

CRA 281 of 2003

21.04.2023

S/L. 2
Court No.12
Sourav/
Suvayan

In the matter of: **Suklal Biswas & Ors.**

....Appellants.

Mr. Himanshu De, Sr. Adv.
Mr. Navanil De
Mr. Rajeshwar Chakraborty
Mr. Srinjan Ghosh
Mr. Subhrajit Dey
Ms. Monami Mukherjee

... for the appellants.

Mr. Sudip Ghosh, Ld. Sr. Govt. Adv.
Mr. Bitasok Banerjee

... for the State.

1. Heard Miss Monami Mukherjee, learned Counsel being led by Mr. Himanshu De, learned Senior Counsel for the appellant and Mr. Sudip Ghosh, learned Senior Government Counsel being assisted by Mr. Bitasok Banerjee, learned Counsel for the State.
2. This appeal arises out of judgment and order of sentence dated 27.06.2003 passed by learned Additional Sessions Judge, Burdwan in Sessions Trial No. 12 of 2000 arising out of Sessions Case No. 81 of 2000 convicting the appellants under Section(s) 307/34 and 323/34 IPC and sentencing them thereunder.
3. The occurrence happened at about 10.00 to 10.30 P.M. on 21.09.1998 at village Kamalnagar under Ausgram P.S. in the District- Burdwan on the main road in front of Durga Mata Cold Storage. P.W. 1, wife of the injured Dilip Sarkar (P.W. 6) is the informant. In the transaction, Dilip Sarkar (P.W. 6) received injuries by concerted assault of all the appellants by 'lathi', 'iron rod' and 'chain'. The appellants at first assaulted Bijoy Krishna Koley (P.W. 5) with the aforesaid weapons. Hearing his shout, Dilip Sarkar (P.W.

6) came to his rescue and Suklal Biswas (since deceased) assaulted on the right side of his head with a 'lathi'. Both the injured persons were taken to Beat House first from where they were taken to Guskara Hospital. After initial treatment in Guskara Hospitals, both the injured persons (P.W.s. 5 and 6) were referred to Burdwan Medical College Hospital where they were treated.

3.1. On receipt of the FIR from P.W. 1, Basudev Ghoshal (P.W. 3), S.I. of Police drew the plain paper FIR under Sections 341/325/326/307/34 IPC, on such report being received from Banshi Dhar Layek (P.W. 8) from the spot. On proper authorization, P.W. 8 took up investigation, prepared the spot map on the very next day, examined the witness, made incriminating seizures, arrested the appellants and filed charge-sheet against the appellants under Section 341/325/326/307/34 IPC.

4. Learned Trial Court, however, framed charge under Section 307/34 IPC so far as assault on Bijoy Krishna Koley (P.W. 5) is concerned and under Section 323/34 IPC against the appellant so far as assault on Dilip Sarkar (P.W. 6) is concerned.

5. Prosecution has examined 11 witnesses to prove the charge, out of whom P.W. 1 is the informant, P.W. 2 and P.W. 4, are eyewitnesses to the occurrence out of whom P.W. 2 has turned hostile. P.W.s. 5 and 6 as introduced (supra) are the injured witnesses, P.W.s. 7, 9 and 11 are the medical officers who have testified about the injury sustained by the victims. P.W. 10 is a neighbour of P.W. 1 (informant) who has also turned hostile. P.W. 3 and P.W. 8 as introduced (supra) are the police officers out of whom, P.W. 8 is the I.O.

