

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 542 of 2018

Dipak Kumar Pal

-Vs-

The State of West Bengal & Ors.

W I T H

C.R.A. 448 of 2018

Rohi @ Rahi @ Gour Konai & Anr.

-Vs-

State of West Bengal & Anr.

For the Appellant : Md. Sabir Ahmed, Adv.
[in CRA 542/2018] Mr. Abdur Rakib, Adv.
Mr. Hillol Saha Podder, Adv.

For the Appellants : Mr. Manas Kumar Das, Adv.
[in CRA 448/2018]

For the State : Mr. Prasun Kumar Datta .. Id. A.P.P.
Mr. Santanu Deb Roy Adv.

Heard on : 31.08.2022 & 06.09.2022

Judgment on : 06.09.2022

Joymalya Bagchi, J. :-

Convicts as well as the victim are before us assailing the judgment and order dated 26.06.2018 passed by learned Additional Sessions Judge, Kandi, Murshidabad, in Sessions Trial No. 12(08) of 2016 arising out of Sessions Sl. No. 196 of 2015 convicting the accused persons viz. Rohi @ Rahi @ Gour Konai and Paresh Konai for commission of offence punishable under Section 323 of the Indian Penal Code and sentencing them to suffer simple imprisonment for one month with a direction to pay compensation of Rs.20,000/-, in default, to suffer simple imprisonment for one month more.

While the convicts have appealed against their conviction in CRA 448 of 2018, the de-facto complainant/victim has appealed before the court praying that conviction ought to have been recorded for a graver offence viz. attempt to murder and accordingly sentence imposed upon them be enhanced.

Prosecution case as alleged against the appellant/convicts is as follows :-

On 30.05.2013 the appellant/convicts were cutting mud from the land of one Uttam Mondal. Appellant/convicts suspected Dipak Kumar Pal, de-facto complainant/victim had informed the matter to Uttam. This enraged them. They violently assaulted Dipak with *shabol*, *rod*, *sticks* etc. Paresh attempted to assault Dipak on the head with a *shabol*. He raised his left hand and resisted the blow. As a result, he suffered

fracture on his left hand. Appellant/convicts also took away Rs.10,000/- from the pocket of Dipak. He was initially shifted to Khargram hospital and thereafter to Kandi hospital. His wife viz. Hirakana Pal (PW1) lodged written complaint at police station resulting in registration of Khargram Police Station Case No.184 of 2013 dated 02.06.2013 under Sections 341/326/308/34 of the Indian Penal Code. Subsequently, the victim was shifted to Berhampore Medical College and Hospital and discharged. In conclusion of investigation, charge-sheet was filed against the accuseds and charges were framed under Sections 341/34, 325/34, 307/34 and 379/34 IPC. The accuseds pleaded not guilty and claimed to be tried. In course of trial, prosecution examined 9 witnesses and exhibited a number of documents.

In conclusion of trial, learned trial Judge by the impugned judgment and order dated 26.06.2018 convicted and sentenced the convicts-appellants, as aforesaid.

Mr. Manas Kumar Das, learned advocate for the appellant/convicts in CRA 448 of 2018 submits there is no independent witness corroborating the evidence of the victim (PW2) and his family members (PWs.1 & 5). PW4, an independent witness turned hostile and did not support the prosecution case. PW8, Medical officer at Berhampore Medical College and Hospital proved the injury report (Ext. 7) wherein it is noted x-ray shows no bony fracture. Hence, his clients are liable to be acquitted.

On the other hand, Mr. Sabir Ahmed, learned advocate for the victim-appellant submits evidence of PWs.1, 2 & 5 is corroborated by the medical evidence on record. Paresh Konai tried to hit PW2 on the head with a *shabol* clearly showing his intention to murder him. PW2 resisted and suffered a fracture on his left arm. Trial Judge ought to have convicted the accuseds for commission of offences punishable under Sections 307/326 IPC. Instead of doing so, he recorded a conviction on a lesser charge viz. Section 323 IPC. Accordingly, he prays that the accuseds be convicted of the graver offences and a just sentence be imposed upon them.

