

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 329 of 1989

Barzahan Mirza

-Vs-

The State of West Bengal & Ors.

For the Appellant : Ms. Monami Mukherjee
(*Amicus Curiae*)

For the State : Ms. Faria Hossain

Heard on : 27.11.2024

Judgment on : 08.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the order of acquittal dated 12.06.1989 passed by the Learned Chief Judge, City Sessions Court at Calcutta in Criminal Revision No.40 of 1988, reversing the order of conviction and sentence passed by the Learned Metropolitan Magistrate, 17th Court, Calcutta on 18.07.1988 in Case No.C/1187 of 1986.
2. The complainant was one of the owners of Premises No.13, Grant Lane, Calcutta and the accused persons were the licencees under him in respect of certain portions of the said premises and four civil suits were pending before the City Civil Court, Calcutta. On 02.09.1986 the accused persons assaulted

the complainant and one Abdul Molla over a false pretext and a G.D. was lodged in the local police station on the said date, i.e., on 02.09.1986.

3. On the next day, i.e., on 03.09.1986 at about 5 A.M. when the complainant was proceeding towards the latrine in the ground floor the accused persons being armed with iron rod and wooden sticks formed an unlawful assembly near the latrine and abused the complainant filthily. On the protest of the complainant, the accused No.1, Abdullah Sardar assaulted him with an iron rod causing injury on his hand, behind the shoulder, accused No.2 assaulted him by means of iron rod on his back accused Nos.3 to 5 assaulted him by means of wooden sticks on his back and hip too. After the incident, the complainant returned to his room and then left for N.R.S. Hospital where his injuries were examined and he was treated.
4. Based on the aforesaid incident, the appellant lodged a General Diary before the Officer-in-Charge, Bowbazar Police.
5. Charges were framed against the appellants under Section 323 of the Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.
6. On these facts, a charge under Section 323 of the Indian Penal Code was framed against the accused persons. At the trial, the accused persons denied the charge levelled against them.
7. During trial, five witnesses were examined on behalf of the complainant to prove the charge levelled against the accused persons.
8. Considering the facts and circumstances of the case the Learned Magistrate by his order dated 18.07.1988 convicted all the accused persons under Section 323 of the Indian Penal Code and sentenced them thereunder to pay

a fine of Rs.200/- each, in default, to suffer rigorous imprisonment for one month each.

9. Against such order of conviction and sentence the accused persons moved the City Sessions Judge, Calcutta in revision reversed the order of conviction and sentence passed by the Learned Magistrate and by an order dated 12.06.1989 acquitted the accused persons from the charge levelled against them.

10. The Learned Advocate representing the appellant submitted as follows:-

- i. The Learned Chief Judge was wrong in observing that there was no corroboration of the evidence of the complainant PW-1 when PW-2, PW-3 and PW-5 the doctor amply and categorically corroborated the statements and deposition of PW-1 the complainant and as such the order of acquittal passed was liable to be set aside.
- ii. The Learned Chief Judge completely ignored the medical evidences of the doctor PW-5 which completely brought home the charge against accused and acquittal the accused persons having observed no doubt there were some injuries on the person of the victim. But only for that reason it could not be concluded that the victim was assaulted by the accused persons and as such the order of acquittal was bad in law and was liable to be set aside.
- iii. As the incident took place in the early morning at 5 A.M. of 3rd September, 1986 inside the premises No.13, Grant Lane, there was no scope for any outsider to be present there as the incident lasted for only about 2/3 minutes and as such the Learned Chief Judge's

observation that the absence of any independent witness, though the alleged incident took place on open place in the early morning and the existence of previous enmity between the parties also last doubt about the probability was wholly wrong and as such the order of acquittal passed was liable to be set aside.