5.1. Defence plea is one of complete denial and false implication.

6. learned trial Court relying on the eyewitness account of the aforesaid witnesses and the corroborative medical evidence has returned the finding of guilt against the appellants under Seciton 307/34 IPC and 323/34 IPC.
7. Ms. Mukherjee, learned Counsel appearing for the appellants raises the following contentions:
 - i) The informant having not mentioned about the presence of light at the spot in the FIR and the witnesses having been examined after about 20 days of occurrence to mention about the presence of the light at the spot, it is doubtful as to how the witnesses could see the occurrence in darkness.
 - ii) Bijoy Krishna Koley (P.W. 5) being a resident of another village, his presence at the odd hour of night at the spot village is doubtful.
 - iii) The ocular testimony of P.W.s. 5 and 6 does not get corroboration in material particular from the medical evidence of P.W.s. 7, 9 and 11.
 - iv) There being discrepancy in the evidence of the eye-witnesses, the entire prosecution case becomes doubtful. The appellants having acted individually so far as the assault is concerned, they could not have been convicted by aid of Section 34 IPC.
8. *Per contra*, Mr. Ghosh, learned Counsel for the State drawing our attention to the spot map which according to our considered view is relevant under Section 11 of the Evidence Act, submits that the very presence of light has been mentioned by the IO in the spot map prepared in the morning of 22.09.1998, the very next day of

the occurrence and the witnesses who have testified about the presence of the light cannot be disbelieved only on the ground that they were examined by the I.O. after 20 days. It is further submitted by him that the chronology of events as testified by P.W. 5 gets ample support from the FIR, evidence of the eyewitnesses, including the hostile witness P.W. 2 and the medical evidence. Assuming arguendo, the injury sustained by the victims to of lessor severity, Mr. Ghosh, submits that the conviction under Section 307/34 IPC so far as appellants are concerned is to be affirmed in view of dictum of Hon'ble Supreme Court in the case of ***State of Maharashtra Vs. Balaram Bama Patil & Ors. (1983) 2 SCC 28 (Para 9 and 10)*** and ***Sachin Jana and Another Vs. State of West Bengal, (2008) 3 SCC 390 (Para 11)***. Mr. Ghosh, therefore, with vehemence submits that the impugned judgment and order of sentence be affirmed and the appeal be dismissed.

9. Before proceeding to discuss the evidence adduced on record, it is beneficial to point out here that Suklal Biswas (appellant no. 1) having died in the meantime, the appeal agaisnt him has already abated. Remaining appellants, namely, Anil Biswas and Sunil Biswas are the sons of deceased Suklal Biswas.

10. On perusal of the evidence of P.W.s. 5 and 6, we find that P.W. 5 has given graphic description of entire transaction in his examination-in-chief. He has testified that, he saw accused Suklal Biswas (since deceased) being armed with a 'lathi', his youngest son Anil being armed with an 'iron rod' and his eldest son Sunil being armed with a 'cycle chain'. All of them came before him, challenged him and accused Anil assaulted him first by iron rod in his hand, leg and back. Receiving such assault, he shouted, then accused

Suklal (since deceased) assaulted him by 'lathi' in the left side of his head. He sustained bleeding injury on his head and accused Sunil assaulted him by 'chain' on different parts of his person. On hearing his shout, Dilip Sarkar (P.W. 6) rushed to the spot and accused Suklal then assaulted Dilip Sarkar by a 'lathi' on his head. Dilip also sustained bleeding injury. The co-villagers took them at first to the beat house and from there to Guskara Primary Health Centre (PHC, for short). P.W. 6 came to the spot on hearing the shout and found Suklal, Sunil and Anil mercilessly beating Bijoy Krishna Koley (P.W. 5) by 'lathi', 'iron rod' and 'iron chain'. When he intervened accused Suklal (since deceased) saying finish him also began to assault him with 'lathi' on his right side of head and he sustained bleeding injury. The evidence of P.W.s. 5 and 6 is corroborated in material particulars by P.W.s. 1 and 4. The medical evidence of P.W.s. 7, 9 and 11 also reflects that both of them had sustained some injuries. But we shall discuss the medical evidence in detail at appropriate stage.

11. so far as contention by Ms. Mukherjee, learned Counsel for the appellant regarding presence of light at the spot is concerned, the spot map which was prepared by the I.O. in the morning of 22.09.1998 show presence of light on the wall of the Durga Mata Cold Storage vide identification mark 'J'. Other witnesses have also testified about presence of light at the spot when the occurrence took place. There is no positive evidence to the effect that there was loadshedding or power cut at the time of occurrence in the village rendering the scene of occurrence i.e. the spot into darkness. There is no effective cross-examination of the relevant witnesses regarding the absence of light though criticism is made by the Counsel for the

appellant on the ground that the witnesses were examined 20 days after the occurrence.

