Form No. J(1)

IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

Present :

The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Rai Chattopadhyay

CRA 568 of 2017

Biswajit Ghosh & Anr.
– Vs. –
The State of West Bengal

For the Appellants:	Mr. Tapan Dutta Gupta, Mr. Parvej Anam, Ms. Rituparna Ghosh, Mr. Sourav Sardar.
For the State:	Mr. Madhusudan Sur, ld. APP, Mr. Manoranjan Mahata.
Heard on:	26.08.2025, 16.09.2025 and 04.11.2025.
Judgment on:	November 4, 2025.

Rajasekhar Mantha, J.:

1. The instant appeal is directed against the judgment of conviction dated 27th July, 2014 and order of sentence dated 28th July, 2014 passed by the learned Additional Sessions Judge, Fast Track, 3rd Court, Malda in Sessions Trial No. 54 of 2015 arising out of Sessions Case No. 419 of 2015. The appellants were convicted under Sections 302/34 of the Indian Penal Code.

THE PROSECUTION CASE:

2. The prosecution's case in brief is that on 20th April, 2013, one Mangli @ Mangala Ghosh entered into the house of the victim and his family to save her life when she was being beaten and chased by the appellants, their brothers and father. The house of Mangali is next to and/or close to the house of the victim and his family. She did not receive serious injuries but was rendered dizzy, after running into the house of the victim's family which comprised of Milan Ghosh (PW-1), Dhananjay Ghosh @ Kalu (PW-8), Sanjoy Ghosh (PW-3) and the deceased victim Ajoy Ghosh.

3. The father of the two appellants/accused persons was one Mangal Ghosh. As soon as Mangal, Biswajit, Mahadev (two appellants) entered the house of the victim chasing Mangli Ghosh and tried to drag her away outside the said house, the two appellants were exhorted by their father Mangal Ghosh (acquitted by the Trial Court) to assault the deceased victim.

4. Accordingly, Biswajit assaulted the deceased Ajoy Ghosh with a Hasua (Sickle) on his neck. His brother Mahadeb assaulted the victim also with Hasua. The victim Ajoy Ghosh, son of Manik Ghosh, is stated to have fallen on the ground and may have died at the spot. The appellants then fled the spot along with others. Some local villagers came to the house of the victim and went away.

5. The police arrived at the spot and inquest was conducted at 3:00 P.M. After completion of the inquest, the body was sent for post mortem.
6. The post mortem doctor, PW-9 found two sharp cutting injuries on the neck and right arm of the victim.
7. Investigation was completed and charge-sheet was filed. Charges were framed against the appellants, namely, Biswajit Ghosh, Mahadeb Ghosh and also Mongal Ghosh and Rekha Ghosh, the parentsof the two appellants.
8. The charges were framed under three heads, namely, Section 341 read with Section 34, Section 447 read with Section 34 and Section 302 read with Section 34 of the Indian Penal Code. The trial commenced.

THE EVIDENCE ON RECORD

9. **PW-1 was the de facto complainant Manik Ghosh**. He deposed that he had filed complaint and his evidence was primarily based on the prosecution case narrated hereinabove.

10. **PW-2 was one Tenu Ghosh, the son-in-law of PW-1.** His evidence was also based on the prosecution case narrated hereinabove. He deposed that his family comprised of nine members of whom three were examined. The statement under Section 164 of the Cr.P.C. of PW-1 was recorded. There is a minor difference between the evidence of PW-1 and PW-2. PW-2 did not mention in his evidence that the appellant entered the house with

any sharp cutting weapons. PW-2 was also a witness to the inquest report.

11. **PW-3 was Sanjoy Ghosh, the elder brother of the victim** Ajoy Ghosh. His evidence is also substantially similar to the prosecution case.

12. **PW-4 was Naru Ghosh,** a villager, who was declared hostile.

13. **PW-5 was a police constable.**

14. **PW-6 was a local villager** whose evidence is primarily hearsay.

15. **PW-7 was the first victim Mangli Ghosh.** She narrated the entire incident and supported the prosecution case.

16. **PW-8 was Dhananjoy @ Kalu Ghosh,** who also supported the prosecution case.

17. **PW-9, namely, Nimai Chandra Sarkar** was the post mortem doctor, who conducted post mortem on the victim. He found the following injuries on the body of the victim:

> "1. One sharp cut injury (6 inches x 1.5 inches x trachea and carotid vessels deep) placed obliquely on the front and sides of neck about $2^1/2$ inches above the supra sterna notch on the front. Sharp cut injuries of skin, subtutaneous tissues, trachea, both sided sternomastoid muscle, both sided carotice vessels and nerves found.
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> 2. One sharp cut injury (3 inches x 1 inch x muscle deep). Placed obliquely on the anterior aspects right forearm found with a tailing of 5 inches long from the lower end of the wound and found skin deep."

18. **PW-10 was Mithu Sk., who photographed the victim**.

19. **PW-13 Sovan Karmakar was the first Investigating Officer**.

