

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 368 of 2004

Ahmed Ali Sha and Anr.

-Vs-

The State of West Bengal

For the Appellants : Ms. Pallavi Priyadarshee
(*Amicus Curiae*)

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 21.09.2023, 12.10.2023, 17.01.2024

Judgment on : 15.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against an order of conviction and sentence passed by the Learned Additional Sessions Judge, Fast Track Court – II, Howrah in Sessions Trial Case No. 611/03 on 30.04.04 convicting the accused persons under Sections 304(2)/34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for 7 years each and to pay a fine of Rs. 2,000/- in default to suffer rigorous imprisonment for 2 months more each, the period of detention undergone by the accused shall be set off against the terms of imprisonment of the instant case.
2. The prosecution case in a nutshell was that 'on 30.09.2003 at about 22:30 – 23:00 hours at night a hot altercation took place amongst Ahmed Ali Sha,

Minsar Sha and Sougat Sha. As a result the accused persons assaulted Saugat Sha. Saugat Sha sustained injuries and was taken to Sebayan Nursing Home, from there he was shifted to Howrah General Hospital. Thereafter, he was transferred to Medical College Hospital where he succumbed to his injuries on 08.10.2003. A written complaint was lodged in the Sankrail Police Station being Sankrail Police Station Case No. 148 dated 08.10.2003 was started against the accused persons under Sections 304 of the Indian Penal Code.

3. After the investigation police submitted a Charge-Sheet against the appellants under Section 304 of the Indian Penal Code.
4. The appellants pleaded not guilty and claimed to be tried for the charge of offence under Sections 304/34 of the Indian Penal Code.
5. The prosecution examined as many as 10 witnesses to bring home the charge and exhibited certain document.
6. The Ld. Advocate for the appellant submitted as follows:-
 - i. The vital witness of this case was PW-9, the doctor who conducted the post-mortem of the body of the victim on 10.10.2021, but the death of the victim occurred on 08.10.2003 due to which the body was partially decomposed as per the inquest report which was prepared on 10.10.2003 and there was no explanation of such delay by the prosecution.
 - ii. The inquest report and the deposition of the PW-9 mostly rest on abrasions and hematoma to which PW-9 in his cross-examination had admitted that such injuries may heal in the course of time

which were not infected. He further found that the brain was pale and on the lungs patches of bronchopneumonia was present. One of the major causes of such disease which the victim was suffering because of heavy drinking. It was to be noted that all the interested/relative witnesses sat tight over such vital fact in their depositions which leads to omission of material facts.

- iii. The evidence of PW-2, mother of the victim, stated the victim returned himself from nursing home to the house by walking as such it can be taken into consideration that he was not severely injured and had become sick being unable to move from such assault.
- iv. The evidence of PW-4 although declared hostile mentioned that the victim was inebriated.
- v. PW-5, nephew of the victim, heard a hue and cry and he went to call his father and as such he also did not see the evidence. PW-5 stated during his cross-examination that assault of the deceased lasted for five minutes.
- vi. It was an admitted fact that there was no eyewitnesses to the occurrence as such no one had seen what actually happened as such they had been the post occurrence witnesses.
- vii. The delay to lodge the complaint on 8.10.2003 after the incident occurred on 30.9.2003 was not explained.
- viii. The fact that the victim was treated at Calcutta Medical College and Hospital but no bed ticket or any other medical documents of the

nursing home or the Howrah General Hospital or other medical documents of treatment till the deceased was alive were seized and no doctor from the hospital was examined as to the cause of the victim's death under Section 161 of the Code of the Criminal Procedure hence the deposition of PW-9, the doctor in his cross-examination had corroborated to such fact hence there cannot be any link from assault to death.

- ix. The Investigating Officer chose to record the statements under Section 161 of the Code of Criminal Procedure mostly of the relatives of the victim who all are interested witnesses to this case. Such conduct of the Investigating Officer diluted the quality of the investigation which in turn shatters the prosecution story.
- x. The grave lacunae that appeared during the course of the investigation that no statement of the victim was recorded by the doctor, or there was any dying declaration even though the victim was alive for 7-8 days after the incident and he was in conscious condition to give his statement.

