

Form J(2)

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

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

C.R.A. 150 of 2019

**Sri Tarun Kumar Ghosh
Vs.
State of West Bengal & Anr.**

**For the Appellant : Mr. Prabir Majumder
Mr. Nanigopal Chakraborty
Mr. Snehansu Majumder**

**For the State : Mr. Narayan Prasad Agarwal
Ms. Subhasree Patel**

Heard on : 09.03.2022 & 11.03.2022

Judgment on : 11.03.2022

Bibek Chaudhuri, J.

Mogra P.S. Case No.33 of 2007 dated 22nd February, 2007 under Sections 341/323/448/147/34 of the Indian Penal Code was tried by the learned Additional Sessions Judge, Fast Track, 1st Court, Hooghly because of the fact that the counter case filed by one of the accused persons of the instant case was registered under Section 304 of the Indian Penal Code and both the said two cases on the self-

same incident were heard together by the learned Additional Sessions Judge. The counter case under Section 304 was registered as Mogra P.S. Case No.33 of 2007. The said case was registered before the learned Additional Sessions Judge, Fast Track, 1st Court as Sessions Trial No. 19 of 2011. The accused in Sessions Trial No.19 of 2011 was acquitted from the charge under Section 304 of the Indian Penal Code by the Court below. The State has not preferred any appeal.

In respect of Mogra P.S. Case No.33 of 2007 corresponding to G.R. Case No.181 of 2007, the Court below convicted the accused Tarun Ghosh for committing offence under Section 323 of the Indian Penal Code and passed an order of sentence of simple imprisonment for three months with fine of Rs.1,000/-, in default, to suffer further simple imprisonment for another ten days. The said order of conviction and sentence is under challenge in the instant appeal.

Mogra P.S. Case No.33 of 2007 was registered on the basis of a written complaint submitted by one Gurupada Ghosh on 22nd February, 2007 stating, inter alia, that on the self-same day at about 7.30 A.M. the appellant along with his father Ramendra Narayan Ghosh, brother Tapan Ghosh, uncles Arup Ghosh, Jayanta Ghosh, Swapna Ghosh, wife of Ramendra Narayan Ghosh, Kalpana Ghosh, wife of Tarun Ghosh, Soma Ghosh, wife of Arup Ghosh, Sumita Ghosh, wife of late Adhir Chandra Ghosh along with some other

unknown miscreants criminally trespassed into the house of the de facto complainant and assaulted him physically. They also assaulted his wife and daughter. As a result of assault, the de facto complainant sustained bleeding injury on his head. The de facto complainant along with his wife and daughter were medically treated at Mogra Primary Health Centre.

It is pertinent to note at the outset that during trial Arup Ghosh and Swapna Ghosh, two F.I.R. named accused persons breathed their last and the case abated against them. The learned trial Judge after trial held the accused Tapan Kumar Ghosh guilty for committing offence under Section 323 of the Indian Penal Code and convicted and sentenced him accordingly.

It is submitted by Mr. Prabir Majumder, learned advocate on behalf of the appellant that from the evidence on record it would transpire that there was a long standing dispute between the de facto complainant and the accused persons over ancestral properties. The de facto complainant in his evidence as P.W.1 stated on oath that on 22nd February, 2007 at about 7.30 A.M. the F.I.R. named accused persons being armed with various weapons trespassed into his house in order to deprive him from the share of their joint property. They started to abuse them in filthy language. Accused Tarun Ghosh and Jayanta Ghosh hit him by fists and blows and he sustained bleeding

injuries on his left eye by a blow inflicted by accused Tarun Ghosh. Jayanta Ghosh and Tarun Ghosh then caught hold of his hands and Arup Ghosh assaulted him on his head with the help of "shovel" causing bleeding injury. The de facto complainant and his family members raised hue and cry which attracted local people who assembled near his house and seeing them the accused persons left the place. They also openly declared that they would dispossess him from the joint property. P.W.2 Manjusree Ghosh is the wife of the de facto complainant. P.W.3 Debolina Ghosh is their daughter. The Medical Officer who examined the de facto complainant on 22nd February, 2007 found a cut injury over the scalp at left parital area measuring 1 and ½ inch long with active bleeding. 2 centimeter long horizontal cut injury below left eye of the de facto complainant. The wound on the head of the de facto complainant was stitched. In respect Manjushree Ghosh the Medical Officer did not find any external injury except swelling over the left side of her forehead. The Medical Officer also did not find any external mark of injury on the person of Debolina Ghosh. The medical examination report prepared by P.W.4 was marked as exhibit-2. P.W.5 Swarup Kumar Josh is the Investigating Officer of this case.

