning, she noticed that her husband was dead. PW3 identified the appellants in Court.

18. PW3 was cross examined on behalf of the appellants. In her cross examination, she admitted that she was reported by her brother that the victim was seized by the appellants. She also stated in cross examination that she saw the appellants Bulu and Lew throwing her husband at her house.

19. PW4 is punchayat member. His evidence is based on hearsay information. PW4 did not add any value to the case of the prosecution.

20. Brother-in-law of the victim deposed as PW5. He stated that the victim Fulchand died 2 years ago. He further stated that one meeting was called by the appellants Bulu, Mahakal and Lew. PW5 went in front of the house of the victim at about 7.00 am. Thereafter, he went inside the house and found the victim lying. He tried to wake him and then discovered that he was dead.

Coming out of the house he found appellants Bulu, Lew and Mahakal on the road. He disclosed before them that Fulchand was dead whereupon they started praying for mercy as they had killed the victim. PW5 tied them with ropes and brought to the house of the victim. PW5 also stated that Bulu, Lew and Mahakal disclosed before him that Akash and Arbind were also with them at the time of commission of the offence. He identified the appellants in court. PW5 also proved his signature on the seizure list through which the alleged offending weapon was seized.

21. In his cross-examination, PW5 admitted that he did not see the incident of killing of the victim by the appellants.

22. An ICDS worker of the locality was examined as PW6. He was declared hostile by the prosecution and in his cross examination by the prosecution, he denied having made any statement to the police in connection with the incident. He did not any value to the case of the prosecution.

23. PW 7 is a police constable who accompanied the police officer holding inquest over the dead body of the victim. He also carried the dead body for post mortem examination. He proved his signatures on the seizure list and the dead body challan.

24. The autopsy surgeon deposed as PW8. He has stated that on November 13, 2015 he conducted post mortem over the dead body of one Fulchand Kumar in connection with UD Case No. 243 of 2015 dated November 13, 2015. PW8 has noted the injuries found on the dead body, namely:

- 1. Clotted blood over nose, left ear and face.*
- 2. Cut injury measuring 5 cm x 2 cm x 0.5 cm over frontal region near midline of head.*
- 3. Haematoma and clotted blood around left ear.*
- 4. Clotted blood and swelling over upper lip, lacerated injury measuring $\frac{1}{2}$ cm x $\frac{1}{2}$ cm.*
- 5. Haematoma and clotted blood around the left ear.*
- 6. Small abrasion near right ear.*

On dissection, PW8 found:

1. *Brain haemorrhage with profuse clotted blood found both in frontal region of brain.*

25. On the basis of post mortem examination, PW8 opined that the cause of death was due to the effects of head and other injuries. He tendered the Post Mortem examination report in evidence which was marked as Exhibit 5.

26. Another police constable has been examined as PW9. He proved his signature on the seizure list through which wearing apparel of the victim was seized.

27. PW10 is the daughter-in-law of the victim. She stated that her father-in-law Fulchand died in the year 2013 i.e. 2 ½ years ago (from April 20, 2018). He was killed by declaring him as a witch. PW10 also stated that on the date of incident, the appellants took her father-in-law to the house of Arbind Oraon and was assaulted there. She tried to go to the house of Arbind Oraon but was restrained by the appellants. She further stated that

after assaulting her father-in-law, the appellants left him at the house of PW10 in an unconscious condition. Subsequently, her father-in-law died. PW10 identified the appellants in court. PW10 was cross examined at length but nothing favourable could be extracted by the defense.

28. A civic volunteer attached to Alipurduar police station deposed as PW11. He proved his signature on seizure list by which the viscera and wearing apparel of the victim was seized.

29. A resident of the locality was examined as PW12. He stated that police visited the house of appellant Laxman Munda accompanied by him on May 14, 2015. The police recovered a wooden branch of tree. He however, could not testify as to from where the said article was brought out by the said appellant. PW 12 proved his signature on the seizure list. The witness was however, declare hostile by the prosecution. He denied a suggestion by the prosecution that the wooden branch was produced by the said appellant from inside his house.

