

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 Ajay Kumar Gupta**

CRA 538 of 2015
(Asan Ali Sk. – Vs. – The State of West Bengal)
With
CRA 551 of 2015
(Kalu Sk. @ Arman Sk. – Vs. – The State of West Bengal)
With
CRA 673 of 2015
(Sahjamal Sheikh & Another – Vs. – The State of West Bengal)
With
CRA 779 of 2015
(Kajal Seikh – Vs. – The State of West Bengal)

For the Appellants in
(CRA 551 of 2015
& CRA 779 of 2015):

Mr. Debabrata Roy,
Mr. Prabir Majumdar,
Mr. Snehasish Majumdar,
Ms. Sarbani Mukhopadhyay,
Ms. Soumik Mondal.

For the Appellants in
(CRA 538 of 2015
& CRA 673 of 2015):

Mr. Fazlur Rahman,
Md. Babul Hussain.

For the State:

Mr. Debasish Roy, Ld. P.P,
Mrs. Amita Gaur,
Mrs. Puspita Saha.

Heard on:

January 2, 2025.

Judgment on:

January 2, 2025.

Rajasekhar Mantha, J.:

1. Each of the aforesaid appeals is directed against the judgment dated 4th August, 2015 and the order of conviction dated 5th August, 2015 passed by the learned Additional Sessions Judge, Second Court at Krishnagar in Sessions Case No. 27(3)2015.

2. By the said judgment, each of the appellants, namely, Kajal Sheikh, Kalu Sheikh, Raju Sheikh @ Nera, Asan Ali Sheikh and Sahajamal Sheikh were convicted under Sections 302 and 34 of the Indian Penal Code for life. They were also directed to pay a fine of Rs.10,000/- each, in default whereof, they were to undergo rigorous imprisonment for another six months.

3. The facts relevant to the instant case are that on 31st July, 2014 at about 8:30 P.M., Chhoto Sajamal Sheikh (the victim) was sitting in front of a tea stall owned by Badar Shah/Sheikh. The accused persons are stated to have approached the victim and initially threw country made bombs to scare away the persons around. The accused then assaulted the victim with fire arms and sharp cutting weapons. The victim sustained grievous injuries and died on the spot.

4. A complaint was lodged immediately thereafter at about 35 minutes past midnight (1st August, 2014) by the paternal aunt of the victim (PW-1) Hachina Bibi. FIR No.228 of 2024 dated

01.08.2014 was registered under Section 302 read with Section 34 of the Indian Penal Code and Section 9(b) of the Indian Explosives Act. However, it appears from the records that U.D. Case No. 23 of 2024 dated 01.08.2014 was also registered. The inquest was conducted on 1st August, 2014 in the early hours around 1:05 A.M.

5. The complainant specifically mentioned the names of the appellant and one Raju Nyara, Riyajuddin, Asadul Shah, Ajad Sheikh, Bara Samsul Sheikh, Gias Sheikh and Kalu Sheikh as persons who assaulted the victim, her nephew.

6. While framing charges by the learned Trial Court, in addition to Sections 302 and 34 of the Indian Penal Code and Section 9(b) of the Indian Explosives Act also framed charges under Section 27 of the Arms Act. The Trial commenced thereafter.

7. PW-1 was Hachina Bibi deposed as a de facto complainant of the instant case. She stated that on the date of the occurrence, the victim came to her house and spoke to her. She thereafter went to a local tea stall belonging to Badar Shah/ Sheikh along with the victim. After seeing him off at the tea stall, she returned to her house. She thereafter heard the victim shouting loudly, asking to call the police. She stated that the appellant Sajamal, also known as Baro Sajamal, shot the victim with a gun. The other appellants assaulted the victim with a Dao (sharp cutting instrument used in

agriculture). PW-1 was stated to be standing near a Chatka Tree (Devil Tree/Saitan Tree). She further stated that the other accused persons also assaulted the victim with sharp cutting weapons. She claimed to have seen the incident despite the fact that it was dark by 8:30 P.M. because of electrical lights nearby. In cross-examination, she denied that the police recorded any statement from her.

8. PW-2, Mucha Karim Sheikh, who was a resident of the village. His house was next to the tea stall. He heard the victim calling for the police in a loud voice. He also heard bomb blasts and then came out of his house. He found the dead body of the victim near to a Metal Road. He also found two persons, namely, Hachena and Jamat calling other persons to take the victim to the hospital. He denied having been examined by the police. After being declared hostile, in cross-examination by the prosecution he named the appellant Bara Sajamal, Raja Sheikh, Nara Sheikh, Ashadul Sheikh, Giyas Sheikh and 6-7 others assaulting the victim with sharp cutting instruments like Hasua and Bhojali. He had also put his signature on the seizure list and identified the same. None of the seized articles were, however, confronted to the PW-2 or produced in Court by the prosecution.

