

(2008) 02 CAL CK 0021**Calcutta High Court****Case No:** C.R.A. No. 453 of 2005

Jalauddin Sk. alias Kalu

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision: Feb. 29, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 428
- Penal Code, 1860 (IPC) - Section 302, 304

Citation: (2008) 4 CALLT 198**Hon'ble Judges:** Kishore Kumar Prasad, J; Girish Chandra Gupta, J**Bench:** Division Bench**Advocate:** Partha Sarathi Bhattacharyya, for the Appellant; Asimes Goswami, K.J. Ahmed and Kalyan Moitra, for the Respondent**Judgement**

Girish Chandra Gupta, J.

This appeal is directed against a judgment and order dated 11.5.2005 and 12.5.2005 passed by Sri A.K. Senapati, Additional Sessions Judge, 2nd Fast Track Court, Jangipur, Murshidabad, in Sessions Trial No. 6(8) of 2004 arising out of Sessions Case No. Sessions Sl. No. 101/04 convicting the appellant u/s 302 of the Indian Penal Code. The appellant was punished with imprisonment for life as also to pay fine of Rs. 5,000/-, in default to suffer simple imprisonment for six months.

2. The case of the prosecution briefly stated is that Alauddin Sk. came back to his house on 16th January, 2004 at about 11.30 a.m. Shortly thereafter, at about 1.30 p.m., the appellant, Jalauddin, brutally assaulted Alauddin with a sharp cutting weapon as a result whereof he died on the spot. The accused-appellant was charged u/s 302 of the Indian Penal Code. The learned trial Judge has found the appellant guilty of the offence punishable u/s 302 IPC. The accused/convict has come up in appeal.

3. It appears that 13 (thirteen) witnesses were examined. P.W.7 Mahazara Bewa, widow of the deceased deposed that about one and half months before the date of incident, there had been a dispute between the members of the family of the deceased on the one hand and the accused on the other. The accused had threatened the members of the family of the deceased with dire consequences. As a result P.W.7 left the dwelling house at Gopalnagar and went to stay at Elami. From the evidence of P.W.2 Anwari Bibi, wife of Samad Sk. who witnessed the assault committed by the accused upon the victim from a distance of 10 cubits, it appears that the accused assaulted the victim Alauddin with a "heso" in the left ribs of Alauddin. Alauddin fell down and blood spilled all around. She identified the accused in Court.

4. The accused thereafter, fled away from the place of occurrence with the offending weapon in his hand. According to her, Tanjila Bibi, the P.W.3, also witnessed the incident. Tanjila Bibi, the P.W.3, corroborated the evidence of P.W.2. The P.W.3 is the wife of the younger brother of the deceased. The accused is also the younger brother of the victim. According to P.W.2, the incident took place at 1.30 p.m. near the house of Golam Nabi, son of Habibur. The place of occurrence has also similarly been deposed by the P.W.3 and the P.W.6. P.W.6 deposed that hearing the hue and cry, he went to the spot and found that Alauddin had already been murdered. He heard from the villagers that Jalauddin went away after murdering Alauddin. The incident of murder took place at 1.30 p.m. on 16th January, 2004. The written complaint scribed by the P.W.5, Golam Nabi, was filed by the P.W. 1 and received by the police at 2.45 p.m. on 16th January, 2004. The police started investigation at 3.15 p.m. on 16th January, 2004. The inquest was held then and there. In the inquest report marked "Exhibit 2/C", the following statement is there as regards the incident which had happened:

It reveals from the primary investigation that today (16.1.04) at about 1.30 p.m. Jalauddin Seikh dealt a blow with the "heso" (a crescent sharp cutting weapon) to his elder brother Alauddin Seikh in continuation of an old feud over the land and he (Alauddin) died on the spot.

5. The accused, as already noted, had escaped from the place of occurrence with the offending weapon in his hand. Police could not arrest him on the date of the incident. On 19th January, 2004 the accused was arrested from a distant place in the house of one of his relatives. Police made attempt to find out the offending weapon but could not succeed.

6. During the examination u/s 313 of the Code of Criminal Procedure, the accused stated as follows:

I was not in my house on that day. All these are false.

No attempt was, however, made by the defence to lead any evidence in support of the alibi taken by the accused.

