

**IN THE HIGH COURT OF TRIPURA
AGARTALA**

CRL REV P 50 OF 2011

Shri Dhaneswar Sinha,
son of Golok Chand Sinha,
resident of Jubaraj Nagar,
P.S. Dharmanagar,
District : North Tripura.

..... Petitioner

- V E R S U S -

The State of Tripura,
represented by the Secretary,
Department of Home,
Government of Tripura, Agartala

.....Respondent

**B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the petitioner : Mr. A.C. Bhowmik, Sr. Advocate,
Mr. D. Sarkar, Advocate

For the respondent : Mr. A. Ghosh, P.P.

Date of hearing : 05.06.2015

Date of judgment & order : 28.07.2015

Whether fit for reporting :

Yes	No
	√

JUDGMENT & ORDER

As the appeal filed by the petitioner against the
judgment of conviction dated 03.01.2011 delivered in case

No.G.R.161/2009 returned by the Judicial Magistrate, First Class, Dharmanagar, North Tripura, has been dismissed by the Addl. Session Judge, North Tripura, Dharmanagar by the judgment and order dated 18.06.2011 delivered in Criminal Appeal No.9(1) of 2011, the petitioner has taken the recourse to challenge that judgment dated 18.06.2011, hereinafter referred to as the 'impugned judgment', by this petition filed under Section 401 read with Section 397 of the Cr.P.C.

[2] Briefly stated, the prosecution case is that one Smt. Mina Sinha (PW.1) by filing a written ejhar (Exbt.1) to the Officer-in-charge, Dharmanagar Police station disclosed that while her husband, Radha kanta Sinha (PW.5) was proceeding to have his bath, the petitioner alongwith his brother Rabi Singha were found erecting fencing in the eastern boundary of their house. As it appeared to Radha Kanta Sinha that some land from their part had been encroached by the petitioner, he raised objection. The petitioner alongwith his brother being violent, gave blow by a dao on the person of the Radhakanta Sinha. As a result, he suffered severe bleeding injuries.

[3] On the basis of the said written ejahar which was filed on 26.04.2009, immediately after the occurrence, Dharmanagar P.S. case No.53 of 2009 under Section

326/34 of the IPC was registered and taken up for investigation. After the investigation was complete, the final police report chargesheeting the petitioner and his brother Rabi Singha, who has been acquitted by the Judicial Magistrate First Class by the judgment and order dated 03.01.2011, was filed and in due course, the charge against them under Section 326 read with Section 34 of the IPC was framed.

[4] Both the accused persons denied the charge and claimed to face the trial. In order to substantiate the charge, the prosecution has adduced as many as eight witnesses including the victim, Radha Kanta Sinha (PW.5), the Medical Officer who attended the victim immediately after the assault, Dr. Lipika Paul (PW.8) at the Tilthai Primary Health Centre and Dr. Debabrata Debnath (PW.4) who treated the victim at the Dharmanagar hospital. However, the Investigating Officer has not been examined by the prosecution. In addition to the oral evidence, the prosecution has introduced a few documentary evidence including the medical report (Exbt.2) and the injury report of the victim (Exbt.3).

[5] On appreciating the evidence on record, the Judicial Magistrate, Dharmanagar, North Tripura, hereinafter referred to as the 'trial court', returned the finding of

conviction for committing the offence punishable under Section 324 of the IPC. But the other accused person, as stated, was acquitted. In terms of the said conviction, the petitioner was sentenced to suffer rigorous imprisonment for a term of two years with fine of ₹1,000 with default sentence.

[6] Being aggrieved by the said judgment of conviction dated 03.01.2011, the petitioner filed an appeal in the court of the Addl. Sessions Judge, North Tripura, Dharmanagar. The said appeal has been dismissed by the Addl. Session Judge, observing that there is no infirmity in the judgment of conviction, even he did not interfere the sentence as awarded against the petitioner.

