

19.12.2024
Court No.13
SL No.2
AP/sp

**CRA 609 of 2012
With
CRAN 3 of 2024**

In the matter of : **Nazimuddin Molla & Ors.**

Mr. Saibal Mondal
Mr. Arindam Jana
Mr. Arhan Sengupta
Ms. Sonali Ghosh

...For the appellant Nos.1 to 3, 5 & 6.

Mr. Shuvradip Panda

...For the appellant No.4.

Mr. Rudradipta Nandy
Mr. Prakash Mishra

...For the State.

Mr. Avishek Sinha
Ms. Madhusree Banerjee

...For the de facto complainant.

1. The Notes of arguments filed by the de facto complainant are taken on record.

2. The instant appeal is directed against a judgment and order dated 17th/18th August, 2012 passed by the Learned Additional Sessions Judge, Fast Track 2nd Court, Alipore in Sessions Trial No.1(12) of 2009 arising out of Sessions Case No.7(8) of 2009.

3. By the impugned judgment, all the appellants/convicts viz
1. Nazimuddin Molla, 2. Abdul Halim Gazi @ Abdul Halim Molla,
3. Toyeb Ali Khan, 4. Azid Laskar alias Ajit Laskar & 6. Izaz Khan are sentenced to suffer life imprisonment and fine of Rs.

5,000/- (rupees five thousand only) each in default of payment of fine further simple imprisonment for 1(one) year each for the offence punishable u/s 302 IPC. They are further sentenced to undergo simple imprisonment for a term of 3(three) years and fine of Rs. 2,000/- each in default of payment of fine further simple imprisonment for 5(five) months for the offence punishable u/s 148 of IPC being the member of unlawful assembly committed such offence in pursuance to their common object u/s 149 of IPC. The punishment is thus recorded u/s 302/148/149 of IPC accordingly. The period of substantive punishment as recorded against each of the convicts do run concurrently.

4. The brief facts relating to the incident are that on the 21st January, 2009 at about 9.40 AM the victim, one Firoj Ahmed Siddique along with his wife boarded the West Bengal Surface Transport Corporation Ltd. bus from Beliadanga bus stop travelling on the Sector Usthi to Esplanade route. The bus on this route is called the “Bhatal Bus”. They were on their way to a school where he was employed as a teacher.

5. Three of the accused Abdur Rajjak Siddiqui, Izaz Khan and third person called Raju were already on the bus. As the bus left Beliadanga bus stop the other accused persons namely Nazimuddin Molla (A1), Abdul Halim Gazi (A2), Toyeb Ali Khan (A3), Azid Laskar (A4), Harez Gazi (A5) also boarded the running bus.

6. Thereafter three of the persons namely Toyeb Ali Khan (A3), Azid Laskar (A4) and Harez Gazi (A5) dragged the victim, from the middle of the bus by holding his collar, to the seat next to the driver. The bus was then moving between Ramrampur and Srichanda, Abdul Halim Gazi (A2), Nazimuddin Molla (A1) and Izaz Khan (A6) stabbed the victim repeatedly on the neck and abdomen with a sharp cutting instrument resembling a knife, locally called Bhojali or a Nepala. Thereafter all the accused persons threatened the bus conductor and driver to stop the bus and they all ran away.

7. The incident was narrated to PW 1, Safique Ahmed Siddique, the brother of the deceased. He was at Behala at the relevant time, approximately 28 kilometers away. He rushed to the spot thereafter and registered a complaint at the Usthi Police Station. FIR was registered against 10 accused persons, namely, Nazimuddin Molla (A1), Abdul Halim Gazi (A2), Harez Gazi (A5), Toyeb Ali Khan (A3), Abdul Rajjak, Izaz Khan (A6), Raju @ Sirajuddin Molla, Jahangir Laskar and Idris Laskar on the same day under Section 302 and 34 of the IPC at 10:45 AM.

8. The victim died on the way to the Hospital. Surathal/Inquest was conducted on the bus itself. The bus was seized by the Usthi PS and released later in the day. The body was later sent for the postmortem which was conducted by PW 11, Dr. Joydipta Chattopadhyay.

9. The weapon was seized immediately on the same day from Ramrampur village. The wearing apparel of the deceased was seized. The seized weapon was a knife with a long blade. Three days after the incident, following the postmortem being conducted, PW 14, Pintu Siddique, a witness to the seizure of the weapon was examined during the trial.

10. Charges were framed under two heads, namely, under Section 148 and under Section 149 & 302 of the IPC, against all the accused persons.

11. PW 1, Safique Ahmed Siddique, was the scribe of the FIR. PW 2, Khurshida Bibi, the wife of the victim, narrated the entire incident. She was travelling on the bus along with her husband and boarded the bus at Beliadanga. She was an eyewitness. She deposed that Firoze Siddique, Khursida Siddique, Heramoth Molla, Murselim Molla, Babar Ali Molla, Asraf Molla, Anwar Molla, Saifuddin Molla as well as accused Halim Gazi, Idris Laskar and Jahangir Laskar also boarded the bus at Beliadanga.

