THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 29th JUNE, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.08 of 2016

Appellant : Tshering Tamang,
S/o Tek Bahadur Tamang,
R/o Chadey Busty, Mangan,
North Sikkim.

versus

Respondent : State of Sikkim

Appeal under Sections 374(2) and 482
of the Code of Criminal Procedure, 1973

Appearance

Mr. B. Sharma, Senior Advocate with Ms. Pema Lhamu Lepcha and Ms. Janu Tamang, Advocates for the Appellant.

Appellant in person.

Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant, vide Judgment and Order on Sentence, both dated 24-12-2015 of the Learned Court of Sessions Judge, North Sikkim at Mangan, in S. T. Case No.02 of 2015, was convicted of the

offence under Section 326 of the Indian Penal Code, 1860 (for short "IPC") and sentenced to undergo rigorous imprisonment of three years and to pay a fine of Rs.5,000/ (Rupees five thousand) only, with a default stipulation. The Appellant assails both by filing the instant Appeal.

2. The Prosecution case before the Learned Trial Court was that, on 23-06-2014 at around 3 a.m., the Appellant accompanied by three other accused persons, went to the house of P.W.5, wherein at the relevant time P.W.2 was residing with her mother P.W.5 and her sisters P.Ws.7 and 8. Shouting from the outside of the house, the Appellant demanded that the door be opened and on his banging and insistence, the victim, P.W.8 opened the door, on which, the Appellant assaulted her, on her hand with a *'khukhuri'* M.O.I. The FIR, Exhibit 4, was lodged by P.W.5 on 23-06-2014 at around 0530 hours. Mangan P.S. Case bearing FIR No.26(06)14 dated 23-06-2014 under Sections 458/307/354/34 of the IPC was registered against the Appellant and under Sections 458/34 of the IPC against his accomplices being Passang Tamang, Dawa Tamang and Bijay Rai. Investigation was endorsed to P.W.13 S.I. Narendra Kr. Pradhan.

3. Investigation revealed that in March, 2014, P.W.2 the wife of the Appellant, was living with her mother P.W.5 due to some animosity with the Appellant, which had been brought to the notice of Mangan Police Station on 20-05-2014. Two days after the said

Complaint, the Appellant went to the house of P.W.5 where P.W.2 was residing and a scuffle ensued between the Appellant and P.W.5 on which P.W.5 slapped the Appellant. This matter was also brought to the notice of Phidang Out Post where P.W.5 had sent one of her daughters namely, Usha Thapa to lodge a Complaint. The Police finding it to be a family dispute advised them to resolve it amongst themselves. On 22-06-2014, on account of a wedding in the house of the Appellant's neighbour, he along with his accomplices attended the same and returned home with them. Around 1 a.m., Dawa Tamang one of the accused asked the Appellant to reach him home. The Appellant and all the other accused persons got into a private Alto Vehicle of the Appellant and *en route* parked the vehicle above the house of P.W.5. All four proceeded to the house of P.W.5, where Dawa Tamang first called out to P.W.2, followed by the Appellant. When finally the door was opened by P.W.7, it is alleged that the Appellant attempted to assault her with a *'khukhuri'* but were restrained by Dawa Tamang. Following this, P.W.8, the victim came to the door, at which time the Appellant assaulted her with his *'khukhuri'* causing severe injury on her left hand. On completion of investigation, Charge-Sheet was submitted against the Appellant and his accomplices, Passang Tamang, Dawa Tamang and Bijay Rai, under the Sections of Law as detailed hereinabove.

4. The Learned Trial Court after hearing the submissions on Charge found *prima facie* sufficient materials to frame Charge against the Appellant under Section 458/326/307 of the IPC. On the plea of "not

guilty" by the Appellant, the Prosecution evidence comprising of thirteen witnesses commenced. Although it would be pertinent to point out that the Charge was framed against Passang Tamang, Bijay Rai and Dawa Tamang also under various provisions of the IPC, the same are not relevant for the present purposes. On consideration of the Prosecution evidence, the Learned Trial Court convicted the Appellant as detailed hereinabove, but opined that the Prosecution could not establish the offence under Sections 307 and 458 of the IPC against him.

5. The arguments raised in Appeal before this Court were that the Learned Trial Court failed to appreciate that the case did not fall under Section 326 of the IPC, as the injury disclosed in the Medical Report, Exhibit 9, is not suggestive of the ingredients of Section 320 of the IPC. The examining Doctor P.W.11 has admitted that the kind of injury sustained by the victim could be caused due to a fall. The victim herself has stated that the injury was caused during a scuffle between the Appellant and herself, apart from which there is no evidence whatsoever to indicate that the Appellant had struck the victim with the *'khukhuri'* and hence, the impugned Judgment on conviction and consequent Sentence be set aside.

6. *Per contra*, it was the argument of Assistant Public Prosecutor that Exhibit 9 clearly indicates that the victim had sustained grievous injury and the Doctor who examined her has opined as much. The attention of this Court was invited to Exhibit 9 and it was

expostulated that the injury caused detachment of the exterior tendon of left index finger, sufficient to amount to grievous injury, therefore, the Judgment and Order on Sentence warrants no interference.

