

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3230 of 2019

Madan Ray & Ors.

Vs

The State of West Bengal.

With

CRR 388 of 2021

(Assigned)

with

CRAN 1 of 2021

Joschna Roy

Vs.

The State of West Bengal.

For the Petitioners

: Ms. Devi Priya Mitra.

For the State

: Mr. Madhusudan Sur,
Mr. Manoranjan Mahato.

Heard on

: 28.02.2023

Judgment on

: 19.04.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against the judgment and order dated 12th June, 2019 passed by the Special Court cum Additional Sessions Judge, First Court, Raiganj, Uttar Dinajpur, convicting the petitioners under Sections 448/326/34 of the Indian Penal Code and Sentencing them to suffer imprisonment for two years each and to pay a fine of Rs. 2000/- for the offence under Section 326/34 of Indian Penal Code and simple imprisonment for three months each for the offence under Section 448/34 of Indian Penal Code. Both the sentences were directed to run concurrently in Criminal Appeal No. 13 of 2016. The order dated 31.03.2016 passed by the Learned Judicial Magistrate, 1st Court, Raiganj in G.R. Case No. 283 of 2007 convicting petitioners under Sections 448/326/34 of Indian Penal Code was affirmed.
2. The prosecution case as per the petition of complaint is that in the evening of 17.04.2007, the petitioner no. 1 had allegedly come to the house of the complainant Mohan Mondal during the function of “Baishnab Seba” in an intoxicated condition. Basudeb Mondal the elder brother of the complainant allegedly persuaded the petitioner no. 1 to leave the house.
3. The petitioner no. 1 then allegedly left and returned at 10 pm with the other petitioners and assaulted Basudev Mondal who sustained injuries. Seeing that, Bindeswar Mondal father of Basudev Mondal, went to save

him but also sustained injuries for which he was medically treated at Raiganj District Hospital.

4. On the basis of the written complaint filed on 23.04.2007 by Mohan Mondal (P.W. 5), Raiganj Police Station Case No. 132 of 2007 dated 23.04.2007 was started against the petitioners for the offences punishable under Sections 341/326/34 of Indian Penal code.
5. On completion of the investigation of the case, the police submitted Charge Sheet on 31.05.2017 for the offences punishable under Sections 341/326/34 of Indian Penal Code against the petitioners and others.
6. Charge under Sections 326/34 of Indian Penal Code and adding Section 448/34 of Indian Penal Code were framed against the petitioners.
7. Defence of the petitioners was of innocence and false implication.
8. The trial commenced and the Learned Judicial Magistrate, Rajganj, Uttar Dinajpur found the petitioners guilty and by his order dated 31.03.2016 Learned Judicial Magistrate, 1st Court, Rajganj in connection to G.R. Case No. 283 of 2007 convicted the petitioners under Sections 448/326/34 of Indian Penal Code accordingly.
9. The petitioners preferred an appeal vide No. 13 of 2016 before the Learned Special Court cum Additional Sessions Judge, First Court, Raiganj, Uttar Dinajpur and it is submitted that without scanning the evidence properly, the learned Judge mechanically by his order dated 12.06.2019 upheld the order dated 31.03.2016 of the Trial Judge.

10. **Ms. Devi Priya Mitra, learned counsel for the petitioners** has submitted that the judgment of the Learned Sessions Judge as well as the Magistrate is based on conjectures and surmises not warranted by the evidence on records.
11. That the ingredients of the offence charged not having been established, the conviction of the appellant is not sustainable-in-law.
12. That both the Learned Sessions Judge and the Learned Magistrate did not look into the fact that P.W. 3 came to know about the alleged incident, only on the next morning and was not an eye witness to the alleged incident.
13. It is further submitted that the Learned Sessions Judge and the Learned Magistrate failed to take into consideration that P.W. 4 though stated that he was admitted in Raiganj Hospital for 13 days in an unconscious state, but P.W. 7 stated that P.W. 4 was admitted in a conscious state and P.W. 8 stated that the bed head ticket does not bear any disclosure about the conscious or unconscious state of P.W. 4 at the time of admission.
14. That the investigating officer conducted the investigation in a casual away and neither did he seize any blood stained wearing apparel nor did he seize any 'Hansua' or 'Lathi' alleged to have been used in the alleged assault.
15. It is submitted that the sentence is too severe.