30. The recording officer deposed as PW13. He testified that on November 13, 2015, he received a written complaint from one Biraj Mukherjee and started Alipurduar PS Case No. 453 of 2015 under Section 302/34 of the Indian Penal Code. He proved the Formal First Information Report and his endorsement of receipt of the written complaint which were marked as Exhibit 7 and Exhibit 1/2 respectively.

31. The investigating officer of the case deposed as PW14. He has stated about the steps taken by him during the investigation of the case. He visited the place of occurrence and prepared rough sketch map with index (Exhibit 8). He also examined the witnesses and recorded their statements under Section 161 of the Code of Criminal Procedure. He also examined the appellant Mahakal Munda and on his statement leading to recovery, recovered the offending lathi. He tendered the relevant portion of the statement of such appellant in evidence (Exhibit 9) as well as the seizure list through

which the offending weapon was seized (Exhibit 6). PW14 also collected the post mortem report, arranged for recording the statement of witnesses under Section 164 of the Code of Criminal Procedure. He also stated that on completion of investigation, PW14 submitted charge-sheet under Section 302/34 of the Indian Penal Code against the five appellants.

32. On conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Code of Criminal Procedure. The appellants claimed to be innocent having been falsely implicated in the case. They however, declined to adduce any defense witness.

33. The case of the prosecution is that the victim was blamed by the appellants to be a witch. On such pretext, the appellant called a meeting where the victim was brought. He was assaulted by the appellants causing severe injuries which resulted into the death of the victim.

34. The dead body of the victim was found lying in the varandah of his house where allegedly, the appellants left the victim after beating him in the night of November 12, 2015. The matter was reported to the police on the discovery of death on the following day i.e. November 13, 2015. Inquest was conducted over the dead body and thereafter, it was sent for post mortem examination.

35. The inquest report as well as post mortem report (Exhibit 5) exhibited that the victim had several injuries on his person. According to the testimony of the autopsy surgeon, PW8, cause of death was the effects of head and other injuries which were ante mortem and homicidal in nature. Therefore, on the basis of the evidence of PW8 coupled with the testimony of Exhibit 5 it is sufficiently established that the victim suffered several injuries on different parts of his body and as a result of such injuries, the victim died. The injuries were opined by the autopsy surgeon to be ante mortem and homicidal. Such

facts established that the victim suffered an unnatural death.

36. PW1 the son of the victim stated in his deposition that his father was being tortured by the appellants for about a year on the pretext of the victim being a witch. On the date of incident, it has come out from the evidence that the appellants called a meeting over the issue. PW1 very clearly stated that at about 9.00 pm the appellants took his father to the house of Arbind and assaulted him. He has further stated that he tried to save his father but was threatened by the appellants. The appellants assaulted the victim inside the room and thereafter, left him at the house of victim in an injured condition.

37. PW1 has also stated that he was moving behind his father when he was taken by the appellants. Such statement was contradicted by the defense on the plea that such statement was not made by PW1 at the time of his examination under Section 161 of the Code of

Criminal Procedure. But statement of such witness so far as it relates to his father being taken by the appellants to the house of Arbind, remains intact. PW1 has further stated that he along with his mother saw the victim being left by the appellants at their house. The mother of PW1 deposed as PW3. She has corroborated the version of PW1. She stated that she the appellants throwing her husband at her house. Her husband was then not in a position to speak and she could discover in the following morning that he was dead. In her cross examination as well, PW3 named the appellants Bulu and Lew whom she saw throwing her husband at her house. She also stated that all the appellants caught hold of her husband on the fateful day and took him elsewhere.

- 38.** PW5 is the brother-in-law of the victim. He testified that on the day of incident, a meeting was called by the appellants in connection with the victim. He went to attend the meeting but could not find the victim there. He then went to the house of victim and found him lying.

He tried to wake him up and thereafter noticed that the victim was dead. Coming out of the house of victim, PW5 also saw the appellants on road.

