

Criminal Appeal No.04 of 2024

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,
KURSEONG,DARJEELING.**

Present : **SRI HEMANTA SINHA,**
Additional Sessions Judge,
Kurseong,Darjeeling.
JO Code-WB00754.

Criminal Appeal No. 04 of 2024.
(CNR No-WBDJ040000

Under Section 413 of BNSS,2023

Smt. Kumudini Tewari
1st Floor ,47/1,ABPath
PB Road,P.S.Kurseong,Darjeeling....Appellant
Vs.

1) State of West Bengal.....Respondent-1
2) Nisha Tamang d/o saran Tamang,
3)Nishal Tamang d/o Saran Tamang.
Residents of Thana Line,P.S.Kurseong,
Dist.Darjeeling.Respondent No.2 & 3

Mr.H.W.Lama, Ld. Advocate.....for the Appellant

Mr.Krishna Chhetri,Ld.P.P-in-Charge...for the State/Respondent
No.1

Mr.Mahesh Taman & Urgen Lama.. Ld.Advocate for the Respondent
Nos. 2&3

Delivery of Judgment: 30th June,2026.

J U D G M E N T

1. The instant Criminal Appeal is preferred by the appellant/
complainant against the Judgment and Order of acquittal
dated.07.08.2024 passed by the Learned Additional Chief Judicial
Magistrate, Kurseong, Darjeeling in c/w GR Case No. No.15 of
2022 arising out of Kurseong P.S. Case No.13 of 2022, dated.
13.02.2022 under section 143/323/423/506 of I.P.C.

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2. The prosecution case in brief is that on 13.02.2022 at around 3:00 p.m., the accused persons namely Sourav Saxena, Nisha Tamang, Nischal Tamang & some other unknown persons started destroying their property. When the daughter-in-law of the defacto-complainant namely Jahanvi Tewari went to investigate the issue at that time the accused Sourav Saxena who was armed with a spade came running and attacked her said daughter-in-law but her daughter-in-law any how managed to escape from that attack. She was attacked by Sourav Saxena and his gang. They followed her back to her house and started banging and kicking. In the past also, the accused persons namely Sorav Saxena and Nisha Tamang attacked them. On 12.02.2022 at around 5:00 p.m. to 6:00 p.m, Sourav Saxena, Nisha Tamang and others also intimidated the defacto-complainant and her family members.

3. On the basis of the written complaint, Kurseong P.S. Case No.13 of 2022 dated.13.12.2022 under Section 143/323/427/506 of I.P.C was registered against the accused persons namely Sourav Saxena, Nisha Tamang and Nishal Tamang. On completion of investigation, the I.O of the case submitted charge-sheet only against the accused persons namely Nisha Tamang and Nishal Tamang under Sections 143/323/427/506 of I.P.C.The Cognizance of the offence was taken by the Learned Additional Chief Magistrate,Kurseong. The copy of the charge sheet was supplied to the accused persons and

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transferred the Case Record to the Court of the Learned Judicial Magistrate, Kurseong for trial.

4. The accused persons were examined under Section 251 of Cr.P.C and the substance of accusation for committing offence under Sections 143/323/427/506 of I.P.C was read over and explained to the accused persons to which the accused/respondent nos. 2 & 3 pleaded their innocence, claimed to be tried and thus, they were put under trial.

5. The prosecution, in order to prove its case, has only examined the I.O. of the case i.e. S.I of Police, Prasang Dorjee Lama as PW-1.

6. At the trial, the Learned Trial Court come to conclusion that the prosecution has failed to prove its case against the accused persons/ respondent Nos.2 & 3 and as such the Learned Trial Court was pleased to acquit the respondents No. 2 & 3 from the accusation u/s 143/323/427/506 of I.P.C.

7. Being aggrieved and dissatisfied with the impugned judgment and order of acquittal dated.07.08.2024 passed by the Learned Judicial Magistrate, Kurseong in c/w GR Case No.15 of 2022 arising out of Kurseong P.S Case No. 13 of 2022, dated.13.02.2022 under Sections 143/323/427/506 of I.P.C, the defacto-complainant/appellant preferred this Criminal Appeal for setting aside the impugned Judgment and order of acquittal on the grounds :

a) that the Defacto-complainant and the vital witnesses have not been examined and as such the judgment of acquittal passed by

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the Learned Trial Court merely on the basis of the evidence of the I.O(i.e. PW-1) and without examining the defacto-complainant and the material witnesses, caused serious miscarriage of justice.

b) that the impugned judgment of and order of acquittal passed by the learned Trial Court suffer from material irregularity and illegality and resulted in serious failure of justice and as such the impugned judgment and order of acquittal can not be sustained and should be set aside.

