

(2016) 06 CAL CK 0071
In the Calcutta High Court
Case No : C.R.A. 118 of 1987.

Bhagwan Shaw and Another - Petitioner @HASH The State of West Bengal and Another

Date of Decision : 21-06-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 304, Section 34

Citation : (2016) CriLJ 4923

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Mr. Anand Keshri, Amicus Curiae, for the Petitioner; Mr. Ayan Basu, Advocate, for the State/Respondent

Final Decision : Disposed Off

Judgement

Joymalya Bagchi, J. - Appeal is directed against judgement and order dated 31.03.1987 passed by learned Additional Sessions Judge, 14th Court, Alipore, 24 Parganas in Sessions Case No. 15(1) of 1986 corresponding to Sessions Trial No. 5(4) of 1986 convicting the appellants for commission of offence punishable under Section 304 Part I of the Indian Penal Code read with Section 34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- each, in default to suffer rigorous imprisonment for three months more and with a direction that the fine, if realised, be paid to the widow of the deceased as compensation.

2. The prosecution case, as alleged against the appellants, is to the effect that the victim Radha Kanta Jha was a resident of 17, Panchanantala Road, Calcutta within the jurisdiction of Lake Police Station and appellants were residents of a nearby basti bearing premises no.22, Panchanantala Road. In the morning of 8.8.1983 at about 5-40 A.M. the deceased Radha Kanta Jha was going to the privy of the premises no.17, Panchanantala Road. At that time, Dilip Shaw, appellant no.2 came there and insisted on using the privy first. There was a hot altercation between the victim and Dilip Shaw over the matter. Dilip Shaw left the place following such altercation, but within five minutes he came back with

his father, Bhagwan Shaw, appellant no.1. Radha Kanta Jha was then fetching water from a nearby tap. Appellant Bhagwan Shaw caught hold of Radha Kanta Jha round his chest and Dilip Shaw picked up a concrete slab and threw it towards Radha Kanta Jha, but missed narrowly. Thereafter Dilip Shaw assaulted Radha Kanta Jha with fists and blows on his chest and abdomen. As a result, Radha Kanta Jha, who was aged about 60 years, fell on the ground and became unconscious. Then the appellants fled away from the place of occurrence. Victim Radha Kanta Jha was removed to the hospital, but declared dead. First information report was registered being Lake Police Station Case No. 311 dated 8.8.83 under Section 302/34 of the Indian Penal Code.

3. In conclusion of investigation, charge sheet was filed and the case was committed to the Court of Sessions for trial and disposal. Charge was framed under Section 302/34 of the Indian Penal Code. The appellants pleaded not guilty and claimed to be tried.

4. In the course of trial, the prosecution examined as many as 11 witnesses. The plea of the appellants was one of innocence and false implication. In conclusion of trial, the Trial Court by impugned judgment and order convicted and sentenced the appellants, as aforesaid.

5. Mr. Keshri, learned amicus curiae submitted that the prosecution has not been able to prove the charge under Section 304 Part I read with Section 34 of the Indian Penal Code. There was no intention to kill and the injuries caused on the victim were not such as would in ordinary course of nature to cause death. There is also no material to show that the death of the victim was due to the injuries inflicted by the appellants. On the other hand, medical evidence shows that the victim suffered asphyxial death due to smothering and diseased condition of heart. He, accordingly, prayed for acquittal of the appellants.

6. On the other hand, Mr. Basu, learned Advocate appearing for the State submitted that there is consistent evidence on record that the appellants came in a body and assaulted the victim and consequentially he died. Medical opinion shows that the asphyxial death of the victim was due to assault on the chest. Hence, the appeal is liable to be dismissed.

7. P.W.1 claims to be an eyewitness of the case. He deposed that he used to stay at 17, Panchanantala Road. He stated that on 8.8.83 at about 5.30 A.M. to 5.45 A.M. victim Radha Kanta Jha had come to the privy of their premises. At that time Dilip Shaw, who was a resident of basti no.22 came near the privy and wanted to use the privy first. Radha Kanta Jha insisted that he would go first when an altercation ensued between them and thereafter Radha Kanta Jha entered the privy and Dilip left the place. Within 5/7 minutes thereafter Dilip Shaw came back with his father, Bhagwan Shaw. At that time Radha Kanta Jha had come out of the privy and had gone to the water tap of the premises. Bhagwan Shaw caught hold of Radha Kanta from behind and Dilip picked up a stone and threw it at Radha Kanta, but missed. Thereafter Dilip assaulted Radha

