

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 205 of 2006

**Sk. Sirajuddin @ Gabbar @ Sk. Saroj
-Vs-
The State of West Bengal**

For the Appellant : Ms. Rituparna De Ghosh
(Amicus Curiae)

For the State : Ms. Faria Hossain
Ms. Mamata Jana

Heard on : 25.09.2023, 17.10.2023, 18.01.2024

Judgment on : 19.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is directed against a judgment and order dated 30.01.2006 and 31.01.2006 passed by the Learned Additional District and Sessions Judge, Fast Track Court – III, Barrackpore, North 24 Parganas in S.T. No. 1(1)/2005 thereby convicting the appellant for the commission of an offence under Section 307 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for 3 months and further directing that the appellant was entitled to set off the period of detention undergone as an under trial prisoner.
2. The prosecution case as alleged against the appellant was that on 28.07.2004 at about 05:00 pm, the appellant came to the house of the de

facto complainant / PW-1 and demanded Rs.1,000/- from the wife of the de facto complainant (PW-3); that upon refusal, the appellant threatened the PW-3 with dire consequences and also threatened to drive them out of the house; that the appellant assaulted the PW-3 with a chopper resulting into bleeding injuries on her head; that the PW-3 was rushed to medical facilities wherein she had to take fifteen stitches on her head.

3. On the basis of a written complaint lodged by Sk. Pappu (PW-1), Titagarh Police Station Case No. 237/04 dated 29.07.2004 under Sections 307/326 of the Indian Penal Code was registered for investigation.
4. Upon conclusion of the investigation, the Investigating Agency submitted a charge-sheet under Sections 307/326 of the Indian Penal Code against the appellant.
5. The instant case being exclusively triable by the Learned Court of Sessions, it was committed to the Court of the Learned Sessions Judge, North 24 Parganas and thereafter it was transferred to the Court of the Learned Additional District and Sessions Judge, Fast Track Court – III, Barrackpore, North 24 Parganas for trial and disposal.
6. The Learned Trial Court framed the charges against the appellant under Sections 326/307 of the Indian Penal Code.
7. The appellant pleaded not guilty to such charges and claimed to be tried.
8. In the course of trial, the prosecution examined as many as 11 witnesses and exhibited certain documents. The defence examined one witness of its own and through a process of effective cross-examination tried to probabilize its own case and to improbabilize the prosecution case.

9. The Learned Amicus Curiae for the appellant submit that:-

- (I) The First Information Report was lodged after a delay of one day only after PW-3 was discharged from the hospital and under such circumstances, the possibility of an afterthought cannot be ruled out.
- (II) It had been specifically stated in the First Information Report that PW-3 was assaulted with a “chopper” whereas PW-3 herself had stated in her evidence that she was assaulted with a “bhojali”. Again, PW-2 also stated in his evidence that PW-3 was assaulted with a “bhojali”. Subsequently, the evidence of PW-9 also revealed that PW-3 had told him that she was assaulted with a “da”. Such contradictions should have been taken into consideration by the Learned Trial Judge and such doubt should have gone to the benefit of the appellant.
- (III) The weapon of assault was not at all recovered in the course of investigation of the instant case.
- (IV) PW-3 went to the police station along with PW-1 and others, the written complaint was scribed by PW-4 and was signed by PW-1.
- (V) The appellant was a brother of PW-1 and as such the instant case was a product of prolonged family disputes which might have prompted PW-1 to lodge a criminal case against the appellant in furtherance of private vendetta and to spite the appellant in the eyes of the society.
- (VI) PW-1, being the de facto complainant of the instant case, was not an eye witness to the alleged incident and his evidence was absolutely hearsay.

