

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

Present: - Hon'ble Mr. Justice Subhendu Samanta.

C.R.A. No. - 392 of 1986

IN THE MATTER OF

Nawsad Sheikh.

Vs.

State of West Bengal.

**For the appellant : Mr. Navanil De, Adv.,
Mr. Rajeshwar Chakraborty, Adv.,
Mr. Srinjan Ghosh, Adv.,
Mr. Subhrajit Dey, Adv.,
Ms. Monami Mukherjee, Adv.**

**For the State : Mr. Narayan Prasad Agarwal, Adv.,
Mr. Pratick Bose Adv.**

Judgment on : 30.03.2023

Subhendu Samanta, J.

The instant appeal has been preferred against the judgment and order passed by the Learned Additional Sessions Judge, 3rd Court Murshidabad in Sessions Trial No. 4th of April 1986 convicting the appellant of an offence u/s 307 of IPC and sentencing him to suffer rigorous imprisonment for 5

years and to pay a fine of Rs. 500/- in default to suffer further rigorous imprisonment for 6 months.

The brief fact of the prosecution case is that on 20nd day of May 1983 about 7: 00 to 7: 30 p.m. PW 1 was Wajed Sk. was taking meal at his house. Suddenly, accused Nawsad Sk. came there and dragged him out of the room and began to assault with fists and blows. Wajed Sk. raised alarm. Hearing his alarm his two brothers Ajid and Kauser who were at Lichubagan nearby, came to rescue Wajed Sk.. While Ajid and Kauser were trying to pacify Nawsad, suddenly Nawsad dealt a blow with Pashni (a sharp cutting weapon) to Kauser on his abdomen, near the shoulder as well as near his eyes causing bleeding injuries. As a result of the pashni blow the intestine of Kauser protruded and he became senseless. His abdomen was tied up with a piece of cloth and the injured senseless Kauser was removed to Lalbag hospital; therefrom forwarded to Behrampur General Hospital. Earlier Alima Bibi, wife of accused Nawsad being an altercation with brother's wife of Wajed Sk. This incident is of sequel to the earlier episode. Wajed went to the police station and lodged an FIR. On the basis of the said information the police case was started, accused persons were put under arrest and sent up for trial.

Charge was framed u/s 148/307/149 IPC against 8 accused persons including the present appellant.

Total 7 witnesses were adduced on behalf of the prosecution including the injured. The accused persons were inquired u/s 313 Cr.P.C. After hearing the defence as well as the Public Prosecutor, Learned Additional Sessions Judge, acquitted all the accused persons from their charges except the present appellant who was found guilty u/s 307 IPC and impugned order of conviction and sentence was passed.

Hence this appeal.

Learned Advocate for the appellant submitted before this court that the impugned order passed by the Learned Sessions Judge is bad in law and

is liable to be set aside. He further argued that learned Sessions Judge, has failed to appreciate the facts and circumstances of this case and came to an erroneous finding. It is the further argument on behalf of the appellant that there are vital discrepancies in the evidences of PWs for which the statement of eye witnesses cannot be believed, the alleged sharp cutting weapon i.e. pashni did not produce in court during trial and no blood stain earth or control earth was seized by the investigating officer during the course of investigation, thus, the investigation of the I.O. is perfunctory. The piece of cloth which was used to tie the abdomen of the injured was also not seized during the investigation. Thus, the conviction on the basis of such investigation is baseless. He further pointed out that there are 25 houses nearby to the place of occurrence, but no villagers or neighbours were cited as witness in this case. All P.Ws are interested witnesses, so their evidences cannot be relied. He again argued that it was alleged in the prosecution case that initially the appellant started assaulting PW 1 Wajed Sk., but it appears that the appellant did not dealt with a blow of Pashni to the PW 1. The statement of relatives of injured cannot be believed. The statement of Dr. is also not supporting the prosecution case as he could not mentioned in his report whether the injury was fresh or not. It is the fact of the prosecution that initially the injured was admitted to Lalbag Hospital, but no doctor of Lalbag Hospital was examined. He further argued that in this case it would be revealed that the appellant had no intention to commit murder to the injured, only influenced by grave and sudden provocation the alleged Pashni was used and the injured sustained injury. Thus, the conviction u/s 307 IPC is not proper, at best the conviction can be maintainable u/s 326 IPC.