- 7. Learned Advocate for the State submitted that the evidence of prosecution witness nos. 3, 5 and 7 were that of the eye witnesses who had unanimously witnessed the incident of assault to have been inflicted upon the victim.
- 8. P.W-3 stated that his father was admitted in Kolkata Medical College who subsequently died after few days. P.W-5 and P.W-6 concurred to the evidence of P.W-3 in its entirety in the context of the injuries being inflicted upon the victim at his relevant parts of the body namely stomach, chest etc.

the victim after sustaining such injury was unable to move a walk and had to be hospitalized.

9. The evidence of the eye witnesses have been aptly corroborated by the evidence of P.W-9, the Doctor and the injuries delineated by P.W-9 in his report signified the manner in which the same were inflicted. It was further submitted that the occurrence of the incident of assault was admitted by the appellant Minsar Shah during her statement being recorded under Section 313 of the Criminal Procedure Code. The aforesaid appellant stated *"It is correct that there was an incident of assault on Swagat but I was not present."* She further stated to a query that she did not assault Swagat.
10. The Learned Advocate for the State contended that in view of the ocular evidence being corroborated by the medical evidence the prosecution has been successful to prove its case beyond reasonable doubt and the appeal shall be dismissed.
11. A circumspection of the witnesses revealed as follows:-
 - i. PW-1 was the elder brother of the deceased. He was working as a tailor. He stated that the deceased passed away on 03.10.2003 Minsar Shah and Ahmed Ali were quarrelling. On seeing them, the victim/deceased asked them why they were quarrelling. They asked him why he was poking his nose in such matters and hit him on his stomach with their legs and his chest with their legs and fists. Thus, the victim/deceased became unconscious. For that reason, the two boys took him and left him at his house. He was in his house the entire night and in the morning he was admitted in the Nursing

home at Andul. Andul Nursing Home referred the case to Howrah Hospital as the condition of the patient was serious. Howrah Hospital further referred him to Medical College Hospital, Kolkata as the condition of the patient was very serious. The victim/deceased told PW 1 that he had just asked the accused why they were fighting and they assaulted him by hitting him with their fists and legs. He identified the accused in court. After the death of his brother, he informed the police and lodged a written complaint that was signed by him. The signature of the witness in the complaint was marked as Ext- 1/1. P.W 1 had studied up to class three and was very knowledgeable about the correct dates according to the calendar. The complaint was written by one of his friends. In his cross examination he stated that his house was very near to the place where his brother had been assaulted by the accused. His son, PW 5 was present at the place and immediately informed him. The age of the victim/deceased was about 35 years old.

- ii. PW-2 was the mother of the victim/deceased. She did not remember the exact date of the death of her son. She deposed that the victim/deceased was riding his 'rickshaw' in front of the house of the accused. They pushed him and assaulted him by hitting his stomach and chest with his legs. The victim/deceased became unconscious. The victim/deceased then came to their house and was on the verge of tears. She had asked him what had happened, and he said that he had been assaulted by the accused. The next

morning, he was admitted in Andul Nursing Home and thereafter Howrah Hospital. Thereafter he was admitted to Medical College in Kolkata and he died at that hospital.

- iii. PW-3 was the daughter of the victim/deceased. She stated that he had died four to five months before the date she deposed. He was assaulted by the accused and identified them in court. She did not remember the exact time, but her father had been assaulted by the accused at night. Listening to the cry of her father, she went out of her house which was very near to the house of the accused. She had brought her father home and next morning he was sent to Andul Nursing Home. The doctor stated that the case was very serious and sent him to Howrah Hospital and then he was sent to Kolkata Medical College as his condition was serious. Her father was admitted in Kolkata Medical College and he died at the hospital a few days after. In her cross examination she stated that they assaulted her father for about half an hour. Two or four people had gathered there. She did not know the topography of the place and she could not state who was on the northern side of her house. Her father's eldest brother, her grandmother resided in the same house. Her grandmother went to the place of occurrence before her.
- iv. PW-4 was declared hostile by the prosecution.
- v. PW-5 was a resident at Phakir locality, the same locality where the victim/deceased resided. The victim/deceased was his uncle, and the complainant was his father. He stated he had passed away four

