

Form J(2)

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

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

C.R.A. 594 of 2016

***Usman @ Luba Ansary
Vs.
The State of West Bengal***

Amicus Curiae : Mr. Pinak Kumar Mitra, Adv.

For the State : Mrs. Sreyasree Biswas, Adv.

Heard & Judgment on : 20.12.2021.

Bibek Chaudhuri, J.

The instant appeal is directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track, 2nd Court at Purulia in Sessions Case No. 11 of 2013 corresponding to Sessions Trial No. 33 of 2013, thereby convicting the appellant for committing offence under Sections 458/323/354/308 of the Indian Penal Code and sentencing him to suffer imprisonment for one year and to pay fine of Rs.500/- with default clause for offence punishable under Section 323 of the Indian Penal Code imprisonment for two years and fine of Rs.1,000/- with default clause for offence punishable under Section 354 of the Indian Penal Code imprisonment to suffer rigorous imprisonment for seven

years and to pay fine of Rs.1,000/- with default clause for offence punishable under Section 308 of the Indian Penal Code and imprisonment for seven years and fine with default clause for offence punishable under Section 458 of the Indian Penal Code.

On the basis of a written complaint filed by one Smt. Anna Sahis before the Officer-in-Charge, Purulia (M) Police Station, Police Station Case No. 139/2012 under Sections 458/341/324/354/308/506 of the Indian Penal Code was started. It was alleged by the *de facto* complainant that in the night of 17/18th July, 2012, she and her husband, Sufal Sahis were sleeping in a room of their house with their two minor children. At about 12 at midnight, the appellant illegally trespassed into the said room and assaulted the husband of the *de facto* complainant on his head with a dagger. The *de facto* complainant raised hue and cry at this, the accused also pulled her saree and assaulted her with kicks and blows. Hearing her hue and cry, local people rushed to the room of the *de facto* complainant and seeing them the accused fled away.

It appears from the materials-on-record that the husband of the *de facto* complainant was taken to Purulia District Hospital immediately after the incident and the Medical Officer found a lacerated injury on the left side of the forehead of the husband of the *de facto* complainant, namely, Sufal Sahis. He was admitted to the

Hospital and subsequently discharged after about 5/6 days of the occurrence.

Police took up the case for investigation and submitted charge-sheet against the accused under the above-mentioned penal provisions before the Court of the Learned Chief Judicial Magistrate at Purulia. Since the case was exclusively triable by the Court of Sessions, it was committed to the learned Sessions Judge, Purulia. Subsequently, the case was transferred to the 2nd Fast Track Court of the learned Additional Sessions Judge at Purulia for trial and disposal. The record further shows that the learned Trial Judge framed charge against the appellant under Sections 458/323/354/308/506(2) of the Indian Penal Code. As the accused pleaded not guilty, trial of the case commenced.

During trial, prosecution examined ten witnesses. Amongst them, the *de facto* complainant deposed as P.W. 1. P.W. 6 is the husband of the *de facto* complainant and injured of the case. P.W. 2, Sristidhar Sahis is the brother-in-law and P.W. 6 who claimed to be present immediately after the occurrence in the house of the *de facto* complainant. P.W. 3, Rajib Sahis, P.W. 4, Sagar Sahis, P.W. 5, Biren Sahis and P.W. 8, Bhutu Sahis were examined in the case as the neighbouring people of the *de facto* complainant who rushed to the place of occurrence immediately after the incident. However, during

trial P.W. 3, Rajib Sahis and P.W. 4, Sagar Sahis were declared hostile by the prosecution. P.W. 9, Dr. Asish Kapat was the Medical Officer of Purulia Sadar Hospital at the relevant point of time and on 18th July, 2012, he medically examined P.W. 6, Sufal Sahis and found one lacerated wound on the left side of forehead measuring about 5 c.m. He was admitted to the Hospital and his wound was repaired by P.W. 9. The bed head ticket and the injury report were marked as exhibits - 2 & 3 respectively. P.W. 7, Bimal Majhi is the scribe of the FIR and P.W. 10 is the Investigating Officer.

