

(2024) 01 CAL CK 0051
In the Calcutta High Court

Case No : Criminal Appeal No. 214 Of 2004, CRAN 1 Of 2004 (Old CRAN 951 Of 2004)

Khokan@ Sambhu Mukherjee.

APPELLANT

Vs

State Of West Bengal & Ors

RESPONDENT

Date of Decision : 18-01-2024

Acts Referred:

Indian Penal Code, 1860 — Section 114, 307, 320, 326, 386(b)(iii), 448
Code Of Criminal Procedure, 1973 — Section 313, 428

Citation : (2024) 01 CAL CK 0051

Hon'ble Judges : Chitta Ranjan Dash, J;Partha Sarathi Sen, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharyya, Z.N Khan, Ashoke Das

Final Decision : Partly Allowed

Judgement

1. In this appeal the judgement of conviction dated January 21, 2004 and the order of sentence dated January 22, 2004 as passed by learned Additional Sessions Judge, Fast Track Court, Katwa in connection with Sessions Trial no.78 of 2002 arising out of Sessions Case no. 57 of 1999 arising out of GR Case no. 433 of 1993 in connection with Katwa P.S Case No. 176 of 1993 dated 10.10.1993 has been impugned. By the impugned judgement learned trial court found the appellant guilty under Sections 448/326/307 IPC and thus convicted and sentenced him to suffer imprisonment for 10 years with fine of Rs. 5000/- i.d to suffer further imprisonment for six months for the offence committed by him under Section 307 IPC, imprisonment for 10 years with fine of Rs.5000/- i.d. to suffer further imprisonment for six months for the offence under Section 326 IPC. By the impugned judgement learned trial court however, did not pass any separate order of sentence for the offence committed by the convict under Section 448 IPC. However, by the impugned judgement it was directed that all the sentences would run concurrently after setting off the period of detention already undergone. The convict of the said trial felt aggrieved and thus preferred the instant appeal.

2. For effective disposal of the instant appeal the facts leading to initiation of the aforesaid sessions trial is required to be discussed in a nutshell.

3. One Bankim Banerjee of Kacharipara, P.S Katwa, District Burdwan, lodged a written complaint on 10.10.1993 with the Officer-in-Charge of Katwa Police Station stating inter alia, that on the said day at about 7:30 p.m one of his neighbours namely; Khokan Mukherjee, the appellant herein focussed a torch on the window of his house to which his eldest daughter Mala Banerjee raised objection. It was his further version that the present appellant then became furious and started abusing his said daughter with filthy languages to which the informant's said daughter and wife Janarani Banerjee again raised objection. It has been stated further in the said written complaint that thereafter the present appellant became excited and he rushed to the house of the informant with a 'Ram Daw' (a sharp cutting weapon) in his hand and at that time the wife of the appellant was instigating him. After entering into the house of the informant the present appellant gave a blow of the said sharp cutting weapon on the right hand wrist of his daughter and he also assaulted Smt. Janarani Banerjee, the wife of the informant on her right hand. It is the further version of the informant that after hearing the hue and cry of the two injured persons as referred to above the informant came out of his room and tried to resist the assailant but he failed and thereafter the neighbours of the informant assembled there and after seeing them the assailant made an attempt to flee away by riding an ambassador car bearing no. WB F 4235. The victims were thereafter taken to hospital for their treatment.

4. On the basis of such written complaint Katwa P.S Case no. 176 of 1993 dated 10.10.1993 under Sections 448/326/307/114 IPC was started. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 448/326/307/114 IPC against the present appellant as well as against her wife Smt. Tanushree Mukherjee.

5. Trial court record reveals that the present appellant being one of the accused was explained of the charges under Sections 448/326/307 IPC against him, which he denied and claimed to undergo trial. The prosecution before the trial court examined 10 witnesses in all and they have exhibited various documents and one material. Before the learned trial court defence has adduced no evidence. However, from the trend of cross examination of the prosecution witnesses and the answers as given by the appellant/ accused in his cross examination under Section 313 Cr.P.C it reveals that the defence case is based on clear denial and false implication.

6. For the sake of brevity the prosecution witnesses before the learned trial court can be categorized in the following manner:-

Private Individuals

Government officials

Police Personnels

1. PW1- Informant and father of PW6 (victim) and husband of PW7 (another victim)

1. PW9- Medical officer of Katwa Sub- Divisional Hospital.

1. PW10-

Investigating Officer.

