

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

Present:

The Hon'ble Justice Tirthankar Ghosh

CRA 732 of 2019

Mithu Sk.

versus

The State of West Bengal

For the Appellant : Ms. Benazir Hasna
Ms. Puja Goswami
Mr. Aliul Islam

For the State : Mr. Ranabir Roy Chowdhury
Mr. Sandip Chakraborty

Heard On : 31-07-2024, 02-08-2024, 05-08-2024.

Judgment On : **05.08.2024**

Tirthankar Ghosh, J. :

The present appeal has been preferred against the Judgment and order of conviction and sentence dated 27.11.2019 and 28.11.2019 passed by the learned Additional Sessions Judge, 1st Court, Lalbagh, Murshidabad in Sessions Trial No. 01(02)2016 arising out of Sessions Serial No. 310 of 2015 thereby convicting the appellant under Section 304 part II of Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years and to pay a fine of Rs.5000/- i.d., to suffer rigorous imprisonment for three months.

Murshidabad P. S. case No. 47 of 2013 dated 28-01-2013 was registered for investigation under sections 341/326/307 of IPC pursuant to an information submitted by Samsunehar Bibi against Mithu Sk, the accused. The allegations in the written complaint were to the effect that the informant on 26th January, 2013 at about 9 am had been to Roshnibagh beside the village for picnic, but as he did not return till 10 p.m, she along with other relations went in search for him and found that his son Nur Alam Sk. was lying in an unconscious state at the floor of the picnic spot. There was bleeding from his nose and there was big swelling behind his head.

The victim was taken to Lalbagh hospital in unconscious condition. Later she came to know from Rajesh Sk. that a dispute arose at the picnic spot between his son/victim and the accused, Mithu Sk., as a result when her son was taking meal, at that time the accused inflicted a fatal blow at the back side of her son's head with a wooden stick with the motive to kill him which resulted in the bleeding from his nose and losing senses. The doctors of Lalbagh hospital referred him to Berhmapore hospital and as there was no improvement of his condition, he was sent to NRS Hospital, Kolkata on 27th January, 2013.

On the basis of the aforesaid complaint, Murshidabad P. S. Case No. 47 of 2013 dated 28-01-2013 was registered for investigation against the accused under Sections 341/326/307 of IPC and the case was assigned to Sub-Inspector of Police, Sri Asit Pramanik (PW-11) for investigation. The

Investigating Officer after taking up the investigation in view of the changed circumstances prayed for addition of Section 304 Part II of the Indian Penal Code after the death of the victim, Nur Alam Sk. and on conclusion of investigation submitted charge-sheet under Section 304 of IPC. The case was thereafter committed to the Court of sessions and finally the proceedings along with the records of the case were transmitted to the learned Additional Sessions Judge, 1st Court, Lalbagh, Murshidabad. The learned trial Court on or about 5th February, 2016 framed charges under Section 304 of IPC. The contents of the charges were read over to the accused to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 12 witnesses which included PW-1, Samsunehar Bibi, complainant and mother of the deceased; PW-2, Rajesh Sk. villager who attended the picnic; PW-3, Niarul Islam, scribe of the FIR; PW-4, R. Singh, S. I of Police who conducted the inquest ; PW-5, Akkas Sk, is the step brother; PW-6, Dr. Molly Banerjee, Demonstrator attached with the forensic medicine who conducted the post mortem and prepared the report; PW-7, Dr. Sourav Chattopadhaya, who conducted post mortem examination; PW-8, Din Mahammad, father of the deceased; PW-9, Mokarim Sk, brother of the deceased who was present at the picnic ; PW-10, Rima Bewa, wife of the deceased; PW-11, Investigating Officer; PW-12, Ayesha Sk., co-villager of the deceased.

