

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

**CRA (DB) 48 of 2023
With
IA NO: CRAN 2 of 2025**

**AKSHOY PAL
VS
THE STATE OF WEST BENGAL**

For the Appellant : Mr. Sekhar Kr. Basu, Ld. Sr. Adv.
Mr. Antarikhya Basu, Advocate
Ms. Madhumita Basak, Advocate

For the State : Ms. Sreyashee Biswas, Advocate
Ms. Puja Goswami, Advocate

Heard and judgment on : June 18, 2025

DEBANGSU BASAK, J.

1. Appeal is against the judgment of conviction dated January 10, 2023 and the order of sentence dated January 11, 2023 passed by the learned Additional Sessions Judge, Fast Track Court, 1st Court, Kandi, Murshidabad in Sessions Trial No. 01(09) 2019 arising out of Sessions Case No. 126 of 2019.

2. By the impugned judgment of conviction, learned trial Judge convicted the appellant under Section 302 of the Indian Penal Code, 1860 and under Section 27 of the Arms Act.
3. Learned Single Judge imposed a sentence of life imprisonment as against the appellant amongst others, by the impugned order of sentence.
4. During the pendency of the appeal, the appellant applied under Section 391 of the Criminal Procedure Code corresponding to Section 432 of the Bharatiya Nagarik Suraksha Sanhita, 2023 for permission to adduce additional evidence. Such application was registered as CRAN 2 of 2022.
5. With regard to CRAN 2 of 2022, learned senior advocate appearing for the appellant submits that, four persons were charge sheeted. Two were apprehended and faced trial along with the appellant. Although, appellant was convicted, the other co-accused was acquitted. The two other co-accuseds who did not face the trial along with the appellant, were tried subsequently. He draws the attention of the Court to the deposition of the same prosecution witnesses as that of the present appellant, in the subsequent trial and submits that, such prosecution witnesses acknowledged in cross-examination

at the subsequent trial that neither of them were eye-witnesses and witnessed the incident. He submits that, therefore, at the basic minimum, the appellant is entitled to the benefit of doubt. That apart, he submits that, the prosecution failed to prove the charges as against the appellant beyond reasonable doubt, in the event, the deposition of the same prosecution witnesses are taken into consideration in the present appeal.

6. In support of his contention that, the appellant is entitled to apply under Section 391 of the Criminal Procedure Code corresponding to Section 432 of the BNSS, 2023, learned senior advocate appearing for the appellant relies upon **AIR 1965 SC 1887 [Rajeswar Prasad Misra vs. The State of West Bengal & Anr.]**
7. Referring to the merits of the appeal, learned senior advocate appearing for the appellant submits that, the prosecution was unable to establish the charges as against the appellant beyond reasonable doubt. He draws the attention of the Court to the deposition of the prosecution witnesses and, in particular to the deposition of the Investigating Officer. He submits that the Investigating Officer in his cross-examination stated that, P.W. 3, P.W. 5 and P.W. 7 did not state to him while making their statements under Section 161 of the

Criminal Procedure Code, that, they were eye-witnesses to the incident. He submits that, therefore, no reliance should be placed on the evidence of the prosecution to convict the appellant of murder and of possession of illegal firearm.

8. Learned senior advocate appearing for the appellant submits that, the firearm used in the incident of murder although was seized from another co-accused, and sent for forensic examination, the same, however, was not established to be used by the appellant at the trial.
9. Learned advocate appearing for the State submits that the evidence in the second trial cannot be used for the purpose of adjudicating the complicity of the appellant. The charges as against the appellant are to be considered on the basis of the evidence led at the first trial. In support of such contention she relies upon **(2022) 14 SCC 392 [A.T Mydeen & Anr. Vs. Assistant Commissioner, Customs Department]**
10. Learned advocate appearing for the State submits that, the prosecution was able to establish the charges as against the appellant beyond reasonable doubt. She draws the attention of the Court to the deposition of the prosecution witnesses. According to her, the prosecution examined P.W. 1, P.W. 3, P.W. 5 and P.W. 7 as eye-

witnesses. She points out that, P.W. 7, corroborated the version of P.W. 1, P.W. 3 and P.W. 5 of the incident. She contends that, the injuries sustained by the victim stands corroborated by the testimony of the prosecution witnesses. The place of occurrence as well as the time of occurrence were established at the trial. Therefore, according to her, there was no ground for interference with the impugned judgment of conviction and order of sentence.

11. As noted above, there is an application for consideration of additional evidence sought to be introduced by the appellant in the appeal. Section 391 of the Code of Criminal Procedure corresponding to Section 432 of the BNSS, 2023 permits additional evidence being considered by the Appeal Court. Section 432 of the BNSS, 2023 is a replica of Section 391 of the Code of Criminal Procedure Code, 1973 which in turn is a replica of Section 428 of the Criminal Procedure Code, 1898.
12. Supreme Court considered Section 428 of the Criminal Procedure Code, 1898 of which Section 391 of the Criminal Procedure Code, 1973 is a replica in **Rajeswar Prasad Misra (supra)**. It notes that, Section 428 of the Criminal Procedure Code, 1898 confers a wide discretion to an Appeal Court to consider additional evidence or to

order retrial and to order one or the other. It observed that the limit of such discretion, is dictated by the exigency of the situation, fair play and good sense. It noted that, additional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. This power is to be used sparingly and only in suitable cases. It should however be not received so as to cause prejudice to the accused.

