Form J(2) **IN THE HIGH COURT AT CALCUTTA**
Criminal Appellate Jurisdiction
Appellate Side

Present :
The Hon'ble Justice Bibek Chaudhuri

C.R.A. 520 of 2018

Aminul Islam @ Amenur Molla
Vs.
The State of West Bengal

Amicus Curiae : Mr. Dipanjan Dutt, Adv.

For the State : Mr. Ranabir Roy Chowdhury, Adv.
Ms. Sujata Saha, Adv.

Heard on : 06.05.2022.

Judgment On : 06.05.2022.

Bibek Chaudhuri, J.

The appellant has filed the instant appeal assailing the judgment and order of conviction passed by the Trial Court for committing offence under Section 324 of the Indian Penal Code and consequence sentence of imprisonment for a term of one year with fine of Rs.1,000/-, in default, to suffer simple imprisonment for further 3 months.

The Officer-in-Charge, Gazole Police Station in the District of Malda received a written complaint from one Mosiluddin Ahmed on 7th August, 2016 alleging, *inter alia*, that on 6th August, 2016 at about 7:45 p.m., his younger brother Serajuddin Ahmed was returning from mosque after observing Namaz. At that time the appellant along with Khatir Mahammad, Nazir Hossain @ Bhaltu, Maijul Rahaman @ Nathua and Mansur Rahaman wrongly restrained him in front of the house of one Jainul @ Buku and assaulted him on his head with iron rod and Hasua with the intention to kill him. As a result of assault, the brother of the de-facto complainant was seriously injured. Hearing hue and cry the villagers rushed to the place of occurrence. The de-facto complainant with his two sons also reached the spot and found Serajuddin lying on the ground in injured condition. He was immediately taken to Gazole Primary Health Centre. The Medical Officer referred him to Malda Medical College & Hospital considering serious nature of assault in the person of Serajuddin. He was admitted to Malda Medical College & Hospital and subsequently to a Nursing Home. It is also stated that the accused persons are habitual offenders. They also assaulted some other people of the village and they were facing trial in G.R. Case No.1069/1991. On the basis of the said complaint, police registered Gazole Police Station Case No.462/2016 dated 7th August, 2016 and took

up the case for investigation. On completion of investigation, police submitted charge-sheet against the accused persons. The Trial Court framed charge against five accused persons including the appellant under Sections 341/325/307/34 of the Indian Penal Code. As the accused persons pleaded not guilty when the charge was read over and explained to them, trial of the case commenced. On conclusion of trial, the appellant was convicted and sentenced in the manner disclosed above while other accused persons were acquitted from the charge.

When the instant appeal came up for hearing, the appellant did not take any step. Therefore, Mr. Dipanjan Dutt, Advocate was requested by this Court to act as Amicus Curiae on behalf of the appellant in the instant appeal. Mr. Dutt, readily accepted the proposal and he has submitted the case of the appellant with all diligence and sincerity.

It is submitted by the learned Amicus Curiae that in a criminal trial the prosecution is duty bound to prove at the foremost the date, time and place of occurrence and the manner of the incident constituting the offence before the Trial Court. If there is any deviation in proving the aforesaid facts, the entire prosecution case becomes suspect. He substantiate his argument referring to the written complaint (Exhibit.1). The written complaint was lodged on 7th August, 2016 with the Officer-in-Charge, Gazole Police Station. In the written complaint it was

specifically stated that the incident took place **yesterday** at about 7:45 p.m. on the road of their village in front of the house of one Jainul @ Buku while his brother Serajuddin was returning from mosque after offering Namaz to his house.

Mr. Dutt next tekes me to formal FIR. In Column No.3 of the formal FIR, the police officer recorded the date of occurrence as on 6th July, 2016. He also refers to the evidence of the de-facto complainant namely Mosiluddin Ahmed who stated on oath in his evidence that the incident took place on 6th July, 2016 at about 7:45 p.m.. Therefore, if the oral evidence of the de-facto complainant and the recording of formal FIR are taken into consideration, there is no other alternative but to hold that the FIR was lodged just after one month of the alleged incident. There is no explanation whatsoever regarding delay in lodging the FIR. The learned Trial Judge did not even consider the matter in the impugned judgment. Therefore, there is every reason to hold that concocted story came up before the Court as a result of delayed FIR.

Coupled with the delay, according to the Mr. Dutt, admittedly the relation between the de-facto complainant and his brother in one side and the appellant and other acquitted accused persons on the other hand was inimical in view of the fact that admittedly a counter case is pending over the self same incident filed on behalf of the

accused persons. In other words, in the alleged incident, admittedly some of the accused persons suffered injury and over the said incident a criminal case was filed against the de-facto complainant, his brother and others by the accused persons. In view of existence of such counter case, false implication of the appellant cannot be ruled out.

It is further submitted by learned Amicus Curiae that except the injured, no eye-witness of the occurrence was examined by the prosecution. Admittedly, P.W.1, Amirul Sarkar, P.W.5, Abdul Kuddus and P.W.6, Jainul Sarkar did not see the incident of assault allegedly inflicted by the appellant on the brother of the de-facto complainant. Therefore, the evidence of the said three witnesses are in the nature of hearsay. The de-facto complainant also did not see the incident because it is found from his evidence that on 6th July, 2016 at about 7:45 p.m. his brother Serajuddin left the mosque before his departure. He reached the place of occurrence hearing hue and cry and saw his brother in wounded condition. Therefore, Serajuddin sustained injury before arrival of the de-facto complainant.

