

12.08.2024
Court No.1
SL No.51
ap/sp

**HIGH COURT AT CALCUTTA
IN THE CIRCUIT BENCH AT JALPAIGURI
CRIMINAL REVISIONAL JURISDICTION**

**C.R.A. 5 of 2020
With
I.A. No. CRAN 1 of 2020 (Old CRAN 2 of 2020)**

**Prem Dorjee Sherpa @ Prem
-Versus-
The State of West Bengal**

For the Appellant: Mr. Pratap Khati.

For the State: Mr. Aditi Shankar Chakraborty, Ld. A.P.P,
Mr. Abhijit Sarkar.

1. This instant appeal is directed against the judgment convicting the appellant dated 21st November, 2019 in Sessions Case No. 24 of 2019 (Sessions Trial Case No. 20 of 2019) arising out of Gorubathan Police Station Case No. 18 of 2019 dated 8th May, 2019 in G.R. Case No. 163 of 2019. The appeal also challenges the sentences dated 22nd November, 2019. The appellant, was sentenced to simple imprisonment of one month and fine of Rs.100/- under Section 341 of the Indian Penal Code. He was also sentenced to rigorous imprisonment for life and fine of Rs.50,000/- under Section 326 of the Indian Penal Code and rigorous imprisonment for life and fine of Rs.50,000/- under Section 307 of the Indian Penal Code.

FACTS OF THE CASE

2. The facts discernable from the evidence on record are that the appellant (sole accused) was always uncomfortable with his daughter-in-law, Babita Alley Sherpa (PW-3), living with him. There were regular quarrels for this reason between the appellant Babita. Babita stayed in the hut insisting and pleading with the appellant, that she was too poor and has no place to go with her baby child.

3. On the fateful day i.e. 8th May, 2019 at about 4:30 P.M., a quarrel broke out again between the appellant and Babita, the appellant insisting that leave the house. Babita refused and the quarrel was loud for all neighbors to hear. The appellant, who was cutting a Ganja plant with a Khukri, tried to attack Babita with it. Babita along with her baby, managed to escape.

4. The victim Lakpa Doma Sherpa, (aka) Binu Sherpa-PW-3, wife of Tshering Sherpa, PW-1 (de facto complainant) was the next-door neighbor. On hearing the commotion and Babita's loud cries, Binu came out and went to rescue Babita. The appellant struck Binu Sherpa, with the Khukuri. A Khukuri (traditional long Knife) is customarily worn by all men in the village.

5. PW1, Tshering Sherpa, was not present on the scene of occurrence. He was on his way to work when he was informed over phone by his sister, Ongai Sherpa, of the incident. He rushed back to the place of occurrence and found the victim with

blood all over herself and injuries on her head sitting in the courtyard.

6. He found the appellant at the place, holding the Khukuri. The other neighbors PW-5 and PW-6 also rushed to the spot after hearing the commotion. They snatched the Khukuri away from the appellant and threw it away. The appellant was sitting in front of his hut after the incident (although the PW-3 deposed that he fled).

7. The neighbors and husband of the victim rushed her to the local P.H.C. at Sherpagaon. A Doctor put in stitches and medication on the injuries of the victim and advised the victim to be taken to Anandaloke Hospital at Siliguri. The victim was at the said Hospital for about seven days. She was later shifted to Kalimpong where she stayed for two and half months, while in consultation with a Doctor. Even as on the date of trial when the victim deposed i.e. 24th September, 2019, she was very uncomfortable and suffering the after effects of the assault.

8. A complaint was made to the Gorubathan Police Station by PW-1, later, on the same day. The said complaint was registered as an FIR, at about 8:05 P.M. The appellant was arrested the next day. He remained in custody since then and throughout the trial and even as on date. At the time of admission of this appeal, there was suspension of sentence and conditional bail. The

appellant could not meet the conditions of bail for want of money and hence remains in custody

9. It is submitted that during the COVID period, the appellant was released on parole on two occasions for about 30 days each when he went to visit and stay in his village and stayed there peacefully. The appellant has been in good behavior during his incarceration.