2. PW2-A neighbor of PW1.

3. PW3- A neighbor of PW1.

4. PW4- A neighbor of PW1.

5. PW5- A co-villager of PW1.

6. PW6- Daughter of PW1 and one of the victims of the alleged incident.

7. PW7- Wife of PW1 and another victim of the alleged incident.

8. PW8- Scribe of the written complaint.

7. Mr. Partha Sarathi Bhattacharya, learned Amicus Curiae, appearing for the appellant in course of his argument draws attention of this Court to the evidence of PW2 and PW5. It is contended by him that on a cursory perusal of the evidence of PW2 and PW5 it reveals that though they claim themselves to be the next door neighbours of the informant (PW1) but they did not support the prosecution case. It is further argued by Mr. Bhattacharya, learned Amicus Curiae that no motive for the commission of the alleged offence by the present appellant was also proved from the deposition of the prosecution witnesses. It is further argued by him that there is clear contradiction with regard to the actual place of occurrence of the alleged incident which the learned trial court failed to visualise while passing the impugned judgement. It is also argued by Mr. Bhattacharya that conviction of the present appellant simultaneously under section 307 IPC with Section 326 IPC is not proper and in support of his contention he places his reliance upon the following reported decisions namely:-

i. Meeting Sk. & Anr. vs. State of West Bengal reported in 2007 (1) CHN 271;

ii. Furkan Sk. vs. The State of West Bengal reported in (2016) 4 CAL LT 568 (HC);

iii. Amir Chand Mondal vs. The State of West Bengal reported in 2023 SCC OnLine Cal 80 : (2023) 243 AIC 518.

8. Mr. Bhattacharya, thus submits that it is a fit case for allowing the instant appeal by setting aside the impugned judgement. It is further submitted by him that for the sake of argument even if this court finds that the appellant is guilty of the offences charged with, the punishment as imposed by the learned trial court may be modified keeping in mind the alleged nature of crime, financial

condition of the present appellant and the date of alleged incident which occurred almost thirty years ago.

9. Per contra, Ms. Zareen N Khan, learned advocate duly assisted by Mr. Ashoke Das, learned advocate appearing for the State contended that there cannot be any justification to disbelieve the testimony of PW6 and PW7 who are the injured witnesses vis-à-vis the corroborative evidence as laid by PW1 being the informant and eye witness to the alleged incident and the evidence of the medical officer who treated the victims. It is further submitted on behalf of the State that the quantum of sentence is quite adequate considering the heinous nature of the crime.

10. The factual matrix in which the appellant came to be prosecuted and convicted has been set out in detail by the trial court in the impugned judgement. Therefore, we did not recapitulate the same all over again except to the extent it is necessary to do so for the disposal of the instant appeal.

11. In order to arrive at a logical conclusion of the instant appeal we consider that a brief look is necessary to the evidence of PW9 being the medical officer of Katwa Sub-Divisional Hospital who on the alleged day of incident examined and treated the two victims namely Mala Banerjee (PW6) and Janarani Banerjee (PW7). The relevant portion of the deposition of PW9 is reproduced hereinbelow in verbatim:-

"On that date, I examined Mala Banerjee.....

On examination I found the following injuries on her person :-

- 1) Incised wound ventral aspect of mid left forearm 1-1/2" x 1/2 "x1/2" with bleeding plus.
- 2) One cromatic amuputation in the right wrist on circumferential wound around right wrist.

She was taken to O.T. left forearm wound was enlarged 1" more, cut massacles, and flexus tender on leading control and right wrist auto-amputation was defationed. Pluster out was put.

She was detained in the hospital upto 19/10/93 and discharged on that date. The weapon used was sharp cutting and the nature of injury was greivous. Such type of injury i.e. amputation of the right hand may be caused due to assault by heavy sharp cutting weapon like RAM DAW. *****

On that date, I also examined one Jana Banerjee, wife of Bankim Banerjee of Kacharipara, Katwa, Burdwan, with sharp cutting injury. On examination I found the following :-

- 1) wound incised 3 1/2" x 1 1/2" x 4" deep dorsally dividing muscles and bone radious with active bleeding.

2) Right fore arm incised wound 1½" x 1" x with protruding out muscles communicating with wound No.1.

She was also admitted on 10/10/93 and discharged on 19/10/93. Under anaesthesia she was operated and bleeding was arrested. X-ray was taken on her right forearm which revealed fracture on right radius.

I opined that nature of injury was sharp cutting and grievous. The weapon used was sharp cutting. Such type of injury may cause death with sharp cutting weapon like RAMDAW."

12. Keeping in mind the aforementioned deposition of PW9, we propose to look to the evidence of PW6, Mala Banerjee who is the daughter of the informant and one of the victims of the alleged incident. PW6 testified before the learned trial court to the effect that the alleged incident took place on 10.10.1993 at about 7:30 p.m when she was standing by the side of the window of their house and at that time the present appellant focussed a torch on her face to which she raised objection and then the present appellant started hurling abusive languages towards her. It has been further testified by her that thereafter the present appellant suddenly entered into their house with a 'ram daw' (a sharp cutting weapon) and tried to assault her mother Smt. Janarani Banerjee (PW7) and when she tried to save her mother from such assault, the blow of 'ram daw' hit her wrist and as a result whereof her right hand from wrist was completely cut off and fell on the earth. It is her further version that the accused again assaulted on the hand of her mother to which her mother (PW7) sustained injury. It was her further version that she and her mother raised hue and cry and thereafter 'para people' assembled there and took them to Katwa Sub-Divisional Hospital for treatment where she was detained for nine days. PW6 was extensively cross examined by the defence but nothing could be elicited in such cross-examination for which an inference could be drawn that the version of PW6 is contrary to the truth.

