

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 202 of 2011

**Ajit Kundu
-Vs-
State of West Bengal**

For the Appellant	: Mr. Dipayan Dan
For the State	: Mr. P. K. Dutta Mr. Santanu Deb Roy
Heard on	: 08.09.2023, 17.10.2023, 22.01.2024, 26.02.2024, 12.03.2024, 19.06.2024
Judgment on	: 13.08.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 16.03.2011 passed by the Learned Additional Sessions Judge, 5th Court, Murshidabad in Sessions Trial No.10 of 2005 (Sessions Serial No.538 of 2005) which was pending before the Learned Additional Sessions Judge, 5th Court, Murshidabad, arising out of Jalangi Police Station Case No.147/2001 dated 12.01.2001, thereby convicting the appellant for offence punishable under Section 325 of the Indian Penal Code and sentencing him to suffer simple imprisonment for 1 year and to pay a fine of Rs.10,000/-, in default, to suffer further simple imprisonment for one year.

2. Jalangi P.S. Case No.147/2001 dated 12.01.2011 under Sections 325/308/34 of the Indian Penal Code was registered for investigation on the basis of a written complaint lodged by one Iti Sarkar PW-1 (de facto complainant).

3. The prosecution case precisely stated:-

On 12.01.2001 at about 06:30 A.M. in front of the house of Basudeb Sarkar (victim), the appellant along with others namely Arun Kundu and Asit Kundu assaulted the victim with iron rod and 'harpa' and one Bapi Kundu stood there with a gun. As a result of such assault, the victim received severe bodily injuries.

4. On the basis of the aforesaid written complaint police took up investigation.

5. On completion of the investigation of the case, investigating agency submitted charge-sheet against the present appellant and other co-accused persons under Sections 325/308/34 of the Indian Penal Code.

6. Charge under Sections 307/325/34 of the Indian Penal Code was framed against the present appellant and others to which they pleaded to be not guilty and claimed to be tried.

7. During the pendency of the instant case, Arun Kundu and Asit Kundu expired and the case was filed against them. The appellant herein and Bapi Kundu faced the trial.

8. The prosecution cited 9 witnesses and exhibited certain documents.

9. Learned Advocate for the appellant submitted as follows:-

- i. The evidence of the prosecution witnesses suffered from gross contradictions and/or embellishments and the same was rendered

highly unreliable in nature and ought not to have formed the basis of conviction in the instant case.

- ii. The deposition of the prosecution witnesses did not establish the essential ingredients of the offence punishable under Section 325 of the Indian Penal Code.
- iii. From the evidence on record, two complaints appeared to have been made to the police authorities; the first one being lodged by the cousin of the victim but the instant case appeared to have been initiated on the basis of the second complaint lodged by the PW-1; the first complaint was never produced before the Learned Trial Court and there were gross contradictions between the versions in the two complaints and it appeared that several embellishments were made in the second complaint as a result of after-thought, informant had failed to explain the same and having regard to the above, chance of cooking up a concocted story could not have been ruled out.
- iv. It also transpired from materials on record that the police authorities had already started investigation and visited the place of occurrence before the First Information Report was drawn up in the instant case which itself cast severe doubt on the veracity of the prosecution case.
- v. There were severe discrepancies in the injury report of the victim inasmuch as the type of injuries described in the injury report could not have been inflicted by 'harpa' and/or iron rod.

- vi. The injury report there was no recording of the name of the assailants as stated by the alleged victims and the same was highly improbable in the facts and circumstances of the instant case.
 - vii. The medical evidence and ocular evidence were mutually contradictory to each other, the mode of inflicting injuries as stated by the witnesses were not supported by the evidence of the doctors.
 - viii. The nature of injuries found on the person of the victim by the doctor could not be said to be grievous in nature and as such conviction of the appellant under Section 325 of the Indian Penal Code was not sustainable.
 - ix. It was impossible to determine from the materials on record as to ascertain in regard to the exact part played by the appellant in causing hurt to the victim.
10. Learned Advocate for the appellant relied on the following to support the contention that if a co-accused person was acquitted the same benefit should be afforded to other on the same footing: ***Ram Laxman vs State of Rajasthan (2016) 12 SCC 389 - para 6 and 7.***
11. Moreover, the other witnesses namely PW-5, PW-6 who were examined for the purpose of corroboration similarly did not make any statement before the investigating officer that the appellant assaulted the victim. Their evidence also was for the first time made in the Court.