39. The daughter-in-law of the victim, PW10 has also corroborated the statements of PW1, PW3 and PW5. She had stated that her father-in-law was killed declaring him a witch. The appellants took the victim to the house of Arbind Oraon where he was assaulted there. Later the appellants left the victim at his house in an injured condition. In her cross examination that she the appellants leaving the victim at her house, of her own eyes. It was late night and there was none present. Such statements made by the witness, has gone uncontroverted. The aforesaid witnesses appear to have successfully withstood their cross examination.

40. Therefore, from the evidence of the aforementioned witnesses, the case of the prosecution unfolds that the victim was brandished as a witch in the locality. The appellants called upon a meeting over the issue on the

date of incident. The victim was brought in the said meeting by the appellants. With a view to punish him for being a witch, he was assaulted by the appellants. Due to such assault, the victim sustained severe injuries as a result of which the victim succumbed.

41. There appears overwhelming uncontroverted evidence to the effect that the victim was caught by the appellant and was taken to the house of one Arbind Oraon. Evidence on record also establishes that it was the appellants who threw the victim at his house and that when he was so thrown, the victim was injured which ultimately resulted into his death. The autopsy surgeon has opined that the victim died due to the effect of such injuries. At least two witnesses PW1 and PW5 claimed to have seen the appellants taking the victim to the house of Arbind Oraon. Similarly two other witnesses had seen the appellants throwing the victim at his house. The testimony of the aforesaid witnesses remained intact in their cross examination test.

42. In that view of the facts, the appellants were under obligation to explain the injuries caused to the victim, in terms of the provisions of Section 106 of the Indian Evidence Act, 1872. No explanation, whatsoever, has been offered on the part of the appellants in discharge of their obligation. Therefore, the evidence on record do suggest to the effect that the injuries sustained by the victim were caused by none other than the appellants.

43. As noted, it is established that the victim was picked up by the appellants and dragged to a certain destination for the purpose of a meeting purporting to punish him for being a witch. He was beaten up by the appellants. The victim sustained severe injuries due to such assault. The injuries described by the autopsy surgeon in the post mortem report as :

- (i). *Clotted blood over nose, left ear and face.*
- (ii). *Cut injury measuring 5 cm x 2 cm x 0.5 cm over frontal region near midline of head.*
- (iii). *Haematoma and clotted blood around left ear.*

- (iv). *Clotted blood and swelling over upper lip, lacerated injury measuring $\frac{1}{2}$ cm x $\frac{1}{2}$ cm.*
- (v). *Haematoma and clotted blood around the left ear.*
- (vi). *Small abrasion near right ear.*

On dissection, of the dead body *Brain haemorrhage with profuse clotted blood found both in frontal region of brain.*

44. The nature of injury detected on post mortem examination, to our estimation, was of such magnitude that while inflicting such injuries, the appellants knew well that such injuries might cause death of the victim. It can never be termed as a mere injury which was likely to cause death. The appellants intended to punish the victim for him being a witch. They assaulted him and they can well be said to know that by inflicting such beating they could cause death of the victim.

45. In such view of the facts, the appellants are rightly held guilty for the offence of murder as defined under Section 300 of the Indian Penal Code. The evidence on

record does not suggest that the appellants inflicted assault on the victim 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. Evidence led at the trial attributes knowledge of causing bodily injury which was likely to cause death to the appellants. Therefore, the appellants cannot be said to have committed an offence punishable under Section 304 of the Indian Penal Code, 1860.

46. In the light of discussions made hereinabove, we find no reason to interfere with the impugned judgment of conviction and order of sentence. The same is affirmed.

47. Accordingly, the instant appeal being **CRA (DB) 10 of 2023** is hereby dismissed.

48. In view of the disposal of the appeal, no interlocutory application survives. Consequently, connected applications, if any, shall stand dismissed.

49. Trial Court records along with a copy of this judgment and order be transmitted, at once, to the learned Trial Court for necessary action.

50. Period of detention already undergone by the appellants shall be set off against the substantive punishment in terms of the provisions contained in Section 428 of the Code of Criminal Procedure.

51. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

52. I agree.

[DEBANGSU BASAK, J.]