

(1984) 02 CAL CK 0005
In the Calcutta High Court

Mustafa Sheikh

APPELLANT

Vs

Lalchand Sheikh and Others

RESPONDENT

Date of Decision : 09-02-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 222, 360, 361, 401

Penal Code, 1860 (IPC) — Section 302, 304, 320, 324, 326

Probation of Offenders Act, 1958 — Section 18, 19

Citation : (1985) CriLJ 1183

Hon'ble Judges : S.P. Das Ghosh, J;B.C. Chakrabarti, J

Bench : Division Bench

Judgement

S.P. Das Ghosh, J.—This revisional application at the instance of the de facto complainant, Mustafa Sheikh, is directed against an order of conviction and sentence passed by Shri S. P. Sen Gupta learned Additional Sessions Judge, 3rd Court, Murshidabad, on 25-9-1981 u/s 324/34 IPC in Sessions Serial Case No. 142 of 1980 in which four persons viz., Lalchand Sheikh, Sukur Sheikh, Fazlu Sheikh and Sademan Sheikh, stood charged u/s 304/34 I.P.C

2. The prosecution case, in a nutshell, is that on 21st Chaitra, 1385 B. S., the aforesaid four accused persons (opposite parties Nos. 1 to 4 in this revisional application) assaulted one Yakub Ali, the brother of the de facto complainant, Mustafa Sheikh, while he was sleeping in his khalian (a khamar where crops are kept), by lathis and chhanis (big hensuas) and that subsequently, Yakub Ali succumbed to his injuries on 19-4-1979 after the occurrence on 4-4-1979. The learned Additional Sessions Judge found, on a consideration of the evidences of P. Ws. examined in the case, that the accused-opposite parties Nos. 1 to 4 conjointly attack Yakub Ali and assaulted him with chhani resulting in several injuries on his persons. One Dr. Baidyanath Biswas (P.W.7) had held post-mortem examination on the dead body of Yakub Ali. He found that the death of Yakub Ali on 19-4-1979 was due to the multiple injuries found by him on the dead body of Yakub Ali which, according to him, were ante-mortem and homicidal in nature, followed by secondary infection and toxemia with pleural infection and

peritonitis. The doctor (P.W.7) found pus both in the stomach and pleural cavity. The learned Judge was of the view that this existence of pus in the stomach and pleural cavity was due to incised wound which was 2½" X W deep into the chest cavity. He was further of the view that one of the causes of death of Yakub Ali was secondary infection and toxæmia with pleural infection and peritonitis. As such, the learned Judge was of the opinion that the accused-opposite parties Nos. 1 to 4 should be found guilty u/s 324/34 I.P.C. and not u/s 304/34 I.P.C., as per the charge framed against the accused-opposite parties, or u/s 326, I.P.C., as per the contention of the learned Assistant Public Prosecutor. The learned Judge was also of the view that having regard to the age, antecedent and financial position of the opposite parties Nos. 1 to 4, it would be better to release the opposite parties Nos. 1 to 4 u/s 360 Cr. P.C. on probation of good conduct. Accordingly, he directed release of the accused-opposite parties Nos. 1 to 4 on probation of good conduct u/s 360(1) Cr. P.C. on execution of separate personal bonds by each of the opposite parties for Rs. 2,000/- together with one surety for Rs. 1,000/- to the satisfaction of the learned Chief Judicial Magistrate, Berhampore, so as to maintain good behaviour and to keep peace for a period of two years, after finding these accused-opposite parties guilty u/s 324/34 I.P.C. and convicting them thereunder. Being aggrieved by this order of conviction and sentence, the present revisional application has been filed by the de facto complainant, who lodged the F.I.R.(Ext. 1/2) leading to the present case.