20. **PW-14 Asit Mondal was the second Investigating Officer**.

21. **PW-15 was Keya Sarkar, who was a Judicial Magistrate**, who recorded the statements of PW-1 and PW-2 under Section 164 of the Cr. P. C.

22. The appellants were thereafter examined under Section 313 of the Cr. P. C. All circumstances appearing against them were confronted to them. They denied the same. Based on the evidence on record the Trial Court convicted the two appellants under Sections 302 read with Section 34 of the IPC. They were not guilty of any other offence charged. The other 2 accused were acquitted.

ANALYSIS OF THIS COURT

23. This Court has carefully examined the evidence of each of the witnesses and the circumstances under which the victim Ajoy Ghosh was assaulted with a sharp cutting weapon and PW-7 Mangli Ghosh was chased from outside her house into the house of the victim by the appellants and the other two accused persons.

24. The evidence clearly establishes that the appellants had intended only to attack Mangli Ghosh, who was the sole and primary target of the appellants. The appellants were chasing her to cause and inflict more injuries on the person of Mangli Ghosh. They were compelled to

enter into the house of the victims only to catch hold of Mangli, who ran into the house of the victim Ajoy. It is only upon the deceased victim Ajoy Ghsh and his brothers Sanjoy Ghosh and Dhananjoy @ Kalu Ghosh intervening to save Mangali from the assault that the appellants inflicted injuries on Ajoy. It cannot be ignored that the appellant Mahadev Ghosh inflicted only one injury on the neck of the victim with a sharp cutting weapon and the appellant Biswajit inflicted another injury on right forearm of on the victim Ajoy.

25. Section 301 of the IPC, arises for consideration in the facts of the present case. The said section makes a person liable who has the intention to cause the death of Mr X, but ends up killing Mr Z. Section 301 is set out below:-

> **Sec. 301 Culpable homicide by causing death of person other than person whose death was intended**
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> If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, ***whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to he likely to cause.***
>
> Emphasis Applied

26. Section 301 is premised on the 'doctrine of transfer of malice' of the accused. The doctrine operates as a deeming fiction and imputes the 'intention to kill' to an accused, when the accused did not actually intend to kill the victim. It transfers the mens rea of the accused to kill Mr. X to Mr. Z by creating a deeming fiction that it shall be deemed that the accused intended to kill Mr. Z, who was not the real target of

the accused. Section 301 artificially supplies motive to the accused to kill a person, when there was none in accused in relation to that person.

27. In the present case, the malice/intention of the appellants to kill Mangali, if there was any at all, cannot be *transferred* to the appellants for causing the death of the victim Ajoy, since the prosecution has not been able to prove the intention of the appellants to attack Mangali Ghosh, who escaped death.

28. Section 301 by employing the words '*the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended'* has made it clear that the prosecution needs to *first* prove beyond a reasonable doubt that the assailant indeed intended (had the mens rea) to kill the person, who was his real prey, but was unable to kill him, and instead committed an unintended killing. Section 301, IPC, does not exempt the prosecution from proving the intention of the appellants behind attacking Mangali. Section 301 of the IPC, therefore, does not come to the aid of the prosecution in the present facts.

29. We are conscious that there have been direct eyewitnesses who saw the appellants assaulting Ajoy. Therefore ordinarily the intention of the appellants to kill Ajoy need not be proved. The decision of the Supreme Court in **Chunni Bai versus State Of Chhattisgarh, reported in 2025 INSC 577** may be referred to in this regard:-

> 46..... when a crime takes place in which there are eye-witnesses and the factum of homicide is proved by medical evidence, recovery of weapon of

> crime etc., the mens rea and the intention may be inferable, which of course is based on presumption. **However, presumption of the existence of intention merely based on the *act and result may not be safe in every case because the act and consequence of the questioned act may have been brought about by certain circumstances beyond the contemplation or control of the accused*.**
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> 47..... Though under the law, it is absolutely not necessary that to prove an offence, motive is also required to be established if the intention or the mens rea can be safely inferred from the surrounding facts. ***But where the motive which can provide the basis for the intention appears to be totally missing, the court has to be very circumspect in drawing the inference of the proof of the presence of intention.***
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> 48.....While proof of motive of the crime may strengthen the prosecution's case in proving the guilt of the offender, failure to prove motive is not fatal if the offence is otherwise proved through direct and incontrovertible evidence. **At the same time, absence of any motive may benefit the accused under *certain circumstances*, for the ingredient of intention which constitutes the mens rea has also to be proved.....**
>
> Emphasis applied

30. The proof of motive is not indispensable to bring home a charge of offence. The dispensation with the exercise to prove motive is however not an absolute rule, but it is rule of prudence based on human conduct, since what goes in the mind of a person remains within the eminently exclusive domain of that person and that person alone.

31. In certain cases as held in **Chunni Bai decision (supra)**, motive does provide clarity on the mind of the accused in committing the crime. The need to prove motive assumes greater significance when the Court is examining whether the accused intended to kill his or her victim, and acted in pursuance thereof.

