**CRIMINAL APPEAL**

**Present: The Hon'ble Mr. Justice Ashim Kumar Banerjee**
**And**
**The Hon'ble Mr. Justice Kishore Kumar Prasad**

**C.R.A. No.40 of 2004**

**Judgment on: April 5, 2010.**

**Rafique Shake**
**-VS-**
**State of West Bengal**

**POINTS:**

MURDER-Victim alcoholic-Victim habituated to suspecting his wife having extra marital relationship with the accused-Victim provoked accused to commit crime-No pre planning of the crime-Accidental death amounting to culpable homicide caused on the spur of the moment without having any real intention to kill the victim, whether would come under Indian Penal Code, Section 302-Indian Penal Code, 1860 Ss.302/304.

**FACTS:**

Chalehar Bibi, widow of late Sahajahan Sekh made a written complaint to the extent that her husband was killed by her brother in-law Rafique Sheikh. As per the complaint, the victim was a habitual drunkard and used to torture his wife and children under the influence of liquor. On the night of the incidence, at about 10:00 p.m. the victim came back home, heavily drunk and abused his wife and children in obscene language. He also made obscene remarks hinting illicit relationship between his wife and brother. Being annoyed, his brother gave a blow with the help of "Daa" to the victim who fell on the ground. The neighbors took him to Basirhat Hospital. However, on the way he succumbed to the injury.

The accused was arrested and charge sheeted under Section 302 of the Indian Penal Code. He pleaded innocence and faced trial.

**HELD:**

To come within the purview of Section 302 the Court has to come to a conclusion that the accused was determined to kill the victim and it was a pre-planned murder. Such plan might be hatched before hand or could be done just prior to the murder. But before committing such offence the accused must have the determination to kill the victim. If such test is positive it would come within the mischief of Section 302. On the other hand any accidental death amounting to culpable homicide caused on the spur of the moment without having any real intention to kill the victim would come under Section 304 (either Part-I or Part-II depending under the circumstances)

Para-33

The victim was in the habit of suspecting his wife having extra marital relationship with the accused. The Court finds from the evidence that he was in the habit of taking alcohol and under the influence of alcohol he used to abuse his wife alleging such illicit relationship she had with the accused. On that day the incident was repeated. This time, such act on the part of the victim, might have provoked the accused and out of anger he committed the crime. Although the incident was proved through ocular evidence the accused should not have been convicted under Section 302. It was a case under Section 304 Part-II of the Indian Penal Code. Para-34

**CASES CITED:**

i) Kazem Ali Mondal & Others –VS- The State of West Bengal 2006, Volume-II, Calcutta Criminal Law Reporter (Calcutta), Page-452)

ii) Noyel Barla –VS-The State of West Bengal, 2006, Volume-I, Calcutta Law Tribunal, Page-240 (High Court)

iii Shri Harendra Nath Borah –VS- State of Assam, 2007, Volume-2, Calcutta Criminal Law Reporter (Supreme Court), Page-176.

iv)Ram Das –VS- State of Madhya Pradesh, 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page- 280.

v) Asraf Sk. & Another –VS- State of West Bengal, 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page-95

vi) Umapada Kayal –VS- State of West Bengal, 2009, Volume-II, Calcutta Law Journal (Supreme Court), Page-279

vii) Heeralal –VS- State of Madhya Pradesh, 2009, Volume-II, Calcutta Law Journal (Supreme Court), Page-33.

viii) Nikhil Ghosh –VS- The State of West Bengal, 2009, Volume-II, Calcutta Law Journal (Calcutta), Page-271.

ix) Ashok Kumar Mondal –VS- Samir Kumar Mondal & Another, 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page-236.

x) Naimuddin –VS- State of West Bengal 2010, Volume-I, Calcutta Law Journal (Supreme Court).

