IN THE HIGH COURT AT CALCUTTA

CRIMINAL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CRA 135 OF 2012

KITAB SK

VS

STATE OF WEST BENGAL

For the Appellant	**:**	**Mr. Kusal Kumar Mukherjee, Adv.**
For the State	**:**	**Ms. Z.N. Khan, Adv.**
		Ms. Sudeshna Das, Adv.
Last heard on	**:**	**19.06.2025**
Judgement on	**:**	**08.08.2025**

CHAITALI CHATTERJEE DAS, J. :-

1. This criminal appeal is filed under Section 374 (2) of Code of Criminal Procedure against an order of conviction passed by the Learned Court the Court of Additional Session Judge, Fast Track 3rd Court, Krishnanagar, Nadia under Section 307 I.P.C against the appellant.

Brief resume of the case

2. The case of the prosecution was initiated on the basis of a complaint lodged before the O.C. Chapra Police Station, Nadia on September 13, 1988 by one Patal Sk. alleging inter alia that on September 8, 1988 at about 7 A.M his brother Sonaruddin Sk, S/O Lt. Almin Ersad Gharami S/O Oayachhed Gharami and while going towards Purbapara at that point of time 1) Babar Ali Mondal, 2)

Ambar Khan, 3) Doulat Mondal, 4) Nasir Sk., ,5) Mosaraf Sk. , 6) Asraf Sk. 7) Akkel Mohalder, 8) Kitab Sk. (present appellant) 9) Barkat Gharami, Romjan Kuhe,10) Dhulo Sk. and many others attacked them with pipe-gun, Hand bomb, Ramdaa and other deadly weapon with an intention to kill them and Baburali,Kitab fired and he sustained gun-shot injury on the thai(upper part) of left leg near to his genitals and it also touched the lip of Ersad Gharami. After that his brother Sonaruddin was admitted in the Shaktinagar Hospital with serious condition with bleeding injuries. On the basis of the said complaint the Chapra P.S. case no 8 dated 8.9.88 under Section 147/148/149/326/307 IPC started against the accused persons including the present appellant.On completion of the investigation the I.O. submitted the charge-sheet and the matter was committed to the Learned Court of Session Judge, Nadia and from there sent to the Court of Additional Session Judge, Fast Track 3rd court , Krishnanagar, Nadia where the charge was framed against 14 accused persons under Section 147/148/149/326/307 IPC.The content of the said charge was read over to the accused persons to which they pleaded not guilty and claimed to be tried, hence the trial commenced on 23.08.07.

3. The Learned Court after assessing the evidences and the exhibited documents including medical papers and after hearing both the learned advocates and on examining the accused persons under Section 313 Cr.Pc, acquitted the 13 accused persons and convicted the present appellant Kitab Sk. for the offence punishable under Section 307 IPC against which the instant appeal has been filed.

Submissions

4. The grounds taken by the appellant in order to maintain the appeal are non-application of judicial mind to consider that no other independent prosecution witnesses supported the case of the de-facto complainant, no name of the assailant found mentioned before the Doctor while the injured was medically examined. Furthermore the Learned Judge did not consider the vital aspect of the case and the basic criteria of Section 307 IPC *"Actus non facit reum, nisi mens sit rea'* and only relying upon the testimony of the injured which is full of inconsistencies, passed the order of conviction against the accused person.

5. The Learned advocate appearing on behalf of the appellant submitted that on 8th of September, 1988 alleged incident took place when the complaint was lodged on September 13, 1988 and no explanation came forward regarding this in-ordinate delay in lodging such FIR. Excepting the injured victim the other brother who was alleged to have accompanying him at the time of incident did not support the prosecution case that the appellant shot the injured rather mentioned about the accidental injury sustained by his brother. The place of occurrence as mentioned in the FIR has not been proved as per the sketch map and P.W. 8 contradicted the evidence of the I.O, in this regard. No offending weapon was recovered from the accused persons and solely on the basis of the version of the injured the Learned Judge passed the order of conviction which is liable to be set aside. It is further contended that the learned Court ignored the fact that the de-facto complaint was also the eye witness but had a different version and the other injured eye witness present with them has denied to have any knowledge about the alleged incident.

6. Per contra the submission advanced on behalf of the Learned prosecution is that of a case which has been well founded and well established by not only

the victim injured but also corroborated with the medical report proved by the treating Doctor and further corroborated by the P.W. 5 , 8 and 10. It is further argued that the judgement reflects that after filing of the charge sheet in the year 1991 the matter was committed in the year 2007 and therefore possibilities of certain minor inconsistencies on account of such delay cannot not be overlooked but those can never be fatal for the prosecution and the order of conviction was rightly passed by the Learned Court after assessing the evidences adduced on behalf of the prosecution witnesses and specially of the injured victim supported with medical evidence.

