

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 641 of 2014

Biswanath Ghosh & Ors.

-Vs-

The State of West Bengal

For the Appellants : Ms. Minoti Gomes,
Md. Hafiz Ali

For the State : Mr. Avishek Sinha

Heard on : 28.07.2023

Judgment on : 11.12.2023

Ananya Bandyopadhyay, J.:-

1. This instant criminal appeal is directed against a judgment dated 20.09.2014 passed by the Learned Additional Sessions Judge, Kandi, Murshidabad convicting the appellants under Section 324 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 6 months and to pay a fine of Rs. 5,000/- each, in default to suffer further period of rigorous imprisonment for 1 month for the offence punishable under Section 324 of the Indian Penal Code in S.T. No.4th August, 2012/ S. Sl. No. 226/2011 (G.R. No. 1530/2009).
2. The prosecution case emanated on the basis of a complaint which inter alia stated that on 26.12.2009 at 7 p.m. the accused persons along with 3 others

being armed with “hansua”, “sabal” and “lathi” allegedly entered the house of one Birendra Kumar Ghosh and started to quarrel over a piece of land and on the objection raised by said Birendra Prasad Ghosh (PW-9), the said accused persons/appellants along with others allegedly assaulted him with the aforesaid weapons physically, causing grievous injury to him. It was further alleged that when his wife Manju Rani Ghosh (PW-10) along with other family members allegedly tried to rescue him, they were also assaulted by the said accused persons causing injuries to them. Thereafter, they were admitted at Kandi S.D. Hospital for medical treatment.

3. On the basis of the aforesaid complaint lodged by one Khokan Ghosh (PW-1) the nephew of the victim Birendra Nath Ghosh (PW-9) at Kandi Police Station a case being no. 553/09 dated 06.12.2009 was initiated against appellants along with others under Sections 149 / 448 / 324 / 325/ 326/ 307 of the Indian Penal Code
4. After registration of the aforesaid case, police started investigation which ultimately culminated into submission of charge-sheet being no. 102/10 dated 28.02.2010 under Sections 143/448/324/325/326/307 of the Indian Penal Code against six accused persons including the appellants.
5. Thereafter the aforesaid case was committed and charge under Sections 325/308 of the Indian Penal Code were framed against the appellants and others on 28.08.2012. The appellants pleaded not guilty to the charge framed against them and claimed to be tried. The specific defence was that the allegations of the prosecution were totally false and fabricated.

6. In the course of trial, the prosecution examined 14 witnesses to substantiate the charge framed against the appellants and others exhibited certain document. No defence witnesses were examined to disprove the said case.
7. The Learned Trial Judge by judgment dated 20.09.2014 found the appellants guilty under Section 324 of the Indian Penal Code and sentenced them to suffer as stated above rigorous imprisonment for 6 months and to pay a fine of Rs. 5,000/- each, in default to suffer further rigorous imprisonment for 1 month. Pertinently the other 3 accused persons namely Smt. Jharna Ghosh, Smt. Mithu Rani and Smt. Sandhya Rani Ghosh were found not guilty of the offence punishable under Sections 325/308/324 of the Indian Penal Code and were acquitted under Section 235(1) of the Code of Criminal Procedure.
8. Learned Advocate for the petitioners submitted that –
 - i. The Learned Trial Judge failed to consider various infirmities in the prosecution evidence which falsify the prosecution case.
 - ii. The judgment of the Learned Trial Judge has been vitiated by reasons of non-consideration of materials which have been elicited in the cross examination of the prosecution witnesses.
 - iii. The ingredients of the offences charged not having been established the conviction of the appellants is not at all sustainable in law.
 - iv. The Learned Trial Judge did not consider that PW-9 specifically stated he was assaulted by the accused persons with hasua, sabal and lathi on head, as a result profound bleeding took place but according to the Doctor (PW-9) he received scalp injury which was simple in nature and no injury by sharp cutting weapons was noticed

and by not considering the same the Learned Trial Judge passed the impugned judgment of conviction.