11. The Learned Advocate representing the appellant submitted as follows:-

- i. The appellant was one of the owners of premises No.13, Grant Lane, Calcutta and the respondent and other accuseds were the licensees under him in respect of certain portions of the said premises.
- ii. The prosecution, in order to prove the case, examined six prosecution witnesses and the defence had examined none. The prosecution witnesses being PW-1 the victim/complainant/appellant, PW-2 and PW-3 eye-witnesses/employees of the appellant, PW-4 and PW-6 formal police witness and PW-5 the doctor who treated the complainant/appellant.
- iii. On July 18, 1988, the Learned Chief Metropolitan Magistrate, Calcutta was pleased to convict the respondent along with three others under Section 323 of the Indian Penal Code and sentenced them to pay a fine of Rs.200/- each, in default, to suffer rigorous imprisonment for one month.
- iv. Being aggrieved and dissatisfied with the order of conviction and sentence dated July 18, 1988 passed by the Learned Chief Metropolitan Magistrate, Calcutta, the respondent and other accused

persons preferred a revision before the Learned Chief Judge, City Sessions Court at Calcutta vide Criminal Revision No.40 of 1988.

- v. The Learned Chief Judge, City Sessions Court at Calcutta, upon going through the evidence on record, was pleased to set aside the order of conviction and sentence dated July 18, 1988 passed by the Learned Chief Metropolitan Magistrate, Calcutta and, thus, acquitted the respondent and other three accused persons from the charge under Section 323 of the Indian Penal Code.
- vi. The appellant being, aggrieved and dissatisfied with the order dated June 12, 1989 passed by the Learned Chief Judge, City Sessions Court at Calcutta, had preferred an appeal before this Court.
- vii. The appellant submitted that the Learned Court below erred by setting aside the order of conviction and sentence dated July 18, 1988 and thereby acquitting the respondent and other three accused persons on the following grounds:-
 - a) The Learned Chief Judge, City Sessions Court at Calcutta upon perusal of the evidence on record had himself observed that the parties were in inimical terms regarding long-standing civil disputes and, therefore, the Learned Trial Court should have come to a conclusion that the prosecution case was genuine and the respondent along with three other accused persons had assaulted the victim/appellant as had been alleged by the prosecution. Though there existed an enmity between the parties, the assault by the respondent

and other three accused persons upon the appellant had taken place on September 03, 1986 at 5 A.M. in the residential house of the victim/appellant, i.e., at Premises No.13, Grant Lane and none could deny such fact.

- b) The Learned Chief Judge, City Sessions Court at Calcutta was wrong in observing that there was no corroboration of the evidence of PW-1 being the complainant/appellant. However, the Learned Chief Judge, City Sessions Court at Calcutta did not take into consideration that PW-2, PW-3 being the eye-witnesses and PW-5 being the doctor who treated the victim had corroborated the statements of PW-1 with regard to the date, time and place of incident. Both the prosecution witnesses deposed that the incident took place on September 03, 1986 at 5 A.M. in the residential house of the victim, i.e., at Premises No.13, Grant Lane. Such corroboration by the prosecution witnesses made PW-1 as well as other witnesses reliable and trustworthy and, therefore, the Learned Chief Judge, City Sessions Court at Calcutta erred by setting aside the order of conviction and sentence.
- c) The Learned Chief Judge, City Sessions Court at Calcutta completely ignored the medical evidence PW-5-the doctor who treated PW-1-the victim/appellant whose evidence along with the evidences of other witnesses were sufficient to bring

home charge under Section 323 of the Indian Penal Code against the respondent and other three accused persons. PW-5 clearly stated in his evidence that he treated PW-1 and found the following injuries on his person – (i) three recent pairs of parallel bruises on the back of left arms, on the back of left chest, other pair on the left gluteal region each one with blood clot; (ii) one haematoma with redness and tenderness on the right gluteal region; (iii) tenderness on the back of right chest. PW-5 also stated in his evidence that PW-1 stated before him that he was assaulted on September 03, 1986 at 5 A.M. by Abdullah Sarkar and other three accused persons with iron rod and wooden stick. Thus, the assault upon PW-1 by Abdullah Sarkar and three others had taken place in the manner as was alleged by the prosecution.

- d) The incident took place at 5 A.M. inside the premises No.13, Grant Lane, thus, there was no scope for any outsider to be present at the place of incident as also the incident lasted for only 2-3 minutes. Therefore, the observation of the Learned Chief Judge, City Sessions Court at Calcutta that there were no independent witnesses at the time of incident was totally erroneous and thereby caused miscarriage of justice by acquitting the respondent and other three accused persons from the charge under Section 323 of the Indian Penal Code.

- e) In order to attract Section 323 of the Indian Penal Code, three essential criteria needed to be fulfilled – (i) the accused must have voluntarily caused hurt to another person; (ii) the hurt must not be grave or life-threatening; (iii) the act must not have been committed in the right of private defence.

