

(2004) 09 CAL CK 0002

Calcutta High Court

Case No: Criminal A. No. 398 of 1990

Arjun Mandi and Another

APPELLANT

Vs

State of West Bengal

RESPONDENT

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**Date of Decision:** Sept. 24, 2004**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 34
- West Bengal Children Act, 1959 - Section 2, 48(1)

**Citation:** (2005) 1 CHN 410**Hon'ble Judges:** Pranab Kumar Deb, J; Amit Talukdar, J**Bench:** Division Bench**Advocate:** Ashim Kumar Roy and Ashish Kumar Roy, for the Appellant; Addl. Public Prosecutor and Krishna Ghosh, for the Respondent

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**Judgement**

Amit Talukdar, J.

This appeal has been filed u/s 48(1){b} of the West Bengal Children Act, 1959 (hereinafter referred to as "the said Act") on behalf of the two appellants who faced Sessions Trial No. XII of January 1990, before the learned Additional Sessions Judge, Sixth Court, Midnapore.

2. The two appellants were found guilty in respect of the offence of Section 302/34 of the Indian Penal Code and sentenced to suffer imprisonment for life; while another co-accused Tota Mandi was, however, acquitted.

3. Before we proceed to consider the appeal on merit it is necessary to lay out certain basic facts. Altogether ten (10) accused persons were arrayed in connection with G. R. Case No. 451 of 1986. Since the present petitioners/ appellants were minors their case was spilt up and were tried separately under the provisions of the said Act in Sessions Trial No. XII of January, 1990 while the seven other accused persons were placed on trial in Sessions Trial Case No. X of January, 1990. In the said trial except Mona Mandi six others were acquitted. Accused Mona Mandi has

preferred an appeal being Criminal Appeal No. 399 of 1990 which is pending for disposal as we find from the office.

4. Now, to the merits of the case.

5. Shri Ashim Kumar Roy, learned Advocate appearing on behalf of the appellants duly assisted by Shri Ashish Kumar Roy has concentrated his argument to a particular point i.e., as the two appellants were minors and were tried by the learned Trial Court within the provisions of the said Act in view of the ratio of the decision of Pradeep Kumar v. State of U.P. 1995 SCC (Cri) 395, although the conviction may be maintained the sentence should be quashed. Shri Roy has further referred to another unreported decision of this Court in Pasupati Mahato v. State, Criminal Appeal No. 106 of 1990, decided on 19.05.2003 by a Division Bench of this Court in support of his submission.

6. Learned Additional Public Prosecutor appearing for the State with Smt. Krishna Ghosh did not dispute the above legal position.

7. Before we embark on an analysis of the point canvassed by Shri Roy we feel that the appeal cannot be disposed of solely on that technical ground as we are the first Court of Appeal we are also necessarily a Court of fact and an appeal before us has to be decided on merit. Although the same has not been canvassed before us we feel that we should assess the evidence and come to our conclusion on merit instead of simply disposing of the appeal on that limited point canvassed by Shri Roy.

8. First we consider the evidence and then enter into the question raised by Shri Roy.

9. From the evidence adduced by the prosecution we find that P.Ws. 1, 2, 6 and 7 were the eye-witnesses. The ocular versions of the prosecution case, as revealed from the eye-witnesses, are recapitulated for a better appreciation of the prosecution case. P.W. 1 deposed that on the date of occurrence P.Ws. 8 and 9, two witch doctors came to their village since a child was suffering from different kind of diseases. P.Ws. 8 and 9 took their meals in the house of accused Tota Mandi and stayed there for the night. Sitting in the house of accused Gurai he took Hanria and in course of drinking accused Tota son of Mona Mandi, accused Lasha Mandi alleged that Babulal, brother-in-law of P.W. 1 was a witch. Over this matter there was a hot exchange of words as a result of which the accused began to assault P.W. 1 and also his brother-in-law. During the incident brother-in-law of P.W. 1 managed to escape and the accused persons chased him. The two appellants who were not at the spot when they were taking Hanria. The two appellants were standing on the road when the other accused persons chased his brother-in-law. The two appellants had two tangis in their hands and they struck Babulal with those weapons as a result of which Babulal fell down on the ground on an injured condition and in the meantime the other accused persons who were chasing Babulal reached the spot and they also joined in the assault. Mona Mandi (the appellant in Criminal Appeal No. 399 of 1990)

gave a blow by axe and accused Narayan assaulted him with a shoval etc. Thereafter, Babulal was taken to his house and he died as a result of assault emerged on him at the spot and subsequently the police was informed.

10. P.Ws. 2, 6 and 7 the other eye-witnesses corroborate P.W. 1 wholly. In their cross-examinations they could not be discredited.

11. According to the eye-witnesses" version the deceased Babulal was struck with Tangis both by the present two appellants followed by assault by the other accused, who were tried separately.

