

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 159 of 2010

**Sunil Malik @ Ramanandi
-Vs-
The State of West Bengal**

For the Appellant : Ms. Varsha Roy

For the State : Mr. Madhu Sudan Sur
Mr. Monoranjan Mahata

Heard on : 09.02.2024, 20.02.2024, 02.05.2024

Judgment on : 11.07.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 08.12.2009 and 09.12.2009 passed by the Learned Additional Sessions Judge, Fast Track Court No.1, Hooghly in Sessions Trial No. 11 of 2008 convicting the appellant for the offence punishable under Section 304 Part-II of the Indian Penal Code, 1860 and sentenced him to suffer rigorous imprisonment for 7 years and a fine of Rs.10,000/- in default to suffer further rigorous imprisonment for 2 years more.
2. The prosecution case emanated out of a complaint lodged by one Sri Sukumar Singh at Pandua P.S. on 22.12.2004 which precisely stated that

Smt. Kakali Roy, the younger daughter of the deceased Sambhu Roy and Smt. Sabita Roy, was married to Sushil Malik @ Ramanandi, the younger brother of accused Sunil who gave birth to a son. The accused Sunil, his mother Jhukki Malik and his wife Smt. Champa Malik resided jointly. Kishore Malik, the father of accused Sunil Malik resided separately. Sushil Malik resided elsewhere. Sushil Malik, the husband of Smt. Kakali Roy married for the second time elsewhere in Bihar at the instigation of the present accused persons as alleged. On 21.12.04 in between 8 p.m. and 08:30 p.m. the deceased Sambhu Roy went to the house of accused persons to protest the marriage of Sushil with another woman during the life time of Smt. Kakali Roy. The accused persons consequently assaulted Sambhu Roy causing fatal injuries, whereby he fell down on the ground, lost his sense and groaned. His daughter Smt. Kakali Roy and wife Smt. Sabita Roy rushed to the house of accused persons and witnessed the accused persons to assault Sambhu Roy. Local people also assembled at the spot. The accused persons escaped. Smt. Kakali Roy with the aid of local people including Dukhu Roy removed the deceased to Pandua hospital, who after his admission, succumbed to the injuries.

3. Based on the above written complaint Pandua P.S. Case No. 254/04 dated 22.12.2004 was registered and investigating initiated.
4. After completion of investigation, police submitted charge-sheet against all the F.I.R. above named accused persons including the appellant vide charge-sheet no. 28.06 dated 28.02.2006 under Sections 304/34 of the Indian Penal Code, 1860.

5. Subsequently, charges against the appellant and 2 other charge-sheeted accused persons were framed under Sections 304/34 of the Indian Penal Code, 1860 to which the appellant pleaded not guilty and claimed to be tried.
6. In order to substantiate the charge against the appellant, the prosecution examined 16 prosecution witnesses and exhibited certain documents.
7. The Learned Advocate for the appellant as well as the State submitted their rival contentions and propositions.
8. The Learned Advocate for the appellant submitted that –
 - i. The deposition of PW-14 and PW-15 were contradictory regarding the cause of death and the ocular version of alleged eye witnesses namely PW-2 and PW-3. The Hon'ble Apex Court in the Case of Vishnu -Vs- State as reported in (2006) 1 SCC 283 has held that “*Expert Medical evidence is not binding as against the Ocular evidence. This is because the medical officer is not a witness of fact and the evidence given by him is really of an advisory character and not binding on the witness of fact*”. Such ratio decided of the Hon'ble Apex Court was applicable in the factual background of the instant case.
 - ii. The deposition of PW-3 was in material particularly inconsistent with the deposition of P.W.2, as well as with the deposition of P.W.15, the autopsy surgeon and with the deposition of PW-14, the Doctor who treated the deceased at first.
 - iii. The appellant as well as the female accused persons had conjointly assaulted the deceased and they were similarly situated regarding the commission of alleged offence. Exbt-5, the injury report which dealt

