

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 636 of 2004
Heben Barman @ Heman
-Vs-
The State of West Bengal**

**With
C.R.A. 77 of 2005
Fulo Debnath & Anr.
Vs.
The State of West Bengal**

For the Appellants : Mr. Navanil De
(Amicus Curiae)

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 19.09.2023, 12.11.2023, 18.12.2023, 24.01.2024

Judgment on : 22.03.2024

Ananya Bandyopadhyay, J.:-

1. These two criminal appeals are preferred against an order dated 30.06.2004 passed by the Learned Additional Sessions Judge, Cooch-Behar, convicting the appellants under Section 326 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for five years and a fine of Rs.10,000/- , in default rigorous imprisonment for one year more in S.T. No. 1(1) 2000, arising out of Sessions Case No. 10 of 1988.

2. The prosecution case in brief is that on the basis of a written complaint lodged by PW-1 namely Priyanath Debnath, an F.I.R was registered as Tufanganj Police Station Case No. 11 dated October 12, 1983. It was alleged that the complainant was cutting a 'simul' tree situated on complainant's land with an axe. At that time, Naren Debnath (appellant) of complainant's village came and forbade him to cut the tree and Heben Barman (appellant) from behind seized the axe from complainant's hand. At that time, Naren Debnath caused injury with the edge of the axe and many people went running there. The accused persons went running towards the house of the complainant and were about to beat his relatives namely Bhaben Das (PW-5) and Chemtu @ Chutung Barman (deceased). As they tried to escape, the accused persons rushed after them towards the house of Babu Barman. At that place, the accused persons turned out Bhaben and Chemtu Barman and attacked Chemtu Barman with dao, axe, iron rod and killed him thereby causing bleeding injury. It has been further alleged that the accused persons turned out the eyes of Bhaben Barman with lime and caused him bleeding injury on various places of his body. It was further stated that the accused persons would also kill the complainant if they could catch him.
3. On July 26, 1989, charge was framed against 13 accused persons under Sections 148/302/149/326 of the Indian Penal Code to which they all pleaded not guilty and claimed to be tried.
4. In order to establish its case the prosecution examined as many as 14 witnesses whereas defence examined as many as 2 witnesses.

5. The Learned Amicus Curiae submitted as follows:

- i. No specific charge was framed under Section 326 of the Indian Penal Code. However, the appellants were convicted under Section 326 of the Indian Penal Code. This was defective charge. It was not merely an irregularity but an illegality which could not be cured. Thus, the appellants had been seriously prejudiced for non-framing of specific charge under Section 326 of the Indian Penal Code as the appellants could not defend themselves against such charge.
- ii. The prosecution had failed to prove any offence under Section 302 of the Indian Penal Code against the appellants and other accused persons. Now, when the principal Section had not been not proved by the prosecution, whether conviction under Section 326 of the Indian Penal Code would at all sustain or not. It was also submitted that all the accused persons were together and allegedly attacked the deceased and victim, i.e. PW-5, however, no offence under Section 302 of the Indian Penal Code was proved against them. In such a case, conviction of the appellants under Section 326 of the Indian Penal Code would not sustain at all.
- iii. PW-5, the victim had not stated the names of the appellants before PW-9, the Medical doctor who treated PW-5. This created a penumbra of doubt on the genuineness of the prosecution case as to who had caused or who was responsible for the injury on the person of PW-5 as there were total 10 accused persons.

iv. PW-7, the daughter of the complainant stated in her cross-examination that the complainant was arraigned as an accused in a criminal case and was convicted in that case. Haren was the father of Naren and Fulo Debnath. PW-7 further deposed that there was a long-standing civil dispute between Naren, Haren and the complainant. Therefore, the story of false implication could not be ruled out completely.

6. The Learned Advocate for the State submitted that the evidence of de-facto complainant, the injured witness and the other prosecution witnesses including the doctors corroborated the event of assault which resulted in the death of one victim and blindness of other beyond reasonable doubt and the appeal shall be dismissed.