xi) Vijender –VS- State of Delhi, 1997, Volume-VI, Supreme Court Cases, Page-171

For the Appellant : Mr. Aninda Lahiri

For the Respondent : Mr. Y. Dastoor

**THE COURT:**

1) Chalehar Bibi, widow of late Sahajahan Sekh of Mathantala Ghoshpara, Police Station Haroa, in the District of 24-Parganas (North) made a written complaint on June 26, 2001 to the extent that her husband was killed by her brother in-law Rafique Sheikh. As per the complaint, Sahajahan was a habitual drunkard and he used to torture Chalehar as well as her children under the influence of liquor. On the night of June 25, 2001 at about 10:00 p.m. Sahajahan came back home, heavily drunk and abused Chalehar and her children in obscene language. He also made obscene remarks hinting illicit relationship between Chalehar and Rafique. Being annoyed, Rafique gave a blow with the help of "Daa" upon Sahajahan and in consequence thereof Sahajahan fell down on the ground. The neighbours took him to Basirhat Hospital. However, on the way he succumbed to the injury. After consulting with the neighbours, Chalehar lodged a written complaint. Rafique was arrested and chargesheeted under Section 302 of the Indian Penal Code. He pleaded innocence and faced trial.

2) PW-1, Sk. Alauddin was the scribe of the complaint. He deposed that he wrote the complaint on the instruction of Chalehar. He read over the complaint to her when she put her signature. Chalehar was not known to him earlier. He was a professional scribe and was not aware of anything about the incident.

3) PW-2, Chalehar Bibi corroborated what she had stated in her written complaint. In cross-examination she stated that she instructed the writer when her brother, her brother in-law and other persons were present. She verbally stated the incident to the officer in-charge. She stated everything. Alauddin wrote what had been stated by her brother. She made oral statement to the police. She used to live on the varandah of the house. Sahajahan used to work in a fishery as

guard. She denied Farooq having visited her house in absence of her husband. She also denied having animosity with Rafique. She also denied her husband having noticed an "illicit intimacy" with Farooq and herself.

4) PW-3, Jahangir Sekh was the son. He was eye-witness to the incident. He deposed that Rafique killed his father. On the courtyard of their house Rafique chopped him with Daa. Incident occurred at about 10:30 p.m. This fact was stated by him to the police as well as the Judicial Officer. He also gave a rough topography of the house as well as the place of occurrence. He also corroborated Chalehar on the happening of the incident.

5) PW-4, was the daughter of Sahajahan and Chalehar who was nine years old at the time of deposing. She also corroborated what Chalehar and Jahangir had stated.

6) Mumtaj Baidya, PW-5 was a post-occurrence witness. On hearing "roar" she rushed to the place and saw Sahajahan lying in a pool of blood. According to her, Rafique assaulted Sahajahan when he sustained injury on his face and head. She was not interrogated by police. She, for the first time, deposed before the Court on the incident.

7) PW-6, Nazrul Baidya saw Rafique to assault Sahajahan. He reached the place when no outsider was present except the wife, daughter and son of Sahajahan and wife of Rafique. He denied having any trouble and/or boundary dispute with Rafique.

8) PW-7 accompanied the deadbody for postmortem. PW-8 started the investigation on the basis of the First Information Report lodged by Chalehar.

9) PW-9 was the Investigating Officer. He visited the place of occurrence. After perusing the FIR he prepared the sketch map of the place of occurrence. He seized blood stained earth and control earth in the presence of witnesses. He tendered post mortem report which he collected from the hospital. He also collected the statement made under Section 164 by Jahangir. He arrested Rafique and chargesheeted him. During cross-examination, PW-9 stated that he made the inquest of the dead body. He examined the witnesses and recorded their statements. He could not identify the handwriting of the doctor who held post mortem. He admitted having not sent control earth as well as wearing apparel for forensic examination. He also did not refer to the statement of the complainant under Section 161. He rather proceeded on the basis of the written complaint. He deposed that the doctor who held post mortem was not available and as such he collected the post mortem report and submitted it to Court.

10) DW-1, Safiq Shake was another brother of the appellant/accused and the victim. He deposed that Rafique did not murder Sahajahan by chopping him. He also deposed that neither him nor his parents or any other member of the family made any complaint either in Court or the Police Station as against Farooq. He admitted that Rafique's conviction was undesirable to them and, as such, he came to Court to save Rafique.

11) On the basis of the evidence, as discussed above, the learned Additional Sessions Judge, 4$^{th}$ Court, Barasat held Rafique guilty of the offence punishable under Section 302 of Indian Penal

Code and sentenced him for life as also a fine for Rs.5000/- and, in default, to undergo rigorous imprisonment for 2 years.