Kanta with fists and blows on the ribs. Radha Kanta then fell on the ground and became unconscious. Dilip and Bhagwan ran away. Rabikanta Jha, Ugranath Thakur, Manindra Bhowmick and others were present at the spot. Indra Kanta Jha, brother of Radha Kanta arrived at the spot after Bhagwan and Dilip fled away. He took Radha Kanta to the hospital in a taxi. P.W.1 went to the police station and he lodged a report. He signed the report at the police station (Ext. 1/1). Indra Kanta came back from hospital and informed him that Radha Kanta had died. Police seized the stone upon preparing a seizure list. He signed on the seizure list (Ext. 2/1). He identified the piece of stone (Mat. Ext. 1).

8. In cross-examination, he stated that there were 15/16 tenants at 17, Panchanantala Road. He cannot say whether any resident of basti no.22 used to come to premises no.17, Panchanantala Road to use the privies in the said premises. He stated that he was not aware that Bhagwan Shaw is a TB patient. He was not aware that the victim was under treatment of Satya Babu, a doctor. He also stated that he cannot say Radha Kanta was a heart patient. He did not know that he was under treatment at Niramoy Clinic, Calcutta near Dhakuria bridge.

9. P.W.2 is another resident of 17, Panchanantala Road. He had witnessed the incident. He corroborated the evidence of P.W.1.

10. P.W.3 Indra Kanta Jha is the brother of the victim. On the date of occurrence at around 5.30/5.45 A.M. Ugranath Thakur came to his house at 30B, Gariahat Road and informed him about the incident. He went to 17, Panchanantala Road and found Radhakanta lying on the verandah in front of his room. He brought a taxi and took Radhakanta to Sishu Mangal Hospital, R.K. Mission, on Lansdowne Road. The victim was declared dead. He went to the police station and informed P.W.1 that Radhakanta had died.

11. P.W.4 Ugranath Thakur is another resident of 17, Panchanantala Road. He deposed that he had seen the incident and corroborated the version of P.W.1, 2 and 3.

12. P.W.5 was tendered for cross-examination.

13. P.W.6 is the police constable who was attached to Tollygunge Police Station. He took the dead body of Radhakanta from Sishu Mongal Hospital to the police morgue at Mominpore for postmortem examination.

14. P.W.7 Rajendra Thakur is the father-in-law of P.W.1 and also resided at 17, Panchanantala Road. He deposed that police seized a cement-stone from the place of occurrence. Upon preparing a seizure list he put his signature on the seizure list (Exbt.2/2).

15. P.W.8 is the postmortem doctor who held postmortem on the dead body of the victim. He found as follows:-

"General condition of the body:

Medium complexion, eyes and mouth closed, both the conjunctiva highly congested. Nose flattened. Thick bloodstained forth inside the nostrils. Marked cyanosis found present on the nails at the tip of fingers, tip of nose and lips.

R.M. present all over.

Wearing apparels consisted of one gamchha (napkin). It was packed, labelled, sealed and handed over to the escorting constable.

External Injuries:-

1. One abrasion 2" X 2" width underlying bruise placed obliquely over left Zygoma.
2. One abrasion 1 1/2" X 1" width underlying bruise placed obliquely on the lower eyelid of the left eye.
3. One abrasion 2" X 1" width underlying bruise on the left side of the lower quadrant of the chest.

Internal Injuries:

1. Brain is congested. Pethecal hemorrhage in the white matter of the brain.
2. Bases of both the lungs oedematous and both lungs highly congested with pethecal hemorrhage spots over both the lungs.
3. Pericardium was intact, but there was deposition of layer of fat over it.

Heart:

Comparatively larger than the average. Both chambers found dilated, right ventricular muscles found hard along with valves. Arteries shows athromatus. Others within normal limits. Death, in my opinion, was due to the effects of asphyxia as a result of smothering associated with diseased condition of the heart, ante-mortem and homicidal in nature.

Further opinion reserved till receipt of Chemical Examiner's report."

16. He also deposed that bloodstained forth inside the nostrils cannot be caused by any injury on the abdomen, but may be caused due any injury on the chest. It may be caused by any external injury on the chest. In cross-examination he clarified that the deceased died as a result of smothering associated with the diseased condition of the heart and not as a result of blow on the stomach. He further deposed that external injuries no.1 to 3 found by him could have been caused by fall or by blow. He did not find any mark of external injury on the nose or on the mouth. It is not a case of sudden cardiac arrest due to fall. It is not a fact that the death is accidental and not homicidal in nature. He did not find any injury on the abdomen or in the internal organs in the abdominal region.

