

IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Apurba Sinha Ray

C.R.A. 32 of 2019

Abdul Sattar & Ors.

-Vs-

The State of West Bengal

For the Appellants	:	Mr. Jagriti Mishra, Adv. Ms. Ananya Bhattacharya, Adv. Mr. Souvik Dere, Adv. Mr. Sabir Ali, Adv. Ms. Mrinmoyee Das, Adv.
For the State	:	Mr. Aditi Shankar Chakraborty, Id. A.P.P. Mr. Arjun Chowdhury, Adv.
Heard on	:	13.12.2023 & 14.12.2023
Judgment on	:	14.12.2023

Joymalya Bagchi, J. :-

1. The appeal is directed against judgment and order dated 23.09.2019 passed by the learned Additional Sessions Judge, 3rd Court, Cooch Behar in Sessions Trial No. 12(4) of 2011 arising out of Sessions Case No. 46 of 2009 convicting the appellants for commission of offence punishable under Section 304 Part-I of the Indian Penal Code and

sentencing them to suffer rigorous imprisonment for ten years each and to pay fine of Rs.5,000/- each, in default, to suffer simple imprisonment for three months more. By the self same judgment and order they have also been convicted along with Puspa Kanta Debnath, Nachimuddin Mia, Kasem Ali and Bikash Debnath for commission of offence punishable under Sections 148/324 of the Indian Penal Code and to pay a fine of Rs.500/- each, in default, to suffer simple imprisonment for one month more on such count.

Genesis of the case :-

2. Prosecution case as alleged against the appellants is as follows :-

On 04.05.2005 a Gram Sansad Sabha was to be convened at Rashidanga booth. In order to prevent their opponents from attending the Sabha, a fight broke out between two political groups in front of the house of Goni Mia, appellant no.2 herein. In course of the fight, Goni Mia, his son Samsul Hoque, Abdul Sattar, Abdul Aziz (both sons of Nachimuddin Mia) assaulted Khaibar Ali with *ballam* and knife. In course of the fight, Jamiruddin Mia (PW 2), Jahangir Alam (PW 3), Nurul Mia (PW 4), Ulbat Ali (PW 7), Amir Ali (PW 8) and one Akkas Ali also suffered injuries. They were medically treated at MJN Hospital, Cooch Behar. Khaibar Ali was shifted to North Bengal Medical College & Hospital where he expired on 08.05.2005.

3. Written complaint was lodged by PW 1 being Kotwali Police Station Case No.124 of 2005 dated 04.05.2005 under Sections

143/323/324/325/506/34 of the Indian Penal Code. After the death of Khaibar Ali, Section 304 IPC was added.

4. In conclusion of investigation, charge sheet was filed and charges were framed against the appellants and nine others under Section 148 IPC, Section 323 IPC (*for causing hurt on Khaibar Ali, Akkas Ali, Amir Ali, Nurul Mia, Urvat Ali and Jamiruddin Mia*), Section 324 IPC (*for causing hurt on Khaibar Ali, Akkas Ali, Amir Ali, Nurul Mia, Urvat Ali and Jamiruddin Mia with khapor, ballam, bow, arrows and firearms*) and Section 304 IPC for the death of Khaibar Ali. To prove its case, prosecution examined 23 witnesses and exhibited a number of documents.

5. In conclusion of trial, learned trial Judge by the impugned judgment and order dated 23.09.2019 convicted and sentenced the appellants, as aforesaid. Co-accused viz. Puspa Kanta Debnath, Nachimuddin Mia, Kasem Ali and Bikash Debnath were also convicted and sentenced under Sections 148/324 of the Indian Penal Code. While the appellants have assailed their conviction and sentence, the co-accused have not appealed against their conviction.

Arguments at the Bar :-

6. Learned Advocate for the appellants submits that the prosecution witnesses are interested parties. They belong to rival political groups. Place of occurrence has not been established. There was a free fight and counter-case was registered. PW 2 & PW 4 are accused in the counter case. Dying declaration of the victim recorded in the hospital (Ext. 5)

does not specifically names of his assailants. Appellants have been falsely implicated and are entitled to an order of acquittal.

7. On the other hand, learned Advocate for the State submits injured eyewitnesses particularly PWs 4 & 8 vividly described the role of the appellants in assaulting Khaibar Ali who succumbed to his injuries. Other witnesses who were at the spot or came shortly thereafter viz. PWs 5 & 7 stated that Khaibar Ali told them that the appellants had assaulted him. Subsequent dying declaration recorded at the hospital has to be seen in the light of the aforesaid evidence which clearly establishes the appellants as the assailants. Ocular version of the injured witnesses is also corroborated by medical evidence on record. Hence, the prosecution case is proved beyond doubt.