The learned Trial Judge on consideration of evidence on record convicted the accused and sentenced him under the above-mentioned penal provisions.

The appellant has challenged the said judgment and order of conviction and sentence in the instant appeal.

It will be out of place to mention at the outset that in spite of all efforts being made by the Court at the time of hearing of appeal, the learned Advocate for the appellant failed to appear. Therefore, by an order dated 24th November, 2021, Mr. Pinak Kr. Mitra, learned Advocate was appointed by this Court as *Amicus Curiae* to assist the Court at the time of hearing in the instant appeal.

Mr. Mitra takes me to the evidence adduced by the witnesses during trial of the case. Referring to evidence of P.W.1, it is

submitted by Mr. Mitra that the *de facto* complainant tried to develop the case during trial in course of her evidence. In order to substantiate his evidence, he draws my attention where the *de facto* complainant stated that after assaulting her husband on his forehead and causing bleeding injury on his person, the accused pulled down her saree and touched her breast and also assaulted her by kicks and blows. He then bring my attention to the FIR and submits that the *de facto* complainant never stated in the FIR that the accused molested her. This part of evidence is an exaggeration and for such reason, the evidence of the *de facto* complainant should not be considered to be the basis of the prosecution case. The learned Trial Judge was not justified in placing reliance on the evidence of the *de facto* complainant.

He further submits that in the FIR, the *de facto* complainant alleged that the accused assaulted her husband with the help of a 'Dagger'. In evidence, she stated that her husband was assaulted by a 'Dauli'. Other witnesses stated that the husband of the *de facto* complainant was assaulted with a blunt object. Someone has stated that the injured was assaulted by a 'Hammer', others have stated that he was assaulted by a wooden plank used for closing the door from inside. Therefore, the witnesses failed to state the nature of the weapon used by the assailant for assaulting P.W.6. If P.W.6 was

assaulted by a 'Dagger' or 'Dauli', there would have been an incised wound but the Medical Officer found lacerated wound on the forehead. The Medical Officer also admitted that similar type of injury might be caused by fall. Therefore, in the absence of the description of nature of weapon, the appellant cannot be held in the charge levelled against him. It is further pointed out by Mr. Mitra that P.W.2, Sristidhar Sahis is the near relative of the *de facto* complainant and her husband. Therefore, he is an interested witness. In his cross-examination, he stated that after the alleged incident, local people assembled on the place of occurrence and amongst them there were Sudhir Sahis, Sisir Dutta and Jimut Dutta. The said persons were not examined by the prosecution during trial of the case. P.W.3, Rajib Sahis and P.W.4 Sagar Sahis did not support the prosecution case. From the evidence of P.W.2, Sristidhar Sahis, P.W.5, Biren Sahis and P.W.8, Bhutu Sahis, it is ascertained that they reached the place of occurrence after the incident. They did not find the appellant fleeing away. Only P.W.2, Sristidhar Sahis who is an interested witness stated that he saw the appellant fleeing away from the place of occurrence. Mr. Mitra has raised the question as to whether the evidence of P.W.3 who **alone** be taken into consideration to find corroboration of the evidence of the *de facto* complainant and P.W.6.

It is further submitted by Mr. Mitra that the incident took place at about 12 at midnight. It is stated that the *de facto* complainant and the P.w.6 that at the time of occurrence they were sleeping. It is needless to say that when a person sleeps at night, the light in the bedroom is either switched off or put off. Therefore, there is a reasonable doubt as to how the appellant was identified by the *de facto* complainant. It is also ascertained from the evidence that the husband of the *de facto* complainant and the accused work together as carpenter. The appellant used to work under P.W.6. He had visiting term with P.W.6. The witnesses including the P.W.6 admitted that he has good relation with the appellant. Therefore, there cannot be any reason for the appellant to assault P.W.6, in other words, the prosecution failed to establish any motive of the appellant to commit such offence. In the absence of such motive, he was entitled to get benefit of doubt.

