

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA 550 OF 2008

**NARU KHAMARU & ANR
VS**

STATE OF WEST BENGAL

For the Appellant : Mr. Pallavi Priyadarshee, Amicus Curiae

**For the State : Ms. Faria Hoissain, A.P.P
Ms. Anand Keshari, Adv.**

Last heard on : 19.06.2025

Judgement on : 08.08.2025

CHAITALI CHATTERJEE DAS, J. :-

1. Thus criminal appeal under Section 374 sub Section (2) of the Code of Criminal Procedure has been filed against a judgement and order of conviction dated 27th June, 2008 passed by the Learned Additional Session Judge, Fast Track Court 3, Howrah under Section 323/34 of Indian Penal Code against the present appellant and sentencing him to suffer imprisonment for 6 months each with fine of Rs. 1000/- each, in default to suffer further simple imprisonment for one month each.

Brief resume of the case

2. On 21st November, 2006 one Gita Khamaru had lodged a written complaint with the Officer-in-charge, Nazirganj Police Station alleging inter alia that on Nov. 12, 2006, her husband Asit Khamaru was assaulted in front of her house at about 11 A.M by the appellant. As per advice of the Doctor he was admitted at the hospital and further admitted on 28th November, 2006 due to severe pain in stomach and chest and he died on 21.11.2006. It was further mentioned in the written complaint that appellant threatened the de-facto complainant not to divulge anything to the police. On the basis of such written complaint Sankrail Police Station No. 290 of 2006 started and after conclusion of the investigation, the charge-sheet under Section 325/304 of the Indian Penal Code was submitted against the appellant. The charges being exclusively triable by a Court of Session the case was committed before the Learned Session Judge and from there transferred to the Court as stated above where the charge was framed and the appellant pleaded “not guilty” to the said charges and accordingly the trial commenced. In order to bring home the charges the prosecution examined 12 witnesses and after assessing their evidence as adduced by the prosecution witnesses and considering the materials exhibited before the Learned Court, the order of conviction was passed under Section 323/34 of the Indian Penal Code and the appellant held not guilty of the charge under Section 304 part (ii) of the Indian Penal Code. Being aggrieved by and dissatisfied with the judgement of the Learned Court the instant appeal has been filed.

Submission

3. The argument advanced on behalf of the Learned Amicus Curie is of deficiency in the judgement in assigning any reason for passing an order of conviction under Section 323 /34 IPC despite glaring inconsistencies in the evidences adduced by the witnesses including the de-facto complaint, the wife of the deceased victim . Furthermore, the victim suffered from Duodenum ulcer and it was a case of Deritonitis which is well established by the doctor and confirmed in the P.M report. It is further established that no external injuries were found in the body of the deceased victim but surprisingly the Learned court gave much credence to the evidence of the de-facto complainant and arrived at an incorrect finding even though no such incriminating material were found to attract Section 323/34 I.P.C. The learned advocate further harped upon the evidence of the prosecution witnesses which revealed that the victim was a habitual drunkard and developed the duodenum ulcer on account of such habit. Lastly it is argued that the learned trial court did not consider that the appellants were near relatives of the de-facto complainant and had no criminal antecedent hence ought to have invoked the power under Section 360 Cr.pc. when the order of conviction was only under Section 323/34 IPC.

Per contra the learned Advocate appearing on behalf of the prosecution submitted that the de-facto complainant has proved the lodging of F.I.R and has adduced 12 witnesses which include the doctors and most of the witnesses have corroborated the case of prosecution. It is further argued even if for the sake of argument it is considered that the victim was a habitual drunker the same will not ipso facto the reason for acquittal of the accused

as the physical assault upon the victim has been proved by the de-facto complainant. Furthermore the victim might have been a patient of Duodenum Ulcer but his death was due to the assault by the accused person. Therefore the learned Court considering the evidence of the prosecution witness coupled with medical paper rightly passed the order of conviction under Section 323/34 IPC. Hence prayed for dismissal of this appeal.