or five months before the day he deposed. Before the death of the victim/deceased, the accused accompanied them. There was a heated argument between the two accused and victim/deceased. They assaulted him by kicking in the stomach and assaulted him with their fists continuously. Then PW 5, PW3 and PW 1 left the victim/deceased in their house. He knew that the victim/deceased was assaulted by the two accused. He was sitting in front of one of the accuse's house. On the following morning the victim/deceased was taken to the hospital, and he remained in the hospital for one week. Thereafter he died in the hospital. In his cross examination he deposed that he worked as a tailor near his house and the victim/deceased was a "van rickshaw puller". The two accused persons assaulted the victim/deceased for about five minutes. Apart from everyone, there were two or three other people. He went and called his father who was PW 1 and PW 3. The police examined him after the death of the victim/deceased. He had stated before the police that he was sitting in front of the house of one of the accused. He had stated before the police that he went to ask his father who PW 1 and PW 3 were and he tried to interfere when the victim/deceased was assaulted.

- vi. PW-6 was the elder brother of the son in law of the victim of the deceased. He resided in the same para of the victim/deceased. He stated he had passed away four or five months before the day he deposed. The two accused persons were quarrelling with each other

and the victim/deceased asked why they were quarrelling so they assaulted him by kicking him in the stomach and chest. He then stated that PW 1 and himself left the victim/deceased at his house as he couldn't walk due to the assault. PW 6 was sitting in front one of the accuse's house. He heard the next morning that the victim/deceased was taken to the nursing home but they didn't accept the patient and referred him to Howrah Hospital. Thereafter he was transferred to Calcutta Medical College Hospital. He died in the hospital after eight or nine days. In his cross examination he stated that he was the elder brother of the son in law of the victim/deceased. He stated that he was examined by the police after the death of the victim/deceased. He however then stated that he was not examined by the police, but his friend told the police that he was present at the time of assault. He had stated such facts for the first time in court.

- vii. PW-7 was attached with Sankrial P/S and O/C. on 08.10.02, he was posted as O/C at Sankrial. At that time, ASI Prabittaranjan Basu was working at Sankrial P/S. On the date, he received a FIR at 10.25 am. The endorsement of the complaint was in his handwriting, and he also signed it. He knew his handwriting and signature. The endorsement in his handwriting was marked as Ext ½. He filled up the formal FIR and PW 7 identified the formal FIR filled up by him and signed by him. The formal FIR was marked at Ext 2. He endorsed the investigation of the case to SI Asoke Kr.

Sarkar. The signature of the formal FIR was of PW 7. The signature of the witness was marked as Ext. 2/2. Sankrial P/S Case No. 148/03 dated 08.10.03 was registered and started under section 304 of the IPC.

- viii. PW-8 was the Executive Magistrate at Serampore. On 10.10.03, he was posted as Executive Magistrate at Sealdah Court and Executive Magistrate Corner Court. On 10.10.03, he held the inquest over the dead body of the victim/deceased at about 3-35pm. The dead body was identified by constable No. 2386 named Bablu Mandal. On inquest, he found injuries which he mentioned in his inquest report as eleven items. The report typed by the typist in his dictation and signed by him was marked as Ext 3. In his cross examination he stated that he had not made any note in the report that together the injuries were old or fresh.
- ix. PW-9 was posted as the Vice Principal and Medical Superintendent of the Mednipore Medical College Hospital, PachimMednipore. On 10.10.03 he was posted as Associate Professor, Dept. of Forensic and State Medical College Calcutta. On 10.10.03, the post mortem was held over the dead body of the victim/deceased who was aged about 35 years and was Muslim Male. The post mortem was in connection with Sankrial P.S. Case No. 143 dated 08.10.03. The body was identified by Bablu Murmu Constable No. 86 of Bowbazar P.S. During his investigation he found the following injuries:-

