

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Gaurang Kanth

**C.R.A.(D.B) No. 314 of 2023
(CRAN 1 of 2023)**

Abdul Latif and Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Sandipan Ganguly, Sr. Adv.
Mr. B Manna, Adv.
Mr. Dattatrya Dutta, Adv.

For the State : Mr. Debasish Roy, Id PP
Ms. Anasuya Sinha, Adv.

Heard on : 11.02.2025 & 13.02.2025

Judgment on : 13.02.2025

Joymalya Bagchi, J.

1. Trial court records have been received.
2. Mr. Ganguly, learned senior counsel for the appellants takes a preliminary point. He contends the appellants were convicted under sections 302/149 IPC. Although charge was framed against the appellants under

sections 304/149 IPC, they have been convicted on a graver charge namely sections 302/149 IPC without altering the charge and giving opportunity to recall witnesses for cross examination in respect of the altered case. As a result the appellants have been severely prejudiced resulting in a mistrial. On this score alone he prays the judgment and order of conviction and sentence be set aside and the matter be remanded for re-trial.

3. Learned Public Prosecutor submits apart from the conviction under sections 302/149 IPC appellants were convicted for causing assault on other victims under sections 326/149 and 307/149 IPC also. The said convictions do not suffer from any infirmity.

4. Prosecution case as alleged against the appellants is as follows :

5. On 22.5.2008 a tree had fallen down due to a storm. The appellants and others removed the said tree. This ensued a quarrel between the appellants and one Most. Tahabina Bibi, the de facto complainant. On the next day i.e. 23.5.2008 at 10 am the appellants and others started abusing Tahabina Bibi and her family members and when they raised objection the appellants and other FIR named accused assaulted them with '*Sabal*', '*farsha*', stick and other weapons. As a result Tahabina's husband Habibur Rahaman (PW2), brother-in-law Abdul Majid (PW7), Matiur Rahaman (PW3) and Rafikul Islam, the deceased were injured. Rafikul had been assaulted on the head with a '*farsa*' by Abdul Latif and Aatur Rahaman on the exhortation of Abdul Nur and Obaidur Rahaman. Injured persons were taken to hospital and Rafikul expired on the next day. FIR came to be lodged by Tahabina Bibi (PW1)

resulting in registration of Harischandrapur PS case no. 85 of 2008 dated 23.5.2008 under sections 143/325/326/506 IPC.

6. In conclusion of investigation, charge sheet was filed under sections 143/323/324/325/326/304/506 IPC against 14 accused including the appellants. Appellants and 8 others were tried while two juvenile charge sheeted accused were tried by the Children's court. Charges were framed under sections 326/149 against the appellants for causing grievous hurt on Tahamina Bibi, Habibur Rahaman, Abdullah Rahaman, Motibur Rahaman and Rafikul Islam by means of sharp cutting weapons, under sections 307/149 IPC for assaulting Tahamina Bibi, Habibur Rahaman, Abdullah Rahaman and Motibur Rahaman with the intention to cause their death and under sections 304/149 IPC for causing death of Md. Rafik @ Rafikul Islam.

7. During trial prosecution examined 16 witnesses.

8. In conclusion of trial, trial judge by the impugned judgment *inter alia* convicted the appellants under sections 326/307/302/149 IPC.

9. Mr. Ganguly rightly assails the conviction under sections 302/149 IPC for the death of Rafikul Islam. Though Charge had not been altered from sections 304/149 IPC to sections 302/149 IPC and opportunity of cross examining the witnesses had not been given, appellants came to be convicted of the graver charge, namely murder.

10. Section 216 Cr.P.C *inter alia* gives power to a court to add or alter any charge at any time before the judgment is pronounced. Sub-section (4) of the

said section states in the event such alteration prejudices the accused or the prosecutor the court may direct a new trial or adjourn the trial.

11. Section 217 Cr.P.C provides if a charge is altered after commencement of trial the prosecutor or an accused shall be allowed to recall and reexamine witnesses and/or examine any new witness with reference to such alteration. Prosecutor and the accused shall also be allowed to call further witness, if necessary.

12. In light of the aforesaid provisions, prior to rendering a conviction for a graver charge it was incumbent on the part of the trial judge to alter the charge and give opportunity to the accused to recall witnesses for cross examination or examine any other witness in respect of the altered charge.

13. We are conscious section 464 Cr.P.C provides no sentence or order of a competent court shall be deemed to be invalid on the ground that no charge is framed or on the ground of an error, omission or irregularities in the charge unless the same causes failure of justice. Admittedly, the appellants have been convicted of a graver charge namely murder without reframing the charges framed against them. Conviction of an accused for a graver charge without reframing or altering the charge and giving an opportunity to them to recall the witnesses or examine further witnesses evidently prejudices their defence and causes failure of justice. Such omission in our estimation cannot be glossed over with reference to section 464 Cr.P.C. This omission infracts the fair trial rights of the accused and amounts to a mistrial.

14. Prosecutor's submission that conviction on other charges is not vitiated is of little consequence. All the charges are set out of the same transaction and the appellants were tried in one trial in respect of these charges. For reasons recorded hereinabove, their conviction for the gravest charge attracting life imprisonment is bad in law.

15. Accordingly we set aside the conviction and sentence and remand the matter for reframing the charge under sections 302/149 IPC against the appellants. After reframing the charge, the appellants would be entitled to recall witnesses for further cross-examination in respect of the altered charge under section 217 Cr.P.C and the trial shall be taken to its logical conclusion in accordance with law.

16. We make it clear we have not expressed any opinion with regard to the validity of the conviction under the aforesaid charges and the same shall be decided independently on the basis of evidence adduced by the trial judge in accordance with law. We also note no appeal has been preferred against the acquittal of other accused by the State or victim.

17. We are informed appellants were on bail during trial. They are directed to be released on bail upon furnishing a bond of Rs. 10,000/- each with two sureties of like amount each to the satisfaction of the trial court and on condition they shall appear before the trial court on every date of hearing and co-operate with the trial.

18. In the event the appellants fail to do so, the said court shall forthwith intimate such fact to this court and the department shall place the matter before the appropriate Bench for necessary order in accordance with law.

19. Trial court shall conclude the trial and pronounce judgment as early as possible preferably within six months from the date of communication of this judgment.

I Agree.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)