

(1984) 03 CAL CK 0005
In the Calcutta High Court

Bikash Ch. Mondal

APPELLANT

Vs

Sasanta Mondal and Others

RESPONDENT

Date of Decision : 20-03-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 377, 386, 389, 390, 391
Penal Code, 1860 (IPC) — Section 302, 304, 323, 34

Citation : (1984) CriLJ 1191

Hon'ble Judges : Sankari Prasad Das Ghosh, J;B.C. Chakrabarti, J

Bench : Division Bench

Judgement

Sankari Prasad Das Ghosh, J.—Susanta Mondal, the opposite party No. 1 before us, stood charged along with four other accused persons, Sm. Hiranmoyee Mondal, Sm. Sabitri Mondal, Sm. Purnima Mondal and Upendra Nath Misra u/s 302/34 I.P.C. for committing murder of one Kalipada Mondal on 29.12.78 at village Nishindra under P.S. Farakka, in furtherance of their common intention. They also stood charged u/s 323/34 I.P.C. for voluntarily causing hurt to one Binod Tanti at the same place and at the same time, in furtherance of their common intention. Ten prosecution witnesses were examined in the case. After considering the evidences of the P.Ws. and the materials on record, the learned Additional Sessions Judge, Fourth Court, Murshidabad found the opposite party No. 1 and the other four accused persons not guilty u/s 302/34 I.P.C. Instead, the learned Additional Sessions Judge found the opposite party No. 1 guilty u/s 304 Part II I.P.C. for causing the death of Kalipada Mondal, convicted him thereunder and sentenced him to suffer rigorous imprisonment for one year. He was also pleased to find the opposite party No. 1 guilty u/s 323 I.P.C. and convicted him thereunder. No separate sentence was passed by the learned Judge against the opposite party No. 1 on his conviction u/s 323 I.P.C. Thereafter the present revisional application has been filed by the de facto complainant, Bikash Chandra Mondal, younger brother of the deceased Kalipada Mondal, for enhancement of sentence of the opposite party No. 1 on his conviction u/s 304 Part II, I.P.C.

2. The contentions of the learned Advocate for the de facto complainant/the petitioner and the learned Advocate for the State are that in the facts and circumstances of the case and when the learned Judge was himself of the opinion that the offence was a very heinous one the sentence on the opposite party No. 1 on his conviction u/s 304 Part II, I.P.C. should be enhanced. Mr. Roy, appearing for the opposite party No. 1, has, on the other hand, contended that the opposite party No. 1 is entitled to plead for his acquittal in this revisional application for enhancement of sentence and that, in the facts and circumstances of the present case, the opposite party No. 1 is to be acquitted for the offence u/s 304 Part II, I.P.C.

3. The revisional powers of the High Court are enumerated in Section 401 of the new Criminal P.C. 1973 corresponding to Section 439 of the old Criminal P.C. (1898). Section 439 of the old Code read as follows:

Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under Sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against this conviction.

4. This right granted to an accused by Section 439 of the old Code for showing cause also against his conviction in a revisional application before the High Court for enhancement of sentence is not mentioned in Section 401 of the new Code, though Section 439 of the old Code corresponds to Section 401(2) of the new Code under which no order u/s 401 should be made to the prejudice of the accused unless he had had an opportunity of being heard either personally or by pleader in his own defence. There is a slight change in Section 401(2) of the new Code, which does not concern us in this revisional application. Though the right granted to an accused to show cause also against his conviction u/s 439(6) of the old Code has been omitted from Section 401 of the new Code, the contention of Mr. Roy appearing for the opposite party No. 1 is that when, u/s 401 of the new Code, the High Court may, in its discretion, exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 Cr.P.C. the High Court is entitled to acquit an accused in a revisional application u/s 401 Cr.P.C. when a right of acquittal of an accused has been conferred on an accused by Clause (c) newly added in Section 386 Cr.P.C. Prior to the enforcement of the new Cr.P.C. there was no right of the Government to prefer any appeal against inadequacy of sentence. Section 377 of the new Code contains a new provision for appeal by the State Government against sentence. Section 377(3) Cr.P.C. is to the effect that when an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence. On the basis of this provision for appeal by the State Government against sentence in Section 377 Cr.P.C. a new Clause (c) has been added in Section 386 Cr. P.C. enumerating the powers of the

