(1986) 04 CAL CK 0044

Calcutta High Court

Case No: Criminal Rev. No.2209 of 1984

Gopinath Sen		APPELLANT
	Vs	
The State		RESPONDENT

Date of Decision: April 21, 1986

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 360, 361
- Penal Code, 1860 (IPC) - Section 147, 323
- Probation of Offenders Act, 1958 - Section 3

Citation: 90 CWN 891

Hon'ble Judges: Sudhangsu Sekhar Ganguly, J

Bench: Single Bench

Advocate: Haradhan Banerjee and Amitava Pan, for the Appellant;Barendra Nath Sur, Amar Ghose and Tapas Midya for the State, for the Respondent

Judgement

S.S. Ganguly, J.

C.R. No. 948 of 1978 of Serampore, district Hooghly arose out of a complaint lodged by the opposite party No. 2 complainant alleging that three persons viz. Jaideb, Bhedo and Ganesh (accused No. 2 to 4) cut bamboos from his bamboo-clump on 13.11.78 and sold them to one Panchanan (Accused No. 1) and that on protest next day the present petitioners Nos.l to 4 Gopinath, Sudhir, Tapan and Manindra (Accused Nos.5 to 8) assaulted him and the aforementioned Joydeb, Bhedo and Ganesh (Accused Nos.2 to 4) excited them to assault him. The learned Magistrate convicted all the accused excepting Panchanan (Accused No. 1) under Sections 323 and 147 of the Indian Penal Code and sentenced them to a fine of Rs. 100/- in default to 20 days simple imprisonment each on each count. Criminal Appeal No. 57 of 1983 filed by accused Nos.5 to 7 and Criminal Appeal No. 61 of 1983 filed by accused No. 2 to 4 and 8 were heard together by the learned Sessions Judge, Hooghly, who affirmed only the conviction and sentence passed by the learned Magistrate against accused Nos. 5 to 8. Hence this revision on allegation that the learned Sessions Judge confirmed the findings of the learned Magistrate with

regard to the charge u/s 323 of the Indian Penal Code, on contradictory or no evidence. It appears from the judgment that the learned Sessions Judge held the incident of cutting of bamboos and carrying them away to the house of Panchanan on the evidence of P.Ws.2 to 4 and 6 and recovery of a number of bamboos from the house of the said Panchanan. Relying on the evidence of the complainant and his witness Tarak (P.Ws.1 and 4) as corroborated by G. D.Entry (Ext.4) and medical evidence (P.W.8) the learned Sessions Judge concluded that the present four petitioners had actually assaulted the complainant opposite party No. 2. As a.result he confirmed the conviction of these four appellants u/s 323 of the Indian Penal Code and finding the punishment nor at all severe he refused to interfere with it.

2. It is pointed out first that even the complainant himself says once that the assault took place in the first floor of the house and that he again says that the occurrence took place in the Dalan. The occurrence, so says the complainant started at the bamboo-clump and ended at the first floor it may be that part of the incident took place in the ''Dalan'' in the ground floor or in the ''Dalan'' or the first floor. That makes very little difference and is really no contradiction at all.

3. It is pointed out next that the P,W. does not name the accused, Tapan. This witness names the accused, Sisir, Gopinath, Jonaki Sen and Habu as the assailant of the complainant. He identified the accused Manindra as Jonaki Sen. Nobody asked him whom did he mean by ''Habu'' and the witness did not clarify. It cannot be held that he really meant the accused. Tapan when he named ''Habu'' as one of the assailants. But then there is the evidence of the complainant himself whom the learned Sessions Judge found no reason to disbelieve. It is not very material therefore that the P.W. 4 did not name the accused Tapan specifically.

4. Since the learned Sessions Judge confirmed the findings of the learned Magistrate on the basis of the evidence on record and his decisions cannot be considered as unreasonable on perverse I do not see any scope of interfering with his judgment in any way.

5. It is urged next that the petitioners having been punished u/s 323 of the Indian Penal Code, they should have been given the benefit of section 360 of the Cr.P.C. or section 3 of the Probation of Offenders Act since no previous conviction has been alleged or proved against any of them. This is an objection which shall have to be upheld. It is for the court to apply the provision of section 360 of the Cr.P.C. or the relevant provision of the Probation of Offenders Act, 1958. But where the court does not do that, the court is obliged to record in its judgment the special reasons for not having done so under the provisions of section 361 of the Cr.P.C. The judgment of neither the learned Magistrate nor the Sessions Judge shows that this aspect was taken into consideration. Neither says that the provision of section 360 or those of the Probation of Offenders Act were taken into consideration and the judgment delivered by them did not show that on a consideration of all the peculiar circumstances of the case they considered it improper to

apply the provisions aforementioned to the facts of this case. The provisions of section 361 Cr.P.C. being mandatory I am of the view that the sentence passed by the learned Magistrate and as confirmed by the learned Sessions Judge in the Criminal Appeal should be set aside which I hereby do and the case shall go back on remand to the Sessions Judge for considering as to whether he should take any action under the provisions of section 360 of the Cr.P.C. or those of the Probation of Offenders Act, 1958. The learned Sessions Judge will be entirely free to take any decision in this regard. After considering the circumstances of the case if he feels that he can apply the provisions aforementioned to the accused in this case he will do that and in case he feels that the accused in this case are not entitled to get the benefits of the aforementioned provisions of law he will record his reasonings under the provisions of section 361 of the Cr.P.C.

The rule is disposed of accordingly. Send the case records back to the learned Sessions Judge, Hooghly at once for earth disposal according to law and in the light of the observed made above.