

**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

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Abdul Majid & Ors.

VS.

The State of West Bengal

For the Appellants : Mr. Pawan Kr. Gupta,
Mr. Syed Julfikar Ali,
Ms. Sofia Nesar, Advocates

For the State : Ms. Faria Hossain,
Mr. Atulya Sinha, Advocates

Heard on & Judgement on: August 2, 2024

DEBANGSU BASAK, J.

1. Appeal is directed against the judgment of conviction dated July 11, 1989 and the order of sentence dated July 11, 1989 passed in Sessions Appeal No. 5(5) of 1988 by the learned Additional Sessions Judge, North 24 Parganas, Barasat.

2. Three persons were convicted and sentenced under Sections 304 (Part II) read with Section 34 of the Indian Penal Code, 1860 for a period of three years and under Section 447 of the Indian Penal Code read with

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Section 34 thereof for a period of three months. Both the sentences were directed to run concurrently.

3. Three persons who were convicted and sentenced preferred an appeal being Criminal Appeal No. 311 of 1989. In the appeal, *suo motu* Rule was issued on August 14, 1989 calling upon the appellants to show cause as to why their conviction under Section 304 (part-II) should not be enhanced or such other order or further orders made as this Court may seem fit and proper.

4. During the pendency of the appeal, out of the three appellants, appellant No. 2 and appellant No. 3 expired. Their death was noted by the order dated July 29, 2024. It was also noted there that appeals of the appellant nos. 2 and 3 abetted consequent upon their death. Appeal survived so far as the appellant No. 1 was concerned.

5. Learned advocate appearing for the appellant No. 1 submits that, the charges framed as against the appellant No. 1 is vague. He submits that, the date of the offence of alleged assault is March 17, 1985, while the date of death is subsequent thereto. He draws the attention of the Court to the charges framed and submits that, the charge sheet contains a date when the alleged incident of assault took place and not the date on which the death occurred.

6. Learned advocate appearing for the appellant No. 1 submits that, the appellant No. 1 did not assault the victim so as to cause any fatal blow on the body of the victim. He draws the attention of the Court to the prosecution witnesses. According to him, the prosecution failed to establish the charges framed as against the appellant No. 1. He submits that, none of the prosecution witnesses saw the appellant No. 1 assaulting

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the victim in the manner so as to cause the injuries allegedly leading to the death of the victim.

7. In any event, learned advocate appearing for the appellant No. 1 submits that, the victim was removed to the rural hospital initially after the incident of assault, where the victim was given medical treatment. Thereafter, he was removed to the sub-divisional hospital where he was admitted for a number of days. Thereafter, the family members of the victim took away the victim from the hospital. He expired on removal. Drawing the attention of the Court to such fact, learned advocate appearing for the appellant No. 1 submits that, the incident of assault took place a number of days prior to the date of death. Consequently, the appellant No. 1 cannot be said to be instrumental in causing the death.

8. Learned advocate appearing for the appellant No. 1 submits that, given the nature of the evidence adduced by the prosecution, at best, although not admitting such stand, the prosecution established a case under Section 304 (Part-II). He submits that, there is no material on record to enhance the quantum of sentence imposed. Quantum of sentence to be imposed is at the discretion of the Learned Trial Judge. The discretion so exercised cannot be said to be perverse.

9. Learned advocate appearing for the State draws the attention of the Court to the evidence of the prosecution witnesses. She submits that, at least three eye-witnesses attributed active role so far as the appellant No. 1 is concerned. Eye-witnesses saw appellant No. 1 to be armed with a wooden stick. Eye-witnesses also saw the appellant No. 1 to be participating in the assault.

10. Learned advocate appearing for the State draws the attention of the Court to the postmortem report as also to the evidence of the Doctor

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conducting the postmortem. She submits that, it would appear from the postmortem report being Exhibit-2 as well as the deposition of such postmortem Doctor being, P.W. 7 that, the death was ante-mortem and homicidal in nature.

11. Learned advocate appearing for the State submits that given the narration of evidence as proved by the prosecution witnesses, intention to cause death by assault is apparent. According to her, not only should the quantum of sentence be increased as, Section 304(Part-II) allows a sentencing up to 10 years of rigorous imprisonment but also offence should be classified as Section 304(Part-I) of the Indian Penal Code, 1860. She submits that, the quantum of punishment before us by the Learned Trial Judge of three years after finding the appellant No. 1 guilty under Section 304(Part-II) is not proportionate to the offence of the appellant No.1. Appellant No. 1 was an assailant and present in the assembly by the three persons who assaulted the victim. Victim died out of the injuries caused by the assailants including the appellant No.1.

