

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

**C.R.A. 222 of 2001
Jamser Ali & Anr.
-Vs-
The State**

For the Appellants	: Mr. Fazlur Rahaman Mr. Argha Banerjee Md. Babil Hossain
For the State	: Mr. Sandip Chakraborty
Heard on	: 28.11.2023, 07.02.2024
Judgment on	: 07.05.2024

Ananya Bandyopadhyay, J. :-

1. This criminal appeal is preferred against the judgment and order of conviction dated 03.05.2001 passed by the Learned Additional Sessions Judge, Cooch Behar in Sessions Trial No. 4(4) of 2000 arising out of Sessions Case No. 111 of 1996 under Sections 307/34 of the Indian Penal Code and sentenced the appellants for seven (7) years of rigorous imprisonment under Section 307 of the Indian Penal Code and also to pay a fine of Rs. 500/- in default further one (1) year of rigorous imprisonment.
2. The prosecution case precisely stated on 26.08.1994, Abiar Rahaman, fourth son of the de-facto complainant, Md. Dasiruddin Mia went to the land of Jagadish Ch. Kar in the morning for cultivating the same as hired labour. At about 9 a.m. Abiar Rahaman returned to his house and after breakfast he proceeded to resume his work as aforesaid. As he

reached near the house of Ratneswar Singh, the accused persons namely Jamser Ali, armed with battam, Ichhamuddin, Javed, Safiar Rahaman, Ramen and Jiten being armed with bamboo stick wrongfully restrained Abiar. Jamser Ali assaulted Abiar on his head from behind and as a result Abiar sustained bleeding injury. Thereafter, rest of the accused persons mercilessly assaulted Abiar Rahaman. At that time one Rina Sultana rushed to the spot and raised alarm. Villagers assembled and Abiar Rahaman was taken to Ghoksadanga Police Station wherefrom he was sent to Ghoksadanga P.H.C.

3. On the basis of the written complaint of de-facto complainant Dasiruddin Mia Ghoksadanga P.S. Case No. 36 of 1994 was instituted dated 26.08.1994 under Sections 341/325 of the Indian Penal Code.
4. After completion of investigation the Investigating Officer submitted the charge-sheet under Sections 307/34 of the Indian Penal Code against all the accused persons. Charges were framed to which the accused persons pleaded not guilty and claimed to be tried.
5. In order to prove its case the prosecution examined 14 witnesses and exhibited certain documents.
6. The Learned Advocate for the appellants submitted that:
 - i. The Learned Judge on the basis of the same evidence acquitted 4 other accused persons and convicted the present appellants on the same evidence.
 - ii. The Learned Sessions Judge ought to have held that no occurrence took place on the same date.

- iii. The appellant Safiar Rahaman happened to be a son of the de-facto complainant and as such the brother of the injured. No motive had been assigned by the prosecution for commission of the alleged offence.
- iv. PW-2, PW-3, PW-5, PW-7 were closely related to each other and admittedly the injured was the foster son of PW-3 and their evidence ought to have been scrutinized carefully.
- v. The injured though conscious after the occurrence could not name any of the appellants before the doctors.
- vi. Admittedly PW-4 was a witness after occurrence and according to him PW-3 went to the spot after him, and he heard about the occurrence from the injured which was not the evidence of PW-9, injured.
- vii. According to PW-8 who claimed to be an eyewitness no female member was present at the spot i.e. falsifying the evidence of PW-2 and this witness i.e., PW-8 was related to PW-3 and such to PW-9 i.e. injured.
- viii. Though about 50 to 60 persons were present at the spot only related witnesses were produced and independent witnesses were left out which raised suspicion of the prosecution story.
- ix. It was alleged that the appellant/accused Jamser did not strike the injured from behind. As such PW-9, i.e. injured, could not see Jamser.
- x. The evidence of the witnesses were contradictory and inconsistent.

- xi. Even the evidence of the doctors who found incised wound on the head of the injured was inconsistent with the allegation of assaulting with buttom in which case lacerated wound was expected.
 - xii. The Learned Trial Judge acquitted the other accused persons giving them benefit of doubt which ground was also available to the appellant.
 - xiii. According to Learned Judge, he acquitted the other accused persons on the ground that they were named by the injured to the doctors which was applicable also to the present appellants since they were not be named to the doctors by the injured.
 - xiv. The Learned Court below did not consider the deposition of PW-13. He stated that the F.I.R. was lodged by one Md. Bachiruddin Mia but the F.I.R., which was exhibited, was lodged by Md. Dasiruddin Mia and therefore the appeal shall be allowed.
7. The Learned Advocate for the State submitted that the evidence of the injured witness, i.e. PW-9, and the eye witnesses PW-1, PW-2, PW-3, PW-5 and PW-6 corroborated each other to establish the prosecution case.
 8. PW-14 the doctor's statement mentioning the injuries conformed to the evidence of the injured witness which led to his hospitalization for a considerable period of time and, therefore, the appeal shall be dismissed.
 9. The evidence of the prosecution witnesses comprised of the following eye witnesses:-