13. At this juncture if we look to the evidence of PW7 it reveals that PW7 being the mother of PW6 and wife of PW1 testified in the same tune as of her daughter. She testified that on the relevant day and hour when PW6 was standing by the side of the window of their house the accused focused a torch on her face and when her daughter raised a protest the accused became angry and started abusing her with filthy languages and thereafter all on a sudden he entered into the house of PW7 and tried to assault her by a 'ram daw' and when her daughter Mala Banerjee (PW6) tried to save her the blow of 'ram daw' hit her wrist portion and as a result whereof her right hand wrist was completely cut down. It is her further version that on account of assault by the present appellant she also sustained cut injuries on her right hand and near elbow joint of her right hand.

14. On perusal of the cross examination of PW7 we find that the answers given by PW 7 are quite consistent to the deposition as adduced by her in course of her examination-in-chief.

15. On comparative study of evidence of PW6, PW7 and PW9 (medical officer) we find that the nature, place and mode of injury as suffered by PW6 and PW7 as revealed from their deposition gets due corroboration from the evidence of PW9 who also opined that such injuries are grievous in nature and may be caused due to assault by a heavy sharp cutting weapon like 'ram daw'. At this juncture if we look to the evidence of PW1 i.e. the informant of the alleged incident we noticed that on the relevant day and hour he was at his home on account of his ill health and after hearing hue and cry of his wife and daughter he found the present appellant in his house and he also noticed the alleged assault upon PW6 and PW7 for which they sustained grievous injury.

16. As discussed above PW 10 is the investigating officer of this case who in his examination-in-chief duly proved the sketch map of the P.O with index which has been marked as 'Exhibit 8'. On perusal of 'Exhibit 8' it reveals that the investigating officer in his sketch map has duly drawn the position of the P.O, the window of the room of the house of the informant where on the relevant day and hour PW6 was standing and the position of the house of the accused. It appears to us that the sketch map being 'Exhibit 8' has been drawn in a correct manner wherefrom the possibility of focussing of torch from the house of the accused to the window of the informant is not at all impracticable as claimed by PW6 and PW7 in their respective testimonies.

17. In view of the chronology of events as discussed (supra) we thus find no reason to disbelieve the testimonies of PW 6 and PW7 who themselves are injured witnesses.

18. The evidentiary value of an injured witness have been discussed in a plethora of decisions of the Hon'ble Supreme court as well as various High Courts of our country and in one such case namely; Mohar vs. State of U.P as reported in (2002) SCC 606 : AIR 2002 SC 3279 the Hon'ble Supreme Court expressed the following view:-

"The testimony of an injured witness has its own efficacy and relevancy. The fact that the witness sustained injuries on his body would show that he was present at the place of occurrence and had seen the occurrence by himself."

18. In view of such proposition of law and in view of the discussion (supra), we have no hesitation to hold that the PW1, PW6 and PW7 are truthful witnesses since being injured witnesses it is expected that they would honestly be interested in ensuring that the real culprits are punished.

19. In view of such we also have no hesitation to hold that the learned trial court is very much justified in holding that it is none but the appellant who caused the injury over the person of the victims i.e. PW6 and PW7.

20. Since the learned trial court has convicted the appellants under Sections 326 and under Section 307 IPC along with Section 448 IPC we feel it obligatory to look to Section 320 IPC which deals with grievous hurt, Section 326 IPC which

deals with voluntary causing grievous hurt by dangerous weapons and means and Sections 307 IPC which deals with attempt to murder and thus the said three sections of IPC are reproduced hereinbelow in verbatim:-

Section 320 in The Indian Penal Code, 1860

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.

Section 326 in The Indian Penal Code, 1860

326. Voluntarily causing grievous hurt by dangerous weapons or means—

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 307 in The Indian Penal Code, 1860

307. Attempt to murder.—

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 murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned. Attempts by life convicts.— When any person offending under this section is under sentence of imprisonment

for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued. A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servant to place it on Z's table. A has committed the offence defined in this section."