Mr. Majumder draws my attention to the cross-examination of P.W.5. It is found from the cross-examination of the Investigating

Officer (P.W.5) of this case that on 22nd July, 2007 Swapna Ghosh died at Chinsurah District Hospital after being injured by the complainant of this case and others. According to Mr. Majumder from the existence of the counter case it reveals that there was a free fighting by and between the parties. The wife of the accused No.1 was seriously injured and subsequently she succumbed to her injuries at Chinsurah District Hospital on the date of occurrence itself. It is also pointed out by him that from the evidence of P.W.1 who is the injured of G.R. Case No.181 of 2007, it is revealed that accused Jayanta and Tarun assaulted him by fists and blows. Then accused Arup Ghosh, since deceased, assaulted him on his head with the help of a 'shovel'. The witness did not even take the name of the appellant Tapan Kumar Ghosh in course of his deposition. Therefore, the learned trial Judge committed a gross error in convicting the appellant under Section 323 of the Indian Penal Code.

It is also urged by Mr. Majumder that the prosecution case as narrated in the written complaint is that the accused persons criminally trespassed into the house of the de facto complainant and assaulted them. However, on conclusion of trial the learned trial Judge recorded an order of acquittal in respect of the charge under Section 448 of the Indian Penal Code against all the accused persons. The State /respondent has not filed any appeal against the said

judgment of acquittal against the accused persons. Therefore, the order of acquittal of the accused persons from the charge under Section 448 of the Indian Penal Code stands. When the accused persons were acquitted from the charge under Section 448 of the Indian Penal Code, how the Court of trial could convict the appellant under the charge of Section 323 of the Indian Penal Code. In support of his argument Mr. Majumder refers to a decision of this Court in the case of **Gour Chandra Pandit versus State of West Bengal** reported in **1984 CRI. L. J. 203**. The Division Bench of this Court in the above mentioned decision observed as hereunder:-

"There is yet another aspect of the matter, viz., that the accused-petitioner though specifically charged under S.447 I.P.C. was acquitted of that charge. If that be so it necessarily follows that the allegation that he had trespassed into the house of the complainant with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property is disbelieved. And if that be so, then again the conviction of the petitioner under S.325 of the I.P.C. on the allegations made in the petition of complaint becomes somewhat inconsistent and conflicting. The matter would have been different had not the accused been specifically charged under S.447. But when he was so charged and acquitted of

the same, the finding of guilt under S.325 on the same facts cannot be sustained. Therefore, in our view, the order of conviction cannot be supported."

Learned P.P.-in-charge has supported the impugned judgment submitting, inter alia, that the learned trial Judge passed by the order of conviction on proper appreciation of evidence and there is no ground to interfere with the judgment passed by the Court below.

Having heard the learned advocates and on careful perusal of the materials on record, this Court finds that indisputably there was a long standing dispute between the parties over their joint property. It is also on record that over the self-same incident one of the accused namely Swapna Ghosh died and a case under Section 304 of the Indian Penal Code was registered against the de facto complainant and others. However, there is no evidence on record to ascertain as to who was the aggressor. If the incident is accepted to be true, it might so happen that the de facto complainant suffered injury on his head and left eye when the accused persons tried to prevent the de facto complainant from committing culpable homicide not amounting to murder. From the evidence on record it is also asserted that the de facto complainant made specific allegation against Jayanta Ghosh, Tarun Ghosh and Arup Ghosh as his assailants. When Jayanta Ghosh was acquitted, there is no reason subscribed by the learned Court

below as to why Tarun Ghosh was convicted for committing offence under Section 323 of the Indian Penal Code. Last but not the least, this Court is in agreement with the observation made by the Division Bench of this Court in the case of **Gour Chandra Pandit** (supra). The allegation of the de facto complainant is that the accused persons criminally trespassed into his house and assaulted him, his wife and daughter. Thus, the place of occurrence is inside the house of the de facto complainant. When the accused persons were acquitted from the charge under Section 448 of the Indian Penal Code, the appellant cannot be held guilty for committing offence under Section 323 of the Indian Penal Code.

As a result the instant appeal is allowed on contest. The judgment and order of conviction and sentence is set aside.

The appellant is acquitted from the charge and discharged from his bail bond.

Let a copy of this judgment be sent down to the Court below along with lower Court record.

(Bibek Chaudhuri, J.)