8. Heard the Ld.Lawyers appeared on behalf of the appellant, Repondnet Nos.2 & 3 and the Ld.P.P-in-Charge on behalf of the State/Respondent No.1.

9. It is contended by the Ld. Lawyer for the appellant that the prosecution, in order to prove it's case, did not examine the defacto-complainant and other vital witnesses. Even there is no reflection in the order sheets that Witness Warrants (i.e.W/W/A) were issued to the defacto-complainant and other witnesses after service of summons upon them. The prosecution has only examined the I.O. of the case.

10. According to the Ld.Lawyer for the appellant, non-examination of the defacto-complainant and other witnesses has resulted in serious failure of justice and as such Judgment and order of acquittal should be set aside.

11. Per Contra, Ld. P.P-in-Charge for the State has contended that the Learned Trial Court has rightly passed the impugned judgment and order of acquittal which does not warrant any interference.

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12. The Ld.Lawyer for the respondent Nos. 2 & 3 also agreed with the contention of the Ld.P.P-in-Charge in passing the impugned judgment and order of acquittal of the respondents.

13. Now the point of consideration is as to whether the impugned judgment and order of acquittal passed by the Learned Trial Court in c/w GR Case No. No.15 of 2022 arising out of Kurseong P.S. Case No.13 of 2022, dated. 13.02.2022 under section 143/323/423/506 of I.P.C., requires any interference or not.

14. In the instant case, the appellant, Kumudini Tewari is the defacto-complainant who lodged a complaint at Kurseong P.S. alleging that on 12.02.2022 at around 3:00 p.m. the respondent nos. 2&3 and the accused Sourav Saxena being armed with a spade damaged their property and on being protest, they attacked her daughter-in-law,Jahanvi Tewari and also threatened them with dire consequences. Previously the accused persons also attacked the defacto-complainant and her family members.

15. On completion of investigation, the I.O. of the case, submitted charge sheet only against the respondent Nos. 2 & 3 i.e. the accused persons namely Nisha Tamang and Nishal Tamang under Sections 143/323/427/506 of I.P.C.

16. At the stage of trial, both the accused persons were examined under Section 251 of Cr.P.C. and the substance of accusation under Sections 143/323/427/506 of I.P.C was read over and explained to

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them to which they pleaded not guilty and claimed to be tried and fixed the date for evidence.

17. It also appears from the TCR that the appellant/defacto-complainant, Kumudini Tewari has not been cited as witness in the list of witnesses in the Charge Sheet. During trial, the prosecution filed a petition under Section 311 of Cr.P.C. for re-calling the defacto-complainant/appellant to depose in the instant case. It appears from the Order No.04, dated 18.05.2023 that Ld.APP filed a petition under Section 311 of Cr.P.C praying for issuance of summon upon the appellant/defacto-complainant to examine her as witness as her evidence is crucial for a just decision of the case. The prayer under Section 311 of Cr.P.C was considered allowed. But the order sheets of the TCR do not reflect whether summon upon the defacto-complainant/appellant was either issued or served.

18. It transpires from the TCR vide Order No.6 dated 18.09.2023 that the Learned Trial Court was pleased to pass an order directing the I.O. to appear personally and explain as to why the principal accused whose name is reflected in the F.I.R, has not been sent/chargesheeted and the next date i.e. 06.12.2023 is fixed for appearance of I.O and evidence.

Order No.7, dated 06.12.2023 does not reflect whether summon upon any charge sheet witness was received or not. Copy of order No.6, Dated 18.09.2023 was not sent to the I.O. So, the Learned Trial Court was pleased to pass an order directing the D.A. to send

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the copy of order No.06, dated.18.09.2023, fixing the next date i.e. 02.04.2024 for appearance of the I.O. and evidence.

On the very next date i.e. on 02.04.2024, the I.O did not turn up before the Learned Trial Court. On that very date, the Learned Trial Court was pleased to pass the following order:

“Today is fixed for appearance of I.O and evidence.Both the suspects filed Hazira. I.O did not turn up., Therefore, invoking my power, I hereby do schedule this case for day to day trial in terms of the schedule below:--

03.06.2024 for evidence of CSW-1 ,2

04.06.2024 for Evidence of CSW-3,4

05.06.2024 for evidence of CSW-5 & 313.

Issue summons accordingly”

The aforesaid order of the Learned Trial Court does not reflect either fixing of date for evidence of the appellant/defacto-complainant or issuance of summon upon the defacto-complainant.

It is abundantly clear from the aforesaid order that no summon was issued in view of the order No.04,dated.18.05.2023.