7. A circumspection of the prosecution witnesses revealed as follows:-

- i. PW-1 in his deposition stated the incident took place at 5-30 A.M. There was a 'simul' tree in his land. He went there to cut that tree by an axe. Then Naren Debnath obstructed him. Heben @ Heven Barman came to the spot from his back side and snatched away that axe. Naran Debnath sustained injury on his chest just at the time of snatching away the said axe. Then they went back to their house. PW-1 returned to his house and came to learn from his wife that his relative namely Chutung Barman and Bhaben Das came to meet him. Then Haren Debnath, Nalin Debnath, Subhas Debnath, Fulo Debnath, Haven Barman, Bijen Debnath, Pasin @ Fusin Debnath, Purneswar Debnath, Sahalam @ Sakhlan Mia and Sajaruddin Mia after forming an unlawful assembly and chased his relatives. Then PW-1 went to the

house of Prodhan Nripen Roy and took shelter in that house. PW-1's wife Fulkumari came to the house of the Prodhan and reported to PW-1 that Chemtu @ Chutung Barman was murdered. The eye-balls of Bhaben Das was damaged by pouring lime on his eyes. They also broke down both the legs of Bhaben. PW-1's wife further reported to him that it was done by the accused persons as named above. PW-1 went to the local police station along with Fazlu Rahaman and PW-1 put his signature on it after going through it. PW-1 identified the petition of complaint written by Fazlu Rahuran and his handwriting (Ext. 1). PW-1 identified his signature on the written complaint (Ext. 1/1). PW-1 identified all the accused in Court. Bhaben Das was blind. Police came to the spot.

- ii. PW-2 was declared hostile by the prosecution.
- iii. PW-3 was declared hostile by the prosecution.
- iv. PW-4 in his deposition stated police prepared inquest report in his presence and he put his signature on it. He identified his signature on the inquest report (Ext. 3).
- v. PW-5 in his deposition stated he was not blind by birth. On 11.10.1983, he along with Chutung went to his son-in-law's house at Charaljani. On the next morning after taking breakfast on his way back to their house, PW-5 reached near the house of Priyanath and called him. One of the female member of PW-1's house informed PW-5 that PW-1 was away. Thereafter, they started walking towards their house. Then, Nalini, Dwijen, Subhas, Provat, Purneswar, Pasin @

Pusen, Fulo, Sahalam Mia, Safiuddin, Joydeb, Heben Barman, Sonia Das and Peru Das shouted “*Dhor, Dhor, Gunda, Gunda*”. Thereafter, they entered into the house of Babudhani but all the accused persons forcibly took away PW-5 and Chutung and the accused persons took them in front of the house of Haren and mercilessly assaulted Chutung. As a result of his legs were broken. Fulo Debnath and Heben @ Heven poured lime and pierced the eye-balls of Chutung by needle. Fulo Debnath assaulted on the testicle of Chutung by a small axe causing his death. PW-5 had witnessed the occurrence. Heben @ Heven and Nalin mercilessly assaulted PW-5 and broke his leg. Fulo poured lime into PW-5’s eyes. At that time Heben @ Heven and Nalin caught hold PW-5’s hands. PW-5 was admitted at Cooch Behar Hospital. He was in the hospital for a month. Thereafter, PW-5 was blind. The incident took place on 12.10.1983. PW-5 could have identified the accused persons if he had vision.

- vi. PW-6 in her deposition stated she was not aware of any incident.
- vii. PW-7 in her deposition stated two persons were apprehended by the accused persons in front of Haren Debnath and assaulted them. As a result, Chutung was murdered and the other whose name was Bhaben became blind due to that assault. Nalin, Haren, Fulo and others assaulted them. PW-7 had identified them by face as they were her co-villagers.
- viii. PW-7 in her cross-examination stated Haren’s house and their house were intervened by bamboo grove. The bamboo grove consists of 4

bighas of land. The trouble ensued over the 'simul' tree. She could not state whether Naren sustained injury or not.

