

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 251 of 1996

Kanai Tudu

Vs.

The State of West Bengal.

For the Appellant : Mr. Prabir Kumar Mitra,
Ms. Ariba Shahab.

For the State : Ms. Rita Dutta.

Heard on : 29.06.2022

Judgment on : 11.08.2022

Shampa Dutt (Paul), J.:

The appeal has been preferred against the judgment and order dated 12.08.1996 passed by the Additional Sessions Judge, 6th Court, Midnapore in Sessions Trial Case no. VIII/1992 convicting the appellant for commission of offence punishable under Section 326 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for two years and to pay a fine of Rs. 500 in default to suffer rigorous imprisonment for one month more.

On 05.10.1989 when Fulmoni Hembram was sleeping with her children in her house and her husband was away for work at village Basantapur, accused Kanai Tudu, on that day at about 1 a.m., along with accused Dhadra Tudu, Kanka Tudu and Hati Hansda entered into the house of Fulmoni and caught hold of her and when she raised alarm, the accused persons tied her mouth with cloth and dragged her to the bank of Gotegeria pukur and assaulted her and left there. Fulmoni again raised alarm. At that time the accused persons again came and accused Kanai Tudu assaulted her on her left leg just below the knee with a small axe, as a result of which she received fracture injury on her leg. Fulmoni also received injury on her left hand, right leg and swelling injury on different parts of her body. One Madan Raut went to attend nature's call and found Fulmoni Hembram in injured condition there. Fulmoni narrated the incident to him and thereafter to her brother (PW 2) (complainant) Bhadra Murmu. Thereafter the villagers assembled and Fulmoni was taken to hospital for treatment and FIR was lodged with Keshpur P.S. Accordingly, Keshpur P.S. case no. 60/89 dated 05.10.1989 was started

against the accused persons. The case was investigated and chargesheet was submitted against the accused persons. Charge was framed under Sections 448/34, 354/34, 307/34, 326/34, 341/34, 452/34 and 376/34 of the Indian Penal Code. The content of charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

In course of trial, prosecution examined nine witnesses and exhibited 2 documents marked Exhibit 1 and 2. Duplicate bed head ticket was marked 'X' for identification but not proved.

The appellant's defence was of innocence and false implication.

On conclusion of trial the Trial Judge by the impugned judgment and order dated 12.08.1996 convicted and sentenced the sole appellant Kanai Tudu under Section 326 IPC. The appellant was found 'not guilty' in respect of charge under Sections 448/34, 354/34, 307/34, 341/34, 452/34 and 376/34 IPC and was acquitted of the said charges.

The other three accused persons were found 'not guilty' of all charges and acquitted accordingly.

Appellant/defence case

Mr. Prabir Kumar Mitra, Ld. Advocate for the appellant submits that the judgment and order of conviction and sentence is bad in law and against the evidence on record and should be set aside. It is submitted that there was a long standing political rivalry between the victim and the appellant and the

motive of the victim was to implicate the appellant in a false case. The total conviction of the appellant is based only on the victim's statement and has not been supported by a single witness. Nor was any documents produced in support of the prosecution case. There is absolutely no medical papers to substantiate the charge under Section 326/34 IPC as held by the Ld. Trial Judge, inspite of the fact that PW 7, Dr. K. Bose stated that he is unable to say anything in the case unless the original papers are shown to him.

The Trial Court convicted the accused, inspite of there being absolutely no independent oral evidence nor any supporting documentary evidence and as such there has been a severe miscarriage of justice and accordingly the appellant is entitled to acquittal in the present case.

State/Prosecution Case

Ms. Rita Dutta, Ld. Additional Public Prosecutor, submits that the prosecution case before the Trial Court was that the victim was admitted in the hospital for four months and was senseless for four to five days and it has been proved by the witnesses that they found Fulmoni on the bank of the tank in injured condition having received fracture injury on her left leg just below the knee due to assault by the appellant Kanai Tudu with a small axe. Further case of the prosecution is that the evidence of the complainant has been corroborated by other witnesses and also the Doctor and as such the prosecution had been able to prove the charge against the appellant before the Trial Court beyond all reasonable doubt and that the Trial Court rightly

convicted and sentenced the appellant. As such the appeal is liable to be dismissed.

Evidence on record:-

Oral evidence:-

Prosecution witness no. 1 Bharati Mandi, has deposed that on the date of incident she along with others had found the victim complainant lying unconscious near Srimanta Danga Gotegeria Pukur. A village Doctor was called and victim was taken to Midnapore Sadar Hospital and this witness had accompanied her.

Prosecution witness no. 2 (hostile) Bhadra Murmu is the brother of the victim. This witness heard about his sister's incident from the victim's son and went to the place of occurrence where party leaders had assembled. They had arranged for the treatment of the victim. **He is the complainant in this case.** This witness in his examination in chief, being the brother of the victim and the complainant in this case has categorically stated that the contents of the FIR (written complaint) was not read over and explained to him but he put his L.T.I. and he does not know the name of the person who wrote this FIR (written complaint). On being cross examined by the prosecution this witness has stated that one Lakshman Mondal a co-villager of the victim might have

written the FIR and then stated, the FIR was written as per his instruction and the same was read over and explained to him (contradictory).

