

**IN THE HIGH COURT AT CALCUTTA
(Criminal Appellate Jurisdiction)
Appellate Side**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.A No.504 of 2011

Habibul @ Habibur Sk. @ Maisal & Ors.

Vs.

State of West Bengal

For the Petitioners

: Mr. Prabir Majumder,
: Mr. Snehanshu Majumder,
: Mr. Avisek Chatterjee,
: Ms. Sangeeta Chakraborty.

For the State

: Mr. Binoy Kumar Panda,
: Mr. Narayan Prasad Agarwala,
: Mr. Partick Bose,
: Mr. Subham Bhakat.

Hearing concluded on : 25/11/2022

Judgment on : 06/01/2023

Rai Chattopadhyaya, J.

1. Six appellants namely, (1) Habibul @ Habibur Sk @ Maisal, son of hafijuddin Sk @ Hafijul Sk @ Maisal, (2) Amzad Sk @ Amzad Ali @ Maisal @ Patal, son of Late Ummat Ali Sk @ Maisal, (3) Sahabuddin Sk @ Maisal, son of Late Ummat Ali Sk @ Maisal, (4) Hafizul Sk @ Hafijuddin Sk @ Maisal, son of Late Ummat Ali Sk, (5) Mofizul Sk @ Maisal, son of Sahabuddin Sk @ Maisal and (6) Alauddin Sk @ Maisal @ Pagol, son of Late Ummat Ali Sk, have preferred this appeal to challenge the judgment and order dated 30.07.2011, of conviction and sentence respectively passed in Sessions Trial No. 3 (Feb) 2009, by the Additional District and Sessions Judge, Fast Track, 3rd Court, Krishnagar, Nadia.
2. The trial was held by framing charges against the accused persons under Sections 354/511/458/308 IPC. The Trial Court found that the evidence brought on record by the prosecution in the trial would be sufficient to bring home the said charges against the accused persons and thus found all of the appellants guilty of the offence under the afore stated provisions of law. Pursuant to such conviction the appellants have been sentenced to suffer rigorous imprisonment for two months each and also to pay fine of Rs. 2500/- each, in

default of which they were directed to suffer further rigorous imprisonment for three months period more individually.

3. Being aggrieved with the said order the appellants are before this court.
4. Mr. Prabir Majumder, appearing on behalf of the appellants has submitted that the Trial Court has committed certain patent illegality in the judgment as mentioned above in this case. Firstly, the charge form dated 6.2.2009, has been referred to. It is submitted that a single charge form for “charges with three heads” for all the appellants framing charges against them under Section 354/458/308 IPC is only perverse and illegal. It is submitted that all the accused persons are not alleged to be engaged in an offence under Section 354 IPC and framing of charge against all of them under the said provision of law is only misconceived and not in conformity with law.
5. It has further been submitted by him that the two doctors examined in trial have not proved the injury reports. Furthermore, the medical documents proved by one of these witnesses would not depict the nature of injury of the victim to bring the alleged offensive act under the provisions of law for which the appellants have been convicted. He further submits that all these relevant points have been beyond consideration of the Trial Court while passing the judgment. It is

further submitted that the incident was of free fight between the parties, in which the appellants have also suffered injuries. A case was lodged by them even prior to the present case, which has been lodged by the defacto complainant only as a counter blast of the previous one by the present appellants. In the said case after completion of investigation charge sheet has been submitted under Section 448/323/506/34 IPC against the defacto complainant and others. It is submitted that in the judgment the Trial Court though has mentioned the fact but has not considered the effect of the matter. In support he has relied on the evidence given in court by the defense witness Habibur Sk (DW 1).

6. Lastly and alternatively he has submitted that the appellants not being any habitual offenders may be released under the provisions of Probation of Offenders Act, 1958, instead of being convicted and sentenced as promulgated by the Trial Court.
7. The State however put vehement objection to such contention and arguments made on behalf of the appellants. Its contention is that the evidence on record has proved the charges against the appellants beyond all reasonable doubts. Under such circumstances the Trial Court has committed no error in holding them convicted in the trial and imposing sentence to them. Mr. Binoy Kumar Panda appearing on behalf of the State has prayed for dismissal of the appeal.

8. The name of the prosecution witnesses are as follows:-

WITNESS LIST

Nos.	Name
PW 1	Najma Bibi
PW2	Fazlur Rahaman Sk.
PW3	Minarul Sk.
PW4	Jakir Hussain Sk.
PW5	Dr. Suder Biswas
PW6	Amir Ali Sk.
PW7	Alauddin Sk.
PW8	Ohab Gain
PW9	Dr. Aurobinda Das
PW10	S.I Prabir Bhattacharjee

9. The following are the documents exhibited by the prosecution during trial:

Exhibit 1	Discharge certificate of PW 4 dated 05.06.2008.
Exhibit 1/1	Signature of doctors thereon.

