

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

Present :

The Hon'ble Justice Bibek Chaudhuri

CRA 83 of 2019

**Nur Islam @ Md. Noor Islam
-Vs.-
State of West Bengal**

For the appellant : Mr. Kaushik Choudhury, Adv.,
Ms. B. Khatun, Adv.

For the State : Mr. Sudip Ghosh, Adv.,
Mr. Bitasok Banerjee, Adv.,
Mr. Bibuswan Bhattacharya, Adv.

Heard on : 03.12.2021.

Judgment on : 13.12.2021.

Bibek Chaudhuri, J.-

The instant appeal is directed against the judgment and order of conviction and sentence dated 18th December, 2018 and 19th December, 2018 respectively passed by the learned Additional Sessions Judge, 2nd Court, Islampur, Uttar Dinajpur in Sessions Case No. 70 of 2017 and Sessions Trial No. 73(06)/2017 convicting the

appellant for committing offence under Sections 307/324 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for two years and to pay fine of Rs.3,000/-, in default, to suffer further rigorous imprisonment for a period of two months for the offence punishable under Section 307 of the Indian Penal Code and simple imprisonment for a period of one year with fine and default clause for the offence punishable under Section 324 of the Indian Penal Code.

On 18th February, 2015 at about 1/1.30 P.M., the younger daughter of the *de facto* complainant was sweeping the courtyard of their house. At that time, the wife of the appellant who happens to be her aunt abused her with filthy language and asked her to stop sweeping on the ground that dust particles were floating towards their house. When she went on sweeping the courtyard, the wife of the accused came and assaulted her with a piece of brick. She raised hue and cry. Hearing this, the mother of the said girl rushed to the spot. A quarrel broke out between the said two ladies. In the meantime, the appellant/accused rushed to the spot with 'Bhojali' in his hand. He first assaulted the mother of the said child on her head with the help of 'Bhojali' causing cut injury. Then again, he tried to assault her and she tried to save her head with her left hand. The second 'Bhojali' blow landed on her left hand causing injury over the fingers of her hand. The little finger of the left hand was severed. The appellant again

struck third blow on her back causing cut injury. The victim fell down on the ground. Hearing hue and cry, one Md. Aziz and others came to the place of occurrence. Md. Aziz tried to save the victim from the hand of the accused but he was also assaulted.

At the time of above incident, the husband of the victim was in his shop situated at about 5/6 kilometers away from her house. He heard the incident and rushed to the hospital because, in the meantime, the victim lady and her younger daughter were taken to the hospital.

The husband of the victim, namely, Azad lodged a written compliant on the date of occurrence at about 3.55 p.m. before the Officer-in-Charge of Islampur Police Station. On the basis of which a case being No.92 of 2015 under Sections 448/324/326 of the Indian Penal Code was registered.

Police took up the case for investigation and on completion of investigation charge-sheet was submitted under Sections 448/324/307 of the Indian Penal Code against the accused.

Since the offence under Section 307 of the Indian Penal Code was triable by the Court of Sessions, the case was committed and subsequently transferred to the learned Additional Sessions Judge, 2nd Court at Islampur for trial. The learned Trial Judge on examination of the witnesses on behalf of the prosecution and examination of the

accused under Section 313 of the Code of Criminal Procedure convicted the accused and sentenced him accordingly. The said judgment and order of conviction was assailed in the instant appeal.

During trial, in order to bring home the charge against the accused, prosecution examined nine witnesses. Amongst them, P.W.1 is the *de facto* complainant. P.W.2 is the wife of the *de facto* complainant and the victim of this case. P.W.3 is the married elder daughter of the *de facto* complainant and P.W.4, Kurban is the husband of P.W.3. P.W.5, Md. Aziz is the cousin brother of the *de facto* complainant. P.W.6 is the younger daughter of the *de facto* complainant. P.W.7 is the scribe and P.W.8 is the Medical Officer who treated Asia Khatun, wife of Md. Azad on 18th March, 2015 at Islampur Sub-Divisional hospital. P.W.9 is the Investigating Officer of this case.