[7] Mr. A.C. Bhowmik, learned senior counsel appearing for the petitioner has submitted that out of sudden provocation the petitioner got excited and gave a blow on the victim. The petitioner is not a habitual offender and considering his age, this court, on taking a reformatory view, may extend him the benefit as available under Section 360(1) of the Cr.P.C. In support of that contention Mr. Bhowmik, learned senior counsel has placed reliance on **Hansa Vs. State of Punjab**, reported in **(1977) 3 SCC 575** where the Apex Court observed as under :

2. The occurrence took place as a result of sudden quarrel between some children and others of the family of Hansa and Mst. Rao in regard to throwing of some bricks or brick-bats. In the course of this sudden occurrence Hansa is stated to have caused the injury on the head of Mst. Rao. Learned Counsel for the appellant has pressed for our consideration the application of provisions of Section 4 of the Probation of Offenders Act, 1958 to his case. We are inclined to accept this stand taken on behalf of the appellant as justifiable and tenable in law on the special facts of this case. The appellant was found guilty of having committed the offence of causing grievous hurt punishable under Section 325 of the Penal Code. The maximum sentence provided therein is seven years.

3. Having regard to the circumstances of the case and the nature of the offence as also the character of the offender, we think it expedient to release the appellant on probation of good conduct for a period of one year from today. His sentence of imprisonment shall remain suspended during this period. He is already on bail and shall continue to be so, provided he executes a bond to the satisfaction of the Sessions Judge, Hoshiarpur, the trial Court, within two weeks from today with or without sureties as that court may direct, to appear and receive sentence when called upon during the said period of one year. In the meantime, the appellant must keep peace and be of good behaviour. The sentence of imprisonment shall stand remitted if he does so. The appeal is accordingly disposed of in the manner indicated above.

[Emphasis supplied]

Mr. Bhowmik, learned senior counsel, has further referred **Om Prakash & Ors. Vs. State of Madhya Pradesh**, reported in **(1982) 3 SCC 224**, which however

has not shed any light on law and as such no detailed reference is required to be made.

[8] When the petitioner was examined under Section 313 of the Cr.P.C., he did not admit that on grave provocation he got excited and committed the offence rather he has denied the entire episode.

[9] Mr. A. Ghosh, learned public prosecutor, in order to rebut the submission made by Mr. Bhowmik, learned senior counsel, has contended that there is no shred of doubt that the petitioner had deliberately assaulted the victim by a sharp cutting dao and caused serious bleeding injury which might have been fatal and as such no leniency can be shown to the petitioner, rather the sentence shall be maintained. Mr. Ghosh, learned public prosecutor has further submitted that at the time of occurrence, the petitioner was about 28 years and as such it cannot be stated that he could not understand the consequence of such assault.

[10] For appreciating the rival submissions made by the learned counsel, this court has taken a short survey of the evidence on record and finds that Smti. Mina Sinha (PW.1), who lodged the written ejhar, has categorically stated in the trial that her husband Radha Kanta Sinha (PW.5) was assaulted by the petitioner and the other

accused person as he raised objection in respect of erecting fencing on their land. As a result, her husband received bleeding injury. Immediately the victim was taken to the Tilthai hospital and later on he was taken to the Dharmanagar hospital for better treatment. In the cross-examination she has stated that on hearing hue and cry she rushed to the place of occurrence and found that the victim was lying on the ground and they arranged his transportation for treatment.

[11] PW.2, Gour Kumar Sinha is the scribe who wrote the ejhar, but he did not state anything of his own.

[12] PW.3, Sri Sonababu Singh has stated that in the relevant point of time he was working in the nearby field of the victim and saw that the petitioner and his brother were scuffling with the victim. He has further stated that he had seen the petitioner giving a dao blow on the 'shoulder of Radhakanta Sinha' and thereafter the petitioner's brother fled away after seeing the blood, taking away the dao in his hand. Later on Dhaneswar Sinha, the petitioner, also left from the place of occurrence. Even though he has been cross examined, but he did not make any contrary statement.