16. **Mr. Madhusudan Sur, learned counsel for the State** has submitted that the judgment and order under revision is in accordance with law and needs no interference. The revision is thus liable to be dismissed.
17. Heard both sides in full. Perused the materials on record including the documents and oral evidence on record. Considered.
18. **Exhibit 2** is the Emergency Slip (shows only fracture).
19. **Exhibit 3** is the injury report (shows only fracture).
20. **Exhibit 4** is the treatment sheet (shows fracture and punctured wound).
21. As seen from the medical papers, injury found is elbow fracture (punctured wound) as per Exhibit 4 and not mentioned in Exhibit 2 and 3.
22. As stated by the patient, he was assaulted by the petitioners with a 'Hansua', a sharp cutting weapon.
23. P.W. 7, is the doctor who admitted the injured. **The patient was conscious.**
24. 'Hansua' is a weapon known as 'Sickle' in English. It is used for cutting grass etc by farmers. It is pointed sharp cutting weapon, when used can cause bleeding injury.
25. Though the witnesses have stated that the injured was assaulted with a 'Hansua', there is neither any seizure list showing any seizure of any weapon(s).
26. The petitioners have been convicted for offence punishable under Section 448/326/34 of Indian Penal Code and sentenced accordingly.

27. **Both the doctors have stated in cross examination that such an injury can be caused by a fall.**
28. The assault by 'Hansua' has not been proved as discussed above.
29. So the use of dangerous weapon has also not been proved.
30. Admittedly the alleged incident took place when **"Baishnab Puja"** was going on in the complainant's house and **about 70-80 persons were present.**
31. Allegedly accused Madan Roy had gone to the house of the complainant in an intoxicated condition and was assaulted. Later allegedly the petitioners including Madan Roy went and attacked them (the complainant's side).
32. **P.W. 2 is the son of the injured. He has stated that a quarrel took place between his father and the petitioners on the date of incident and nothing else happened. He was declared hostile by the prosecution.**
33. P.W. 4 is the injured. He has stated that he was injured with a hansua and suffered bleeding injury. He has stated that he became unconscious and fell and regained his sense at Raiganj Hospital.
34. Doctors have stated he was conscious.
35. P.W. 7 has stated that the injured (PW 4) allegedly suffered injury on 17.04.2007 at 7 pm. He was taken to the hospital on 18.04.2007 at 2.30 pm. The medical papers at Raiganj Medical Hospital (Exhibit 4) show elbow fracture (punctured wound).

36. A punctured wound is usually caused by a sharp **pointed** object such as nail, animal teeth, wood spinsters, pins, glass etc. Here the injury is allegedly by a 'Hansua' and there is a fracture and a punctured wound (no bleeding was found). The injury report does not support the statement of the injured that he was assaulted with a "Hansua". Even his own son (PW 2) has not supported his statement. Admittedly there was a quarrel between the parties, but nothing else happened (as stated by PW 2, the son of the injured, though he was declared hostile by the prosecution).
37. The relevant findings and reasoning of the learned Trial Court are reproduced here:-

".....obviously, some minor variations and some omissions are found when the testimony of PW 5 is juxtaposed with the content of the FIR. But having regard to the span of time between the incident and the deposition and also to the limitation of human memory, the same may be overlooked."

"The defence has further suggested that PW 5 did not mention the fact that his father had sustained injury on his hand owing to a blow of hansua and the witness has replied that he cannot recollect the same at present. In fact, the witness has come to depose almost six and a half years after the incident and he is not expected to recollect the content of the FIR in details. However, as I have already mentioned, by putting this suggestion the defence has virtually admitted the fact of execution of the FIR by PW 5....."