12. A First Information Report dated March 21, 1985 under Section 447, 304 and 34 of the Indian Penal Code, 1860 was registered by the police on the written compliant of P.W. 1, being Exhibit-1. Police investigated such F.I.R and submitted a charge sheet before the Trial Court. Charges as against the appellant No. 1 were framed on May 12, 1988. Charges were under Sections 447, 304 (Part-I) and 34 of the Indian Penal Code, 1860.

13. In order to prove the charges as against the appellant No.1, prosecution examined 15 witnesses. On conclusion of the evidence on the part of the prosecution, the appellants were examined under Section 313 of the Criminal Procedure Code. In such examination, the appellants denied any complicity in the incident. Concentrating on the deposition

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recorded under Section 313 of the appellant No. 1 as he is the surviving appellant, appellant No. 1 apart from his denial with regard to the incident and claim for false implication, stated that he was asked by the deceased and the members of his family to work for a particular political party. On his refusal to do so, they disagreed to send his wife to him and implicated him falsely in the criminal case.

14. Prosecution witness No. 1 is the son of the deceased. He stated that his sister, being P.W. 5, was married to appellant No. 1. He stated that, appellant No. 1 came to their residence on March 16, 1985 and stayed therein. In the following morning, i.e., on March 17, 1985, appellant No. 1 met the victim and proposed that, appellant No. 1 be allowed to take P.W. 5 with him back to the matrimonial residence of P.W. 5. Victim suggested that the father of appellant No. 1 should come to the residence on a formal visit as he did not visit the residence for a long time. Victim also told the appellant No. 1 that, P.W. 5 could be allowed to go with the father of the appellant No. 1 when he visited the house. Thereafter, appellant No. 1 left for his residence.

15. P.W. 1 stated in his evidence that, appellant No. 1 again came to the residence at about 9 a.m on March 17, 1985. P.W. 1 met the appellant No. 1 on the way. P.W. 1 went to the house of the appellant No. 1 and stayed there only for 10/15 minutes and returned home thereafter. In the evening on March 17, 1985, all the three appellants came to the house of the P.W. 1 and the victim armed with wooden stick and "ease made of timber".

16. All the three appellants all of a sudden took the victim at first, the father of the appellant No. 1 struck the victim with the wooden stick on the head. Thereafter, the two other appellants including appellant No. 1

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assaulted the victim. The victim fell down on the ground and sustained blood injury on his head and abrasion and lacerated injuries on the throat and back.

17. P.W. 1 stated that he tried to rescue the victim from the attack, whereupon the appellant No. 1 also made an attempt to give him a blow with wooden stick. However, P.W. 1 managed to resist the attack by catching hold of the wooden stick.

18. P.W. 1 stated that at that time the victim along with two sisters, one of them being P.W. 5 and his brother who is P.W.2 were present at the residence and an alarm was raised whereupon local people intervened. The appellant No.1 fled away. Thereafter, P.W. 1 along with P.W. 10 removed the injured to the rural hospital. Victim was admitted at the rural hospital. Victim was bleeding profusely from his mouth. As his condition was precarious, on the Medical Officer's advice the victim was removed to the Sub-Divisional Hospital at Basirhat. Victim was admitted there. Victim remained in the hospital for sometime. As the condition of the victim deteriorated, Medical Officer of the Sub-Divisional Hospital advised removal of the victim to better equipped hospital at Kolkata. While the victim was removed to the hospital as condition further worsened the victim was taken to the rural hospital and got admitted there. Victim died at the rural hospital at about 4 p.m. on March 21, 1985.

19. P.W. 1 stated that on March 21, 1985, he went to the police station and lodged the complaint. He identified his signature on the written complaint. His signature in the written complaint was marked as exhibit. He identified the appellants in Court as assailants.

20. P.W. 1 was cross-examined at great length. Nothing useful was extracted from such cross-examination.

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21. Son-in-law of the victim deposed as P.W.2. He is an eye-witness to the incident of assault. He corroborates the evidence of P.W.1. He was also cross-examined at great length with nothing useful to the defence being extracted from him during such cross-examination.

22. P.W.3 is a rickshaw van driver who assisted in removing the victim from the Sub-Divisional hospital to the rural hospital on March 21, 1985. He does not add much value to the case of either the prosecution or the defence.

23. P.W.4 is the younger brother of the victim. He stated that, on March 17, 1985, he was at his residence. When attracted by a hue and cry he rushed to the courtyard of the victim's house and found him lying on the ground in an injured condition. He found appellants fleeing away from the spot. P.W.s 1 and 2 told him that the appellants assaulted the victim. He stated that, the victim was removed to the medical centre for medical aid. He was present when the victim expired on March 21, 1985. He identified the appellants as the persons who fled the place of occurrence on March 17, 1985.

