

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 1670 of 2005

Ratnakar Ghosh

-Vs.-

The State of West Bengal

For the Petitioner: Mr. Dipak Kumar Sengupta, Sr. Adv.,
Mr. Mrityunjoy Chatterjee, Adv.,
Mr. Golam Nure Imrohi, Adv.,
Mr. Susnigdho Bhattacharyya, Adv.

For the State: Mr. Abhra Mukherjee, Adv.,
Mr. Dipankar Mahata, Adv.

Heard on: 21 April, 2022.

Judgment on: 14 December, 2022.

BIBEK CHAUDHURI, J. : –

1. The judgment and order dated 20th May 2005 passed by the learned Additional Sessions Judge, Kandi in Criminal Appeal No.1 of 2003 confirming the judgment and order of conviction and sentence dated 23rd July, 2003 passed by the learned Sub-Divisional Judicial Magistrate for the offence punishable under Section 326 of the IPC in G.R Case No.365 of 1990 arising out Burwan P.S Case No.84 of 1990 dated 8th August, 1990 thereby holding the petitioner guilty for committing offence under Section 326 of the IPC and sentencing him to undergo simple imprisonment for two years and to pay fine of Rs.1000/-, on default to

suffer simple imprisonment for another three months is assailed in the instant revision.

2. Before I proceed with the discussion as to whether the impugned judgment suffers from patent illegality, and/or the material irregularity, let me state the following facts for proper adjudication of the instant revision.

3. On 7th August, 1990 one Dhiraj Ghosh lodged a written complaint with the officer-in-charge of Burwan P.S stating, inter alia, that his father Haradhan Ghosh was returning home from the local settlement office at about 5.10 pm, when one Sudhakar Ghosh wrongfully restrained him on the road near the village and snatched away an umbrella from his possession. Then Shankar Ghosh directed Ratnakar to cut Haradhan's ear and on being instructed Ratnakar cut the right ear of Haradhan with a razor. He fell down on the ground and raised hue and cry which attracted the complainant and other villagers. They found Ratnakar standing at the spot with a razor in his hand. The son of the injured first took him to Burwan P.S and from the P.S he was taken to the local health centre. The injured was medically treated in the local health centre. The son of the complainant, namely, Dhiraj Ghosh lodged a written complaint on the basis of which Burwan P.S Case No.84 of 1990 under Sections 326/34/114 of the IPC was registered against the above named three accused persons.

4. On completion of investigation police submitted charge-sheet against the accused persons under Section 326/114/34 of the IPC in the

court of the learned Sub-Divisional Judicial Magistrate at Kandi. The accused persons duly appeared before the trial court to face trial. Charge was framed against the accused persons under Section 326/34 of the IPC.

5. In order to bring home the charge against the accused persons prosecution examined as many as ten witnesses. Amongst them PW1 is the complainant, PW2 is Haradhan Ghosh who received injury on 7th August, 1990 at about 5.10 pm. PW3 Ganesh Bagdi, PW4 Naba Kumar Ghosh, PW5 Jaladhar Ghosh, PW6 Gadadhar Ghosh, PW7 Tinkari Das, PW8 Gopal Das are the local villagers. PW9 is the Investigating Officer of the case and PW10 is the Medical Officer who initially treated injured Haradhan Ghosh. The written complaint has been marked as Exhibit-1, Exhibit-2 is the formal FIR and the injury report is marked as Exhibit-3.

6. The learned Magistrate on due consideration of the entire evidence on record held that the prosecution was able to prove the charge against the accused persons under Section 326/34 of the IPC and they were convicted and sentenced accordingly.

7. The accused persons preferred an appeal before the learned Additional Sessions Judge, Kandi which was registered as Criminal Appeal No.1 of 2003. The said appeal was disposed of by the learned Additional Sessions Judge on 20th May, 2005 holding accused Ratnakar Ghosh guilty for committing offence under Section 326 of the IPC. He was convicted and accordingly sentenced. Other two accused persons/appellants were however acquitted of the charge.

8. Before dealing with the materials on lower court record and the submission made by the learned Senior Counsel on behalf of the petitioner as well as the learned P.P-in-Charge, this Court should be very candid to record that appraisal or reappraisal of evidence adduced by the witnesses on behalf of the prosecution during trial of the case is not permissible in revision. The revisional court can only look into the question as to whether the impugned judgment and order is *ex facie* illegal and suffers from material irregularity. Reappreciation of evidence on record is not permissible while exercising revisional jurisdiction by this Court. The jurisdiction of the court is only confined to consider as to whether the learned court below was justified in convicting the accused on the evidence on record as it stands. The revisional court is not entitled to subscribe further reason while allowing or dismissing the revision against the impugned judgment of conviction and sentence.

9. It is already recorded that out of three accused persons two accused namely, Sudhakar and Shankar Ghosh were acquitted by the lower appellate court. The lower appellate court confirmed the order of conviction and sentence against Ratnakar Ghosh who was convicted and sentenced to suffer simple imprisonment for two years with fine and default clause for committing offence under Section 326 of the IPC.