12. P.W. 13, who conducted the post-mortem examination over the deadbody of deceased Babulal found the following injuries :

"1. Three incised wounds transversely on the neap of the neck measuring from 6" x 1/8" to 3" x 1/8". Those injuries cut survival bones 3 to 5.

2. One sharp cutting horizontal wound below the right mandible region 4" x 1/2" x bone deep.

3. One sharp cutting wound below the pina of the ear 4" x 1".

4. Multiple abrasion over left eye brow about 1/2 x 1/2".

13. According to her death "was due to shock and haemorrhage resulting from the injuries abovcmentioned which were ante-mortem and homicidal in nature." She was of the further opinion that "The injuries could be caused by sharp cutting weapons like tangi, axe and knife or dragger."

14. The ocular version of P.Ws. 1,2,6 and 7 fits in with the medical evidence.

15. P.Ws. 3, 4 and 5 were the other supporting witnesses. P.W. 3 heard about the incident after he came to the spot immediately the same took place. P.W. 4 was the Chowkidar of the village who signed on the inquest report (Ext. 2) and the seizure list (Ext. 3) in connection with the tangi seized by the police. P.W. 5 also signed on the inquest report as well as the seizure list pertaining to the seizure of the tangi.

16. From the above evidence we find that P.Ws. 1,2, 6 and 7 were consistent in their version with regard to the assault caused by the present two appellants by tangi. From their evidence it is found that although there was a gathering in the house of accused Gorai after the arrival of P.Ws. 8 and 9 - two witch doctors where all of them consumed Hanria but neither the present two appellants were part of the gathering in the house of accused Gorai nor they consumed Hanria but they were standing at a distance on route where the deceased Babulal was running for his life after being chased by the accused persons and Babulal was assaulted by both the appellants in furtherance of common intention dealt tangi blows on the Babulal as a result of which he fell down and was assaulted by the other accused, who have been tried separately.

17. The conduct of the appellants in striking the deceased Babulal while he was escaping and their detaching themselves from the main assembly at the house of accused Gorai speaks volumes of against them. Even if there were some discrepancies in the evidence of the witnesses, in our view, the same was not of much consequence and did not in any manner affect the prosecution case. It is a clear case of the prosecution that after the altercation took place in the assembly at the house of accused Gorai where all of them had taken Hanria and as a result of some hot talks the brother-in-law of P.W. 1, Babulal freed himself from the clutches of the accused and started escaping and he was given a hot chase by the accused. It is at that point of time in a detached place the present appellants stood on the path which was covered by Babulal while he was escaping and at that point of time he was struck successively by tangies by the appellants with their common intention as a result of which Babulal fell down and the accused Mona Mandi (accused in Criminal Appeal No. 399 of 1990) thereafter struck him which resulted in the death of Babulal and we are of the view that the prosecution has been able to bring home the charge against the appellants quite satisfactorily.

18. As such on merit we find no scope to interfere with the conviction as passed by the learned Trial Court and the same has to be affirmed.

19. Now, let us see as to the submission made by Shri Roy on the question of maintaining the conviction but quashing the sentence is taken up for consideration.

20. The unreported decision referred to by Shri Roy in Pasupati Mahato v. State (supra) has taken into account various decisions of the Supreme Court and although maintaining the conviction quashed the sentence of the appellant. The decision of Pradeep Kumar v. State of U. P. (supra) relied upon by Shri Roy was dealing with a case under the U. P. Children Act, 1951 where the appellant was a child within the meaning of Section 2(4) of the U. P. Children Act, 1951, after the accused was convicted in respect of the charge of Section 302/34 of the Indian Penal Code in appeal before the Supreme Court it was held that the appellants had not completed the age of 16 years at the relevant time and was dealt with under the U. P. Children Act as such, the appellants who at the time of disposing of the appeal were more than 30 years instead of sending to the approved school their conviction although was sustained, the sentences were quashed.

21. In the present case we find that the appellants were tried separately as they were not of age at the relevant time when the incident took place and they were falling within the definition of child within the scope of Section 2(e) of the said Act. Accordingly, taking into account the ratio of the said decision of Pradeep Kumar v. State of U. P. (supra) including the unreported decision of Pasupati Mahato v. State (supra), we feel that although the conviction of the appellants has to be sustained in view of our finding hereinabove we quashed the sentence.

22. Accordingly, it is directed that the conviction recorded by the learned Trial Court in respect of the offence of Section 302/34 of the Indian Penal Code against the two appellants is affirmed; but, however, the sentence awarded by the learned Trial Court is hereby quashed.

23. Since the appellants are on bail, granted by an earlier Division Bench, they are discharged from their bail bond.

Pranab Kumar Deb, J.

24. I agree.