- ix. PW-8 in her deposition stated Chutung and Bhaben came to their house in search of his husband/PW-1 and she told them that his husband had gone to the garden. They went away. She identified Haren, Nalin and others, who were present in Court, chased Chutung and Bhaben and took them in front of the house of Haren and assaulted them. Due to merciless assault Chutung was succumbed to the injury and Bhaben became blind. The accused persons poured lime and tobacco in the eyes of Bhaben. As a result he became blind.
- x. During cross-examination PW-8 stated her husband went to the garden for cutting a 'simul' tree. Bhaben and Chutung were her nephew by village courtesy. PW-8 stated they lived in their village. Then she stated they lived one mile away from their house. She knew all the accused persons.
- xi. PW-9/Doctor in his deposition stated he examined one Bhaben Das, Hindu male, aged about 30 years. On examination he noticed the following injuries:-
 - a. Lacerated injury of upper lid of the right eye.
 - b. Lime burn of both lids, conjunctiva and cornea of both the eyes.
 - c. Whole corneas of both the eyes was opaque due to burn. Vision was finger counting at one feet.

Vision of the left eye was totally lost. This type of injury may be categorized as grievous hurt.

The injury of the left eye might be caused by piercing the eye-ball by a sharp weapon. Cornea might be opaque if lime was poured in the eye.

The portion of the injury report was written and signed by PW-9 (Ext. 4).

- xii. During cross-examination PW-9 stated he had not mentioned the age of the injury. He found the lime particles in the eye-balls but he did not preserve the same for handing over to the I.O. or chemical examiner. It was not possible to give definite opinion without the report of the chemical examiner. He had not seen the person for the first time when he examined him.
- xiii. PW-12 in his deposition stated on 12.10.83 the then Officer-in-Charge received a written complaint from one Priyanath Debnath and on the basis of that complaint he started Tufanganj PS Case No.11 dated 12.10.83 under Sections 147/148/149/326/302 of the Indian Penal Code. PW-12 identified the form of F.I.R. filled up and signed by then then Officer-in-Charge A.B. Chakraborty, Ext-7. PW-12 identified the written endorsement on the petition of complaint Ext-1/2. Officer-in-Charge endorsed the case to D. Thappa for investigation. On perusal of C/D D.Thapa performed a part of the investigation. After transfer PW-12 took up the investigation of this case as per direction of the Officer-in-Charge on 10.4.85. PW-12 perused the C/D. He made an attempt to collect the FSL report, but failed and thereafter PW-12 submitted charge-sheet against the accused persons under Sections 147/148/326/447/302 of the Indian Penal Code.

xiv. PW-13/the post-mortem doctor in his deposition stated he performed post-mortem examination on 13.10.1983 at 3.45 p.m. On dissection he found the following injuries:-

- a. One small lacerated injury $\frac{1}{2}$ " x $\frac{1}{2}$ " running transversely over the lateral end of right forehead;
- b. Diffused bruise on the left forehead. Clotted blood was found beneath scalp after dissection. Clotted blood was found over the brain tissue after opening skull;
- c. One lacerated injury $1\frac{1}{2}$ " x $\frac{1}{2}$ " bone deep on the lower part of left leg. Fracture of both tibia and fibula was found at that level;
- d. One small bruise on the posterior and upper part of the right forearm;
- e. Multiple small lacerated injuries over the front aspect of the neck.

Rigor mortis were present all over the body.

Death, in his opinion was due to shock and haemorrhage following above noted injury which were ante-mortem and homicidal in nature.

PW-13 identified the injury report prepared and signed by him (Ext. 8).