12. She further deposed that three of the aforementioned accused persons boarded the bus while it was in motion, along with the Rajjak, Izaz and Raju. She clearly testified about the occurrence on the bus and the participation of each of the accused persons.

13. She deposed that her husband was stabbed when the bus was passing between Ramrampur and Shrichanda village. She

identified the accused and the wearing apparel of her husband that were seized by the Police.

14. PW 3, Mosaraf Molla, was another co-passenger eye witness and a resident of the same village, as were PW 4, H.A. Molla and PW 5, Saifudin Molla. They all deposed in lines with the evidence of PW 2. However, there were minor discrepancies regarding the names of the persons who dragged the victim to the front of the bus and those who actually inflicted the fatal wounds on the deceased. There were also certain differences in the evidence of PW 2, PW 3, PW 4, PW 5 and PW 6 regarding the nature of the weapon used. Some of the eye witnesses said that the weapon was a knife and the others said that it is either a nepala or bhojali.

15. PW 7, Mohim Sarkar was the driver of the bus. He deposed that he was driving the bus in question and provided a general overview of the incident on the bus and its stoppage.

16. PW 8, Subrata Biswas was the conductor of the bus. PW 7 and PW 8 both deposed about the stoppage of the bus at Beliadanga and final stoppage at the instance of the accused persons. They also deposed about the seizure of the bus. PW 11, Joydipta Chattopadhyay was the postmortem doctor who opined that the death of the victim occurred due to injuries sustained in the incident as noted above as ante mortem and homicidal in nature.

17. PW 5, Nandan Mondal provided details of the seizure of the weapon which was a knife and the wearing apparel. He also described how he raided and subsequently arrested the accused persons from nearby villages. He was cross-examined in extensively by the accused persons. The accused persons were examined under Section 313 of the Cr. P.C.

18. The Trial Judge thereafter proceeded to deliver judgment and convicted each of the accused persons under Section 302 of the IPC and Section 148 for sentenced as above.

19. From the evidence it appears that there was political rivalry between the accused persons and the family of the victim.

20. Criminal proceedings were pending against the victims based on complaints lodged by the accused.

21. Learned counsel for the appellants Mr. Saibal Mondal argued that the charge framed itself was incorrect since Section 34 was not taken into consideration by the Sessions Judge. It is submitted that the offence under Section 148 and 149, must be preceded by an offence under Section 34. In absence of any charge under Section 34 or any finding in that regard, the appellants could not have been convicted under Section 149.

22. Reference in this regard is made to the decision of ***Sharad Birdhichand Sarda Vs. State of Maharashtra*** reported in ***AIR 1984 SC 1622*** and the decision of ***Rebati Baidya Vs. State of West Bengal*** reported in ***2014 (1)***

Calcutta Criminal Law Reporter (Cal) 171. It appears to this Court that in the facts of the **Rebati Baidya** (supra), an additional charge was framed after the evidence was over and after the statement of the accused under Section 313 was recorded. The facts of the said **Rebati Baidya** (supra) case are completely different from the facts of the instant case.

23. In response thereto learned counsel for the de facto complainant has relied upon a decision of **Lalji and Ors. Vs. State of U.P.** reported in **(1989) 1 SCC 437** particularly Para 9, 10 and 13. It appears clearly from the aforesaid paragraphs that a conviction under Section 149 of the IPC read with Section 302 of the IPC can occur even in the absence of a charge, proof or finding under Section 34 of the IPC. The principle of Constructive Vicarious Liability was applied for the act of one member to apply to all members of the unlawful assembly leading to the crime in question. The argument of the appellants, therefore, cannot be sustained.

24. Learned counsel for the appellant next argued that the evidence of PW 2 differed from that of PW 3, PW 4, PW 5 and PW 6 in so far as the weapon in question is concerned.

25. This Court however notes that each of the five witnesses referred to a sharp cutting instrument used by the accused persons for the purpose of inflicting the assault and the injuries on the victim. It is quite possible that such instrument may not have been clearly and explicitly identified by the witnesses, given

their respective placement in the bus. A long knife, bhojali and nepala are all sharp cutting instrument that can be easily concealed by any person.

26. The difference in the evidence of the five eyewitnesses, as to exact local name of the weapon, who were located in different parts of the bus, cannot really be considered as any serious discrepancy to the discredit their evidence.

27. Learned counsel for the appellant next argued that several vital witnesses namely the wife of Basir Ali, who is stated to have informed the complainant of the incident, one Harez Gazi, who was also an eyewitness, Babar Ali, Asraf Ali, Mutsalim, Phular and some of the seizure witnesses of the wearing apparels were not produced by the prosecution. The appellants, therefore, could not have been convicted by the Trial Court.

28. This Court has carefully considered the evidence of the PW 2, PW 3, PW 4, PW 5 and PW 6. Each of the five persons are eyewitnesses to the incident. They have unambiguously confirmed and corroborated the role of each of the appellants in the incident that occurred on the bus. The death of the victim and the evidence of the post mortem doctor have completed the chain of circumstances in the instant case. It appears that the murder of the victim was preplanned and cold blooded in the broad day light.

