

(2011) 06 BOM CK 0161

In the Bombay High Court

Case No : Criminal Appeal No. 137 of 2001, Criminal Application No's. 2552 and 2553 of 2011

Chandrakant Kashinath Somware and Shivraj Kashinath Somware

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360
Penal Code, 1860 (IPC) — Section 323, 34, 436
Probation of Offenders Act, 1958 — Section 3, 4

Citation : (2012) BomCR(Cri) 495

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : U.R. Marlapalle, for the Appellant; B.V. Wagh, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Shrihari P. Davare, J.—Heard learned Counsel for the parties.

2. Appellants herein faced the trial for the offence punishable u/s 323 r/w 34 of the Indian Penal Code, as also for the offence punishable u/s 436 r/w 34 of the Indian Penal Code, on the complaint lodged by the complainant, namely Smt. Muktabai w/o Manikrao Khausade, alleging that the Appellants herein and one Gajanan Baswant Soware (acquitted accused) in furtherance of their common intention voluntarily caused hurt to the complainant in the night of 28.5.1999, and in the same night, somewhere in the odd hours around 1.00 a.m. to 2.00 a.m. set her residential hut to fire and thereby committed mischief.

3. While dealing with the matter, the learned Trial Court divided the alleged occurrence of the incident in two parts and the first part allegedly was that in the night of 28.5.1999 the complainant Muktabai and her son Balaji and daughter Manisha were present in their hut when at about 9.00 p.m. the Appellants herein

and Gajanan Baswant Soware (acquitted accused) reached there and accused No. 1 Chandrakant and accused No. 2 Shivraj asked her as to why she tethered the hybrid jersey cow at the place which was to be ploughed. They also gave abuses to her and both of them assaulted her by kicks and fist blows. They also threatened her son Balaji that they would kill him. However, some neighbourers gathered out side her house and tried to intervene. Thereafter, she and her son Balaji gave information to Police Patil. Police Patil along with PW2 Kishan came with her to the hut and they pacified the accused persons and told them that on the next day the dispute over ownership of the place may be settled. Thereafter Appellants herein and acquitted accused went towards their another agricultural land situated on the way to the village where they had a flour mill. Accordingly, Police Patil and PW2 Kishan also returned to their respective houses.

4. Second part of the incident is that the complainant Muktabai was perturbed due to earlier incident, and therefore, she had no sound sleep. At about 2.00 a.m., she heard some sound from behind her hut, and hence, she came out of the hut and noticed that Appellant No. 1 Chandrakant was standing behind the hut and he was having a plastic canister in his hand and he threatened the complainant that he would set her house ablaze and soon thereafter he ignited the match stick and put it at the bottom of Kud (Thatched Wall) of the rear side of her hut. Hence, complainant raised hue and cry due the flames, and her neighbourers, namely Ishwar Adekar, Babu Kalyankar and Subhash Kalyankar reached there within short while. Accordingly, she narrated them that Appellant Chandrakant had ignited fire to her hut. Hence, some flames had damaged nearby hut of Ishwar Datram Adekar. The domestic articles, grains, thatched walls and cash amount of Rs. 12,000/kept in the hut were all gutted in the fire. In the next morning, she reached Ardhapur Police Station and gave her report. Investigation was carried out and all the three accused came to be chagesheeted for the offence under Sections 323, 436 r/w 34 of the Indian Penal Code.

5. Accordingly, charge was framed against all the Appellants and the acquitted accused and it was explained to them, they denied the charge and pleaded not guilty to the said charge and claimed to be tried. Accordingly, to substantiate the charges levelled against the Appellants and even the acquitted accused, the prosecution examined as many as 7 witnesses.

6. Considering the evidence adduced/produced by the prosecution and also considering the submissions advanced by the learned Counsel for the parties, the Trial Court believed the first part of the incident to the extent of Appellants herein, but disbelieved the second part of the incident, as well as disbelieved the charges levelled against the acquitted accused Gajanan Baswant Soware, and consequently, Appellant Nos. 1 and 2 herein were convicted for the offence punishable u/s 323 r/w 34 of the Indian Penal Code and they were sentenced to undergo S.I. for 3 months and to pay fine of Rs. 1,000/, in default to suffer S.I. for one month; whereas accused No. 3 Gajanan Baswant Soware was acquitted for the said charges and all the three accused were acquitted for the offence

punishable u/s 436 r/w 34 of the Indian Penal Code, by way of judgment and order, dated 26.2.2001, rendered by the learned Sessions Judge, Nanded in Sessions Case No. 165 of 1999. Being aggrieved and dissatisfied by the said judgment and order, the Appellants herein have preferred the present appeal challenging the conviction and sentence inflicted upon them and prayed for quashment thereof.