12. It was a settled position of law that a statement made in court for the first time without any such statement made before the investigating officer was unreliable:

Khalil Khan vs State of M P (2003) 11 SCC 19 - para 6

Meera vs State of Rajasthan (2004) 11 SCC 231 - para 15

13. Long standing animosity between the parties false implication from the evidence of PW-4 and PW-5 it transpired that there was a long standing dispute between the PW-4's family and the family of the appellant since the time of their father.
14. Considered the rival submission of the Learned Advocate for the State.
15. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 in her deposition stated the incident to have occurred in front of her house on the bank of a tank. When the family maid servant went to the said tank for washing clothings, the accused persons viz. Asit Kundu, Ajit Kundu, Bapi Kundu and Arun Kundu abused her to leave the place. Her husband appeared and asked them to vacate the place. While her husband, the maid servant and PW-1 were returning to their house, the accused Ajit Kundu hit on the head of her husband with an iron rod. Asit Kundu and Arun Kundu assaulted her husband with 'Harpa' made of bamboo (wood made latches of the door). Bapi Kundu stood there with a gun for killing her husband. Due to the said assault her husband sustained injury on his head and the fingers of his hand were

fractured. He also sustained injury on his eye. Nizamuddin Alimuddin came to the place of occurrence and they rescued her husband. Her husband was brought to Sadi-Kandiar Hospital and therefrom he was brought to Berhampore Hospital.

- ii. During cross-examination PW-1 stated that the said tank belonged to the accused persons. Alimuddin and Nizamuddin also claimed that the said tank belonged to them which was disputed at the time of incident she along with her maid servant was entering into the house and her husband was following them.
- iii. PW-2 in her deposition stated that he knew the complainant Iti Sarkar. She also knew her husband Basudev Sarkar. She was working in their house as maid servant. The incident took place about 4 years back in the morning at about 6.30 a.m. in front of the house of the complainant and near a tank. Then she went to the said tank for washing clothing. The accused namely Ajit Kundu, Asim Kundu, Arun Kundu and Bapi Kundu abused her with filthy language. Then Iti Sarkar came there and she was also abused by them. Thereafter Basu Sarkar came there and asked her to leave the place. Then Ajit Kundu, Asit Kundu and Arun Kundu assaulted Basudev. Bappa Kundu was there with a gun. The victim was assaulted with iron rod on his head due to which he had lost his clear sight. He also sustained bleeding injury on his head. Ajit Kundu assaulted PW-4 with an iron rod. Asim

Kundu assaulted Basudev with “Harpa”. Basudev Sarkar was first taken to P.S. and therefrom to the hospital.

- iv. PW-3, PW-5 and PW-6 reiterated the evidence of PW-1 and PW-2.
- v. PW-4 deposed that on the relevant date his maid servant went to a tank which was situated in front of their house for washing clothes at about 6.30 a.m., when the accused persons namely Asit Kundu, Ajit Kundu, Arun Kundu and Bapi Kundu abused her in filthy language. His wife was also there. He asked his wife and maid servant to leave the place. Then the accused persons assaulted him with an iron rod and wooden latches. He sustained bleeding injury on his head and fracture injury on the fingers of right hand. Stitches were rendered to him. Ajit assaulted him with iron rod. Arun, Bapi and Asit Kundu assaulted him with two latches one made by bamboo and another made by wood. He was brought to Sadi-Kandiar Hospital. Therefrom he was shifted to Berhampore New General Hospital. He was admitted at Berhampore New General Hospital for 8 days.
- vi. PW-7 the Medical Officer at the relevant date and time found the following injuries:
 - “1. Blunt trauma with lacerated wound over the right forehead (size 6 cm x 1 cm x 1 cm) near right eye, curved wound.*
 - 2. Lacerated wound with clinically fracture right finger.*
 - 3. Blunt trauma over the left hand and left elbow.*
 - 4. Lacerated wound over the left ear.*

5. *Blunt trauma with swelling over the central part of the scalp.*

6. *Blood sustained whole body.”*

The first aid was given to the patient and referred to Berhampore New General Hospital for further treatment. The said injury report was prepared and signed by him marked as Ext.2. Such type of injuries might be caused if any person was assaulted by more than one person with an iron rod and “harpa” made by “wood and bamboo”.

vii. During cross-examination PW-7 stated that such type of injuries might not be caused if any person fell down upon a hard and rough substance.

viii. PW-8 in his deposition stated that he was retired Medical Officer. On 12.10.2001 while he was attached to Berhampore New General Hospital as M.O., PW-4, the victim was admitted at the said hospital under him, on 12.10.2001 and discharged on 19.10.2001.