Mr. Prasun Kumar Datta, learned Additional Public Prosecutor supports the prosecution case.

I have gone through the evidence on record.

PW1 (Hirakana Pal) is the wife of the victim viz. Dipak Kumar Pal. She was an eyewitness to the incident. She deposed on 30.05.2013 at around 11:30 A.M. Dipak had gone out to fetch water from a tube well. The accused persons were talking in abusive language. The accuseds suspected Dipak had complained to Uttam that they were extracting mud. There was an altercation. The accuseds assaulted her husband with iron rod, lathi & *shabol*. As a result her husband received injury on the left hand when he tried to protect his head from the assault by the accused. He was taken to Khargram BPHC. Therefrom he was

transferred to Kandi S.D. Hospital and finally treated at Berhampore Medical College & Hospital.

PW2 (Dipak Kumar Pal) is the victim. He deposed on 30.05.2013 at around 11:30 A.M. he was proceeding to fetch water from a tube well. Accuseds were taking away mud from the land of Nemai Mondal and Uttam Mondal. Uttam raised objection. Accuseds thought he had informed Uttam. Out of grudge, they assaulted him. Paresh tried to hit him on the head with a *shabol* but he resisted. As a result, he suffered injury on the left elbow. Rohi assaulted him with a *lathi* on his back. He sustained fracture injury on his left hand. He was vomiting blood. He shouted and his son and wife rushed to the spot. He was shifted to Khargram BPHC. Then he was shifted to Kandi S.D. Hospital and thereafter, to Murshidabad Medical College & Hospital for better treatment.

PW5 (Suman Pal) is the son of the victim. He has corroborated the evidence of his father (PW2).

PW3 (Dr. Md. Abdus Sabur) is the medical officer who treated the victim at Khargram Rural Hospital. The patient told him that he was physically assaulted by bamboo and iron stick on chest, left side of shoulder and left arm. He found abrasion on the back of his neck, swelling over his left arm and forearm. He proved the injury report. He proved his treatment sheet marked as Ext.2.

PW6 (Dr. Hansaraj Chattapadhyaya) is the medical officer who treated the victim at Kandi SD Hospital. He found the following injuries:-

- (1) Swelling over left elbow joint and shoulder joint.*
- (2) Fracture the tip of olecrenon of his left forearm.*

He proved the treatment sheet (Ext.3).

PW8 (Dr. Wasim Bari) is the medical officer who was attached to Murshidabad Medical College & Hospital. He was one among the team of doctors who treated the victim. On clinical examination, he noted the following :-

- (1) There remain bruise and mild tenderness around the elbow and lower arm.*
- (2) CT Scan was within normal limit as I perused it subsequently.*
- (3) X-ray also shows no bony fracture.*

As X-ray showed no bony injury, Dr. Sandip Ghosh suggested discharge of the patient on the next morning.

PW7 (Ashok Kr. Mondal) and PW9 (SI Srimanta Kr. Dutta) are the Investigating Officers of the case.

From the evidence of PWs.1, 2 & 5 it appears there was a dispute between the accuseds on one hand and the victim on the other hand. Accuseds suspected the victim had complained they were cutting mud from the land of Uttam Mondal. Over such dispute they had assaulted him with *shabol* and *lathi*.

Mr. Das appearing for the appellant/convicts argued version of PW2 and his family members is not supported by independent witness. PW4 was examined as an independent witness but he turned hostile. He was cross-examined with reference to his previous statement to police. It is common knowledge whenever a dispute crops up resulting in a criminal case, local people choose not to take sides. This is evident from the fact that the sole independent witness resiled from his earlier statement to police and sought to give evasive answers in course of his cross-examination.

Evidence of the injured victim (PW2) and his family members viz. PWs.1 & 5 are clear and consistent with one another. Their presence at the place of occurrence has not been improbabilised. In view of their consistent version, *volte face* by the independent witness during trial would not cast doubt regarding the truthfulness of the prosecution case. Moreover, medical evidence on record i.e. PWs.3, 6 & 8 prove immediately after the incident the injured witness was shifted to Khargram Rural Hospital and thereafter, treated at Kandi S.D. Hospital and Murshidabad Medical College & Hospital. Medical reports exhibited in course of trial show he suffered injuries on his body due to physical assault. Thus, medical evidence corroborates the ocular version of the injured witness. Hence, the gist of the prosecution case that PW2 suffered injuries due to assault by the accuseds viz. Rohi @ Rahi @ Gour Konai and Paresh Konai has been proved beyond doubt.