[13] PW.4, Dr. Debabrata Debnath has stated that on 26.04.2009, the day of occurrence, he examined the victim (PW.5) and found the following injuries :

- 1) There was one incised wound over the left shoulder region measuring 2" x 1"x muscle incised and fresh in nature.**
- 2) There was tenderness over the right parietal region of scalp.**
- 3) Tenderness over the chest wall in ventral aspect. X-ray examination of chest wall and head nothing abnormality detected."**

He has pointed that the injury No.1 was grievous in nature and caused by sharp weapon, whereas injuries no. 2 and 3 were simple in nature and caused by blunt object. The victim was admitted on 26.04.2009 and discharged on 06.05.2009. He identified his report, Exbt. 2. He was cross examined, but no contrary statement could be elicited.

[14] PW.5, Radha Kanta Sinha (the victim) has stated that on 26.04.2009 at about 2.00 p.m. while he was proceeding towards the local pond for having bath by using the front-side road of their house, he suddenly noticed that the petitioner and his younger brother, Rabi Singha erecting bamboo fencing on his boundary. Then he raised objection. Initially they did not pay attention to his words and started quarrel with him. Suddenly both the accused Dhaneswar

Sinha and Rabi Sinha came forward to assault him and Dhaneswar gave him a dao blow on his left shoulder. The blood was oozing out and he fell down on the ground. The villagers rushed to the place of occurrence and in response to the scream as raised by his family members and seeing the family members rush the accused persons fled away from the place of occurrence. Initially he was taken to the Tilthai Primary Health Centre. He has denied the suggestion that his wife (PW.1) had caused the said injury.

[15] PW.6, Smti. Mousumi Sinha, is the daughter of PW.1 and the victim. She has stated that, on hearing such quarrel she rushed to the place of occurrence and saw the petitioner giving a dao blow on the left shoulder of her father and after that the victim fell down on the ground. Without spending time, his father was shifted to the hospital by her mother and the maternal uncle Sonababu Singh (PW.3). Her father was initially treated in the Tilthai PHC and thereafter in the Dharmanagar hospital. An attempt was made to derive contradictions between her statement made to the Police Officer and the statement made in the trial, but such contradiction in the context of the case appears inconsequential.

[16] PW.7, Smti. Rebati Sinha is the sister of PW.1. She has supported the statement made by PW.1 and PW.5.

She claimed that she witnessed the occurrence that the petitioner gave a dao blow on the shoulder of Radha Kanta Sinha. The victim immediately fell down on the ground. Radha Kanta was taken initially to the Tilthai PHC and therefrom to the Dharmanagar hospital for treatment. But, she has claimed in the cross examination that she has stated to the police officer that the petitioner gave a dao blow on the left shoulder of Radha Kanta Sinha. When attention was drawn to her previous statement as recorded under Section 161 of the Cr. P.C., no such statement was found available. As the Investigating Officer was not examined by the prosecution, those contradictions could not be proved. As a result, in the considered opinion of this court, the testimony of PW.7 ought not to have considered by the trial court in its entirety.

[17] PW.8, Dr. Lipika Paul has claimed that she had treated the victim and found the following injuries :

- “i) A leceration of around (2x3) centimeter size present over left shoulder.**
- ii) Bleeding positive,**
- iii) Mild abrasion positive right of neck,**
- iv) The type of injury was simple.”**

She referred the victim to the Dharmanagar Sub-Divisional hospital for better treatment. She urged the court to correct the injury report where she had incorrectly

written that the injury was on the right shoulder. She also brought alongwith her, the original M.L.C. Register and after comparing, the trial court allowed her to correct the injury report. In the cross-examination, she has stated that she found two injuries and both of them were simple in nature. She has admitted that she did not mention in the injury report that he did not refer the victim to the Dharmanagar hospital.

[18] On scrutiny of the said report, the trial court was of the view that the petitioner received serious bleeding injury. Even though the Investigating Officer was not examined, leaving aside the evidence which is affected for such non-examination, this court is of the view that the prosecution has succeeded in proving the charge under Section 324 of the IPC. As such, the conviction as returned under Section 324 of the IPC, does not require any interference from the court.