7. While believing the first part of the incident, learned Trial Court observed that so far as first part of the incident is concerned, version of PW1 Muktabai has been corroborated by her son PW5 Balaji, since his presence at the spot is natural and his evidence shows that PW1 Muktabai was assaulted by accused persons and juvenile accused, namely Manohar @ Manmath. He also corroborated the fact that Police Patil and PW2 Kishan brought about the amnesty. His testimony also discloses that accused were annoyed because the hybrid jersey cow was tethered in the open space. Learned Trial Court also observed that PW3 Baba has corroborated the spot panchanama Exh.20 and his testimony has not been diminished in the cross-examination. It is also observed by learned Trial Court that testimonies of PW4 Sadashiv and PW2 Kishan reveal that both of them visited the house of PW1 Muktabai in the night and requested the accused to stop the quarrel. Their evidence also reveals that Muktabai had visited the house of Police Patil in order to give information regarding the quarrel, which had started on account of place of tethering of her cow and the place used for keeping fire wood and dried plants. Their testimonies further disclose that they had urged the accused to go away and thereafter they returned to their locality. Their testimonies further reflect that the hut of PW1 Muktabai is in the outskirts of village locality and the land behind the hut was ploughed with the help of tractor. PW5 also admitted that cow was tethered and was standing by the side of their house when they reached there. The Trial Court further observed that evidence of PW1 Muktabai goes to prove that she was assaulted by accused Nos. 1 and 2 in the course of quarrel and there is no reason to dislodge her version. Moreover, her immediate conduct is also pertinent to note, since she went to the nearby village locality and urged the Police Patil to help her. Moreover, learned Trial Court further observed that deposition of PW2 Kishan reveals that he and Police Patil intervened and had removed the accused persons from the said place and PW2 Kishan is an independent witness, and there is no substantial reason for him to speak lie. The impugned judgment further reveals that although there are minor discrepancies, the substance and core of the evidence in respect of first part of the incident has remained unshattered, and consequently, Trial Court held Appellant No. 1 Chandrakant and Appellant No. 2 Shivraj guilty for the offence punishable under Sections 323 r/w 34 of the Indian Penal Code.

8. Having the comprehensive view of the matter and considering the evidence on record and also considering the observations made by the learned Trial Court while convicting Appellant Nos. 1 and 2 for the offence punishable u/s 323 of the Indian Penal Code and sentencing each of them to undergo S.I. for 3 months and

to pay fine of Rs. 1,000/, in default to suffer S.I. for one month more, there is no glaring defect and no interference therein is called for in the appellate jurisdiction, and therefore, the conviction and sentence imposed upon Appellant Nos. 1 and 2 deserve to be confirmed and maintained.

9. At this juncture, the learned Counsel for the Appellants preferred application under Sections 3 and 4 of Probation of Offenders Act along with Section 360 of the Code of Criminal Procedure and prayed that the applicants i.e. Appellant Nos. 1 and 2 herein be released after due admonition i.e. to grant benefit u/s 3 of the Probation of Offenders Act, and alternatively it is prayed that they be released on probation of good conduct i.e. to grant benefit u/s 4 of the Probation of Offenders Act.

