

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 365 of 2016

Paresh Ghosh & Ors.

Vs

The State of West Bengal.

For the Appellants

: Mr. Sekhar Kumar Basu, Sr. Adv.
Mr. Ranadeb Sengupta,
Mr. Pranidhi Singh.

For the State

: Mr. Anand Keshari.

Hearing concluded on

: 12.04.2024

Judgment on

: 14.05.2024

Shampa Dutt (Paul), J.:

The Appeal:-

1. The present appeal has been preferred against a judgment and order dated 30.04.2016 and 02.05.2016, passed by the Learned Additional Sessions Judge, 1st Fast Track Court, Kandi, Murshidabad in Sessions Trial No. 07 (05) 2012 (Corresponding to Sessions Serial No. 49 of 2011), thereby convicting the appellant no.1 for the commission of the offence punishable under Section 324 of the Indian Penal Code and sentencing him to undergo simple imprisonment of 3 (three) years and to pay a fine of 1,000/-, in default to undergo simple imprisonment for a further period of one month and also convicting the appellants no. 2-4 for the commission of the offences punishable under Sections 325/308/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for a period of 7 (seven) years for the commission of the offence punishable under Sections 325/34 of the Indian Penal Code and also to undergo rigorous imprisonment for a period of 7 (seven) years and to pay a fine of Rs. 2,000/- in default to undergo rigorous imprisonment for a further period of 2 (two) months for the commission of the offences punishable under Sections 308/34 of the Indian Penal Code with a direction that all the sentences shall run concurrently in respect of appellant no. 2 - 4.

The Prosecution:-

2. The appellants along with three others were placed on trial before the Learned Additional Sessions Judge, 1st Fast Track Court, Kandi, Murshidabad (hereinafter referred to as the Learned Judge) in Sessions Trial No. 7 (5) 2012 (corresponding to Sessions Serial No. 49 of 2011) to answer charges framed against them for the commission of the offences punishable under Sections 149/325/308/34 of the Indian Penal Code.
3. The case was registered for investigation on the basis of a complaint lodged by one Nidhu Saha (hereinafter referred to as the informant), with the Officer-in-Charge of the Salar Police Station. On the basis of the aforesaid complaint, Salar Police Station Case No. 94 dated 31.10.2008 was registered for investigation against the appellants and others for the commission of offences punishable under Sections 147/148/149/448/323/324/326/308 of the Indian Penal Code.
4. After completion of investigation, the investigating agency submitted its report in the final form, vide Charge Sheet No. 08/09 dated 31.01.09 under Sections 147/148/149/448/323/324/326/308 of the Indian Penal Code, against the appellants herein and four others. After complying with the necessary formalities, the case was committed to the Court of Learned Additional Sessions Judge, Kandi, Murshidabad. The case was transferred to the file of the Learned Judge, for trial and

disposal. The prosecution case as presented to the Learned Trial Court is inter alia to the effect that:-

On 31.10.2008 at about 2 p.m., Gour Ghosh, Subhas Ghosh, Baman Kaibartya, Sanjit Ghosh, Paresh Ghosh, Ramprasad Ghosh and others, attacked the house of the informant, being armed with sticks, iron rod and sharp cutting weapons. Gour Ghosh and Baman Kaibartya assaulted the brother of the informant namely Giridhari with an iron rod and he fell down on the ground. Thereafter, Subhas Ghosh Assaulted Giridhari with 'Jhapa Dao' (a sharp edged weapon) on his ear and gave out that, they would kill him. It was further alleged that, when the informant tried to resist, he and one of his neighbor namely Motor Hazra, were also attacked by the assailants. Giridhari was shifted to hospital from the place of occurrence for his treatment.

5. On Completion of trial, the Appellant were convicted and sentenced as above.

The Defence:-

6. The defence case is that from the evidence on record it shows that there is a contradictory description of the place of occurrence and also contradictory version of the alleged incident.
7. It is further stated that as the accuseds had filed a prior case against the complainant, there is a good chance of false implication.
8. The accused persons were also not named before the doctor who examined the injured.
9. That unduly long and compounded questions while examining the accused under Section 313 of Cr.P.C. has prejudiced them.

10. And that the prosecution having failed to prove their case against the accuseds beyond all reasonable doubt, the judgment under appeal being bad in law is liable to be set aside.