with the name of the assailants also supported the version of PW-2 & PW-3. The depositions of PW-7, PW-8, PW-10, PW-11 regarding the commission of offence by the appellant herein was based upon hearsay evidence. The Hon'ble Apex Court in the case of Sakatar Singh vs. State as reported in AIR 2004 SC 2570 had held that statement of witness not based but on his personal knowledge marked on what he heard from Hearsay others was "Hearsay", evidence and such evidence was inadmissible. The findings of the Learned Trial Judge in view of the aforesaid discussion had resulted in gross travesty of justice and as such, the impugned order and were judgment dated 08.12.09 and 09.12.09 was liable to be set aside.

- iv. It had not been established by sufficient evidence that Sushil had married for the second time which prosecution was shockingly lacking. The presence of the deceased in the home of the accused, for the purpose of ventilating his alleged grievance against the alleged marriage of Sushil could not be believable so long. The deceased Shambhu Roy developed illicit relationship with the female accused Jhukki Roy and on the relevant date and time he entered into the house of accused persons with a view to having his illicit connection with the female accused persons and when the accused persons raised alarm and shouting, the deceased got dashed against the pucca wall. While fleeing away therefrom and thereby he received injuries and died in the hospital. This defence version must have been accepted by the Learned Trial Judge by meticulous scrutinisation of

depositions to be probable and trust worthy and benefit thereof must not have been denied to the present appellant.

- v. The scribe of the F.I.R. namely Sukumar Singh (PW-6) did not have any knowledge as to how the murder was committed and for the obvious reason he was declared hostile by the prosecution. There was no iota or substance to show that PW-6 said Sukumar Singh had the occasion to see the actual incident of assault.
- vi. In the F.I.R. it had been specifically averred that one Dolu Roy and the local people assembled there and witnessed the incident but they had been withheld. Non-Examination of such independent eye witnesses by the prosecution had shrouded the factual matrix of the prosecution case with mystery of cloud and as such the impugned judgement and order dated 08.12.09 and 09.12.09 were deserved to be aside to prevent miscarriage of justice.
- vii. In order to rope an accused with the charge under Section 304 Part II of the I.P.C. there should be an intention to cause death or to cause such bodily injury as the appellant knew would likely to cause death. There should be an intention of causing bodily injury sufficient in the ordinary course of nature to cause death. The observation of the Hon'ble Apex Court in the case of Thankachan -Vs- State of Kerala as is reported in (2005) 11 SCC 536, which is quite apposite in the factual scenario as adumbrated in the instant case by the depositions of PW-2 and PW3 as well as the F.I.R. which did not speak that the appellant had the requisite knowledge that his act was likely to cause

death after taking into considerations together with the totality of the circumstances such as the weapon used, the part of the body where injuries were inflicted, the number of injuries caused and the deliberateness of the act committed etc.

9. A circumspection of the prosecution witnesses revealed as follows:

- i. PW-1 a constable, carried the dead body of Sambhu Roy from Pandua P.S. to Chandannagore S.D. Hospital morgue for P.M. examination under a challan. Alamats namely wearing apparels of the deceased were produced, identified by PW-1 was marked as Mat. Exbt. I (collectively).
- ii. PW-2 in her deposition recounted that the accused Sunil Roy was her brother-in-law, accused Jhukki was her mother-in-law and the accused Champa was sister-in-law. Susil Roy was her husband. Her father was murdered by accused Sunil Roy, Jhukki Roy and Champa Roy nearly 4 years ago on 4th Pause in the night at about 8 p.m. in the courtyard of the house of the accused persons. Her father was assaulted and beaten to death by kicks and fists. She saw the incident in electric light upon her father by accused persons in their house with her own eyes who groaned in pain. They removed her father with the help of van to local hospital at Pandua for his medical treatment who subsequently expired. Her husband married for the second time and resided in Bihar. The present accused persons arranged the marriage of her husband elsewhere. Her father went to make protest such incident of marriage and the accused persons

assaulted her father. Her father consumed liquor. PW-2 was examined by the police.