PW-1, Samsunehar Bibi in her examination-in-chief before the Court deposed that on 26th January, 2013 at about 4 pm, Mithu Sk. told his son to go for a picnic to be held at Roshnibagh which was 1 km away from her house and her son accompanied him for attending such picnic. At about 7 pm one Rajesh and Imran brought her son to her house and at that time she found that her son was in an unconscious state. She learnt from them that there was a dispute between her son and Mithu Sk. and at that time Mithu Sk gave a blow with a wooden stick on the left side of the head of her son from his back and due to such assault her son sustained injury and became unconscious. Initially a village doctor was called but there was no improvement after his treatment as he was vomiting and blood was oozing out from his nose. On the next morning at about 5 am, he was taken to Lalbagh Hospital and from there to Berhampore hospital and subsequently he was referred to a hospital at Kolkata. Her son was lastly admitted at NRS Medical College and Hospital, Kolkata and on Monday at about 3 pm he succumbed to his injury. She further deposed that after the date of incident she had been to the police station and submitted a complaint but as the police refused to take verbal complaint, she filed written complaint which was written by a law clerk namely, Niarul Sk. She identified the accused in Court and in cross-examination she reiterated her version which she had narrated regarding the incident in her examination-in-chief and additionally denied the suggestion which was asked on behalf of the defence that her son climbed a mango tree in an intoxicated condition and sustained injury as he fell down from the tree.

PW-2, Rajesh Sk. deposed that he knew the deceased Nur Alam and his mother. On 26.01.2013 he along with other villagers including the deceased and the accused organized a picnic at Roshnibagh. At about 7/7.30 p.m. when they were taking meal, at that time there was altercation between Nur Alam and Mithu Sk. After meal, suddenly Mithu Sk. gave a blow at the back side of the head of Nur Alam by a wooden stick. Due to such assault, Nur Alam fell down and Mithu Sk. fled away. At that time he requested a villager who had a motor cycle to take Nur Alam to his house and with his assistance, Nur Alam was brought back to his house. The witness deposed that subsequently he heard that on the following day Nur Alam was taken to Lalbagh Hospital wherefrom he was referred to Berhampore Hospital and further to NRS Hospital, Kolkata and after two days Nur Alam died. He identified Mithu Sk. in Court. In cross-examination the witness reiterated his version relating to the date on which the picnic was held, the time when the meal was taken, the incident of altercation between the accused and the deceased and the vital blow being inflicted with the aid of a wooden stick by the accused upon the deceased. The witness categorically denied the fact that the deceased climbed a mango tree in an intoxicated condition or that the deceased sustained injury as he fell down from the tree.

PW-3 Niarul Islam is a Law Clerk who was the scribe of the FIR. He identified the written complaint in Court.

PW-4, Sub-Inspector R. Singh deposed that he performed inquest over the dead body of Nur Alam Sk in presence of witnesses at NRS Medical College police morgue and prepared a report in his own handwriting which bears his signature and also obtained signature of one witness and thumb impression of others. He identified the inquest report which was admitted in evidence.

PW-5, Akkas Sk. deposed that Samsunehar Bibi (PW-1) is his stepmother and Nur Alam was her son. He stated that three years ago on 26.01.2013 a picnic was held at Roshnibagh where 20/22 boys were involved in the said picnic. On that date Mithu Sk. out of previous grudge inflicted a blow on the head of Nur Alam with a wooden stick resulting in an injury. He further stated that from the said place Rajesh and Imran brought Nur Alam to his house by motorcycle and a quack doctor was consulted, but his condition deteriorated and gradually he became restless. Subsequently in the night they brought Nur Alam to Lalbagh Hospital and he was referred to Berhampore Hospital and further referred to Kolkata. In the hospital at Kolkata, said Nur Alam succumbed to injuries. He identified Mithu Sk. in Court. The witness in his cross-examination stated that there was no visible mark of injury at the back side of the head of deceased, but he was restless with pain. Doctor Rehemani Sk of the village was called who prescribed medicine, however, Nur Alam could not consume the same. At about 8/8.30 p.m. on that day he went to bed and at about 2/2.30 a.m. in the midnight, he had to go to hospital for the injured being shifted at Lalbagh Hospital. On the following day, he again visited the hospital. However, he denied regarding the stages relating to the

incident not having taken place in the manner as he has described in his examination-in-chief and on questions being asked in cross-examination, he specifically stated that the picnic was organized on the relevant day as deposed by him.