The Evidence:-

11. Prosecution witness no. 1 is the complainant. He has reiterated his statements in the written complaint. This witness has stated that accused Paresh Ghosh had filed a case against the complainant and injured in this case.
12. P.W.2 is the injured Giridhari Saha. He has spoken about the assault upon him by the accuseds/appellants.
13. P.W.3 (injured). He has stated about the **fighting between the two groups for about 20-25 minutes.**
14. P.W.7 is the medical officer who has proved the injury reports of injured, Giridhari Saha (Exhibit 2), Nidhu Saha (Exhibit 3), Motor Hazra (Exhibit 4).
15. **None of the accuseds were named by the injured before the doctor. There is no injury to show that a sharp edged weapon “Jhapa Dao” was used as stated in the written complaint.**
16. Regarding the finding of grievous hurt sustained by victim/injured Giridhari Saha, **the trial Judge has held as follows:-**

(i) During cross-examination of P.W.2 the defence side did not take any denial regarding treatment of the victim at those hospital as stated by him in his examination in-chief. In this case C.S.W. 10- Dr. Arnab Roy was summoned and even after issuance of B.W.A. said M.O. did not turn up for which

it necessitated the Court to peruse C.D. and on perusal of the C.D. the injury report at page – 27 issued by Dr. Arnab Roy of National Medical College and Hospital, Kolkata in respect of victim Giridhari Saha is found lying with the C.D. and on perusal of the same it appears that said M.O. mentioned that there was head injury and from the C.T. Scan report doctor opined that **hemorrhagic contusion in right temporal region and collection in sphenoid of sinus.**

- (ii) Record reveals that after examination of the I.O./P.W.8, on the basis of the petition of the prosecution u/s 311 Cr.P.C., Dr. A.K. Chowdhury and Audiologist A. Biswas were also summoned but they too did not turn up though relevant medical papers lying with the C.D. reveals that on 13/11/2008 Dr. A.K. Chowdhury of Neuro-medicine Department of S.S.K.M. (P.G.) Hospital referred the patient Giridhari Saha to Neurosurgery O.P.D. and there concerned doctor opining that **loss of mastoid air cell and left VII nerve palsy** referred the patient therefrom to the E.N.T., where doctor opined **incomplete closure of left upper eyelid** and eudiometry report lying with C.D. reveals that the expert found **perforation in T.M. (tympanic Membrane i.e. in eardrum).** The last page of the medical report dt. 13/11/2008 issued from S.S.K.M. Hospital in respect of patient/victim Giridhari Saha reveals that the facial nerve of the victim Giridhari Saha was disfunctioning. So, **the injury over the left ear of the victim Giridhari can undoubtedly be said as grievous hurt and the same could have been said grievous in nature basing on the above mentioned injury reports.**

17. The injuries as noted by the trial Judge are:-

- i) **Hemorrhagic Contusion in right temporal region.**

(These lesions are caused by **injuries to the capillaries**, which leads to **small amount of petechial hemorrhage and edema**).

ii) **Collection in Sphenoid of Sinus.**

(Air fluid levels in the sphenoid sinus have been described in association with skull fracture, cerebrospinal fluid rhinorrhea and sinusitis).

iii) **Loss of Mastoid air cells.**

(There is a loss of air spaces and is called sclerosis (an infection)).

iv) **Left VII nerve palsy.**

(Bell's palsy is an unexplained episode of facial muscle weakness occurs due to damage to the facial nerve (due to viral infection)).

v) **Perforation in T.M. (Tympanic Membrane i.e. in eardrum).**

(This is when eardrum ruptures, creating a hole between the external and middle ear (cause may be from loud sound, head trauma, infection, air travel pressure)).

(Often, no specific treatment is needed other than maintaining dry ear precautions and resolve without complications).

On finding the above injuries the trial Court opined that the victim Giridhari sustained injuries grievous in nature.

18. The said doctors, in spite of being summoned could not be examined due to their non appearance.

19. A medical expert is a person who has specialised knowledge and expertise in a field that enables him to offer opinions and draw conclusions pertinent to the case, as well as to aid the court impartially and objectively. The medical expert witness is supposed to offer an opinion backed by solid justifications and supporting data.
20. The opinion of a medical expert is not direct evidence, but it has corroborative value. It can only support the grounds of an eyewitness and prove the direct evidence. The testimony of an expert (medical in this case) is solely useful as advisory assistance to the court. Since the expert is not a witness of the facts, the court must evaluate his judgment impartially. The expert is never given the authority to make decisions, rather, they are made by the Court with assistance from the expert.
21. No piece of evidence can be said to prevail over the others after it has been sorted, tested, analysed, and evaluated unless it is conclusive, convincing, and beyond a reasonable doubt.