17. P.W.9 is the plan maker who prepared a rough and final plan of the place of occurrence (Exbt.4 and 5).

18. P.W.10 held inquest over the dead body of the victim.

19. P.W.11, investigating officer, submitted charge sheet upon completion of investigation.

20. It appears that P.W.1, 2 and 4 are the residents of the same premises where the victim resided. They unequivocally deposed that the appellant no.2 initially threw a stone at the victim but missed. Thereafter the appellant no.1 held the victim and the appellant no.1 assaulted the victim by fists and blows on his chest and abdomen. The victim fell on the ground and became unconscious. Upon being taken to the hospital he was declared dead. The version of these witnesses have remained unshaken in cross-examination. As a result, one can safely conclude that the victim had been subjected to physical assault by appellant no.2 with the assistance of appellant no.1 immediately prior to his death. P.W.8, autopsy surgeon, deposed that the victim had died due to asphyxia as a result of smothering and due to the diseased condition of heart which is ante-mortem and homicidal in nature.

21. Mr. Keshari, learned amicus curiae argued that ocular version in the instant case is inconsistent with the medical information and therefore the appellants are entitled to acquittal. He in support of such contention submitted that none of the eyewitnesses have stated that the appellants had smothered the victim and there was no external injury on his mouth and face. Therefore there is a clear dichotomy between the ocular version and the medical evidence in the instant case.

22. On the other hand, Mr. Basu, learned Advocate for the State submitted that opinion of P.W.8 is not wholly inconsistent with the version of the prosecution case. P.W.8 deposed that bloodstained froth inside the nostrils may not be caused by injury in the abdomen but may be caused by external injury on the chest. He drew my attention to the fact that eyewitnesses deposed that appellant no.2 had dealt blows on the chest of the victim and there was external injury on the chest.

23. In view of the evidence on record, I am in agreement with the learned Advocate for the State that the medical evidence cannot be said to be wholly inconsistent with the ocular version. The victim who was an aged person suffering from a diseased heart condition had initially been attacked by appellant no.2 with a stone which fortunately missed the target. Thereafter, while appellant no.1 held the victim the latter was assaulted by fists and blows by the said appellant on his chest and abdomen. As a result of the injury on the chest and the diseased condition of the heart he suffered asphyxial death. Under such circumstances, one has to assess as to whether the conviction under 304 Part I read with Section 34 of the Indian Penal Code could be upheld or not. The fact that the victim was suffering from a diseased heart condition was not known to the appellants. The nature of injuries inflicted by the appellants do not show that they intended to kill the victim or had knowledge that such injury would kill him owing to his poor health. Such injuries were also not sufficient in ordinary course

of nature caused death of the victim. However, in face of the diseased condition of heart of the victim which was unknown to the appellants, such injuries turned out to be fatal. Hence, I am of the opinion that the conviction of the appellant ought to be converted from Section 304 Part I read with Section 34 of the Indian Penal Code to Section 325 read with Section 34 of the Indian Penal Code. Conviction of the appellants are, accordingly, converted to Section 325/34 of the Indian Penal Code.

24. Coming to the issue of sentence, I find that the incident occurred three decades ago. The appellants did not act with extreme cruelty but the injuries were caused in the course of an altercation by and between the parties. They do not have criminal antecedents. Appellant no.1 did not deal any blow upon the victim but had merely held the victim in the course of assault. Accordingly, I modify the sentence imposed upon the appellant no.1 and direct that he shall suffer imprisonment for a period already undergone and shall pay a fine of Rs.5,000/-, in default to suffer rigorous imprisonment for three months more. Sentence upon the appellant no.2 is modified and it is directed that he shall suffer rigorous imprisonment for three years and shall pay a fine of Rs.5,000/-, in default to suffer rigorous imprisonment of six months more. The fine, if realised, shall be paid to the legal heirs of the victim.

25. The bail bonds of the appellants are cancelled and they are directed to surrender forthwith before the trial Court and serve out the sentence immediately.

26. The period of detention suffered by the appellants during investigation, enquiry or trial shall be set off against the substantive sentence imposed upon the appellants under Section 428 of the Code of Criminal Procedure.

27. The appeal is, accordingly, disposed of.

28. Copy of the judgement along with LCR be sent down to the trial court at once for necessary action and execution of sentence in accordance with law.

29. I record my appreciation for the able assistance rendered by Mr. Keshari as *amicus curiae* for disposing of the appeal.

30. Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.