

Form J(2)

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

CRA 217 of 2018

**Hossain @ Hussain Sk. & Ors.
-Vs.-
The State of West Bengal**

For the Appellants	:	Mr. Manjit Singh, Adv., Mr. Gaganjyot Singh, Adv., Mr. Biswajit Mal, Adv., Mr. Atarul Hoque Molla, Adv.
For the State	:	Mr. Bidyut Kumar Roy, Adv., Mrs. Rita Dutta, Adv.

**Heard on : 28.01.2021
Judgment on : 05.03.2021**

Bibek Chaudhuri, J.

This is an appeal under Section 374(2) of the Code of Criminal Procedure filed by the convicts/appellants (in jail) assailing the judgment and order of conviction and sentence dated 30th April, 2018 passed by the learned Additional Sessions Judge, 2nd Court at Jangipur, Murshidabad in Sessions Trial No.169 (Jan) of 2009

corresponding to Sessions Case No.208 of 2008 arising out of Sagardighi Police Station Case No.77 of 2006 dated 20th June, 2006.

During trial the learned Sessions Judge, 2nd Court, Jangipur, District Murshidabad held the appellants guilty for committing offence under Sections 304 (Part-II)/323/34 of the Indian Penal Code, convicted them and sentenced them to suffer rigorous imprisonment for five years each for committing offence under Sections 304 (Part-II)/ 34 of the Indian Penal Code and to suffer rigorous imprisonment for three months for the offence under Sections 323/34 of the Indian Penal Code.

Sagardighi Police Station Case No.77 of 2006 was registered on the basis of a written complaint submitted by one Badrul Sk. On 20th June, 2006 alleging, inter alia, that on 15th June, 2006 at about 12 noon the uncle of the de facto complainant and other persons were abusing his father with filthy language over a land dispute. When the de facto complainant protested, his uncle called his sons and brother. They rushed to the place of occurrence being armed with iron rod, 'sabal' etc. Then they started assaulting the father of the de facto complainant and him by 'lathi', iron rod and 'sabal'. They severely assaulted the father of the de facto complainant on his head with the help of iron rod and 'sabal'. As a result of such assault he fell down on the ground senseless. The accused persons also assaulted the de

facto complainant on his right hand. In the meantime, local people assembled at the spot and seeing them the accused persons fled away. The defacto complainant and his father were taken to Sagardighi Hospital. He was discharged on the next day of the incident but his father was referred to Berhampore District Hospital for better medical treatment. However, the father of the de facto complainant expired on 19th June, 2006 at 4 A.M.

It is also stated by the de facto complainant that he could not lodge the FIR earlier as he was busy for his father's medical treatment.

On the basis of the said complaint police registered Sagardighi Police Station Case No.77 of 2006 under Sections 304/34 of the Indian Penal Code and took up the case for investigation. On completion of investigation police submitted charge sheet against four FIR named accused persons under Sections 304/323/34 of the Indian Penal Code.

Trial of the case was taken up by the Learned Additional Sessions Judge, 4th Fast Track Court at Jangipur. He framed charge against the accused persons including the appellants under Sections 323/34 of the Indian Penal Code and Sections 304 (Part-II)/34 of the Indian Penal Code. The accused persons pleaded not guilty and accordingly trial of the case commenced.

It is found from the lower Court record that the prosecution examined 14 witnesses to establish charge against the accused persons. Amongst them, P.W.1, Badrul Sk. is the de facto complainant. P.W.8, Aklema Bibi is the mother of the de facto complainant and widow of Kuddus Sk., since deceased. P.W. 11, Dr. Debasish Ghosh is the autopsy surgeon who performed post mortem examination over the dead body of the deceased Kuddus Sk. P.Ws. 12, 13 and 14 are the police officers who had specific role during investigation of the case.

It is important to note that P.W.2, Motiur Rahaman could not state anything about the incident. P.W.6, Ahamad Sk. and P.W.7 Madeswer Sk. did not support the prosecution case and they were declared hostile by the prosecution. Other witnesses are absolutely formal in nature and of no relevance in deciding the instant appeal. Series of documents were marked exhibits which I propose to refer in the body of the judgment.

It is already recorded that charge sheet was filed by the investigating officer against four accused persons. During trial of the case Toyab Sk. expired. The appellants are the brother and brother's sons of the deceased Kuddus Sk.