10. Charge-sheet was filed in the matter under Sections 341/326 of the Indian Penal Code. The charges, however, framed against the appellant under Sections 341, 326 and 307 of the Indian Penal Code. The committal was done on 14th August, 2019. The evidence commenced thereafter on 23rd September, 2019.

The Depositions of the Prosecution Witnesses

11. PW-1, Tshering Sherpa being the de fact complainant of the case. He deposed that on 8th May, 2019 he on the way to work at about 4:30 P.M. His wife had called him over telephone and told him about the incident and the attacked by the appellant. He rushed back home. He found the victim lying in a Courtyard bleeding with injuries on her head.

12. PW1 also deposed that the huts of the victim, accused and the de facto complainant are next to each other. He along with other neighbours immediately took the victim to Sherpagaon

P.H.C. He further deposed that the victim had taken to Hospital at Kalimpong for removal of stitches and later had taken to Siliguri Anandaloke Hospital where she stayed for seven days.

13. He thereafter brought the victim to Kalimpong where she stayed at his brother's house for about two and half months. He confirmed that the complaint was written by Phurtemba Sherpa (PW-5) on his instructions, who was a neighbor, witness to the incident, a cultivator and also a local teacher.

14. PW-2, Parusam Basnet, was also a neighbour, who was watching television inside his hut on the date and time of the incident. Hearing the commotion outside, he rushed out and saw the victim with bleeding injuries lying in the courtyard. The victim face was covered with blood. He further deposed that he had heard the accused person quarreling with his daughter-in-law Babita (PW-3). He tried to stop the bleeding and accompanied PW-1 and the victim to the P.H.C. at Sherpagaon. He was not an eyewitness to the incident.

15. PW-3, Babita Alley Sherpa is the daughter-in-law of the appellant. She deposed that the appellant was her father-in-law. There were regular quarrels in the house as the appellant did not want Babita to stay with him. He often tried to drive her out. Babita insisted that she should be allowed to stay in the house with her little baby.

16. She deposed that at the relevant point of time at 4:30 P.M. the appellant started shouting at her and asked her to leave the house immediately. He was admittedly cutting ganja plant with his Khukuri. Babita, out of fear being assaulted, ran away with her child. The appellant started chasing her with Khukuri. The victim Binu Sherpa then rushed out of her house and tried to save Babita and her baby from being assaulted. She deposed that then the appellant struck Binu thrice on her head in the middle of her head and on the sides and the victim fell down.

17. PW-3 deposed that her husband, Dawa Sherpa and other neighbors came and snatched away the Khukuri from the hand of the accused person. She said that the accused ran away thereafter. Babita also deposed that the victim was taken along with her neighbours and her husband, Dawa Sherpa to the local P.H.C at Sherpagaon. She further deposed that the victim has become unconscious and not able to speak after the incident. She confirmed that her husband and husband of the victim and other villagers in the village took the victim to Sherpagaon P.H.C. and later on Siliguri Anandaloke Hospital. Her evidence could not be shaken in her cross-examination.

18. PW-4 was the victim, Binu Sherpa. She deposed that on 8th May, 2019 she had come back to her house at 2:00 P.M. from her place of work. On the way back, she picked up some vegetables and after returning, found Babita (PW-3) crying for help.

19. PW-4 further deposed that the appellant was trying to assault Babita with a Khukuri. Babita was carrying a baby at that point of time. The victim kept her vegetables on the wall of the house and ran to save Babita and her little baby when the accused assaulted her with a Khukuri twice on her head. The third injury sustained was also from Khukuri, as it slipped out the hands of the appellant. The victim sustaining a lacerated 3rd injury as a consequence thereof. PW 4 identified the appellant and the weapon. Her evidence could not be shaken in cross-examination.

20. PW 5, Phurtemba Sherpa, another neighbor, was a cultivator and a teacher. He was the scribe of the complaint. He also reached the place of occurrence after hearing the commotion at about 4:30 in the evening. He found that the victim lying bleeding with hands on her head at the place of occurrence. He had taken the victim to a local PHC and to the Anandaloke Hospital at Siliguri later.

21. The appellant was arrested from his house the next day. The khukuri was seized from the appellant which he voluntarily gave to the police, in the presence of the PW 5.