During examination of the witnesses on behalf of the prosecution, some documents were marked as exhibits which I propose to refer subsequently in the body of the judgment. However, it is pertinent to mention here that the offending weapon was marked Mat. Exhibit –1 during trial of the case.

Since this Court is of the first Court of Appeal, it is the duty of this Court to apprise the evidence on record independently and to ascertain the facts of the case.

Let me start with the evidence of the injured witness (P.W. 2). It is stated by her on oath on 18th March, 2018 at about 1.00/1.30 p.m. her daughter, Baby was sweeping and cleaning the courtyard of their house. At that time, the wife of the accused, namely, Asra Banu came and asked her daughter to stop sweeping. She restrained her from sweeping and abused her with filthy language. She also assaulted her. Hearing hue and cry, P.W. 2 came to the place of occurrence and a quarrel broke out between them. At that point of time, the appellant rushed to the spot with a 'Bhojali' in his hand. He openly declared that he would finish P.W. 2 and gave a blow on her head with the help of 'Bhojali'. When she tried to save her raising her left hand on her head, the second blow of 'Bhojali' landed on her fingers of the left hand. Three fingers were severely cut and the little finger was chopped from the body. The learned Trial Judge recorded the demeanor of the said witness when she showed her amputated left hand to the learned Judge to prove that her little finger of the left hand were severed and amputated. According to P.W.2, after receiving all the aforesaid cut injury, she became unconscious. She regained her sense at the hospital. Several stitches were done on her head, back and fingers. The husband of the *de facto* complainant came to the hospital in the meantime and she narrated the incident to him. Then, he went to the local police station to lodge complaint against the

accused. It is also stated by P.W.2 that she made a statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure. The said statement was marked as 'exhibit-1' during trial and signatures of P.W.2 was marked 'exhibit.1' series on the said document.

The evidence of P.W.1 who is the *de facto* complainant suggests that what he heard from his wife and other witnesses about the incident was got to be recorded by a local advocate and it was handed over to the Police Officer attached to Islampur Police Station on the basis of which the police case was started. It is found from his evidence that he came to know that at the time of occurrence, local people assembled at the place of occurrence and they took the victim lady to the hospital.

P.W.3, Mumtaz Begum and P.W.6, Baby Begum corroborated the evidence of the injured witness in their evidence. They claimed themselves to be the eyewitnesses of the occurrence.

From the evidence of P.w.4, Kurban who is the husband of P.W.3, it appears that he is a shop owner situated about 10-15 feet away from the place of occurrence. On the date and time of occurrence, he was in his shop. At that time, he heard hue and cry of P.W.6, Baby coming from their house. He rushed to the place and saw that the accused was trying to assault Baby with a 'Bhojali'. When the

mother of Baby came to save her daughter, she was hit by 'Bhojali' on her head. When she tried to save her head raising the left hand, the accused gave second blow with the help of 'Bhojali' on her left hand causing severe injury on her fingers and the little finger of the left hand was severed. He also assaulted the victim lady on her back with the help of 'Bhojali'. In the meantime, local people gathered at the place of occurrence and seeing them, he fled away throwing the 'Bhojali' at the place of occurrence. Police seized the said 'Bhojali' which was identified by P.W.4 as offending weapon and the said weapon was marked as Material Exhibit.I. From his cross-examination, it is found that about 30 local people assembled at the place of occurrence. P.W.5, Md. Aziz also claimed himself as the eyewitness of the occurrence and corroborated the evidence of other witnesses.

According to P.W.8, Dr. Satyabrata Roy on 18th March, 2015, he medically examined Asia Khatun. At the time of his examination, he found a cut injury on the frontal scalp, left shoulder and left middle finger. He also found that middle phalanx of her little finger was partially amputated. According to the Medical Officer, said injuries were simple in nature. The medical examination report was marked as exhibit.4 during trial of the case.

