
(2006) 01 CAL CK 0007
In the Calcutta High Court
Case No : C.R.A. No. 367 of 1999

Md. Rafique @ Chachu

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-01-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 300, 302, 304, 307, 323

Citation : (2006) 4 CHN 713

Hon'ble Judges : Pranab Kumar Deb, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : S.S. Ray, Sudip Banerjee and Devipriya Mitra, for the Appellant;Asimes Goswami and Minoti Gomes, for the Respondent

Judgement

Alok Kumar Basu, J.—The sole appellant, Md. Rafique alias Chachu, preferred this appeal from jail being convicted both u/s 302 and u/s 398 of the IPC by the learned Additional Sessions Judge, Alipore in connection with Sessions Trial No. 6(1) of 1997.

2. The prosecution case in brief was that on 1st August, 1996 at about 11.40 in the night, the present appellant along with others came in a white ambassador car having fake number-plate in front of the grocery shop under the name and style "Prabhat Stores" situated at 7/1, Bampass Road, Calcutta -29.

3. The persons who came in the ambassador car were armed with weapons like pistol, nepala, etc. and they entered into the grocery shop and demanded the key of the cash-box from the proprietor of the shop, namely, Gulab Mehata.

4. At that relevant time Gulab Mehata along with his son, Mukesh Mehata, was about to take their dinner and the FIR maker, Shyam Mehata just came inside the shop with drinking water.

5. Since Gulab Mehata refused to hand over the key of the cash box, the present appellant shot at Gulab Mehata from the front side at his chest and receiving the injury Gulab Mehata fell down and thereafter the appellant and the others also

inflicted cut injuries on the person of Gulab Mehata. The miscreants also assaulted Mukesh Mehata with the butt of the revolver.

6. Soon after the occurrence, hearing the alarm of the FIR maker, Shyam Mehata, and his brother, Mukesh Mehata, the neighbours of the locality rushed in the shop and Gulab Mehata and Mukesh Mehata were removed to the nearby hospital where subsequently Gulab Mehata succumbed to his injuries.

7. One of the neighbours informed Tollygunge Police Station immediately about the occurrence and Tollygunge Police Station soon thereafter arrived at the spot and started investigation.

8. On completion of the investigation police submitted the chargesheet against the present appellant along with others under Sections 302/34, 307/34 and 398/34 of the IPC.

9. It is pertinent to mention that during original trial of the sessions case, this appellant could not be placed for trial since he escaped from police custody on his way to the Court-room from the jail and only after arrest of the appellant subsequently, he was placed for trial and hence this trial commenced only with the present appellant.

10. It is also significant to mention that in the original trial Sk. Akbar and Nuruddin Mollah were convicted by the Trial Court and on appeal being preferred by them, the conviction order of Sk. Akbar was set aside but conviction of Nuruddin Mollah u/s 398 of the IPC was confirmed and his conviction u/s 307/34 of the IPC was modified to that u/s 323/34 of the IPC. The said judgment of the Division Bench has subsequently been reported in Nuruddin Molla and Another Vs. State, .

11. Against the present appellant, the learned Trial Court framed the charges under Sections 302/34, 307/34 and 398/34 of the IPC and as the appellant pleaded innocence, prosecution produced its evidence in order to substantiate the charges framed against him.

12. From the record it appears that during trial of this appellant, prosecution produced 26 witnesses including the FIR maker and the eyewitness, Mukesh Mehata, the injured brother of the FIR maker, witnesses who noticed the appellant to shoot at Gulab Mehata and who subsequently identified the appellant during T.I. Parade, the learned Magistrate who conducted the T.I. Parade in jail and also the P.M. doctor and the I.O.

13. It is also significant to mention that since at the time of the trial of the appellant the original case record of the learned Trial Court was with this High Court, no original paper could have been produced and the learned Trial Court proceeded with the trial on the basis of the certified copy of the original records as per the direction of the High Court.

14. The learned Trial Court on perusal of the evidence of the FIR maker, his

brother. Mukesh Mehata, and the witnesses who identified the appellant at the time of the occurrence and subsequently during the T.I. Parade came to the conclusion that the appellant was physically present inside the shop-room of the victim on the date of occurrence and he in fact shot at the victim, Gulab Mehata, resulting in his death in the hospital.