32. The distinguishing feature between Section 300, IPC and its exceptions read with Section 304, IPC is indeed the intention of the accused. The intention of the accused tilts a case from section 300,

IPC to 304, IPC. When there is a death by an act of a human, undoubtedly the case is one of culpable homicide. The vexed question, however, is whether it is a first degree of culpable homicide that is murder under Section 300, IPC or second degree of culpable homicide under the first part of Section 304, IPC or third degree of culpable homicide under the second part of Section 304, IPC. The Supreme Court in **Chunni Bai decision (supra)** held as follows as regards the significance of the intention of the accused in a case of Murder:-

> 21. it can be understood that one of the criteria to determine, in any given case, as to whether the act amounts to "murder" or "culpable homicide not amounting to murder" ***is the presence or absence of intention of the offender.***
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> 24...However, we have certain reservations about such a conclusion being drawn by the courts below ***in respect of proof of "intention" or the conscious knowledge of what she was doing in the light of the peculiar facts and circumstances obtaining in the case***. In our opinion, it cannot be conclusively held in the present case that the intention of the appellant or conscious knowledge of what she was doing, a component of mens rea, has been established beyond reasonable doubt.
>
> Emphasis Applied

33. In the present case, the need for the intention of the appellants to be on record is not to prove that the appellants have assaulted the victim Ajoy. The eyewitnesses have been unequivocal in stating that the appellants have assaulted Ajoy. The emphasis on intention is called for to ascertain whether the appellants have the murderous intention against Ajoy. The question of intention has arisen in view of the fact that the original target of the appellants was Mangali, but not Ajoy.

34. If the appellants had intended to kill the victim they could have and would have inflicted further blows on the victim. It is possible they may

have been prevented from doing so by Dhananjoy @ Kalu and Sanjoy Ghosh, brothers of the victim. The reason for assaulting Ajoy was only to remove him from getting access to Mangli.

35. Admittedly, the prosecution has not brought on record nor intended to do so nor has it otherwise come on record of any enmity between the appellants and the family of Manik Ghosh, PW-1, and the father of the deceased victim. It is strange and appears to have been an omission on the part of the prosecution is the failure on their part to bring the motive behind the attempt to assault Mangly Ghosh.

36. The peculiarity in this case arises from the fact that the appellants did not intend to kill Ajoy, the victim. The prosecution, however, misdirected itself in finding and collecting the evidence against the intention of the appellants to kill Ajoy but not Mangali. Accordingly, the prosecution could not find any such intention because the appellants did never have the intention to kill the victim Ajoy. The prosecution was required to pursue the lead, if any, as to why the appellant was up against Mangali.

37. The above misdirection of the prosecution has left the mind of this Court in doubt that the appellants may not have the intention to cause injuries to the victim with a view to ending his life. The injuries found by the post-mortem doctor do not indicate that there were several severe injuries on the body of the deceased.

38. Another peculiarity of this case is that it is only Ajoy who died in the altercation with the appellants. Ajoy was accompanied by his two other brothers, who were equally active participants in the fight against the

appellants. The other two surviving brothers were equally trying to save Mangali from the attack of the appellants. Ajoy and his two brothers, therefore, may have received sudden and grave provocation, or Ajoy may have fallen prey in a sudden fight with the appellants. The said circumstances are covered under exception nos. 1 and 4 to Murder under Section. 300 IPC. The prosecution, therefore, has been unable to explain the exact circumstances in which the appellants attacked the victim, from which the intention of the appellants can be discerned with reasonable clarity.

39. The prosecution, therefore, has not been able to drive home any intention or motive on the part of the appellants to cause the death of the victim Ajoy Ghosh.

40. Having regard to the aforesaid discussion, this Court is of the view that the appellants are at best liable to be convicted under the second part of Section 304 of the I.P.C. being culpable homicide not amounting to murder.

41. This Court has only discussed the parts of the evidence that are vital and necessary for the purpose of ascertaining the applicability of Section 302 of the I.P.C. It is, however, cannot be ignored that the prosecution has not been able to drive home the charges under Sections 341 or 447 much less read with Section 34 of the I.P.C.

42. In the backdrop of the above, since the appellants have undergone an incarceration of about eight years they are sentenced to the extent that they have been imprisoned till date.

43. For the reasons stated hereinabove, the impugned judgment of conviction and the order of sentencing are liable to be set aside and is hereby set aside.

44. The instant criminal appeal is allowed and disposed of.

45. The appellants, namely, Biswajit Ghosh and Mahadeb Ghoshshall be set at liberty forthwith from the custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the Learned Trial Court, which shall remain in force for a period of six months under Section 437A of the Code of Criminal Procedure corresponding to Section 481 of the BNSS, 2023.

46. The trial court records along with a copy of this judgement be sent down at once to the learned trial court for necessary action.

47. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(*Rajasekhar Mantha, J.*)

(*Rai Chattopadhyay, J.*)