It is the further argument of the Learned Advocate for the appellant that the incident happened in the year 1983 and long 40 years has already been elapsed; the appellant has suffered immense mental agony during the pendency of the Criminal Trial as well as the instant appeal. Thus at this juncture in view of the judgment of Hon'ble Supreme Court in **A.R. Antulay Vs. R.S. Nayek** right to speedy trial of the present appellant and long pendency of the present appeals need be considered. He further argued that

the appellant has already suffered conviction during the course of investigation inquiry and trial so at this juncture he may be released from all the charges.

Learned Advocate appearing on behalf of the state submitted that total 8 persons were arrayed as an accused in this case. Charge was framed u/s 148 and 307/149 IPC. All the accused persons were acquitted from this case except the present appellant. Conviction of the present appellant was recorded by the Learned Sessions Judge, u/s 307 IPC. The conviction is specifically supported by the evidence of prosecution, the statement of eye witnesses as well as the statement of injured and the statement of doctor corroborates each other. The intention to kill the injured was very much there as it reveal from the statement of the doctor. It would be revealed from the statement of I.O. that the Pashni (sharp cutting weapon) was seized during the course of investigation of this case. He further pointed out that the appellant is all along on bail so he cannot plea for his mental agony during the long pendency of the instant appeal. So, he prayed for dismissal of the instant appeal.

Heard, the Learned Advocates; perused the evidences of prosecution. It appears to me that the PW1 of this case is the de- facto- complainant who initially assaulted with fists and blows by the appellant. PW 2 is the person who appeared there on hearing the alarm of PW 1. PW 3 is the injured who also appeared along with PW 2 from the nearing Lichubagan. It is the deposition PW 3 (injured) that while he was trying to pacify the accused/appellant then suddenly the appellant inflicted the pashni blow at his abdomen and on right hand and on his cheek. PW 4 is the wife of PW 2 who was there at the time of incident PW 5 is the villager who heard the fact and saw the injured. P.W 6 is the I.O. and PW 7 is the doctor who treated the injured. In considering the circumstances and the evidence of the prosecution it appears to me that the fact of assault inflicted by the appellant was witnessed by PW 1, PW 2, PW 3 and PW 4. The statement of the doctor who treated the injured supported the factum of assault and corroborated the injuries as stated by the PWs. Considering the same I find

nothing irregular in the opinion of the Learned Sessions Judge, regarding the fact that the appellant has assaulted the injured (PW 3) with the Pashni on the alleged date of incident.

During the course of argument Learned Advocate for the petitioner cited several judgments wherein Hon'ble Supreme Court has converted the sentences of grievous offences to the punishment of minimum offences wherein the mitigating factors was the age of the appellant and long pendency of the appeal.

(1999) 3 Supreme Court Cases 309 [K. RAMAKRISHNAN UNNITHAN VS. STATE OF KERALA]

Penal Code, 1860- S. 304 Pt. II- Sentence under – Case coming up before Supreme Court a long period of over 13 years after the occurrence- Accused was on bail under Supreme Court's order and had already undergone sentence for about four years- In such circumstances, sentence limited to the period already undergone- Criminal Trial- Sentence- Mitigating factors – Delay in final disposal of appeal.

(1988) Supreme Court Cases (Cri) 905 [SUNDER SINGH VS. STATE OF RAJASTHAN]

Penal Code, 1860- Section 304 Part I- Gunshot fired causing death- Incident sequel to dispute between the parties as to who had the turn to use the water pump- No clear evidence who in fact had the turn- In the circumstances Held, it can be assumed that the accused-appellant in exercise of his right to use the pump got enraged and tried to prevent the mischief by the deceased- Hence conviction altered from one under Section 302 to that under Section 304 Part I – In view of the advanced age (76 years), appellant sentenced to the period of imprisonment already undergone by him

Criminal Trial- Sentence- Mitigating factors- Age

(1971) 3 SCC 762 [JAI NARAIN MISHRA AND OTHERS VS. STATE OF BIHAR]