- (VII) PW-2 stated in his evidence that PW-3 was taken to the hospital by PW-2, PW-5, one Kanis Fatma and one Md. Samsul. However, the said Kanis Fatma and Md. Samsul were never examined by the prosecution.
- (VIII) PWs 2, 3, 5, 7, 10 were all interested witnesses and as such their evidence were parrot-like and should not have formed the basis of conviction in the instant case.
- (IX) PW-7 was not an interested witness whereas it was clear from the evidence on record that PW-7 was the tenant of PW-1 and as such he was a highly interested witness.
- (X) PW-6 clearly stated in his evidence that the written complaint was written by the scribe/PW-4 and signed by PW-1 sitting in the police station.
- (XI) No statement of PW-3 was recorded under Section 164 of the Code of Criminal Procedure.
- (XII) No ingredients of the offence punishable under Section 307 of the Indian Penal Code could be established from the materials on record and the evidence and as such the prosecution totally failed to bring home the charge beyond reasonable doubts.
- (XIII) The delay caused in lodging the First Information Report had not been properly explained. PW-3, after being discharged from the hospital, went to her paternal abode with PW-1 and others and under such circumstances, a possibility of a clear afterthought and concoction could not be ruled out.

(XIV) PW-6 clearly stated during cross-examination that the written complaint was drafted at the police station in the presence of PW-6.

(XV) PW-7 clearly stated during cross-examination that he did not witness the alleged incident himself and as such no reliance should have been placed the version of PW-7.

(XVI) DW-1 clearly stated in her evidence that the injuries sustained by PW-3 were out of an accident arising out of an attempt to assault the appellant by PW-2 and during the said attempt, PW-3 had intervened and accidentally got hurt.

(XVII) The deposition of the prosecution witnesses did not establish the essential ingredients of the offence punishable under Section 307 of the Indian Penal Code.

10. The Learned Advocate for the State submitted that the appellant inflicted the injury on the vital part of the body with an intention and knowledge to kill the victim and as such the prosecution was able to prove its case beyond reasonable doubt.

11. A circumspection of evidence of the prosecution witnesses revealed as follows:

- i) PW-1 Sk. Pappu stated in his examination-in-chief that he was the de facto complainant. He lodged a complaint against his brother Sk. Gabbar @ Sk. Saroj. Incident took place on 28.07.04 at about 5 P.M. in their house at Pipe Road Barrackpore in the district North 24-Parganas. He was not present in the house. Accused Gabbar demanded Rs.1000/- from the wife of PW-1 Mamtaz Begam but

when his wife did not agree to give money then accused assaulted his wife on her head with a 'Chopper' and fled with that 'Chopper'. He returned home and found and learnt his wife had already been taken to B.N. Bose Hospital by his brother Sk. Firoz, his sister and her husband. He then went to B.N. Bose Hospital. His wife was referred to R.G. Kar Medical College. After returning home he came to learn the incident from wife of his younger brother thereafter he went to B.N. Bose Hospital. His wife was admitted at R.G. Kar Hospital and she was discharged the next day after the treatment. He lodged a complaint at Titagar Police Station on the discharge of his wife from the hospital, that the day after the incident. He submitted the written complaint to the P.S. His friend Prokash Shaw wrote the complaint at his instruction. His signature on the written complaint was marked as Exbt.-1.

- ii) In his cross-examination PW-1 stated that he could only write his name in English. He could not read and write, except putting his signature. He could not read Bengali. His friend Prokash Shaw wrote the complaint as per dictation of the police officer at the P.S. and he put the signature and he also put his signature. He could not go through the content of the written complaint which was written in Bengali. He was not examined by the police subsequently in connection with that case. At about 05:00 p.m. on the date of incident he returned home. He reached B.N. Bose

Hospital at about 05:05 p.m. by Motor-Cycle, he did not accompany his wife to R.G. Kar Medical College.

He met his wife after the incident at B.N. Bose Hospital and thereafter at about 12 noon on the next day at the police station. His brother Sk. Firoj his father-in-law and himself were present at the police station at that time.