Analysis

4. After hearing both the Learned Advocate appearing on behalf of the appellant as well as on behalf of the State respondent and going through the materials on record the moot question now falls for consideration is as to whether the Learned Trial Court rightly passed the order of conviction under Section 323/34 against the present appellants when the charges as levelled against them under Section 304 part (II) was not proved.
5. In order to unearth the truth it is necessary to assess the evidences as adduced by the Prosecution. The de-facto complainant is the wife of the deceased victim deposed as P.W.1 and her testimony reveals that the cause of death of her husband was because of the physical assault inflicted upon him by the cousin 'Dewars'. She further deposed that the incident happened on Sunday 12th day of English Calendar month at about 1 year 3 months ago from the date of deposition, at about 12 noon. She further deposed that her husband was pulled from the Dalan of the house and was tied with a rope with a tree and was assaulted by rope and foot and as she was afraid of her life on account of threatening by the accused persons she did not go to police station but after demise of her husband she lodged the written complaint. The written

complaint was scribed by Swapan Das. She further deposed that she cannot read and write properly and she cannot read the content of the written complaint which was marked as exhibit 4. However she stated to the scribe of the complaint that her husband was pulled from him the house and was assaulted by rope and foot and after being tied with a tree. She further deposed that she stated to the treating Doctor that the accused persons assaulted her husband who prescribed the medicine. She denied that her husband was a habitual drunkard or for that reason got his liver damaged.

6. P.W. 2 the full blood brother of the deceased who turned hostile only said that his brother died about 1 year back and was admitted in hospital. P.W. 3 another brother of the deceased deposed that he heard that his uncle the present appellant assaulted his brother at the time of quarrel as a result he died and also heard that the rope was tied on neck of his brother and was assaulted in his stomach. This version has further been corroborated by P.W. 4 who is brother-in-law of the deceased to the extent that, the uncle's son assaulted the deceased on 12th November, 2007 Sunday at about 11 A.M for which he was admitted in the hospital and died. P.W.5 being a neighbour declared as hostile witness.

7. P.W.6 though adduced evidence being a resident of local area having knowledge about the death of the deceased failed to disclose any reason of such death. In this case, the most important witness is P.W.9 that is the Medical Officer/Surgeon who was posted at Howrah District Hospital since July 1996. He examined the deceased Asit Khamaru on 28th November, 2006 and on perusal of the treatment-sheet the witness deposed that it was written on a plain paper and the patient had severe pain in his stomach and was

diagnosed as a case of “DERITONITIS” .He further deposed that due the reason he had a surgery on the same day and in the post operated period his condition was serious and was shifted at ICU where he died on 21st November, 2006 at 2 A.M. According to the version of this witness at the time of admission of the patient no complaint was made by the patient or his family members about the assault or the assailants. In his cross-examination he gave the detailed description of the Diagnosis where he said that a hole in the Duodenum was detected and it was Duodenum Ulcer. P.W.10 another Medical Officer attached to Howrah District Hospital in the year 2000 deposed that he issued the death certificate of Asit Khamaru. The Learned defence Counsel tried to impress the Court by advancing the argument that the deceased was a habitual drunkard which is manifest in Doctor’s report and the cause of the death was Deritonitis for which he had to undergo a surgery and thereafter the situation become critical and he expired. Furthermore in view of the cross-examination P.W. 9 that the hole in the duodenum which was full of pass means it was practically Duodenum Ulcer and as per version of P.W. 2 the other Medical Officer, ulcer can take place if someone takes liquor for considerable period of time. The attention of this Court was also drawn in course of argument to the evidence of P.W.1 where the suggestion was put to her and she denied “not a fact that my husband was drinking for considerable period so had his liver damaged” not a fact that her husband died he was operated for alleged drinking and/or he felled on the brick built road in drunken condition after having altercation with the members of club. The suggestion was also put to P.W. 3 that is the sister of the deceased to which she replied “not a fact my brother used to return to his house by using abusive

language 'I do not know whether my brother was in drunken condition on the date of incident and was taken to his house by the members of the Netaji Club. I did not know the condition of the stomach of my brother; On the contrary She denied that her brother was admitted in hospital as he became unwell due to drinking. P.W. 4 in his cross-examination deposed that Asit used to take "liquor". P.W. 5 denied the suggestion that Asit the victim was using abusive language in a drunken condition standing in front of the house of the accused person but in cross-examination said he knows that Asit used abusive language in a drunken condition and Para people used to protest that. He also deposed that Asit was becoming unhealthy due to drinking and was treated by the Doctor. The Learned Trial Court on analysing the evidence adduced was of the opinion that there was no case of the prosecution that victim sustained only bleeding or cut injury due to assault of the accused persons and/or he was given bandage or plaster on his body and was also of the view that the non-examination of the local doctor was not fatal to the prosecution case. Furthermore, the Learned Court considered the medical papers marked exhibit 3 series together with the evidence of Doctor examined as P.W. 9 and P.W. 10 and the post mortem report, and the death certificate, Exhibit 4 and observed that the assault of the victim on his stomach certainly can trigger the ulcer which forced the doctor to operate the victim and septicaemia developed causing the death of the victim and hence passed the order of conviction against both the accused persons.

