

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 634 of 2017

SAILEN MALIK & ANR.
VS
STATE OF WEST BENGAL

For the Appellant : Mr. Arindam Jana, Adv.
Mr. Sujan Chatterjee, Adv.

For the State : Mr. Bidyut Kr. Roy, Adv.
Mr. Sima Biswas, Adv.

Hearing concluded on : 18th May, 2023

Judgement on : 19th May, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal challenges the judgment and order of conviction passed by the learned Additional District & Sessions Judge, Fast Track 1st Court, Hooghly in S.T. 2054 of 2014 Old No. 49 of 2008 corresponding to Polba Police Station Case No. 74 of 2003.
2. Briefly stated, one Netai Khara set the criminal proceeding into motion by informing the Officer-in-Charge of Polba Police Station that on 21st May, 2003 a dispute cropped up between Sailen Malik and Gour Khara. The members of both the families got involved. However, the matter was settled peacefully. On 22nd May, 2003 Gour Khara, the elder brother of the informant, on his way back to home from Bhaturia was restrained wrongfully by the family members of Sailen

and was assaulted. After the said incident, the informant along with Gour Khara went to Polba Police Station. After returning home at about 11.45/12 hours the informant found Gopal Pakhira, Ajit Pakhira, Anil Malik, Sunil Malik, Mohan Adak, Sailen Malik and Indrajit Malik invaded their house being armed with weapons and wanted to know if police was informed. As he answered in the affirmative Sailen landed a blow of iron rod on Jagannath Khara. His mother Abhaya Khara came to his rescue and was assaulted. When Gour Khara came, he was assaulted by Gopal Pakhira with sharp cutting weapon. Victims were taken to Polba Police Station and from there to B.P.H.C. wherefrom they were referred to Chinsurah Imambara Hospital. The information since disclosed offence cognizable in nature, Polba Police Station Case No. 74 of 2003 was registered on 22nd May, 2003. Police took up investigation which culminated into submission of charge-sheet.

3. Trial was commenced on 17th December, 2008. The accused persons stood the trial pleading their innocence to the charges. In course of trial, accused Indrajit Mailk expired and the proceeding was filed against him.
4. In order to bring home charges prosecution examined as many as twelve witnesses. Latika Sadhukhan was examined as defence witness No. 1. Learned trial court after considering evidence on record both oral and documentary was pleased to pass the impugned judgement.

5. Impeaching the impugned judgment, Mr. Jana, learned counsel representing the appellants submits that learned trial court failed to appreciate the evidence on record in its proper perspective.
6. The judgment impugned is manifestation of absolute misreading of evidence. Learned trial court failed to appreciate the discrepancies galore.
7. Drawing my attention to the testimony of PW-1, Netai Khara, Mr. Jana submits that admittedly a case was started against the defacto complainant and other witnesses including Gour Khara at the behest of Sailen Malik, in fact there was a free fight as a result members of both the families sustained injuries. Pw-1 during his cross-examination has admitted the fact. But he suppressed the fact that Latika and Kanchan, the members of the family of Sailen Malik were admitted to the District Hospital at Chinsurah with injuries. PW-1 stated that he was not aware of the said fact. Jagat Ghosh, PW-2 stated that Sailen Malik and his associates, armed with different weapons came to the house of Netai Khara and assaulted Jagannath, his mother and subsequently Gour Khara was also assaulted when he came to the rescue of his brother and mother. PW-3, Jaganath Khara is one of the victims who stated that he was assaulted by Sailen with iron rod on his left hand and on the backside of his head. Gour Khara was assaulted by Gopal Pakhira. During cross-examination he stated that his mother fell down on the ground and sustained bleeding injury. He was not aware of the fact that Latika, Kanchan, Gopal, Indrajit and Sailen suffered injuries on their persons.