- iii) PW-2 Sk. Firoz in his deposition stated that Sk. Pappu was his elder brother. Momtaj Begum was his wife. Incident took place on 28.07.04 at 05:00 p.m. in their house at Pipe road Chiriamore. His younger brother Gabbar assaulted his sister-in-law Momtaz on her head with a 'Bhojali'. He was then present in the house. At the relevant time his Boudi was cleaning the Varanda and as a result of the assault she fell down on the ground and was taken to B.N. Bose Hospital wherefrom she was referred to R.G. Kar Hospital where her injury got 15 stitches. She was referred to S.S.K.M. Hospital subsequently by R.G. Kar Hospital. On the next day she was discharged from the hospital. They lodged a complaint at Titanagar P.S. Thereafter police came to the spot and he was examined by the police.
- iv) In his cross-examination PW-2, inter alia, stated that Gabbar was his younger brother. He had good relation with him. Himself, his wife Anwara Begum, his elder sister Kanish Fatma and her husband Md. Samsad took his sister-in-law to hospital.

His elder sister resides with her husband at a place within 5 minutes' walk from their house. They went to hospital by taxi. Blood was oozing from the head injury of his sister-in-law but his wearing apparel did not become blood stained as her head was covered with a Cloth/Gamchha. At about 4-30 p.m. they reached B.N. Bose Hospital. It took 5/6 minutes time to go to B.N. Bose Hospital from their residence by taxi. By the same taxi they went to R.G. Kar Hospital within about 45 minutes. They stayed at R.G. Kar Hospital up to 7 p.m. Then they went to S.S.K.M. Hospital as his boudi was referred to S.S.K.M. after her injuries were stitched at R.G. Kar Hospital by another taxi. They reached at about 9:15 P.M. S.S.K.M. Hospital. They stayed there up to 10:30/11 P.M. Himself, his wife and brother-in-law accompanied his boudi to S.S.K.M. Hospital from R.G Kar Hospital. From S.S.K.M. Hospital they all went to his father in-laws house which was nearer to hospital. At about 11-30 a.m. on the next day, himself, his wife, his boudi and his father-in-law came to P.S. Then his elder brother came to P.S. and lodged a complaint which was written by his friend at his instruction in his presence. The nick name of the said friend B. Bhodel (sic). The complaint was written in Bengali by the said friend.

Police examined all of them at the P.S. at about 1 P.M. on that date of lodging complaint.

He did not state to police that there was a family dispute between Sk. Gabbar and his brother Pappu.

At the relevant time Gabbar used to stay in adjacent Kaneka house. At the time of incident himself, his wife, his boudi (sister-in-law), Mamtaj Begum were present in their house. The tenants on in ground floor were also in the house with their families.

After incident when they were taking his boudi hospital neighbouring people came but he did not state anything to them as they were in hurry. He could not mention the name of those neighbours. They asked him as to what had happened. On 29.7.04 police came to their house at noon but he could not remember the exact time.

- v) PW-3 Mumtaz Begum in her deposition stated that Sk. Papu was her husband. Incident took place on 28th July, 2004 at about 04:30/05:00 p.m. in her house at 5A, Pipe Road, Chiriamore. Her brother-in-law Gabbar came to their house and tried to demolish their garage, another brother-in-law Sk. Firoz went to the garage and Sk. Gabbar fled. Gabbar again entered into their house through the narrow lane behind their house and demanded money from her. He demanded about Rs.1000/-. As she did not give the money he assaulted him on her head with a 'Bhojali'. As a result she sustained cut injury on her head. She fell down on the ground and she was taken to B.N. Bose Hospital, by her brother-in-law and his wife. She was referred to R.G. Kar Hospital by B.N. Bose

Hospital as her cut injury was serious. In R.G. Kar Hospital 15 stitches were applied on the injury on her head and CT scan was done. She was then referred to S.S.K.M. Hospital for further check-up. On that night after being discharged from him to hospital she went to her father's house which was situated near P.G. Hospital. On the next day she went to the Titagar P.S. with her husband, sister and his brother Sk. Firoz and lodged and complaint. Subsequently police came to their house and examined herself and her sister-in-law and brother-in-law. Three outdoor tickets issued by three hospitals were marked as Exbt.-2, 2/1 and 2/2 respectively.