P.W.6 is Dr. Molly Banerjee – a demonstrator, who was attached with the Forensic Medicine Department of NRS Medical College and Hospital. On 01.02.2013, she performed post-mortem examination over the dead body of one Nur Alam Sk in connection with Murshidabad P.S. Case No. 47/2013 dt. 28.01.2013. At the time of performing the post-mortem examination she found the following injuries:

“1. One abrasion $\frac{1}{2}$ ” x $\frac{1}{2}$ ” over dorsal aspect of distal phalanx of 2nd toe, $\frac{1}{4}$ ”x $\frac{1}{4}$ ” over dorsal aspect proximal phalanx of left toe, $\frac{1}{2}$ ” x $\frac{1}{2}$ ” over tip of left toe of left foot.

2. On dissection, I found,

i) Extra vasation of blood with blood clots – 6”x4” diffused over left parieto-temporo-occipital region of scalp.

ii) One fissure fracture placed obliquely 2½” in length over left temporal bone with one extra-dural hemorrhage with blood clots – 2½”x2” over left temporal lobe of brain underline the fissure fracture.

iii) Sub-dural hemorrhage with blood clots over both cerebral hemispheres.”

She opined that death was caused due to the effect of the injuries as noted in the postmortem report which was ante-mortem in nature and the report was prepared in her own hand writing being signed by her with the

official seal. She identified the postmortem report which was admitted in evidence. In her cross-examination, she stated that generally head injury as she noticed may occur to a person if anyone falls down from a considerable height. On further cross-examination, she stated that height is not the only factor but many circumstances are required to be considered while analyzing the injuries.

P.W.7 is Dr. Sourabh Chattopadhyay, he deposed that the ossification test of one Mithu Sk was conducted in reference to Murshidabad P.S. Case No. 47/2013 dt. 28.01.2013 and, in his opinion, the age of the accused was above 22 years but below 25 years. He prepared the report in respect of the same. In his cross-examination, he deposed that the report should have been annexed with X-ray plate and other modes of examination and, on being further cross-examined, the witness reiterated regarding the age of the accused.

P.W.8 is Din Mahammad, who is the father of the deceased Nur Alam. He reiterated the incident in the same manner as deposed by the P.W.1 and P.W.2.

P.W.9 is Mekarim Sk – the brother of the deceased Nur Alam. He also reiterated the incident in the same manner as narrated/deposed by P.W.1, 2 and 8.

P.W.10 is Rima Bewa – the wife of the deceased Nur Alam. She deposed that the incident took place on 26th of January, 2013 and on that date her

husband along with his friends including Mithu Sk went for a picnic at Roshnibagh and she heard that a scuffle took place and Mithu Sk assaulted her husband. She deposed that a quack doctor was called, who after examination of the deceased assured that there was no seriousness of injury. However, around 1 O'clock at night she found her husband in restless condition and she called other family members. Around 5 O'clock at dawn her husband was brought to Lalbagh hospital and, subsequently, was referred to Berhampore hospital, where the deceased disclosed to her that Mithu Sk. assaulted him. She identified the accused in Court. She further stated that she had three minor children. In her cross-examination, she stated that she did not go to the Lalbagh Sub-Divisional Hospital as also at Berhampore Hospital. On 27th January, 2013 her husband was brought to Kolkata from Berhampore hospital for medical treatment. In cross-examination she denied of the incident of not having taken place and reiterated regarding the version of the quack doctor who examined the deceased and categorically stated that there was no seriousness of injury.

