

Form J(2)

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

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

CRA 147 of 2019

**Sambhu Bhowmik @ Shambhu Bhowmick & Ors.
Vs.
State of West Bengal**

**For the Appellants : Mr. Sourav Chatterjee
Mr. Sanat Kumar Das
Mr. Sujan Chatterjee**

**For the State : Mr. Prasun Kumar Dutta, Ld. APP
Md. Kutubuddin
Mr. Santanu Deb Roy**

Heard on : 02.03.2022

Judgment on : 02.03.2022

Bibek Chaudhuri, J.

Procedural irregularity not only took away a judicial forum from the appellants to agitate their grievances but patent illegality in the judgment and order of conviction and sentence for the offence punishable under Section 323/325 of the Indian Penal Code in Sessions Case No.44/15 corresponding to Sessions Trial No.07/15

caused miscarriage of justice and palpable harassment of the appellants. The appellants might not have pursued the instant appeal had the judgment been not passed by the learned Additional Sessions Judge, 5th Court, Malda.

Upon a written complaint submitted on 25th October, 2012 alleging an incident of assault upon the de facto complainant and his friends by the FIR convicted the accused persons /appellants, police submitted charge sheet under Sections 341/323/325/307/379/427/506/34 of the Indian Penal Code. After the case being committed to the 5th Court of the learned Additional Sessions Judge at Malda he framed charge against the accused persons under Sections 341/323/325/307/379/427/506/34 of the Indian Penal Code. When the charge was framed in respect of magistrate triable offences and no charge was framed under Section 307 of the Indian Penal Code on perusal of the papers and documents produced before the Court below, the right cause of action ought to have been to send the case record to the Court of the learned Magistrate for trial. But the learned Additional Sessions Judge, 5th Court, Malda continued trial of the case assigning a strange reason that another charge under Section 307 of the Indian Penal Code ought to have been framed by his predecessor-in-office. It is surprising to note that even after such objective finding, learned Judge in the Court

below did not frame any charge under Section 307 of the Indian Penal Code. Though trial of a Magistrate triable case by a Court of Sessions is not an illegality, it is highly irregular because the appellant lost a forum for appeal before the Court of Sessions and they had to come before this Court in appeal.

On conclusion of trial, the learned trial Judge held the accused persons guilty for committing offence under Sections 323 and 325 of the Indian Penal Code.

Mr. Sourav Chatterjee, learned advocate for the appellants has assailed the impugned judgment and order of conviction only on two but very pertinent grounds.

First, he submits that the incident took place on 23rd October, 2012 it was a Durga Puja day. The prosecution case is that the de facto complainant and his three friends were returning to their house after visiting pandal at about 10.30 P.M. On the way he accidentally collided his motorcycle against a barricade set up by police authority in front of a puja pandal. The complainant and the pillion rider fell down on the ground and a portion of the barricade was broken. Over the said issue the accused persons demanded a sum of Rs.1,000/- from them. On their refusal altercations started about the complainant and his friends on one hand and the accused persons in other group. The accused persons physically assaulted the de facto

complainant and his friend Goutam Das with the help of iron rod, bamboo and pieces of wood. Both of them sustained injuries. Mr. Chatterjee after referring to the case of the prosecution draws my attention to the injury report (Ext.2 and 3) prepared by P.W.9 Dr. Ramen Roy immediately after the incident. P.W.9 recorded the history of the injury to the effect that the injured persons were assaulted by some members of general public. Thus, it is clear that the injured persons would not state the names of their assailants before the doctor who medically examined them immediately after the occurrence. In other words, the injured persons got their initial scope to state the names of the accused persons before the doctor but they did not. On the other hand, the FIR was lodged after a lapse of two days. In the FIR the de facto complainant (PW.1) narrated the names of the accused persons. Mr. Chatterjee has raised a question as to whether the FIR story is subsequently concocted and manufactured or not. There is no reply in the body of the impugned judgment. Secondly, the learned trial Judge held the accused persons guilty for committing offence under Section 325 of the Indian Penal Code. On perusal of the bed head ticket of the injured Goutam Das regarding treatment of Malda District Hospital. The said bed head ticket was not exhibited in the trial Court. Only one discharge certificate was exhibited as Ext.-6. The learned Judge compared the bed head ticket

with the discharge certificate and found that a surgery was conducted upon the injured Goutam Das and he was given post operational treatment. At the time of surgery he was also given blood from outside.