ix. PW-9 in his deposition stated that at present he was posted as Inspector, D.I.B., Murshidabad. On 12.10.01 he was posted as O/C, Jalangi P.S. and on that date he received one written complaint from one Eti Sarkar w/o Basudev Sarkar against one Asit Kundu and 3 others and after receiving complaint he had registered Jalangi P.S. Case No. 147/01 dated 12.10.01 under Section 325/308/34 of IPC and took up its investigation. He had

filled up the formal FIR and put his signature thereon, marked Ext.3. The endorsement on the written complaint was written and signed by him, marked Ext.1/1. During investigation he visited the P.O., prepared rough sketch map with index. The said sketch map with index, marked Ext.4. Then he recorded the statement of available witnesses under Section 161 Cr.P.C. He also examined the injured at Berhampore N.G. Hospital and recorded his statement under Section 161 Cr.P.C. He arrested one Arun Kundu s/o Late Abani Kundu of Jalangi Biswaspara and forwarded him before the Learned Magistrate. He had collected injury report from Berhampore N.G. Hospital. After perusing the materials on record he had submitted C/S being no.34/02 dated 31.3.02 under Sections 325/308/34 of IPC against 4 accused persons.

16. In the case of ***Mathai v. State of Kerala***¹, the Hon'ble Supreme Court held the following:-

“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.”

¹(2005) 3 SCC 260

17. The Hon'ble Apex Court in **Prabhu v. State of M.P.**² held the following :-

“8. ...

10. Section 325 deals with punishment for voluntarily causing grievous hurt.

12. Section 326 provides that 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 corrosive substance, or by means of any explosive substance, or by means of any substance which 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 for life or with imprisonment of either description for a term which may extend to ten years, and also with a liability to pay a fine.

13. Sections 325 and 326, like the two sections immediately preceding, provide the ordinary punishment and punishment under certain aggravating circumstances of the offences mentioned thereunder. The two latter sections apply to the case of causing 'grievous hurt' and the immediately preceding two sections to the case of 'hurt'.

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.”

²(2008) 17 SCC 381

18. In the case of **Shri Kishan v. State of U.P.**³ the Hon'ble Supreme Court held the following: -

“6.Apart from the one injury on the head, which proved fatal, the other injuries were not of a very serious nature.... As such, none of the accused can be held to be personally liable for the fatal injury....

The above finding as well as the broad circumstances of the case go to show that the common intention of the accused was to cause grievous injury to the victim. The fact that one of them exceeded the bound and gave a fatal blow on the head of the deceased would make him personally liable for the fatal injury, but so far as the other three are concerned, they can be held liable only for the injuries which were caused in furtherance of the common intention and not for the fatal injury. As it is not possible on the material on record to find out as to which one of the accused gave the fatal blow, there is no escape from the conclusion that each one of the four accused can only be guilty of the offence under Section 325, read with Section 34, Penal Code, 1860....”

19. In **Sakharam v. State of M.P.**⁴, the Hon'ble Supreme Court observed the following:

“10. “Grievous hurt” is defined in Section 320 IPC. To make out the offence of voluntarily causing grievous hurt, there must be a specific hurt voluntarily inflicted and coming within the eight kinds of hurt enumerated in Section 320 IPC. By perusal of x-ray report (Ext. P-23), it is evident that PW 2 sustained fracture or dislocation of the bone which clearly falls in the category of grievous hurt as expressly mentioned in clause Seventhly of Section 320 IPC. The fracture or dislocation of bone is considered grievous hurt because it causes great pain and suffering to the injured person. Even though Dr Moitra (PW 15) was not questioned about the nature of the injuries, fracture of the

³(1972) 2 SCC 537

⁴(2015) 10 SCC 557

frontal bone would bring the offence within the definition of “grievous hurt”. Having regard to the nature of injuries and the x-ray report, in our view, the High Court rightly convicted the appellant under Section 325 IPC and the same cannot be modified.”

20. The Hon’ble Apex Court in the case of **State of Rajasthan v. Major Singh**⁵ observed the following:-

“4. ...In our view, considering the medical evidence which corroborates the prosecution version, particularly, of the injured witness, PW 1 Jeet Kaur, there is no reason to disbelieve the evidence of the aforesaid two witnesses....”

21. The Hon’ble Supreme Court in the case of **Malkiat Singh v. State of Punjab**⁶ held the following:-

“6. ...On the contrary, we find that the evidence of Mit Singh gets ample corroboration from the fact that within almost an hour of the incident he lodged the FIR wherein he not only detailed the prosecution case as to how Darbara Singh and Uttam Singh were assaulted by the appellant but also stated that the appellant had sustained minor injuries at the hands of Uttam Singh when he tried to rescue Darbara Singh. The medical evidence corroborates the ocular version of PWs 4 and 5 and the recovery of the kassi pursuant to the statement of the appellant which was found to contain human blood, when examined by the Forensic Science Laboratory, also lends credence to the prosecution story.”