- i. PW-1, the father of the victim reiterated the facts stated in the complaint further deposing that Jamser Ali Miah armed with a buttam, and Echhamuddin, Jaber, Safiar Rahman, Ramen, and Jiten armed with bamboo stick restrained his son and assaulted him from behind on his head and neck. The rest of the accused person assaulted his son mercilessly all over his body with a bamboo stick. PW-1 deposed to have seen the incident from a distance of 1 bigha of land. He rushed to the spot after his son raised an alert at the assemblage of the villagers, six of the accused persons escaped. PW-2 had seen the occurrence and tried to nurse the body of his son. Thereafter the victim was taken to the local hospital for admission. PW-1 identified his signature on the complaint marked at exhibit 1/1. The victim was admitted at Ghoksadanga P.H.C for two days and at Mathabhanga Hospital for twenty-two days. During his cross examination, PW-1 submitted his ignorance for the cause of the assault and denied the existence of an enmity Ramen and his son. He further indicated a dispute to have occasioned between both of his sons over damage of crops which was settled by his intervention.
- ii. PW-2 deposed that on hearing the cry of Abiar, she came out of her house to find Jamser and Echhamuddin assaulted him with the *buttam* and Safiar assaulted him with a bamboo stick and she deposes that they intended to end his life. She rushed to cover the body of Abiar. In her cross-examination she deposed that Jamser

had assaulted Abiar and he had been in the hospital for twenty four days.

- iii. PW-3, the foster father of the victim deposed that Jamser struck Abiar on the head with a buttam and they attacked him from behind. As a result of the attack, he was bleeding profusely. Furthermore, Echhamuddin and Safiar attacked him bamboo sticks. However, he deposed that Jiten and Ramen were standing at a distance. They had gone to Ghoksadanga P.S where the Police officers present at the station advised them to take him Abiar to a hospital. They took him to Ghoksadanga P.H.C and at the time of admission his condition was serious. In his cross-examination he deposed that around fifteen to sixteen people had assembled at the place of occurrence. He further deposed that Jamser, Echhamuddin and Safiar had attacked Abiar however Jiten and Ramen were standing at a distance. P.W-6, Jamser, Echhamuddin and Hemanta all had houses around the place of occurrence and had assembled at the place of occurrence. It was his daughter, P.W-2 who first reached the police station and after that father of the complainant and himself followed. Abiar was his foster son.
- iv. PW-4 deposed that on 26.08.94 at about 9:00 am he rushed out of his house and found Echhamuddin, Jamser, Safiar and Javed standing in front of the house of Ramen. Abiar was lying on the ground and was bleeding from his wounds. He had heard from Abiar that Jamser, Safiar, Javed and Echhamuddin had assaulted him with *buttam* and bamboo sticks. In his cross examination he

deposed that Abair was released from the hospital after 24 days. P.W-2 had reached the spot before him. P.W-3 and Jatin had reached the spot after him. He denied that neither he nor P.W 6 were working in that lands of Shinu Patowari at the time of the incident.

- v. PW-5, the younger brother of PW-3 deposed that on 26.08.94 at about 9:00 am he heard the cry of P.W-2 and rushed to the spot. He witnesses Jamser armed with a *buttam* and Echhamuddin and Safiar armed with bamboo sticks had assaulted Abiar mercilessly. Abiar incurred injuries and bled from his wounds. He was subsequently taken to the hospital. Abiar was then admitted at Ghoksadanga P.H.C for two days and at Mathabhanga Hospital for twenty-two days. In his cross examination he deposed that P.W 3 was his elder brother.
- vi. PW-6 deposed that on 26.08.94 at about 9am he heard Ramen Lad and Jiten yelling that they had encircled Abiar. He witnessed Jamser armed with a buttam and the rest of the accused armed with bamboo sticks attacking Abiar. Jamser had struck a blow on the head of Abiar. Due to the attack he had wounds all the over his body. He accompanied the rest to take Abiar to Ghoksadanga P.H.C where he was admitted for two days. He observed at the time of admission the physical condition of Abiar was severe. In his cross examination he deposed that Ramen and Jiten had restrained Abiar. He further denied working in the land of Shibu Barman at the time of the occurrence.