Hence the value of the medical evidence or expert opinions, in general, depends on the subject's nature.

22. ***In Magan Bihari Lal vs State of Punjab, 1977 AIR 1091, decided on 15th February, 1977.***

The Supreme Court of India held that "It is now well settled that expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a handwriting expert. There is a profusion of presidential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial

corroboration. This rule has been universally acted upon and it has almost become a rule of law.”

- 23. In Ram Narain Singh v. State of Punjab, AIR 1975 SC 1727, decided on 15th July, 1975.**

The Supreme Court held that where the evidence of the witnesses for the prosecution is inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution’s case and unless reasonably explained it is sufficient to discredit the entire case.

- 24. In Solanki Chimanbhai Ukabhai V. State of Gujarat, AIR 1983 SC 484, decided on 22nd February, 1983.**

The Supreme Court stated that “typically, the significance of medical evidence is only corroborative. It just establishes that the injuries might have been brought on in the way claimed, nothing more. The medical evidence can be utilised by the defence to show that the injuries could not have been caused in the way that is being claimed, so casting doubt on the eyewitnesses. The testimony of the eyewitnesses cannot be rejected based on an alleged discrepancy between it and the medical evidence, however, unless the medical evidence goes so far as to fully rule out any possibility of injuries occurring in the manner claimed by the eyewitnesses.

- 25. If the evidence of the witness for the prosecution is inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case.**

- 26. In State of M.P. vs Dayal Sahu, AIR 2005 SC 3570, decided on 29th September, 2005, the Supreme Court held:-**

*“A plethora of decisions by this Court as referred to above would show that once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the Court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities. Reverting back to the facts of the case, the testimony of prosecutrix-PW.1 that she has been ravished by the accused at 4.00 A.M. on 1.4.1991 remains unimpeached. She was subjected to cross-examination but nothing could be elicited to demolish the statement-in-chief. Her statement was corroborated by the statements of PWs 2, 4 and 5 in material particular, coupled with FSL report Ex.P-8 and Ex.P-9, which has been accepted by the Trial Court and even by the High Court. **The High Court was totally erred in law in recording the acquittal of the accused by giving him benefit of doubt for non-examination of doctor, thereby committed grave miscarriage of justice.**”*

27. Section 320 of I.P.C. defines, grievous hurt as follows:-

“320. Grievous hurt.—The following kinds of hurt only are designated as “grievous”:—

(First)— Emasculation.

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

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

(Fourthly)— Privation of any member or joint.

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

(Sixthly)— Permanent disfiguration of the head or face.

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

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

28. In the present case, it is clear that no such injury was found, on any of the three injured. The injury in the ear drum as already discussed is not permanent privation of hearing.
29. As such the said finding of the Learned Trial Judge is not in accordance with law and the ingredients required to prove the charge under Section 325 of IPC against the accused person is clearly absent, being not proved beyond all reasonable doubt.
30. No weapon of assault has been seized in this case.
31. The injuries noted are also **not caused by dangerous sharp edged weapons as alleged.** Thus the ingredients evidence required to constitute offence under Section 324 of IPC is also absent.
32. The history of assault as given by Giridhari Saha to the doctor is of physical assault by bamboo on left ear and on back, thus not supporting the statement in the written complaint as to being assaulted by “Jhapa Dao” as sharp edged weapon.

33. Nidhu Saha and Motor Hazra have stated about assault with a lathi (wooden batam).

34. There is no seizure list in this case.

35. Section 308 of IPC, lays down:-

“308. Attempt to commit culpable homicide.—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, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Ingredients of offence.- The essential ingredients of the offence under sec. 308 are as follows:-

(1) Accused committed an act;

(2) The act was committed with the intention or knowledge of committing culpable homicide not amounting to murder;

(3) The act was committed in such circumstances that if the accused by that had caused the death of the victim, he would have been guilty of culpable homicide.”

36. In the present case, it is on record that there was an altercation between two groups and a free fight took place. Evidence shows assault by lathi or Bamboo.