Exhibit 2	Discharge certificate of PW 6 dated 06.06.2008
Exhibit 2/1	Signature of the doctors on Exhibit 2.
Exhibit 3	FIR.
Exhibit 4	Collection of medical paper of the Primary Health Centre regarding treatment on the injured persons.
Exhibit 5	Rough sketch map.
Exhibit 6	Formal part of the FIR.

10. In this appeal the prosecution has examined ten witnesses. PW 1 is the complainant herself whereas PW 3 and 4 are the son and husband of the complainant, PW 6 is her father-in-law, (PWs 3, 4 and 6 being the injured victims), PW 2 and 7 are the neighbors and co-villagers, whereas PW 5 and 9 are the doctors. PW 8 is the scribe of the FIR and PW 10 is the investigating officer of this case. The chronology of incident narrated in the FIR dated 02.06.2008 and stated by PW 1 in her deposition during trial would be as follows:-

11. The date of incident has been mentioned to be on 01.06.2008 at 12:00 hours in the night. PW 1 deposes to have been sleeping in her thatched room alone. Allegedly at that time Habibur Sk. @ Maisal, i.e, appellant no.1 secretly entered into her room and attempted to commit intercourse with her forcefully. The complainant asserts to have raised alarm being physically violated by the appellant no.1 and

due to the same the said person is said to have fled away from the room. PW 1 has further stated that the miscreant was identified by her in electricity light and also the incident was narrated by her to her husband who eventually informed it to the father and uncle of the said accused person Habibul Sk. The matter did not end there. On the next morning, i.e, on 02.06.2008 at about 7:30 a.m the other appellants namely, Amzad Sk, Hahabuddin Sk, Hafizul Sk, Mofizul Sk, Alauddin Sk broke into the house of the complainant and lifted her son in order to kill him. Allegedly, at that time they were armed with iron rods and coshes. Her son was assaulted severely. It is deposed and corroborated in the FIR that as the said persons broke into the house of the complainant and assaulted her son, the other members present therein, i.e, her husband Zakir Hossuin, father-in-law Amir Ali were also assaulted resulting into the sufferance of bleeding injuries. The witness says that all the three injured persons were taken to Bethuadahari Hospital and on the next date her husband and father-in-law were referred for better treatment to Shaktinagar District Hospital.

- 12.** This evidence of the PW 1 have been supported by PW 3 her son, PW 4 her husband, PW 6 father-in-law and also PW 2 the co-villagers.
- 13.** PW 3 deposed about the offence of outraging modesty of his mother by Habibul Sk. on 01.06.2008. Though he said he was not present in

house at that point of time, he immediately rushed to his house after hearing her mother's hue and cry to find the offender to flee away. He has corroborated the substantive evidence of PW 1 regarding the incident allegedly happen on the next date in the morning, i.e, all the appellants breaking into their house being armed with fatal weapons and committing severe assault upon the three male members of the family as mentioned above. This witness has further stated that the other two injured persons had to be hospitalized for treatment due to the seriousness of the injuries received. Thus, he has duly corroborated what has been earlier deposed by PW 1.

- 14.** PW 4 has also corroborated the evidence of PW 1 and 3 regarding commission of offence of outraging modesty of PW 1 by Habibul and that of assault by all other appellants against all his family members including the complainant resulting to grievous hurt. These witnesses also corroborated the fact of being hospitalized for treatment.
- 15.** So has done PW 6 father-in-law, he has duly corroborated the evidence of PW 1, 3 and 4.
- 16.** Expecting the members of the same family including the injured victims, the other witness who is supporting the prosecution case is PW 2. PW 2 is a local resident who says to have been present at the tea stall of PW 4 on 12:00 hours in the night on the date of incident.

He says that the complainant raised alarm at the attempt of the appellant no.1 to outrage her modesty. He approached along with all others to the concerned place of concurrence where he heard the complainant to narrate the entire incident to her husband, i.e, PW 4. This witness has also stated to have noticed, while going to the field on the next morning, all the appellants being engaged in assaulting and house breaking.