Evidence on record :-

8. PW 1 (Ajijul Mia) deposed the incident occurred on the day of Gram Sansad Sabha. He along with others had come infront of the house of Goni Mia. The accused persons were armed with sharp cutting weapons, bow and arrows. A fight broke out between them and the accused persons. Goni hit Khaibar with a *ballam*. Others were also injured in course of the incident. He fled away from the spot. Injured persons including Khaibar were shifted to MJN Hospital, Cooch Behar. He lodged written complaint at Kotwali Police Station.

9. PW 2 (Jamiruddin Mia) is an injured witness. He stated hearing hue and cry he had come to the spot. He was assaulted by Kasem Ali. He heard Goni had pierced Khaibar. His hand was fractured. He was

admitted at Cooch Behar hospital for 10-20 days. During cross-examination, he admitted a counter-case was registered over the incident. He was an accused in the said case.

10. PW 3 (Jahangir Alam) stated there was an assembly in front of the house of Goni Mia. Khaibar Ali was assaulted by Goni and Sattar with *ballam*. He was admitted at MJN hospital and thereafter shifted to North Bengal Medical College & Hospital where he expired. He signed on the inquest report.

11. PW 4 (Nurul Mia) is also an injured witness. He was assaulted by Kashem Ali. He sustained bleeding injuries. He stated Abdul Sattar and Abdul Aziz assaulted Khaibar with ballam and Goni assaulted him with knife. They were medically treated at MJN hospital. Khaibar was shifted to Medical College where he expired.

12. PW 7 (Ulbat Ali) is another injured witness. He stated he was assaulted by *lathi*. Khaibar was assaulted with a *ballam* and dagger. He and Khaibar were taken to Posharihat in a motorcycle by PW 9 and then in a Maruti van to MJM hospital. Enroute Khaibar stated Goni, Abdul Sattar, Abdul Aziz and Samsul Hoque had assaulted him. He was treated at MJM Hospital.

13. Similarly PW 8 (Amir ali) is another injured witness. He stated Goni caught hold of Khaibar. Abdul Aziz and Sattar assaulted him in the belly. Son of Goni i.e. Samsul Hoque also assaulted Khaibar.

14. PW 5 (Hasina Bibi) is the wife of Khaibar Ali. She is a post-occurrence witness. On the next day, she met her husband at MJM

hospital, Cooch Behar. He told her that Abdul Aziz, Abdul Sattar, Goni Mia and Samsul Hoque had assaulted him with *ballam* and knife. On 08.05.2005 her husband expired.

15. At MJM Hospital Khaibar Ali was examined by PW 11 (Dr. Dipak Das) in the Emergency Department. He found one stab injury in the upper abdomen and also an injury in the lower back. He proved the injury report.

16. PW 21 (Dr. Nandita Sinha Sarkar) also examined Akkas Ali in the hospital.

17. PW 17 (Dr. D. K. Khara) and PW 18 (Dr. Puspa Barman) also examined Khaibar in the hospital. Dr. Khara examined Khaibar on 04.05.2005. He stated the patient had stab injury in the abdomen. He found the patient conscious but a bit disoriented. He was losing blood and having tachycardia. He advised blood transfusion. He referred the patient to North Bengal Medical College & Hospital.

18. PW 18 found the patient drowsy and in shock. At MJM Hospital on the same day dying statement (Ext 4) of Khaibar was recorded by Dr. Kalyan Mukherjee (PW 20) in presence of staff nurses viz. PWs 12 & 13.

19. PW 16 (Dr. Sukdeb Roy) examined Ulbat Ali (PW 7), Amir Ali (PW 8), Nurul Mia (PW 4) and one Akkas Ali in the said hospital. He proved their injury reports.

20. PW 23 (SI Manoranjan Roy) is the first Investigating Officer.

21. PW 22 (SI Nikhil Saha) is the second Investigating Officer who submitted charge sheet.

22. Learned Advocate for the appellants contends in order to prevent each other from attending a Gram Sansad Sabha, a clash broke out between two political groups. A large number of persons were injured including Khaibar Ali. It is unclear who had attacked Khaibar resulting in his death.

23. I have tested the evidence on record in the light of the aforesaid submission on behalf of the appellants. Prosecution case primarily rests on the evidence of injured eyewitnesses, oral and written dying declarations of the deceased and medical evidence.

Version of injured witnesses:-

24. PWs 4, 7 & 8 suffered injuries in course of the incident. PW 16 examined PWs 4, 7 & 8 and proved their injury reports. PW 4 stated he saw the appellants assault Khaibar Ali with *ballam* and knife. PW 8 stated Khaibar was held by Goni Mia and Abdul Sattar, Abdul Aziz and Samsul Hoque, son of Goni Mia assaulted him. It is contended that the other witnesses like PW 1 did not implicate Abdul Sattar and Abdul Aziz in the assault. In fact, PW 1 had not named Abdul Sattar in the FIR. PW 3 did not implicate Aziz as the assailant.