- vii. P.W-7, deposed that on 26.08.94 at about 9:00 a.m., Abiar was going to the fields of Jagadish Kar and he was attacked by Ramen, Jiten, Jamser, Safiar, Jabed and Ecchamuddin had restrained him and attacked him. Jamser armed with a buttam and Safiar, Ecchamuddin and Jabed armed with bamboo sticks attacked him. As a result from the attack, Abiar was bleeding profusely from his head. They had first taken Abiar to the police station and then to Ghoksadanga P.H.C where he was admitted for two days. He was later transferred to Mathabhanga Hospital where he was admitted for twenty to twenty two days. In his cross examination he deposed that he was at his house at the time of the incident however on hearing the cry of PW-2, he rushed to the place of occurrence and witnessed the assault on Abiar. In his cross examination he deposed that PW-3, PW-5 and PW-8 were his brothers.
- viii. PW-8, the brother of PW-3 deposed that in front of the house of Ramen, Jabed, Safiar, and others had wrongfully restrained Abiar and assaulted him. Jamser had attacked Abiar with a buttam and Safiar and Jabed had attacked him with a bamboo stick. Abiar profusely bled from his wounds and collapsed on the road as a result from his injuries. He was admitted at Ghoksadanga P.H.C for two days and at Mathabhanga Hospital for twenty-two days. In his cross examination he deposed that on hearing hue and cry, he reached the place of occurrence where many people had assembled at the spot and marpit was going on. The incident had lasted for 10 to 15 minutes. He states that many people has assembled at the

spot, including his elderbrother being P.W-3, P.W-6 and Hasuddin. However, no females were present at the spot. He further deposed that Abiar was the foster son of his elder brother.

- ix. PW-9, the victim had deposed that when he was going to the field of Jagadish Kar for cultivation and he had reached the house of Ramen, Ramen and Jiten had wrongfully restrained him. Then Jamser, Echhamudin, Javed and Safiar appeared from the house of Ramen. Jamser was armed with a buttamand Ecchamiddin, Javed and Safiar were armed with bamboo sticks. Jamser then hit Abiar with the buttam on the back of his head and the rest assaulted him with bamboo sticks. Due to the attacks, he fell on the ground, however he did not lose his sense, P.W-2, P.W-6, P.W-5, P.W-7, P.W-3 and others witnessed the occurrence and took him to the police station where he was then admitted at Ghoksadanga P.H.C for two days and at Mathabhanga Hospital for twenty-two days under the treatment of P.W-11. He received stitches on his head. In his cross examination he deposed that he did not make any statements before the doctor. He did not know the reason why he was assaulted. He has used the road he travelled on the day of the occurrence since his birth. He further deposed that fifty to sixty people had assembled at the place of occurrence. P.W-3 was his foster father.
- x. PW-10, a Medical technologist of Mathabhanga S.D. Hospital reproduced the injury report.
- xi. PW-11, attached to M.J.N Hospital as a surgeon was posted at Mathabhanga Hospital on 31.08.94., he deposes that Abiar was

admitted to Mathabhanga Hospital with an old head injury. The date of the injury was 26.08.94., the patient was admitted on 31.8.94 and discharged from the hospital on 22.09.94. He deposed that the patient told him it was a case of physical assault. The injury report written and signed by him was marked at exhibit no. 2. In his cross examination he deposed that the injury on the head of Abiar was six days old.

- xii. PW-12, the Officer in Charge at Kotwali P.S stated that he had done nothing in the case except forwarding the chargesheet.
- xiii. PW-13, the S.I. posted at Ghoksadanga P.S. deposed that MD. Bachiruddin Mia had submitted an FIR and on that basis he had started P.S case on 26.08.94 under Section 341/325 of the IPC against six accused people. The FIR filled up and signed by him had been marked at exhibit no. 3 and the receiving endorsement on the body of the FIR was marked at exhibit no. 3/1. Thereafter he took up the investigation of the case. He visited the place of occurrence and prepared the sketch map with index which was marked at exhibit no. 4. He had examined the witnesses and collected the injury report. After the completion of the investigation, he submitted a chargesheet against all the six accused persons under Section 341/325/306 of the IPC.
- xiv. PW-14, the medical officer Ghoksadanga P.H.C as Medical Officer had examined Abiar and has found the following injuries in the injury report marked at exhibit no. 5:-

- i. Two scalp injury incised looking wounds on Right lateral aspect about 2" x "x % each with bleeding and swelling of 2%" x 1" x 1". Stitches were given and bandaging was done.
- ii. One injury at anterior to tibia upper 1/3rd and lower 2/3rd junction 1" x 1" with bleeding of right foot. Stitches were given.
- iii. One injury each at left and right lateral aspect middle of both hands. Only swelling 1" x 1".
- iv. Four rail-road injury on upper back each 2" in length.
- v. This injury was sufficient to cause death of a man

In his cross examination he deposed that Abiar was admitted on 27.08.94 and discharged on the same date. Abiar did not disclose the name of any patients.