11.1. In view of the spot map which is very much indicative about the presence of light prepared by the I.O. on the very next date of occurrence, we do not find any justification to accept the contention raised by Ms. Mukherjee, learned Counsel for the appellant to the effect that there was no light at the spot at the time of occurrence and the witnesses could not have seen the occurrence as testified them in the darkness.

12. Coming to the second contention raised by the learned Counsel for the appellant, we find that P.W. 5 himself has testified that he was staying in the spot village in a room constructed by the side of the cold storage. Further P.W. 10 who has turned hostile, in his cross-examination has testified that Bijoy Krishna Koley (P.W. 5) was working as a mason and was residing in their village. No doubt, P.W. 5 has been contradicted on the aspect that he did not say before the I.O. that at the time of incident he was returning from the house of one Prasanta after taking information about his illness. Such contradiction, however, is at the fringe inasmuch as there is ample evidence to show that P.W. 5 was staying in a room situated besides the cold storage in question and the spot of the occurrence is situated just in front of the cold storage. The appellants might have come there to assault P.W. 5 or they might have waited for him there for P.W. 5 to return. Be that as it may, the contradiction pointed out by learned Counsel appearing for the appellants is not at all material to disbelieve the prosecution case so far as the assault on P.W. 5 is concerned and also so far as the presence of P.W. 5 at the spot at the relevant time of the transaction is

concerned.

13. Next point urged by the learned Counsel for the appellants is that the witnesses were examined after 20 days of the occurrence. It is well-settled in law that evidence of injured witnesses is the best evidence. In this case both the injured witnesses i.e., P.W.s. 5 and 6 being consistent in their testimony and their evidence in core having not been demolished at all by the defence by effective cross-examination, examination of other witnesses after 20 days of the occurrence does not command to us to disbelieve them on the ground of delayed examination by the I.O. The peculiarity of the case is that it is the duty of the defence to seek explanation from the I.O. if there is any defect in the investigation but in the present case, not a single question has been put to the I.O. (P.W. 8) by the defence as to why there has been delay of 20 days in examination of material witnesses including eyewitnesses. In view of such fact, this contention of learned Counsel for the appellants has also no legs to stand and must fail.

14. So far as conviction of the appellant by aid of Section 34 is concerned, we find from the evidence of P.W.s. 5 and 6 being corroborated by P.W.s. 1 and 4 that all the accused persons assaulted the victims in a concerted manner and at the time of assault Suklal (since deceased) was giving command to finish them. They had come together to the scene of occurrence, they mounted the assault in a concerted manner to both the injured persons (P.W.s. 5 and 6) and they decamped from the spot together when the co-villagers rushed to the spot. The very manner of coming together, attacking together in sync with the command/utterances by Suklal (since deceased) and leaving the spot together make it

abundantly clear that all the appellants had shared common intention when they mounted the assault and thus the principle of joint liability under Section 34 IPC has been rightly saddled.

15. The next vital question is whether the appellants have committed an offence under Section 307/34 IPC. It is our experience that generally the witnesses and especially the rustic witnesses exaggerate the assault made to them while testifying in Court and giving their statement before the police and to find out the veracity of such witnesses, it is beneficial and a matter of prudence to look for corroboration in the medical evidence. P.W.s. 7, 9 and 11 are the medical officers who have been examined in the present case. P.W. 7 is the medical officer who was working in the surgery department of Burdwan Medical College at the relevant point of time when both P.W.s. 5 and 6 were admitted. In our view to cover up the lacuna in her evidence, prosecution has examined P.W. 9 who is a medical officer attached to Guskara P.H.C. at the time of his examination in Court. P.W. 11 is another medical officer who was attached to Burdwan Medical College as Emergency Medical Officer on 22.09.1998 when P.W.s 5 and 6 were taken there. If we look at the evidence of all the three witnesses, we find that both P.W.s. 5 and 6 were examined first at Guskara P.H.C. by one Dr. Tarun Kumar Rakshit (not examined). From Guskara PHC they were referred to Burdwan Medical College where P.W. 11 received them in the casualty as Emergency Medical Officer and examined them and P.W. 7 is the Medical Officer who treated the injured i.e., P.W.s. 5 and 6 and issued bed head ticket vide Ext. 3 collectively.