- v. The Learned Judge lost sight of the fact that Manju Rani Ghosh (PW-10) specifically deposed that she received head injury by lathi but Doctor (PW-8) specifically stated that she received scalp injury and skin abrasion.
- vi. The Learned Judge erred in not considering the evidence of PW-7 (Subhas Chandra Ghosh) where he specifically deposed during trial that he was assaulted by sabal on his nose by the appellants but the Doctor (PW-8) specifically stated that the injury was simple in nature.
- vii. The fact that PW-11 (Probash Chandra Ghosh) who specifically deposed during trial that he was assaulted by the accused/appellants with the help of the said weapons on his knee but the Doctor (PW-8) deposed that there was trauma on the right knee joint and no abnormality was found.
- viii. The evidence of PW-8 (Doctor) revealed the injury received by the victims are simple in nature and such type of injury may be caused due to fall on hard substance and swelling injuries may be caused by dashing on hard substance. Moreover, there is no mention regarding injury by sharp cutting weapons and the victims have not stated the names of the assailants during their medical examination which shows that entire episode of physical assault is based on imagination in order to implicate the appellants falsely in the present case.

- ix. The investigation conducted by the Investigating Agency was totally perfunctory in nature in as much as neither the wearing apparels of the victims were seized nor the injured persons were examined which were enough to frustrate entire prosecution case.
 - x. In view of the aforesaid state of affairs and the evidence as also materials on record, the conviction of the appellants under the said Section is not at all sustainable in law and liable to be set aside for ends of justice, as the prosecution has miserably failed to prove the prosecution case as alleged beyond all reasonable doubt, coupled with fact that excepting interested witnesses, no independent witness was examined in the present case.
9. The Learned Advocate for the State in utmost fairness submitted the absence of the ingredients to constitute the offences under Section 324 of the Indian Penal Code and the investigation conducted to be unsatisfactory. Moreover, there has been a dispute between the parties to have resulted in the injuries sustained by them and left it to the discretion of this Court.
10. A circumspection of the evidence of the prosecution witnesses revealed as follows:-
- a. PW-1, Kokhon Ghosh, the complainant in his deposition stated that the appellants and the other accused persons had assaulted Manju Rani Ghosh by shabol, lathi, etc who received injury on her head and backside. Both of them got medical treatment at Kandi S.D. Hospital.

- b. During his cross-examination, PW-1 stated a dispute to have been existed between the parties relating to a passage on the northern side. Hearing a commotion, he had been to the house of his uncle with others and saw his uncle and aunt in injured condition. He further stated to have seen the assault with sharp cutting weapons. He further stated that the police seized the wearing apparels wet by blood, bloodstained earth, etc. He denied the knowledge that the accused persons filed another case on 6.12.2009 against them.
- c. PW-2, Dr. Uttam Raichowdhury, in his deposition stated to have examined one Subhash Chandra Ghosh and detected an injury on the left eye which according to him was caused due to trauma and the injury was simple in nature. During his cross-examination, PW-2 stated that he did not find any wound caused by sharp cutting weapon. He further stated that the trauma could be possible due to cold.
- d. PW-3, PW-4 and PW-5 were tendered by the prosecution and the opposition declined to cross-examine.
- e. PW-6, Paramesh Ghosh, stated to have reached the spot hearing hue and cry and saw the assault upon his uncle by the accused persons. After the assault the injured persons were brought to the Kandi Hospital for treatment. He stated to have seen the assault on his uncle and aunt. During his cross-examination, he stated to have witnessed the injuries on the

entire body of his uncle and aunt. He saw the relative pouring water on their bodies. His uncle was almost senseless at that time. Police had visited the place of occurrence after a day of the incident. He further stated there was a case of attempt to rape on Birendra Ghosh filed by the accused, Jharna Ghosh.