- a. One abrasion 3.5 x 2.5' over back of left elbow and adjoining right arm and right forearm.
- b. One abrasion '1.5 x 1' over back left elbow.
- c. One abrasion '1.5 x 0.3' over back of left forearm, 1.2' below hip of left olierenda process.
- d. One abrasion '1 x 0.3' over back of left forearm 1" below injury no. 3.
- e. One abrasion "1.2 x 0.3" over back of left forearm "1.4" below injury No.4.
- f. One abrasion 1" x 0.3" over ventral aspect of left forearm 1.3" below left wrist.
- g. One abrasion 3" x 3" over front of Patella of left knee.
- h. One abrasion 1.5" x 0.5" over anterior aspect of left leg 5" above left ankle.
- i. One abrasion 1" x 0.5" over top of back of right shoulder.
- j. One abrasion 3.5" x 2.5" over right buttock.
- k. One abrasion 6" x 3" right flank of antirior abdominal wall.
- l. One hematoma 8" x 3.5" over soft tissues of left forearm in the ventral aspect 1.9" below left elbow beat.
- m. Fracture over head of right alna.
- n. One rightparamedian incision 6" long including 10 stitches made surgically 4" above symphysis pubis was present over ant. abdominal wall with drainage on either side of ant.abdonimal wall.

- o. One hematoma 4" x 3" over soft tissue's of scalp over both parietal region.

All the injuries revealed evidence of vital reaction. The abrasions were dark black with partial fallen of scalp. The hematoma was dark brown. He could not find any other injury. In his opinion, the death was due to the effect of the injuries, and they were antemortem in nature. There was some pus present in the brain as well as in the lungs due to the effect of the injuries. The reason was concurred by Dr. A.K. Gupta head, Dept of Forensic and State Medicine medical College, Calcutta. The injury over the head including the findings of the brain were sufficient to cause the death of the person in ordinary course of nature and the other injury definitely aggravated the death process. The injury of the exterior part of the body may have been caused with fists and blows. The report was prepared by him and signed by him and was marked as Ext 5. In his cross examination he stated that visible injuries he found were abressio and hematoma. It was correct that the abrasionin few occasions were simple injury and may have healed in the course of time. As per his report he found that the brain was pale due to the presence of pus on the surface level and on the lungs from bronchophneumonia in patchy areas which were the result of actually injuries. Apart from that, the hematoma soft tissue of the scalp, he did not find any other injuries. The pus was formed within the eight to nine days the patient was alive. He did

not refer to or consult any medical report of the patient when he was alive. It was correct that the abrasion and hematoma, which he found were not infected. Multiple abrasions with multiple dimensions on different parts of the body would not be caused by a simple fall on the ground.

- x. PW-10 was attached with Sankrial PS as SI. On 08.10.2003, he was posted at Sankrial P.S. as SI. On that date the OC endorsed the Sankrial P.S. Case No. 148/03 dated 8.10.03 to him for investigation. The case was started by ASI Pabitra Bose. During investigation he visited the place of occurrence and prepared a rough sketch map along with the index which bears his signature and is marked at Ext 4. He examined the witnesses and recorded their statement. He collected the post-mortem report. Before that, he arrested the accused persons. From Bowbazar Thana he received the inquest report. He also collected the inquest report and the postmortem report during his investigation. He submitted the chargesheet for the offense under Section 304 of the IPC against the accused persons. He examined and recorded the statements of PW 4. He stated before him that he was sitting in front of the house of Shanu Shah. He saw that the victim/deceased and the two accused were in a heated argument. PW 4 also stated that he saw the two accused assaulting the victim/deceased with his fists and the victim/deceased fell down on the road and the two accused left him there and fled away. He identified the two accused in court. In cross

examination, PW 10 stated that it was not a fact that he had only examined the relatives of the deceased and his people at home. He examined the people from the house of 'B' shown in his sketch map.

12. The Learned Advocate for the appellants agitated the deviations with regard to the Inquest Report and the Post-mortem Report stating that the Inquest Report primarily detected the abrasions and the hematoma.