- vi) In her cross-examination PW-3 stated that she read up to class-VIII. She could not go through the content of the exbt.-2. Exbt.-2 was issued by R.G. Kar Hospital Exbt.-2/1 was issued by B.N. Bose Hospital. Exbt.-2/2 was issued by P.G. Hospital. She could not read Bengali. That copy of the injury report was issued by R.G. Kar Hospital, she could not go through the content of the report. She got married about 17 years back. Her husband has 4 brother and 1 sister. The residential house where they live belong to her mother-in-law. There are four rooms on the ground floor and four rooms on 1st floor. In one room there was garage run by her husband and brother-in-law Sk. Firoz.

There were many houses surrounding their house. She could not say the name of the inhabitants of that house. At about 01:30

p.m. on 30.07.04 she was examined by the police. She stated to police that as soon as she was assaulted she became senseless. She regained her sense immediately after the incident in the house. When she was taken to hospital she had her sense. She did not state to police that when she regained her sense she found that she was in the hospital. At the time of incident her brother-in-law Sk. Firoz, Jaa Roji Parbin, anwara Begam (Jaa) were present in the house. About 50 neighbours came to their house after the incident. Sk. Mukin, who was a tenant under her mother-in-law, Buchi, Sandha's mother, Krishna's mother and father, Chunna's mother and Papu came to their house after the incident.

At the relevant time the appellant Sk. Gabbar used to stay in a room on the 1st floor.

As a result of assault she sustained bleeding injury but much blood was not shredded due to assault. Her wearing saree became blood stained. At about 11:30 a.m. on the next day she went to police station. At that time her husband got the written complaint and submitted to P.S. She did not handover the blood stained wearing apparel to the police.

She stated to police that on the day of incident Gabbar was trying to break their garage and that when her brother-in-law Sk. Firoz went to the ground floor Sk. Gabbar fled away and that Sk. Gabbar coming to the house again though the lane behind their house demanded Rs.1000/- from him and he assaulted him on her

head with Bhojali. She went to the hospital by Taxi and she reached B.N. Bose Hospital at about 04:30 p.m. At about 05:30 p.m. she reached R.G. Kar Hospital with her Nanad and her brother-in-law Sk. Firoz and Anowara Begam. Kanish Fatma was her nanad. Kanish fatma also accompanied to him to the P.S. on the next date. She was not examined by the police.

PW-3 denied the suggestion that in the month of March 04, Gabbar was assaulted by her husband and that on 28.07.04 her husband and brothers assaulted her mother-in-law and that in the afternoon on 28.07.04 Sk. Firoz picked up a quarrel with Sk. Gabbar and that he quarreled with Sk. Gabbar that Sk. Firoj threatened Sk. Gabbar to leave the house otherwise they would kill him and that Gabbar asked the reason for his leaving the house and that at that time Firoj asked the employees of the garage to come upstairs and that the employees of the garage being asked with rod, came upstairs and that the said employees and her brother-in-law were attempting to assault Sk. Gabbar with iron rod and that she was standing nearby and that and iron rod suddenly hit her head and that as such she sustained injury. Previously the tenants on the ground floor paid rent to her father-in-law and after his death as per his instruction and said tenants now pay rent to Sk. Firoj.

- vii) PW-4 Prokash Shaw in his deposition stated that incident took place on 28.07.04 in the evening at about 04:30/05:00 p.m. he

knew Sk. Pappu. Sk. Pappu was married, he knew his wife who was some Begam. After the incident Sk. Pappu rushed to him and requested him to accompany him to Titagar Police Station. On 29.07.04 he went to Titagar P.S. and wrote the complaint in Bengali as per instruction and narration of Pappu. After scribing the complaint he read over the explained the content of the same to Pappu who then put his signature on the complaint. He also put his signature on the said complaint. The said written complaint was written and signed by him. The written complaint was marked as Exbt.-1/1 and the signature of Pw-4 was marked as Exbt.-1/2.