- iii. During cross-examination PW-2 stated the house of accused persons was surrounded by mud wall. She could not state when her husband married for the second time at Bihar. She did not initiate any criminal proceeding against her husband for his subsequent marriage of his earlier. She did not lodge any diary. On the following morning she was examined by police at P.S. She stated to I.O. that she had seen the incident of assault upon her father. She stated to I.O. that her father was murdered by accused persons. She stated to I.O. that at the relevant period accused Sunil was lighting the bulb by means of hooking and that she saw the occurrence with the help of such light. She could not state the name of the van puller in whose van her father was removed. She stated to the attending Medical Officer that she saw the accused persons assaulting her father causing such injury.
- iv. PW-3 in her deposition stated that PW-2 was her daughter and her husband died 4 years back on 4th Pause in the hospital. The present accused persons namely Sunil, Jhukki and Champa assaulted her husband by means of fists and blows. They also pushed her husband on the ground. The husband of her daughter PW-2 married for the second time arranged by the accused persons. Her husband went there to make protest such marriage. Accused persons assaulted him causing his subsequent death in hospital. PW-3 went to the house of

- the accused persons and she saw the alleged incident. She was examined by police. The appellants along with other accused sent the husband of her daughter elsewhere to be married for the second time. Her husband sustained apparent injuries on his eyes, abdomen and chest being assaulted by the accused persons.
- v. During cross-examination PW-3 could not state who assaulted her husband first and by what means nor could state who assaulted for the last and by what means. She could not state where and how the husband of her daughter contracted his subsequent marriage. Police came to their house for investigation and she was examined on the following morning at about 7 a.m.
 - vi. PW-4 in his deposition stated that PW-3 was his sister. He reiterated the evidence of PW-2 and PW-3. The accused Sunil, Jhakki and Champa together assaulted Sambhu Roy by fists and blows and subsequently he succumbed to his injuries at the hospital on the same day. As he reached at the spot of incident, Sambhu Roy groaning. Local people assembled. PW-2 and PW-3 were present. The accused persons fled instantly.
 - vii. During his cross-examination PW-4 stated that he stated to police that with the help of local people he removed Sambhu Roy by a van to Pandua hospital where he was admitted but died immediately thereafter.

- viii. PW-5 in his deposition stated to be the scribe of the complaint filed at Pandua P.S. The said complaint which he wrote was marked as Exbt.-3. Sukumar Singh signed the complaint.
- ix. PW-6 recounted that the wife of the deceased Sambhu approached him for lodging a complaint. They went to P.S. where a complaint was prepared. Motilal Biswas wrote the complaint and he signed the same. His signature appearing on the complaint was marked as Exbt.-3/1. He was not aware how the murder was committed. He was not examined by I.O.
- x. PW-8, PW-10 and PW-11 had been post occurrence witnesses and their evidence was based on hearsay. They were not interrogated and examined by police. They went to P.O. after the incident was over.
- xi. PW-9 an A.S.I. of police was a seizure list witness to seizure of wearing apparels of the deceased. His signature appearing on the seizure list was marked as Exbt.-2/1. He identified the alamats namely wearing apparels already marked as Mat. Exbt.-I collectively.
- xii. PW-12 in her deposition stated she was a member of nursing staff attached to Pandua Hospital and had been a witness to the inquest. Her signature appearing on the inquest report was marked as Exbt.-4/1. She identified the signature of Dr. Amit Kr. Day, who was a witness to the inquest. His signature was marked as Exbt.-4/2 on the inquest report.
- xiii. PW-13 was the first Investigating Officer.

xiv. PW-14, the Medical Officer, recounted that he was posted at Jamgram P.H.C. On 21.12.04 he was deputed at Pandua Hospital. On that day in the night at about 10 p.m. the patient Shambhu Roy was brought to the hospital by Kakali Roy and Duku with the history of assault and injury. The patient was not in a position to speak. His daughter Kakali reported that her husband had married another woman at a place in Bihar and so her father abused her husband and others at their house when her father was assaulted by her husband and others in their house. PW-14 attended the patient and found the followings :-