3. The contentions of the learned Advocate for the petitioner are twofold. It is first contended that the learned Judge ought to have found the opposite parties Nos. 1 to 4 guilty u/s 326/34, I.P.C. instead of u/s 324/34, I.P.C. The second contention is that the learned Judge ought to have sentenced the opposite parties Nos. 1 to 4 u/s 326/34, I.P.C. instead of directing release of these opposite parties on probation of good conduct u/s 360, Cr. P.C. The contention of the learned Advocate for the opposite parties Nos, 1 to 4, on the other hand, is that the learned Judge was right in directing conviction of these opposite parties u/s 324/34, I.P.C. and that Under the provisions of Section 401(3), Cr. P.C., this revisional court is unable to interfere with the implied order of acquittal of the opposite parties Nos. 1 to 4 on the charge u/s 304/34, I.P.C. It is also contended that in view of the provisions of Sections 360 and 361, Cr. P.C., the learned Judge acted rightly in directing the release of the opposite parties on probation of good conduct u/s 360, Cr. P.C. Mrs. Maitra appearing for the State has argued that the learned Judge was right in convicting the opposite parties Nos. 1 to 4 u/s 324/34, I.P.C., as ingredients of grievous hurt u/s 320, I.P.C. are lacking in the present case. She has further argued that in view of the provisions of Section 19 of the Probation of Offenders Act, 1958, (hereinafter referred to as the Act for the sake of convenience), the learned Judge was not right in invoking the provisions of Section 360, Cr. P.C. and directing the release of the opposite parties Nos. 1 to 4 on probation of good conduct.

4. Let us now first discuss as to whether the conviction of the opposite parties Nos. 1 to 4 u/s 324/34, I.P.C. can be changed to one u/s 326/34, I.P.C., apart

from the question of competence of this Court to enter into this question, in view of the provisions of Section 401(3), Cr. P. C., as contended by the learned Advocate for the opposite parties. A perusal of the judgment shows that on the dead body of Yakub Ali, there were two injuries which could be called grievous. These injuries were as follows:

(i) one partly healed stitched incised wound (penetrating) 2 1/2" x 1/2 deep into, the chest cavity, sixth inter-costal space - lateral and below the left nipple.

(ii) one old incised wound 6" X 1/2" X bone deep stitched on the mid-line of the scalp in the vault, (vault?) bone is cut about 1 m.m. on dissection.

According to the doctor (P.W.7), these injuries Nos. 3 and 4 were grievous in nature. A scrutiny of the provisions of Section 320, I.P.C., however, shows that to make these injuries grievous, in nature, there should have been fracture under the 7th clause to Section 320, I.P.C. There is no evidence by the doctor (P.W.7) that on dissection, injury No. 4 (the old incised wound on the mid-line of the scalp in the vault (vault?)) or the other partly healed incised wound caused any fracture. As already stated, Yakub Ali died on 19-4-1979 after the occurrence on 4-4-1979. As such, these injuries Nos. 3 and 4 cannot be stated to be injuries which endangered life or caused Yakub Ali to suffer .during the space of twenty days severe bodily pain. Moreover, there was the evidence of the doctor (P.W.7) about surgical interference. In these circumstances, we are of the opinion that the learned Judge acted rightly in convicting the opposite parties Nos. 1 to 4 not u/s 326/34, I.P.C. but "under Section 324/34, I.P.C. We are not, however, impressed by the argument of the learned Advocate for the opposite parties Nos. 1 to 4 that this Court of revision is not competent to interfere with the order of conviction u/s 324/34, I.P.C. and to alter the conviction to one u/s 326/34, I.P.C. In view of the provisions in Section 222(2), Cr. P.C. a person charged with offence can be convicted of a minor offence, although he is not charged with it The opposite parties Nos. 1 to 4, though charged u/s 304/34, I.P.C., have, accordingly, been convicted of a minor offence u/s 324/34, I.P.C. There has not, however, been an acquittal altogether of the opposite parties Nos. 1 to 4 for the offence of causing death of Yakub Ali. In these circumstances, when there is no finding of acquittal altogether for the offence by the learned Judge, the bar of a revisional court to convert a finding of acquittal into one of conviction u/s 401(3), Cr. P.C. cannot operate in this case. If this Court would have been impressed by the materials on record and the arguments of the parties that this case deemed conviction u/s 326/34, I.P.C. instead of u/s 324/34, I.P.C., though the charge was u/s 304/34, I.P.C., the revisional court, could have passed such an order on altering conviction from Section 324/34, I.P.C. to one u/s 326/34, I.P.C. when the charge was already there u/s 304/34, I.P.C. Be that as it may, when we have already found that the learned Judge was right in not convicting the opposite parties Nos. 1 to 4 u/s 326/34, I.P.C., the contention of the : learned Advocate for the petitioner for altering the conviction to one u/s 326/34, I.P.C. cannot be accepted.