7. Having heard both the Learned Advocates and ongoing through the materials on record the moot question now falls for consideration is as to whether the Learned Court was right in passing the order of conviction against the present appellant Kitab Sk. while passing the order of acquittal in respect of 13 other accused persons.

Analysis

8. The written complaint was lodged before the O.C. Chapra P.S by Patal Sk. the brother of the injured victim and the eye witness to the incident scribed by Bansibadan Sarkar. Patal Sk., adduced evidence as P.W.4 and deposed that he along with his brother and others were present in the field as they went to see "jag" when the FIR named accused persons shot fire and his brother sustained the gun shot injury. He stated in his evidence that the complaint was written by Bansi and his cross-examination manifest they and the victims belonged to different political ideology .In his cross-examination he specifically stated that his brother was not aimed but the ammunition struck his brother

accidentally however this fact was never mentioned in the written complaint. Bansi adduced evidence as P.W. 2 and deposed as per instruction of Patal Sk he wrote the complaint. In his cross also reiterated about their inclination towards a particular political party .P.W. 3 is Ersad Gharami whose presence can be seen at the P.O with the injured and de-facto complainant in the written complaint, denied about any such incident. Interestingly in the written complaint lodged by Patal sk. the name of this Ersad Gharami was found mentioned who was not only with the victim and Patal Sk. but further alleged that the attackers had the intention to kill Sonaruddin and Ershad Gharami and he also sustained a lip injury on account of such firing . The injured himself that is P.W. 5 only mentioned about himself and his elder brother who went to the field and specifically said that no other person were present but Ershad denied about any such incident .Therefore the inference can be drawn from the above that either in the written complaint the de-facto complainant did not state the correct fact or there is some suppression of fact as narrated before this Court by the injured himself as well as the de-facto complainant. Furthermore if the content of the FIR to be the foundation of the case the same cannot be consider in piece meal manner. However presence of other persons along with the injured and the de-facto complainant is apparent form the evidence of P.W. 4 who was also an eye witness to the incident. Furthermore Ershad Gharami whose presence at the P.O. was doubtful was not declared a hostile witness by the prosecution .Therefore these inconsistencies definitely creates cloud over the veracity of the evidence of the injured and therefore it is necessary to look for further corroboration. P.W 8 is the mother of the victim who during her evidence in chief said she saw Kitab shot at her son but in her

cross she deposed that she was in her home and the incident took place inside their para. So neither her claim as the eye witness can be believable nor her presence was mentioned by the injured or the de-facto complainant and her testimony about witnessing the incident can very well be said to be not established.

9. According to Section 3 of the Evidence Act and Section 2 of the BSA 2023,a fact is said to be proved when ,after considering the matters before it ,the Court believes it to exists ,or considers its existence so probable that a prudent man ought ,under the circumstances of that particular case ,to act upon the supposition that it exists .A fact is said to be disproved when ,after considering the matters before it ,the court either believes that it does not exit, or considers its non-existence so probable that a prudent man ought ,under the circumstances of that particular case ,to act upon the supposition that it does not exists and a fact is said to be not proved when it is neither proved nor disproved.

So no indication can be found from Section 3 of the Evidence Act and present Section 2 of the BSA ,2023 that a fact can be said to be proved even when the court entertains a reasonable doubt as to whether the fact exists or not.

10. In a criminal jurisprudence the place of occurrence always plays significant role. In this case the written complaint shows that when they were going towards Purbapara the alleged incident happened. The P.W.4 during his evidence mentioned about a field where they went to see “Jag” and P.W. 5 also deposed about a field and in cross examination stated that “Rasta passes

through the Northern side of our village and there is another Rasta which extended East to West". He further deposed that his land is in village Pitambarpur and house of Javed is near to his land and the incident happened when he was returning home by rasta besides the field. P.W 8 said when her son was returning home the incident took place .The sketch map with index as prepared by the I.O has been marked with exhibit 4. On a close scrutiny of the said sketch map with index the P.O is shown on the land of Salim Gharami and adjacent to a field path East-West direction. Other than that on the two sides, lands of some other persons are shown but none of whom has been examined in this case. The I.O did not examine any owner of the land besides the P.O .So after marinating the above versions the conclusion can be drawn that the P.O could have been either on the road (rasta) or in the field but no fixed name of such road or area can be ascertained. Therefore the P.O cannot be said to be established beyond doubt.