15. The learned Judge from the evidence of the I.O., the evidence of the owner of the ambassador car and other circumstantial evidence also came to the conclusion that on the date of occurrence the present appellant along with others entered into the shop-room of the victim with the purpose of committing decoity and when they did not succeed in their plan, the present appellant shot at Gulab Mehata and he also inflicted injury on Mukesh Mehata. The learned Judge also come to the conclusion that prosecution successfully proved that at the time of attempt of committing the decoity this appellant was armed with a revolver. The learned Judge on such findings convicted the appellant u/s 302 of the IPC and he also convicted the appellant u/s 398/34 of the IPC.

16. Appearing for the appellant, Mr. S.S. Ray submits before us that since the delivery of the judgment by the Division Bench in the case of Nuruddin Molla and Another Vs. State, , he has little scope to submit challenging the basic prosecution fact relating to the occurrence.

17. Mr. Ray submits that from the evidence of the FIR maker and also from the evidence of other witnesses examined during the trial of the appellant, it is established that the present appellant was physically present inside the shop-room.

18. Mr. Ray contends that having regard to the P.M. report and the opinion of the doctor who conducted the P.M. examination and having regard to the statement of the eye-witnesses including the FIR maker, there is also little scope for him to deny the prosecution charge that the appellant did not assault Gulab Mehata (since deceased) with the help of a firearm.

19. Mr Ray contends that in what circumstances the appellant shot at Gulab Mehata was not, however, clarified from the prosecution evidence and. particularly in view of the fact that Mukesh Mehata, the brother of the FIR maker, who was also injured at the time of occurrence, did not identify the appellant as the person who shot at his father and naturally there is scope to raise doubt about the prosecution case that this appellant with the sole intention of causing homicidal death of Gulab Mehata shot at him.

20. Mr. Ray finally contends that when the appellant was convicted u/s 302 of the IPC, in the background of the prosecution case that the appellant was a member of a group who came to the shop-room for the purpose of committing decoity, there is no necessity of sentencing the appellant separately u/s 398 of the IPC.

21. Mr. Asimes Goswami, appearing for the State-respondent submits that from the judgment reported in Nuruddin Molla and Another Vs. State, which is placed

before this Bench, there is little scope for the appellant to challenge the prosecution case and in the reported judgment it was held by the Division Bench after considering the prosecution evidence that on 1st August, 1996 an attempt was made to commit decoity in the shop-room of Gulab Mehata and the persons named in the chargesheet actually were involved in such attempt to commit decoity and it was also held in the reported judgment that Gulab Mehata died a homicidal death on receipt of bullet injury at the time of occurrence and Mukesh Mehata was injured at the same place and in connection with the same occurrence.

22. Mr. Goswami contends that during the trial of this appellant, prosecution produced the FIR maker-cum-eye-witness of the occurrence along with those witnesses who had seen the appellant to shot at Gulab Mehata during their entry into the shop-room for the purpose of commission of decoity.

23. Mr. Goswami contends that it has been the consistent statement of the FIR maker and also of the eye-witnesses that the present appellant shot at Gulab Mehata from the front side aiming at his chest and it is important to mention that the P.M. doctor while examining Gulab Mehata noticed gun-shot injury in the chest of the deceased and the doctor opined that injury was sufficient in the ordinary course to cause death of the deceased.

24. Mr. Goswami contends that from the prosecution evidence and having regard to the judgment reported in the case of Nuruddin Mollah and Anr. v. State (supra), prosecution successfully established its case that the appellant was a member of the group who entered into the shop-room for the purpose of commission of decoity and the appellant was armed with revolver and he shot at Gulab Mehata resulting in his death subsequently in the hospital and that being the factual position, there is no scope at all to interfere with the order of conviction and sentence.

25. We have considered the submissions of both Mr. Ray and Mr. Goswami and we have carefully examined the evidence-on-record along with the judgment delivered in the case of Nuruddin Mollah and Anr. v. State (supra).

