

Calcutta High Court

HON'BLE JUDGE(S): **JOYMALYA BAGCHI, SIDDHARTHA ROY CHOWDHURY ,
JJ**

FARID SK. ALIAS MANOWAR HOSSAIN V. STATE OF WEST BENGAL

CRA - 874 of 2013, decided on 16/12/2022

(A) Penal Code (45 of 1860) , S.302, S.34— Evidence Act (1 of 1872) , S.3— Murder - Proof - Allegations that accused persons dragged victim out of bus and killed him by using deadly weapons like knife, bhojali - Testimony of eye witnesses corroborated with other witnesses and medical evidence regarding fact that accused persons killed deceased by slitting his throat - Conviction, proper.

(Para 9, 10, 11)

(B) Penal Code (45 of 1860) , S.302, S.34— Evidence Act (1 of 1872) , S.3— Murder - Proof - Allegations that accused along with co-accused persons killed deceased by using deadly weapons - Eye witnesses deposing that accused did not share common intention to commit murder of victim - Accused entitled to benefit of doubt.

(Para 12)

Name of Advocates

Sekhar Kumar Basu, Sr. Adv., Ranadeb Sengupta for Petitioner;
Sanjoy Banerjee for Respondent.

1. **SIDDHARTHA ROY CHOWDHURY, J. :-**This criminal appeal assails the judgment and order passed on 25th September, 2013 and 26th September, 2013 by learned Additional Sessions Judge, Kandi, Murshidabad in Sessions Trial No. 1 of April, 2013 (corresponding to Sessions Case No. 247 of 2013), convicting the appellants for committing offence under Section 302/34 of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay fine of Rs. 10,000/- in default to undergo imprisonment for further period of one year.

2. Briefly stated, Lili Bibi wife of Hasem Sk. set the criminal administration of justice into motion by informing the Officer-in-

charge of Salar Police Station that on the fateful day her husband Hasem Sk. along with Laltu Sk., Lala Sk., Dasa Sk. and Sishu Ghosh were going to Kandi by bus registered as WGQ-57-4343. Akkash Sk. also boarded the bus at Kagram. After the bus left Salar Bus Stop suddenly Dudun Molla, Bali Molla, Miraj Molla, Farid Sk. and few other persons boarded the bus, dragged Hasem Sk. out and killed him by using deadly weapons like knife, bhojali, throat of Hasem Sk. was slit by the miscreants.

3.As the information disclosed offence cognizable in nature Salar P.S. Case No. 104 of 2010 dated 6th July, 2010 was registered under Section 302/34 of the I.P.C. Police took up investigation which culminated into submission of charge sheet. Trial commenced only against the appellants, other

accused persons did not face the trial. During trial prosecution examined as many as 25 witnesses and learned Trial Court having considered the evidence on record was pleased to pass the impugned judgement.

4. Mr. Sekhar Kumar Basu, learned Senior Counsel representing the appellants submits that learned Trial Court passed the impugned judgment upon a misreading of evidence. Farid Sk. one of the convicts, though was charged for committing offence within the meaning of Section 302/34 of the I.P.C., the prosecution witnesses stated that he desperately tried to save Hasem Sk. and for that he incurred the displeasure of co-accused Dudun Molla. Learned Trial Judge ignored the thumb rule of criminal law that when two views are possible, the one that tilts in favour of the accused should inure to his benefit. It is further contended that the requirements of Section 27 of the Evidence Act has not been complied with by the Investigating Officer but learned Trial Court failed to appreciate the same. Exhibit

15/1 and Exhibit 15/2 are the statements of two convicts recorded by the I.O. in course of investigation under Section 161 of the Cr.P.C. In the said statements none of the accused persons gave any indication of place where the knife and bhojali were kept hidden by them. While adducing evidence as P.W. 25, the I.O. claimed to have seized two knives, being produced by the appellants. The I.O. however, did not recover any bhojali though there was reference of bhojali in the statement purportedly made by the accused persons while in custody. It indicates the hollowness in the claim of I.O. about recovery of incriminating weapons from the possession of the appellants. Police planted the weapons which is why it was not sent for forensic examination.

5. Out of 25 witnesses examined P.W. 1 Lili Bibi was the de-facto complainant did not have any direct knowledge about the incident. P.W.s 2 to 4 are co-passengers. They claim to be eye witnesses.

6. P.W. 2 Laltu Sk. @ Kaferul Kasem stated that on 6th July, 2010 he was going to Kandi along with others by bus. At Salar, Dudun Molla, Bali Molla, Miraj and Farid murdered Hasem Sk. Accused Bali Molla slit the throat of the victim while Farid Sk. tried to restrain them. P.W. 3 is one of the co-passengers who stated that after the bus left Salar Bus Stop within few minutes Hasem Sk. was dragged out of the bus by Bali Molla and Dudun Molla and he was killed by the accused persons. The witness could not identify Farid Sk. on dock. During cross-examination he stated to have found Dudun Molla and Bali dragging Hasem Sk. out of the bus. P.W. 4 and P.W. 6 are two other persons going to Kandi Court along with victim and they stated that after the bus left Salar Bus Stop and rolled down for 100 cubits it was stopped, Dudun Molla, Bali Molla, Miraj, Farid entered inside the bus and Miraj, Bali and Dudun stabbed Hasem Sk. in the bus. Hasem was dragged out of the bus then Dudun Molla, Bali Molla and Miraj stabbed him. His throat

was slit by Bali Molla. Farid tried to restrain them.