10. Sum and substance of the contentions raised by the applicants/Appellants in the said applications is that the applicants have already paid the fine amount as well as they have undergone the imprisonment for about 10 days as well as the applicants submit that they have not been convicted for any offence under any law on 28.5.1999 or thereafter except present offence and the family of the applicants have earned reputation in the surrounding region and family is known as peace loving people. Moreover, the applicant Chandrakant submits that he has been appointed as Special Executive Officer by the Hon'ble Governor of Maharashtra and copy of appointment order dated 12.1.1999 is annexed at Exh."A" to the said application. In the said context, it is submitted that the said appointment has been given effect only after due scrutiny of the credentials of the concerned appointee, so also considering his past behaviour. It is also submitted by both the applicants that the alleged offence has taken place about 12 years back and considerable time has been elapsed and they have been granted bail in the present appeal and they have never resorted to misuse of the said liberty. In addition to that, the complainant has left the village before 11 years and both the families are living peacefully for 11 years in different villages. He further stated that if the applicants are sent to jail, not only they would suffer, but their families and their children would be worst affected persons, for the alleged offence, which happened on the spur of moment without any intention or motive. According to the applicants, they have not indulged in any criminal act either before the offence or even thereafter and the offence in question in the present matter is the first offence allegedly committed by them. Moreover, the applicants assert that they have never even indulged in petty quarrels and they have annexed the character certificates at Exh. 2 with the application, issued by the Sarpanch of the Grampanchayat of the village. Accordingly, applicants submit that they are ready and willing to furnish surety if directed and also assure that they would keep peace and be of good behaviour as well as they have got fix place of residence and agriculture land at village Kamatha (Bk.) Tq. and Dist. Nanded, and therefore, they urge that either they be released after due admonition or they be released on probation of good conduct.

11. In the said context, the learned Counsel for the Appellants/applicants has

relied upon judicial pronouncement in the case of Sitaram Paswan and Another Vs. State of Bihar, . Moreover, the applicants have also categorically stated in the afore said applications that they have got fix place of residence and agricultural land at Kamatha (Bk.), Tq. and Dist. Nanded,, at which they are likely to reside during the period of afore said bond.

12. Accordingly, it appears that the incident occurred on the spur of the moment and is traverse in nature. Moreover, there is no material on record to invoke that the Appellants have any previous conviction, and hence, there is no impediment in holding that the Appellants are the first offenders. The Appellants have been convicted for the offence punishable under Sections 323 r/w 34 of the Indian Penal Code for giving kick and fist blows to the complainant Muktabai. It is also contended that the said complainant Muktabai had left the village about 11 years back and the said complainant as well as the Appellants are residing peacefully for last 11 years in different villages. Moreover, it is also apparent that the applicants/Appellants were granted bail in the present appeal about 11 years back and there is no grievance of the Respondent that the Appellants misused the said liberty.

13. Considering the ratio laid down in the said judicial pronouncement and considering the contents of the said applications and also considering the very intention behind Section 360 of the Code of Criminal Procedure, as well as considering the facts that the applicants, who have been convicted for the offence punishable under Sections 323 r/w 34 of the Indian Penal Code are above 21 years of age and the said offence is punishable with fine to the extent of 1,000/and imprisonment to the extent of one year, and as contended by the applicants in the said applications they have not been convicted for any other offence earlier to the present offence or thereafter and having regard to the ages of the applicants, which is presently 41 years and 37 years respectively and their character and antecedents, as contended by them in the present applications, as well as considering the circumstances in which the offence was committed, as discussed herein above, I am of the view that the Appellants/applicants should be released on probation of good conduct instead of sentencing them at once to the punishment, and therefore, they deserve to be released on their entering into a bond with surety to appear and receive sentence when they are called upon during such period of one year, meanwhile undertaking to keep peace and be of good behaviour.

14. Having the comprehensive view of the matter, I am of the opinion that present applications deserve to be allowed in the interest of justice.

15. In the circumstances, present appeal is required to be allowed partly and the conviction inflicted upon Appellant Nos. 1 and 2 deserves to be maintained and confirmed. However, instead of sentencing the Appellants for the said offence, they deserve to be released on entering into a bond with surety to appear and receive sentence when called upon during such period of one year and in the mean time give an undertaking to keep the peace and be of good behaviour by

allowing the applications preferred by the applicants herein.

16. In the result, present appeal is allowed partly and the conviction inflicted upon Appellant Nos. 1 Chandrakant Kashinath Somware and Appellant No. 2 Shivraj Kashinath Somware for the offence punishable u/s 323 of the Indian Penal Code stands confirmed and maintained. However, instead of sentencing Appellant Nos. 1 and 2 to punishment, I direct that Appellant Nos. 1 and 2 be released on probation on their entering into a bond for Rs. 10,000/with one surety in the like amount by each of them, for one year, within the period of four weeks from today, before the Trial Court to appear and receive sentence when they are called upon during such period of one year, meanwhile undertaking to keep peace and good behaviour for the period of one year, by allowing the applications in that respect preferred by the applicants herein and present appeal and both the applications stand disposed of accordingly.