It is submitted by Mr. Chatterjee that even assuming that injured Goutam Das was operated and blood was transfused to him and he was medically treated for some days, those conditions do not come within the definition of Section 320 of the Indian Penal Code. Therefore, the learned trial Judge committed error in convicting the accused persons under Section 325 of the Indian Penal Code.

Mr. Prasun Kumar Dutta, learned advocate for the respondent has supported the findings of the learned Court below. It is further submitted by him that an irregular judgment cannot be held to be illegal if the finding of the learned Judge is held to be correct.

During trial prosecution examined 11 witnesses. Amongst them P.W.11 is the Investigating Officer and P.W.9 is the Medical Officer. All other witnesses are the de facto complainant, his friends and co-villagers. According to the de facto complainant on 23rd October, 2012 at about 10.30 P.M. he and his friends namely Manab Singh (P.W.4), Goutam Das (P.W.3) and Tanmay Mondal (P.W.5) were returning their respective homes after visiting Durga Puja riding motorcycles. The motorcycle of the de facto complainant accidentally

dashed a barricade set up by the police in front of a Durga Puja pandal at a place called Seven Mile. The de facto complainant and his friends fell down on the ground. Then the accused persons came there and assaulted them with bricks, bamboo and pieces of wood. If the evidence of P.W.1 is believed, it would have to be held that P.W.1 and all his friends were assaulted by the appellants. If P.W.4 Manab Singh did not support the prosecution case. P.W.5 Tanmay Mondal deposed that he was not even present at the spot and he heard that altercation took place between the de facto complainant and his friends and the accused persons. P.W.1 did not take the name of Manoj Singha (P.W.2) as one of the said friends who went to see Durga Puja with them on 23rd October, 2012. P.W.6 Bapi Saha, P.W.7 Biswajit Singha and P.W.8 Milan Sarkar are the local residents. They did not support the prosecution case.

On careful appreciation of the evidence on record and the FIR as well as the injury report, this Court finds glaring contradictions in the evidence of the witnesses on behalf of the prosecution. It is also pertinent to mention that over self-same issue a counter case is also pending. Under such circumstances, the finding of the learned trial Judge holding the accused persons guilty for committing offence under Section 323 of the Indian Penal Code cannot stand and is liable to be set aside.

Section 325 of the Indian Penal Code is the penal provision for voluntarily causing grievous hurt. Section 320 of the Indian Penal Code defines grievous hurt in the following words:-

"320. Grievous hurt.- The following kinds of hurt only are designated as "grievous":-

First.- Emasculation.

Secondly.- Permanent privation of the sight of either eye.

Thirdly.- Permanent privation of the hearing of either ear,

Fourthly.- Privation of any member or joint.

Fifthly.- Destruction or permanent impairing of the powers of any member or joint.

Sixthly.- Permanent disfiguration of the head or face.

Seventhly.- Fracture or dislocation of a bone or tooth.

Eighthly.- 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."

On perusal of the medical injury report as well as the evidence of P.W.9 I do not find any ingredient of Section 320 of the Indian Penal Code and the nature of injury sustained by the injured Goutam Das does not fall within the VIII clauses of Section 320 of the Indian Penal Code defining grievous hurt. Thus, the learned Judge in the

trial Court is also wrong in holding the accused guilty for committing offence under Section 325 of the Indian Penal Code.

For the reasons stated above the judgment and order of conviction and sentence is set aside. The instant appeal is **allowed** on contest.

The appellants are acquitted from the charge and discharged from their respective bail bonds.

Lower Court record be sent down to the learned Court below.

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

(Bibek Chaudhuri, J.)