13. **A.T. Mydeen (supra)** held that an accused at a trial possesses the right to be tried only on the basis of evidence recorded in his presence and witness cross-examined by him. Evidence which was recorded in his absence cannot be introduced in order to evaluate the guilt of such accused at a trial.
14. In the facts of the present case, the appellant desires that the Appeal Court considers evidence at the subsequent trial in which the appellant was not involved, although, the second trial was in respect of the same offence. In other words, appellant seeks to rely upon the evidence of the prosecution introduced at a trial in respect of the same offence in respect of other co-accused and in a trial which he was not involved.

15. **A.T. Mydeen (supra)**, in consideration of the fact that a common judgment was passed in two appeals based on two separate trials and judgments over the same incidence, observed that, the High Court ought to consider the evidence in both the trials in order to decide the culpability of the accused persons.
16. **A.T. Mydeen (supra)** cannot be read or construed to be a proposition that an accused cannot rely upon evidence which was not recorded in his presence to assess the charges as against him. It was not considered in the context of Section 341 of the Criminal Procedure Code, 1973 scenario. To our understanding **A.T. Mydeen (supra)** restricts the prosecution from putting forth any evidence as against the accused which was not recorded in presence of such accused for consideration of the Court. In other words, it is open to an accused to invite the Court, to assess evidence which was not recorded in presence of the accused, although at the same time, it would prevent the prosecution from relying upon such evidence which was not recorded in the presence of the accused, if the accused objects to the introduction of such evidence.
17. In such circumstances, there appears no impediment in considering the evidence of another trial specially when both the trials refer to

the same incidence. Self same witnesses giving two different versions over the same incidence in the two trials would give rise to a reasonable doubt regarding the trustworthiness of such witness as well as veracity of prosecution case, if it so transpires.

18. In the facts of the present case, the appellant is inviting the Appeal Court to consider and evaluate evidence at a subsequent trial of a criminal case emanating out of the same offence to adjudicate on the charges as against the appellant.
19. Section 432 of the BNSS, 2023 which is a replica of Section 391 of the Criminal Procedure Code, 1973 empowers the Appeal Court to take further evidence or direct it to be taken. In an appeal, if the Appeal Court is of the view that additional evidence is necessary, for reasons to be recorded may take the evidence itself or direct it to be taken.
20. An Appeal Court considering a request for additional evidence, is required to return a finding that the evidence sought to be introduced if not allowed to be introduced would result in failure of justice. However, Appeal Court is required to be cautious and use such powers sparingly and for adequate reasons.

21. While allowing additional evidence to be taken either by itself or by the appropriate Court, the Appeal Court must ensure that the evidence allowed to be introduced in appeal, does not cause prejudice to any of the parties.
22. In such context, we allow the application made by the appellant under Section 391 of the Criminal Procedure Code, 1973 corresponding to Section 432 of the BNSS, 2023.
23. The claim of the appellant that, the same prosecution witnesses implicating the appellant at the trial, subsequently in the second trial gave a version of the incident which exonerates the appellant. This claim requires consideration. In the event such claim is substantiated then the appellant would be entitled to acquittal. Non-consideration of the evidence sought to introduced would, therefore, result in failure in justice.
24. We, therefore, proceed to consider the evidence of the prosecution as against the appellant both on the basis of the evidence led at the trial in which the appellant was present as also on the basis of the evidence of the prosecution at a trial of the same offence, as against the co-accused in which the appellant was not present.

25. In the trial as against the appellant, prosecution examined 9 witnesses. Prosecution Witness No.1 claims himself to be de facto complainant and lodged the writing complaint. He introduced the written complaint at the trial which was marked as Exhibit-1/1. He stated in cross-examination that, on the date and time of the incident while he was returning from Kandi to his house, he saw his injured nephew lying on the road in a bleeding injured condition. He said that, he along with Tarak Mondal and Nitya Gopal were returning home from Kandi and that except them there was no other person present. He stated in his cross-examination that he was at a distance of about fifteen hands from the victim. He tried to save the victim. He also stated that, he was there for ten to fifteen minutes at the place of occurrence at the time of incident.
26. P.W. 2, Tarak Mondal, which P.W. 1 stated to be along with P.W. 1 when he found the victim in injured condition. P.W. 2 stated that, he found the victim to sustain bomb injury. He, however, went home. In cross-examination, he stated that, he heard a sound of firearm and he found Sisir Pal, Sukhen Pal and Arun Ghosh to attack/assault the victim. He saw the victim fall on the ground. After few moments,

he tried to go near the victim but could not do so due to fire and went home.