29. In the backdrop of the clear evidence of the five witnesses, there is no need of any further evidence to prove the prosecution case. The prosecution case has been driven home and proved beyond any reasonable doubt from the evidence of PW 2 to PW 6.

30. The decision of the Supreme Court in the case of ***State of U.P. and Anr. Vs. Jaggo alias Jagdish and Ors.*** reported in ***1971 (2) SCC 42*** cited by Mr. Mondal, would have no application in the facts of the case. The Hon'ble Supreme Court in the said case found that non-examination of one witness rendered in the chain of circumstance is incomplete. The evidence of such witnesses was vital to the prosecution case. The facts of the instant case are, therefore, quite different.

31. Learned counsel for the appellants next argued that the identification of the wearing apparels by PW 2 during the trial did not match with the wearing apparels of her husband/the victim as described in course of evidence. This Court has carefully considered the seizure list of wearing apparels which was handed over to a police constable by the post mortem doctor three days after the incident and immediately following the post mortem.

32. It is quite possible that when evidence was being recorded four years after the incident, the wife of the victim/deceased, who must already have been in emotional trauma may or may not have exactly identified the colour of the shirt, vest or pajama

that her husband was wearing at the relevant point of time. It, is, however, clear from the evidence that PW 2 clearly identify her husband's trousers and footwear.

33. In the above circumstances, the discrepancy in the evidence regarding the colour of shirt as described by PW 2 in the seized garment of the victim is not so vital or material as to discredit her evidence.

34. It is lastly argued by Mr. Mondal, that the knife in question could not have been seized within two hours of the incident.

35. It is further argued that the FSL report was inconclusive regarding the blood on the weapon. This Court finds that the weapon in question had dried blood stain on it, which was not sufficient for the serological test to give an FSL report, to determine whether it contained the blood of the victim or not. However, evidence of the eyewitnesses being PW 2 to PW 6 is clear and explicit. The weapon itself was identified during trial. In the backdrop of the aforesaid overwhelming evidence, the absence of FSL report regarding the blood of the victim on the weapon does not dent the prosecution case.

36. Indeed it is true that the weapon in question was not produced before the post mortem doctor for an opinion as to whether it would have caused injuries in question. Once again this Court relies upon the overwhelming evidence of the

eyewitnesses and the evidence of the Investigating Officer. While it is desirable that the weapon ought to have been opined on by the post mortem doctor to correlate it with the injuries suffered by the victim, the mere absence of the opinion of the post mortem doctor that the weapon caused the injury to the victim, cannot be demolish the prosecution case.

37. It is lastly argued by Mr. Mondal that the procedure under Section 313 followed by the Trial Court i.e. confronting the accused persons with the circumstances that emerged against them during the trial is faulty.

38. This Court found that the first question was put to the accused persons under Section 313 to the extent that the accused persons were wrongly warned that any of their answers could be used against them. The said question is set out hereinbelow:-

“ 1.Q. I ask you some questions to which you are not bound to answer. If you answer the questions be careful because your answer may be used against your and you may be punished for the same. Do you understand?”

39. This Court, however, notes that each of the circumstances available against the accused persons were duly confronted to them under Section 313. The accused were represented by lawyers in course of trial.

40. Counsel for the defense has not argued in course of trial that their clients were ready and willing to clarify any of the

circumstances presented against them if so given an opportunity.

41. Learned counsel for the State has indicated that the vernacular version of the first question set out hereinabove in course of Section 313 of the Cr.P.C. would clarify that the Trial Judge questions the witness strictly in terms of Section 313 of the Cr.P.C. and did not transgress thereunder.

42. In view of the discussions already made hereinabove, this Court need not go into the vernacular version.

43. This Court directs that for all future purposes of hearing of appeals and conduct of trial, the vernacular version of the question under Section 313 of the Cr.P.C. along with a translation by the Judge be recorded by the Trial Court. This would greatly assist the prosecution as well as the acts in criminal trial.

44. The Registrar General of this Court shall communicate the order of the Court to all District Judges in the State for onward communication to the Judges holding trials under them.

45. In the backdrop of the above emerging facts, this Court is of the clear and unequivocal view that the accused persons have not been prejudiced by the aforesaid erroneous warning to them by the Sessions Judge in course of examination under Section 313 of the CrPC.

46. This Court finds that Sessions Judge has discussed the entire evidence on record and has analyzed the same thoroughly.

47. This Court is of the view that the Trial Judge has appreciated the evidence properly and has rightly convicted the accused. The conviction of the accused under section 149 read with Section 302 of the IPC cannot be faulted. The sentencing of the accused is commensurate with the evidence against the appellants.

48. In view of the above, the appeal fails and is hereby dismissed.

49. Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellants in terms of Section 428 of the Code of Criminal Procedure, 1973.

50. In view of the above, connected applications, if any, shall stand disposed of.

51. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)