7. The arguments advanced at the Bar by Learned Counsel for the parties were heard at length and due consideration given. Records of the Learned Trial Court have been carefully perused by me, including the evidence on record.

8. The question which falls for determination by this Court would, therefore, be whether the evidence pointed sufficiently to the guilt of the Appellant for commission of the offence under Section 326 of the IPC.

9. The entire dispute appears to have arisen out of a misunderstanding/quarrel between the Appellant and his wife P.W.2 while the rest of the family of P.W.2 have evidently been dragged into it. Whatever be the circumstances, the requirement of criminal jurisprudence is that the Prosecution has to prove its case against an accused beyond a reasonable doubt. On the anvil of this principle, we may carefully examine and analyse the evidence of the Prosecution witnesses.

10. P.W.1 is a Police Constable posted at the Phidang Out Post, according to whom on 23-06-2014, P.W.2 appeared at the O.P. around 3.10 a.m. and informed him that the Appellant and the other accused

persons had come to her house and were creating a nuisance. He contacted P.W.12 Assistant Sub-Inspector Paul Singh Rai, informing him of the incident, who also reached the Out Post. P.W.1 along with P.W.12 accompanied by P.W.2, went to the place of occurrence (for short "P.O."), where they saw the Appellant with a *'khukhuri'* in his hand, in front of the door of the house of P.W.2, along with the other accused persons. The Appellant was allegedly shouting that he would cut his mother-in-law P.W.5. P.W.12 snatched the *'khukhuri'* from the hand of the Appellant, which was identified as M.O.I by P.W.1. P.W.12 to the contrary states that the 'Complainant' who appeared at "Phidang Out Post" was Kala Thapa, P.W.7. That, at the Phidang Out Post when he examined the 'Complainant' the victim P.W.8 also arrived there complaining that the Appellant had assaulted her with a *'khukhuri'* and she had sustained an injury. Accordingly, he along with P.W.1, P.W.7 and P.W.8 went to the P.O. Pausing here for a moment attention has to be drawn to the fact that not only is there an anomaly with regard to whether it was P.W.2 or P.W.7 who informed the Phidang Out Post of the incident, but there is also a contradiction in the evidence of P.W.1 and P.W.12 with regard to the appearance of P.W.8 at the Out Post. P.W.1 makes no mention of P.W.8, while P.W.12 states that P.W.8 also appeared at the Police Out Post. P.W.1 and P.W.12 thereafter took all the accused persons to the Mangan Police Station, where Seizure Memo, Exhibit 1, was prepared for seizure of M.O.I *'khukhuri'*. Perusal of Exhibit 1, however, nowhere reveals that M.O.I was seized from the

possession of the Appellant. Although as per P.W.12, the weapon of offence was first seized by him vide Exhibit 10, in the presence of P.W.1 and P.W.2, this document also does not reveal as to who M.O.I was seized from. Therefore, who was in possession of M.O.I at the relevant time of seizure has remained unexplained along with the above anomalies.

11. The evidence of P.W.2 (a hostile witness), contrary to what P.W.1 has stated, reveals that she had not gone to the Out Post that relevant night to inform him of the incident. Her evidence reveals that it was P.W.8 who had gone there, after which the Police personnel from the Out Post came and took them to the Mangan P.S. This witness having been cross-examined by the Prosecution, admitted to having made her statement as reflected in "Document A", which is said to be her statement under Section 161 of the Code of Criminal Procedure, 1973. Even if it is to be assumed that the portion marked 'A' is correct, there appears to be an anomaly with the evidence of P.W.1 and P.W.12 who states that on reaching the P.O. P.W.12 snatched the *'khukhuri'* from the hand of the Appellant, whereas the portion marked 'A' would reveal that, P.W.2 told the Police that, even while they were proceeding towards Phidang Out Post the Appellant had a naked *'khukhuri'* in one hand and its scabbard in the other. Besides, in the document marked 'A' she claims to have seen the Appellant assaulting P.W.8 but under cross-examination admits that she did not witness the incident with her own eyes, but saw the injury sustained by P.W.8 only at the Out Post. The

vacillating statements of P.W.2 surely does not inspire confidence in her evidence.

12. Exhibit 2 according to P.W.3 was prepared in his presence vide which M.O.II, M.O.III and M.O.IV were seized at the Mangan P.S. by the Police. That the said Seizure Memo Exhibit 2 bears the signature of P.W.3 and one Usha Thapa. Usha Thapa is evidently one of the sisters of P.W.2 as emerges from the evidence of P.W.5. Firstly, Usha Thapa has not been produced as a witness for the Prosecution for reasons unknown, while P.W.3 on the other hand has failed to throw any light with regard to the person from whom the M.Os were seized, or for that matter the place of seizure, rendering the Exhibit as an ineffective piece of document for the Prosecution case. In fact, even the evidence of the I.O. is only to the extent that he seized the wearing apparels of the victim and a bronze metal found at the P.O., duly preparing a Seizure Memo. Who the seizures were made from has not been disclosed.