- i. *"The patient was unconscious.*
- ii. *There was a cut injury on the upper lip measuring 1" in length.*
- iii. *There was swollen injury over and around the left eye.*
- iv. *The patient was gasping.*
- v. *The patient was sluggish.*
- vi. *Pulse was rapid and feeble."*

He meted out necessary treatment to the patient as far as practicable. The patient was got admitted. The condition of the patient was precarious and unpredictable. He prepared a report thereof, under his hand and signature marked as Exbt.-5. Such type of injury might happen if someone was dealt with a lathi. The patient died in the said hospital unit and an inquest was conducted by police, in their presence and he stood as a witness to it. His signature appearing on

inquest report prepared in carbon process which had already been marked as Exbt.4/2.

- xv. During his cross-examination PW-14 stated that he prepared the report in the cyclostyled form supplied to them. A patient register was maintained wherein the particulars of the patient and nature-of-treatment were entered into. They were in the habit in the rural hospital to prepare a report of the examination of patient in case of assault in separate sheet apart from treatment sheet.
- xvi. PW-15 in his deposition stated that he was a Medical Officer and posted at Chinsurah Hospital. On 22.12.04 he was attached to Chindernagore Sub- Divisional Hospital. On that day in afternoon at about 2 p.m. he conducted an autopsy over dead body of one Shambhu Roy of village Arti, Battala under Pandua P.S. being brought and identified by police escort Lakshman Dhara a constable attached to Pandua P.S. in connection with Pandua P.S. U.D. case No. 99/04 dt. 22.12.04.

PW-15 detected the following:-

- i. *“Rigour mortis was present.*
- ii. *The subject was average built.*
- iii. *There were two stitches on lower lip.*
- iv. *There was blakish marks over andarouna left eye.”*

On Dissection PW-15 found the following:-

- i. *“There was fracture on right rib from 4 to 7.*
- ii. *There was clotea bloou on bothplural cavity.*

iii. There was haemorrhage on brain.”

In his opinion the cause of death was due to the direct effect of aforesaid injuries which were anti mortem in nature.

He obtained viscera and handed over to police escort for further chemical analysis so as to confirm his opinion.

He prepared a report thereof in the prescribed form. The said report marked was as Exbt.6 which stated such type of injury might occur if someone was dealt with leg blows and lathi as well.

- xvii. During his cross-examination PW-15 stated that such type of injury as detected on the face of the deceased might occur if someone was dashed against the pucca wall with great force.
- xviii. PW-16 in his deposition stated at the relevant time he drew up the formal F.I.R. and his signature was marked as Exbt.7.

The case was endorsed to him for investigation. At the outset on receipt of an intimation from Pandua B.P.H.C. that a man named Sambhu Roy was admitted into that hospital with the history of severe injuries and thereafter, he succumbed to his injuries, he registered and initiated Pandua P.S. U.D. Case No. 99/04 dt.22.12.09 at 2.30 p.m. He went to hospital and saw the man lying dead on his bed with the history of injuries. He held inquest over the dead body and prepared the report marked as Exbt.4. He sent the dead body to hospital morgue for autopsy under challan marked as Exbt.1/1. He seized the wearing apparels of the and the seizure list was marked as

Exbt.2. He collected the P.M. examination report and the injury report.

xix. During his cross-examination PW-16 stated that he could not collect the F.S.L. report in connection with viscera of the deceased. There was no investigation or report in C.D. whether there had been any electric connection at the house of the accused person. The witnesses did not disclose as to how they got the scope to witness the incident in the dark night. There was also no note whether it was a dark or moonlit night. He did not examine Bishnu Singh who had the house adjacent to P.O. He also did not examine Kallyan Roy. There was no investigation as to where and how Sushil Malik married for the second time. He did not examine Matilala Biswas who wrote the complaint.