- 17.** Thus ocular evidence of the prime witnesses of the prosecution are found in this trial to be coherent and unblemished. The direct evidence given by all the injured persons leaves no scope of any doubt regarding appellant's involvement in the acts as alleged.
- 18.** PW 5 and 9 are the two doctors to support prosecution case in this appeal. PW 5 has asserted the fact that on 03.06.2008 he examined and treated PW 4 and 6 with the history of assault. He further deposes that both patients were referred to Bethuadahari Primary Health Centre by him. The fact of hospitalization of these two is asserted by Dr. Biswas, i.e, PW 5. PW 9 is the medical officer of the Bethuadahari Hospital. He has deposed to have examined PW 4 and 6 and referring their case to Shaktigar District Hospital on the ground of seriousness of the injury. He deposes that PW 4 suffered injury on the head and left forearm and PW 6 had injuries on head. This witness says according to the history assault recorded as per

description of the injured persons, the appellants namely, Hafizul Sk, Amzad Sk, Alauddin Sk were the assailants.

- 19.** Now this appeal court would decide on the point as to whether the judgment impugned in this appeal passed by the Trial Court is legal and proper, also if there is any such lawlessness or perversity in the impugned judgment, which would render the same to be a nullity in the eyes of law and in case charges against the appellants are found to be proved and impugned judgment to be proper, whether the appellants being accused persons therein, shall be eligible to be released according to the provisions of the Probation of Offenders Act, 1958, or shall be eligible for exoneration from the order of remittance of the fine as directed by the Trial Court.
- 20.** As discussed earlier, there is complete coherence in the evidence of the witnesses nos. 1, 3, 4, 6 and 2 regarding the facts alleged and the same suffers from no major and gross discrepancy. Eventually, PW Nos.1, 3, 4 and 6 are the victims and eye witnesses. PW 2 is also an eye witness so far as the incidents occurred on 02.06.2008 morning is concerned. They have withstood cross-examination and no defense could be put so far as the facts of 02.06.2008 are concerned.
- 21.** In this regard due and necessary corroboration can be found from the documentary evidence like treatment papers (marked exhibits in this

case) and the oral evidence given by the doctors being PWs 5 and 9. Facts of hospitalization of both PWs 4 and 6 are on record, proved through oral and documentary evidences. Injury at the vital part of the body like head is also proved from doctor's evidence being corroborated by the treatment papers. A careful consideration of the evidence on record in this trial would show that the decision of the Trial Court is based on proper appreciation of evidence on record and the same does not suffer from any patent or gross error or perversity, which may warrant this Court's interference into the same.

22. In this case the appellants have faced trial for the charges under Section 354/458/308 IPC. However, they have been held convicted and have been sentenced for the offence under Section 308 IPC only. Accordingly it is found proper not to divert the discussion regarding proof of offence alleged under Section 354 or 458 IPC, though a cursory view may be attributed.

23. Section 354 IPC has provided for punishment for the offence of assault or criminal force to woman with intent to outrage her modesty. The language of the provision clearly indicates that the intention of the accused to apply criminal force to the woman and applying intentional and motivated force to outrage her modesty would be the constituent factors for an offence under the said provision of law. A point has been raised in argument that in this

trial, by the witness as well as in the FIR, allegations have been made against appellant no.1 only, so far as the said offence is concerned, though the Court has erroneously framed charge against all the appellants under the afore stated provision of law, which is only unsustainable in the eye of law. Since finally in the impugned judgment the appellants have not been held guilty of offence under Section 354 IPC, it is found unnecessary to go into the discussion of the same any further in this appeal.

24. So far as the charge against the accused persons/appellants under Section 458 IPC is concerned, i.e, punitive provisions for larking house trespasses and house breaking by night after preparation for hurt, assault or wrongful restraint, similar view may be taken with respect to this charge also under which the appellants have not been held guilty in the impugned judgment. Hence, no discussion is made as regards the same.

25. The offence for which the appellants have been held guilty and sentenced by the Trial Court is that under Section 308 IPC, i.e, attempt to commit culpable homicide. To bring home this charge against the appellants the prosecution had to lay down sufficient evidence beyond all reasonable doubts to prove the ingredient thereof which may be summarized in the following way:-

26. The essentials to prove an offence under Section 308 IPC may be stated to be -

- (i) Nature of the act: the act attempted should be of such a nature that if not prevented or intercepted, it would lead to the death of the victim.
- (ii) Intention or knowledge of committing the offence: the intention to kill is needed to be proved clearly beyond reasonable doubts. To prove this the prosecution can make use of the circumstances like an attack by dangerous weapons on vital body parts of the victim. The person attempting to commit culpable homicide do so that the intention knowledge that if the act that he does causes death he would be guilty of culpable homicide not amounting to murder.
- (iii) Performance or execution of offence: the intention and the knowledge resulting in the attempt to culpable homicide by the accused is also needed to be proved for conviction under the afore stated section.
- (iv) The act by the offender would cause death in its ordinary course.

