

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 362 of 2001

Swapan Kumar Acharyya

-Vs-

The State of West Bengal & Ors.

For the Appellant : Ms. Jharna Biswas
(Amicus Curiae)

For the State : Ms. Pallavi Priyadarshee

Heard on : 17.11.2023, 08.02.2024, 04.09.2024

Judgment on : 13.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 06.06.2001 passed by the Learned Additional Sessions Judge, 4th Court, Barasat, North 24 Parganas in Criminal Appeal No.7 of 1999, thereby setting aside the judgment dated 08.01.1999 passed by the Learned Judicial Magistrate, 3rd Court at Barrackpore in Case No. C/441/91 whereby the Opposite Party No.2 was committed under Section 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 4 months with fine of Rs.1000/- in default to suffer further rigorous imprisonment for 1 month.
2. The prosecution case precisely stated that on 17.02.1991, at about 09:30 p.m., when the complainant came out of his house, he saw a boy named

Sujit Pal @ Bhai conversing with the complainant's brother namely Ashoke Acharyya. Eventually the respondent no.2 allegedly abused the brother of the complainant filthily. On such protest raised by the complainant, the respondent no.2 allegedly assaulted the complainant with a bamboo stick on his left nose. The said accused person also tried to assault the complainant with a tube-light. The other accused person namely Sanjib Kahar assaulted the complainant and his brother by holding their hair. Further the accused intimidated the complainant with dire consequences with loss of life if the incident was reported to the police.

3. Based on the aforesaid complaint, Naihati P.S. G.D.E. No.950 of 17.02.1991 was initiated under Section 323/506/34 of the Indian Penal Code.
4. Charge was framed against the appellant under Sections 323 of the Indian Penal Code to which they pleaded not guilty and claimed to be tried.
5. In order to prove its case the prosecution examined as many as 3 witnesses and exhibited certain documents while the defence did not adduced any evidence.
6. Learned Advocate for the appellant submitted as follows:-
 - i. A thorough and careful scrutiny of records would categorically show all the eye witnesses had specifically directed the respondent no.2 responsible for the injuries of the victim.
 - ii. The appellant while deposing as PW-1 had categorically enlightened the factum of assault inflicted by the respondent no.2 on them on the fateful day before the Learned Trial Court but the Learned Judge did not apply his judicial mind into that vital aspect and had passed the

aforesaid order rather arbitrarily which was wholly illegal and therefore, the same was liable to be set aside forthwith.

- iii. A close and careful scrutiny of the evidence of PW-1, PW-2 and PW-3 would amply show that the prosecution had been able to prove the specific overact on the part of respondent no.2 beyond any shadow of doubt and therefore, the impugned purported judgment and order complained of liable to be set aside forthwith.

7. Learned Advocate for the appellant further submitted as follows:-

- i. It would be evident from the record that PW-1 i.e., the appellant categorically corroborated the prosecution story beyond any shadow of doubt and his version was well supported by PW-2, PW-3 and inspite of massive cross examination the testimony of PW-1 remained unshaken.
- ii. A close and careful scrutiny of the evidence of PW-1, PW-2 and PW-3 would amply show that the prosecution had been able to prove the specific overact on the part of opposite party no.2 beyond any shadow of doubt and therefore, the impugned purported judgment and order complained was liable to be set aside forthwith.

8. Learned Advocate represent the State submitted as follows:-

- i. No independent witnesses were examined especially the eyewitness namely Sudip Dey who also got injured while saving PW-2 as the broken pieces of tube light fell into his eyes.
- ii. In PW-1's cross examination stated that he had admitted that another eyewitness Sudip Paul was present there along with Sudip

Dey but they did not come forward for his rescue. It was humanely not possible for a person to see a person getting assaulted and will not stretch any aid for the victim's rescue.

- iii. PW-2 has admitted that they were assaulted by three accused namely Gopal Kahar, Sanjib Kahar and Lakshmi Kahar to the extent that he had fallen on the ground. However PW-3 the mother had admitted in her chief that the assault was made mainly by Sanjib and Lakshmi. Curiously enough both these accused persons were acquitted from the charge as their role for causing the assault was not at all corroborated.
- iv. In that case in hand where the accused was convicted under Section 323 of the Indian Penal Code where the section pertains to voluntarily causing hurt and in the deposition of the prosecution witnesses we have come across about the physical assault inflicted upon the victim, his brother, mother elder sister and other locals who had come to rescue them. After such alleged incident they got themselves medically treated and do registered a formal FIR against the accused persons. Curiously enough the doctor who could have thrown light on the nature injury given was not examined.
- v. Even though the doctor was not examined the Learned Counsel representing the prosecution side did not invoke Sec 294 of the Code of the Criminal Procedure to bring on board the injury reports of the victims which is the cogent piece of evidence in that aforesaid case. In a case where voluntarily hurt was involved, without the injury reports

nothing remains in the case and the prosecution case cannot get the benefit of doubt.