10. PW-2 Smt. Kakali Roy, who was the daughter of the deceased Sambhu Roy, the eye witness to the occurrence recounted that on the relevant date in the night at about 8 p.m., her father Sambhu Roy consumed liquor and went to the house of accused persons to protest against organizing the marriage of her husband elsewhere. She witnessed the accused persons to assault her father Sambhu Roy in the electric light through fists and kicks and her father groaned. During her cross examination, she failed to depose as to when and how her husband entered into a subsequent marriage at Bihar. She had not seen or known the identity of the girl whom her husband married. She did not lodge any diary. She did not initiate any criminal proceeding against her husband. PW-16, S.I. Kartick Chandra Ghosh during

his cross examination deposed that the witnesses did not disclose how they witnessed the incident in the dark night. He also did not investigate whether there had been any electric connection at the house of accused persons at the relevant time. PW-2 did not specify the overt act displayed by the individual accused persons in committing the alleged crime.

11. PW-15 Dr. Samojit Mukherjee, the autopsy surgeon who conducted autopsy over the dead body of deceased Sambhu Roy deposed the cause of death was due to the direct effect of the injuries as mentioned in the post mortem report (Exbt-6) which were ante mortem in nature. He further opined such type of injury might occur if someone was assaulted with kicks and lathi. PW-15 further disclosed such type of injuries might be the result if someone was dashed against pucca wall with great force. PW-14 Dr. Amit Dey, the then Medical Officer of Pandua Hospital who treated the deceased Sambhu Roy on 21.12.2004 at about 10 p.m. opined that the injuries noticed by him could be due to assault by lathi. During his cross-examination he further opined such type of injury might also occur if someone was dashed against pucca wall with force. The prosecution did not produce further opinion recorded by PW-15 considering the FSL report.
12. PW-3 Smt. Sabita Roy, the wife of the deceased, also the eye witness to the occurrence deposed to have gone to the house of accused persons on hearing the cries of her husband and she saw such the incident of assault upon her husband. During her Cross examination PW-3 could not state as to who assaulted her husband for the first and for the last time. She also could not narrate who assaulted her husband and by what means. She failed to

describe any specific overt act on the part of the appellant. There were inconsistencies in the deposition of PW-2, PW-3, PW-14 and PW-15.

13. PW-7 & PW-8 had been to the place of occurrence immediately after the occurrence of assault upon the deceased and learnt the accused Sunil (the appellant herein) exclusively to have inflicted on injuries on the deceased victim. PW-7, PW-8, PW-10, PW-11 did not implicate the female accused persons to have assaulted the deceased. The testimony of such post occurrence witnesses is based on hearsay, unaccountable and discreditable.
14. The alleged incident of assault was initiated at the instance of the victim who abruptly being inebriated approached the appellants to protest the second marriage of his son-in-law. The prosecution failed to prove the presence of the appellants at the place of occurrence to have been directly witnessed by PW-2 and PW-3. The prosecution could not prove the overt act of the appellants as PW-2 and PW-3 did not specifically attribute the distinct role of the appellants in inflicting injuries. The prosecution failed to prove the motive, intention and knowledge of the appellants to assault the victim in order to murder him. There was no premeditation on the part of the appellants to inflict injuries on the victim. Admittedly, the victim went to the house of the appellants and the other accused persons. Whether there was a scuffle, assault or a push towards the wall by the appellants could not be established by the prosecution to result in his death.
15. PW-14, the Medical Officer who attended the victim observed a cut injury on the upper lip, a swollen injury over and around the left eye which inferred that the victim might have collided a hard substance on his face. PW-14 did

not notice any other injury on the body of the victim. Possibly, the victim as a result of a collision the hard substance fell on the ground fracturing his right rib due to his feeble body. The prosecution failed to prove its case beyond reasonable doubt.

16. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the instant criminal appeal is allowed.
17. Accordingly, the criminal appeal being C.R.A. 159 of 2010 is disposed of.
18. There is no order as to costs.
19. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
20. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)