- viii) PW-5 Anwara Begum in her deposition stated that Sk. Pappu was her brother-in-law. Mumtaz Begum was the wife of Sk. Pappu. Incident took place on 28th July, 04 at about 04:30/05:00 p.m. Sk. Gabbar was trying to demolish their garage and her husband went down and asked him the reason of such an act. There was an altercation between them. Gabbar left the place. Thereafter Gabbar again came to Mumtaz Begum and an altercation took place between them and Mumtaz Begum asked Gabbar to leave the room but Gabbar refused and assaulted Mumtaz Begum with a 'Chopper'. They then took Mumtaz Begum to B.N. Bose hospital. Mumtaz Begum referred to R.G. Kar hospital from B.N. Bose hospital. She was again referred to S.S.K.M. hospital. In that night they stayed at her father's house at Kashipur after Mumtaz Begum

being discharged on next day. They went to Titagar P.S. and lodged a complaint.

- ix) PW-6 Anup Kr. Samanta in his deposition stated that he was posted as A.S.I of Police attached to Noapara P.S. On 29.07.04 he was posted at Titagarh P.S. as A.S.I. On that date he filled up the formal FIR. It bore his signature. On receipt of a written complaint from one Sk. Pappu, he made endorsement on the same. The endorsement on written complaint was marked as Exhibit 1/3. He then filled up the formal FIR and started Titagarh P.S. case No. 237 dated 29.07.04 under Section 326/307 of I.P.C. against Sk. Gabbar, S/o- Sk. Kalu. The formal FIR filled up and signed by him which was marked as Exhibit 3. His signature was marked as Exhibit 3/1. The endorsement of I/C Titagarh P.S. was marked as Exhibit 3/2.
- x) During his cross-examination PW-6 stated that he was being on duty officer up the formal F.I.R. on receipt of the complainant. The complainant was written at the P.S. in his presence and Sk. Pappu put his signature thereon.
- xi) PW-7 Fazal Haque in his deposition stated that he knew Sk. Pappu. He knew his wife Mamtuz. He knew Sk. Gabbar. He knew the incident took place in between Sk. Gabbbar and Sk. Pappu. The incident took place about 10 months back in an afternoon. Sk. Pappu and his family members are residing in the upstairs and they reside in the ground floor building. He heard a hue and cry and

found that Gabbar was roaming here and there surrounding the building and then he went away towards Chiriamore. Again he came to the house through the gali and went to the first floor. Suddenly he heard a hue and cry coming from the first floor and he heard a sound coming from staircase. He came to know subsequently that Gabbar after committing assault on the head, wife of Sk. Pappu left the house.

- xii) During his cross-examination PW-8 stated that he was examined by the police two or three days after the incident at about 10:00 a.m. He did not witness as to who assaulted whom and with which weapon.

At the relevant time Gabbar used to reside in another room on the ground floor and his father and others brothers also used to reside in the upstairs.

When he heard the hue and cry coming from the upstairs he did not notice any of the neighbours in-front of the house.

He did not state to police that he heard hue and cry coming from upstairs and that Gabbar was roaming around the house and then he left towards Chiriamore. He did not state to police that Gabbar had assaulted the wife of Pappu on her head. Police has not examined him anything on this score. In spite of hearing hue and cry he did not went to upstairs.

- xiii) PW-8 Subal Kr. Jana in his deposition stated that he was an employee of R.G. Kar Medical College & Hospital. He had been

authorized by Deputy Supt. Of R.G. Kar Medical College of hospital to bring the injury report of Mumtaz Begum.

- xiv) PW-9 Dr. Ashim Jiban Basu in his deposition stated that on 28.07.04 he was posted at R.G. Kar Medical College as Medical Officer and he examined one Mumtaz Begum, wife of Sk. Pappu 5/A, Paik Para, Chiriamore, Barrackpore, P.S. – Titagar, North 24 Parganas at 05:55 p.m. The patient was referred to that hospital by B.N. Bose hospital at Barrackpore. On being asked the patient stated that the place of occurrence was her residence and that at about 04:30 p.m. in that afternoon he was hit by a 'dao' by one Sk. Gabbar over forehead. On examination of the patient he found out injuries on scalp. Stiches with silk were given at C.R.O.T. and she was advised C.T. Scan and to attend N.R.S./S.S.K.M. Neurosurgery. The carbon copy of injury report of Mumtaz Begum written and signed by him and prepared through same mechanical process was marked as Exbt.-4. Each part of the body was vital. In his opinion, forehead was also a vital part.
- xv) During his cross-examination PW-9 stated that a patient having such type of injury was usually attended by general emergency department of Medical College and Hospital. Original injury report was usually received by police from clerk concerned of the hospital. Ext. 2 revealed that the patient was referred from B.N. Bose Hospital but it did not bear ticket no. or particular of B.N. Bose Hospital. He could not state whether original injury report was