7. Mr. Bhattacharyya, the learned Advocate, appearing in support of the appeal, drew our attention to the written complaint lodged by the P.W. 1. He relied on the following portion of the written complaint which is as follows:

My father Alauddin Seikh lived outstation because of his driving job. Today (16.1.2004) at about 11.30 a.m. my father came back home. At about 1.30 p.m. suddenly an altercation started between my father and my uncle (father's younger brother) Jalaluddin Seikh alias Kalu over a piece of jointly owned land Kalu alias Jalaluddin son of late Lokman Ali. Gopalnagar chased my father with a "hasua" (a crescent shaped cutting weapon) in his hand. My uncle Jalaluddin caught my father Alauddin in front of the open gate at the boundary wall of the house of Habibur Rahaman situated beside our house and struck him on his back with the "hasua". My father fell down on the earthen road in front of the open door and died forming a pool of blood all around.

He also relied on the following sentence from the evidence of the P.W.2:

I did not make any hue and cry after seeing the occurrence but a number of people were assembled there on hearing the quarrel.

8. He submitted that both documentary and oral evidence go to show that there was an altercation between the brothers which led to a fight. That fight led to an assault which resulted in the death of the victim. He submitted that it was not a pre-planned murder and, therefore, the learned trial Judge erred in convicting the accused u/s 302 of the Indian Penal Code. The accused-appellant could at the highest be punished under Part I Section 304 of the Indian Penal Code.

9. Mr. Goswami, the learned P.P., appearing for the State disputed the submission of Mr. Bhattacharyya. He submitted that P.W. 1 the defacto-complainant in his evidence has stated that he was not present at the time of the incident. He, therefore, submitted that it is not open to the accused to take benefit. He, therefore, submitted that it is not open to the accused to take benefit of that part of the written complainant which contains a recital that there had been an altercation between the brothers namely the accused and the deceased Alauddin. He further submitted that the sentence, extracted by Mr. Bhattacharyya from the evidence of the P.W.2 that a number of persons had collected hearing the quarrel between the accused Jalauddin and the victim Alauddin does not really go to show that the accused was provoked by the victim. He submitted that there is no scope to strike down the findings of the learned trial Judge and this Court should not interfere with the judgment and order under challenge.

10. We have considered the rival submission of the learned Advocates, appearing for the parties. We are of the considered opinion that the prosecution cannot get rid of the statement appearing in the written complaint which is exhibit 1. It is the document of the prosecution and the prosecution is bound by whatever is written in the document.

11. Therefore, in all fairness, the benefit of whatever has been written in the written complaint cannot be denied to the accused, if the accused wants to rely on that. There is some substance in the submission of Mr. Bhattacharyya that the evidence of the P.W.2 road in conjunction with the FIR does, in fact, go to suggest that there was some sort of provocation which may have led the accused to assault the victim which ultimately resulted in his death.

12. Based on the evidence and submission, we are of the view that the possibility of the accused-appellant having been deprived of the power of self-control by the provocation emanating from the victim cannot be ruled out altogether.

13. In that view of the matter, we are inclined to substitute the punishment u/s 304 Part I of the Indian Penal Code from the one inflicted u/s 302 of the Indian Penal Code.

14. We, therefore, after the conviction of the accused-appellant from one u/s 302 of IPC to that of u/s 304 Part I of IPC and reduce his sentence from imprisonment for life as also to pay fine of Rs. 5,000/-, in default to suffer simple imprisonment for six months to ten years rigorous imprisonment as also to pay fine of Rs. 5,000/-, in default to suffer simple imprisonment for six months. The appellant is in custody and he is directed to serve out the remaining part of his sentences as indicated above. The entire amount of fine if realized, shall be paid to P.W.7 Mahazara Bewa, widow of the deceased Alauddin.

15. The appellant shall get the benefit of set-off in terms of Section 428 of CrPC out of the period of imprisonment already undergone.

16. The learned trial Court is directed to issue necessary revised Jail Warrant as required by the Rules in respect of this appellant.

17. With this modification, the appeal is partly allowed.

18. Lower Court records with a copy of this judgment to go down forthwith to the learned trial Court for information and necessary action.

19. Send a copy of this judgment to the Superintendent, Correctional Home, where the appellant is now under detention for information.

20. Urgent xerox certified copy of this judgment, if applied for, be delivered to the learned Advocate for the parties, on compliance of all formalities.

Kishore Kumar Prasad, J.

21. I agree.