12) Analysis of the judgment and order impugned reveals that the learned Judge was of the view that PW-2 to 6, despite facing “pain staking” cross-examination stood by their evidence and as such they were “trustworthy, convincing, cogent and acceptable”. With regard to the post mortem report the learned Judge held that minor discrepancy in medical examination did not take away the solid and concrete evidence of murdering the victim by chopping. The factum of killing of Sahajahan by chopping was also admitted by the DW-1. The defence, however, put the blame on one Farooq Sekh. No such suggestion was given to the prosecution witnesses. PW-6, was confronted with the suggestion that Sahajahan was murdered by “somebody else”. He flatly denied such suggestion. The learned Judge totally disbelieved the defence case as unbelievable. He held the accused guilty of the offence and sentenced him accordingly.

13) Being aggrieved by the judgment and order of the learned Additional Sessions Judge, the appellant, Rafique preferred the instant appeal.

14) Mr. Aninda Lahiri, learned counsel appearing for the appellant contended as follows :

i) Independent vital witnesses were not called. The learned Judge depending upon the ocular evidence of the interested witnesses awarded conviction.

ii) The Post Mortem Report was not proved and could be tendered in evidence in absence of the doctor who conducted the post mortem. Hence, the learned Judge was not entitled to rely upon the copy of the Post Mortem Report.

iii) The defence witness categorically stated that Farooq was responsible for the murder. Such plea was not, at all, considered.

iv) No dying declaration was recorded which could be the basis of the conviction.

v) The weapon was not seized. Blood stained clothes of the victim were also not seized.

vi) Blood stained earth seized by the police was not chemically examined.

vii) The motive was not proved.

viii) There was material discrepancy between the place of occurrence as some of the witnesses deposed that incident occurred on the courtyard whereas others deposed that the dead body was found in the adjacent lane of the house.

15) To support his contention, Mr. Lahiri cited the following decisions :-

***i) 2006, Volume-II, Calcutta Criminal Law Reporter (Calcutta), Page-452 (Kazem Ali Mondal & Others –VS- The State of West Bengal)***

***ii) 2006, Volume-I, Calcutta Law Tribunal, Page-240 (High Court) (Noyel Barla –VS- The State of West Bengal)***

***iii) 2007, Volume-2, Calcutta Criminal Law Reporter (Supreme Court), Page-176 (Shrie Harendra Nath Borah –VS- State of Assam)***

***iv) 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page- 280 (Ram Das –VS- State of Madhya Pradesh)***

***v) 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page-95 (Asraf Sk. & Another –VS- State of West Bengal)***

***vi) 2009, Volume-II, Calcutta Law Journal (Supreme Court), Page-274 (Umapada Kayal –VS- State of West Bengal)***

***vii) 2009, Volume-II, Calcutta Law Journal (Supreme Court), Page-33 (Heeralal –VS- State of Madhya Pradesh)***

***viii) 2009, Volume-II, Calcutta Law Journal (Calcutta), Page-271 (Nikhil Ghosh –VS- The State of West Bengal)***

***ix) 2009, Volume-I, Calcutta Law Journal (Supreme Court), Page-236 (Ashok Kumar Mondal – VS- Samir Kumar Mondal & Another)***

***x) 2010, Volume-I, Calcutta Law Journal (Supreme Court) (Naimuddin –VS- State of West Bengal)***

16) Mr. Y. Dastoor, learned counsel appearing for the prosecution opposing the appeal contended that motive was not, at all, important when ocular evidence supported the conviction. According to Mr. Dastoor, PW-2, 3 and 4 used to sleep on the varandah and, as such, they were natural

witnesses. Those witnesses, although related to the victim, could not be shaken in cross-examination. Mr. Dastoor further contended that there was no discrepancy with regard to the place of occurrence as from the evidence it would appear that the victim sustained injury at the courtyard. He was taken to the health centre and thereafter he was again brought back to the house. Hence, there could be no discrepancy with regard to the place of occurrence in view of the fact that the body was found in the adjacent lane where the villagers might have kept it after returning from the health centre. Mr. Dastoor, however, in his usual fairness contended that the prosecution should have been more vigilant in having the blood stained earth and the control earth chemically tested. They also did not make any attempt to seize the wearing apparel and to have it chemically examined. Mr. Dastoor, however, contended that the murder was proved by ocular evidence. The very fact that the accused hit the victim, was consistently deposed by PW-2, 3 and 4. He, however, in his usual fairness, contended that in case the original Post Mortem Report was not tendered in evidence it would not be safe to accept such report in absence of the doctor. He drew our attention to the Apex Court decision in the case of ***Vijender –VS- State of Delhi*** reported in ***1997, Volume-VI, Supreme Court Cases, Page-171*** in this regard**.**

