

Form J(2)

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

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

**CRA 141 of 2019
With
I.A. No. CRAN 1 of 2019 (Old No. CRAN 1089 of 2019)**

**Sambhu Makar @ Sambhu Makarh
Vs.
The State of West Bengal**

Amicus Curiae : Mr. Arkadeb Bhattacharya, Adv.

For the State : Mr. Avishek Sinha

Heard on : 18.05.2022 & 19.05.2022

Judgment On : 19.05.2022

Bibek Chaudhuri, J.

On 28th November, 2016 at about 11 P.M. one Sumita Sahoo, wife of Dharmahari Sahoo was sleeping in her room with her daughter Sipra. At that time the accused namely Sambhu Makar trespassed into the house of Sumita Sahoo and assaulted her with the help of a

knife causing sharp cutting bleeding injury on her abdomen, arm and arm-pit. On being assaulted as such she woke up and saw the accused with blood stained knife in his hand. She raised scream which attracted the brother-in-law of Sumita and other neighbouring people. While the brother-in-law of Sumita was approaching towards her house, he saw the accused fleeing away with a knife in his hand. The accused also uttered that he had finished Sumita.

The brother-in-law of the injured and other local people took her to a primary health centre. The Medical Officer gave initial treatment to the injured and then referred her to East Medinipur District Hospital at Tamluk.

The said brother-in-law of injured Sumita namely Baneshwar Sahoo lodged a written complaint on 29th November, 2016 before the Officer-in-charge, Moyna Police Station. On the basis of which police registered Moyna Police Station Case No. 311 of 2016 under Sections 448/326/307/509 of the Indian Penal Code and took up the case for investigation.

The investigation ended with submission of charge sheet. The trial was conducted by the learned Sessions Judge, Purba Medinipur and on completion of trial the accused/appellant was convicted for the offence punishable under Sections 326/307/448 of the Indian Penal Code. He was sentenced to suffer rigorous imprisonment for five

years with fine and default clause for the offence punishable under Section 307 of the Indian Penal Code. He was further sentenced to suffer rigorous imprisonment for three years with fine and default clause for the offence punishable under Section 326 of the Indian Penal Code and also sentenced to suffer rigorous imprisonment for six months for the offence punishable under Section 448 of the Indian Penal Code.

The convict has challenged the order of conviction and sentence passed by the learned Sessions Judge, Purba Medinipur in Sessions Trial No.2(March), 2017 arising out of Sessions Case No.48(February), 2017.

Learned amicus curiae on behalf of the appellant submits that in order to establish the charge against the accused person, prosecution examined eight witnesses. Amongst them P.W.1 is the de facto complainant. P.W.2 is the scribe of the F.I.R. P.W.3 is the injured lady and P.W.4 is the daughter of the injured Sumita Sahoo. P.W.5 is the husband of the injured. P.W.6 Pabitra Kumar Mondal is the Medical Officer attached to Moyna Block Primary Health Centre who medically treated the victim on the very date of occurrence and gave initial treatment to her. P.W.7 is a seizure witness and P.W.8 is the Investigating Officer of this case. Taking me to the F.I.R. it is submitted by the learned amicus curiae on behalf of the appellant that

the de facto complainant stated in the FIR as well as in course of his evidence that hearing the scream of the injured lady and subsequently by hearing many people assembled at the place of occurrence. Some of them accompanied the injured and the de facto complainant to hospital on the very night of the occurrence. But the de facto complainant did not disclose the names of the said neighbouring persons who assembled at the place of occurrence immediately after the incident. No independent local villager was examined during trial of the case. All the witnesses are close relatives of the injured. The evidence of the husband of the injured namely Dharmahari Sahoo (P.W.5) is of little importance because his evidence is in the nature of hearsay. Therefore, the learned amicus curiae invites the Court to appreciate the evidence of the witnesses in the light of the fact that they are the close relatives of the injured and obviously interested witnesses. It is also mentioned by him taking me to the sketch map prepared by the Investigating Officer that one Amal Sahoo is the nearest neighbour who used to reside at the relevant point of time at the closest proximity of the place of occurrence. Said Amal Sahoo was not examined by the prosecution during trial of the case.