10. Section 307 of the Indian Penal Code states as follows:-

“Section 307. Attempt to murder. - *Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.*

Attempts by life-convicts.-- 2[When any person offending under this section is under sentence of 2[imprisonment for life], he may, if hurt is caused, be punished with death.]

Illustrations

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of 3[the first paragraph of] this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.”

11. Section 326 of the Indian Penal Code states as follows:-

“Section 326. Voluntarily causing grievous hurt by dangerous weapons or means. –

“Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a 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 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

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

¹(1988) 4 SCC 551

“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 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 Bihar²:-

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

²(2004) 13 SCC 189

(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...”

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*

³(2015) 11 SCC 366

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. The Hon’ble Supreme Court held the following in **Panchram v. State of Chhattisgarh**⁴:-

“7. *The incident in the case had taken place 23/24 years ago. The root cause, as per the stand of the appellant is that the injured was having inappropriate relations with his wife, is not a matter of dispute as the injured in his cross-examination had admitted this fact. In the complaint filed by the injured on the basis of which F.I.R. was registered, he stated that Rajkumar alias Munna (PW 6) was accompanying the appellant when he caused injuries. However, he was declared hostile. **The weapon used is a scissors which is not a normal weapon of offence in case there is any intention to cause death.** The appellant was doing the work of a tailoring. As per the injury report, there was a scratch below the neck, incised wound on the left thigh and a small cut size 1 ½ cm × 1 cm × 5 cm below the ribs.*

⁴2023 SCC OnLine SC 394

8. In his statement, the injured appearing as PW-1 submitted that when Munna (PW 6) shouted for help, Kantilal (PW 8) and Radheyshyam (PW 9) came there and seeing them the accused ran away. However, Kantilal (PW 8) was declared hostile. The prosecution had produced another witness Radhey Shyam (PW 7). He was also declared hostile and did not support the prosecution version. Even the scissors which was seized by the police is small scissors which is used by tailors. With the aforesaid evidence on record and the kind of weapon used, in our view the offence will not fall within Section 307 I.P.C. From the reasons for fight as are emerging on record, it doesn't seem to be pre-planned act. It, at the most, can fall within the four corners of Section 326 IPC as a sharp-edged weapon was used. The injuries were not caused with an intention to cause death and were not sufficient to cause death. Hence, in our view the conviction of the appellant with respect Section 307 IPC cannot be sustained however the offence under Section 326 IPC is made out. The conviction for other offences namely under Sections 341 IPC and 506B IPC are sustained.”

16. In **Jai Narain Mishra v. State of Bihar**⁵, the Hon’ble Supreme Court observed the following:-

“11. Taking the case of appellant Suraj Mishra, we find that he has been convicted under Section 307 IPC and sentenced to five years rigorous imprisonment. According to the evidence Suraj was responsible for the chest injury which is described by Dr Mishra PW 6 as a penetrating wound 1½" × ½" × chest wall deep (wound not probed) on the side of the right side of the chest. Margins were clean cut. Suraj, according to the evidence, had thrust a bhala into the chest when Shyamdutt had fallen as a result of the blow given by Mandeo with the farsa on his head. According to the Doctor the wound in the chest was of a

⁵(1971) 3 SCC 762

grievous nature as the patient developed surgical emphysema on the right side of the chest. There was profuse bleeding and, according to the Medical Officer the condition of the patient at the time of the admission was low and serious and the injury was dangerous to life. Out of the four injuries which the Medical Officer noted, this injury was of a grievous nature while the other three injuries were simple in nature. Where four or five persons attack a man with deadly weapons it may well be presumed that the intention is to cause death. In the present case, however, three injuries are of a simple nature though deadly weapons were used and the fourth injury caused by Suraj, though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid. The benefit of doubt must, therefore, be given to Suraj with regard to the injury intended to be caused and, in our opinion, the offence is not one under Section 307 IPC, but Section 326 IPC His conviction, therefore, under Section 307 IPC is set aside and we convict him under Section 326 IPC. His sentence of five years' rigorous imprisonment will have to be reduced accordingly to three years' rigorous imprisonment."