- vi. The independent eye witness Sudip Dey could have thrown light in the matter, had be examined at the trial stage. There were serious latches on the part of the prosecution especially when no independent, corroborative witness was coming in that case. The witnesses examined in that case from the complainant side, were all close relatives to each other and they cannot be taken into as independent, corroborative witness.
- vii. The document i.e., the General Diary, the complaint which sets the criminal law in motion was not produced which is absolutely fatal to the prosecution case.

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

- i. PW-1 deposed that occurrence arose on 17.02.1991 at 09:30 p.m., and at that time he came out from his house and found an altercation in between his brother namely Ashoke and one Sujit Paul @ Bhai. At that time, the accused persons namely Gopal Kahar and Sanjib Kahar abused him. He protested whereby Gopal Kahar tried to assault his brother by a split bamboo which struck on his left nose. Furthermore, Gopal Kahar tried to assault PW-1 by a tube light but failed and then that tube light was broken. His mother and elder sister came there and the accused persons had also assaulted them. The accused person had threatened them with life if they intimated the

matter to the concerned P.S. Thereafter, PW-1 and his brother went to P.S. and lodged diary.

- ii. PW-1 in his cross-examination stated that the accused Gopal Kahar wanted to assault his brother but as he tried to save his brother it was misdirected towards him.
- iii. PW-2 deposed that PW-1 was his elder brother. While he was talking to his friend on the PWD road, the accused persons namely Gopal Kahar and Sanjib Kahar abused him in filthy language. PW-2 and PW-1 protested accordingly. Gopal Kahar assaulted on the left nose of PW-1 by a stick. Subsequently Gopal Kahar took a tube-light from the nearby shop and hit and injured one Sudhir Dey who came to save them.

Another accused Smt. Lakshmi Kahar caught hold of his hair and as a result he fell down on the ground. Accused Sanjib Kahar assaulted him by fists and blows. Witnesses came to the spot and they were also assaulted by those three accused persons. Thereafter, they went to the P.S. were referred to hospital for medical treatment.

- iv. PW-2 in his cross-examination stated he was assaulted by the accused Sanjib Kahar and other accused persons with fists and blows. His father, his elder brother, himself and others went to the P.S. and lodged diary.
- v. PW-3 deposed that PW-1 was her elder son. She knew all the accused persons. She came out from her room and found one altercation between PW-1, PW-2 and the accused persons.

Gopal Kahar assaulted her son i.e., PW-1 on his left side neck by a stick. The accused persons tried to assault her said son with a tube light but with the intervention of local people, the accused failed to assault her son i.e., PW-1 with that tube light. One Sudip Dey saved her son from such assault and sustained injury on his eye. There was mayhem with her son i.e., PW-1 and PW-2 with the accused persons. PW-1 sustained bleeding injury from his nose and thereafter they went to P.S. and lodged diary.

vi. PW-3 in her cross-examination stated PW-1 sustained injury on his left nose.

10. In order to prove the charge under Section 323 of the Indian Penal Code apart from oral evidence the medical report of injury to have been sustained by the victims should have been produced. The prosecution failed to produce the medical report as well as corroborate the same by the oral evidence of the doctor examining the injured person. Apart from the injured witnessed and their mother corroboration from any independent witness was absent. The tube-light, stick, etc. had not been seized or produced before the Court. The shop owner from whose premise the tube-light had been taken to hit the victim had not been cited as a witness though non-examination of Investigating Officer is not fatal to establish the crux of the prosecution case, however, in the instant case where the ocular evidence form the foundation of the prosecution case, the evidence of the Investigating Officer to corroborate the factum of recording their versions under Section 161 of the

Code of Criminal Procedure would have necessitated to effectuate the prosecution case.

11. The prosecution had failed to establish its case and this Court is not inclined to interfere with the impugned order and judgment.
12. In view of the above discussions, the prosecution cannot be said to have proved its case beyond reasonable doubt and as such the instant criminal appeal being CRA 362 of 2001 is allowed.
13. Under such facts and circumstances, the judgment and order dated 06.06.2001 passed by the Learned Additional Sessions Judge, 4th Court, Barasat, North 24 Parganas in Criminal Appeal No.7 of 1999 is set aside.
14. Accordingly, the instant criminal appeal being CRA 362 of 2001 is disposed of.
15. There is no order as to costs.
16. I record my appreciation for the able assistance of Learned Advocate Ms. Jharna Biswas, *Amicus Curiae* in disposing of this appeal.
17. The Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
18. 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.)