PW-11, Asit Pramanik is the Investigating Officer of the case who deposed that after the receipt of the complaint from Samsunehar Bibi (PW-1), the then Inspector-in-Charge, Murshidabad PS started Murshidabad P. S. Case No. 47 of 2013 dated 28-01-2013 under Sections 341/326/307 of IPC. The formal FIR was duly filled by the then Inspector-in-Charge of the police station and after being assigned with the investigation, he visited the place of occurrence, prepared draft sketch map with index and also examined the

available witnesses. He received information that on 31st January, 2013 the injured Nur Alam Sk died at NRS Hospital at Kolkata. He collected the post mortem report and also collected the inquest report from the Entally Police Station. He advanced prayer for addition of Section 304 of the Indian Penal Code which was allowed and thereafter arrested the accused and produced him before the learned Court. On conclusion of investigation he submitted chargesheet against the Mithu Sk under Section 304 IPC. In his cross-examination he categorically stated that PW-5 Akkas Sk during examination did not state to him that from the picnic spot Rajesh Sk. and Imran Sk. brought Nur Alam Sk. to his house on a motor-cycle and the said motor-cycle belonged to Imran Sk. and on that day he brought him to their house. He also contradicted the version of PW-9, Mokarim Sk. to the effect that during investigation he did not state to him that Imran Sk. and Rajesh Sk. brought their brother at their house by riding motor-cycle and they called a quack doctor who assured that there was no seriousness and at 1 O'clock the condition of their brother deteriorated gradually and he started vomiting, became restless and at around 5 O'clock they brought their brother at Lalbagh hospital and admitted him there.

PW-12 is Ayesh Sk. who denied of knowing any reason as to why the deceased was admitted to hospital and what was the reason behind his death, as such he was declared hostile.

Learned advocate appearing for the appellant submitted that there was a difference of version in the facts of the case when it commenced and the evidence which was adduced before the Court, to that extent learned advocate appearing for the appellant drew the attention of the Court to the relevant part of the letter of complaint addressed to the to the Inspector-in-Charge, Murshidabad PS and also the deposition of PW-1, Samsunehar Bibi. Learned advocate further submitted that even if the prosecution evidence is accepted in its entirety the same fails to connect the appellant with the alleged offence as there was gulf of difference between the evidence of the mother of the deceased in the letter of complaint and her deposition before the Court which changes the foundational facts. It would be dangerous to rely such evidence and arrive at a conclusion of guilt. The learned trial Court, according to the learned advocate for the appellant, ignored the gross deviation in the prosecution case and accepted the same to be sacrosanct thereby arriving at a conclusion of guilt. Additionally, it has been submitted that on close scrutiny of whole of the evidence it would reflect that there were hardly any witness to the incident and most of the witnesses are near relations who being vindictive in their fixed state of mind deposed before the Court in an embellished manner for convicting the appellant.

Learned advocate for the appellant drew the attention of the Court to the evidence of PW1 and PW8 who in their cross-examination admitted that they filed a case before the High Court for implicating other persons including the relations of the appellant. According to the learned advocate for the

appellant, the prosecution has failed to make out any case to hold the appellant guilty and as such he may be acquitted of the charges. In support of her contention, she relied upon the following judgements of the Hon'ble Supreme Court:

- i) Madhavan and others Vs. State of Tamil Nadu reported in (2017) 15 Supreme Court Cases 582,
- ii) Maqsood and others Vs. State of Uttar Pradesh reported in (2016) 15 Supreme Court Cases 748 and
- iii) Govindan Vs. State represented by the Deputy Superintendent of Police reported in (2022) 3 Supreme Court Cases 82.

Mr. Roy Chowdhury, learned advocate for the State emphasised that even if there was deviation in the complaint which was submitted by PW-1 and her deposition in Court yet it is an admitted fact that she was never there in the picnic. The eye-witnesses were there who corroborated the version and there is a ring of truth attached to the version of all the witnesses that it was the appellant only who inflicted vital blow upon the deceased. According to the State, *post mortem* report would reflect that there is a corroboration in the deposition made before the Court by the witnesses and the injuries which have been described by PW-7, the doctor/demonstrator, who conducted the *post mortem* examination. There is a consistent version that with the wooden stick the deceased was struck by Mithu Sk. at the back of his head. This part of the evidence squarely matches with the version of the medical expert who opined

that the death was due to cause of injuries which are *ante mortem* in nature. Learned advocate for the State submits that prosecution has proved its case beyond any reasonable doubt. As such, no interference is called for in respect of the judgement delivered by the learned trial Court and in order to substantiate his argument, he relied upon a judgement of the Hon'ble Supreme Court in Dharma Ram Bhagare Vs. State of Maharashtra reported in 1973 (1) SCC 537.

