

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 356 of 2008

Sk. Nowsad & Ors.

-Vs-

The State of West Bengal & Anr.

For the Appellants : Mr. Himangshu De
Mr. Navanil De
Mr. Srinjan Ghosh

For the State : Mr. N. P. Agarwala
Mr. Pratick Bose

Heard on : 13.10.2023, 18.12.2023, 21.02.2024, 02.05.2024

Judgment on : 18.07.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment dated 17.06.2008 and order dated 19.06.2008 passed by the Learned Additional Sessions Judge, Fast Track, 2nd Court, Paschim Midnapore, convicting the appellants under Section 308/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for a term of four (4) years each. The appellants were further directed to pay compensation of Rs.12,000/- each to the de-facto complainant Maleka Bibi within two (2) months from the date of order, i.d., the de facto complainant shall be at liberty to take necessary steps before the Learned Magistrate in the nature of realizing the fine as laid down in the

Code of Criminal Procedure, but she shall not take any steps before the appeal period is over in connection with Sessions Trial Case No. XXXVII of March 2006.

2. The prosecution case precisely stated that on 21.03.2005, one Maleka Bibi filed a complaint at the police station, inter alia, alleging that on 21.02.2005 when her husband Sk. Nazrul was returning from the market, the accused persons caught him and assaulted him with a brick and thereafter tried to kill him by throwing him into the pond. Certain villagers arrived at the spot of incident. Witnessing the villagers, the accused persons escaped. The victim was taken to a local doctor by the complainant, who referred her husband to Midnapore Hospital. After three days, the doctors of Midnapore Sadar Hospital advised the complainant to be shifted to Nil Ratan Hospital at Kolkata. It was further alleged that due to the said assault the health of victim gradually deteriorated.
3. Based on the aforesaid complaint Sabang P.S. Case No. 20/05 dated 21.03.2005 was initiated.
4. On completion of the investigation, charge-sheet was submitted against 4 accused persons vide charge-sheet No. 27 of 2005 dated 30.04.2005 under Sections 325/308/34 of the Indian Penal Code. Charges were framed against the 4 accused persons to which they pleaded not guilty and claimed to be tied.
5. The prosecution examined six witnesses and exhibited certain documents.
6. The Learned Advocate for the appellants submitted as follows:-

- i. The charge was framed upon an incident of March 21, 2005 whereas the date of incident as stated in the F.I.R. was on February 21, 2005 and also from the evidence of the Private Doctor (PW-4), it could be ascertained that he treated the victim on February 21, 2005 and he treated the victim after 5 months from receiving the injury. Therefore, the date of incident according to the statement of the Private Doctor (PW-4) was on or around October, 2004.
- ii. Hence, no incident took place on March 21, 2005 and as such, the charge framed against the accused persons was defective and highly prejudicial as also it could not be cured.
- iii. Therefore, there had been a total violation of Section 212 of the Code of Criminal Procedure which contemplated as follows:-

"Section 212: Particulars as to time, place and person. –

(1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged."

- iv. The appellants stated that the complainant was examined as PW-1 on July 06, 2006. Thereafter, the complainant was examined as CW-1 on March 15, 2008 on recall, i.e., after 1 year and 8 months from the date on which she was examined as PW-1.
- v. The complainant namely Maleka Bibi (PW-1/CW-1) lodged a complaint before the Police Station on March 21, 2005 and the date of incident was on February 21, 2005 and therefore, there had been a delay of one

month as she was busy in treating the patient/victim, which was highly doubtful as no medical papers had been submitted by the complainant with regard to such treatment.

- vi. The complainant failed to provide any medical papers relating to the treatment of the victim either at Midnapore Sadar Hospital or at Nilratan Hospital at Kolkata.
- vii. The Learned Advocate for the appellants relied on the decision of the Hon'ble Supreme Court cited in **AIR 1971 Supreme Court 66 : (1970) SCC 450 : Khedu Mohton V State of Bihar** - A Three Bench Judgment which, inter alia, stated that:-

"The delay of about 8 days in filing the complaint in a case of this nature throws a great deal of doubt on the prosecution story. It was the duty of the prosecution to explain the delay satisfactorily. Failure of the prosecution to do so undoubtedly is a circumstance of considerable importance."

- viii. It was further submitted that PW-2 stated in his cross-examination that he heard that his brother sustained injury from a road roller. The evidence of PW-2 was binding on the prosecution.
- ix. The Learned Advocate for the appellants relied on the decision of the Hon'ble Supreme Court cited in **(2016) 4 AICLR 652 (S.C) : Pankaj V State of Rajasthan**, that:-

"It is a well settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. In as much as the prosecution has failed to

establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story deserves to be rejected. When the evidence produced by the prosecution has neither quality of credibility, it would be unsafe to rest conviction upon such evidence. After having considered the matter thoughtfully, we find that the evidence on record in the case is not sufficient to bring home the guilt of the appellant. In such circumstances, the appellant is entitled to the benefit of doubt"

- x. Therefore, in its totality, prosecution has failed to prove the case beyond reasonable doubt and the complaint, the framing of charge and the evidence of the witnesses does not inspire any confidence.