Mr. Sreyasi Biswas, learned Public Prosecution-in-Charge, on the other hand, submits that P.W.6 is the injured witness. In his evidence he stated that the appellant is the perpetrator of the offence as a result of which he sustained bleeding injury on his head. It is also established in evidence that the appellant entered into the room of the P.W.6 at dead hours of night only to cause hurt to him. P.W.6 is the injured witness. It is not expected that P.W.6 will implicate an

innocent person leaving aside the real culprit. It is established beyond any shadow of doubt that P.W.6 sustained lacerated bleeding wound on his forehead. The medical evidence supports the ocular testimony of the P.W.1 and P.W.6. Therefore, there is no reason to interfere with the finding made by the learned Trial Court in respect of Section 458 and Section 323 of the Indian Penal Code.

Having heard the learned Counsels for the parties and on perusal of the entire evidence on record, I am in agreement with the learned Public Prosecutor-in-Charge that the evidence of an injured witness with regard to the identity, his assailant should be given due consideration because his evidence stands on higher pedestal than that of an interested witness. A victim of an offence or an injured person will not implicate an innocent person at the cost of the real culprit. However, the Court is under obligation to scrutinize the evidence of an injured witness when there are number assailants implicated in a case. In respect of only accused being the perpetrator of offence, it is not expected that the injured person will implicate him falsely.

Furthermore, there is no reason appearing from the evidence on record as to false implication of the appellant.

Indisputably, the appellant and P.W.6 used to work together as carpenters and they had good relation till the date of the incident

being taken place. Neither the *de facto* complainant nor the P.W.6 did not subscribe any reason as to why P.W.6 was assaulted by the appellant.

Submission made by the learned *Amicus Curiae* with regard to the identification of the appellant would have been held good if there was a cross-examination on the point of identification. No question, not even a suggestion was put to P.W.2 and P.W.6 that in the darkness of the room, it was not possible for P.W.1 and P.W.6 to identify the appellant.

On close scrutiny of evidence, this Court is of the view that the learned Trial Judge was absolutely justified in convicting the accused under Sections 458 and 323 of the Indian Penal Code.

However, I do not find any material in support of the offence under Section 354 and Section 308 of the Indian Penal Code. Therefore, the instant appeal is **allowed** in part.

While the conviction under Sections 458 and 323 of the Indian Penal Code passed by the learned Trial Judge is maintained, the conviction under Sections 354 and 308 of the Indian Penal Code is set aside.

Thus, the appeal is **allowed** in part.

The appellant is acquitted from the charge under Section 354 and Section 308 of the Indian Penal Code.

The conviction under Section 458 and Section 323 of the Indian Penal Code is affirmed and in respect of the said two convictions, the appeal is dismissed.

With regard to sentence, this Court is of the view that the appellant is facing trial since 18th July, 2012. For entire 9 years, the appellant suffered mental agony for the outcome of the case filed against him and the instant appeal. Moreover, the prosecution has not been able to produce any evidence with regard to the motive of the appellant in committing such offence. Considering all such aspects of the matter, I am inclined to take a lenient view in respect of the sentence to be undergone by the appellant.

The order of sentence is modified accordingly: -

The appellant be sentenced for rigorous imprisonment for one year with fine of Rs.1,000/- (Rupees One thousand), in default, to suffer further simple imprisonment for one month for committing offence under Section 458 of the Indian Penal Code.

For the offence under Section 323 of the Indian Penal Code, the appellant be sentenced to pay fine of Rs.1,000/- (Rupees One thousand), in default, to suffer simple imprisonment for one month.

The period of sentence already undergone by the appellant shall be set off against the actual period of punishment under Section 428 of the Code of Criminal Procedure.

Let a copy of this judgment be sent to the learned Court below for information along with the lower court record.

The learned Trial Judge is directed to issue notice upon the appellant to surrender before Court to suffer sentence within 3 weeks from the date of receipt of the copy of the judgment along with lower court record, failing which, he shall be at liberty to issue warrant of arrest against the appellant.

Before I part with, I must record a word of appreciation for Mr. Pinak Kr. Mitra, because he as an *Amicus Curiae* has assisted this Court very efficiently and has also been able to keep up the interest of the appellant which is reflected from this judgment hereinabove.

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

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

(Bibek Chaudhuri, J.)

Srimanta/Suman
A.Rs. (Court)