22. The Hon’ble Apex Court in **Jai Karan v. State of U.P.**⁷ held the following:-

“12. Great emphasis was led on the approximate time of injury. That in no way affects the credibility of PW 2's evidence. Though the

⁵(1999) 9 SCC 106

⁶(1996) 10 SCC 274

⁷(2003) 12 SCC 655

evidence of PW 1 does not specifically indicate the injury on PW 2, that is but natural. Before a young person two murders were committed and it is quite natural to create a sense of shock and minor variations in his evidence do not affect his testimony which is otherwise credible. Unless the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. (See Solanki Chimanbhai Ukabhai v. State of Gujarat [(1983) 2 SCC 174 : 1983 SCC (Cri) 379 : AIR 1983 SC 484] .) To similar effect is the decision in State of U.P. v. Krishna Gopal [(1988) 4 SCC 302 : 1988 SCC (Cri) 928 : AIR 1988 SC 2154] .”

23. In **Balu Sudam Khalde v. State of Maharashtra**⁸, the Hon’ble Supreme Court held the following:-

“26. *When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:*

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

⁸2023 SCC OnLine SC 355

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

27. In assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or put forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence.”

24. The Hon’ble Supreme Court held the following in **Thathanna v. State of**

A.P.⁹:-

“10. ...The evidence of A-3, A-8 and A-9 though is not accepted in respect of their own assailants but the fact that the occurrence has taken place is accepted and that in respect of these appellants the other witnesses have also consistently spoken regarding the parts

⁹1994 Cri LJ 632

played by the three appellants. The nature of the injuries inflicted by these three accused to that extent is corroborated by medical evidence and also spoken to by the other eyewitnesses consistently and the same has been accepted. For all these reasons we see no ground to interfere.”

25. The Hon’ble Supreme Court in the case of **Leela Ram v. State of Haryana**¹⁰

held the following:-

“9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105 : AIR 1985 SC 48] . In para 10 of the Report, this Court observed: (SCC pp. 514-15)

“10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them

¹⁰(1999) 9 SCC 525

to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.”

26. In the case of **Shio Shankar Dubey v. State of Bihar**¹¹, the Hon’ble Supreme Court held the following:-

“21. The prosecution case in the present case being fully proved against the accused, the eyewitness account of PW 11, who was accompanying the deceased has given the eyewitness account of the entire incident. The names of all the five accused and role attributed to them have been promptly recorded by the police officials within half-an-hour of the incident on the spot. The medical evidence corroborates the ocular evidence. Both the courts below have not committed any error in convicting the appellants and sentencing them. We do not find any error in the judgment of the courts below. There is no merit in the appeal. The appeal is dismissed.”

¹¹(2019) 6 SCC 501

27. The evidence of the related witnesses/the injured eye witness and the medical evidence are corroborative in nature. PW-1, PW-2, PW-3, PW-5 and PW-6 equivocally stated the maid servant to have been abused by the present appellant and others and on restraint the present appellant along with others assaulted the victim, i.e., PW-4 with an iron rod, and offending weapons made of bamboo and wood. The mistreatment of the maid servant was unanimously evinced by the aforesaid witnesses which was succeeded by the acrimonious act of the accused persons including the present appellant.
28. The witnesses as aforesaid described the individual overt acts of the present appellant along with other accused persons which was exacted translation into action resulting in the injuries depicted by PW-7 in his report prepared by him. The injury sustained on the head, eye, fingers with fracture had been the consequence of the assault inflicted on the victim/PW-4.
29. Minor discrepancies, aberrations and contradictions in the evidence of the prosecution witnesses would not affect the crux of the prosecution story which could be proved otherwise through reliable and credible evidence. The evidence of the injured witness corroborated the version of the Medical Officer who attended him. The injuries with regard to fracture, severity to the eyesight, head injury fall within the definition of grievous hurt under Section 325 of the Indian Penal Code.
30. In view of the above discussions and considering the lapse of time, the sentence is modified to the extent of incarceration undergone by the

appellant and the appellant shall be liable to pay a fine of Rs.50,000/- within three months from the date of passing of this order.

31. Accordingly, the instant criminal appeal being CRA 202 of 2001 is disposed of.

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

33. 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.)