5. As for the second contention for awarding substantive punishment to the opposite parties Nos. 1 to 4 instead of invoking the provisions of Section 360, Cr. P.C., it is to be stated that u/s 19 of the Act, Section 562 of the old Criminal P.C. of 1898 shall cease to apply to the States or parts thereof in which the Act has been brought into force, subject to the provisions of Section 18 of the Act. The provisions in Section 562 of the old Code are similar to the provisions of Section 360 of the new Criminal P.C. 1973, though there has not yet been any amendment of Section 19 of the Act by inserting Section 360, Cr. P.C. instead of Section 562 of the old Code in Section 19 of the Act. It has been held in the case of Gurbachan Singh and Others Vs. State of Punjab and Another, that Section 360 of the new Code has to be read in Section 19 of the Act in place of Section 562 of the old Code. We are respectfully in agreement with this view of the Punjab and Haryana High Court. The contention of the learned Advocate for the opposite parties Nos. 1 to 4 that when the new Code is a later enactment, the provisions of the Act cannot be so extended as to make Section 360 of the new Code nugatory, cannot be accepted. In the case of State of Punjab Vs. Harbans Lal, , it has been held that where the provisions of the Act are applicable, employment of Section 360 of the new Code is not to be made. The learned Advocate for the opposite parties Nos. 1 to 4 drew our attention to Section 360(10) of the new Code and argued that if Section 360(10) of the new Code was read along with the provisions of Section 361 of the new Code, it could be seen that the provisions of Section 360 of the new Code could still be attracted in this case, in spite of the bar u/s 19 of the Act. This contention cannot also be accepted. Section 360(10) of the new Code is to the effect that nothing in that section shall affect the provisions of Probation of Offenders Act, 1958, or the Children Act, 1960, or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders. u/s 361 of the new Code, provision has been made for recording special reasons in judgment for not dealing with an accused u/s 360 or under the provisions of the Act in cases where the Court could have dealt with such an accused u/s 360 of the new Code or under the provisions of the Act or with a youthful offender under the Children Act, 1960, or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders. A perusal of Section 360(10) of the new Code shows that the Parliament had in mind the provisions of the Act, while enacting Section 360 of the new Code. The Act did not come into force after passing of the Act, 1958. Operation of the Act to a State or part of the State depended upon the notification to be issued by the State attracting the provisions of the Act to that State or parts of that State. In fact, so far as West Bengal is concerned, the provisions of the Act were not extended to the State of West Bengal just after enactment of the Act. By a notification issued on 13-10-1966 by the State of West Bengal; the Act was extended to Calcutta and some other parts in West Bengal and subsequently, by another notification issued on 26-11-1974, the Act has been extended to the districts of Murshidabad (the present case relating to the district of Murshidabad), Bankura and Birbhum. Prior to the issuance of the notification on 26-11-1974 extending the provisions of the