17. The Hon'ble High Court at Calcutta in **Jahangir Seikh v. State of W.B.**,⁶ held the following:-

"26. *This issue has already been decided by us in a judgment dated October 6, 2015, in the matter of Furkan Sk v. The State of West Bengal (in re: CRA 463 of 2014) and the relevant portion of the above judgment is quoted below:-*

"The provision of Section 307 of the I.P.C. deals with attempt to murder. The essential ingredients of the offence under the above provision are follows:-

(i) The accused did some act;

⁶2016 SCC OnLine Cal 467

(ii) Such act was done with intention or knowledge that hurt was likely to be caused to the victim by the act.

For the last part of the offence the accused be guilty of murder was under sentence of life imprisonment when he committed the offence.

Further, when any person offending under this Section is under sentence of imprisonment for life, he may, if hurt is cause, be punished with death.

The provision of Section 326 of the I.P.C. deals with voluntarily causing grievous hurt by dangerous weapon or means having essential ingredients as follows:-

(i) Accused caused grievous hurt;

(ii) He caused it voluntarily;

(iii) He caused it by any of the following means:-

(a) by any instrument of shooting, stabbing or cutting;

(b) by any instrument, if used as a weapon of offence likely to cause death;

(c) by fire or heated substance;

(d) by poisonous or corrosive substance;

(e) by explosive substance;

(f) by any substance deleterious to the human body to inhale or swallow;

(g) by means of any animal.

Therefore, whether the culpability of the accused would fall under Section 307 or 326 of I.P.C. would depend upon presence of distinguishable essential ingredients in a case of commission of offence under any of the above provisions. But essential ingredients of offences under both the aforesaid provisions, i.e. Sections 307 and 326 of the I.P.C. cannot be present in case of commission of one and same offence.”

28. *But there was no evidence on record to suggest that the above act of the appellant causing grievous hurt to the PW 2 was an outcome of his intention or knowledge to cause death of the PW 2, for that the appellant would be guilty of murder in that event. So, the essential ingredients of commissioning of offence by the appellant punishable under the provision of Section 307 of the I.P.C. was not proved beyond any reasonable doubt.”*

18. The course of evidence of the prosecution witnesses indubitably established an incident of assault sustained by the victim, i.e. PW-9, who received an injury on his head and had to be hospitalized on 13.08.94 and was discharged on 22.09.94. The incident of assault occurred on 26.08.94 and the victim was hospitalized on 31.08.94. The injury report marked Exhibit 5 prepared by PW-14 described the wounds on the relevant portions of the victim.

19. PW-13 the Investigating Officer submitted the charge-sheet against six accused persons under Section 341/325/307 of the Indian Penal Code. PW-13 however did not seize any blood-stained wearing apparel and the victim for further examination nor did he recover the offending weapon. The incident occurred between two family members. The enmity between the parties was not specifically described rather than a

triviality of causing damage to the crops which was settled by PW-1 the father of the victim and the appellant Safiar Rahaman. There are discrepancies and inconsistencies in the evidence of PW-1, 2, 3, 5, 6 and 9. However, the crux of the prosecution case is unshaken and undeniable in view of the evidence of the injured witness, i.e. PW-9, being corroborated by the medical evidence of PW-11 and PW-14.

20. In the instant case the injury was received on the vital part of the body of the victim however the offending weapon was not recovered and the depth of the wound on the head of the victim was treated with stitches. After an initial treatment the victim was hospitalized after a lapse of 5 days which might have aggravated the intensity of the injuries received by him without continuous medical treatment during the said period.
21. It is imperative to establish the intention of committing an offence under Section 307 of the Indian Penal Code to cause injuries to the victim to such an extent that death would be imminently the result.
22. The weapon being a bamboo stick cannot be considered to be a deadly weapon. The injuries apart from the one caused on the scalp were not grave enough to cause death of a person.
23. Prosecution could not prove that the appellants assaulted the victim with premeditation and absolute knowledge to cause his death.
24. The prosecution could not prove the intention that the appellants inflicted the injuries being sanguine that their action will inevitably result in the death of the victim. Therefore, the offence under Section 307 of the Indian Penal Code could not be proved however the 'buttam'

used as a weapon could have caused death of the victim if it was directed with a vigorous intensity.

25. Under such facts and circumstances, sentence is modified from Section 307 of the Indian Penal Code to Section 326 of the Indian Penal Code.

Sentence is reduced from seven (7) years to three (3) years.

26. Accordingly, the instant criminal appeal is disposed of.

27. There is no order as to costs.

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

29. 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.)