In the present case, all the above three ingredients had been satisfied by the prosecution. Firstly, the respondent and other three accused persons had voluntarily caused hurt upon PW-1 by entering PW-1's premises with an intention to hurt him. Secondly, the injuries on the person of PW-1 were simple in nature and not grievous or life-threatening as opined by PW-5 being the Medical Officer. Thirdly, the respondent and other accused persons attacked PW-1 at 5 A.M. in the residential premises of PW-1 as was corroborated by the other two eye-witnesses and, therefore, the act was not committed in the right of private defence or was not sudden and grave provocation but was intentional on the part of the accused persons and there was prior meeting of minds.

- f) The appellant submitted that though almost 35 years had gone by yet the respondent should be convicted under Section 323 of the Indian Penal Code as the aim of the law was to see that such offences did not recur and disturb the public peace.

g) Thus, if all the evidences on record were properly appreciated, it would be seen that the prosecution had been able to prove the case beyond reasonable doubt and, therefore, order dated June 12, 1989 demanded interference of this Hon'ble Court and was liable to be set aside.

12. The Learned Advocate representing the State left it to the discretion of this Court.

13. PW-1 the complainant said at 5 A.M. on 03.09.1986 when he and Abdul Mollah were going down the ground floor for attending nature's call and came near the latrine these four accused persons and one named Mohiuddin Sardar (absconding) being armed with iron rod and wooden sticks jumped upon and abuse him in filthy languages. On protest Abdullah Sardar assaulted him on his left hand and left shoulder by iron rod. Alauddin assaulted him on his back and buttock. Salauddin, Mohiuddin and Maniruddin assaulted all by wooden stick on his back and buttock. He sustained pain and injury on his body. He then went to N.R.S. Hospital and narrated the incident to the doctor. Then he went to Bowbazar Police Station and lodged a written complaint there.

14. The complainant also deposed that no outsider assembled at the place of occurrence.

15. PW-2 Salem Ali stated that he knew the complainant and the accused persons. On 03.09.1986 at 5 A.M. Barjahan and Abdulla told him to close the door as they were going to latrine. He closed the door and went to the roof. All of a sudden he heard a hue and cry in the ground floor near latrine

and from the roof found that all the accused persons assaulted Barjahan by means of rod and sticks on his back and buttock. They were also abusing him in filthy languages. On coming down, he found that the incident was over and the accused persons fled.

16. PW-3 Abdul Molla, who was also a resident of 13, Grant Lane, corroborated the statements of PWs-1 and 2. He also deposed that no outsider assembled during the incident. He further deposed that in the 2nd floor, there was no latrine but a bathroom, i.e. an urinal. In the ground floor there was a urinal. Near the gate there was a latrine which they used.

17. PW-5 Amiya Ghosh deposed that on 03.09.1986 he examined the complainant Barjahan Mirza at 8:15 A.M. and found the following injuries:-

- a) 3 recent pairs of parallel bruises (each about $\frac{1}{2}$ ") and one paid about 3" x $\frac{1}{3}$ " on the back of left arm, one paid $1\frac{3}{4}$ x $\frac{1}{3}$ " on the back of chest left side and the other paid about $2\frac{1}{2}$ x $\frac{1}{3}$ " on the left gluteal region each with blood clot (red and tenderness)
- b) One Hematoma – $\frac{3}{4}$ " in diameter with redness and tenderness on the right gluteal region.
- c) Tenderness on the back of chest right side.

The patient stated to him that he was assaulted on 03.09.1986 at about 5 A.M. by Abdulla Sardar and his sons Salauddin Sardar, Alauddin Sardar, Mohinuddin Sardar and Moniruddin Sarkar with iron rod and ruler. These injuries might be caused by iron rod and ruler.

Depending upon the nature, minute and gravity of strikes, it might be opined that these injuries might be caused if one was assaulted at random by 4/5 men. If one was assaulted on different parts of body by many people these injuries might be numerous.