26. From the evidence of the FIR maker, I.O. and the eye-witnesses we find that prosecution successfully established its case that on 1st August, 1996 at about 11.40 in the night a group of miscreants including the present appellant entered into the shop-room of Gulab Mehata (since deceased) and when Gulab Mehata refused to hand over the key of the cash-box, one of the miscreants shot at him resulting in his death subsequently in the hospital.

27. Now, the crucial question of determination in this appeal has been whether prosecution actually succeeded in proving its basic allegation that the present appellant was the person who shot at Gulab Mehata on 1st August, 1996 and whether Gulab Mehata really died on receipt of such gun injury.

28. Our attention has been drawn to the specific evidence of the FIR maker and

other three witnesses on record examined by prosecution who in most clear and unambiguous term supported the statement of the FIR maker and deposed that on the date of occurrence they saw this appellant inside the shop-room and they also saw this appellant to shot at Gulab Mehata from the front side and for which Gulab Mehata was injured and he was removed to the nearby hospital.

29. Now coming to the statement of the doctor who conducted the P.M. examination over Gulab Mehata, we find that Gulab Mehata was shot at his chest by a firearm and. he died on receipt of such gun injury.

30. It has been contended on behalf of Mr. Ray that whether the act of the appellant would come u/s 302 of the IPC simpliciter or having regard to the facts and circumstances and having regard to the fact Mukesh Mehata did not identify the appellant as the person who shot at his father, it can reasonably be contended that the appellant had no real intention to shot at Gulab Mehata but in a panicky situation and suddenly at the spur of the moment he opened his firearm which resulted in the injury of Gulab Mehata and for that reason the act of the appellant would be governed u/s 304 of the IPC.

31. We have given our anxious deliberation to the specific point taken by Mr. Ray in support of the appellant so as to bring down his conviction from u/s 302 to that of Section 304 of the IPC.

32. In a criminal trial neither the Trial Court nor the appeal Court can travel beyond the evidence and the statutory provision although it is always open to the Appeal Court to interpret the evidence within the framework of statute and in doing so if there is any scope to bring down the order of conviction, the Appeal Court must do the same in the greater interest of justice.

33. We find that relying on almost unchallenged evidence of prosecution the appellant was convicted u/s 302 of the IPC in the terms of fact that he shot at Gulab Mehata from his firearm and as a result of that injury alone Gulab Mehata subsequently died in the hospital. There is no challenge regarding identification of the appellant at the place of occurrence and also subsequently both in jail and in Court during the trial.

34. To bring down conviction u/s 302 of the IPC to that u/s 304 of the IPC the only option open to the appellant was to take help of the exceptional clause of Section 300 of the IPC and looking at the entire evidence of the FIR maker and other eye-witnesses, we do not get any iota of evidence to support this stand of the appellant.

35. From the prosecution evidence which has gone almost unchallenged, it is found that the appellant along with others entered into the shop-room with the intention of committing decoity and the appellant opened his firearm when the owner of the shop refused to hand over the key of the cash-box and the appellant by opening his firearm aimed the chest of the deceased as his target and that single gun shot injury was sufficient to cause death of the deceased in

ordinary course and was the opinion of the doctor. We also get that the appellant. his firearm just standing in front of the deceased. All these factors taken together did not persuade us to accept the contention of Mr. Ray that the act of the appellant would come u/s 304 of the IPC and not u/s 302 of the IPC. However, we find merit in the contention of Mr. Ray that since in an occurrence relating to attempt to commit decoity the appellant was convicted u/s 302 of the IPC. there is no justification to pass separate sentence u/s 398 of the IPC.

36. As a result, having regard to the evidence-on-record and after considering the submissions of both sides, we find no merit in the appeal so far as the conviction of the appellant u/s 302 of the IPC is concerned and his consequential sentence order. But, we set aside the sentence order passed against the appellant u/s 398 of the IPC for the reason already mentioned in the body of our judgment.

37. The appeal, therefore, is allowed in part. The conviction and sentence of the appellant u/s 302 of the IPC is hereby confirmed.

38. Since, the appellant is in jail, send a copy of the judgment and order to the Superintendent of the Correctional Home where the appellant is detained for his information forthwith.

39. Send a copy of this judgment and order to the learned Trial Court along with the L.C.R. for information and necessary action.

Pranab Kumar Deb, J.

I agree.