

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

**C.R.A. 157 of 2018
CRAN 2575 of 2019
Nefajuddin Sheikh @ Montu Sk.
-Vs-
State of West Bengal**

For the Appellant(s) : Mr. Sandip Chakraborty
Mr. Asraf Mondal

For the State : Mr. Bitasok Banerjee

Heard on : 28.11.2024

Judgment on : 28.11.2024

Joymalya Bagchi, J. :-

1. Paper books have been prepared and the appeal is ready for hearing. Hence, the matter is placed today for hearing.
2. Appellant has assailed judgment and order dated 27.02.2018 and 28.02.2018 passed by the learned Additional Sessions Judge, 5th Court Krishnagar, Nadia in Sessions Trial No.VII(III) 2013 arising out of Sessions Case No.7(3) 2013 convicting him for commission of offence punishable under Sections 302/34 of the Indian Penal Code and sentencing him to suffer rigorous

imprisonment for life and to pay fine of Rs.25,000/-, in default, to suffer imprisonment for two years more.

Prosecution case:-

3. Prosecution case as alleged against the appellant is as follows :

On 20.5.2009 around 8 p.m Jasimuddin Sk was gossiping with Atibur Rahaman Mondal, Jinu Doctor, Yamin Kazi (PW5) and Anowar Sheikh (PW8) at the road side of Chaksatikhal in the club meeting room of Nefazuddin Sk. @ Afazuddin Sk. Suddenly 8/9 persons came and started firing at him. As a result, Jasimudin fell down. The miscreants started running away from the spot. Their faces were covered with cloth. Kataruddin Sk (PW1), father of Jasimuddin and Samsul Sk. (PW6) brother of Jasimuddin saw the miscreants running away. Two of the miscreants, removed their face covering and told PW 1 they have murdered his son. Police came to the spot and PW1 lodged written complaint against the appellant, Samed Sk and others resulting in registration of Tehatta PS case no. 297 of 2009 dated 20.5.2009 under sections 302/34 IPC and sections 25/27 of the Arms Act.

Proceeding before the Court

4. During investigation empty cartridges and blood stained earth were collected from the place of occurrence. Complicity of other

accused namely Montu Sk, Ramjan Sk and Chand Ali Mondal transpired. In the meantime, Samed Sk was murdered and charge sheet was filed against the appellant and three others. Charge was framed against the appellant and others under sections 302/34 IPC.

5. Accused pleaded not guilty and claimed to be tried. In course of trial prosecution examined 13 witnesses and exhibited a number of documents as well as material exhibits. In conclusion of trial the learned trial judge by judgment and order dated 27.2.2018 and 28.2.2018 convicted and sentenced the appellant, as aforesaid. Other accused were acquitted.

Arguments at the Bar

6. Mr. Chakraborty with Mr. Mondal for the appellant submits all other co-accused have been acquitted. Accordingly, conviction of the appellant under sections 302/34 IPC is illegal. Without prejudice to the aforesaid, he contends the eye witnesses PWs 1 and 2 are unreliable. Sketch map prepared during investigation does not show the culvert where PW 1 was sitting. Source of light by which the witnesses identified the miscreants has not been proved. PW2 stated there was no street light in the locality. Body of the deceased was found at the residence of PW1 which shifts the place of occurrence. PW6 is an accused in the murder of Samed Sk (co-accused in FIR) and his deposition

ought not to be relied on. No fire arm was seized and the deceased has suffered only one single bullet injury improbabilising the prosecution case of firing by 8/9 persons. Accordingly, he prays for acquittal.

7. Mr. Banerjee for the State submits PWs 1 and 6 are the eye witnesses. PW1 stated he was sitting on a culvert 18/20 cubits away from the place of occurrence i.e. the meeting room of the appellant. Hearing sounds of firing they rushed to the spot and found the miscreants running away. Two of them i.e. the appellant and Samed Sk (since deceased) removed their face covering and told PW1 that they have murdered his son. There was prior enmity between the appellant and his son PW 6, which was corroborated by PW 1. Post mortem report (Ext.-3) was proved on admission which shows the victim died due to gun-shot injury. Hence, the appeal is liable to be dismissed.

Analysis and Findings:-

8. PWs 1 and 6 are the eye witnesses. Kataruddin Sk (PW1) deposed his son was sitting in the room of the appellant where local people used to assemble and gossip. At that time he was sitting on a culvert. He heard sounds of firing and rushed towards the place of occurrence. In the electric light of the room he saw the miscreants running away. Appellant and Samed Sk (since deceased) removed their face covering and threatened that

they had murdered his son. He narrated the incident to local people and to police. As per his dictation Osman Mondal (PW11) scribed the FIR. He put his signature on the FIR. Police seized bullet cartridges from the place of occurrence. He put his signature on the seizure list. PW6 Samsul Sk is his son. He deposed in the evening around 7/7.30 p.m. his brother was in the club room. He saw the miscreants fleeing away. When he abused, they removed their face covering and stated that they did the right thing. He identified the miscreants as the appellant and Samed Sk.

9. It is argued PWs 1 and 6 related to the deceased had prior enmity with the appellant. PW6 is an accused in the murder of co-accused Samed Sk. Other witnesses namely PWs 5 and 8 who were at the place of occurrence have not supported the prosecution case.