19. It appears from the Order No.10, dated. 03.06.2024 and Order No.11,dated.04.06.2024 that no witnesses were present on the date dates.

Order Vide No.12 dated.05.06.2024 shows that CSW-5 i.e. I.O was present and he was examined as PW-1. As per schedule vide Order dated.02.04.2024 the evidence of the prosecution was closed

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and fixed the next date for examination of the accused persons under Section 313 of Cr.P.C.

There is no whisper in those orders as to whether summons upon the witnesses were received after service or not. There is also no whisper in those orders whether the Learned Trial Court has taken necessary steps to secure the attendance of either defacto-complainant or the material witnesses for their depositions in the instant case.

20. The order sheets of the TCR clearly show that the defacto-complainant as well as the material witnesses were not examined in the instant case and at the time of trial, no necessary steps were taken to secure the attendance of the material witnesses.

21. It is abundantly clear that the principle of natural justice and fair trial of both the sides have been violated by completely skipping the examination of the complainant and other vital witnesses of the instant case .

22. The primary object of criminal trial is to ensure fair trial. The fair trial includes fair and proper opportunities allowed by law to the prosecution to prove it's case as well as to the defence to prove the innocence. In the instant case, the complainant and the other material witnesses were not examined.

The primary object of Section 313 of Cr.P.C is to give the accused persons a fair opportunity to personally explain any incriminating evidence adduced against them. It ensures a fair trial by allowing the accused persons to state their side directly to the judge.

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Section 313 of Cr.P.C also casts a duty on the Court to put in an enquiry or trial, questions to the accused person for the purpose of enabling him/them to explain each material circumstances appearing in evidence against the accused persons. But in the instant case, neither defacto-complainant nor any material witnesses were examined. So, no question of incriminating evidence arises against the accused persons. The purpose of examination of the accused under Section 313 of Cr.P.C has been frustrated by not examining the complainant and the material witnesses which resulted in serious violation of natural justice.

23. The impugned judgment of acquittal is passed merely on the basis of the evidence of PW-1 i.e. I.O. of the case, S.I, Passang Dorjee Lama. The impugned judgment and order of acquittal passed by the Learned Trial Court suffer from material irregularity by not examining the defacto-complainant and the material witnesses which resulted in serious miscarriage of justice.

24. Now the question arises as to the appellant being the victim of the instant has the right to prefer appeal against the order of acquittal.

The provisions of Section 413 of BNSS, 2023, lays down that the victim shall have the right to prefer appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

25. Bare reading of Section 427(a) of BNSS, 2023 clearly shows that the Appellate Court in an appeal from order of acquittal, has the

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power to reverse such order and direct further inquiry be made or that the accused be re-tried or committed for trial according to law.

26. In view of the above, I am of the view that the impugned judgment and Order of acquittal dated.07.08.2024 passed by the Learned Judicial Magistrate, Kurseong, Darjeeling in c/w GR Case No. No.15 of 2022 arising out of Kurseong P.S. Case No.13 of 2022, dated. 13.02.2022 under section 143/323/423/506 of I.P.C., can not be sustained and accordingly set aside.

27. The case is remanded for retrial for a fresh decision on merits in accordance with law after proper appreciation of evidence already on record as well as the additional evidence of the defacto-complainant and other material witnesses which would be recorded in retrial.

In the results, Criminal Appeal succeeds.

Hence, it is,

ORDERED

that the **Criminal Appeal No. 04 of 2024** be and the same is allowed on contest.

The Judgment and Order of acquittal dated.07.08.2024 passed by the Learned Judicial Magistrate, Kurseong, Darjeeling in c/w GR Case No. No.15 of 2022 arising out of Kurseong P.S. Case No.13 of 2022, dated. 13.02.2022 under section 143/323/423/506 of I.P.C., is hereby set aside.

The case is remanded for retrial for a fresh decision on merits in accordance with law after proper appreciation of evidence already

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on record as well as the additional evidence of the defacto-complainant and other material witnesses which would be recorded in retrial with a direction to dispose of the case as expeditiously as possible. During retrial, in taking additional evidence, the Learned Trial Court will take necessary steps to secure the presence of the defacto-complainant and other material witnesses to depose in the instant case.

The respondents/accused persons nos. 2 & 3 are directed to appear before the Learned Trial Court on 16.07.2026 at 10.30 a.m positively to face the retrial of the case without waiting any summon/notice.

Let the copy of the Judgment along with the TCR be send to the Court of the Learned Judicial Magistrate,Kurseong for information.

Dic & Corr, by me,

.....Sd/-.....

Additional Sessions Judge,
Kurseong,Darjeeling.

.....Sd/-.....

Additional Sessions Judge,
Kurseong,Darjeeling.