With regard to delay in lodging FIR, Mr. Dutt also refers to the cross-examination of P.W.2 where he clearly admitted that he lodged complaint after one moth of the incident.

He next refers to the evidence of P.W.4, Serajuddin Ahmed who is the injured person in the incident. In order to cover up the lacuna with regard to the date of occurrence, P.W.4 deposed that the incident took place on 6th August, 2016. He also stated that he was assaulted by the acquitted accused persons with the help of iron rod and by the appellant with Hasua. As a result of receiving Hasua blow on his head, he sustained a deep cut injury and the said wound was stitched up with 23 stitches.

Learned Amicus Curiae then takes me to the injury report of P.W.4 (Exhibit 2) which was issued by Dr. Shyam Sundar Halder, P.W.3. On perusal of the said injury report it is found that Medical Officer examined the injury on 6th August, 2016 at about 8:33 P.M. at Gazol Rural Health Centre and found a cut injury approximately 4 cm. in length on the head of the patient. In the injury report the medical officer opined that such injury may be caused by lathi. Though in the injury report the medical officer did not state as to whether the injury sustained by P.W.4 was incised or lacerated wound, the medical officer in consultation with the injury report opined during his evidence that the said cut injury was lacerated injury.

It is submitted by Mr. Dutt that if there is laceration, the injury cannot be held to be caused by Hasua because if a person is assaulted

with the help of Hasua there shall be incised wound. Therefore, the appellant was wrongly connected with the injury sustained by P.W.4 because the prosecution case is that the appellant caused injury on the head of P.W.4 with the help of Hasua.

For the reason stated above, learned Amicus Curiae submits that the appellant was wrongly convicted. The evidence on record is not sufficient against the appellant and he is entitled to be acquitted of the charge.

Mr. Ranabir Roy Chowdhury, on the other hand, submits that if there is any discrepancy between ocular and medical evidence, ocular of the witness shall prevail. P.W.4 stated on oath in unequivocal term that the appellant gave a blow of Hasua on his head, as a result of which he sustained a deep cut injury. The other accused persons assaulted him with iron rod. It is not in dispute that P.W.4 sustained injury of the date and time of occurrence. Therefore, it matters little if the medical officer fail to state the nature of injury received by P.W.4. Mr. Roy Chowdhury further submits that the learned Trial Judge considered the evidence of the witnesses in delayed way and dispassionate manner. If the injured person’s evidence is believed, the appellant cannot escape from his conviction.

Having heard the learned counsel for the parties and on careful perusal of the evidence on record, the question that arises before this Court for consideration is the date of occurrence when the incident took place. In the FIR dated 7th August, 2016 the de-facto complainant stated that the incident took place **yesterday**, meaning thereby the incident took place on 6th August, 2016. The formal FIR was filled up stating the date of occurrence as on 6th July, 2016. The de-facto complainant stated that he lodged the complaint after one moth of the occurrence. Therefore, the recording of the date of occurrence in the formal FIR tallies with the evidence of P.W.2. If on the other hand, the evidence of P.W.4 is taken into consideration, it would be found that the incident allegedly took place on 6th August, 2016. Again on perusal of the injury report it is ascertained that the incident took place on 6th August, 2016 and the injured was examined medically on 6th August, 2016 at 8:33 p.m. at Gazol Rural Health Center. Therefore, if the Court accepts the evidence of the de-facto complainant, then there would be no other alternative but to hold that P.W.4 received injury on 6th August, 2016 but the de-facto complainant himself stated on oath that he lodged complaint one month after the incident meaning thereby the incident took place on 6th July, 2016 on which date P.W.4 did not receive any injury. The

appellant cannot be implicated for any incident that took place on 6th August, 2016. Therefore, prosecution failed to prove the date of occurrence when the incident took place.

It is true that in case of discrepancy between ocular and medical evidence, ocular testimony shall prevail because the medical evidence is in the nature of an expert's opinion. The Court cannot deny that P.W.4 received cut injury on his head but in order to ascertain the nature of injury, the evidence of expert can only be relied on. When the medical officer stated that P.W.4 sustained lacerated injury, the said injury cannot be treated as incised wound on the basis of ocular testimony of P.W.4. If the P.W.4 is assaulted with the help of a Hasua on his head, there would have been an incised wound. Unfortunately enough, no incised wound was found on the head of P.W.4. When the allegation of the prosecution is that the appellant assaulted P.W.4 with Hasua, in the absence incised cut injury, the appellant cannot be connected with the injury sustained by P.W.4.

Therefore, in my considered view, the appellant is entitled to benefit of doubt and the learned Trial Judge ought to have recorded an order of acquittal in favour of the appellant.

In view of the above discussion, this Court is of the view that the impugned judgment and order of conviction and sentence is liable to be set aside.

Accordingly, the instant appeal is **allowed**. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track 2nd Court at Malda on 31st July, 2018 and 1st August, 2018 respectively in Sessions Trial No. 2(9) of 2017 arising out of Sessions Case No. 348 of 2017 is set aside.

The appellant is acquitted from the charge and discharge from his bail bond.

Let a copy of this Judgment along with lower court record be send down to the Court below.

Urgent photostat certified copies of this order may be delivered to the learned Counsel for the parties, if applied for, upon compliance of all formalities.

(Bibek Chaudhuri, J.)