16. In view of aforesaid sequence, we feel persuaded to take up

the evidence of P.W. 9 first. Admittedly, P.W. 9 was not the Medical Officer in Guskara PHC on the date of occurrence i.e., on 21.09.1998. One Dr. Tarun Kumar Rakshit was the Medical Officer at that time. Prosecution did not take any step to examine Dr. Tarun Kumar Rakshit. P.W. 9 produced two injury reports vide Ext. 6 and 6(a) (with objection by the defence) in respect of P.W.s. 5 and 6 respectively and said injury reports according to P.W. 9 were prepared from the injury register maintained in the Guskara PHC. P.W. 9 could not say the injury register has been maintained in whose handwriting. He only copied the material from the injury register and proved the same (with objection by the defence) in the Court. According to reports proved by P.W. 9, Bijoy Krishna Koley (P.W. 5) had sustained following injuries i.e. lacerated injury on the left side of the scalp, three stitches were given on the patient and T. Toxoid injection with Septran tablet and Paracetamol were given. So far as Dilip Sarkar (P.W. 6) is concerned, he had sustained the following injuries i.e. lacerated injury on the right side of forehead, five stitches were given and T.Toxoid injection and tablet Septran and Paracetamol were given. P.W. 9 has candidly admitted that he had no personal knowledge about the injury sustained by the victims. He further testified that he has not noted the conditions of the injured persons in the injury report. We, however, loath to accept the injury report proved by P.W. 9 vide Ext. 6 and 6(a), in view of the fact that the original document i.e., injury register had not been proved by the prosecution. It is the settled law that when the primary evidence is in existence, the Court should not allow secondary evidence of the same to be given in a particular case. Always the best evidence should come on record and the secondary

evidence vide Ext.. 6 and 6(a) which have been copied down from the injury register having been proved, we discard the evidence of P.W. 9.

17. Coming to the evidence of P.W. 11, it is found that his evidence is of no avail to the prosecution inasmuch as he has not been able to say about the nature of injuries etc., and only stated that the injuries were bandaged. P.W. 7 is the Medical Officer who actually treated both the injured persons i.e., P.W.s. 5 and 6. According to P.W. 7, Bijoy Krishna Koley (P.W. 5) had sustained the following injuries, i) abrasion in the back which was superficial and ii) black eye on right side. So far as Dilip Sarkar (P.W. 6) is concerned, P.W. 7 has testified that there was no external injury on his person. She has further testified that the injuries as found in the person of Bijoy Krishna Koley (P.W. 5) are not grave.

18. Bijoy Krishna Koley (P.W. 5) was referred to the department of Ophthalmology as there was injury on his eye. According to P.W. 7, the ophthalmic surgeon opined that the blackness in the eye might have been caused by trauma on the head due to assault. From the evidence of P.W. 7, we find that there was no stitches on the wounds sustained by P.W. 5 and P.W. 6 as testified by P.W. 9 in his evidence while proving Ext. 6 and 6(a). P.W. 5 has also not testified in his evidence that his wounds were stitched in Guskara PHC. P.W. 6, however, has testified that his wounds were stitched at Guskara PHC but when we read the evidence of P.W.6 in conjunction with the evidence of the I.O. (P.W.8), we find that on that aspect P.W. 6 has been contradicted under Section 145 Evidence Act, as he had not stated before the I.O. that he got his injury stitched at Guskara PHC. From the evidence of P.W. 7 and the aforesaid discussion, we

get confirmation to our view so far as our finding regarding veracity of Ext. 6 and 6(a) proved by P.W. 9 is concerned. From the evidence of P.W. 7, we find that the injury sustained by Bijoy Krishna Koley (P.W. 5) was not grave, it was superficial in nature and the assault on him was not severe as deposed to in ocular testimony of P.W.s. 5, 6, 1 and 4. However, as it is the settled law that when there is variation in the evidence of ocular testimony and medical opinion, we have to give preference to ocular testimony so far as manner of assault is concerned but so far as injury is concerned, we may prefer to give primacy to medical testimony regarding nature of injury sustained because it is also the direct evidence of the Medical Officer who has examined the injured.