27. P.W. 3 is the cousin brother of the victim. He stated that the victim died due to bomb blast injury and gunshot injury. He stated in examination-in-chief that, Akshay Pal and his two sons Sisir Pal and Sukhen Pal hurled bomb to the victim and also fired from their firearms. He stated that Arun Mondal fired on the back side and right side of the head of the deceased. He was cross-examined by the defence.
28. P.W. 4 is the wife of the victim. She stated that, the murder was committed with gunshot and bomb. She is, however, not an eye-witness to the incident.
29. P.W. 5 is the cousin brother of the victim. He stated that, Akshay Pal and his two sons namely, Sisir Pal, Sukhen Pal and Arun Ghosh surrounded the victim and that Akshay Pal shot the victim on the head and chest. Arun Ghosh hurled bomb from the back side. All the accused fled away from the Southern side. He was also cross-examined by the defence.
30. A Sub-Inspector of Police was examined as P.W. 6 at the trial. He was instrumental in initiating the unnatural death case. He tendered the

inquest report which was tender in evidence and marked as an Exhibit.

31. The father-in-law of the victim deposed as P.W. 7. He stated that, he was following the victim. He stated that, four persons shot at the victim and hurled bomb upon the victim who died on the spot. He identified Akshay Pal, Sukhen Pal, Sisir Pal and Arun Ghosh to be the persons involved in the murder. In cross-examination, he stated that, for the first time in Court he stated that he was following the victim his scooter. He, however, acknowledged that he stated to the police that the accused persons hurled bomb at the victim
32. The post mortem Doctor was examined as P.W. 8 at the trial. He tendered the post mortem report in evidence which was marked as Exhibit-5. In cross-examination he stated that he was a gynaecologist.
33. Investigating Officer was examined as P.W. 9 at the trial. He narrated about the course of investigation. In cross-examination, he acknowledged that P.W. 7 did not make certain statement during his examination under Section 161 of the Criminal Procedure Code. He also stated that P.W. 3 and 5 stated that it was their assumption that Akshay and others murdered the victim.

34. At the conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where, he denied his complicity. He declined to adduce any evidence.
35. As noted above, two of the accused stood trial subsequently. In the subsequent trial, prosecution examined several witnesses. Common witnesses examined between first trial and the second trial going by the numerical number in the first trial are P.Ws. 1, 3, 5 and 7.
36. In the second trial, again, going by the numerical number ascribed to the prosecution witnesses at the first trial, P.W. 1 stated that, he could not write or read Bengali but can sign. He stated that, he signed the written complaint after it was written and that he did not know what was written in it. He stated that, he did not see the incident and did not have any knowledge about the incident. He stated that he heard various talks of the villagers about the incident and hearing such incident, he deposed in the Court.
37. P.W. 3 was first trial was examined as P.W. 3 in the second trial. In the cross-examination, he stated that, on hearing the sound of bomb and hearing the news of the death of the victim, he went to the place of occurrence. He also stated that he saw the accused Sisir Pal and

Arun Ghosh at or near the place of occurrence when he reached there.

38. P.W. 2 of the first trial was examined as P.W. 4 in the second trial. He stated in his cross-examination that he did not know about the involvement of the Sisir Pal and Arun Ghosh in the death of the victim. He did not go to the place of occurrence and did not see anything.
39. P.W. 4 in the first trial was examined as P.W. 5 in the second trial. In cross-examination, he stated that, on hearing the news of the incident from the public, he went to the place of occurrence. He also stated that he did not see Arun Ghosh and Sisir Pal near the place of occurrence when he reached there.
40. P.W.7 at the first trial deposed as P.W. 6 in the second trial. In cross-examination, he stated that he cannot say who hurled the bomb as he was in his house during the incident. He also stated in cross-examination that in his earlier statement before the Court was based upon hearsay knowledge from the people nearby.
41. At the first trial, prosecution witnesses 1, 3, 5 and 7 are stated to be eye-witnesses. P.Ws. 1, 3, 5 and 7 of the first trial were examined as P.Ws. 1, 2, 3 and 6 respectively at the second trial. In cross-

examination, in the second trial, all of them stated unequivocally that they were not eye-witnesses to the incident and that they were not present at the place of occurrence.

42. We find from the records that, the same set of prosecution witnesses who claimed themselves to be eye-witnesses at the first trial, denied being eye-witnesses at the second trial. In fact, the same set of prosecution witnesses are giving two versions of the same incident, at the trial relating to the same offence.
43. In our view, therefore, the benefit of doubt, if anything else should be afforded to the appellant before us in view of the fact that, the prosecution witnesses, who deposed as against him at the trial, gave a different version at the second trial.
44. In view of the discussions above, we set aside the impugned judgment of conviction and the order of sentence, and acquit the appellant.
45. Appellant be released forthwith, if not required in any other police case.
46. Appellant will, however, comply with Section 437A of the Code of Criminal Procedure corresponding to Section 481 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 forthwith.

47. A copy of the judgment and order along with the Trial Court Records be transmitted to the jurisdictional Court forthwith.
48. CRA (DB) 48 of 2023 and IA No.: CRAN 2 of 2025 are **disposed of** accordingly.

(Debangsu Basak, J.)

49. I agree.

(Md. Shabbar Rashidi, J.)

[Dd/Ad]