[19] While giving a serious consideration to the submission made by Mr. A.C. Bhowmik, learned senior counsel appearing for the petitioner, in respect of extending the benefit of Section 360(1) of the Cr.P.C. for purpose of releasing the petitioner on probation of the good conduct, this court finds that such exercise has not been taken by the trial court as well as by the appellate court. Such omission

is serious in nature. Whether the benefit under Section 360(1) of the Cr.P.C. by releasing the accused persons on furnishing a bond of good conduct would be extended to the petitioner or not, both the trial court and the appellate court were under duty to explore that aspect. The provision made under Section 360 of the Cr.P.C. are not dead letters, they form substantive part of the sentencing policy available in the penal statute. It is true that the benefit under Section 360(1) of the Cr.P.C. cannot as a matter of rule be given following the reformatory foot-prints, as the earlier view (**Phul Singh Vs. State of Haryana : (1979) 4 SCC 413**) has been pushed aside with the passage of time. In **State of Karnataka Vs. Krishnappa**, reported in **(2000) 4 SCC 75**, the apex court on appreciating the various aspects has laid down the law, observing as under :

“The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.”

But for this, that exercise shall not be abandoned under any circumstance. It may be negated with reasons. Having regard to the various aspects of the

transaction, this court is of the view that the petitioner cannot be allowed to remain on probation on executing a bond of good conduct.

[20] It is well settled that there should be an attempt to strike a balance between the aggravating and mitigating circumstances while awarding the proportionate sentence. The similar view has been taken in **State of M.P. Vs. Balu**, reported in **(2005) 1 SCC 108**, where approvingly referring to **T.K. Gopal Vs. State of Karnataka**, reported in **(2000) 6 SCC 168**, the apex court has extracted the paragraph 19 from **T.K. Gopal Vs. State of Karnataka**, which reads as under:-

"The question of sentence in such cases was considered by Krishna Iyer, J. in Phul Singh v. State of Haryana : (1979) 4 SCC 413, in which he observed that sentencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady. He further observed that a hypersexed homo sapien cannot be rehabilitated by humiliating or harsh treatment. In that case it was found that the appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The learned Judge thought that given correctional courses through meditation therapy and other measures, his erotic aberrations may wither away, particularly as the appellant had a reasonable prospect of shaping into a balanced person. But, this theory was not followed in later decisions as it was found that in spite of devices having been employed and adopted within the jail premises so as to reform the

offenders, there was negligible improvement in the commission of crime. Crime, instead of declining, had increased and, today, it has assumed dangerous proportions. While one person is reformed and moves out of jail, another offender is born. Consequently, in two recent decisions, relating to the offence of rape, one rendered by the present Chief Justice of India and the other by Brother Lahoti, the sentence was enhanced in *State of Karnataka v. Krishnappa* : (2000) 4 SCC 75 while in the other case, namely, *State of Rajasthan v. N.K.* : (2000) 5 SCC 30 the order of acquittal passed by the High Court was set aside and substituted by an order of conviction."

[Emphasis supplied]

[21] The crime referred in **State of M.P. Vs. Balu**, was different in nature. But, in the case in hand, suddenly the petitioner had struck a blow on the left shoulder of the victim. From the evidence, it cannot be inferred that there was pre-mediation or common object to hurt by dangerous weapons. Having instantaneously provoked by the quarrel, the petitioner gave the blow. It is no doubt, a mitigating circumstance which ought to have been appreciated by the trial court or the appellate court. But that was not considered. Hence, this court is of the opinion that the sentence requires interference and accordingly it is interfered with.

[22] Having regard to all the aspects as stated, the petitioner is sentenced to suffer rigorous imprisonment for 3(three) months with a fine of ₹10,000 (Rupees ten thousand), in default, he shall suffer further rigorous imprisonment for 2(two) months. The said amount shall be paid to the victim (PW.5) as the compensation without prejudice to his right under Section 357A of the Cr.P.C. If the petitioner has suffered any detention in the pre-trial, the trial and the post-trial period, that shall be set off from the sentence.

[23] With the modification in the sentence as indicated above, this revision petition stands partly allowed.

Send down the LCRs forthwith.

JUDGE

Moumita