13. According to P.W.5, the mother of the victim, she admittedly did not know as to how P.W.8 sustained injury neither was she aware as to who had brought M.O.I or where it came from. She admits that the Appellant or his accomplices did not enter her house and she was unaware of what transpired outside her house at the relevant time. The evidence of P.W.7 would reveal that she saw P.W.8 and the Appellant pushing each other but she did not witness the use of fist, kicks and blows by the Appellant neither did she see the use of any

kind of weapon by the Appellant, to assault P.W.8. She did not notice any blood stains on M.O.I and the *'khukhuri'* was seen by her on her return from Phidang Out Post. The victim P.W.8 is admittedly right handed and on the relevant night she had seen M.O.I in the hand of the Appellant when a scuffle took place between them, in front of the main door of their house. During the scuffle, P.W.8 states that, she sustained injury on her left hand and later came to know that the injuries on her hand was caused by a *'khukhuri'* which she has seen in the hand of the Appellant. This witness at no point in her evidence categorically stated that she was aware that the Appellant had assaulted her with M.O.I, her statement being limited to the extent that there was a scuffle between them and she sustained injury on her left hand. She learnt later that M.O.I had caused the injuries. No explanation has been put forth about how she came to know this fact later. She has not pointly stated that the injury was caused by M.O.I nor has she specifically stated that the Appellant caused the injury. Evidently the injury occurred accidentally during the scuffle and no *mens rea* of the Appellant has been proved. Neither has it been established that the injury was a result of the use of M.O.I.

14. The evidence of P.W.10 fails to support the Prosecution case. No blood was found on M.O.I which was forwarded to her as Analyst-cum-Assistant Scientific Examiner of the RFSL, Saramsa, Ranipool for examination and opinion. If P.W.12 had snatched M.O.I at the P.O. where was the opportunity afforded to the Appellant to wipe it

clean? The investigation of the I.O. revealed that the victim was assaulted with M.O.I 'inside' the house of the Complainant. None of the previous witnesses have stated that the Appellant had indeed entered the house of the P.W.5 since all concerned witnesses have stated that the scuffle that took place at the main door of the house.

15. According to Senior Counsel for the Appellant, the conviction of the Appellant by the Learned Trial Court is solely based on the Medical Report of P.W.11. To assess the Medical Report, we may briefly consider the evidence of P.W.11 the examining Doctor who stated that on 23-06-2014, P.W.8 was examined by him and he found the following;

> **"**1. General examination
>
> a. Patient was stable, vitals were normal;
>
> 2. Systematic examination
>
> a Chest – No abnormalities detected;
>
> b. CVS examination – S1 & S2 normal; Heart rate 88 pm; BP - 100/60 mmhg;
>
> 3 Per Abdominal – No abdominal detected;
>
> 4 CNS - Patient was conscious and NAD
>
> 5 Local examination -
>
> a. Incised wound on dorsum of left hand measuring 10 x 2 cm
>
> There was a soft tissue injury with detachment of exterior of tendon of left index finger;**"**

16. On the basis of the said injuries, the witness was of the opinion that the injury was grievous. Exhibit 9, on perusal, reveals that the victim has not given an account of her injuries to the Medical Officer. *Inasmuch* as in Exhibit 9 the column *"Note : Medical Officer is*

requested to note the account given by the injured person as to the cause of the injuries and make it clear that such account came from the lips of the injured person himself/herself", no such report has been recorded. A history of the injuries is only reflected on the reverse page of Exhibit 9 under the following head, *"Brief facts of the case (as known to the police at this moment)"*. That having been said grievous injury in the legal parlance falls within the provision of Section 320 of the IPC. The said Section is reproduced hereinbelow for easy reference;

> **"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 suffer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.**"**

17. It is clear that the injury as recorded on Exhibit 9 does not fall under any of the criterion elucidated hereinabove. Consequently, the question of grievous injury having been sustained by P.W.8 does not arise. In any event, a crime comprises of *actus reus* and *mens rea*. *Actus*

reus when proved beyond a reasonable doubt in combination with *mens rea* produces criminal liability, which in the instant case is lacking, the Prosecution evidence having failed to establish the presence of both in the Appellant, with regard to P.W.8. Thus, in this context Exhibit 9 has no value.

18. A summation of the entire facts and circumstances and the evidence on record leads to the inevitable conclusion that the Prosecution has failed to establish its case at all, far be it from proving the case beyond a reasonable doubt. Consequently, in the absence of any cogent or clinching proof against the Appellant, I am of the considered opinion that the Learned Trial Court has erred in convicting the Appellant under Section 326 of the IPC.

19. Resultantly, the Appeal is allowed.

20. The impugned Judgment and Order on Sentence is set aside. The Appellant is acquitted of the Charge under Section 326 of the IPC. He is discharged from his bail bonds.

21. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

22. Copy of this Judgment be forwarded to the Learned Court below for information and compliance.

23. Records of the Learned Trial Court be remitted forthwith.

(Meenakshi Madan Rai)
Judge
29-06-2016

Approved for reporting : **Yes**

Internet : **Yes**

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