appellate court in an appeal for enhancement of sentence. Under the new Code, the powers of the appellate court under Clause (c) to Section 386 Cr.P.C. are the same as the powers of the court of appeal in an appeal from a conviction with the difference that in an appeal for enhancement of sentence the appellate court can enhance the sentence or reduce the same. The contention of Mr. Roy is that when explicit provision has been made in the Clause (c) to Section 386 Cr.P.C. for acquittal of an accused in an appeal by the State Government against sentence, there is no reason why the accused should not be entitled to plead for his acquittal, even though the present revisional application is "by a party interested, i.e., the de facto complainant. This contention of Mr. Roy is challenged by the learned Advocate for the State. Considering the various provisions of the Cri.P.C. we are to accept the contention of Mr. Roy that in a revisional application by a party interested for enhancement of sentence, an accused is entitled to plead for his acquittal. First, the High Court has been given the power u/s 401 Cr.P.C. to exercise any of the powers conferred on a court of appeal under Sections 386, 389, 390 and 391 Cr.P.C. In exercise of its revisional jurisdiction for enhancement of sentence, the High Court is thus entitled also to acquit an accused under Clause (c) to Section 386 Cr.P.C. The High Court cannot acquit an accused in a revisional application for enhancement of sentence by a party, interested, unless the accused is given an opportunity to plead for his acquittal. Any other interpretation will limit the power of the High Court to exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 Cr.P.C. while exercising its powers of revision. Secondly, the purpose of Section 377(3) Cr.P.C. is to see that if the State asks for an enhancement of sentence, it should be prepared to face the risk of the accused being altogether acquitted. This was the purpose behind Section 439(6) of the old Code. This is the purpose for enacting Sub-section (3) to Section 377 of the new Code. If the State is to be prepared to face the risk of an accused being altogether acquitted, in case the State files an appeal against sentence, there is no reason why a party interested should not be prepared to face this consequence, simply because the old Section 439(6) has not been continued in Section 401 of the new Code. Thirdly, in the new Code a proviso has been added to Section 393 Cr.P.C. corresponding to Section 430 of the old Code. This proviso is to the effect that notwithstanding the final disposal of an appeal against conviction in any case, the appellate court may hear and dispose of, on the merits, an appeal for the enhancement of sentence u/s 377, arising out of the same case. In other words, the effect of the proviso newly added in Section 393 Cr.P.C. is that even if an accused becomes unsuccessful after filing an appeal against his conviction, the accused is entitled again to plead for his acquittal if the State files an appeal for enhancement of sentence. We are, accordingly, of the opinion that though Section 439(6) of the old Code has been deleted from Section 401 of the new Code (corresponding to Section 439 of the old Code), enumerating the revisional powers of the High Court, the accused is entitled even in a revisional application by a party interested for enhancement of sentence to show cause not only against enhancement of sentence but also against his conviction.

5. To come now to the other contention of Mr. Roy that on the basis of the materials on record the opposite party No. 1 is entitled to be acquitted. It has been argued that no specific evidence has been adduced by any of the P. Ws. as to on which portions of the body of Kalipada, the accused No. 1 struck by lathi. Mr. Roy took us through the evidence of the two eye-witnesses, Chaina Mondal (P.W. 2) and Binod Tanti (P.W. 5) for lending assurance to his contention that none of these two eye-witnesses had stated as to on which part of the person of Kalipada the opposite party No. 1 struck by a lathi. The evidence of P.W. 2 is that in the small hours of 29.12.78, when she woke up on hearing the cries of her father, the deceased Kalipada, she called her sister Niyati and her brother's wife, Jayanti Mondal (the wife of the opposite party No. 1) from their sleep. The evidence of P.W. 2 shows that P.W. 2 and Niyati tried to go downstairs and that they did not succeed as the door of the staircase was chained from the other side. P.W. 2 had stated that she then leaned forward across the railings on the first floor verandah and saw all the five accused persons of the case, including the opposite party No. 1, assaulting her father, Kalipada on the inner courtyard at the ground floor of their house. The evidence of P.W. 2 is that on the date of the occurrence she was sleeping on the first floor of that house and that Niyati and Jayanti were also sleeping at the first floor of that house. P.W. 2 has stated that she then saw a lathi in the hand of the opposite party No. 1 and a rod in the hand of the accused Upen. According to P.W. 2, accused Purnima Mondal and Sabitri Mondal (acquitted in the case by the learned Judge) were driving hot Khunties into the eyes of her father. P.W. 2 has stated that thereafter Niyati and she tried again to go downstairs. She (P.W. 2) then found the door on the staircase open. P.W. 2 has stated that she then came down on the ground floor and saw the accused Upen withdrawing. In her cross-examination P.W. 2 stated that when she came down to the ground floor, at the time of the occurrence, the assault on her father had already ended. The evidence of P.W. 2 is that after coming to the ground floor she found Binod Tanti (P.W. 5) entering their house. P.W. 2 has stated that Binod Tanti protested against the assault on her father and that she saw the accused Susanta assaulting him with his lathi on the right side of his chest and on his left knee. The contention of Mr. Roy, on the basis on these evidences of P.W. 2, is that as the assault on Kalipada ended when P.W. 2 came down to the ground floor and when P.W. 2 saw the opposite party No. 1 assaulting her father with lathi on the right side of his chest and his left knee, the opposite party No. 1 is entitled to have an order of acquittal because on post-mortem examination of the dead body of Kalipada by P.W. 8, Dr. N.R. Saha, on 30.12.78, no injury was noticed by him on the right side of the chest or on the left knee of Kalipada. This contention cannot be accepted. At the time of hearing of arguments Mr. Roy conceded that the evidences of P.W. 2 that she saw the accused Susanta assaulting him with his lathi on the right side of his chest and on his left knee related to the assault on Binod Tanti (P.W. 5) by the opposite party No. 1 and not to assault by the opposite party No. 1 on her father. It is to be stated in this connection that on examining Binod Tanti, Dr. K.M. Amanullah (P.W. 9). found on 29.12.78, haematoma on the right side of the chest over the