27. An attempt to commit a crime is also considered a crime under the Indian Penal Code. Each and every attempt which falls short of

success creates a threat in the minds of people which is the injury caused and moreover the moral guilt of the offender is taken as equal to the guilt of that person had he succeeded in committing the crime. An attempt to do a criminal act which has been codified as an offence in the Code is also a crime and punishable under Section 511 IPC. An attempt to commit a crime occurs when an individual makes a mind set (with motive) to do a criminal act and makes an effort or does an act/conduct in furtherance to commit that crime, by arranging means and methods that are necessary for the commission, but fails to achieve the commission of a crime.

28. Section 308 deals with the offence of ‘attempt to commit culpable homicide’. This Section is applied when an action is taken by an individual with the intention and knowledge that if by his acts death was caused, he would be guilty of culpable homicide not amounting to murder. An individual is charged for an “attempt” to commit a crime, when he takes steps for a crime to be completed but due to some shortcomings, failed.

29. At the cost a reiteration in this appeal it may be noted that the consistent and reliable evidence of the witnesses being duly corroborated by the treatment reports and ocular evidence of the attending doctors, the ingredients of the offence under Section 308 as mentioned above are established well in this case. So far as the

offence under Section 308 IPC is concerned the trial court is found to have committed no error in making its decision and coming to a definite finding. The impugned judgment suffers no illegality or impropriety so far as the findings regarding guilt of the accused persons under Section 308 IPC is concerned. To this extent there is no scope for this appellate court to interfere with the finding and decision of the Trial Court in the impugned judgment, and to this extent same is upheld.

- 30.** The next point and alternative argument made on behalf of the appellant is based on the following finding of the Trial Court made in the impugned judgment:-

“Considering nature of the offence committed and having regard to the surrounding facts and circumstances, the convicts are not entitled to be released on probation or admonition. Convicts have been found guilty of the offence punishable under Sec.308 IPC.”

- 31.** It is submitted by Mr. Majumder that the appellants are not habitual offenders, they have been convicted by the judgment of the trial court back in the year 2011 and since then their conduct is no way hostile to the interest of any other citizen or good order of the society. It is also submitted that during this long period of time the appellants have not at all misused the liberty granted to them under bail. On all these grounds he has suggested that the provisions of Probation of Offenders Act, 1958, may be espoused in the appellants' case.

32. Section 4 of the Probation of Offenders Act, 1958 would be the relevant provision in this case, which is as follows:-

“4. Power of court to release certain offenders on probation of good conduct.—(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and

shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

33. In this respect one may seek guidance from the verdict of the Hon'ble Supreme Court, in **Mohd. Hashim v. State of U.P. reported in (2017) 2 SCC 198**, and the relevant portion of the same may be quoted as bellow :-

"21. In this regard, it is also seemly to refer to other authorities to highlight how the discretion vested in a court under the PO Act is to be exercised. In *Ram Parkash v. State of H.P.* [*Ram Parkash v. State of H.P.*, (1972) 4 SCC 46 : 1973 SCC (Cri) 119 : AIR 1973 SC 780] , while dealing with Section 4 of the PO Act in the context of the Prevention of Food Adulteration Act, 1954, the Court opined that the word "may" used in Section 4 of the PO Act does not mean "must". On the contrary, as has been held in the said authority, it has been made clear in categorical terms that the provisions of the PO Act distinguish offenders below 21 years of age and those above that age and offenders who are guilty of committing an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. Thereafter, the Court has proceeded to observe: (SCC p. 48, para 7)

"7. ... While in the case of offenders who are above the age of 21 years, absolute discretion is given to the court to release them after admonition or on probation of good conduct in the case of offenders below the age of 21 years an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act. (*Rattan Lal v. State of Punjab* [*Rattan Lal v. State of Punjab*, AIR 1965 SC 444 : (1965) 1 Cri LJ 360] and *Ramji Missar v. State of Bihar* [*Ramji Missar v. State of Bihar*, AIR 1963 SC 1088 : (1963) 2 Cri LJ 173] .)"