11. In order to constitute an offence under Section 307 of IPC intention or knowledge must be such as is necessary to constitute murder. For that reason certain relevant factors which are necessary are the nature of weapon used, the place where the injuries were inflicted the nature of injuries caused and also the opportunity available to the accused. Admittedly, the case in hand proves that the victim P.W. 5 suffered a gunshot injury. The Learned Trial Court heavily relied upon the sole testimony of the injured and the medical report and the evidence of Doctor to pass the order of conviction. P.W 10 adduced evidence who treated the injured on 8.9.1988 and he proved the injury report but no history of assault was mentioned and no name of

assailant was noted therein. However the report and the evidence well established the fact that the injured admitted on that day with a gunshot injury. Fact remains most of the prosecution witnesses either turned hostile or failed to support the prosecution case excepting the injured and his mother. It is undisputed that the evidence of the injured should be given higher evidentiary value than that of the other witnesses at the same time it is also to be considered that the nature of evidence should have been sterling in the nature for which no further corroboration is necessary and the Court should be in a position to accept the version of the witness without any hesitation. As it has been discussed that presence of Ersad Gharami who was also attacked as described by the de-facto complainant himself denied of any such incident and he was not declared as hostile. The de-facto complainant himself who was accompanying the injured in his written complaint mentioned the names of Babar Ali Mondol son of Rahim, Najir Mondol son of Jalil and Kitab Sk son of Iddu fired from the pipe gun and Sonaruddin suffered the gun shot injury in his thigh when it touches the lips of Ershad but during his evidence he made a departure and only said that it was an incidental injury suffered by his brother. So from the above factual backdrop this testimony definitely proves the case of firing but whether the present accused person shot Sonaruddin with the intention to kill him cannot be said to be established in his case beyond the shadow of all reasonable doubt. No offending weapon was recovered from the possession of Kitab Sk or from any of the accused persons and hence no bullet was sent to FSL to ascertain the fact that the firing was made through the weapon possessed by the appellant. No independent witness supported the case of prosecution or even the presence of all the accused

persons at the P.O as alleged. The written complaint further disclosed Shiraj Gayen and Nasir Sk, directed the FIR named accused persons who assembled there with deadly weapon to kill Sonaruddin and Ersad Gharami but the Prosecution failed to establish any such case before the Learned Trial Court accordingly they also got acquitted .The de-facto complainant specifically took the name of Rabbani Md. Nazir Jalil, Ktiab Sk who fired from the pipe gun as a result his brothers sustained gunshot injuries but the Learned Trial Court took note of such fact and *observed "may be he did not sustain severe injuries like Sonaruddin Sk. so he did not say anything against the accused persons".* This view of the Learned Trial Court cannot be accepted since there is no room for presumption unless it is fully established beyond doubt .In a criminal case unlike civil case the proof beyond reasonable doubt is to be established and not on preponderance of probabilities.

12. The Learned Trial Court discussed about the weak points in the defence case as no suggestion was there on the ground of previous enmity, animosity and grudge to the victim for his deposing against accused Kitab Sk. but the difference of political ideologies of the victim his brother ,mother and scribe and the accused persons is well demonstrated . The written complaint manifest the alleged attack was initiated at the instance of a group of persons whom the mother of the injured described as Kitab and his party men and therefore the inimical relationship between them cannot be ruled out .In the case of ***Basheera Begum vs Mohd Ibrahim***[1] the Hon'ble Supreme Court has held that the burden of proving an accused guilty beyond all reasonable doubts lies on the prosecution. If upon analysis of evidence, two views are

[1] (2020) 11 SC 174

possible, one which points to the guilt of the accused and the other which is inconsistent with the guilt of the accused the latter must be preferred.

Conclusion

13. Therefore in summation of supra the following deficiencies are found;

i) The glaring inconsistencies in the version of written complaint and the testimonies of the de-facto complainant and the injured regarding the presence of Ershad Gharami who was not declared hostile despite not supporting the prosecution case.

ii) No explanation of long delay in lodging the F.I.R.

iii) No corroboration of the evidence of the injured regarding the offence committed by the appellant despite having inconsistencies.

iv) The learned court acquitted all the 13 accused persons but passed the order of conviction only against this appellant when two other F.I.R named accused persons were almost similarly circumstanced.

v) The inimical relationship due to difference of political ideologies.

vi) The place of occurrence not proved beyond reasonable doubt.

vii) No recovery of weapon/ from any of the accused or from this appellant and no seizure of the bullet or FSL report pertaining to the bullet.

14 In the light of aforesaid discussion this court is of the opinion that the prosecution was not able to prove the case beyond all reasonable doubts.

15. Hence this court is constrained to extend the benefit of doubt to the appellant.

16. In view of the aforesaid discussion the instant Criminal Appeal stands allowed. Conviction and sentence of the Appellant are set aside

17. The Appellant Kitab Sk.be released from the bail bond if any in terms of Section 437 A of the Code of Criminal Procedure and 481 of BNSS. Trial Court Records along with a copy of this Judgement be sent down at once to the Learned Trial Court for necessary action.

18. Urgent certified copy of this judgement if applied shall be made available upon compliance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)