22. PW 6, Dawa Tengi Sherpa. He was a resident of the village living 300 meters away from the house. He reached the place of occurrence after 20 minutes of the incident and found that the victim sitting in the courtyard bleeding with injuries on her head.

He also accompanied the villagers to take the victim to the local PHC and subsequently to the hospital at Siliguri. He also found the accused sitting outside house when he reached the place of occurrence. It is, therefore, clear that the accused person had not fled from the scene of the crime.

23. PW 7 was Passang Lamu. She was the mother-in-law of the victim and lived with her. She deposed that she was a neighbour of the appellant. When she heard the commotion on the date and time of occurrence, she also went to the place of occurrence and saw the victim with grave injuries on the head. She also saw the accused appellant sit in front of his house after the incident. She identified the offending weapon.

24. PW 8, Nirmal Roy was the Officer-in-Charge, of the Gorubathan Police Station, who received the complaint and filled up the formal FIR and signed it. He identified the de facto complainant/PW 1.

25. PW 9, Fajlul Islam was the Investigating Officer. He stated that he arrested the appellant from his own house of the next day of the incident. The accused took out the khukuri and gave it to the Investigating Officer, who seized it and prepared the seizure list.

26. The appellant cross-examined all the witnesses for the prosecution.

27. The appellant was examined under Section 313 of the CrPC. He admitted his signature on the seizure list. He denied all the suggestions to him. He also refused to adduce any evidence.

The Decision of the Trial Court

28. Based on the above, the Court below in an unconventional way went on to discuss the oral and documentary evidence come on record. The Trial Judge, discussed the propriety of the FIR, the effect of delay in lodging the FIR, the proof of the place of occurrence, the evidentiary value of witnesses, who are relatives of one and another and the value of the evidence that came on record.

29. The appellant was found guilty and convicted under Sections 341, 326 and 307 of the IPC.

Analysis of this Court

30. This Court has carefully considered the evidence on record and the judgement delivered by the Court below. There is absolutely no evidence whatsoever even from the two eye-witnesses namely PW 3 and PW 4 that the victim was detained or restrained by the appellant. The conviction of the appellant under Section 341 of the IPC is wholly misconceived. The conviction of the appellant under Section 341 of the IPC is therefore set aside.

31. PW1 said that the victim was immediately taken to the Sherpagaon P.H.C after the incident. PW-2, an immediate neighbor, said that he saw the victim lying in the courtyard. PW-3 said that the appellant fled from the scene after the neighbors snatched Khukri from the assailant. Therefore, the appellant did not *voluntarily obstruct*, and in fact has not obstructed the locomotion and movement of the victim, as the victim and the witnesses faced no obstruction in taking the victim to the hospital. Reference in this regard is made to Para 11 of the decision of the Supreme Court in **N. S. Madhanagopal & Anr. Vs. K . Lalitha** reported in (2022) SCC OnLine SC 2030.

“11.The complaint also fails to disclose the necessary ingredients to constitute the offence of wrongful restraint. In order to attract application of Section 341 which provides for punishment for wrongful restraint, it has to be proved that there was obstruction by the accused; (ii) such obstruction prevented a person from proceeding in a direction to which he had a right to proceed; and (iii) the accused caused such obstruction voluntarily. The obstructor must intend or know or would have reason to believe that the means adopted would cause obstruction to the complainant. (emphasis applied).”

32. In so far as Section 307 of the IPC, this Court finds that the appellant assaulted the victim without any intent to commit murder. She was assaulted merely because she was trying to prevent the appellant from assaulting Babita and her little baby. There is no evidence on record of any past enmity between the appellant and the victim. In fact, they are neighbours. The

relations between the appellant and the victim's family was never strained.