- f. PW-7, the injured Subhas Chandra Ghosh, in his examination-in-chief, stated to have come out of his house and witnessed the bleeding injury on the head of his father. He further stated that his mother received bleeding injury and as he approached them, the accused, Madhusudhan assaulted him via shabol on his nose. He became senseless on the spot. He was taken to Kandi where he was admitted for 15 days. During his cross-examination, he stated to have been an accused in a criminal case filed by the accused Jharna as the complainant. There was an incident of brick bats. When he reached the spot, he found Kokhon Ghosh and Paramesh Ghosh. He stated to have regained sense at the hospital and saw his wearing apparel wet with blood. He stated that to the police to have assaulted by the accused persons.
- g. PW-8, Dr. P. Chakroborty had examined the injured, Subhas Chandra Ghosh and found the history of physical assault to be lacerated injury on the cheek, urla of the nose, $\frac{1}{4}$ inch X 4inch X 4 inch, C.T. scan showed possible hemorrhage in his left axillary sinus. The nature of injury was simple. He had also

examined one Manju Rani Ghosh who sustained scalp injuries and skin abrasions without any abnormalities. He had also examined Birendra Ghosh whose injury was found to be simple. He had examined Probash Chandra Ghosh who was found to have suffered trauma on his right knee joint and left hand. On X-Ray, no abnormalities were found. During cross-examination, PW-8 stated that such type of injury might be caused due to fall on a hard substance. Swelling injury may be caused by dashing on a hard substance. There was no mention regarding the cause of injury by sharp cutting weapon. The injured persons did not state the names of the assailants. The injury reports were marked as Ext. 2/1, 3, 4 and 5 respectively with regards to Manju Rani Ghosh, Birendra Kumar Ghosh and Probash Chandra Ghosh. The injuries were detected to be simple in nature.

- h. PW-9, the injured victim, Birendra Kumar Ghosh, stated to have been assaulted by Biswanath by a hashua on his head. Accused, Swapan assaulted him on his head by a shabol and the accused, Madhusudhan assaulted him by a lathi on his head. The occurrence was witnessed by Kokhon, Paramesh, Santosh Ghosh who saved him. His elder son, Subhash Chandra Ghosh, his wife, Manju Rani Ghosh and another son, Probash Ghosh was also assaulted. His wife was assaulted by Swapan at first. Madhusudhan assaulted him. Sandha Rani

Ghosh and Jharna Ghosh and Mithu Ghosh assaulted his wife. His son, Subhash Ghosh was assaulted on his nose by a shabol by Madhusudhan. His son, Probash was also assaulted by shabol. He did not state to the doctor by whom he was assaulted. During his cross-examination, he stated the existence of a small passage on the eastern side of his house. On eastern side of the passage, there was a pond. There was another passage on the northern side of the house. They had a pending suit relating to that passage. Dispute at the time of framing bamboos on the northern side of the road arose. Profound blood came out after assault by hashua. After that he was running towards his house to save himself. Then he received injury by iron rod on his head. He sat down after the assault by iron rod. He was feeling pain. Kokhon and Paramesh took him to the hospital for treatment. He saw Manju, Subhash and Probash in injured condition at the hospital.

- i. PW-10, Manju Rani Ghosh stated to have sustained injury on her left hand and that she was admitted at Kandi Hospital. During her cross-examination, she stated that she did not lose her sense after being assaulted but her wearing apparels became blood stained and the same blood fell on the ground at the place of occurrence. She had shown the blood stained cloth to the police at the hospital. The dispute arose with the accused persons when the accused persons tried to get their way

through the western side passage of their house. She was assaulted on the eastern side of her house via Kali Temple. At the time of the incident, her husband and her son were also present.

- j. PW-11, the injured Probash Chandra Ghosh, stated the accused Swapan Ghosh to have assaulted him with an iron rod on his knee and the other accused person assaulted on his back and he was treated at the Kandi Hospital. During his cross-examination, he stated there was continuous dispute over an issue of passage between the parties.
- k. PW-12 had prepared the formal F.I.R, written and signed by him, marked Ext. 6. He stated to be ignorant personally about the subject of the case. PW-13 was the Investigating Officer who visited the place of occurrence, examined the available witnesses and recorded their statements under Section 161 Cr.P.C., arrested the accused persons, collected the injury reports, submitted the charge sheet against the accused persons. He had also prepared the rough sketch map along with index marked Ext. 7 and 7/1 respectively. During cross-examination, PW-13 stated that he did not seize the blood stained wearing apparels of the injured persons. He did not seize any blood stained earth from the place of occurrence and also could not recover any offending weapon from the place of occurrence. He further stated that it was a fact that he did not

record any statement of the injured under Section 161 Cr.P.C. He did not record the statement of the defacto complainant, Kokhon Ghosh. He further stated that the offence investigated in the instant case were not cognizable offences.