It is in situations like this that an accused is entitled to get the benefit of doubt where the complainant himself is in two minds about the statements before the court. An accused under the criminal law is held to be innocent until proved guilty and thereby an accused is entitled to get the benefit of doubt in situations where the evidence is not conclusive and there is indecisiveness in the witness while deposing before the court. Again on being cross examined this witness has stated that the officer-in-charge (O.C.) told them how to write the FIR and that one of the party members wrote the FIR as per instruction of the O.C. and that he does not know what is written in the FIR. This witness stated that he is illiterate and that he did not state to the O.C. that the victim's son informed him that his mother was raped and injured. This witness seems to be fluctuating during the total evidence given by him before the court.

Prosecution witness no. 3 Fulmoni Hembram is the victim. This witness on oath has reiterated the entire prosecution case wherein she stated that accused Dhadra, Kanka and Hati raped her (all acquitted) but the appellant herein (Kanai) did not rape her. This witness has stated that she was assaulted and raped and that she showed all her injuries to the Doctor at the time of treatment. But it is seen that there was absolutely no medical documents produced/proved before the Trial Court to substantiate the statement of the victim as stated in the evidence before the Trial Court.

Prosecution witness no. 4 Mantu Hembram is the husband of the victim Fulmoni. At the time of the incident he was working at Basantpur, Debra. He was informed by Bijoy Hembram about the incident in this case and he came to know about the total incident from the victim Fulmoni after he rushed to the Midnapore Hospital where the victim was being treated and he has denied having any political rivalry with the accused persons.

Prosecution witness no. 5 Lakshman Mondal has deposed that he is the scribe of the written compliant and proved the same in court (Exhibit 1 and 1/1).

Prosecution witness no. 6 Nemai Das, does not know anything about the incident in this case.

Prosecution witness no. 7 is Dr. Kingshuk Bose. This witness does not know if he wrote any letter to O.C. Kotwali P.S. on 05.10.1989 when he was attached as Medical Officer at Midnapore Sadar Hospital. On seeing a duplicate copy of a letter signed by the Superintendent of Hospital Dr. Motilal Deb dated 26.02.1990 he stated that he admitted the victim in the hospital on 05.10.1989 and he has also stated that from the letter he found that the patient had received fracture on her leg (marked 'X' for identification).

It is to be noted that the said copy of letter has not been proved before the Court nor marked Exhibit during trial and as such the evidentially value of such document is to be considered.

Prosecution witness no. 8 Sudarshan Routh (hostile). He had seen the victim lying in senseless condition with cut injury on her leg but he knows nothing else about the case.

Prosecution witness no. 9 S.I. B. Moitra is the Investigating Officer in this case. He investigated the case and has stated on oath that he collected the bed head ticket of the victim (marked 'X' for identification), but not proved nor marked Exhibit. On completion of investigation he submitted chargesheet. This witness has categorically stated that inspite of several attempts by him, he could not collect the injury report of the victim.

Documentary evidence

Exhibit 1- written complaint.

Exhibit 1/1- signature of the scribe (PW 5) on the written complaint.

Exhibit 1/2- endorsement of the written complaint.

Exhibit 2- Formal FIR.

Document **marked 'X'** for identification is a duplicate bed head ticket.

Analysis of evidence

The appellant alone has been convicted for offence punishable under Section 326 of the Indian Penal Code.

Section 326 of the Indian Penal Code lays down as follows:-

“Section 326:- Voluntarily causing grievous hurt by dangerous weapons or means.- Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

Ingredients of offence:- The essential ingredients of the offence under Section 326 are as follows:

- (1) Accused caused grievous hurt;**
- (2) He caused it voluntarily;**
- (3) He caused it by any of the following means, i.e.**
 - (a) by any instrument of shooting, stabbing or cutting;**
 - (b) by any instrument, if used as a weapon of offence likely to cause death;**
 - (c) by fire or heated substance;**

- (d) by poisonous or corrosive substance;**
- (e) by explosive substance;**
- (f) by any substance deleterious to the human body to inhale or swallow;**
- (g) by means of any animal.**

Section 320 of Indian Penal Code, describes 'grievous hurt'.

Section 320 of the Indian Penal Code lays down as follows:-

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.

Whether it is a case of simple hurt or grievous hurt is a question of judicial determination based on evidence according to the facts and circumstance of each case.

In State of Uttarakhand Vs. Darshan Singh, 2019 SCC online SC 1431.

“It was held that the law on contradiction between medical evidence and ocular evidence has been summed up that though the ocular testimony of a witness has greater evidentiary value vis a vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true the ocular evidence may be disbelieved.”

In 2003 SCC Online Punjab & Haryana 224, State of Punjab Vs. Naseeb Singh: The Supreme Court held in “Para 24”.