Learned amicus curiae has built up his argument on the issue of material contradictions in the evidence on record. In order to

substantiate his argument he takes me to the formal F.I.R. As per the formal F.I.R., Moyna P.S. Case No.311 of 2016 was recorded on 29th November, 2016 at about 3.45 A.M. From the evidence of the de facto complainant it is ascertained that the F.I.R. was written under his instruction by Hiralal Maiti (P.W.2) in the police station. Thus, if the evidence of P.W.1 is believed, it ought to be held that P.W.2 Hiralal Maiti was present in the police station at the time of writing and submitting the written complaint by the de facto complainant. However, P.W.2 in his evidence stated that he wrote the written complaint in his chamber under the instruction of the de facto complainant. Again, P.W.1 clearly stated in his cross-examination that he came to the P.S. at about 7/7.30 A.M. on 29th November, 2016 and wrote the F.I.R. If this piece of evidence is accepted to be true, the police authority had no occasion to register F.I.R. No.311 of 2016 at 3.45 A.M. on 29th November, 2016. Therefore, the genesis of the prosecution case is shrouded by mystery.

The Learned *Amicus Curiae* next draws my attention to the evidence of P.W. 3. At the outset, it is submitted by him that in cross-examination P.W. 3 admitted that at the relevant point of time she had two daughters, namely Sipra Sahoo and Supriya Sahoo. At the time of incident, her eldest daughter was married and she was staying in her matrimonial home. Therefore, it is obvious that injured

Sumita was sleeping with her younger daughter named Supriya. However, the eldest daughter of injured Sumita was examined as P.W. 4 during trial and she claimed that she was sleeping with her mother on the fateful day of the occurrence when her mother received stab injury on her person. As per the evidence of P.W. 3, Sumita, P.W. 4, Sipra was in her matrimonial home on the date of occurrence. Therefore, there was no occasion for P.W. 4 to sleep in the night of 29th November, 2016 by the side of her mother. She cannot claim herself as an eyewitness of the occurrence. Prosecution has cited her as a witness only to build up a false and concocted case against accused.

Learned *Amicus Curiae* has placed before this Court another contradiction where P.W. 4 claimed that there was altercation between the accused and her mother for about 5/10 minutes then the accused assaulted her mother. On the contrary, injured Sumita stated in her evidence that during her sleep she suddenly failed pain in her abdomen and woke up. She found the accused running away after stabbing her at her abdomen, forearm and armpit. Seeing such bleeding injuries she started screaming. Therefore, before receiving injury P.W. 3 had no altercation with anybody, nobody abused her with filthy language. The assailant trespassed into her house and caused injury as stated by her and while the assailant was leaving the

room the injured woke up out of pain and saw the accused. Thus, if the evidence of P.W. 3 and P.W. 4 are considered side by side it would be difficult for the Court to believe in one of the said two witnesses.

On the same breath, the Learned *Amicus Curiae* submits that the actual eyewitness, namely, Supriya was withheld by the prosecution. Non-examination of Supriya would adversely affect the prosecution case. The Learned Trial Judge failed to consider such material contradictions in the evidence-on-record.

The Learned *Amicus Curiae* next argues on the point of identification of the accused by P.W. 1 and P.W. 3. It is submitted by the Learned *Amicus Curiae* that the alleged incident took place during darkness of night at about 11.00 P.M. The *de facto* complainant stated in his evidence that a night lamp was burning in the room of the *de facto* complainant where the incident took place. However, he did not state such fact in the written complaint. P.W. 4, Sipra Sahoo stated in her evidence that they switch on the light of the room after disappearance of the accused from the place. Therefore, there is no explanation as to how the accused was identified by P.W. 3 and P.W. 4 during darkness of night. It is further submitted by the Learned *Amicus Curiae* that during investigation Police seized one knife on the basis of a statement made by the accused leading to discovery of the fact, being the knife. In this regard, it is submitted by the Learned

Amicus Curiae that recovery of a knife on the basis of a statement of the accused while he is in custody does not automatically lead to a conclusion that he has committed the offence. In support of his contention he refers to a decision of the Hon'ble Supreme Court in the case of ***Mustkeem @ Sirajudeen -Vs.- State of Rajasthan*** reported in **(2011) 11 SCC 724**. In paragraph 25 of the aforesaid report it is held by the Hon'ble Supreme Court:-

"With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution".