33. The appellant did not have *mens rea* to murder or attempt to murder the victim. The prosecution has also not led any evidence on this score. The finding of the Court below that the appellant was guilty under Section 307 of the IPC is, therefore, wholly de hors the evidence on record and therefore hereby set aside. Reference in this regard is made to Para 9 of the decision of the Supreme Court in **Sivamani And Anr. Versus State Represented By Inspector Of Police, Vellore Taluk Police Station, Vellore District** reported in **2023 INSC 1027:-**

9. In State of Madhya Pradesh v Saleem, (2005) 5 SCC 554, the Court held that to sustain a conviction under Section 307, IPC, it was not necessary that a bodily injury capable of resulting in death should have been inflicted. As such, non-conviction under Section 307, IPC on the premise only that simple injury was inflicted does not follow as a matter of course. In the same judgment, it was pointed out that ‘...The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section.’ The position that because a fatal injury was not sustained alone does not dislodge Section 307, IPC conviction has been reiterated in Jage Ram v State of Haryana, (2015) 11 SCC 366 and State of Madhya Pradesh v Kanha, (2019) 3 SCC 605. Yet, in Jage Ram (supra) and Kanha (supra), it was observed that while grievous or life-threatening injury was not necessary to maintain a conviction under Section 307, IPC, ‘The intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the 10 weapon used and the severity of the blows inflicted can be considered to infer intent. (emphasis applied)’

34. Let us now come to the evidence in support of the conviction under Section 326 of the IPC.

35. Section 326 of the IPC requires proof of causing grievous hurt to a person with or without any intention to kill. The very act of assaulting a person that could eventually lead to a death or cause very grievous and grave injury are the basic ingredients of the section. The said section is attracted in the facts of the case.

36. The appellant knew that he was carrying a dangerous weapon. His intension was actually to assault, Babita, his daughter-in-law. He did not want her to live with him. That was the sole purpose of trying to attack on Babita. The presence of the weapon of his hand is also incidental since he was cutting a plant. The appellant did not intend to kill anyone.

37. There is clear and comprehensive evidence of frequent domestic, loud publicly known in the house of the appellant, for such reason. On the given day, the discord between the father-in-law and daughter-in-law erupted again. The appellant lost control of himself. He asked Babita to leave the house with her child. Babita, as usual, refused. In a fit of rage, the appellant, who was cutting Ganja plants with his Khukuri stood up to attack Babita. It appears that the appellant would have used anything in his hand to assault Babita. Babita ran away to save herself and the child.

38. The victim Binu a long standing neighbour, rushed out hearing the quarrel and tried to prevent the appellant from

assaulting Babita. The appellant in the same fit of rage hit the victim to free himself to go to attack Babita.

39. The aforesaid clearly proves that the appellant may or may not have known the ultimate consequence of his action on the victim. He only appeared to want to remove the victim who was preventing him from assaulting Babita. He did not hesitate to strike the victim more than once i.e. twice on the head with the khukuri. It is irrelevant, therefore, as to whether the appellant wanted to cause harm to the victim or not.

40. The desire or *mens rea* of the appellant is, completely irrelevant under Section 326 of the IPC. The assault of the victim was indeed serious that she received at least several stitches on the head at the local PHC and was treated for more than seven days at Anandaloke Hospital at Siliguri. The appellant was clearly guilty of offences under Section 326 of the IPC. In this regard, the decision of the apex court in **Hori Lal v. State of U.P., (1970) 1 SCC 8** may be referred to:-

6. It now remains to consider whether the conviction of the appellants under Section 326 for grievous hurt is justified. The answer to this question would depend on the nature of the injuries which have been found on PW 2, namely, whether they are simple or grievous. In order to justify conviction under Section 326, injuries on PW 2 must satisfy the requirements of clause 7 or clause 8 of Section 320 of the Penal Code, 1860, otherwise they will be treated as simple injuries. Clauses 7 and 8 of Section 320 of the IPC provide that an injury could only be designated as grievous if it is: (1) a fracture or dislocation of a bone or tooth, or (2) 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.