37. In *Jugut Ram vs The State of Chhattisgarh*, AIR 2020 SC 4395, decided on 16th September, 2020, the Supreme Court held:-

“7. A lathi is a common item carried by a villager in this country, linked to his identity. The fact that it is also capable of being used as a weapon of assault, does not make it a weapon of assault simpliciter. In a

case like the present, of an assault on the head with a lathi, it is always a question fact in each case whether there was intention to cause death or only knowledge that death was likely to occur. The circumstances, manner of assault, nature and number of injuries will all have to be considered cumulatively to decipher the intention or knowledge as the case may be. We do not consider it necessary to dilate on the first principles laid down in this regard in *Virsa Singh vs. The State of Punjab*, 1958 SCR 1495, which stand well established. Suffice it to notice from precedents that in *Joseph vs. State of Kerala*, (1995) SCC (CrL.) 165, the appellant dealt two blows on the head of the deceased. The deceased died two days later. The post mortem report found lacerated injury on the head and internal examination revealed fracture to the occipital bone extended up to the temporal bone. The High Court convicted the appellant under Section 302 IPC holding that the injury caused by the lathi was sufficient to cause death of the deceased. This Court observed as follows:

“3.The weapon used is not a deadly weapon as rightly contended by the learned counsel. The whole occurrence was a result of a trivial incident and in those circumstances the accused dealt two blows on the head with a lathi, therefore, it cannot be stated that he intended to cause the injury which is sufficient (sic). At the most it can be said that by inflicting such injuries he had knowledge that he was likely to cause the death. In which case the offence committed by him would be culpable homicide not amounting to murder. We accordingly set aside the conviction of the appellant under Section 302 IPC and the sentence of imprisonment for life awarded thereunder. Instead we convict the appellant under Section 304 Part II IPC and sentence him to five years’ RI.”

8. In *Chamru Budhwa vs. State of Madhya Pradesh*, AIR 1954 SC 652, the appellant dealt a blow on the head of the deceased with a lathi and which proved fatal. The injury was medically opined sufficient in the ordinary course to cause death. Conviction under Section 302, IPC followed. This court observed as follows:

“5. It now remains to consider whether the offence which he committed falls within the first part or the second part of Section 304 of the Indian Penal Code. When the fatal injury was inflicted by the appellant on the head of the deceased by only one blow given in the manner alleged by the prosecution it could as well be that the act by which death was caused was not done with the intention of causing death or of causing such bodily injury as is likely to cause death. The act appears to have been done with the knowledge that it was likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death within the meaning of Part II of Section 304 of the Indian Penal Code.

6. We accordingly allow the appeal to this extent that the conviction of the appellant under Section 302 of the Indian Penal Code and the sentence of transportation for life awarded to him will be set aside, but the appellant will be convicted of having committed the offence under Section 304 Part II of the Indian Penal Code and will be sentenced to seven years’ rigorous imprisonment.”

9. In Gurmukh Singh vs. State of Haryana, (2009) 15 SCC 635, the deceased died three days later after an assault on the head with a lathi opined to be sufficient in the ordinary course of nature to cause death. Holding that the assault was made on the spur of the moment without premeditation the conviction was altered from one under Section 302 to Section 304 Part II and a sentence of seven years was handed. Similarly in Mohd. Shakeel vs. State of A.P., (2007) 3 SCC 119, the appellant had caused only one injury and had suffered injury himself also. Altering the conviction from under Section 302 IPC to 304 Part II, the appellant was sentenced to the period undergone since 1999.”

- 38.** Thus considering the nature of injuries, there is no material/evidence on record to prove the charge under Section 308 of IPC. No such knowledge or intention has been proved by the prosecution, beyond all reasonable doubt.

- 39.** It has been proved that there was a (free) fight between the parties.
- 40.** The accuseds/Appellants had also lodged a complaint against the complainant and others.
- 41.** There are thus cases against each other and the fight (altercation) was between two groups as stated by P.W. 3, 4 and 5.
- 42.** The injuries as discussed above are also not grievous and the instruments as noted by the doctor allegedly used for the assault were not dangerous sharp edged weapons as alleged. No fracture either in the scalp or elsewhere has been noted.
- 43.** The case accordingly falls within the ambit of Sections 319/321 of the Indian Penal Code, thus punishable under Section 323 of IPC.
- 44.** In view of Section 222 of Cr.P.C., Section 323 of I.P.C. being a lesser charge is included in the charge framed in this case.

Conclusion:-

45. The conviction and sentence is accordingly modified as follows:-

All the Accuseds/Appellants are thus convicted for offence punishable under Section 323 of IPC and sentenced to suffer imprisonment for the period undergone and to pay a fine of Rs. 1000/- i.d. to suffer S.I. for 3 months.

46. CRA 365 of 2016 is accordingly disposed of.

- 47.** Appellant's to comply with the order of sentence within 30 days from the date of communication of this Judgment and Order failing which trial Court to proceed in accordance with law.

- 48.** All connected applications, if any, stand disposed of.
- 49.** Interim order, if any, stands vacated.
- 50.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 51.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)