24. P.W.5 is the wife of the appellant No.1 and daughter of the victim. She corroborated the evidence of P.Ws. 1 and 2 with regard to the assault meted out by the appellants upon the victim. She was cross-examined at great length without any useful material to the defence being extracted.

25. The doctor who attended the victim on March 17, 1985 at the rural hospital deposed as P.W.6. He described the injuries he found on the body of the victim. He stated that, he did not find any external

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injury on the nose or mouth of the victim which caused its bleeding. He stated that, bleeding from mouth and nose was indicative of internal hemorrhage. He also stated that, the lacerated wound which was found on the head of the victim could be caused by any blunt substance such as the piece of bamboo or a wooden stick. He tendered the certificate issued by him which was marked as Exhibit-2. He was cross-examined at length by the defence without any useful material to the defence being extracted from him.

26. The Superintendent of the Sub-Divisional Hospital deposed as P.W.7. He conducted the post mortem on the dead body of the victim. He described the four injuries that he found on the body of the victim. He tendered the post-mortem report in evidence which was marked as Exhibit-3. He stated that, in his opinion, death was due to the injuries noted in the post-mortem report and that, such injuries were ante-mortem and homicidal in nature.

27. P.W.7 was cross-examined at length. The opinion expressed by P.W.7 with regard to the cause of death was not dislodged during cross-examination.

28. The police constable who held the inquest on the dead body of the victim deposed as P.W.8. He tendered the inquest report and other documents which were marked as Exhibits at the trial.

29. P.W. 9 is the wife of the victim. She corroborated the evidences of P.W.s. 1, 2 and 5 with regard to the complicity of the appellants in the assault. She was also cross-examined at some length by the defence. No useful material to the defence was extracted by such cross-examination.

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30. P.W. 10 is a local villager. He stated that, there was a dispute between the victim and the appellant No.1 over some matter concerning the daughter of the victim, who is the wife of the appellant No.1. He narrated about the fitment of the victim. He is a seizure list witness. He tendered his signature on the seizure list in evidence.

31. The scribe of the written complaint deposed as P.W.11. He identified his signature on the written complaint. He is also a seizure list witness. He tendered his signature on the seizure list at the trial.

32. The Assistant Sub-Inspector of Police who received the written complaint from P.W.1 deposed as P.W.12. He drew up a formal FIR which was tendered as evidence and marked as Exhibit-7.

33. A relative of the victim deposed as P.W.13. He stated that on March 17, 1985 while he was proceeding to the market place, he went to his maternal uncle's (victim's) house between 3 p.m. and 3.30 p.m. There he was gossiping for some time. When he was about to leave the house of the victim, appellant No.1 came to the house of the victim and demanded that, the victim should allow the wife of the appellant No.1 to accompany the appellant No.1 on his way back home at once. Appellant No.1 also stated that unless his wife was allowed to go to her matrimonial home by that evening, dire consequences would follow. P.W.13 intervened and persuaded the appellant No.1 to return to his residence peacefully. Thereafter, P.W.13 left the place. P.W.13 stated that after he walked down for some time, he saw one of the accuseds coming out of the victim's house armed with the wooden stick in hand. He caught hold of such accused being appellant No.3 and requested him to get the matter settled amicably instead of

kicking up a row. Appellant No.3 pulled away and went to the victim's house. Soon thereafter, P.W.13 found appellant nos. 1 and 2 to be proceeding to the victim's house. He also saw appellant nos.1 and 2 to enter the courtyard of the victim. P.W.13 followed them. P.W.13 saw the appellant No.3 strike the victim with wooden stick on the head. Appellant nos.1 and 2 also assaulted the victim with the wooden stick. Thereupon, victim fell down on the ground.

34. P.W.13 was examined at great length on behalf of the defence. Nothing favourable to the defence was extracted by such cross-examination.

35. The Sub-Inspector of Police who conducted the investigation deposed as P.W.14. He narrated the course of investigation. He, in fact, continued with the investigation upto the given point of time that is till June 23, 1985 when he was transferred to a different police station.

36. P.W.15 is the second Investigating Officer who deposed as to the further course of investigation with regard to the FIR.

37. Both P.Ws.14 and 15 were cross-examined on behalf of the defence without any useful material being extracted for the defence by such cross-examination.

38. As noted above, all the three accused persons were examined under Section 313 of the Code of Criminal Procedure where they claimed innocence and false implication. Appellant No.1 in his deposition under Section 313 of the Code of Criminal Procedure, apart from claiming false implication also stated that, he was asked by the

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victim to work for a particular political party and on such refusal was falsely implicated.