It is, therefore, submitted by the Learned *Amicus Curiae* on behalf of the appellant that the genesis of the case was doubtful because the prosecution has failed to prove at what point of time the FIR was registered. Secondly, identification of the accused by the *de facto* complainant is doubtful because during darkness of night, it was not possible for the *de facto* complainant to identify the accused.

Thirdly, presence of P.W. 4, Sipra Sahoo in the room where the alleged incident occurred is absolutely false and false to the knowledge of the prosecution. Fourthly, the real eyewitness, namely, Supriya Sahoo, younger daughter of the injured was withheld by the prosecution. Fifthly, the discovery of material object, in the instant case, knife and its use in the commission of offence by the accused were not linked by reliable and cogent evidence. Sixthly, in view of long standing animosity between the accused and the injured because of the fact that the injured previously implicated him in a case under Sections 376/511 of the Indian Penal Code, false implication of the accused cannot be ruled out.

In view of the above contradictions, it was not safe for the Trial Court to convict the accused for committing offence under Sections 326/307 of the Indian Penal Code.

Learned Public Prosecutor-in-Charge, on the other hand, submits that no criminal trial is free from contradictions. It is obvious that there shall be contradictions, omissions and in some cases even exaggeration in the evidence-on-record. It is the duty of the Court to consider as to whether contradictions in the evidence-on-record are the material contradictions or minor contradictions which can be overlooked while considering the entire evidence-on-record as a whole

to arrive at a decision if the prosecution was able to establish the charge against the accused or not.

The Learned Public Prosecutor-in-Charge submits that the genesis of a case instituted on Police report is the FIR and not the time when the FIR is lodged. It is obvious that if the FIR is lodged at a belated stage a duty casts upon the Court to find out as to whether there is exaggeration leading to false implication of the accused in the FIR story. It is further submitted by the Learned Public Prosecutor-in-Charge that the Learned *Amicus Curiae* does not raise any question as to the occurrence which took place on 28th November, 2016 at 11.00 P.M. From the formal FIR it is found that the FIR was lodged at about 3.45 A.M. on 29th November, 2016. But the *de facto* complainant stated that the scribe came to the Police Station on 29th November, 2016 at about 7.00/7.30 A.M. and then he wrote the written complaint under the instruction of the *de facto* complainant. The scribe, on the other hand, stated in his evidence that he wrote the complaint at his chamber. Whatever may be the time and wherever may be the place where the written complaint was drawn up, it is not in dispute that Moyna Police Station Case No. 311/2016 was lodged on 29th November, 2016 without unnecessary delay on the basis of a written complaint signed by the *de facto* complainant.

It is further submitted by the Learned Public Prosecutor-in-Charge that the injured received injury on 28th November, 2016 at about 11.00 P.M. She was examined by the Medical Officer (P.W. 6) on 29th November, 2016 at about 1.00 A.M., i.e., she was medically treated within two hours of the incident. The victim stated the name of the accused as her assailant before the Medical Officer. This should be treated as the earliest version of none other than the injured before the Medical Officer who is an independent and disinterested witness.

The Learned Public Prosecutor-in-Charge next submits that even if the evidence of P.W. 4 is left aside from consideration, there is no reason to disbelieve the evidence of injured Sumita Sahoo. From the evidence-on-record it is ascertained that there was obvious motive of the accused to commit such offence because the injured previously instituted a case against the accused under the charge of Sections 376/511 of the Indian Penal Code. On the date of occurrence, the said case was pending. The *de facto* complainant as well as injured witness stated that the accused used to put pressure upon the injured to withdraw the said case. However, the injured did not withdraw the said case. It may be the possible motive to cause severe injury to the accused. It is, therefore, submitted by the Learned Public Prosecutor-in-Charge that even if this Court is hesitant to consider direct

evidence against the accused the circumstantial evidence would lead the Court to hold that the accused had committed the offence and the Learned Trial Judge rightly convicted the accused.

In ***Sharad Birdhi Chand Sarda –Vs.- State of Maharashtra*** reported in **(1984) 4 SCC 116** the Hon'ble Supreme Court laid down the salient principle regarding appreciation of circumstantial evidence. They are :-

- “(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely may be fully established;
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (iii) The circumstances should be of a conclusive nature and pendency;
- (iv) They should exclude every possible hypothesis except the one to be proved;
- (v) There must be a chain of evidence so complete as not to leave any reasonable doubt for the conclusion consistent with the innocence of the accused and must

show that in all human probability the act must have been done by the accused.