PW-13 further opined that type of injury might be caused by blunt/sharp-cutting weapon or by battum. That type of injuries were enough to cause a man to death.

xv. PW-14 in his deposition stated the case was endorsed to him for holding investigation. He perused the F.I.R, visited the P.O., examined the available witnesses, prepared sketch map with index. PW-14 identified the sketch map with index written and prepared by him

(Ext.9). He seized blood-stained earth and other articles under seizure list in presence of witnesses. PW-14 identified the seizure list prepared and signed by him (Ext.10). He also seized bamboo stick and other articles under seizure list. PW-14 identified the seizure list, prepared and signed by him (Ext.2/1). PW-14 arrested some of the accused persons and forwarded them to the Court of Learned S.D.J.M., Tufanganj. On PW-14's transfer he handed over the case to Officer-in-Charge, for endorsing the same to other person for further investigation. He examined Sudhan Das. He stated to PW-14 that the local villagers chased two persons and their names were Chutum @ Chutung Barman and Bhaben Das. He stated to PW-14 that all the accused persons assaulted Bhaben and Chutum causing the death of Chutum and blindness of Bhaben. He also stated to PW-14 that all the accused persons poured lime in the eye of Bhaben causing his blindness.

8. In ***Prabhu vs. State of Madhya Pradesh***¹, the Hon'ble Supreme Court held as follows:-

"14. 'Grievous hurt' has been defined in Section 320 IPC, which reads as follows:

'320. Grievous hurt.—The following kinds of hurt only are designated as "grievous":

Firstly.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

¹ (2008) 17 SCC 381

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.'

15. Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Section 320 must be strictly proved, and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly.

16. The expression 'any instrument which, used as a weapon of offence, is likely to cause death' has to be gauged taking note of the heading of the section. What would constitute a 'dangerous weapon' would depend upon the facts of each case and no generalisation can be made.

17. The heading of the section provides some insight into the factors to be considered. The essential ingredients to attract Section 326 are : (1) voluntarily causing a hurt; (2) hurt caused must be a grievous hurt; and (3) the grievous hurt must have been caused by dangerous weapons or means. As was noted by this Court in *State of U.P. v. Indrajeet* [(2000) 7 SCC 249 : 2000 SCC (Cri) 1338] there is no such thing as a regular or earmarked weapon for committing murder or for that matter a hurt. Whether a particular article can per se cause any serious wound or grievous hurt or injury has to be determined factually. ... At this juncture, it would be relevant to note that in some provisions e.g. Sections 324 and 326 expression 'dangerous weapon' is used. In some other more serious offences the expression used is 'deadly weapon' (e.g. Sections 397 and 398). The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the

question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable.”

9. The evidence of PW-5, the injured victim corroborated with the medical report of PW-9 in terms of his opinion in the document marked as Exhibit-4. The ocular evidence of other prosecution witnesses namely PW-1 and PW-5 are corroborative in nature. Evidently, a dispute occasioned concerning felling of a ‘simul’ tree. The enmity between the appellants and the victims is indisputable with regard to institution of criminal cases as reflected in the evidence on record.
10. The overt act of the present appellants have been specifically described by the injured victim who suffered blindness and lost vision of left eye being pierced by a needle. The eye being a sensitive organ is susceptible to damage and piercing of the same by a needle being an object is dangerous enough to injure the eye causing loss of eyesight. The needle in terms of the other weapons might be negligible in its magnitude, however, severely effective in causing damage to any part of the body with its intrusion sharpness, penetrating nature.
11. The medical report substantially described the injury sustained by PW-5 to have permanently lost his vision of one of the vital organs of the body being left eye. The overt acts of the both the appellants have been vividly described by the evidences of PW-1, PW-5, PW-8, PW-9 and PW-13. The evidence of PW-9 revealed the presence of lime burn on the both the eye lids, conjunctiva and cornea. The deliberate act of Fulo Debnath and Heben

Barman with the knowledge and intention of the severity of such an act and the serious consequence thereof, this Court is not inclined to interfere with the order of the Learned Trial Court.

12. In view of the above discussions, both the criminal appeals being CRA 636 of 2004 and CRA 77 of 2005 are dismissed.

13. There is no order as to costs.

14. I record my appreciation for the able assistance rendered by Learned Advocate, Mr. Navanil De, as *Amicus Curiae* in disposing of the appeals.

15. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

16. 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.)