7. Heard the rival contentions of the Learned Advocate for the State.

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

- i. PW-1 stated that her husband died about 1 year 5 months ago. PW-1 filed one complaint at the police station which was written by her brother-in-law Sk. Mamud (PW-2) and she signed the complaint which was marked as Exhibit-1 and her signature was marked Exhibit-1/1.
- ii. During cross-examination PW-1 stated she did not know the accused. Her husband was admitted in the hospital and expired 5/6 months later from the date of incident. After writing of the complaint, it was not read over to her. Her husband was suffering from illness and disease. He was treated at various places.

- iii. PW-2 stated in his evidence that Sk. Nazrul was his brother who was ill. PW-2 further stated that he wrote the complaint and he put his signature thereon. The written complaint was marked as Exhibit-1/2. PW-2 wrote the complaint that the accused persons hit Nazrul by brickbats causing injury and tried to push him into the water. Certain villagers stated the accused had assaulted the brother of PW-2 viz. Mosali, Sovan Ali.
- iv. During cross-examination, PW-2 deposed that he heard his brother sustained injury from road roller. His brother was treated medically in Sadar Hospital, Midnapore and Nil Ratan Hospital.
- v. PW-3 and PW-5 failed to narrate the incident of assault.
- vi. PW-4, a private medical practitioner deposed that on 21.02.2005 he treated one patient Sk. Nazrul after 5 months of sustaining injuries on his neck. After examination, PW-4 found the right hand of Sk. Nazrul was numb which meant partly senseless. The victim also stated to PW-4 that he incurred more sweating on the right part of his body compared to his left side. PW-4 suggested for investigation of M.R.I (Magnetic Resonance Imaging) of cervical spine (which meant neck bone) and nerve conduction velocity side of all four limbs. The patient did not report to PW-4 subsequently.
- vii. PW-6 conducted the investigation and filed the charge-sheet under Sections 325/308/34 of Indian Penal Code against four accused persons.

9. In the case of **Roop Chand v. State (NCT of Delhi)**¹, the Hon'ble Supreme Court held the following:-

“6. Section 308 of IPC provides that “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 culpable homicide not amounting to murder”; and in case any hurt is caused to any person by such act, then “the accused is liable to be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

7. Therefore, to secure conviction under Section 308 of IPC, the prosecution must prove that the accused had requisite ‘intention’ or ‘knowledge’ to cause culpable homicide, which in turn can be ascertained from the actual injury as well as from other surrounding circumstances.”

10. From the course of the evidence on record, it transpired that the victim was alive for 5-6 months after the incident of assault but the Investigating Officer did not endeavour to record the statement of the victim. PW-1 denied to have read the contents of the complaint written by PW-2, her brother-in-law and further declined to identify the accused persons, during her testimony before the Court as a prosecution witness however during her examination as CW-1, she stated the appellants and two other accused persons assaulted her husband who was thrown into the pond and claimed that she was prevented to depose before the Court by the appellants on threat of dire consequences.
11. The prosecution failed to cite a creditworthy and trustworthy eyewitness to the incident. Both PW-1 and PW-2 stated that the victim was suffering from

¹ 2020 SCC OnLine SC 1353

ailments. The health condition of the victim as observed by PW-4, the medical practitioner, referred to paralytic condition of the victim who indicated numbness of his body alongwith a generalized degree of perspiration the same without indicating the nature and severity of the injuries suffered by him. The victim appeared to be in a state of consciousness to reveal the names of the appellants to have inflicted injury upon him. The overt act of the appellant subjecting the victim to the injuries at his neck had not been specifically mentioned.

12. The prosecution could not produce medical documents with regard to the hospitalization of the victim either at Midnapore Sadar Hospital or at Nilratan Sarkar Hosipital at Kolkata or at the hospital at Orissa. There was sufficient delay in filing the complaint after one month of the incident. The explanation for such delay was the time consumed in treatment of the victim. PW-3 and PW-5 the neighbours of the victim were oblivious of the incident of the assault.
13. The alleged injury caused to the victim was not proved to be grievous in nature alleged to have been caused by the appellants since the victim was alive for 5-6 months after the alleged incident.
14. The prosecution failed to prove that the appellants had knowledge and intention to kill the victim.
15. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the criminal appeal is allowed.

16. Accordingly, the instant criminal appeal being CRA 356 of 2008 is disposed of.
17. There is no order as to costs.
18. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
19. 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.)