The learned advocate for the appellant criticized the impugned judgment and order of conviction and sentence on the following grounds: -

- (i) No local witnesses were examined by the prosecution though it is stated by the witnesses, especially P.W.4 and P.W.5 that about 30 people assembled at the place of occurrence. All the witnesses are close relatives of the victim lady and the *de facto* complainant. Indisputably, there was long standing enmity between the *de facto* complainant and his brother. Therefore, false implication of the accused cannot be ruled out. Under such circumstances, non-examination of local witnesses is fatal for the prosecution;
- (ii) Admittedly, there was long standing dispute between the parties. Such dispute may be a cause of false implication of the accused by the *de facto* complainant. Learned Trial Judge did not consider the above circumstance while convicting the accused;
- (iii) All the witnesses on behalf of the prosecution are close relatives of the *de facto* complainant and the victim lady. They are absolutely interested in the outcome of the result of the prosecution case. Therefore, they

might be interested to depose falsely against the accused;

- (iv) It is further submitted by the learned advocate for the appellant that the seized 'Bhojali' at a mark of 'Trisul' on its body. In cross-examination, P.W.5 candidly admitted that 'Trisul' is a mark of Lord Shiva and the Mohammedan do not keep any weapon with certain marks of Hindu deities. Therefore, the weapon that was exhibited is not the offending weapon. It is more so because in her statement recorded under Section 164 of the Code of Criminal Procedure, the victim lady said that she was assaulted with the help of a 'Dau'. 'Dau' and 'Bhojali' are two different weapons. Therefore, the prosecution failed to produce the offending weapon and some weapon was tagged in the case to frame the accused with a cock and bull story;

- (v) It is argued by the learned advocate for the appellant that the offending weapon, i.e. 'Bhojali' was not seized in presence of any local witness. It was also not sent to the State Forensic Science Laboratory to prove as to whether there was any blood stain on it;

- (vi) The Investigating Officer did not seize the wearing apparels of the victim lady though she stated in her deposition that her wearing apparels were soaked by blood on being assaulted with the help of 'Bhojali';
- (vii) The prosecution is absolutely silent as to who took the victim lady to the hospital.

In view of the above contradictions, it is submitted by the learned advocate for the appellant that the prosecution case ought not to have been held to be proved beyond all shadow of reasonable doubt and the appellant was entitled to get benefit of doubt by the learned Trial Court.

Learned Public Prosecutor-in-Charge, at the outset, draws my attention to the examination of the accused under Section 313 of the Code of Criminal Procedure. He refers to the answer of the accused in question Nos. 4, 14, 20 and 39. In question No.4, it was asked to the accused that the incident took place on 18th March, 2015 at about 1:20 p.m. when the *de facto* complainant was in his needs of. The accused, in reply, admitted the said fact. In question No.14, accused was asked that at the relevant point of time, the daughter of P.w.2, Baby was sweeping and clearing the courtyard. The accused also admitted the said fact and stated that his daughter and wife were cutting vegetables in their house and since the dust particles were flying, quarrel began.

In question No. 20, it was asked to the accused that P.W.2 sustained bleeding injury on her head and then she had placed her left hand on the injured portion of her head to stop bleeding and at that time her brother-in-law, Md. Aziz came to save her. In reply, the accused stated that Aziz was not present at the place of occurrence at the relevant point of time. In question No. 39, the accused was asked that hearing the hue and cry, Md. Aziz also came running to the spot and requested him not to assault P.W. 2. At this, the accused replied that he did not see Aziz. He remained at his meat shop throughout the day. Thus, according to the learned senior Government advocate (criminal), the appellant himself admitted his presence at the spot when the incident took place.

It is further admitted by the learned advocate for the State respondent that it is not the law that the evidence of the related witnesses should be discarded. On the other hand, their evidence requires close scrutiny by the Court of law to come to a finding as to whether the accused is falsely implicated by them or not. If it is found that the evidences of the related witnesses are trustworthy, Court can safely base its conviction taking into account the evidences of the related witnesses. It is further submitted by the learned senior Government Pleader (Criminal) that P.W. 2 is the injured witness. She stands at a higher pedestal than any other witness. It is not expected

that P.W. 2 after being severely assaulted will implicate an innocent person only due to previous grudge and dispute between her husband and brother-in-law. According to the learned counsel, enmity or previous dispute between the parties is a double edged weapon. It may be the result of false implication of an accused and at the same time, the Court has every right to consider that the real accused is not spared and innocent person is implicated due to enmity between the parties. In the instant case, all the witnesses unequivocally stated that P.W. 2 was assaulted by the accused/appellant with the help of a 'Bhojali'. From cross-examination, nothing has been elucidated that the evidence of the witnesses on behalf of the prosecution ought to be discarded. It is also pointed out by the learned advocate for the State respondent that the little finger of the victim girl was severed from the phalanx of the said finger. The said injury is a grievous hurt within the meaning of Section 320 of the Indian Penal Code and he calls upon the Court to hold the appellant guilty for committing offence under Section 326 of the Indian Penal Code.