10. It is true PWs 1 and 5 are relations of the deceased. However, mere relationship between the witnesses and the deceased is not a ground to disbelieve their version if found credible. One ought not lose sight of the fact that relations would not falsely implicate someone and screen the actual offender. That apart, prior enmity is a double edged sword. It would give motive to commit the crime too.

11. Hence, I am not inclined to reject the evidence of PWs 1 and 6 on these counts. I have also examined the evidence of PWs 1 and 6 in the light of depositions of PWs 5 and 8 who were said to be at the place of occurrence. PW5 resiled from his previous statement to police and was declared hostile. He was cross examined with regard to his earlier statement before police wherein he stated that while he was sitting at *Baithakkhana* of Nefazuddin, 7/8 persons covering their faces with cloth came to the spot and fired bullets at the deceased.

12. PW8 while not admitting his presence at the place of occurrence corroborates the prosecution case that there was firing at the place of occurrence and a person had died.

13. Investigating officer PW13 came to the spot and recovered empty cartridges as well as blood stained earth from the place of occurrence.

14. These pieces of evidences corroborate the prosecution case that 8/9 persons had come to the meeting room of the appellant and had fired at Jasimuddin resulting in his death.

15. It is also relevant at the time of firing the faces of the miscreants were masked. Hence it would not be possible for the persons gossiping with Jasimuddin to identify them. It is only while the miscreants were running away that they met father and

brother of Jasimuddin, PWs 1 and 6. At that time two of them removed their masks and threatened Jasimuddin's father that they have killed his son. This helps PWs 1 and 6 to identify the appellant and Samed Sk. (since deceased) as the persons who fired at the victim. Their versions remained unshaken during cross-examination.

16. It is argued there was no light at the place of occurrence. PW2 deposed there was no street light at the place of occurrence PW 2 had been declared hostile. In his previous statement before police he stated he had identified the appellant and Samed Sk in the street light at the locality. During his deposition in court he resiled from his previous statement and tried to make out a case that there was no lamp post. I consider it prudent not to rely on such a prevaricating witness.

17. On the other hand, PW1 has clearly stated he had seen the miscreants from the light of *Baithakkhana* i.e the meeting place. It is also stated that there was street light in the locality. Presence of light leading to identification of the appellant and Samed Sk is, therefore, established without reasonable doubt. Post mortem report has been exhibited on admission as Ext 3. From the injuries it is clear that Jasimuddin died due to gun-shot injury corroborating the prosecution case as narrated by PWs 1 and 6.

18. From the aforesaid discussion, I hold the eye witnesses (PWs 1 and 6) are reliable and have been corroborated by other evidence on record. In view of the credible and corroborated version of PWs 1 and 6 implicating the appellant as one of the miscreants who murdered the victim, investigational failure in recovering the weapon of offence cannot be a ground to disbelieve the prosecution case. It is argued though 8/9 persons fired, only one bullet injury was noted in the post mortem. It is apposite to recount investigating officer recovered a number of fired bullet cartridges from the place of occurrence which establishes a case of indiscriminate firing by a number of persons.

19. Materials on record show after the incident body of Jasimuddin was shifted to the courtyard of PW1. Inquest was conducted there. As discussed earlier, fired bullet cartridges were recovered from the place of occurrence. In light of such material establishing the place of occurrence, post occurrence shift of the body does not affect the credibility of the prosecution case.

20. Finally, it is argued appellant alone could not be convicted under Section 302 read with Section 34 IPC. Section 34 IPC speaks of constructive liability of a number of persons who shared common intention to commit an offence. Prior to trial, Samed Sk. had died and charge was framed against the appellant and others who had been acquitted.

21. A scrutiny of charge framed under Section 302 read with Section 34 IPC against the appellant would show that the appellant alongwith 8/9 others in pursuance to their common intention had committed the murder. No charge was framed against Samed Sk. as he had died prior to trial. In these circumstance, acquittal of 3 accused, namely Montu Sk., Ramjan Mondal and Chand Ali Mondal does not render the conviction invalid. Evidence on record shows appellant and Samed Sk. (since deceased) alongwith others had committed the murder. Non-mention of Samed Sk. in the charge is a minor omission which has neither mislead the appellant nor occasioned failure of justice.

22. As the evidence on record clearly proves the appellant had shared common intention with Samed Sk. (since deceased) and unknown others to commit murder, acquittal of some of the named accused does not render the conviction of the appellant bad in law.

23. Accordingly, I uphold the conviction and sentence of the appellant.

24. Appeal is accordingly dismissed.

25. In view of dismissal of the appeal, connected application if any, is also disposed of.

26. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off against the

substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

27. Let a copy of this judgment along with the trial court records be forthwith sent down to the trial court at once.

28. Appellant is a septuagenarian and it is submitted he has no criminal antecedents.

29. In the event the appellant makes a prayer for remission of his sentence upon completion of 14 years of actual imprisonment, the appropriate authority may consider such prayer bearing in mind relevant factors including age, criminal antecedent and his conduct in the correctional home.

30. Photostat certified copy of this judgment, if applied for, shall be made available to the appellants upon completion of all formalities.

I agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)