17) We have considered the rival contentions. We have also carefully perused the evidence on the record. PW-1 was the scribe. He deposed that whatever was told by Chalehar Bibi was written by him. He also deposed that he read over the complaint to Chalehar Bibi. PW-2, 3 and 4 were the widow and the children of the victim. PW-2 Chalehar categorically deposed that her husband came to the house in drunken condition and started abusing her. She also called Nazrul Baidya, a villager, to pacify the victim. The accused suddenly came to the spot and hit the victim from behind with the help of a Billhook (Dah). The victim fell on the ground having a profuse bleeding.

On raising hue and cry, the villagers came and took the victim to the hospital. On the way to hospital the victim died. In cross-examination, she deposed that she used to stay in a varandah of the house. The victim had six brothers including himself and the accused. All of them stayed in the same house. She also deposed that her husband used to suspect her having illicit relationship and used to abuse her in drunken condition. She deposed that the incident took place in a lane attached to the door of the house. The police seized the blood stained clothes. They came back at 3 a.m. in the morning. She denied of having any illicit relationship with Farooq or that Farooq killed the victim. She also deposed that the police did not seize the weapon, however, seized the blood stained earth. PW-3 was the minor son. He corroborated his mother to the extent that the accused killed his father in the courtyard of the house. He also deposed that he made a statement before the Judicial Officer. In cross-examination he reiterated having made statement before the Judicial Officer at Basirhat. He also deposed that the blood stained clothes were not seized by the police. According to him, the trouble was frequent. On hearing his "roar" people rushed to their house. He deposed that the accused chopped his father from behind. According to him, the incident occurred in the courtyard and not in the lane. According to him, there was no lane attached to the door of the house. PW-4 was the minor girl child. She deposed that at about 10'O clock in the night, Rafique struck his father with a billhook on the courtyard of their house. PW-5, Mumtaj Baidya, being an independent witness, also corroborated that Rafique assaulted the victim. In cross-examination, she, however, stated that she reached the house when she found the victim groaning in pain lying in a pool of blood. PW-6, Nazrul Baidya also corroborated PW-2, 3, 4 and 5 to the extent that Rafique assaulted the victim. He was an eyewitness. In cross-examination, he categorically deposed that he saw Rafique to assault the victim. His statement was recorded by the police. He denied of having any boundary dispute with Rafique, the accused.

18) PW-7, the constable carried the dead body of post mortem. PW-8 the concerned police inspector recorded the complaint. PW-9 was the investigating officer. He gave details of the investigation.

19) We have analyzed the evidence independently. We find that PW-2, 3 and 4 being the widow and the children of the victim corroborated each other in the matter of commission of crime by the accused. Their ocular evidence was supported by PW-5 and 6. PW-6 was the eyewitness whereas PW-5 came to the place of occurrence just after the attack. PW-5 saw the victim lying in a pool of blood groaning in pain. The motive was clear. The victim used to blame the accused having illicit relationship with his wife being PW-2 and in a drunken condition he started abusing the PW-2 possibly referring to the accused. The son being PW-3 deposed that it was a routine affair. Hence, the accused perhaps was annoyed and due to such annoyance hit the victim and caused his death.

20) It is true that the doctor who conducted the post mortem did not come to support his opinion. However, the ocular evidence, as discussed above, in our view, was sufficient enough to inflict Rafique for the offence. Suggestion was given that the lady had illicit relationship with one Farooq who caused the murder. DW-1 also deposed to the said effect. Such evidence, however, did not have any corroboration from any other witness.

21) It is true that the prosecution did not conduct the trial in the way it ought to have been. The investigative agency did not have the blood stained earth and control earth chemically analyzed.

They also did not seize the weapon. However, such flaw, on the part of the prosecution from facts and circumstances cannot be fatal as definite ocular evidence stares on the face of the record.