10. I have already stated the prosecution case as depicted in the written complaint. Accordingly the written complaint the father of the defacto complainant was restrained by Sudhakar Ghosh then Sankar Ghosh

directed Ratnakar cut his ear. Thereafter Ratnakar Ghosh cut the upper portion of the right ear of the Haradhan.

11. It is important to note that except the injured no other person saw the incident though the incident took place on the village road in the afternoon. From the evidence of PW4, PW5, PW6 and PW1 it is ascertained that they reached the place of occurrence after hearing hue and cry of the Haradhan 7/8 minutes after the incident. Therefore, none of the witnesses saw the incident. They heard the incident from injured Haradhan Ghosh. Under such circumstances, evidence of Haradhan is of immense importance. If there appears contradiction in the evidence of Haradhan Ghosh, the petitioner is entitled to get benefit of doubt.

12. According to the written complaint Haradhan Ghosh was wrongfully restrained on the road near the village by Sudhakar Ghosh. However, in his evidence PW2 Haradhan stated on oath that he was restrained by Ratnakar and Sadhukar Ghosh. On being restrained he raised hue and cry. Then Sankar Ghosh came to the spot and directed Ratnakar to cut his ear. Thereafter Ratnakar had cut his ear with the help of a razor.

13. The case as portrayed by the defacto complainant as well as the injured suggests that all the accused persons shared common intention to cause "grievous hurt" to PW2. Therefore, the learned Magistrate framed charge against the accused persons under Section 326/34 of the IPC.

14. To attract Section 34 of the IPC, the following ingredients are required to be proved:-

- i) The criminal act (consisting of an series of acts) should have been done, not by one person, but by more than one person.
- ii) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

15. Looking at the first instance, the accused who is to be fastened with liability on the strength of Section 34 IPC, should have done some act which has nexus with the offence. Even an omission can, in certain circumstances amount to an act. The act need not be an overt act. The accused who only keeps the common intention in mind, but does not do any act at the scene, can be convicted with the aid of Section 34.

16. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then the liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. Common intention has to be distinguished from same or similar intention. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of common intention, render each of such persons liable for the result of them all, as if he had done them by himself.

17. Bearing the principal in mind if the judgment of the first appellate court is assessed it would be found that the impugned judgment suffers from patent illegality and material irregularity. The prosecution case proceeded with the charge that all the three accused persons in furtherance of their common intention caused grievous hurt to the PW2. When the appellate court found that two of the accused persons who allegedly shared the common intention with the present petitioner not guilty, the remaining one, i.e., the petitioner ought to have been entitled to get benefit of doubt.

18. The learned Judge in the lower appellate court failed to appreciate that the defacto complainant is the son of the injured. PW4 Naba Kumar Ghosh, PW5 Jaladhar Ghosh, PW6 Gadadhar Ghosh who supported the prosecution case are near relatives of the injured. The independent witnesses, namely, PW3 Ganesh Bagdi did not support the prosecution case and was turned hostile. PW7 Tinkari Ghosh and PW8 Gopal Das also did not support the prosecution case. Under such circumstances, the evidence of witnesses who supported the prosecution case ought to have been appreciated with great caution and circumspection.

19. The learned judge in the First Appellate Court failed to consider that the Investigating Officer did not seize the wearing apparels of the victim though he stated in his evidence that his wearing apparels were stained with blood after he suffered injury on his right ear. He also stated that blood fell on the ground of the place of occurrence. The Investigating

Officer also did not seize blood stained and controlled earth from the place of occurrence. The offending weapon was also not seized.

20. When the prosecution case is supposed to be proved on the basis of the solitary evidence of the injured persons, it is important for the prosecution to prove the motive of the accused persons. The prosecution has failed to produce any evidence to prove motive of the accused persons in committing the offence.

21. The learned Additional Sessions Judge, Kandi failed to consider that the Investigating Officer could not produce the case diary and therefore the defence could not take contradictions from the Investigating Officer with regard to statements made by other witnesses on behalf of the prosecution. This is a serious lapse on the part of the prosecution.

22. For the reasons recorded hereinabove, this Court is of the view that the judgment and order of conviction and sentence passed against the petitioner suffers from illegality and material irregularity.

23. For the reasons stated above the petitioner is entitled to be acquitted from the charge.

24. Accordingly the impugned judgment and order of conviction passed by the learned Additional Sessions Judge, Kandi in Criminal Appeal No.1 of 2003 is set aside.

25. The instant revision is allowed on contest.

26. The petitioner namely, Ratnakar Ghosh is acquitted from the charge under Section 326 of the IPC. Set at liberty and release from his bail bond.

27. Let a copy of this order be immediately sent to the court of the learned Additional Session Judge for information and necessary action.

(Bibek Chaudhuri, J.)