It is further submitted by him that in order to prove the charge under Section 307 of the Indian Penal Code nature of injury is not the relevant factor. What is relevant is the intention of the accused. In the instant case, while assaulting the victim (P.W. 2) the accused repeatedly said that he would finish her on the date of occurrence.

She stated that he would sever her head from her body. The assault was perpetrated on the most vital part of his body, i.e., body and shoulder. The intention of the accused can be gathered from all such circumstances.

Therefore, there is no reason to interfere with the judgment and order of conviction passed by the learned Trial Judge excepting that the accused ought to be held guilty under Section 326 of the Indian Penal Code.

In **State –Vs.- Krishna** reported in **(2011) 1 SCC (Cri) 381** it was held by the Supreme Court: -

“In a criminal case, the prosecution case may suffer from inconsistencies here and discrepancies there, but that is a short coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities appearing in the evidence. In the latter, however, no such benefit may be available to it. Therefore, it is the duty of the Court to separate false from the truth as in the deposition of witnesses there are always normal discrepancies, howsoever honest and truthful they may be and these discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and

horror at the time of occurrence and threat to the life. In sifting the evidence, the Court has to attempt to separate chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out."

It is established beyond any shadow of doubt that on 18th March, 2018, the wife of the *de facto* complainant suffered cut injury on her head, left hand and back. As a result of such assault by a sharp cutting weapon, the little finger was severed from phalanx. Section 320 of the Indian Penal Code defines grievous hurt and in 7th Clause of the said Section "fracture or dislocation of bone or tooth is stated to be grievous". When a portion of little finger is severed from phalanx it is dislocation of bone situated above phalanx of the little finger and privation of the said finger. Since the injury was caused by sharp cutting weapon, the appellant ought to have been charged under Section 326 of the Indian Penal Code.

The learned Trial Judge wrongly framed charge against the appellant under Section 324 of the Indian Penal Code. Therefore, the charge is required to be altered.

The learned advocate for the appellant has criticized the impugned judgment on the ground that no local witnesses were examined though the evidence on record suggests that there were

number of people residing in the said locality. In my view, non-examination of local witnesses is not fatal for the prosecution specially when the evidence of the related witnesses does not suffer from glaring contradictions and discrepancies. It is our common experience that now a days the independent persons do not want to involve in a dispute occurring between the members of the same family and they refrain themselves from adducing any evidence in support of one of the parties. It is not the rule of evidence that the deposition of interested and related witnesses are to be thrown away on the ground of interestedness. In case of interested and related witnesses the responsibility of the Court seems to be greater to scrutinize the evidence closely to separate the chaff from the grain.

Admittedly, a long-standing dispute was going on between the family members of the *de facto* complainant and his brother. The relation between the two families is inimical. However, it is to be borne in mind that enmity is a double edged weapon. It cuts both ways. There may be false implication of the accused due to enmity and at the same time, it may occur true account of the incident. It is needless to say that an injured witness does not implicate an innocent person only on the ground of enmity leaving aside the real culprit. In the instant case, all the eyewitnesses stated in unequivocal term that accused Noor Md. assaulted the P.W. 2 with the help of a 'Bhojali' on

her head, hand and back. This Court also considers the contradiction that in her statement recorded under Section 164 of the Code of Criminal Procedure P.W. 2 stated that she was assaulted with the help of a 'Dau' but during trial, a 'Bhojali' was shown as offending weapon. Such contradiction is also minor in nature and Court can always discard the same. It is needless to say that the offending weapon was seized from the courtyard of the house of the *de facto* complainant. All the witnesses stated that after assaulting P.W. 2, the appellant fled away throwing the offending weapon on the courtyard of the house of the *de facto* complainant. Seizure of the offending weapon was made in presence of Md. Aziz (P.W. 5) and Md. Kurban (P.W. 4). In their evidence, they stated that police seized the offending weapon under a seizure list and they put their signatures as witnesses to the seizure. Their signatures on the seizure list were marked as exhibits 2/1 and 2 respectively. In view of such circumstances, there cannot be any doubt with regard to the nature of the offending weapon.