9. PW-3, Akli Bibi was a resident of the said village. She was declared hostile. In cross-examination by the prosecution, she

stated that she had informed the police that Ashadul Sheikh, Laltu Sheikh, Maiuddin Sheikh, Bara Sajamal, Giyas Sheikh, Ajmir Sheikh, Raju Sheikh, Nara Sheikh, Riajuddin Sheikh and Kalu Sheikh assaulted the victim with Bhojali and other sharp cutting instruments. She denied knowing the accused persons and yet appears to have named them. The persons named by PW-3 were at variance with those named by PW-1.

10. PW-4 was Taslima Bibi wife of PW-2. She was declared hostile and identified some of the appellants in course of trial.

11. PW-5 and PW-6 were Alihim Sheikh and Mir Kashem Sheikh respectively. They were related to the victim. They were the seizure witnesses. PW-3 to PW-6, therefore, were not the eye-witnesses. They had heard of the role of the appellants in causing the death of the victim.

12. PW-7 was Kalam Sheikh, the father of the victim. He stated that his son was murdered at Bejarli Colony (a place different from the place of occurrence). He stated that he was returning home and found his wife crying and saw his son lying dead on the road. While he named the appellants as the assailants and identified them on the dock, he was also not an eye-witness to the incident.

13. PW-8 was Lalbanu Bibi, mother of the victim. She contradicted her husband's statements. She stated that she and her husband went to the place of occurrence after hearing a bomb

blast. She, however, does not mention the presence of PW-1 at the time and place of occurrence.

14. PW-9 was the Investigating Officer of the case, Bikash Halder. Apart from narrating the incident in a brief manner, he deposed that he had collected two bombs from the house of Raju Sk. He also produced the seizure list and identified her signature thereon. FSL report of the bomb was exhibited. He claimed to have recovered Hasua (sharp cutting weapon) from the house of Kajal Sk., one of the appellants herein. He produced the seizure list of the weapon. The weapon itself was, however, not confronted to the Investigating Officer of the case by the prosecution nor was it produced in Court.

15. The other evidence on record indicates that the weapon was recovered not behind the house of Kajal Sheikh but from another place. The same is evident from a statement recorded under Section 172 of the Code of Criminal Procedure of Kajal Sheikh. Based on the aforesaid evidence albeit inconclusive and contradictory, the Trial Judge convicted the appellants for life under Section 302 read with Section 34 of the Indian Penal Code.

16. The Trial Judge appears to have placed complete reliance on the evidence of PW-1 and PW-9, the Investigating Officer of the case. Before this Court deals with the impugned judgment, there

are two subsequent events that are necessary and relevant to mention.

17. In respect of other persons involved in the incident, namely, Azad Sheikh, Laltu Shah and Giyas Sheikh, a separate *de novo* trial was conducted subsequent to the impugned judgment being Sessions Case No. 27 (3) of 2015. The charges against the said persons arose out of the same FIR being No. 228 of 2014 dated 1st August 2014. A second *de novo* trial was also conducted against six other persons, namely, Jalal Sheikh, Hapi Nera, Asadul Shah, Ajmir Sheikh, Mahiruddin Sheikh, Riyajuddin Sheikh @ Riyajuddin being SC Case No. 27 (3) of 2015 under the same FIR No. 228 of 2014.

18. The same witnesses as in the instant case also deposed in the aforesaid two *de novo* trials.

19. Each of the accused persons in the said two *de novo* trials has been acquitted. The Sessions Court in the aforesaid two *de novo* trials found fatal contradictions in the evidence of PW 1 Hachina Bibi (alleged eye witness). Such contradictions are also apparent in the instant case. The said contradictions are as follows:

(a) The presence of PW-1 in the place of occurrence is doubtful. There are loopholes in the evidence with regard to her presence at the place and time of occurrence.

(b) In the instant case, she had deposed that she came out of her house after hearing the bombs in question. In the other two *de novo* trials, she deposed that she went to request the victim to come and have a meal in their house.

(c) In the instant case she stated that she saw the incident, standing near the aforesaid Chatka tree. In the *de novo* trials, she deposed that she was watching the incident standing behind the tables of other persons at the tea stall.

(d) The sketch map, prepared by the Investigating Officer of the case (PW-9), did not show the existence of Chatka tree at the place of occurrence.