25. Incident occurred in course of a melee. A large number of persons had attacked each other. In this backdrop, one must assess ability of the witnesses to identify all the assailants of Khaibar Ali. When a large number of persons are involved in a murderous attack, it is likely evidence of the eyewitnesses with regard to the roles of individual accused would vary from one another. In such cases courts have as a

rule of prudence sought corroboration from at least two witnesses with regard to role of an accused in the incident. In this regard, reference may be made to *Masalti & Ors. vs. State of Uttar Pradesh*¹ and *Krishnagowda & Ors. vs. State of Karnataka*².

26. Applying the said principle I find appellants have been implicated in the murder at least by two witnesses particularly the injured witnesses i.e. PWs 4 & 8. Their versions with regard to the role of the appellants in the murderous assault are substantially consistent and have remained unshaken during cross-examination.

Dying declarations of the victim:-

27. Ocular versions of the injured witnesses find corroboration from the dying declaration of the victim. PW 7 was injured along with Khaibar in course of the incident. PW 9 removed both of them in a motorcycle to Pasharihat. Therefrom they were taken to the hospital in a Maruti van. On the way, Khaibar told PW 7 that he had assaulted by appellants and Samsul Hoque. On the next day, when his wife (PW 5) visited him in the hospital. Khaibar came out with the same names to his wife.

28. Learned Advocate strenuously argues the written dying declaration (Ext. 4) recorded by PW 20 in the hospital does not specifically name the appellants. The written dying declaration is as follows :-

“2nd son of Nazimuddin of Rashidanga-I with a sharp Ballam and also 3 other persons one of them was Gani’s son Samsul”

¹ 1964 SCC OnLine SC 30

² (2000) 1 SCC 306 (para 5 and 6)

29. It is argued none of the appellants have been named in the said statement. On the first blush the argument appears to be attractive but deeper scrutiny of attending circumstances particularly the deteriorating health condition of the victim who had lost considerable blood and had become disoriented and drowsy in the hospital would explain away the apparent dichotomy. Immediately after the incident, Khaibar had disclosed the names of his assailants to his injured comrade viz. PW 7. Subsequently, he was admitted in hospital. By that time he had lost considerable blood and had become disoriented and drowsy. Due to his deteriorating health condition, he could not give out the names of all his assailants but stated they were four in number and one of them was the second son of Nachimuddin and another was Samsul, son of Goni Mia.

30. The aforesaid dying statement before the doctors generally corroborates the more detailed dying declaration made by Khaibar earlier to the injured witnesses. It may not be out of place to note Abdul Sattar and Abdul Aziz are sons of Nachimuddin Mia. Khaibar had given out names of four persons i.e. the appellants and Samsul in his earlier oral dying declaration which corresponds to the number of assailants indicated by him in his written dying declaration. Hence, oral and written dying declarations are substantially reconcilable and they corroborate the ocular version of the injured eyewitnesses.

Medical evidence :-

31. Medical evidence i.e. post-mortem report (Ext. 15) and the injury report of Khaibar Ali show stab injuries on the abdomen which also corroborate the version of the injured eyewitnesses.

Conclusion:-

32. In the light of the aforesaid evidence on record, I am of the opinion the appellants and Samsul Hoque were armed and assaulted Khaibar Ali with sharp cutting weapons like *ballam* and knife which resulted in his death. This establishes prior concert and proves the appellants shared common intention to commit culpable homicide of Khaibar Ali. Hence, they are liable to be convicted under section 304 read with section 34 IPC.

33. Though charge was framed under section 304 IPC simplicitor and conviction was also recorded under the same head, conviction of the appellants with the aid of section 34 IPC does not prejudice the appellants for the following reasons. Firstly, section 34 IPC is a rule of constructive liability and unlike criminal conspiracy does not create independent offence. Secondly, appellants were fully aware of the evidence led against them and their respective roles which transpired therefrom during trial. They had ample opportunity of defending themselves. Hence, no new case has been made out and recording of conviction under section 304 read with section 34 IPC without reframing the charge does not prejudice them in the facts of the case (see *Ramji*

*Singh And Another vs. State of Bihar*³ and *Gurpreet Singh vs. State of Punjab*⁴).

34. Accordingly, save and except altering the conviction of the appellants from 304 IPC to 304 read with 34 IPC, conviction and sentence recorded by the trial Court are upheld.

35. The appeal is accordingly, dismissed.

36. Bail bonds of the appellants shall stand cancelled and they are directed to surrender forthwith and serve out the remainder of the sentence in accordance with law. In the event they fail to do so, trial court shall issue appropriate processes against them for their apprehension and execution of their sentence.

37. Lower court records along with copies of this judgment be sent down at once to the trial Court for necessary compliance.

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

I agree.

(Apurba Sinha Ray, J.)

(Joymalya Bagchi, J.)

sdas/akd/PA

³ (2001) 9 SCC 528

⁴ (2005) 12 SCC 615