Now, it is the duty of this Court to assess the evidence-on-record on the basis of the above principles laid down by the Apex Court to come to its independent finding as to the fate of the charge framed against the appellant.

On careful perusal of the entire evidence on record I find the following admitted factual circumstances which were not denied by the accused during cross-examination of the witnesses on behalf of the prosecution or in course of his examination under Section 313 of the Code of Criminal Procedure. They are :-

- 1) the accused was previously known to the family members of the injured and even to the husband and brother-in-law of the injured Sumita.
- 2) Sumita lodged a complaint under Section 376/511 of the IPC against the accused previously before the police and a case was registered against the accused. Charge-sheet was submitted and on the date of commission of offence the trial of the said case was continued.
- 3) Sumita Sahoo received sharp cutting penetrating injury on her abdomen, arm-pit and forearm on 29th November, 2016;

- 4) Within 2 hours of receiving such injury, the injured was medically examined at Moyna Block Primary Health Centre. She stated the name of the accused as her assailant before the Doctor at the time of her medical examination. The said statement of the injured before the Medical Officer within 2 hours of the incident was not even challenged by the defence in course of cross-examination of P.W.6 and P.W.3.
- 5) The FIR of this case was lodged without any unnecessary delay. Even if it is held that the FIR was not registered at 03:45 am on 29th November, 2016, there is no doubt that the FIR was registered on 29th November, 2016. The appellant is the FIR named accused.
- 6) Leading to a discovery statement made by the accused while he was under the custody of police, a knife was seized by the Investigating Officer from the bank of the pond situated beside the house of the injured.
- 7) During investigation police seized a wrapper owned by the accused from the place of occurrence. It is not even suggested to the witnesses on behalf of the prosecution that the wrapper does not belong to the accused.

Under such circumstances, let me now assess the value of the Contradictions pointed out by the learned *Amicus Curiae* to come

to a decision as to whether the said contradictions are of such nature that would lead this Court to alter the order of conviction and sentence passed by this Court.

The learned *Amicus Curiae* submits that the prosecution examined P.W.4, Sipra Sahoo as an eye witness but from the evidence of P.W.3, it is clear that Sipra Sahoo was not present at her paternal home on the date and time of occurrence and she was at her maternal home. Therefore, the prosecution created a false evidence framing P.W.4 as an eyewitness. I am in agreement with the learned *Amicus Curiae* from the evidence of P.W.3 who is the mother of P.W.4 and the injured of this case, Sipra was not sleeping with her mother on the fateful date of occurrence. She was also not present at the place of occurrence. Therefore, a question naturally arises as to whether the principle "*falsus in uno, falsus in omnibus*" is applicable in criminal trial or not. The answer to this question is always in the negative. There may be some false evidence in record. It is the duty of the Court to separate the chaff from the grain. It is the honours duty of the Court to find out the truth from the ring of falsehood and if it is possible for the Court to find out the truth from falsehood, the ring of falsehood can be considered as immaterial and minor contradictions.

Keeping aside the evidence of all other witnesses, if the evidence of P.W.3 is considered, it would be found that she woke up from her sleeping on the date and time of occurrence sensing pain in her abdomen. She then found that she received bleeding injury in her abdomen, arm-pit and forearm. Her wearing apparels were stained with blood. She also found the accused standing inside the room with a knife in his hand. The defence did not put any suggestion to the effect that the victim was assaulted by some persons other than the accused. The learned *Amicus Curiae* has raised a question as to how the injured could ascertain the identity of the accused. The de-facto complainant stated in her evidence that a night lamp was burning in the room of the injured when she was sleeping with her daughter. There is obvious contradiction as to whether the night lamp was burning before the incident or immediately after the incident, it was switched on. Whatever may be the time, it is not in dispute that the P.W.3 saw the accused with a knife in his hand in her room immediately after she received her injury and there was no other person in her room except her younger daughter who was sleeping with P.W.3. P.W.1 also stated in his evidence that while he was coming to the house of his sister-in-law, he found the accused fleeing away brandishing a knife saying that the injured was finished. Coupled with the above evidence, if discovery statement of the

accused and recovery of the knife are taken into consideration together, there would be no other conclusion but to hold that the appellant had assaulted P.W.3 on 28th November, 2016. With the above evidence, another evidence may be tagged that a wrapper of the accused was recovered from the room of the injured and was seized by police. Thus, if the above circumstances are taken together, this would create a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and the said circumstances, would establish that in all human probability the act must have been done by the accused.