5th, 6th, 7th and 8th inter-costal space and haematoma on the left leg on the lower end of tibia of Binod. In other words, on the basis of the evidences of P.W. 2 that she saw the accused Susanta assaulting him with his lathi on the right side of his chest and on his left knee, the opposite party No. 1 cannot secure an order of acquittal on the ground of absence of any injury on the person of Kalipada on the right side of his chest or on his left knee.

6. The evidence of Binod Tanti (P.W. 5) is that on the date of the occurrence, on hearing a hue and cry coming from inside the house of Kalipada Mondal, he tried to go inside that house and found the entrance door of that house closed from within. He began to beat on that entrance door and after some time the door was opened. He found Kalipada Mondal lying on the courtyard and accused, Hironmoyee holding the hairs of Kalipada with her clenched fists on the ground. The opposite party No. 1 was then assaulting Kalipada with a lathi. The accused Sabitri Mondal was then shouting for breaking Kalipada into pieces. Binod Tanti (P.W. 5) has stated that he then saw the broken head of Kalipada and injuries on the left arm and left leg of Kalipada. There is nothing in the evidence of any of these P.Ws. 2 and 5 to show as to on which portions of the body of Kalipada the accused Susanta struck Kalipada by lathi. Even then, ordinarily a close relative is the last person to screen the real culprit and falsely implicate an innocent person. The factum of relationship of Chaina Mondal (P.W. 2) with her brother Susanta (the opposite party No. 1), far from being the foundation for any criticism of the evidence of Chaina Mondal, is a sure guarantee of the truth of her evidence. Nothing has been suggested in the cross-examination of P.W. 2 to show that P.W. 2 bore any malice or grudge against her own brother. It may be that because accused Susanta is her own brother, P.W. 2 has not given out in details on which portions of the body of Kalipada Susanta struck by lathi. Even then, we cannot but rely on the evidence of P.Ws. 2 and 5 about the striking of Kalipada by Susanta by lathi. It is no doubt true that when the opposite party No. 1 stood charged along with four other accused persons u/s 302/34 I.P.C. the opposite party No. 1 cannot be found guilty u/s 304 Part II I.P.C. unless prosecution can establish by satisfactory evidence that the death of Kalipada was caused by Susanta by striking on some vital parts of his body, e.g., on his scalp or parietal bone on which injuries were noticed by P.W. 8 at the time of holding post-mortem examination on the dead body of Kalipada. As there is no such evidence to show as to on which part of the person of Kalipada Susanta struck by lathi, we have no other alternative than to alter the conviction of Susanta from Section 304 Part II I.P.C. to one u/s 323 I.P.C. for voluntarily causing hurt to Kalipada Mondal at Nishindra under P.S. Farakka on 29.12.78 and to maintain the sentence of rigorous imprisonment for one year, imposed by the learned Judge, though the conviction would be altered to Section 323 I.P.C.

7. The Rule is, accordingly, discharged with the modification that the conviction of the opposite party No. 1, Susanta Mondal, u/s 304 Part II I.P.C. is altered to one u/s 323 I. P. C. The opposite party No. 1, Susanta Mondal, is found guilty u/s 323 I.P.C. for voluntarily causing hurt to Kalipada Mondal on 29.12.78, is

convicted thereunder and is sentenced to suffer rigorous imprisonment for one year.

B.C. Chakrabarti, J.

I agree.