22) In the case of Kazem Ali Mondal & Others (Supra), the Division Bench of this Court observed that the prosecution did not make any attempt to prove the Post Mortem Report through the doctor or the Chief Medical Officer. Considering such fact and the other evidence the Division Bench acquitted the accused from the charges.

23) In the case of Vijender (Supra), the Apex Court also discussed the effect of non-examination of the doctor who conducted the post mortem.

24) In the case of Noyel Barla (Supra), the Division Bench was the opinion that it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of events. The Division Bench considering the facts and circumstances of the case involved therein observed that non-examination of two eye-witnesses seriously prejudiced the appellant/accused.

25) In the case of Ram Das (Supra), the Apex Court on the facts involved therein came to a conclusion that the accident occurred due to a “sudden altercation” and there was no evidence to indicate that there was any previous enmity between the accused and the victim.

26) In the case of Asraf Sk. (Supra), on examination of the evidence, the Apex Court observed that when a case rests squarely on circumstantial evidence the inference of guilt can be justified only

when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.

27) In the case of Umapada Kayal (Supra), the Apex Court, although, upheld the conviction relying on the eyewitness as also the oral dying declaration proved through a prosecution witness, reduced the sentence by converting the conviction under Section 304 Part-II.

28) In the case of Naimuddin (Supra), brickbatting killed an old man of seventy-eight years. The Apex Court converted conviction under Section 304 Part-II and reduced the sentence.

29) In the case of Heeralal (Supra), the Apex Court, considering two inconsistent dying declarations, acquitted the accused from the charges.

30) In the case of Nikhil (Supra), the victim died in an altercation followed by tussle between two groups. The Division Bench of this Court reduced the sentence by converting the conviction under Section 304 Part-I.

31) In the case of Ashok Kumar Mondal (Supra) the victim died in course of quarrel between two families. Conviction was converted into Section 304 Part-I.

32) In the case of Harendra Nath Borah (Supra), the Apex Court was of the view that all culpable homicide are not murder. Considering the evidence on record, the Apex Court observed that the

case, in hand, was the lowest type of culpable homicide and, as such, the case would be covered by Section 304 Part-I and not Section 302.

33) From the decisions discussed above, we find that to come within the purview of Section 302 the Court has to come to a conclusion that the accused was determined to kill the victim and it was a pre-planned murder. Such plan might be hatched before hand or could be done just prior to the murder. But before committing such offence the accused must have the determination to kill the victim. If such test is positive it would come within the mischief of Section 302. On the other hand any accidental death amounting to culpable homicide caused on the spur of the moment without having any real intention to kill the victim would come under Section 304 (either Part-I or Part-II depending under the circumstances)

34) In the instant case, the victim was in the habit of suspecting his wife having extra marital relationship with the accused. We find from the evidence that he was in the habit of taking alcohol and under the influence of alcohol he used to abuse his wife alleging such illicit relationship she had with the accused. On that day the incident was repeated. This time, such act on the part of the victim, might have provocated the accused and out of anger he committed the crime. In our view, although the incident was proved through ocular evidence the accused should not have been convicted under Section 302. It was a case under Section 304 Part-II of the Indian Penal Code.

35) The appellant is convicted under Section 304 Part-II of the Indian Penal code instead of Section 302 as inflicted by the Court below.

36) The accused is sentenced to rigorous imprisonment for ten years coupled with a fine of Rs.5000/- and, in default, to suffer further rigorous imprisonment for two months.

37) In case, the fine is realized, the same be paid to the victim's children being PW-3 and 4 towards compensation. With this modification the appeal is disposed of.

38) Learned Trial Court is directed to issue modified jail warrant in respect of the appellant in accordance with Rules.

39) Let a copy of this judgment be sent to the Superintendent, Correctional Home where the appellant is now suffering his sentence for information and necessary action.

40) Let a copy of this judgment along with Lower Court Records be sent down at once to the learned Trial Court for necessary action.

41) Urgent xerox certified copy will be given to the parties, if applied for.

**Kishore Kumar Prasad, J:**

42) I agree.

**[ASHIM KUMAR BANERJEE,J.]**

**[KISHORE KUMAR PRASAD,J.]**