received by the police in connection with this case. In the Ext. 2 there was writing to the effect that chief complaint as history of injury over-head. He did not mention the nature of the injury in his report. In his report he had not mentioned as to whether the patient conscious or not at the time of examination.

- xvi) PW-11 K. Debnath in his deposition stated that he was posted as S.I. police attached Titaghar P.S. on 29.07.04 also he was posted at Titaghar P.S. Titaghar Case No. 237 dated. 29.07.04 was endorsed to him by O.C. Titaghar P.S. on investigation. After taking the charge of investigation, he visited the P.O. and prepared sketch map marked as Exbt.-5 collectively.

He arrested the accused person. He examined the witnesses and recorded their statement under 161 Cr.P.C. He examined the injured at hospital. He collected the outdoor ticket of Mamtaz from B.N. Bose Hospital. He recorded the statement also 161 Cr.P.C. He examined de-facto complaint Pappu and recorded his statement 161 Cr.P.C. He could not recover the Chopper, as the accused stated that he had thrown away elsewhere. He collected the injury report of Mamtaz from R.G. Kar Medical College. After completing investigation and in consultation with his superior, he submitted charge-sheet against Sk. Gabbar under Sections 326/307 of I.P.C.

- xvii) In his cross-examination PW-11 stated that he did not collect the discharge certificate of Mamtaz from R.G. Kar Medical College. He did not examine any doctor of B.N. Bose Hospital or R.G. Kar

Medical College in connection with that case. It was the fact that investigation started after lodging of the F.I.R. He went to see Mamtaz Begum at hospital on 30.07.04 at about 11:00 a.m.

- xviii) Further, deposition of PW-11 was resumed on 06.09.05 and he stated that there was no mention in the C.D. as to whether he examined the injured. He submitted C/S 30.07.04. The P.O. was the Veranda on the first floor of the house situated to the west of Pipe road, Chiriamore, Barrackpore. As per sketch map P.O. was the house of the complainant. During his investigation he did not ascertain the ownership of the house, he did not collect blood stained earth or blood from the P.O. as the P.O. had already been washed away. He did not take photograph of P.O. During his investigation he visited the P.O. one at 01:15 p.m. on 29.07.04. He did not examine any doctor in connection with that case. He collected the injury report the complainant. On 30.07.04 at 11:00 a.m. he examined all the witnesses on 29.07.05 at 02:15 p.m. There was no mention in the C.D. as to when he submitted C/S on 30.07.05. As per C.D. the investigation was completed at 12:45 p.m. on 30.07.04. Before submitting C/S he consulted his superior. During investigation he did not ascertain as to how many rooms are there in that house. He arrested the accused on 29.07.04 at 05:00 p.m. and produced in court on 30.07.04. He did not record the statement of accused Gabbar. He did not pray for taking the accused in police custody for recovery of weapon.

Witness Sk. Firoj stated to him that Sk. Gabbar assaulted his boudi with 'dao' in order to kill her while she was working on Varandah (trying to kill using 'dao' by hitting on the head). Witness Anwar Begum stated to him that Sk. Gabbar assaulted his 'boudi' with 'dao' causing bleeding injury in order to kill her (trying to kill using 'dao' causing bleeding injury on head). He did not record the statement of Sk. Pappu under Section 161 Cr.P.C. He examined the witness at the P.O. There are many houses surrounding the P.O. He examined Prakash Shaw who resides near P.O. Sk. Imanuddin, father-in-law of the injured was dead at the time of the incident. Sk. Firoj did not state to him that as a result of assault his boudi fell down on the ground. He did not state to him that Gabbar assaulted his boudi with bhojoli. He stated that assault was done with dao. He examined FajalHaque. He did not examine Ramesh Thapa. He did not seize the wearing apparels of the injured.