It is true that the investigation of a criminal case may be faulty inasmuch as the Investigating Officer may not seize the blood stained wearing apparel of the victim or that he failed to send the offending weapon for forensic test. For such faulty investigation, prosecution case shall not suffer. If the prosecution is able to prove the charge producing trustworthy, cogent and unblemished evidence, failure on

the part of the Investigating agency to send the offending weapon to the Forensic Science Laboratory and seize the blood stained wearing apparels of the victim cannot stand on the way.

In order to prove the charge under Section 307 of the Indian Penal Code the prosecution is required to prove that the act must be done with such intention or injury or done under such circumstances that if death be caused by the act, the offence of murder will emerge. It has to be seen whether the act perpetrated by the accused irrespective of result, was done with the intention or knowledge and under circumstances that if not intervened death was the ultimate result.

In the instant case, the appellant assaulted the victim lady on the most vital part of the body, i.e., on her head and back with the help of a sharp cutting weapon. The blow was so severe that the wound on the head required twelve stitches and there were six stitches on the back. The little finger of the victim was severed from the phalanx. The witnesses also stated that the appellant was declaring that he would finish the *de facto* complainant at the time of assault. Thus, the intention to commit murder of the accused is discernible from the act and conduct of the accused.

It is needless to say that for committing an offence under Section 307 of the Indian Penal Code the offenders shall be punished

with imprisonment for a term which may extend to 10 years and shall also be liable to fine, and if hurt is caused, the offenders shall be liable either to imprisonment for life or to such imprisonment as hereinbefore mentioned. In the instant case, hurt was caused to P.W. 2 by the appellant. The learned Trial Judge under the facts and circumstances sentenced the appellant to rigorous imprisonment for 2 years only and to pay fine of Rs.3,000/-, in default, to undergo further rigorous imprisonment for 2 months for committing offence under Section 307 of the Indian Penal Code.

This Court is of the view that such punishment is not in conformity with the act done by the appellant. In my considered opinion, the accused should be sentenced to rigorous imprisonment for 7 years and to pay fine of Rs.10,000/-, in default, to undergo further simple imprisonment for 6 months for committing offence under Section 307 of the Indian Penal Code.

On the question of enhancement of sentence, I have heard the learned advocate for the appellant. It is submitted by him that the incident took place in the year 2015. The appellant has suffered tremendous mental trauma during the pendency of trial and appeal. He is also a family man and only bread earner of the family. So, he submits the Court to take lenient view on the sentence of the appellant.

While affirming conviction passed by the trial Court, considering both aggravating and mitigating circumstances, the accused/appellant is sentenced to suffer rigorous imprisonment for 7(seven) years and to pay fine of Rs.10,000/-(Rupees Ten Thousand), in default, to suffer further simple imprisonment for 6(six) months for the offence punishable under Section 307 of the Indian Penal Code.

Sentence for committing offence under Section 324 of the Indian Penal Code passed by the learned Trial Judge is confirmed.

Substantive sentence of imprisonment for both the offences shall run concurrently. However, imprisonment for non-payment of fine shall run separately.

The instant appeal is, therefore, **dismissed** on contest and the order of conviction passed by the learned Trial Judge is confirmed. However, the order of sentence is modified as stated above.

The appellant is directed to surrender before the learned Trial Court to suffer sentence within three weeks from the date of delivery of this judgment, failing which the learned Trial Judge shall issue warrant of arrest against the convict/appellant.

On his surrender or arrest, as the case may be, the learned Trial Judge shall issue jail warrant as per the provisions of law.

A copy of the judgment be sent to the learned Court below forthwith along with the lower court record.

The parties are at liberty to act on the server copy of this order.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta/Mithun
A.Rs. (Court)