

(2014) 07 CAL CK 0086**Calcutta High Court****Case No:** C.R.A. 459 of 2010

Anehaque S.K.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: July 23, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 388, 428
- Penal Code, 1860 (IPC) - Section 300, 302, 304, 34

Hon'ble Judges: Tapash Mookherjee, J; Nishita Mhatre, J**Bench:** Division Bench**Advocate:** Milan Mukhrjee, Saurav Chatterjee and Rajiv Lochan Chakraborty, Advocate for the Appellant; Manjit Singh, Ld. Public Prosecutor and Arnab Chatterjee, Advocate for the Respondent**Final Decision:** Partly Allowed**Judgement**

Tapash Mookherjee, J.

The judgment and order dated 23.06.2010 and 24.06.2010 passed by the learned Additional Sessions Judge, Fast Track Court-IV, Krishnanagar, Nadia, in Sessions Trial No. IX (7) 07, (Sessions Case No. 50 (6) 07) are under challenge in the present appeal. By the aforesaid order learned Trial Court convicted the Appellant Anehaque Sk. for the offence of murder u/s 302 I.P.C. and sentenced the Appellant to suffer R.I. for life and to pay fine of Rs. 1,000.00 (rupees one thousand only) I.D. to suffer S.I. for one year.

2. Prosecution's case in short, is as follows:-

3. On 20.07.1999 one Anower Sk. son of Late Patai Sk. of village Mokampara under P.S. Kaliganj, District Nadia, submitted a written complaint at the Kaliganj P.S. and stated therein that on that day at about 5.45 a.m. when his father Patai Sk. was going towards the field for cultivation with his buffaloes there was a clash between those buffaloes and a buffalo of the accused Faju Sk. which stood tied up by the side

of the road. A quarrel ensued in connection with that incident between Patai Sk. and the Appellant Anehaque Sk. and four other accused persons in the case and during such quarrel the Appellant Anehaque assaulted Patai Sk. with a spear while the other accused persons assaulted Patai Sk. with different kind of weapons. Patai Sk. sustained grievous injuries due to such assaults and he ultimately succumbed to his injuries, and the Appellant fled away.

4. Kaliganj P.S. Case No. 152/99 dated 21.07.1999 u/s 304/34 I.P.C. had been started on the basis of the aforesaid F.I.R. and after completion of investigation charge-sheet u/s 304/34 I.P.C. had been submitted against all the five accused persons.

5. Before commitment intimation was given to the committing court regarding the death of the accused Ajgar Sk. However, in the record of the committing court the case is shown as filed against the accused Ajgar Sk.

6. After commitment, the case had been transferred to the Court of learned Additional Sessions Judge, Fast Track Court-IV, Krishnanagar, Nadia, for trial.

7. Considering the materials collected during investigation a charge u/s 304/34 I.P.C. had been framed against the present Appellant Anehaque Sk. and three other accused persons namely, Faju Sk., Majibar alias Muji Sk. and Nijam Kha. All the accused persons denied the charge and pleaded their innocence.

8. Prosecution examined as many as eleven witnesses. Prosecution also proved some documents which had been marked Exhibit-1 to 8. Considering the evidence, thus produced by the prosecution, learned Trial Court found the Appellant guilty of the charge u/s 302 I.P.C. and hearing the Appellant on the point of sentence passed an order sentencing the Appellant to suffer R.I. for life and to pay fine of Rs. 1,000.00 (rupees one thousand only) I.D. to suffer R.I. for one year. Learned Trial Court found the other accused persons facing trial not guilty of the charge u/s 302/34 I.P.C. and accordingly acquitted them.

9. Being dissatisfied with and aggrieved by the aforesaid judgment of conviction and order of sentence the accused Anehaque filed the present appeal.

10. Learned Counsel for the Appellant has submitted that in the F.I.R. names of several persons have been named as the eyewitnesses of the incident. Some of them have been examined also by the prosecution but most of them denied having any knowledge about the incident of murder in question and hence the entire case of the prosecution is false. He further argued that P.W.-1 and 10 who are claimed to be the eyewitnesses have long standing enmity with the family of the accused persons and hence their evidence should not be accepted as true. He further added that the injuries found in the body of Patai Sk. may be caused by accidental fall as stated by the doctor. The further contention of the learned Counsel for the Appellant was that assuming the case of assaults has been proved against the

Appellant then also it is not a case u/s 302 I.P.C. but may be at best a case u/s 304 part II or part I, I.P.C.

11. In reply, learned Counsel for the Respondent/State argued that P.W.-1 and 10 are eyewitnesses of the incident and no serious contradictions, inconsistencies in their statements being there, they can be safely relied upon especially when their evidence find corroboration from the medical evidence as well, and hence those evidence are sufficient to prove the guilt of the Appellant.