- l. PW-14 was the law clerk at Kandi Court who had scribed the complaint which along with the signature was marked as Ext. 1/1 and 1/2 respectively.
- m. PW-1, Kokhon Ghosh, the defacto complainant contradicted his own statement of having seen the incident of assault, to have been caused by sharp cutting weapon. During his examination-in-chief as well as in cross-examination, he stated to have been to the place and saw his uncle and aunt in injured condition. He did not name any of the assailants to be present at the Court or to have seen them.
- n. The medical evidence of PW-2 contradicted the evidence of Subhash Chandra Ghosh, who only found an injury to have been caused through trauma which was simple in nature. In contradiction to the evidence of PW-7, PW-2 did not mention any wounds caused by sharp cutting weapon to result in profuse bleeding to wet the wearing apparels. PW-2, the doctor in his cross-examination stated lacerated injury maybe caused by hard substance. Such type of injury may be caused by falling upon any hard substance.

- o. PW-6, Paramesh Ghosh, did not mention the assault on the son, i.e. Probash Ghosh, but his uncle and aunt, i.e. Manju Rani Ghosh and Birendra Ghosh. He stated to have disclosed the fact to the police at the time of the investigation contrary to the statement of PW-13, that none of the prosecution witnesses were examined by him. PW-6 did not mention the names or the overt act of any one of the accused persons, though confirmed the institution of a criminal case against the victim, Birendra Ghosh by the accused, Jharna Ghosh. He further stated to have seen bleeding injury on the entire body of his uncle and aunt contrary to the medical evidence and the relative pouring water on their face and body. However, no such villager was examined or cited as a witness.
- p. PW-10, Subash Chandra Ghosh stated to have reached the spot of the incident and witnessed bleeding injury on the head of his father as well as bleeding sustained by his mother as he approached them, he was assaulted by “shabol” by the accused, Madhusudhan and he became senseless and thereafter, he was admitted at the Kandi Hospital and was discharged after 15 days. He too in his cross-examination admitted the institution of a criminal case against him by the accused Jharna, regarding a case of throwing brick bats. During his cross-examination, he stated that he was interrogated by the police and he had narrated the incident of assault at the time of investigation.

Contrary to the evidence of the investigating office, PW-13, stated to have not examined any of the injured persons.

- q. PW-8, Dr. P. Chakroborty had examined the injured, Subash Chandra Ghosh and stated the nature of injury to be simple, with a scalp injury of 2inchX1/4inchX1/4inch. He had examined Probash Chandra Ghosh and found trauma on right knee-joint and left hand. On X-Ray, abnormality was not found. The injury report was marked as Ext. 3. He had also examined Manju Rani Ghosh and found the injury to be simple. He had examined injured Subash Chandra Ghosh and found lacerated injury on left cheek, above the nose ½inchX1/4inchX1/4inch, C.T. scan showed hemorrhage in his left axillary sinus and the nature of injury was simple. The injury report was marked as Ext. 2/1. During his cross-examination, PW-8 stated such type of injury may be caused due to fall on hard substance. Swelling injury may be caused by dashing on a hard substance.

