

UMAPADA KAYAL

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1015 of 2003)

OCTOBER 6, 2009

[V.S. SIRPURKAR AND DEEPAK VERMA, JJ.]

Penal Code, 1860 – s. 304 (Part-II) – Nine accused prosecuted u/s. 302/34 – Acquittal of all the accused by trial court – High Court acquitting eight accused – One accused convicted u/s. 304 (Part-II) relying an evidence of eye-witness, medical evidence and version of other witnesses – On appeal by convicted accused, held: Conviction by High Court justified – However, in view of age and health of the accused, sentence reduced to 5 years RI from 10 years RI.

Appeal: Appeal against acquittal – Interference with – scope of – Held: The whole appeal is open on facts as well as law.

Appellant-accused alongwith eight accused was tried for offence punishable u/s. 302/34 IPC. All the accused were acquitted. In appeal, High court maintained the acquittal of all the accused except the appellant-accused and convicted him u/s. 304 (Part II) relying on the evidence of PW6 (eye-witness), PW 7, and PW8 and medical evidence. He was sentenced to undergo 10 years RI. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1. The judgment of the trial court lacks the proper appreciation of the evidence of the eye-witnesses as also the evidence of the Doctor who had conducted the post-mortem. Therefore, the High Court committed no

A mistake in re-appreciating the evidence. [Para 10] [1044-A-B]

1.2. In an appeal against acquittal, the whole appeal is open on facts as well as on law and the High Court can go into re-appreciation of evidence if it finds that the said appreciation was not proper at the trial level and that is precisely what has happened in the present case. PW 1 and PW 6 have specifically referred to the role played by the appellant-accused in striking the deceased with 'chowki'. (a stick with spikes). Both the witnesses have been extensively cross-examined but the whole cross-examination is irrelevant since there has been no cross-examination in respect of the actual incident. Both the witnesses had asserted in their evidence that the chowki was struck in the body of the deceased by the appellant and had to be pulled out. The other important circumstance is the oral dying declaration of the deceased. He told PW 6 that the accused had beaten. Strangely, there is no cross-examination of PW 6 on this aspect. [Para 8] [1043-A-D]

E 1.3. PW 21 the doctor who conducted post-mortem examination, in his statement very clearly asserted that the injuries which were found on the body of deceased could have been caused by the said weapon (chowki) which was shown to him at the time of evidence. There is very little cross-examination in the respect of those injuries and as a matter of fact those injuries were quite probable. [Para 9] [1043-D-F]

G 2. There is no error in the judgment of the High Court when the High Court has chosen to rely on the evidence of PW 6, PW 7 and PW 8. In fact, the High Court has considered the evidence of the said witnesses in depth. Therefore, even if the High Court had not given any reason to find fault with the judgment of acquittal, the H High Court was correct in coming to its conclusions. The

conviction of the accused for an offence under Section 304 I.P.C. is confirmed. However, considering the fact that the incident took place 26 years back and the accused had inflicted only a single blow, the sentence is reduced to five years' rigorous imprisonment. [Paras 9 and 11] [1043-G-H;1044-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1015 of 2003.

From the Judgment & Order dated 23.8.2002/26.8.2002 of the High Court at Calcutta in Govt. Appeal No. 3 of 1989.

Piyosh K. Roy (for G. Ramakrishna Prasad) for the Appellant.

Tara Chandra Sharma for the Respondent.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This appeal is filed by the sole accused who has been convicted for the offence under Section 304 Part-II of Indian Penal Code. Initially, as many as nine accused persons came to be tried before the learned Additional Sessions Judge on the allegation that they had committed the murder of one Shaktipada Kayal on 5.6.1983.

2. Briefly stated, the prosecution story, as emerging from the first information report, was that the deceased Shaktipada Kayal along with his younger brother PW 6 Kush Kumar Kayal and their few relatives had gone to the tank (pukur) for catching fish and while coming back, they saw accused persons plucking fruits from the palm tree belonging to the deceased. On questioning as to why the fruits were being plucked, the deceased and his brother PW 6 were assaulted by as many as nine persons. At once, Umapada picked up a chowki (a stick with spikes) and struck a blow on the left side of the chest of deceased. The chowki penetrated into his body. PW 6 also sustained injuries in the incident. The deceased was carried

A immediately to P.G. Hospital, Calcutta but did not survive. As
a result, the first information report came to be lodged on the
next day i.e., on 6.6.1983.

B 3. After usual investigation and collecting the statement of
the concerned witnesses, a charge-sheet came to be filed
against as many as nine persons. Learned Additional Sessions
Judge *vide* judgment dated 20.9.1988 acquitted all the nine
accused holding that the offence under Section 302 read with
Section 34 I.P.C. was not proved against any of the accused.