The de facto complainant stated in her evidence that on 15th June, 2006 at about 12 noon a quarrel broke out between his father

and uncles over a land dispute. During such quarrel accused Mintu Sk. and Sagir Sk. who are the sons of the accused Hossain Sk. rushed to the spot with iron rod and 'sabal'. Both Mintu Sk. and Sagir Sk. assaulted his father on his scalp with the help of 'sabal'. He sustained severe bleeding injury on his head and fell down on the ground unconscious. The brothers of the deceased, namely, Tayab Sk. and Hossain Sk. caught hold of the father of the de facto complainant when he was assaulted by Mintu Sk. and Sagir Sk. They also assaulted the de facto complainant with the help of 'lathi', iron rod and 'sabal'. The de facto complainant raised alarm which attracted the local people. Seeing them the accused persons fled away. The local people took the de facto complainant and his father to the Sagardighi Hospital. His father was referred to Berhampore District Hospital for better treatment. However, he succumbed to his injuries on 19th June, 2006. The de facto complainant lodged the FIR on 20th June, 2006. It was written by P.W. 3, Sadhan Roy under his instructions. The FIR was marked as Exhibit 1 during trial of the case.

It is ascertained from the cross-examination that the de facto complainant visited Sagardighi Police Station on the date of occurrence itself within one hour and reported the incident to the police. It is also found from his cross-examination that the police came to their house on 15th June, 2006 at about 2.30 P.M.

P.W.8, Aklema Bibi is the widow of the deceased Kuddus Sk. She stated that on the date of occurrence at about 12 noon over a land dispute, the accused persons started abusing her husband and other family members standing in front of their house. When her son asked them as to why they were abusing, the accused Mintu Sk. and Sagir Sk. assaulted her husband by giving a blow on his head with iron rod and 'sabol', while other two accused persons namely Toyab Sk. and Hossain Sk. were holding her. They also assaulted her son, i.e., the de facto complainant

Apart from the de facto complainant and her mother, P.W.9 Sabbir Sk. stated in his evidence that on the date and time of occurrence he was returning home from agricultural field. At that time he saw that the accused persons were abusing Badrul Sk. and his family members. They also assaulted Badrul Sk. and his father Kuddus Sk. while accused Hossain Sk. and Tayob Sk. caught hold of Kuddus Sk. Mintu Sk. and Sagir Sk. assaulted him on his head with the help of iron rod and 'sabol'. From the evidence of P.W.11 Dr. Debasish Ghosh who conducted the post mortem examination over the body of the deceased it is found that the deceased sustained one large hematoma with Oedematous area over subcutaneous tissue of scalp over cortex, left temporal region and under lying the scalp, skull bones were fracture and subjacent brain matter over moral parietal

region were contused, lacerated with scatter areas of haemorrhage. According to P.W.11, cause of the death of the said patient was due to the effect of the injury which is anti-mortem and homicidal in nature. According to P.W.9, Sabbir Sk., on the date and time of occurrence he was returning home from agricultural field. When he reached near the house of Badrul Sk., he found the accused persons abusing Badrul Sk. and his family members. They also assaulted Badrul and he fled away. Then accused Hossain Sk. and Toyab Sk. caught hold of the father of Badrul named Kuddus and the accused Mintu Sk. and Sagir Sk. assaulted him on his head with iron rod and 'sabal'. On being assaulted as such, he fell down on the ground. Hearing hue and cry local villagers rushed to the spot and the accused persons fled away.

Mainly on the basis of above evidence, the learned trial Judge convicted the appellants.

It is submitted by the learned advocate for the appellants that from the evidence of the de facto complainant (P.W.1) and his mother (P.W.9) it is ascertained that there was long standing land dispute between the parties. It is also submitted by the learned advocate for the appellants that except the de facto complainant and his mother, no other witnesses corroborated their evidence. P.W.6, Ahamad Sk. and P.W.7 Madeswer Sk. were declared hostile by the prosecution. According to the learned advocate for the appellants P.W.9, Sabbir

Sk. is a chance witness and his evidence cannot be accepted as trustworthy in view of the fact that his presence at the place of occurrence on the date and time of incident is doubtful.

It is also submitted by the learned advocate for the appellants that presence of the de facto complainant at the spot is also doubtful because P.W.9 stated on oath that accused Mintu Sk. and Sagir Sk. allegedly assaulted Badrul Sk. first and he fled away from the place of occurrence on being assaulted. Then accused Toyab Sk., since deceased and Hossain Sk. caught hold of Kuddus and accused Mintu Sk.. and Sagir Sk. assaulted him on his head with the help of iron rod and 'sabal'. If the evidence of P.W.9 is believed, presence of Badrul at the very point of time when Kuddus was allegedly assaulted by Mintu Sk. and Sagir Sk. becomes doubtful and testimony of Badrul as eye witness of the occurrence cannot be accepted to be truth.