7. .. It is true that fracture has not been defined in the Penal Code. It is sometimes thought as in the case of Po Yi Maung v. Ma E Tin [A (1937) Rang 253] that the meaning of the word fracture would imply that there should be a break in the bone and that in the case of a skull bone it is not merely sufficient that there is a crack but that the crack must extend from the outer surface of the skull to the inner surface. In Mutukdhar Singh v. Emperor [A (1942) Pat 376] it was observed that if the evidence is merely that a bone has been cut and there is nothing whatever to indicate the extent of the cut, whether a deep one or a mere scratch on the surface of the bone, it will be difficult to infer that the injury is a grievous hurt within the meaning of Section 320 of the Penal Code. In our view, both these assumptions are misleading. It is not necessary that a bone should be cut through and through or that the crack must extend from the outer to the inner surface or that there should be displacement of any fragment of the bone. If there is a break by cutting or splintering of the bone or there is a rupture or fissure in it, it would amount to a fracture within the meaning of clause 7 of Section 320. What we have to see is whether the cuts in the bones noticed in the injury report are only superficial or do they effect a break in them. The nature of the injuries as spoken to by the doctor in his evidence, discloses the length, breadth and depth of each injury. So far as the depth of the Injuries 3, 4, 5 and 6 is concerned, each one of the injuries shows that it is bone deep and they are described as cutting the underlying bone. In Injury 3 left humerus, in Injury 4 radius, in Injury 5 both the bones of the left forearm and Injury 6 the tibia bone shaft have been cut which would show that they are fractures. Apart from this the doctor as noticed earlier has in his evidence said that these injuries are grievous. It is contended that the doctor has not disclosed the reason why he thinks that the injuries were grievous. But in our view the doctor would not be unaware of what injuries are grievous or what are simple. At any rate, the nature of the injuries considered with the evidence of the doctor would undoubtedly establish that all the aforesaid injuries were grievous. These injuries were inflicted by Kantas which are dangerous weapons and hence the conviction under Section 326 is fully justified. (emphasis applied)

41. Therefore even deep rupture may constitute a fracture waiting for the meaning of grievous hurt provided by section 320(7). In the present case, the application of numerous stitches on the head of the victim shows that she has indeed suffered deep rupture, and suffered grievous hurt.

42. To the extent that the appellant was sentenced to rigorous imprisonment for life under the aforesaid Section needs to be assessed in the light of the facts discussed hereinabove.

43. Admittedly, the victim was not the appellant's target at all. She came in the middle of a family quarrel which could have resulted in as serious consequences on Babita. There was constant regular dispute with regard to Babita's living in the house with the appellant. There was no enmity or dispute between the appellant and the victim, Binu. She had only come in the way and the appellant only wanted to remove her from the way of his object of assaulting Babita. This never eventually happened.

44. If the appellant wanted to kill Babita he could have done it at any point of time before as she lived in the same house. The appellant was there in the house most of the time when his son was not there to protect her.

45. These are the mitigating circumstances that one must look at while imposing a sentence after convicting a person under a section of the Penal Code. Section 326 of the IPC empowers a Court to sentence a person with rigorous imprisonment for life or up to 10 years. The Court below chose to impose the highest degree of punishment available under Section 326 of the IPC. The Trial Judge has completely ignored the mitigating circumstances.

46. In the backdrop of the mitigating circumstances, indicated hereinabove, this Court is of the view that the highest degree of penalty and punishment under Section 326 is not warranted in the facts of the case.

47. At the risk of repetition, it is reiterated that the assault on the victim by the appellant was happened in the spur of the moment when she only intervened to save Babita. The appellant neither intended to hurt or assault Binu, the victim nor cause any injury to her. She received the injury in the heat of the movement.

48. The appellant has been in incarceration for about 5 Years now, since his first arrest after registration of the FIR. He has been in good behavior during incarceration. There have been no complaints against him during his parole. The appellant has been substantially punished already and appears to have had enough time for remorse.

Conclusion

49. In the aforesaid facts and circumstances of the case, this Court directs the sentence of the appellant to be reduced to seven years and the fine payable by him to be reduced to a sum of Rs.1,000/-.

50. The sentence already served by the appellant pre and post-trial shall taken into consideration in calculation of the period of

seven years, in terms of the applicable laws and Rules and procedure. If any further period is required to be served by the appellant, the same shall be served in simple imprisonment.

51. With the aforesaid directions the appeal is allowed in part and disposed of.

52. Let a copy of this judgment be sent down the Court below for information and compliance.

53. In view of the disposal of the criminal appeal, the connected application being I.A. No. CRAN 1 of 2020 (Old CRAN 2 of 2020) is also disposed of.

54. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)