8. Gopal Khara, PW-4 stated that on 22nd May 2003 of his way back to home he was restrained and assaulted by Latika, her sister and sister-in-law. He went to Polba Police Station with his brother Netai and informed the police. After coming back home he found his mother Jagannath Ghosh, Netai Ghosh and Naba Kr. Khara, who were talking to each other. After sometime, he got attracted by hue and cry and rushed to the house of his mother. He found his brother Jagannath was lying on the ground so was his mother with bleeding injuries. He tried to lift his mother and brother when Gopal Pakhira made an attempt to assault him with sharp cutting weapon. He sustained bleeding injuries. He received bleeding injury on the back of his head. During cross-examination he stated counter case was started against them. PW-5 Netai Khara parroted the PW-4. PW-6 Abhaya Khara is the mother of the defacto complainant who stated that Sailen assaulted her with a sharp cutting weapon on her head. She fell down and sustained injury. During cross-examination she stated that on the following day of quarrel hot altercation took place between Hero, her grandson and Latika. That was the only incident, preceded by hot altercation. She stated further during cross-examination that she was in her sense. PW-7 the attending physician, Dr. P.G.Sarkar who examined Jagannath Khara, during cross-examination he admitted that he also attended Kanchan Malik and Latika Malik who were admitted in the hospital and were under his treatment as indoor patient. The discharge certificates are admitted Exhibit A and A1. PW-8 is the scribe of the written complaint. PW-9 is the doctor who attended the victims on 4th June, 2003 in Calcutta

Medical College. PW-10 is the Recording Officer, PW-11 is the doctor who attended Abhaya Khara, Gour and Jagannath Khara. The witness was told by the injured Abhaya that she was assaulted by Sailen Malik and Indrajit Malik. The doctor attended Gour Khara who had bleeding injury over head and right thumb. He was told by the patient that Sailen and Indrajit Malik assaulted him. Jagannath Khara was also examined by him.

9. The evidence of PW-7, Dr. P.G.Sarkar is sufficient to indicate that Latika and Kanchan both were admitted in the hospital with injury. From the testimony of the witness, Latika Sadhukah, DW-1 particularly from her cross-examination, it is found that Jaganath Khara, Gour Khara and Sadhana Khara were admitted to the hospital. In course of fighting they assaulted Latika and her family members and the family members of Latika including herself reciprocated and assaulted them. There was free fight between the two groups.
10. I have already pointed out that admittedly a counter case was initiated against the victim and the defacto complainant of this case.
11. This fact when considered in the light of the testimony of Latika Sadhukha particularly her cross-examination it shows that the incident of free fight took place and both sides sustained injuries.
12. Under such circumstances, in absence of any specific evidence as to who was the aggressor and who was the aggressee, in my opinion, benefit of doubt ought to have been given by the learned trial court to the accused persons, more so because of the discrepancies appearing

from the description of assailants, given to the doctor PW-7 and before the trial court on oath.

13. That apart there is discrepancy as to the place of occurrence, according to PW-1, 2, 3, 4 and 5, the incident took place inside the house of Netai Khara, the defacto complainant while according to PW-6, Abhaya Khara only one incident took place that started with hot altercation between Hero and Latika followed by the incident of assault. According to the said lady only one incident took place. The testimony of PW-6 belies the claim of PW-1 and PW-4 that in front of the house of Latika, Gour was assaulted and thereafter the accused persons again came and assaulted the victims in the house of Abhaya. None of the witness claimed to have seen Latika in the house of PW-1. Only PW-6 stated about the presence of Latika at the place of occurrence which was in front of their house. Therefore, evidence of PW-6 that makes the place of occurrence doubtful. Prosecution failed to fix the place of occurrence. There is lack of unity so far time, place and manner of action is concerned, which shrouds the case of prosecution with suspicion.
14. Under such circumstances, I am of the view that with all certainty it cannot be said that the accused persons invaded the house of the victims and assaulted them. There was rather a free fight. There is one more aspect not to be ignored. Charge was framed under Section 148/149/324/307 and 326 of the India Penal Code.
15. Learned trial court recording an order of acquittal as against the four accused persons convicted Gour Pakhira and Sailen Malik, the appellants under Section 324 of the Indian Penal Code which is also

not supported by the testimony of witnesses. Sailen Malik could not have been convicted under Section 324 of the IPC for having used iron rod as weapon of assault. Therefore, conviction under Section 324 as against Sailen Malik who allegedly used an iron rod as weapon of assault cannot be maintained. Therefore, in my view the impugned judgement should not be allowed to remain in force and should be set aside, which I accordingly do.

16. The copy of judgement along with the lower court record be sent down to learned Trial Court for information and necessary compliance.
17. Urgent photostat certified copy of this judgement, if applied for, be given to the learned advocates for the parties on usual undertaking.

(SIDDHARTHA ROY CHOWDHURY, J.)