11. There are serious contradictions between the ocular evidence as well the medical evidence. The evidence of the injured witnesses is exaggerated and contrary to the evidence of the doctors through the injury reports marked as exhibits. The wearing apparels to have been bloodstained, the bloodstained earth from the place of occurrence and the offending weapon were not recovered by the police officer. None of the prosecution witnesses were examined. The offence under Section 324 of the Indian Penal Code to be constituted required certain ingredients as follows:

“324. Voluntarily causing hurt by dangerous weapons or means.—*Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*”

12. In **Anuj Singh @ Ramanuj Singh @ Seth Singh Vs. State of Bihar**¹, the Hon’ble Supreme Court held as follows:

“20. *It is a well-known fact that the term “hurt” simply means performing an act which leads to physical pain, injury or any disease to a person. At times, hurt may be caused voluntarily or it can be caused by using dangerous weapons or means. A person will be liable to have caused hurt voluntarily through dangerous weapons and means under Section 324 IPC which reads as under:-*

“324. Voluntarily causing hurt by dangerous weapons or means.—Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, 8 or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be

¹ 2022 SCC OnLine SC497

punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

21. *To establish an offence under Sec 324 IPC, the presence of following ingredients is a must which are as follows:-*

1. Voluntary hurt caused to another person by the accused, and

2. Such hurt was caused:

a. By any instrument used for shooting, cutting or stabbing, or any other instrument likely to cause death, or

b. By fire or other heated instruments, or

c. By poison or other corrosive substance, or

d. By any explosive substance, or

e. By a substance that is dangerous for the human body to swallow, inhale, or receive through blood, or

f. By an animal.

22. *When a person commits an offence of voluntarily causing hurt by dangerous weapons and means under Section 324 of Indian Penal Code, then such person shall be punished with imprisonment for a period of three years, or with fine.”*

13. In the case of **Ramesh alias Dapinder Singh Vs. State of Himachal Pradesh**², the Hon’ble Supreme Court held as follows:

“16.

(c) Bishu Sarkar v. State of W.B.:

“7. ... The allegations coming from all the witnesses are consistent that none of the present appellants had dealt any blow by any weapon and all that they did was to participate in the scuffle. It is true that PWs 2 and 5 assert that the present appellants had caught hold of Raju Bose. But it is not clear from the record whether

² (2021) 15 SCC 53

such act was so intended to enable Accused 1 to deal the fatal blow. Further, PW 3 is completely silent on this aspect.

8. In the circumstances we deem it appropriate to grant benefit of doubt to the present appellants and acquit them of the charge under Section 302 read with Section 34 IPC. This appeal is thus allowed and the conviction and sentence recorded against the present appellants is set aside.

17. Having considered the entire material on record, in our view, it cannot be said with certainty that the appellant shared the common intention with accused Sadhu Singh and Nirmal Singh to commit the murder of the deceased or that the appellant had done something “in furtherance” of the common intention of all. Giving him benefit of doubt, we absolve him of the liability under Section 34 of the IPC insofar as the charges under Sections 302 and 324 of the IPC are concerned. We, however, find him guilty of the offence punishable under Section 323 read with Section 34 of the IPC. Affirming such conviction and sentence, we grant benefit of doubt to the appellant and acquit him of all the other charges.”

14. The instant case is exemplary of an aftermath of a dispute between the parties where the offence under Section 324 of the Indian Penal Code could not be established. However, in the opinion of the doctors who examined the injured witnesses, injury was found to be simple, which attracted the ingredients under Section 323 of the Indian Penal Code.

15. Section 323 of the Indian Penal Code state as follows:

“323. Punishment for voluntarily causing hurt.—*Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a*

term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

16. Admittedly, a criminal case had been instituted against the injured persons by the accused persons and the acrimony propelled the injured victims to exaggerate the brawl and intensify the gravity of assault contrary to the medical report. The injuries sustained by the victims were simple in nature with swelling and laceration which were beyond the scope and periphery to attract the elements of Section 324 of the Indian Penal Code. Nonetheless, evidentiary value and credibility of the medical reports supersede the oral evidence to justify injuries as an outcome of the act of the appellants to attract the constituents of Section 323 of the Indian Penal Code.
17. In view of the above discussions, the offence under Section 324 of the Indian Penal Code has not been established by the prosecution and accordingly, the conviction under Section 324 of the Indian Penal Code is modified to be under Section 323 of the Indian Penal Code and the appellants are sentenced to pay a fine of Rs. 1,000/-, in default to suffer imprisonment for one month.
18. There is no order as to cost.
19. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
20. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)