

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1015 OF 2003

UMAPADA KAYAL

....APPELLANT

VERSUS

STATE OF WEST BENGAL

....RESPONDENT

JUDGMENT

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 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.

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.

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. 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 21 Dr. Asoke

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.

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 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 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 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

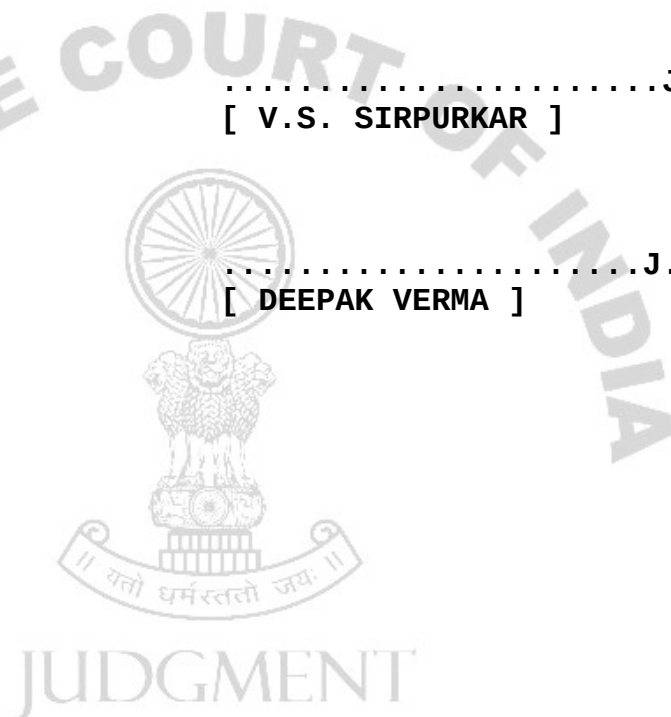
the sentence to five years' rigorous imprisonment.

12. With this modification, the appeal is partly allowed. The 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.

.....J.
[V.S. SIRPURKAR]

.....J.
[DEEPAK VERMA]

NEW DELHI
OCTOBER 6, 2009.



SUPREME COURT OF INDIA



JUDGMENT