22. We have referred to the aforesaid authority to stress the point that the court before exercising the power under Section 4 of the PO Act has to keep in view the nature of offence and the conditions incorporated under Section 4 of the PO Act. Be it stated in *Dalbir Singh v. State of Haryana* [*Dalbir Singh v. State of Haryana*, (2000) 5

SCC 82 : 2004 SCC (Cri) 1208 : AIR 2000 SC 1677] it has been held that Parliament has made it clear that only if the Court forms the opinion that it is expedient to release the convict on probation for the good conduct regard being had to the circumstances of the case and one of the circumstances which cannot be sidelined in forming the said opinion is “the nature of the offence”. The Court has further opined that though the discretion has been vested in the court to decide when and how the court should form such opinion, yet the provision itself provides sufficient indication that releasing the convicted person on probation of good conduct must appear to the Court to be expedient. Explaining the word “expedient”, the Court held thus: (SCC p. 86, paras 9-10)

“9. ... The word “expedient” had been thoughtfully employed by Parliament in the section so as to mean it as “apt and suitable to the end in view”. In *Black's Law Dictionary* the word “expedient” is defined as “suitable and appropriate for accomplishment of a specified object” besides the other meaning referred to earlier. In *State of Gujarat v. Jamnadas G. Pabri* [*State of Gujarat v. Jamnadas G. Pabri*, (1975) 1 SCC 138 : AIR 1974 SC 2233] a two-Judge Bench of this Court has considered the word “expedient”. The learned Judges have observed in para 21 thus: (SCC p. 145)

‘21. ... Again, the word “expedient” used in this provision, has several shades of meaning. In one dictionary sense, “expedient” (adj.) means “apt and suitable to the end in view”, “practical and efficient”; “politic”; “profitable”; “advisable”, “fit, proper and suitable to the circumstances of the case”. In another shade, it means a device “characterised by mere utility rather than principle, conducive to special advantage rather than to what is universally right” (see *Webster's New International Dictionary*)’.

10. It was then held that the court must construe the said word in keeping with the context and object of the provision in its widest amplitude. Here the word “expedient” is used in Section 4 of the PO Act in the context of casting a duty on the court to take into account “the circumstances of the case including the nature of the offence...” This means Section 4 can be resorted to when the court considers the circumstances of the case, particularly the nature of the offence, and the court forms its opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on probation of good conduct.”

34. Thus whether or not provisions of the Probation of Offenders Act shall be espoused in a particular case, would depend on the facts and circumstances of the said case. The law has provided certain criteria to be considered before it is found expedient by it to extend the afore stated provision of law in case of any convict. It is propounded that court is to consider circumstances of the case including the nature of offence and the character of offender. After considering the aggravating and mitigating circumstances the court shall form an opinion whether the offender may be released on prohibition of good conduct instead of being directed to suffer the sentence of imprisonment and fine awarded by the court. The court shall apply its mind, assess the circumstance of a particular case specifically the nature of offence and the conditions incorporated under Section 4 of the said Act and through this process shall determine if the accused is to be granted benefit under the said Act and on what conditions , if any.

35. No doubt on this case there is no adverse report regarding the conduct of the appellants since after their conviction. It is also not reported whether any criminal antecedent of the appellants are available indicating thereby that the present occurrence might have been a maiden and stray one in the day to day life of the appellants. The facts indicated by the records that the parties being engaged in a

scuffling at the hot haste over certain difference of opinion cannot also be ruled out. As a matter of fact, existences of two police cases filed by both the parties have already come on record during trial. This may be considered to be the mitigating circumstance as against the facts proved in this trial against the accused persons discussed earlier. After a very careful consideration of the same this Court is of the opinion that in this case it would be expedient to extend the provision as afore stated under the Probation of Offenders Act, 1958 in case of the appellants who have been sentenced by the Trial Court to suffer two months of rigorous imprisonment and for payment of fine of Rs. 2500/- each after being convicted for the offence as mentioned above.

- 36.** Upon this finding, sentence of the appellants of imprisonment and fine are now set aside. Instead of the same all of the appellants shall be released on probation of good conduct, for the period of the two months from the date of this judgment. During this period, the appellants shall remain under the same bond furnished with the Trial Court. The appellant shall visit the officer-in-charge of Krishnagar Police Station if called for in connection with the present case or the other case lodged by them concerning the self same incident during this probation period, only for the purpose of ensuring their good

behavior. The appellants shall maintain good conduct and behavior during the probation period.

37. With these directions this appeal is disposed of.

38. Appeal is allowed partly. The impugned judgment dated 30th July, 2011 is upheld to the extent that the appellants are found guilty of the offence under Section 308 IPC. However, the finding of the Trial Court in the said judgment that the Probation of Offenders Act, 1958, could not be extended to the appellants and the sentence imposed are set aside. Instead the directions as mentioned above in paragraph no. 36 are made.

39. Urgent certified website copy of this judgment, if applied for, be supplied to the parties upon usual undertaking.

(Rai Chattopadhyay,J.)