Act to the districts of Murshidabad, Bankura and Birbhum, it could have been argued that the provisions of the Act could not be attracted to deal with the present case. If there would not have been any such notification issued on 26-11-1974, this Court could have considered if the opposite parties Nos. 1 to 4 of the present case could have been dealt with u/s 360 of the new Code. But when such notification dated 26-11-1974 has since been issued, extending the provisions of the Act also to the district of Murshidabad, we are unable to attract the provisions of section Section 360 of the new Code for dealing with the opposite parties Nos. 1 to 4, though the age of these opposite parties is stated to be below 21 years. In the case of State of Punjab Vs. Harbans Lal, , the provisions of Section 360(10) of the new Code were also considered and it was held that where the provisions of the Act were applicable, the employment of Section 360 of the new Code was not to be made. Undoubtedly, , u/s 361 of the new Code, reasons are to be recorded for not dealing with an accused under the Probation of Offenders Act, if the Court could have dealt with that accused under the Act. These provisions in Section 361, Cr. P.C. read with the provisions in Section 360(10), Cr. P.C. cannot make inoperative the provisions hi Section 19 of the Act, which create a bar for invoking Section 360 Cr. P.C. to a State or a part of a State wherein the Act has been extended by a State. We are, therefore, unable to accept the contention of the learned Advocate for the opposite parties Nos. 1 to 4 that in spite of the provisions of Section 19 of the .Act, the provisions of Section 360, Cr. P.C. could be invoked for dealing with the opposite parties Nos. 1 to 4 of the present case. Assuming for the sake of argument that the provisions of Section 360 of the new Code could also be attracted in this case, though our view is otherwise, we are not inclined to release the opposite parties Nos. 1 to 4 on probation of good conduct, as done by the learned Judge, on a consideration of the gravity of the offence and the facts and circumstances of the present case.. After being assaulted by the accused-opposite parties Nos. 1 to 4 at about 9/10 p.m. on 4-4-1979, Yakub Ali suffered not only the incised wound (penetrating) 2 1/2" X 1/2" deep into the chest cavity and incised wound 6" X 1/2" X bone deep on the mid-line of the scalp in the vault, (vault?) as described earlier, but also other incised injuries being incised wound 1" X 1/2" X 1/2" muscle deep medial to the left nipple, incised wound 1/2 X 1/2" X 1/2" muscle deep below the left nipple and incised wound situated anterolaterally over the right knee joint. Though the learned Judge had himself observed that the assault on the deceased was unprovoked and that the true motive for the murder was yet to come to light, he was of the view that these opposite parties Nos. 1 to 4 probably indulged in a sporadic criminal activity and should not be described as veteran criminals. Even if, the opposite parties Nos.1. to 4 are not veteran criminals, they caused the injuries to Yakub Ali, without any provocation at about 9/10 p.m. on 4-4-1979, while Yakub Ali was sleeping along with his brother, the de facto complainant, at the khalian, by assaulting him with lathis and chhanis (big henuas), resulting in aforesaid injuries. In the circumstances we are of the opinion that instead of releasing the opposite parties Nos. 1 to 4 under probation of good conduct, the opposite parties Nos. 1 to 4 should be sentenced to suffer

rigorous imprisonment for three years u/s 324/34, I.P.C. The learned Judge was also of the view that in the event of misuse of the privilege by the opposite parties Nos. 1 to 4 within two years, they should be called upon to receive sentence which should be rigorous imprisonment for three years. It appears that the Rule issued by this Court in the present case was for altering or modifying the conviction of the opposite parties Nos. 1 to 4 from Section 324/34, I.P.C. to one u/s 302/34, I.P.C., though the revisional application was for convicting the opposite parties Nos. 1 to 4 u/s 304/34, I.P.C. instead of u/s 324/34, I.P.C. as done by the learned Judge. As we have already discussed, the opposite parties Nos. 1 to 4 could not be convicted in this case u/s 326/34, IPC, what to speak of convicting them u/s 302/34, I.P.C., which was not the case of even the prosecution in the Court below.

6. As the matter stands, the Rule is to be discharged with the modification that instead of maintaining the order of the learned Judge, directing the release of the opposite parties Nos. 1 to 4 on probation of good conduct u/s 360, Cr. P.C., the opposite parties Nos. 1 to 4 should be sentenced to suffer rigorous imprisonment for three years.

7. The Rule, is, accordingly, discharged with the modification that the order of the learned Judge, directing the release of the opposite parties Nos. 1 to 4 on probation of good conduct and for keeping peace for a period of two years u/s 360(1), Cr. P.C. on execution of bonds by them is set aside. Instead, each of the opposite parties Nos. 1 to 4 is sentenced to suffer rigorous imprisonment for three years on their conviction u/s 324/34, I.P.C. Let the opposite parties Nos. 1 to 4 be taken into custody for serving the sentence imposed on them.

8. Let the lower court records be sent down at once.

B.C. Chakrabarti, J.

9. I agree.