39. Victim expired on March 21, 1985. Exhibit-3 is the Post-mortem report of the victim. Exhibit-3 records the injuries found on the dead body of the victim. P.W. 7 is the Post-mortem doctor who deposed at the trial. He tendered the post-mortem report which was marked as Exhibit-3. He stated that, there were four injuries found. Injury nos.2 and 4 relates to depressed fracture of the parietal bone. He stated that, the death was due to the injuries noted in the post-mortem report, ante-mortem and homicidal in nature.

40. Eye-witnesses of the incident being P.W.s.1,2,5,9 and 13 consistently attributed the assault on the head of the victim to the appellant No.3. Out of the four injuries, two injuries on the head which were noted in the post-mortem report and as deposed by P.W.7 at the trial can attribute to the death of a person, were inflicted by the appellant No.3. None of the witnesses being P.W.s 1,2,5,9 and 13 stated that, appellant No.1 caused any blow to be inflicted on the head of the victim. However, all such eye-witnesses stated that the appellant No.1 participated in the assault on the victim and did land blows on the victim with wooden stick.

41. Learned Trial Judge proceeded to hold the appellants to be guilty under Section 304 (Part II) of the Indian Penal Code, 1860 read with Section 34 thereof also under Section 447 thereof.

42. Evidence placed on record establishes assault on the victim. Evidence placed on record of the eye-witnesses being P.W.s. 1,2,5,9 and 13 establishes that all the appellants entered into the house of the

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victim whereupon the assault took place. In such circumstances, Section 447 of the Indian Penal Code, 1860 being house trespass stands established.

43. Assault on the victim by all the appellants also stand established by the eye-witnesses being P.W.s.1,2,5,9 and 13. The fact that the victim suffered injuries from the assault stands corroborated by the medical evidence produced on record, namely, that of P.W.s 6 and 7.

44. All the three appellants were present at the place and time of occurrence. They were armed with wooden stick and "ease made of timber". P.W.13 in his evidence stated that, apart from the incident of assault, he talked with the appellant No.1 and tried to defuse the situation. The appellant No.1 stated that in the event, his wife was not allowed to return to the matrimonial home with him, dire consequences would follow. It is the consistent evidence of the prosecution witnesses, that the wife of appellant No.1, who is the daughter of the victim, was at her paternal home. Victim was refusing to let her daughter, that is the wife of the appellant No.1, to go to her matrimonial home despite the appellant No.1 requesting for the same till such time, victim met the father of the appellant No.1.

45. Consistent evidence of the prosecution witnesses is that, the appellant No.1 stayed the night at the house of the victim. Again, the consistent evidence of the prosecution witnesses is that, appellant No.1 left the house of the victim in the morning and returned with the other two appellants at the time of the assault to the house of the victim. P.W.13 interacted with the appellant No.1 prior to the appellant No.1 coming back to the residence of the victim, at the time

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of assault. P.W.1 stated in his evidence that, when P.W.1 tried to defuse the situation with the appellant No.1, it was given out by the appellant No.1 that since the victim was not allowing the wife to accompany him, victim would face dire consequences.

46. Evidence of the prosecution witnesses establishes ingredients of Section 34 of the Indian Penal Code, 1860 so far as the appellant No.1 is concerned. Appellant No.1 is also an assailant. He was present at the place of occurrence and at the time of the assault. As against him, Section 447 of the Indian Penal Code, 1860 stands established. His participation in the assault leading up to the death of the victim which was classified as ante-mortem and homicidal in nature, allows a conviction under Section 304 (II) of the Indian Penal Code, 1860 to be made.

47. Charge framed as against the accused cannot be said to be vague or incapable of comprehension. Charge speaks of the incident of assault and the death of the victim. Date of assault is stated in the charge framed. Death was a result of such assault. Place of occurrence of the incident of assault is also stated in the charge. Accused understood the charge as framed. No contemporaneous complaint was raised with regard to its alleged vagueness and incomprehensibility. Contention of the appellant No. 1 in this regard is without substance.

48. Learned Trial Judge imposed a punishment of three years which is within the time period band of punishment prescribed under Section 304(II) of the Indian Penal Code, 1860. Learned Trial Judge exercised discretion in doing so. We find no perversity in such discretion being

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exercised in the facts and circumstances of the present case, for us to take a different view in appeal.

49. In such circumstances, we affirm the judgment and order under appeal. We direct the sentences awarded to run concurrently.

50. In view of the discussions above and affirmation of the judgment and order under appeal, we discharge the Rule issued on August 14, 1989.

51. A copy of this judgment and order along with the trial courts' records be transmitted expeditiously to the jurisdictional Court.

52. Period of detention, if any, undergone in the meantime be set off under Section 428 of the Code of Criminal Procedure.

53. CRA 311 of 1989 is **dismissed**.

(Debangsu Basak, J.)

54. I agree.

(Md. Shabbar Rashidi, J.)

Dd/AD