7.P.W. 5, Islam Sk. did not witness anything. His evidence is inadmissible being hearsay. P.W. 7 and 8 are witnesses to seizure of blood stained soil collected by the I.O. from the spot and their signatures are marked as Exhibit 3 and 3/1. P.W. 9, 10, 11 and 12 are the driver, conductor and Khalisi of the bus who denied to have witnessed the incident. These witnesses stated that they were taking tea at a tea stall and subsequently came to know about the murder of a man. P.W. 13 is the Judicial Magistrate who recorded the statements of two witnesses Laltu Sk. and Lala Sk. under Section 164 of Cr.P.C., admitted as Exhibit 4 and 5. P.W. 14, Abdul Azem took some photographs of dead body and the place of occurrence. P.W. 15 is the Autopsy Surgeon who found sharp cutting injury front of left side of the neck measuring about 4"/2" upto bone depth. Sharp cutting incised

wound middle of the neck at the level middle thyroid cartilage 3 ½"/2". Multiple stab injury at the level of thyroid upto skin depth. Stab injury in the right side of the mouth 1"/ ½ " upto bone depth. Two Stab injury right side of the chest 1"/ ½ " upto bone depth. Two stab injury in abdomen and also lower abdomen upto visceral depth. 35 stab injury on the left side of the flank upto muscle depth. There are three stab injury on right arm 1" / ½ " each upto muscle depth. Two stab injury on the right of scapula 1"/ ½ " upto bone depth and in the back ten stab injury ½ " / ½ " upto bone depth. According to Autopsy Surgeon the cause of death was haemorrhagic shock due to multiple injuries. P.W. 16 and P.W. 18 did not have any direct knowledge about the alleged incident. P.W. 17 was tendered by the prosecution for cross-examination. P.W. 19 is the Recoding Officer who registered Salar P.S. Case No. 104 of 2010 dated 6th July, 2010 under Section 302/34 of the I.P.C., F.I.R. is admitted as Exhibit 8 and P.W. 20 is the Home Guard,

Laikat Ali who put his signature on the seizure list after the bus by which the victim or other witnesses were travelling, was seized by the I.O. So is the evidence of P.W. 21 A.S.I. Pradip Kumar Ghosh P.W. 22 Abu Bakkar Sk. P.W. 23 Ali Sk. P.W. 24, Mafirul Kasem is the scribe of the written information who stated to have penned the information under the dictation of Lili Bibi. The written information is admitted as Exhibit 12.

8. P.W. 25 is the I.O. of this case who arrested two accused persons, examined the witnesses, recorded their statement under Section 161 of the Cr.P.C. and also arranged for recording of statement of two witnesses under Section 164 of the Cr.P.C. by learned Judicial Magistrate, Kandi. Accused Bali and Farid, according to P.W. 25 made statements before him that led him to the recovery of incriminating weapons which he seized and with the permission of superior, he submitted charge sheet after collecting post mortem report and after getting the rest of the accused persons Dudun Molla, Miraj Sk declared as proclaimed offenders.

9. The prosecution witnesses namely P.W. 2 Laltu Sk., P.W. 3 Dasa Sk., P.W. 4 Lala Sk., and P.W. 6 Akkash Sk. withstood the test of cross-examination. There is nothing to impeach the credibility of those witnesses. The oral testimony of the aforesaid witnesses unerringly suggest that Hasem Sk., the victim was done to death by Bali Molla and other two accused persons. Bali Molla slit the throat of Hasem Sk. The testimony of the eye witnesses P.W.2, P.W. 3 and P.W. 4 as I have already indicated herein before, is getting support from the testimony of Autopsy Surgeon P.W. 15, Dr. Tapas Kr. Das as well as from the post mortem report admitted as Exhibit 6.

10. The eye witnesses, however, made exonerating statements by saying that Farid Sk. tried to restrain the accused persons and for that he was assaulted by his father-in-law Dudun Molla. It goes

without saying that testimony of three eye witnesses out of four, exonerating Farid Sk., unveils a probability that Farid Sk. was not sharing the intention of committing murder of Hasem Sk. with the rest of the accused persons.

11. True it is the statement leading to the recovery of incriminating weapons does not inspire confidence. But when we find direct evidence coming from the witnesses to the occurrence who stood the test of cross-examination, the deficiency if any in the prosecution case regarding recovery of incriminating weapons or non-examination of those weapons in FSL does not take the sting out of the prosecution case. So far convict Bali Molla is concerned we do not find any reason to interfere with the finding of the learned Trial Court.

12. So far Farid Sk. the co-accused is concerned, we are of the considered opinion he should be extended benefit of doubt for the statements made by three out of four eye witnesses exonerating

Farid Sk. His conduct as we see through the testimony of eye witnesses P.W. 2, P.W. 3, P.W. 4 unerringly suggests that he did not share common intention to commit murder of the victim. Therefore, while maintaining the order of conviction against Bali Molla, we reverse the order of conviction and record an order of acquittal extending benefit of doubt to accused Farid Sk. He be forthwith released from custody, if not wanted in any other case, upon executing a bond to the satisfaction of the trial Court for a period of 6 months in terms of Section 437 A Cr.P.C.

13. Period of detention suffered by Bali Molla during investigation, inquiry and trial shall be setoff in terms of Section 428 Cr.P.C.

14. Consequently, the appeal is allowed but in part. Application, if any, stands disposed of.

15. Lower Court record along with copy of judgment be sent down to learned Trial Court and a copy of judgment be sent to

Superintendent of Correctional Home for necessary compliance.

16. Urgent photostat certified copy of this judgment, if applied therefor, should be made available to the parties upon compliance of requisite formalities.

17. I agree, :-**JOYMALYA BAGCHI, J.**

Appeal Partly Allowed