38. PW 5 not recollecting the fact that his father had sustained injury on his hand owing to a blow of "Hansua" **is a very relevant piece of evidence. It is the evidence on which the total case is based.** Such fact of

assault/attack cannot be forgotten easily and it is not believable that one can forget such an incident in Six and a half years.

39. There was admittedly a criminal case filed by the accuseds against the complainant.
40. PW 5 (complainant) has also not seen accused Madan allegedly strike the blow of Hansua. The finding of the Trial Court that in a crowd it is not possible to see everything clearly goes in favour of the defence.
41. Though the fact of being hospitalized and treated is proved, Exhibit 2 and 3, (Injury Reports) show that the alleged injury is a fracture of the elbow and an (abrasion?) on the forehead. **There is no note of any bleeding injury nor punctured wound (as in Exhibit 4).** Such injury of fracture on elbow and abrasion on forehead, prima facie indicates a fall, as there is no bleeding injury, considering the nature of assault (PW 7).
42. The Trial Court also believed the assault by 'Hansua' though no such weapon was either seized or produced. If such assault had taken place, then along with the injuries there would be active bleeding.
43. Thus from the above appreciation of evidence it is evident that there was a quarrel between the parties and P.W. 4 (injured) fell down and could have sustained the elbow fracture (PW 7).
44. The alleged incident is dated 17.04.2007 at night. FIR was lodged on 23.04.2007 **(delay of Six days)**. The Trial Court has explained the delay holding that it was due to the treatment of the injury (fracture). Though 'Fracture' falls within the category of grievous hurt, this kind/nature of

injury does not justify the delay of six days. There remains a doubt that it was an afterthought, the benefit of which is to be given to the accused/defence, taking into consideration the nature of other evidence/materials on record.

45. In spite of “Baisnab Seva” program going on where 70-80 persons were present, there are no independent witnesses. The observations/findings of the Trial Court that independent witnesses do not want to come to the witness box, is not believable as there were 70-80 persons present and also considering the nature of the present case.
46. The Appellate Courts findings is based on the findings of the Trial Court with no significant independent findings or appreciation of evidence.
47. The findings of the Appellate Court that at the time of alleged incident all 70-80 pilgrims had left (no evidence on record) is also not correct as such ‘Seva’ of ‘Puja’ program are conducted throughout the night.
48. It is also observed that the Appellate Court has referred to the **‘trial’ Court** as **‘lower’ Court**, which is not the proper term or word and such word/term is to be avoided.
49. Thus the findings/observations of both the trial and the Appellate Court are not in accordance with law, as the prosecution has not been able to prove the case beyond reasonable doubt. Thus to prevent an abuse of the process of Court/law, the judgment and order under revision is liable to be set aside.

50. **CRR 3230 of 2019 along with CRR 388 of 2021 with CRAN 1 of 2021 are allowed.**
51. The judgment and order dated 12th June, 2019 passed by the Special Court cum Additional Sessions Judge, First Court, Raiganj, Uttar Dinajpur, affirming the judgment and order dated 31.03.2016 passed by the Learned Judicial Magistrate, 1st Court, Raiganj in G.R. Case No. 283 of 2007 convicting the petitioners under Sections 448/326/34 of Indian Penal Code is hereby set aside.
52. Accuseds /petitioners are acquitted of offence punishable under Sections 448/326/34 of Indian Penal Code and discharged from this case and released from their respective bail bonds.
53. There will be no order as to costs.
54. All connected Applications stand disposed of.
55. Interim order if any stands vacated.
56. Copy of this judgment be sent to the Court of the learned Special Court cum Additional Sessions Judge, First Court, Raiganj, Uttar Dinajpur and learned Judicial Magistrate, 1st Court Raiganj, Uttar Dinajpur for necessary compliance.
57. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)