Further question which remains for consideration is whether the conviction of the accuseds was rightly recorded under Section 323 IPC or they ought to have been convicted on a graver charge.

Mr. Sabir Ahmed emphatically argued evidence on record shows they intended to murder the victim. Even otherwise, victim suffered fracture and conviction atleast should have been recorded under Section 326 IPC.

On the other hand, Mr. Manas Kumar Das submitted appellants-convicts dealt single blows in course of the scuffle. They did not intend to murder the victim. Whether the victim suffered fracture is doubtful in view of the opinion of the medical board as appearing from the evidence of PW8.

Analysing the evidence on record in the light of the aforesaid submissions, I note though PWs.1, 2 & 5 deposed Paresh Konai had aimed at the head of the victim which was resisted by the latter with his arm, there is nothing on record to show that the accuseds had again struck at the victim after he had fallen down. This gives an impression though the accuseds had intended to strike the victim with weapons of offence to cause physical injury but in all probability they did not intend to murder him.

Hence, I am not inclined to alter the conviction of the convicts-appellants from Section 323 IPC to Section 307 IPC.

It is also unclear whether the victim (PW2) suffered fracture wound. Though doctor (PW3) who treated the victim at Kandi SD Hospital noted fracture in the olecranon process, PW8, a member of the medical board constituted at Murshidabad Medical College & Hospital opined X-ray shows no bony injury. Hence, it is doubtful whether victim had suffered fracture due to physical assault which would amount to grievous hurt under section 320 IPC. However, evidence on record leaves no doubt in my mind appellants-convicts had used dangerous weapon viz. *shabol* to cause physical injury on the hand and body of the victim.

In view of such fact, their conviction ought to have been recorded under Sections 324/34 IPC instead of Sections 323/34 IPC.

In the light of the aforesaid discussion, I alter the conviction of the convicts-appellants from Sections 323/34 IPC to Sections 324/34 IPC.

With regard to the issue of sentence, I find that facts and circumstances of the case particularly the aggressive behaviour of the convicts do not justify a lenient treatment under Section 360 of the Code of Criminal Procedure or the provisions of the Probation of Offenders Act, 1958.

I note the graver injury on the arm was caused by Paresh Konai with a *shabol*. Rohi @ Rahi @ Gour Konai had assaulted the victim with a *lathi*. When conviction is recorded against multiple accuseds with the help of Section 34 IPC for sharing common intention, an individualised

sentencing approach requires to be adverted to by referring to the specific overt act of each accused committed in pursuance to the common intention shared by them.

In that backdrop, in view of the graver injury caused by Paresh Konai, I am of the opinion a higher sentence requires to be imposed upon him that what has been awarded by the trial court. Under such circumstances, I enhance the sentence imposed upon Paresh Konai and direct that he shall suffer rigorous imprisonment for one year and pay a compensation of Rs.20,000/-, in default, to suffer rigorous imprisonment for six months more.

Sentence imposed upon Rohi @ Rahi @ Gour Konai by the trial court however, shall remain unaltered. Compensation amount, if realised, shall be handed over to the victim (PW2).

We are informed Rohi @ Rahi @ Gour Konai has already suffered the substantive sentence imposed upon him. He is directed to deposit the compensation amount within one month from date failing which the default sentence shall be executed against him in accordance with law.

Bail bond of Paresh Konai is cancelled. He is directed to surrender forthwith before the court below and serve out the enhanced sentence imposed upon him, failing which the court below shall issue appropriate process for his apprehension and execution of the sentence in accordance with law.

Period of detention suffered by the appellant/convicts during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

Accordingly, CRA 542 of 2018 is allowed in part. CRA 448 of 2018 is dismissed.

Lower court records along with a copy of this judgment be sent down at once to the learned trial Court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)