(e) The inquest report, on which PW 1 claims to have signed, was conducted under an artificial torch light. This would indicate that there was gross insufficient light at the place of occurrence. PW 1, therefore, could not have identified 15 assailants attacking the victim herein.

(f) There is further contradiction as regards the place of inquest. The inquest was conducted at the place of occurrence whereas the P.W. 1 stated that the inquest was conducted at a hospital.

(g) The role of any of the accused persons or the names of the accused persons who assaulted the victim and the weapon used in course of assault such attack are not stated in the inquest report.

(h) The names of Kalu Sheikh and Kajal Sheikh were not mentioned by PW1. The name of Kajal Sheikh featured in the FIR without any mention in the complainant.

(i) Kajal Sheikh's name featured for the first time in the evidence of the I.O. As to how Kalu and Kajal, the appellants herein, were impleaded as accused in the instant case is not known or explained by the prosecution.

(j) In the complaint, the PW 1 did not mention of any gunshot being fired. However in the statement under Section 164 of the Cr.P.C. she stated that two gunshots have been fired. It is further contradicted by her evidence in the de novo trials that victim was shot once and not twice.

(k) In the instant case, PW 1 does not mention any gunshot fired on the victim.

18. There are several other omissions and inconsistencies in the prosecution case and the investigation as already stated above.

(a) The allegedly seized Hasua (a sharp cutting instrument used in agriculture) was not produced in course of trial.

(b) The post mortem doctor was not examined to prove the contents of the post mortem report.

(c) None of the seized articles were produced in course of trial. Only the seizure lists and some labels were produced.

(d) The eyewitness i.e. the tea stall owner, Badar Shaw/Sheikh or persons working at the tea stall were not produced by the prosecution.

(e) Hachena Bibi and Jamat who were present at the place and time of occurrence, as deposed by PW-2 but Jamat was not produced by the prosecution.

19. The prosecution has, therefore, withheld vital evidences and witnesses who could have thrown light on the actual incident. The prosecution was duty bound to produce the best evidence. It has failed to do so. An adverse inference is therefore called for against the prosecution. Reference in this regard is made to paragraphs 19, 21 and 22 of the decision of the Supreme Court of India in the case of **Ram Singh – Vs. – State of Uttar Pradesh** being Criminal Appeal No. 206 of 2024 decided on 21st February, 2024.

“19. Interestingly, neither Desh Raj, brother of PW-1 and son of the deceased, who was very much present at the place and time of occurrence was examined by the police nor the other brother Sunder Lal, the scribe, who had written the first information, was examined by the police. Omission to examine Desh Raj by the prosecution is most crucial as according to the prosecution version he was very much present when the incident occurred. We may also mention that the behaviour of Sunder Lal is also very unusual. He did not accompany PW-1 to the police station. There is also no evidence that he had rushed to the place of occurrence where his mother was

killed. An adverse inference will have to be drawn against the prosecution for not examining material witnesses. Be that as it may, it was only PW-1 and PW-2 who had stated that Ram Singh had fired from a country made pistol at PW-1 but the bullet had hit mother of PW-1, who died of the bullet wound. On the other hand, PW-3 categorically stated that he did not see accused Ram Singh carrying any country made pistol. Further, it has come on record that there was previous enmity between PW-1 and the accused relating to election of village Pradhan because of which there were cross cases between them.

21. At this stage, what is noticeable is that the weapon of offence i.e. the country made pistol used by the accused in the offence, could not be recovered by the police and therefore not exhibited. Thus, the main material evidence i.e., the weapon of offence was not exhibited. In the seizure memo, it was mentioned that a 12 bore cartridge was lying on the cot and alongwith the tikli of the cartridge which was stuck on the wound of the deceased, were seized by the police. On the other hand, in the evidence of the doctor, PW-6 as well as from the post-mortem report, it has come on record that 55 small pellets were taken out from the body of the deceased during post-mortem. The bullet wound was bone-deep which clearly reveals that the deceased was shot at from close range. In his evidence, PW-4 Sub-Inspector B.D. Verma deposed that during preparation of the inquest report, one tikli and 12 pellets were seized from the wound of the deceased. The pellets as well as the tikli of the cartridge were not sent to any ballistic expert, as a result of which there is no ballistic report on the basis of which it could be said for sure that the pellets found outside the body and from within the body could be traceable to the tikli of the 12 bore cartridge which in turn could be traced to the country made pistol from which the shot was allegedly fired by the appellant. There is no explanation of the prosecution regarding the 55 pellets retrieved from the body of the deceased during post-mortem; whether those could be linked to the 12 bore cartridge and the tikli. Importantly, the country made pistol was never recovered. Prosecution has not said anything in this regard. That apart, as per the version of PW-4, the blood stained clothes of the deceased which were seized were sent to the chemical examiner but the report from the chemical examiner was not received till the date and time of his deposition.