19. Mr. Ghosh, learned Counsel for the State has relied on the case of State of Maharashtra (Supra) where in Paragraph 9 and 10, the Hon'ble Supreme Court has held thus:

“9. Shri Rana appearing for the State strenuously contended that the High Court has committed a grave error in holding that the offence under Section 307 IPC was not made out merely because the injuries inflicted on the witnesses were in the nature of a simple hurt and in these circumstances it is not possible to hold any of the accused persons guilty in respect of that offence. We find considerable force in this contention. A bare perusal of Section 307 IPC would show that the reasons given by the High Court for acquitting the accused of the offence under Section 307 were not tenable. Section 307 IPC reads:

“Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of

either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.”

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. 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 this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

10. The High Court, in our opinion, was not correct in acquitting the accused of the charge under Section 307 IPC merely because the injuries inflicted on the victims were in the nature of a simple hurt. Therefore, that part of the judgment of the High Court acquitting Accused 1, 2 and 11 of

the offence under Section 307 IPC cannot be sustained and must be set aside. They have, however, already served out sentence of imprisonment for two years for the offence under Sections 147 and 148 IPC in pursuance of the order of the High Court. When the State filed an appeal against them they were arrested again and had to remain in jail for three months before they could be released on bail. Thus, they have already served a sentence of two years three months. In the circumstances the ends of justice should be met if the sentence is limited to the period already undergone.”

20. Further in the case of Sachin Jana and Another (Supra), Hon’ble Supreme Court in Paragraph 11 has held thus:

“11. “9. ... Section 307 IPC reads:

‘307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.’

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section

makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. 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 this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.”

This position was highlighted in State of Maharashtra v. Balram Bama Patil [(1983) 2 SCC 28 : 1983 SCC (Cri) 320] , SCC p. 32, para 9.”

21. Having thoroughly gone through the aforesaid dictum of Hon’ble Supreme Court and the provisions contained in Section 307 I.P.C. along with illustration appended thereto, we are of the view that the facts of the present case is on a different footing and the aforesaid decisions are clearly distinguishable in the present case. So far as assault on Dilip Sarkar (P.W. 6) is concerned, there is no question of conviction under Section 307 IPC read with Section 34 thereof inasmuch as charge has been framed under Section 323/34 IPC only and conviction has been recorded thereunder. So far as Bijoy Krishna Koley (P.W. 5) is concerned, the charge having been framed under Section 307/34 IPC and conviction having been recorded thereunder, we are of the considered view that in view of the nature of injury sustained by Bijoy Krishna Koley (P.W. 5) which

is not at all grave in nature and which cannot at all be held to be fatal in any manner and there being padding up of the case by the prosecution so far as the medical evidence is concerned. We deem it just and proper to modify the conviction of the appellants under section 323/34 IPC so far as assault on P.W.5 is concerned.

22. From the record, we find that the appellants were in custody for about two months after the judgment was pronounced. Taking into consideration the circumstances involved, the delay in disposal of this appeal and the fact that the appellants are at large since August 2003, we do not want to send them back to jail again.

23. Accordingly, the sentence in respect of the appellants is confined to period already undergone and each of them is further sentenced to pay fine of Rs. 1,000/- each within a period of one month from today in default each of them shall suffer S.I. of 15 days more.

24. With the aforesaid modification in the conviction and sentence, the appeal being **CRA 281 of 2003** is allowed in part.

25. The LCR be sent down to the appropriate Lower Court along with a copy of the judgment.

26. Before parting with the Judgement, we feel persuaded to put on record our appreciation for Miss Monami Mukherjee, who with only 3 months of experience in Bar could ably and successfully assisted us in understanding the matter. Similarly we also appreciate the valuable assistance rendered by Mr. Ghose, learned Counsel for the State.

27. Judgment dictated in open Court.

28. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