- 8.** It is undisputed that the Learned Court did not find any ingredient to attract Section 304 part-II as no intention of the appellant was found to be established and therefore passed the order of acquittal. It is settled law that

the evidence required in criminal case is higher standard of proof than the preponderance of probabilities which means the prosecution must prove the case beyond the shadow of all reasonable doubt. It is held in several decision by the Supreme Court as well as this High Court that burden of proving an accused guilty beyond all reasonable doubt lies on the prosecution.

- 9.** In this case, the Post Mortem report has been marked with Exhibit. 6 which is proved by the I.O/ P.W. 12 who collected the Post Mortem report. On perusal of such P.M report which was marked as exhibit with consent it is seen that the death was due to septicaemia, post-operative infection and a case of perforation of Duodenum Ulcer. The post mortem report clearly mentioned no external injuries are found excepting a big sized wound which is Duodenam perforation. In this case the autopsy sergeant has not been cited as a witness. P.W. 8 held the inquest who prove the same and marked with exhibit 2. The inquest report took note of that on 12th November, 2006 the deceased in drunken condition used abusive languages for which the present appellant assaulted him and he sustained injuries. The exhibit 3 series, the bed head ticket reveals that the patient was admitted with history of acute pain and the condition of patient was serious. The exhibit 3(d) which is on a plain paper and is proved by the treating Doctor manifest the condition of the patient as very rest less without any history of any injury .Not a single witness can be found who saw the incident when he was tied in a tree and was assaulted on a stomach and the manner in which he was alleged to be assaulted only a day before his expiry as stated by de-facto complainant, there ought to have been presence of some external injury over the body of the victim which was not found. The cause of injury mentioned in the Post Mortem Report and the

condition of the ulcer can no way draws the inference that the victim was hit so severely that aggravated the ulcer . Where there is no trust worthy evidence or ocular witness and medical report /Post Mortem Report established the cause of death on Septicaemia post-surgery and no external injury is found the averments that the victim was tied with a tree with a rope and the assault made upon him do not find any basis and it goes without saying that the case of the prosecution is demolished with these medical evidence.

10. The de-facto complainant lodged the complaint after demise of her husband that is the injured and according to her version also her husband was pulled out from the Dalan of the house and after assault he was taken to Doctor on Monday before Doctor Ranjit of Chunabati but the said Doctor has not been cited as a witness. The P.W. 9 Doctor Tapan Bhanja in his cross Said that the patient was not admitted on police reference and no complaint was made by the patient or his family members so again the story of taking the victim to the police station before lodging the F.I.R lacks any basis .

Conclusion

11. Therefore from the above facts and circumstances the clear picture that is established, the deceased victim had an habit of drinking liquor for a prolong period as a result Duodenum Ulcer developed. The victim was in habit of using abusive language in drunken condition and on the relevant date he did the same as a result protest was raised and the possibility of hot altercation between the accused persons and the victim cannot be ruled out. However after that the patient suffered severe pain in stomach was taken to the hospital

where immediately O.T held and he died because of post-operative septicaemia duodenal perforation on the next day.

12. Not an iota of evidence can be found to establish the charges under Section 325/304 and but the Learned Court has found them guilty of the offence committed under section 323 IPC though none of the ingredients to attract 323 was established. Hence the said judgment and order of conviction is liable to be set aside.

13. Accordingly this criminal appeal stands allowed. The accused persons are hereby acquitted from the charges under Section 323/34 IPC.

14. The judgement and order of conviction as passed by the Learned Court is hereby set aside. A copy of the order along with the T.C.R. be sent down to immediately for forwarding the same to the Learned Court for taking necessary steps.

15. The Appellant Naru Khamaru released from the bail bond if any in terms of Section 437-A of the Code of Criminal Procedure and 481 of BNSS.

16. Photostat copy of this judgement if applied, shall be made available upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)