C 4. The judgment of the learned Additional Sessions Judge
was challenged before the High Court. The High Court *vide*
judgment dated 23.8.2002 dismissed the appeal against all the
accused except the appellant-accused No. 1 Umapada Kayal
and convicted him for offence under Section 304 Part II I.P.C.
D and sentenced him to undergo 10 years' rigorous imprisonment.
The High Court relied on the evidence of the injured witness
PW 6 Kush Kumar Kayal as also the other two eye witnesses
PW 7 Kalipada Kayal and PW 8 Bhabesh Chandra Kayal. The
High Court has also referred to the medical evidence of PW
E 21 Dr. Asok Kumar Maitra who had performed the post-
mortem on the deceased. Hence, the present appeal.

6. We have heard learned counsel for the parties and have
carefully gone through the evidence of all the witnesses.

F 7. Mr. P.K. Roy, learned counsel appearing for the
appellant painstakingly took us to the evidence of all the
witnesses. He submits that the High Court has erred in allowing
the appeal against acquittal only against the present appellant
who was accused No. 1. Learned counsel further submits that
G the reasons given by the learned Additional Sessions Judge
were proper as he had the benefit of seeing the witnesses and
under such circumstances, unless the reasons given by the
learned Sessions Judge were considered and found to be
perverse, the order of acquittal should not have been interfered
H with by the High Court.

8. The argument is attractive but without substance in this case. It is held in a number of judgments of this Court that in an appeal against acquittal, the whole appeal is open on facts as well as on law and the High Court can go into re-appreciation of evidence if it finds that the said appreciation was not proper at the trial level and that is precisely what has happened here. PW 1 Kalipada Kayal and PW 6 Kush Kumar Kayal have specifically referred to the role played by the appellant-accused Umapada Kayal in striking the deceased with 'chowki'. Both the witnesses have been extensively cross-examined but the whole cross-examination is irrelevant since there has been no cross-examination in respect of the actual incident. Both the witnesses had asserted in their evidence that the chowki was struck in the body of the deceased by the appellant and had to be pulled out. The other important circumstance is the oral dying declaration of the deceased. He told PW 6 Kush Kumar Kayal "Uttamda amake merechhe" (Uttamda beat me). Strangely, there is no cross-examination of PW 6 Kush Kumar on this aspect.

9. We have gone through the evidence of PW 21 Dr. Asoke Kumar Maitra who conducted the post-mortem on the body of the deceased. PW 21 in his statement very clearly asserted that the injuries which were found on the body of deceased could have been caused by the said weapon (chowki) which was shown to him at the time of evidence. There is very little cross-examination in the respect of those injuries and as a matter of fact those injuries were quite probable. As per the evidence of PW 21, injury No. 4 found on the body of deceased corresponds well with the blow of the chowki. It is true that the said injury was a single serious injury but the deceased had suffered other injuries probably due to fall. Therefore, we find no error in the judgment of the High Court when the High Court has chosen to rely on the evidence of PW 6 Kush Kumar Kayal, PW 7 Kalipada Kayal and PW 8 Bhabesh Chandra Kayal. In fact, the High Court has considered the evidence of the said witnesses in depth. Therefore, even if the

- A High Court had not given any reason to find fault with the judgment of acquittal, in our opinion, the High Court was correct in coming to its conclusions.

10. We ourselves have seen the judgment of the trial court which does lack the proper appreciation of the evidence of the eye witnesses as also the evidence of the Doctor who had conducted the post-mortem. Therefore, in our opinion, the High Court committed no mistake in re-appreciating the evidence. In that view, we do not find any merit in this appeal and we would dismiss the same. However, Mr. P.K. Roy, learned counsel appearing for the appellant very earnestly urged before us that this incident had taken place 26 years back and the accused has also now crossed the age of his youth. According to the learned counsel, the accused is not enjoying a good health. Under such circumstances, the imprisonment of 10 years' R.I. would be a harsher punishment.

11. Mr. Tara Chand Sharma, learned counsel appearing on behalf of the State of West Bengal, however, suggests that the accused must be in late 50's and the accused had shown no mercy while giving a blow of chowki to the deceased and, therefore, he does not deserve any sympathy. As a matter of fact, according to the learned counsel for the State, there should have been an appeal against the judgment of the High Court inasmuch as the High Court has converted the offence from Section 302 to 304 Part II I.P.C. However, that appeal not having been filed, it is not open to the learned counsel to suggest that the accused could and should have been convicted for the offence under Section 302 I.P.C. Be that as it may, we do not find any difficulty in confirming the conviction of the accused for an offence under Section 304 Part-II I.P.C.. However, considering the fact that the incident took place 26 years back and the accused had inflicted only a single blow, we would choose to reduce the sentence to five years' rigorous imprisonment.

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12. With this modification, the appeal is partly allowed. The A
bail bonds of the accused-appellant are cancelled. The
appellant is directed to surrender within two weeks from today
to serve out the remaining sentence failing which non-bailable
warrants shall be issued against him. The original record be
sent back immediately. B

K.K.T.

Appeal partly allowed.