Learned advocate for the appellants further submits that from the evidence of P.W.1 it is ascertained that after the incident he went to Sagardighi P.S. and informed the same to the police officer. Then he went to Sagardighi Hospital for medical treatment. According to him, police came to their village on the date of occurrence at about 2.30 P.M. Prosecution has suppressed the said information made by the de facto complainant at Sagardighi P.S. on 15th June 2006. On the contrary, the complaint dated 20th June, 2006 was treated as

F.I.R. in this case. It is submitted by the learned advocate for the appellants that the statement dated 20th June, 2006 cannot be treated as FIR as it is hit by Section 162 of the Code of Criminal Procedure.

In view of such contradiction, it is submitted by the learned advocate for the appellants that the appellants should be acquitted from the charge and the judgment and order of conviction and sentence passed by the learned trial Judge should be set aside.

Learned advocate for the respondents, on the other hand submits that it is not the number of witnesses but the quality of evidence that matters for taking a decision as to whether prosecution has been able to establish the charge against the appellants or not. In the instant case P.W.1 is the son of the deceased. P.W.9 is the widow of the deceased. Though both the witnesses are interested witnesses, their evidence cannot be discarded because they would not intentionally give false evidence to implicate innocent persons for the death of the father of P.W.1 and husband of P.W.9. Both the witnesses stated that accused Toyab, since deceased and Hossain Sk. caught hold of Kuddus Sk. and accused Mintu Sk. and Sagir Sk. assaulted him on his head with the help of iron rod and 'sabal'. They faced cross-examination by the learned counsel for the defence but their evidence could not be shaken. Coupled with the evidence of

P.W.1 and P.W.9, if the medico logical examination report is considered then the Court has no other alternative but to come to an irresistible conclusion that the deceased was assaulted by the blunt weapon on his head and as a result of such assault and injury received by him he died. In view of such circumstances, there is no reason to spill ink over the judgment and order of conviction passed by the learned Court below.

It is needless to say that during investigation of the case police failed to recover offending weapon. From the evidence of one Nirmal Das, D.W.1 it is ascertained that the information made by the de facto complainant immediately after the occurrence on 15th June, 2006 was recorded in P.S. G.D. book. The said G.D. book was produced in Court but it was not marked exhibit. Therefore, this Court is not in a position to see the contents of the G.D. entry and /or the information given by the de facto complainant immediately after the occurrence in the P.S. Therefore, the Court had no scope to compare the statement of P.W.1 made immediately after occurrence on 15th June, 2006 with the FIR lodged on 20th June, 2006.

The inquest report of deceased Kuddus Sk. was marked exhibit during trial of the case. From the inquest report it is ascertained that the deceased that the deceased received injury on his head in course of a mutual fighting between him and his brothers with 'lathi'. At the

time of inquest, the witnesses did not state the names of Mintu Sk. and Sagir Sk. as the assailants.

Prosecution case is that Mintu Sk. and Sagir Sk. assaulted Kuddus Sk. with the help of iron rod and 'sabal'. If two persons assaulted another with the help of two blunt weapons, there must be two injuries on the head of the deceased. However, the autopsy surgeon found only one injury over the head of the deceased Kuddus Sk. It is needless to say that solitary injury cannot be inflicted by both accused Mintu Sk. and Sagir Sk. if the prosecution case is believed that the injury was caused either by Mintu Sk. or Sagir Sk. However, the prosecution failed to prove as to who amongst the appellants caused fatal blow on the head of the deceased.

In view of such circumstances and lacuna in the prosecution case the evidence of P.W.1 and P.W.9 cannot be believed. All through their endeavour was to implicate all male members of the family of the brothers of the deceased.

There is absolutely no evidence that Kuddus Sk. was assaulted in furtherance of intention of all the appellants.

For the reasons stated above, I am of the view that the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court at Jangipur, District - Murshidabad in Sessions Trial No.169 (Jan) of 2009 cannot sustain

and the appellants are entitled to get benefit of doubt. As a result, the instant appeal is allowed on contest, however, without costs.

The appellants namely Hussain Sk., Mintu Sk. and Sagir Sk. are acquitted from the charge under Section 323/304 (Part-II)/34 of the Indian Penal Code, set at free and released from their respective bail bonds.

Let a copy of this judgment be sent to the learned Court below along with Lower Court Record.

(Bibek Chaudhuri, J.)