18. The Learned Chief Judge, City Sessions Court at Calcutta had set aside the order and conviction dated July 18, 1988 on the following grounds:-

- a) Existence of previous enmity between the appellant and the respondent – *“It transpires from the evidence on record that the parties are admittedly in inimical terms.....PW-1, Barzahan Mirza has admitted that this premises No.13, Grant Lane was purchased by him along with Dr. M. Hasan and Dr. Mossaddek Mirza in 1981. He has further admitted that he filed 3 civil cases and 4/5 criminal cases against Abdullah Sardar. On the other hand, Abdullah Sardar filed a Title Suit against Barzahan Mirza and others claiming tenancy right of the premises.”*
- b) Absence of any independent witness – *“In the circumstances, in the absence of any single independent witness to corroborate the story of assault, it is difficult to accept the prosecution story of assault, as stated by three interested witnesses.”*
- c) Injuries found on the body of the victim/appellant were not in accordance with the story of assault as alleged by the prosecution – *“In the instant case according to the prosecution the assault was done by 4/5 persons with weapons like iron rod and bamboo stick. It is common experience that assault by iron rod itself is sufficient to cause death if inflicted on any vital part. It is difficult to believe that while assaulting a person the assailants would be careful so that there may not be any injury on any vital part. So, the prosecution evidence regarding the nature of assault cannot be said to be compatible with the injuries found by the doctor on the body of the complainant.”*

19. The Hon'ble Supreme Court in **Anwar Ali v. State of H.P.**¹ held the following:-

“14.1.

15. In *Chandrappa v. State of Karnataka* [*Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325], this Court reiterated the legal position as under: (SCC p. 432, para 42)

‘(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

¹(2020) 10 SCC 166

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

....

17. In State of Rajasthan v. Naresh [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069] , the Court again examined the earlier judgments of this Court and laid down that: (SCC p. 374, para 20)

'20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260] , this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include: (SCC p. 286, para 28)

'(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State [Dhanapal v. State, (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.”

(emphasis supplied)

14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in paragraph 20 of the aforesaid decision, which reads as under: (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , SCC p. 199)

“20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [Rajinder Kumar Kindra v. Delhi Admn., (1984) 4 SCC 635 : 1985 SCC (L&S) 131] , Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312] , Triveni Rubber & Plastics v. CCE [Triveni Rubber & Plastics v. CCE, 1994 Supp (3) SCC 665] , Gaya Din v. Hanuman Prasad [Gaya Din v. Hanuman Prasad, (2001) 1 SCC 501] , Aruvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [Gamini Bala Koteswara Rao v. State of A.P., (2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])”

(emphasis supplied)

*It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 : 1999 SCC (L&S) 429] , **that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.***

20. The following was held by the Hon'ble Supreme Court in **Ballu v. State of M.P.**²:-

“9. Apart from that, it is to be noted that the present case is a case of reversal of acquittal. The law with regard to interference by the Appellate Court is very well crystallized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments which the High Court itself has reproduced in the impugned judgment, which are as reproduced below:

“13. In case of Sadhu Saran Singh v. State of U.P. (2016) 4 SCC 357, the Supreme Court has held that:—

“In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while

² 2024 SCC OnLine SC 481

enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded.”

14. Similar, In case of *Harljan Bhala Teja v. State of Gujarat* (2016) 12 SCC 665, the Supreme Court has held that:—

“No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open for the appellate court to express the right conclusion after re-appreciating the evidence. If the charge is proved beyond reasonable doubt on record, and convict the accused.”

21. Assessing the entire evidence on record and the observation of the Learned Chief Judge, City Sessions Court, it appeared that the prosecution failed to prove its case beyond reasonable doubt. The injuries claimed to have been sustained were exaggerated, contrary to the opinion of the treating doctor in the injury report. The offending weapons, viz. iron rod, etc. were not seized. The enmity and acrimonious relationship between the parties are indisputable through admission various civil litigations instituted as mentioned. More so, in view of the cited decisions, this Court is not inclined to interfere with an order of acquittal.

22. In view of the above discussions, the Learned Trial Court rightly passed the impugned order of acquittal and this Court is not inclined to interfere with the same.

23. In view of the above discussions, the instant criminal appeal being CRA 329 of 1989 stands dismissed.
24. There is no order as to costs.
25. I record my appreciation for the able assistance rendered by the Learned Advocate Ms. Monami Mukherjee as *Amicus Curiae* in disposing of this appeal.
26. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
27. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(AnanyaBandyopadhyay, J.)