13. It was further submitted that the injuries in the form of abrasions would not result in the death of the victim. However, the victim was suffering from bronchial diseases with lung patches. Moreover, the victim had an addiction for drinking alcohol which might have resulted in his fall. None of the prosecution witness was the eye witness to the occurrence and had suppressed the same before the Court who were otherwise post occurrence witnesses. The incident occurred on 30.09.2003 and the complaint was lodged on 08.10.2003 without an explanation for such delay raising reasonable doubt and suspicion against the veracity of the prosecution case. The injuries depicted in the Inquest Report marked as Exhibit-3 and the Post-mortem Report marked as Exhibit-5 corroborated each other in terms of the same to have been sustained by the victim on his right abdomen, left elbow, left hand, right elbow, right hip joint, left leg, right shoulder etc. The Inquest Report conspicuously denoted the superficial injuries to have been sustained by the victim. In contrast to the injuries affecting the inner parts of the body of the victim which would not be necessarily detected through a mark or an abrasion on the skin of the body. The Post-mortem Doctor being P.W-9 had vividly described the wounds to damage internally as a

consequence of the injuries inflicted on the victim. P.W-9 had categorically mentioned that the pus, present in the brain as well as the lungs were due to the effect of the injuries contrary to the claim of the learned Advocate that the victim was suffering from bronchopneumonia which affected his lungs to create patchy areas. Moreover, multiple numbers of abrasions of multiple dimensions could not have been caused by virtue of a simple fall on the ground at various places if the same had not been caused through external forces.

14. In the case of **Ramu v. State of U.P.**¹, the following was observed by the Hon'ble Supreme Court:-

“3. Having examined the evidence on record we are in agreement with the High Court that the appellant did not have any motive whatsoever to cause any fatal injury to the deceased. We also agree with the High Court that the injury in question was caused during a melee in which six persons took part, therefore, in our opinion, on the facts and circumstances of this case, the act of the appellant in causing injury to the deceased which led to his death, cannot be the one which could be construed even as an act of culpable homicide not amounting to murder. Therefore, to that extent in our opinion the High Court fell in error in holding the appellant guilty for an offence under Section 304 IPC. In our considered opinion on the facts and circumstances of this case the act of the appellant is one of causing grievous hurt with a deadly weapon which is punishable under Section 326 IPC....”

15. The main ingredients to constitute an offence under Section 304 of the IPC in the intention and knowledge on the part of the assailant. It is imperative

¹(2004) 12 SCC 250

that a person willfully commits a crime which results in the death of another person. Any “bodily hurt” that ends in another person’s death is brought on by that person, that person either acts with the purpose of killing someone or with the awareness that the actions might kill someone without intending too.

16. In the instant case, the incident of assault was not premeditated or deliberated, the victim entered into the brawl unconsciously and the appellants initially had no intention to kill him but eventually assaulted him. There was no evidence of enmity or acrimony between the parties. The unintentional manner in which the injuries were effectuated on the body of the victim, at the vital parts namely the head and the abdomen of the victim cannot out rule out the possibility that the perpetrators were ignorant that the severity of their actions will not terminate in the death of that victim. However, the victim was assaulted with fist, blows and kick without the aid of any weapon. It can be inferred that the appellants might not have the knowledge that such assault by dint of fist, blows, kicks etc. will cause the death of the victim. Both the elements of intention and knowledge of causing bodily harm to the victim to culminate in his imminent death were improbabalised by the facts and circumstances of the instant case. However, the ocular evidence in conjunction with the medical evidence proved the victim’s death to have been instigated by the injuries suffered by him.
17. At the preliminary stage, the victim fought with the injuries by himself which however, aggravated in its intensity with lapse of time whereby he had to be hospitalized with further complications which became severe on the basis of

its initiations at an early stage. The lack of intension and knowledge of the victim the primary essentials to constitute an offence under Section 304 part II of the Indian Penal Code being absent in the instant case the conviction of the appellants under Section 304 part II is altered to Section 326 of the IPC and the sentence is reduced from 7 years to 3 years.

18. In view of the above discussions, the instant criminal appeal is dismissed.

19. There is no order as to costs.

20. I record my appreciation for the able assistance rendered by Learned Advocate, Ms. Pallavi Priyadarshee as Amicus Curiae in disposing of the appeal.

21. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

22. 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.)