He examined Prakash Shaw being an eye witness. He did not examine any Majin Shaw. Anwara Begum did not state to him that when Gabbar was trying to demolish the garage her husband went to forbid him and that Gabbar assaulted Mamta Begum on her head with a chopper.

- xix) Further, in his cross-examination PW-11 stated that he examined injured on 30.07.04. He had not mentioned the time and place of examination of injured. PW-3 Mamta stated to him that as a

result of assault she became senseless. Mamtaz Begum did not state to him that on the day of incident Gabbar was trying to break the garage and that when her went to the ground floor, Sk. Gabbar fled away.

- xx) DW-1 Samsun Nisha in her deposition stated that Gabbar was her son. She had five sons and one daughter. The eldest son was Sarfuddin @ Piarue, second son Sabuddin @ Pappu, the name of the third son was Nijamuddin @ Firoz, the name of the other sons are Sk. Saraj @ Gabbar and Sk. Samir. Kanis Fatma was her daughter. Her husband was alive. They had two houses situated adjacent to each other and those are standing her name. Her husband and four sons along with their families reside in the Pacca building. Herself and her son Gabbar and his family reside in the adjacent tile shade house. Pappu was a motor mechanic. There was a garage in the pacca building where her son Pappu was a mechanic. There are two employees who and brother of Pappu's wife work in the said garage beside Sk. Firoz. She visited the pacca building also. When himself and Gabbar went to pacca building quarrel started with her other sons.

Her son Pappu did not want that they go to that house. On the day of incident himself and Sk. Gabbar went to the upstairs of the building to see her ailing husband Pappu, Firoz and other employees of the garage tried to assault to Sk. Gabbar with an iron rod. At that time, wife of Sk. Pappu came there and she was

suddenly hit by the iron rod and she sustained injury. Dispute had cropped up as Firoz and Pappu were demanding entire property. Pappu and Sk. Firoz did not provide maintenance for himself and her husband. They even received rent collected from tenants.

In her cross-examination DW-11 stated that she had received no summon to depose. She had come to depose on her own will so that the dispute could be settled. Mamtaz and Pappu resided on the first floor on that building.

12. In ***Hari Singh v. Sukhbir Singh***¹, the following was held by the Hon'ble Supreme Court:-

“7. On the first question as to acquittal of the accused under Sections 307/149 IPC, some significant aspects may be borne in mind. Under Section 307 IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of “attempt to murder”. Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only

¹(1988) 4 SCC 551

the blunt side of it despite they being attacked by the other side. They suffered injuries but were not provoked or tempted to use the cutting edge of the weapon. It is very very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction under Section 307 is generally not called for. We, therefore, see no reason to disturb the acquittal of accused under Section 307 IPC.”

13. The following was observed by the Hon’ble Supreme Court in **Parsuram Pandey v. State of Bihar**²:-

“15. *To constitute an offence under Section 307 two ingredients of the offence must be present:*

- (a) an intention of or knowledge relating to commission of murder;*
- and*
- (b) the doing of an act towards it.*

For the purpose of Section 307 what is material is the intention or the knowledge and not the consequence of the actual act done for the purpose of carrying out the intention. The section clearly contemplates an act which is done with intention of causing death but which fails to bring about the intended consequence on account of intervening circumstances. The intention or knowledge of the accused must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence “of attempt to murder”. Intent which is a state of mind cannot be proved by precise direct evidence, as a fact it can only be detected or inferred from other factors. Some of the relevant considerations may be the nature of the weapon used, the place where injuries were inflicted, the nature of the injuries and the circumstances in which the incident took place...”

²(2004) 13 SCC 189

14. In **Jage Ram v. State of Haryana**³, the following was observed by the Hon'ble Supreme Court:-

“12. For the purpose of conviction under Section 307 IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc.