In view of the above discussion I hold that learned Trial Judge rightly came to the conclusion that on 28th November, 2016 at about 11 am, the accused trespassed into the room of the injured, assaulted her by a knife in her abdomen, forearm and arm-pit causing penetrating stab injury.

Now comes to a question as to whether the act which is proved to have been committed by the accused amounts to an offence under Section 326/320 of the Indian Penal Code. In order to prove charge under Section 326 of the Indian Penal Code, prosecution relied upon the injury report of P.W.3. P.W.6, the Medical Officer found:-

- (1) sharp cut wound in abdomen near umbilicus measuring about 1 inch in length.
- (2) Sharp cut wound on the right axilla measuring 7" in length and ½" in depth.
- (3) Sharp cut wound on the right first web of finger measuring 1 and ½" in length.

It is found from the evidence that the injured was referred to Purba Medinipur District Hospital at Tamluk and she was admitted to the hospital for about 18/20 days. The Investigating Officer did not find it necessary to collect the Bed Head Ticket and Discharge Certificate of P.W.3 to prove the extent of her hospitalization during trial of the case.

Section 326 is the penal provision for voluntarily causing grievous hurt by dangerous weapons or means. It is needless to say that the injured received stabbing injury on her person. It was caused by a sharp cutting weapon, i.e. a knife. Section 320 defines grievous hurt and in the 8th Clause of Section 320, it is stated "Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits." That the injured was hospitalized for 20 days in severe bodily pain or that due to hospitalization she was unable to follow her ordinary pursuits, has not proved by the prosecution during

trial of the case producing the medical evidence on this point. Therefore, this Court is of the view that the appellant ought to have been convicted under Section 324 of the Indian Penal Code.

In order to bring home the charge under Section 307 of the Indian Penal Code, the prosecution is under obligation to prove that the act must be done with such intention or knowledge or done under such circumstances, that if death be caused by the act, the offender would have been held guilty of murder. In most of the cases, there cannot be any direct evidence with regard to the intention of the accused. The intention, however, has to be reduced or inferred from the following facts:-

- a) nature of weapon used;
- b) the place where injuries were inflicted ;
- c) nature of injuries caused;
- d) Opportunity available to the accused.

In the instant case, the nature of injury shows that the victim received injury on her abdomen below umbilicus. Secondly, the injury was caused by a sharp cut penetrative weapon. Therefore, considering the place where the injuries were inflicted and nature of the weapon used, this Court is of the view that the learned Trial Judge did not commit any error in convicting the accused under Section 307

of the IPC. Therefore, the accused is convicted under Sections 448/324/307 of the IPC.

Now comes the question of sentence.

It is pointed out by the learned *Amicus Curiae* that on this date the accused has already suffered sentence for about 3 years 3 months and 26 days. During pre-trial the accused was in custody for 1 year 3 months and 15 days. Thus, the accused was in incarceration for 4 years 7 months and 5 days.

The learned Trial Judge passed a sentence against the accused for rigorous imprisonment of 5 years with fine and default clause for the offence punishable under Section 307 IPC.

This Court is not unmindful to note that the accused has been facing trial in the Trial Court as well as in this Court since 2016. More than 6 years have elapsed. Therefore, with regard to the sentence, this Court is inclined to take a lenient view.

The sentence passed against the accused is altered in the following manner:- for the offence under Section 448 of the IPC, the convict is sentenced to rigorous imprisonment for one year and for the offence 307 IPC, the convict is sentenced to rigorous imprisonment of 4 years with fine of Rs.5,000/-, in default to suffer further imprisonment of 3 months.

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

The period of detention of the accused in custody shall be set off against the period of sentence.

Let a copy of this judgment be sent to the Court of the learned Chief Judicial Magistrate at Tamluk for information and necessary action.

Let a copy of this judgment along with the lower court record be sent to the Court of the learned Sessions Judge, Purba Medinipur in his information along with lower court record.

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

The instant appeal and the connected application are accordingly disposed of on contest with the above order.

(Bibek Chaudhuri, J.).