12. Anowar Sk. (P.W.-1) is a son of the victim Patai Sk. P.W.-1 in his evidence stated that in the morning of the day of the incident when his father was going towards the field for cultivation with his buffaloes and plough, a buffalo of the accused Faju Sk. which was kept tied at a place by the side of the house of Faju Sk. Clashed with the buffalo of his father Patai Sk. due to which an altercation developed between his father Patai Sk. and all the accused persons of the case and that he was standing by the side of his father and he himself found the Appellant giving a blow of a "fala", i.e., a spear below the chest of his father and the other accused persons also assaulting on the head of his father Patai Sk. P.W.-1 stated further that after seeing such incident of assault he chased the Appellant. But ultimately the Appellant managed to escape. P.W.-1 added further that immediately after the incident they tried to shift his father to the Hospital but on the way his father died.

13. P.W.-1 stated further that during the incidents of assaults one Bhulu (Dhulo) Sk., Bakul Sk., Kamal, Ashad of his village and his mother were present on the spot and they also witnessed the incidents.

14. The mother of P.W.-1 died before the commencement of trial. Bakul Sk., Dhulu Sk. and Ashad Sk. had been examined as P.W.-2 to 4 respectively and all of them declined having any direct knowledge about the incidents and as such they were all declared "Hostile" by the prosecution. Learned Counsel for the Appellant argued that according to the evidence of P.W.-1 as well as the contents of the F.I.R. all the aforesaid persons had witnessed the incidents of assaults but all of them stated that they had not seen any such incident of assault as such the prosecution case as a whole fails for such reason alone. In reply, learned Counsel for the State/Respondent submitted that all those witnesses had intentionally suppressed the truth to avoid any consequence of their deposing against the accused persons. So, the fact that they had not supported the prosecution case itself is not fatal for the prosecution as the prosecution's case is proved from the evidence of P.W.-1 and P.W.-10 who were the eye-witnesses and also from other materials on record as well.

15. P.W.-2 at the beginning of his Examination-in-chief clearly stated that the incident took place eight years back. Again during his Cross-examination he repeated that the incident of assault and quarrel actually took place. However, he did not say anything else regarding the incident.

16. P.W.-3 during his Examination-in-chief also admitted that the incident took place. P.W.-4 also stated that he found the dead body of Patai Sk. at the Hospital. So, none of the witnesses denied the happening of the incident of assault resulting in the death of Patai Sk. From the evidence of S.I., Gopal Pandey the Investigating Officer of the case, (P.W.-11) it is found that all the P.W.-2 to 4 in their statements u/s 161 Cr.P.C. during investigation stated that they had witnessed the incidents of assaults and that the Appellant and the other accused persons were responsible for the death of Patai Sk. But P.W.-2 to 4 resiled from their earlier statements during their evidence. Why they did so is a different issue. A family feud between the families of the victim and the accused persons had been going on since long. It may, therefore, be so, that to avoid involvement in such feud between two families, P.W. 2 to 4 did not support the prosecution case intentionally. Such an attitude is not uncommon now-a-days. So, the fact that the P.W.-2 to 4 did not support the prosecution, itself is not definitely fatal for the prosecution's case if the case is otherwise proved.

17. P.W.-1 stated that the F.I.R. he had submitted, had been scribed by one Kamal Sk. as per his instruction. The said Kamal Sk. was examined as P.W.-6. During his Examination-in-chief P.W.-6 admitted having scribed the F.I.R. as per instructions of P.W.-1. He further added that the contents of the F.I.R. was read over to the P.W.-1 after which P.W.-1 put his L.T.I. on it, and on his proving the F.I.R. had been marked Exhibit-2. P.W.-6 signed on the inquest report as well as on a seizure list and his signatures on those documents had been marked Exhibit-3 and 4 on his identification. From the evidence of the I.O. (P.W.-11) it is further found that P.W.-6 made statement before the I.O. u/s 161 Cr.P.C. in which he stated that he had witnessed the quarrel between the parties and the Appellant giving a blow of spear below the chest of the deceased. However, during his evidence-in-chief he also denied having any knowledge regarding the cause of death of Patai Sk. and as such he was declared "Hostile" by the prosecution. It should be mentioned here that P.W.-6 signed on the inquest report in which the incident is narrated in detail. However, during Cross-examination he stated that he scribed the F.I.R. as per the instruction of a political leader, named, Subod Chakraborty and that he signed in the inquest report at the P.S.

18. Biren Mondal (P.W.-7) also resiled from his earlier statement before the I.O. and as such he was also declared "Hostile" by the prosecution.

19. Bulu Chunari (P.W.-8) proved his signature in the inquest report.

20. Mana Sk. alias Yasin Sk. (P.W.-10) is a son of the deceased Patai Sk. P.W.-10 stated that on 21.07.1999 at about 5.45 a.m. when his father was going to the field for cultivation the Appellant and other accused persons attacked his father and during such attack the Appellant caused hurt to his father by a spear and other two accused persons assaulted his father with Lathi. He added further that after the assault the Appellant fled away to take shelter in the house of one Nijam being chased by P.W.-1. P.W.-10 claimed that he had witnessed all those incidents.

21. Dr. Rathindra Nath Halder (P.W.-5) performed P.M. Examination over the dead body of the victim and according to him he found one sharp cut injury over left side of upper part of the abdomen and one sharp cut injury over the occipital region, and according to him the cause of death was due to shock and haemorrhage caused for the aforesaid two injuries.