“In view of the settled principle of law referred to above and the conclusion thereof, we hold that it is not possible to hold that absence of x-ray film during the course of trial or where x-ray of the injured is not even done in all cases would result in acquittal of the accused under Section 326 IPC. It will depend on the facts and circumstances of each case, where eye witness version is duly supported by medical evidence, particularly by an expert medical evidence which clearly

shows that bone had fractured and it was visible from naked eye, the court would not be justified in granting acquittal to the accused for the offence under Section 326 of the IPC.”

The Supreme Court in Criminal Appeal No(s). 1039 of 2021 (arising out of SLP (Criminal) No(s). 7001 of 2021) (Diary No. 14956/2021) (Bhagwan Narayan Gaikwad Vs. The State of Maharashtra and Ors.) held:-

“The Court, while considering an appeal on the ground of amicable settlement between the parties in a case of conviction under Section 326 of the Indian Penal Code considered the detailed evidence adduced by the Doctor (PW 8) in the said case. The said witness categorically and in detail stated about the injury sustained by the victim. The court also considered the medical certificate (Exhibit 59) which laid down all the injuries clearly.”

In the present case though the complainant (PW 2) being the brother of the victim was declared hostile as he contradicted the contents of the written complaint, but PW 5 the scribe of the FIR has proved the same in court (marked Exhibit 1 series).

Prosecution witness no. 1 is an independent witness who had seen the victim lying unconscious near the place of occurrence with bleeding injuries and cut mark in one of the legs.

Prosecution witness no. 3 is the victim. She has stated that the appellant Kanai Tudu assaulted her with an axe on her left leg just below her

knee and she lost her senses and regained her sense after 5 to 6 days at Midnapore Sadar Hospital and she remained in hospital for 4 months.

Prosecution witness no. 8 an independent witness though declared hostile by the prosecution noticed a cut injury on the leg of the victim.

Surprisingly, **Prosecution witness no. 7 Dr. Kingsuk Bose** was the Medical Officer on the date of incident at Midnapore Sadar Hospital. This witness on oath has categorically stated that he does not remember if he wrote any letter to O.C. Kotwali P.S. from a duplicate copy of letter signed by the Superintendent of the hospital signed on 26.02.1990 (marked 'X' for identification). This witness has stated that from the document it can be seen that he had admitted the victim in Midnapore Sadar Hospital on 05.10.1989. **The said document being the only medical document produced in this case was not proved before the Trial Court.** This witness has further deposed that the patient received fracture on her leg, as seen from the document marked 'X' for identification. On the other hand the witnesses as discussed above have all stated that they found the victim lying with bleeding and cut injury on her leg. No such "noting of bleeding injuries" is there in the document marked Exhibit 'X' for identification. As such the only medical paper which has not been proved before the Trial Court is not corroborated either by the Doctor nor the other witnesses who allegedly saw the victim in injured condition. It is the case of the victim that she was in the hospital for treatment

for four months but no such medical papers were produced before the Trial Court.

As such it is seen that the nature and extent of injury allegedly sustained by the victim has not been proved by the prosecution before the Trial Court.

In a case under Section 326 IPC the ingredients required to constitute such offence to be proved before the court, is that “the victim suffered grievous hurt by any instrument ofcutting” In the present case neither was the axe seized nor the axe which is allegedly the offending weapon in this case has been produced nor any medical papers to substantiate or prove the prosecution case, has been brought before the Trial Court.

Section 320 of the Indian Penal Code lays down the kinds of hurt which are designated as “grievous”. The present case of the victim has been framed in respect of the **7th kind being a fracture** But the only document wherein it has been noted that the victim suffered a fracture **has not been proved** by the prosecution before the Trial Court. Neither the Doctor could recollect the case nor was any relevant medical papers produced before the Doctor for him to prove the injuries allegedly sustained by the victim. The evidence of the Doctor who has only deposed by seeing the only medical paper marked ‘X’ for identification (not proved) stating that the victim had suffered a fracture has not been corroborated by the witnesses in the present case.

Conclusion

In the present case from the evidence on record including the facts and circumstances of the case it could not be ascertained as to whether the victim sustained injuries as stated by the prosecution. No medical documents were proved before the court. The only medical document marked Exhibit 'X' shows a fracture but the same is not corroborated by the evidence of the other witnesses, nor has the document been proved. The statement of the witnesses to the effect that the victim had suffered bleeding injury on her knee has not been noted in the only medical document marked 'X' for identification and **thus not proved**. In view of the said observation and discussion as made above, this court finds that the appellant is entitled to get the benefit of doubt as the prosecution could not prove the charge under Section 326 IPC before the Trial Court beyond reasonable doubt by either oral evidence or documentary evidence. The case relates to an incident dated 05.10.1989 (**a case of more than 33 years**).

Considering all these facts, the materials on record, and the evidence as discussed above, the judgment and the order of conviction and sentence is thus liable to be set aside.

The appeal is thus allowed. The appellant is accordingly acquitted of all charge and discharged/released from his Bail bond.

Let a copy of this judgment along with the lower court records be sent down to the trial court immediately.

Urgent Photostat Certified copy of this Judgment, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)