21. Keeping in mind the legislative provision as enacted in Section 307 IPC along with its illustrations vis-à-vis the evidence as adduced by PW6 and PW7 it does not appear to us that the alleged act of the present appellant comes under the purview of Section 307 IPC especially when none of the injured witnesses or even the informant had disclosed that the present appellant on the relevant day and hour entered into their house with a 'ram daw' in his hand with an intention to kill PW6 and PW7. On the contrary both PW6 and PW7 have distinctly testified that the present appellant entered into their house with the said sharp cutting weapon for assaulting them. In view of such, we are of considered view that the learned trial court is not at all justified in convicting the present appellant under Section 307 IPC and thus the charge as framed against him under Section 307 IPC fails and the present appellant is found not guilty of the offence under Section 307 IPC.

22. In further considered view of us since the cutting and/or amputation of the right hand of PW6 by the action of the present comes under the purview of Section 320 IPC and since such act has been committed by the present appellant by a dangerous weapon like 'ram daw' (a sharp cutting weapon) which has been proved beyond reasonable doubt, this Court holds that the learned trial court is perfectly justified in convicting the present appellant under Section 326 IPC. Similarly, on the basis of the materials as placed before us we are convinced that the charge under Section 448 IPC has also duly being proved as against the appellant and thus we find no reason to interfere with the finding of the learned trial court in this regard.

23. There is however, another facet of law which we consider it obligatory to answer. The question is as to whether learned trial court is at all justified in

convicting the present appellant both under Section 326 I.P.C and under Section 307 IPC for the same and one offence.

24. In considered view of us the decision taken by our High Court in the reported decision of Furkan Sk. (supra) is very much relevant and the relevant portion of the said decision is reproduced hereunder:-

"17. Therefore, whether the culpability of the accused would fall under Section 307 or 326 of I.P.C would depend upon presence of distinguishable essential ingredients in a case of commission of offence under any of the above provisions. But essential ingredients of offences under both the aforesaid provisions, that is Sections 307 and 326 of the I.P.C cannot be present in case of commission of one and same offence. So , the impugned order of conviction of the appellant for commission of offence punishable under Section 307 as also under Section 326 cannot be sustained in law and the same requires interference in this appeal to the extent as may be discussed in the later part of this judgement."

25. The same view was taken in the reported decision of Meeting Sk. (supra) and in a previous judgement passed by us in CRA 480 of 2009 (Amir Chand Mondal vs. The State of West Bengal)(supra). In view of the above decision we are of the view that the learned trial court is not at all justified in convicting the present appellant both under Section 326 and under Section 307 IPC for the one and same offence and accordingly the conviction as awarded by the learned trial court under Section 307 IPC as against the present appellant stands hereby set aside. However, the conviction as recorded by the learned trial court as against the present appellant under Section 326 and Section 448 IPC stand hereby affirmed.

26. At this juncture we also feel obligatory to answer as to whether the sentence as awarded by the learned trial court for the offence under Section 326 IPC is adequate or not. Admittedly the incident of crime as occurred with the persons of PW6 and PW7 are not premediated and on the contrary it is found that the same occurred on account of sudden escalation of anger and on account of focusing of torch light on the face of PW6 by the present appellant. From the cross examination of PW6 and PW7 we also find no previous enmity between the victims and the present appellant. We find that the incident that had occurred on 10.10.1993 i.e. more than 30 years back. From the case record of the instant appeal as well as from the GR case record we find that the appellant had spent almost 6 years in judicial custody.

27. Considering the entire aspect of this matter we think that justice would be sub-served if the period of sentence of the present appellant is restricted to 7 years for the offence committed by him under section 307 IPC.

28. In view of the discussion made hereinabove we thus, in exercise of power under Section 386 (b) (iii) alter the extent of the sentence of the appellant under Section 326 IPC in the manner indicated hereinbelow:-

The appellant Khokan Mukherjee @ Sambhu Mukherjee is thus sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5000/- i.d. to suffer further rigorous imprisonment for 6 months subject to the provisions of Section 428 Cr.P.C for the offence committed by him under Section 326 IPC. Since the learned trial court has not passed any separate sentence for the offence committed by the present appellant under Section 448 IPC we also do not propose to impose any separate sentence upon the present appellant for the offence committed by him under Section 448 IPC.

29. In view of the aforementioned observations the instant appeal is allowed in part.

30. The appellant is hereby directed to surrender before the learned trial court within a period of one month from the date of passing of this judgement for undergoing remaining part of his sentence, failing which the learned trial court shall issue non-bailable warrant of arrest against the present appellant Khokan Mukherjee @ Sambhu Mukherjee for taking him into custody for serving the remaining part of his sentence.

31. Department is directed to forward a copy of this judgement along with the LCR to the learned trial court forthwith.

32. Department is further directed to forward a copy of this judgement to the Secretary, Calcutta High Court Legal Services Committee who shall on receipt of the same disburse the admissible amount of Honourium to Shi Partha Sarathi Bhattacharya, Ld. Amicus Curiae as appointed by us.

33. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.