14. Having regard to the weapon used for causing the head injuries to Sukhbir, nature of injuries, situs of the injuries and the severity of the blows, the courts below recorded concurrent findings convicting the second appellant under Section 307 IPC. In our considered view, the conviction of the second appellant Rajbir alias Raju under Section 307 IPC is unassailable.”

15. In **Ghulam Mustafa Vs. State of Uttaranchal**⁴ (now Uttarakhand), the following was observed by the Hon'ble Supreme Court:-

“8. To justify a conviction under Section 307 IPC, the court has to see whether the act was done with the intention to commit murder and it would depend upon the facts and circumstances of the case.

³(2015) 11 SCC 366

⁴ (2016) 15 SCC 752

Although the nature of injuries caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be gathered from the circumstances like the nature of weapons used, parts of the body where the injuries were caused, severity of the blows given and motive, etc.

9. *Just before the occurrence PW 1 Munnu Lal came to the Fire Station for surprise check and recorded the absence of the accused in the general diary and returned home. Within a few minutes the appellant-accused armed with lathis went to his house and indiscriminately beat him with lathis causing injuries in neck, chest, hands, buttocks and thighs. PW 3 Dr N.D. Punetha mentioned in her report that Injuries 11, 17 and 18 are grievous in nature. In fact the grievous injuries are the fractures of wrist bones in both the hands. Though the injuries caused were 18 in number, they were not on vital parts of the body. It is true that the appellants had acted in a state of fury but it cannot be said that they caused those injuries with the intention to cause death. The appellants are not liable to be convicted for the offence under Section 307 IPC and at the same time for having voluntarily caused grievous hurt they are liable to be punished under Section 325 of the Penal Code.”*

16. The course of evidence of the prosecution witnesses primarily was the testimony of the related witnesses. Though the presence of the neighbours was mentioned by the aforesaid prosecution witnesses namely the victim and her family members, the prosecution failed to cite any independent witness.
17. The incident of assault was the consequence of a dispute between the family members. The offending weapon was not recovered. The blood stained earth or wearing apparel of the victim were not seized and sent to the FSL for further examination.

18. The prosecution witnesses namely the victim and her family members as aforesaid did not allude any acrimonious relationship amongst them. However, DW-1 the mother of the appellant and the mother-in-law of the victim deposed of a family dispute over the prolonged period of time.
19. There have been inconsistencies in the evidence of the related witnesses as well as the victim. However, the same are not serious or grave enough to destabilize the prosecution case. The ocular evidence of the aforesaid prosecution witnesses corroborate with the medical report, injury report, the bed head tickets which evince the fact of hospitalization of the victim having received an injury on her forehead. Forehead is indubitably a vital organ of the body which was inflicted with an injury to be attended with 15 stitches. Though the doctors did not mention the nature of the injury, however, such bleeding injury being advised for CT scan cannot be presumed to be a simple one but definitely a grievous one. An assessment of trend of the evidence indicated a recurring dispute between the parties and each one of the family members tried to shield the act of the other.
20. The prosecution failed to prove the intention of the appellant to murder the victim with the knowledge that an assault of severe nature will ultimately cause death to the victim. The nature of the weapon, the depth of the injury and other ancillary circumstances could not be proved by the prosecution including the presence of the independent witnesses. However, DW-1's testimony did conform to the occurrence of incident of an assault which might have exploded to such an extent whereby the victim was injured

without the intention and the knowledge of the appellant to cause death to the victim.

21. Under the facts and circumstances of the case, in the absence of the elements to constitute the offence under Section 307 of the Indian Penal Code, the conviction is modified to the commission of an offence under Section 325 of the Indian Penal Code. The sentence is reduced from five (5) years to two (2) years.
22. In view of the above discussions, the instant criminal appeal is dismissed modifying the sentence to two (2) years.
23. There is no order as to costs.
24. I record my appreciation for the able assistance rendered by Learned Advocate, Ms. Rituparna De Ghosh, as Amicus Curiae in disposing of the appeal.
25. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
26. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)