22. From the above, it is evident that there are glaring inconsistencies in the prosecution version which have been magnified by the absence of the testimony of the material witnesses and the ballistic report coupled with the non-recovery of the weapon of crime.”

20. In the light of the above, evidence of PW 1 could not have been relied upon by the Trial Judge. The other inconsistencies, would clearly indicate that far from proof beyond reasonable doubt of the role of the appellants, there is no clear evidence of the role played by each of the aforesaid appellants in the offence they have been charged with.

21. The impugned judgment and order of conviction dated 4th & 5th August, 2015 passed by the Additional District & Sessions Judge, 2nd Court, Krishnanagar, Nadia in Sessions Trial No. IV (IV) of 2015 arising out of Sessions Case No.27(3) of 2015, therefore, cannot be sustained.

22. In any event, it is now well-settled that when a set of accused persons in respect of the same FIR are acquitted, the other accused persons, in the absence of specific role applied by the other accused persons, cannot suffer conviction. Reference in this regard is made to paragraphs 14, 15 and 17 of the decision of the Supreme Court of India in the case of **Javed Shouket Ali Qureshi – Vs. – State of Gujarat** reported in **(2023) 9 Supreme Court Cases 164**.

“14. Assuming that PW 25 and PW 26 identified Accused 2, 3 and 4 by stating that they were members of the mob; once a coordinate Bench of this Court discards their testimony in its entirety being unreliable, the benefit of the said finding will have to be extended to Accused 2, 3 and 4 as they are similarly placed with

Accused 1, 5 and 13. Moreover, except for PW 25 and PW 26, no other witnesses have ascribed any role to Accused 2, 3 and 4.

15. *When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the criminal court should decide like cases alike, and in such cases, the court cannot make a distinction between the two accused, which will amount to discrimination.*

17. *Accused 1, 5 and 13 were convicted only on the basis of the testimony of PW 25 and PW 26. They were acquitted by holding that the testimony of both witnesses was unreliable and deserved to be discarded. If the same relief is not extended to Accused 3 and 4 by reason of parity, it will amount to violation of fundamental rights guaranteed to Accused 3 and 4 by Article 21 of the Constitution of India. Therefore, we have no manner of doubt that the benefit which is granted to Accused 1, 5 and 13 deserves to be extended to Accused 3 and 4, who did not challenge the judgment of the High Court. In this case, the suo motu exercise of powers under Article 136 is warranted as it is a question of the liberty of the said two accused guaranteed by Article 21 of the Constitution.”*

23. The aforesaid decision was followed in the case of Ram Singh’s decision (supra) at paragraphs 31 and 32.

“31. In such circumstances, it cannot be said that the prosecution could prove the accusation against the appellant beyond all reasonable doubt. As a matter of fact, on the same set of evidence, the trial court gave the benefit of doubt to the other accused Lala Ram primarily on the ground that there was a grudge between the accused and PW-1.

32. This Court in the case of Javed Shaukat Ali Qureshi, has held that when there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. This Court clarified as under:

15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the criminal court should decide like cases alike, and in such

cases, the court cannot make a distinction between the two accused, which will amount to discrimination.”

24. It is seen in the instant case that PW 1 has rattled of the names of at least 15 persons including the appellants and the accused persons in the two de novo trials mentioned hereinabove. The acquittal of accused persons in the two de novo trials would be completely and wholly inconsistent with the conviction of the appellants in the trial in the instant appeals. The FIR number and the incident are one and the same in the instant trial and the other two de novo trials.

25. The aforesaid is, therefore, yet another reason to acquit the appellants in the instant case. Hence, the appeals are hereby allowed.

26. The impugned judgment and order of conviction dated 4th & 5th August, 2015 passed by the Additional District & Sessions Judge, 2nd Court, Krishnanagar, Nadia in Sessions Trial No. IV (IV) of 2015 arising out of Sessions Case No. 27(3) of 2015 shall stand set aside.

27. The appellants, namely, Asan Ali Sk., Sahjamal Sheikh, Raju Seikh and Kajal Seikh shall 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.

28. The accused/appellant Kalu Sk. @ Arman Sk. shall be discharged from his bail bonds after six months in terms of Section 437A of CrPC corresponding to Section 481 of the BNSS, 2023.

29. Let a copy of this judgment be sent down to the Court below for information.

30. In view of the disposal of the criminal appeal, the connected applications are disposed of.

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

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)