22. Both the P.W.-1 and 10 stated clearly that the Appellant had given a blow of spear below the chest of the deceased. The injury number one stated in the P.M. Report (Exhibit-1) corroborates the aforesaid statements of the P.W.-1 and 10.

23. The F.I.R. in the case had been submitted within less than two hours from the incident and the contents of the F.I.R. do lend full supports to the oral testimonies of the P.W.-1 and 10.

24. To counter the case of the prosecution, the Defence had picked up the following specific case. According to the Defence P.W.-1 and 10 used to often torture their father Patai Sk, i.e., the victim in the case to grab the property of the victim and the family of the Appellant had always stood by the side of the victim against the Appellant and for such reason it was the P.W.-1 and 10 who had killed their father and subsequently tried to shift the blame on the Appellant and the other accused persons acquitted in the case, to save themselves. However, no positive evidence is there on record to prove such allegation, that apart, the allegation itself, at its face, looks to be quite absurd. It is true that in a criminal case the Defence has no liability to prove the innocence of the accused. But when any specific case is pleaded by the Defence in support of their innocence, the Defence invites the liability to prove such specific case in their support and where it is proved that the Defence has taken up a false alibi then the prosecution's case gets strengthened as it has happened in the present case.

25. It was a contention of the learned Counsel for the Defence that out of the five accused persons against whom the charge has been framed u/s 302/34 I.P.C. three accused persons have been found not guilty of the charge by the learned Trial Court and the fact being so, the Appellant cannot be alone found guilty of the charge. Learned Trial Court placed too much importance in the inquest report and for some other reasons as well, learned Trial Court acquitted the three other accused persons. Whether or not learned Trial Court was legally correct to acquit the three accused persons in the case is not an issue in this appeal since there is no appeal against their acquittal. So, the acquittal of three accused persons in the case does not give the present Appellant a right to be acquitted. It should be mentioned here that the learned Trial Court has found the Appellant guilty direct of the charge u/s 302 I.P.C. and not with the aid of Section 34 I.P.C. So, the aforesaid contention of the learned Counsel for the Defence is not acceptable.

26. As discussed above, P.W.-1 and 10 have been proved to be the eye-witnesses of the incidents in question. No serious anomaly or inconsistency in their evidence has

been pointed out by the learned Counsel for the Defence. Victim is the father of P.W.-1 and 10. It is very difficult to believe that a son will falsely implicate any innocent person to protect the real killer of his father. The medical evidence is in conformity with the oral testimonies of P.W.-1 and 10 regarding the assault by the Appellant. The F.I.R. in the case has been submitted within the shortest possible time and the contents of F.I.R. lend full support to the oral evidence of P.W.-1 and 10. We have, therefore, no hesitation to hold that the Appellant caused the death of the victim Patai Sk. by assault with a spear.

27. The last contention of the learned Counsel for the Defence was that the assault on the victim by the Appellant, as alleged, was not premeditated act and as such if the killing of the victim by the Appellant is found proved then the case should fall under the provision in Section 304 I.P.C. We find force behind such contention.

28. From the evidence on record it is found that the incident arose out of a sudden quarrel between the family of the deceased in one hand and the family of the Appellant on the otherside in connection with a clash between the cattle of the two families. It is not found from the evidence that the Appellant and any of his family members came to the spot with a calculated plan to kill the victim. In fact, the incidents of assaults resulted from a sudden quarrel between the two groups. It is true that the weapon used by the Appellant was a dangerous weapon but the fact itself does not mean that the Appellant carried the weapon with an intention to kill the victim. The Appellant had given one blow only by the weapon in his hand. It cannot be, therefore, said that the Appellant acted in a cruel manner or that the Appellant had taken an undue advantage. Over and above all, two injuries are found in the body of the deceased, one of which is proved to have been caused by the Appellant and according to the doctor (P.W.-5) performing P.M. Examination, the cause of death is due to shock and haemorrhage following both the injuries. It is not stated by P.W.-5 that the injury No. 1 caused by the Appellant, itself is sufficient to cause the death of the victim. We are, therefore, of the view that the case proved falls under the exception 4 to Section 300 I.P.C. and as such the offence proved in the case is an offence punishable u/s 304 Part one I.P.C.

29. In view of the discussion above the order of conviction and sentence passed by the learned Trial Court finding the Appellant guilty of the offence u/s 302 I.P.C. is hereby set aside. The Appellant is found guilty of the offence punishable u/s 304 Part one I.P.C. He is sentenced to suffer R.I. for 10 years and to pay fine of Rs. 5,000.00 (rupees five thousand only) I.D. to suffer R.I. for one year more. The period of detention of the Appellant during the investigation inquiry or trial be set off against the period of substantive sentence of imprisonment stated above, in terms of the provision of Section 428 Cr.P.C. The Appeal is accordingly allowed in part.

30. Department to comply with the provision in Section 388 Cr.P.C.

31. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Advocates for the parties upon compliance of all formalities.