I have considered the submissions advanced by the learned advocates for the appellant and the State and taken into account the corroborations relating to the facts as well as the discrepancies pointed out by each of the parties. It is a fact that PW-1 in the complaint has narrated the incident as if she along with her relations had been to the picnic spot after her son did not return home and found her son Nur Alam lying unconscious, while before the Court she referred that her son Nur Alam was brought by PW-2 Rajesh Sk. and one Imran in a motorcycle. This Court, therefore, cannot rely upon the evidence of PW-1, the mother of the victim. However, one aspect cannot be ignored by this Court also that the evidence of PW-10, wife, Rima Bewa who both in her examination-in-chief and in her cross-examination stated that the deceased after being brought home in an injured condition was treated by a quack doctor who categorically stated that injury was not serious and it was at late night her husband Nur Alam started vomiting with blood oozing out of his nose. There is also evidence to the extent that no external injury was visible. However, there is a consistent version of PW-2 and PW-9 who were present at

the picnic that it was Mithu Sk. who inflicted the vital blow at the back of the head of the victim/deceased.

As such, taking into account the chronology of events, one issue which crops up before this Court is whether the blow inflicted by Mithu Sk is the sole reason for the cause of death or had the deceased been treated in a proper timely manner, immediately after he was brought at his home he could have survived, as in the facts of the case, the victim died after a period of five days. The initial treatment by a quack doctor who assured the family members of deceased that there was no seriousness in the injury, inspired confidence in the family members who were comfortable and did not take him to the hospital. The possibility of the deceased's condition deteriorating during the said period cannot be ruled out and as such, the issue relating to culpable homicide cannot be solely attributed to the blow being inflicted by the accused. The chance of the deceased surviving if he was immediately hospitalized for proper treatment cannot be ruled out and as such, the act of the accused even if it is accepted to be true cannot be considered to be the sole reason for the cause of death of Nur Alam SK./deceased.

Having considered the same, I am of the view that the materials collected by the prosecution falls short of holding the appellant responsible for the charge(s) under Section 304 (II) of IPC. However, the consistent version of the witnesses, particularly, P.W.2 and P.W.9 refers to the appellant having

struck the vital blow with a wooden stick at the back of the head of the victim/deceased do make out an offence against him.

Taking the overall factual circumstances into consideration, I am of the view that although the appellant cannot be held guilty under Section 304(II) of IPC, but he is responsible for committing the offence under Section 325 of IPC. Therefore the appellant is held guilty and is convicted under Section 325 of IPC.

The records reflect that the appellant during the stages of investigation and trial has suffered a period of three and half months and, after the delivery of the judgment by the learned trial Court when he was taken into custody, he was granted bail after about more than one year and three months.

Having considered that the appellant has served for a period of more than one year and seven months in custody, I am of the view that further detention of the appellant is unwarranted. Accordingly, the sentence of the appellant is reduced to the sentence already undergone by him with the fine amount remaining unaltered.

Consequently, the following conclusions are arrived at by this Court:

- i. The appellant is held guilty for the offence under Section 325 of IPC.
- ii. The sentence of approximately one year and seven months so served by the appellant is considered to be just and proper in the facts of the case as the incident took place in the year 2013.

- iii. The fine amount which has been imposed by the learned trial Court is not interfered with and the appellant would deposit the same within a period of four weeks from the date of communication of this order.

As the appellant is on bail, he may be discharged from the bail bond, immediately after the fine amount is deposited.

With the aforesaid observations, CRA 732 of 2019 is **Partly Allowed**.

Pending application, if any, is also disposed of.

Department is directed to send back the lower Court records along with a copy of this judgment, immediately to the learned trial Court.

All concerned parties shall act on the server copy of this judgement duly downloaded from the official *website* of this Court.

Urgent Photostat certified copy of this judgement, if applied for, be given to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)