(i) The accused was responsible for causing an injury which was a penetrating wound on the side of the right side of chest caused by a Bhala. The wound was of a grievous nature as the patient developed surgical emphysema on the right side of the chest. Out of the four injuries received by the injured only this injury was of a grievous nature while the other three injuries were simple in nature. Where four or five persons attack a man with a deadly weapon it may well be presumed that the intention is to cause death. However, when three injuries are of simple nature though deadly weapons were used and the fourth injury, though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid the benefit of doubt must be given to the accused with regard to the injury intended to be caused. Therefore, the offence is not only under Section 307 but under Section 327 IPC

(1988) 4 SCC 551 'PARA'- 7 [HARI SINGH VS. SUKHBIR SINGH AND OTHERS

On the first question as to acquittal of the accused under Sections 307/149 IPC, some significant aspects may be borne in mind. Under Section 307 IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but were not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see

no reason to disturb the acquittal of accused under section 307 IPC

(1979) Supreme Court cases (Cri) 522 [MD. ISAK MD. AND OTHERS VS. STATE OF MAHARASHTRA] penal Code, 1860- Sections 302 and 325-Where the occurrence arose out of hot exchange of abuses leading to assault with sticks and no evidence to show who struck the fatal blow, the offence fell under Section 325/34 and not Section 302

Hon'ble Supreme Court in **ABDUL REHMAN ANTULAY'S Case [1992 Supreme Court Cases (Cri) 1993]** in **Paragraph 86** has set out some principles of law for providing speedy and fair trial to the litigants

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re- trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on

account of death, disappearance or non-availability of witnesses or otherwise

In considering the principles laid down in the above mentioned citations it appears that the incident happened in the year 1983 and the trial was concluded in the year 198, i.e. within 3 years. The instant appeal is pending since long due to the reasons not actually within the control of the appellant or the court. However, in considering the merits of this case it is true that the appellant has assaulted the injured by a sharp cutting weapon in which the injured (PW3) has sustained a grievous injury. Learned Sessions Judge, is of opinion that in considering the nature of injury the offence committed by the appellant is come under the provisions of Section 307 IPC and he convicted the appellant under the provisions of law for the offence of attempt to murder. To constitute an offence u/s 307 of IPC the intention or knowledge must be such as is necessary to constitute murder. The fact of this case shows that when the injured tried to pacify the appellant while he was assaulting PW 1 with fist and blows suddenly, appellant took the pashni (sharp cutting weapons) and dealt with the blow of the Pashni to the injured. The entire episode of the assault is proved to an early incident of quarrel between the ladies of the families. Thus, it can be easily presumed that the present appellant had no intention knowledge to kill the injured but he was influenced by sudden provocation of the circumstances. Though, the injury inflicted by the appellant is not simple in nature, but attending circumstances proved that the appellant never had any intention or previous plan to kill the injured by giving a blow to pashni.

Considering the circumstances and considering the attending facts of this case it appears to me that the punishment imposed by the learned Sessions Judge to the appellant need be altered. The order of conviction upon the appellant u/s 307 IPC is thereby altered to 326 of IPC; considering the alteration of the conviction in my view it would be sufficient for the appellant to suffer rigorous imprisonment for 3 years.

Constitutional mandate for right to speedy trial to the accused person vis-a-vis the abundant duty imposed by Penal Code to provide adequate

punishment to the proved convict has no contrast; rather an equilibrium has to be maintained in a judicial pronouncement. It appears that appellant was enjoying bail all along during trial of this case and during entire appeal period. Thus, I find no substance in the submission of suffering mental agony by the appellant.

Accordingly, the Criminal Appeal is allowed. The order sentence imposed upon the appellant is altered and reduce to rigorous imprisonment for 3 years and also to pay a finding of Rs 500/- in default to suffer further rigorous imprisonment for 6 months.

The appellant is directed to appear before the Learned Trial Court on 24th April 2023 to serve out the sentence.

The period of detention undergone by the appellant during investigation inquiry and trial of this case be set off against the sentence of imprisonment. According to the provisions of 428 Cr.P.C.

Let a copy of this order along with the LCR be send down to the Learned Sessions Judge for his opinion and compliance.

(Subhendu Samanta, J.)