

(2017) 05 BOM CK 0153
In the Bombay High Court
Case No : 591 of 2003

Dadu S/o Keshav Waghmare

APPELLANT

Vs

The State of Maharashtra, & Ors.

RESPONDENT

Date of Decision : 09-05-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused

[Indian Penal Code, 1860](#), [Section 34](#), [Section 307](#), [Section 323](#)

Citation : (2017) 05 BOM CK 0153

Hon'ble Judges : S.S. Shinde

Bench : SINGLE BENCH

Advocate : Shailesh S. Chapalgaonkar, D.R. Kale

Judgement

1. Heard the learned A.P.P. appearing for the State and the learned counsel appearing for the original accused.

2. Criminal Appeal No. 591 of 2003 is filed by appellant/accused no.1, challenging the Judgment and Order of conviction dated 13th August, 2001 passed by the Sessions Judge, Kopargaon, in Sessions Case No. 10 of 2001, thereby convicting him for the offence punishable under Section 325 of the Indian Penal Code (for short "I.P.C."). Criminal Appeal No. 680 of 2003 is filed by the appellant/State seeking enhancement of sentence awarded to original accused no.1 in Sessions Case No. 10 of 2001 by the Sessions Judge, Kopargaon.

Criminal Appeal No. 683 of 2003 is filed by the State, challenging the Judgment and Order of conviction dated 13th August, 2001 passed by the Sessions Judge, Kopargaon, in Sessions Case No. 10 of 2001, thereby acquitting the original accused nos. 2 to 4 for the offences punishable under Sections 307 and 323 read with section 34 of the I.P.C.

3. The prosecution case, in brief, is as under : (A) Complainant (PW1) Dinkar is residing at Korhale along with his family members and is working as a peon in

Agricultural Department. Kusum is his wife, Santosh is his son, Ujwala, Kamal and Nirmala are the daughters of THE complainant. Nirmala is married and on 29th October, 2000 she had come to village Korhale for Diwali festival. The complainant owned and possessed the agricultural land at village Korhale. At the time of incident, there was pulses (moog math) standing in the land of the complainant. On the day of incident, the complainant returned from his duty at about 6 p.m., at that time his daughter Ujwala informed him that the cattle of accused Dadu Waghmare were grazing in the field of complainant, and when she asked Dadu about the same, he got annoyed and abused, threatened and assaulted her.

(B) It is the case of the prosecution that, the complainant thereafter went to the house of Dadu and asked about the said incident of assault. At that time, Dadu got annoyed and assaulted Nirmala by an axe on her head. When complainant tried to rescue Nirmala, accused Dadu assaulted him from back side on his head, and at that time accused Rakhma and son of Dadu assaulted the wife of complainant by stick on her head. Daughter Kusum was also assaulted by the accused on her head. Wife of accused Dadu also assaulted. All were injured and, therefore, they were taken to Pravara Hospital Loni by the son of complainant by Jeep.

(C) It is the case of the prosecution that, the Deputy Superintendent of Police, Shri Jadhav, on the day of incident was on patrolling duty along with other police staff and at Babhaleshwar Outpost, he received telephonic message from PSO Rahata that incident of assault took place at village Korhale and four injured were admitted in the hospital. Immediately, after receipt of said information, he rushed to Pravara Hospital, Loni. He found complainant and others were admitted in the hospital in injured condition. Nirmala was serious, therefore after giving first aid, she was shifted to Nashik for further treatment. In the hospital Deputy Superintendent of Police, Shri Jadhav recorded the statement of the complainant. On the basis of his statement, an offence bearing C.R. No.79 of 2000 was registered against the accused. Thereafter, the investigation was carried out.

(D) It is the case of the prosecution that, in morning, the Deputy Superintendent of Police went to village Korhale and prepared spot panchanama in presence two panchas. From the spot, he seized soil mixed with blood, one stone stained with blood and one human tooth. All these articles were seized under spot panchanama. On the same day, he recorded the statement of eye witnesses and on 2nd November, 2010 he arrested the accused Nos.1 to 3 under arrest panchanama. On 3rd November, 2000, he visited Pravara Hospital and recorded the statement of injured. At that time he also seized blood stained cloths of injured Dinkar, Kusum and Kamal in presence of panchas.

(E) It is the case of the prosecution that, accused Dadu while in Police custody was interrogated by the Police. At that time, he gave confession that he is ready to produce the stick and axe. Accordingly his confession was recorded in presence of panchas. Thereafter the accused led the Police and panchas to one

field and he produced the stick and axe, which he has concealed in the heap of Bajra Crops. There were blood stains on the said axe and stick produced by the accused. Both these articles were seized under panchanama in presence of panchas on the spot. On 4th November, 2000 the Investigating Officer arrested accused No.4. On 7th November, 2000, Investigating Officer sent Head Constable Shinde for recording the statement of injured Nirmala at Nashik. However, Head Constable Shinde reported that she is not in a position to give her statement and accordingly submitted his report. On 16th November, 2000 as the Investigating Officer Mr. Jadhav transferred, further investigation of the said crime was handed over to A.P.I. Pachpute.

(F) It is the case of the prosecution that, A.P.I. Pachpute, also recorded statements of witnesses. He sent the injured to doctor for taking their blood samples. Thereafter, he sent all the muddemal with blood samples to C.A., Aurangabad for its analysis. After completion of investigation, the chargesheet came to be filed in the Court of Judicial Magistrate First Class, Kopargaon.

(G) Since the offence punishable under section 307 of I.P.C. is exclusively triable by the Court of Sessions, the trial Judge committed the case to the Court of Sessions. Thereafter, the charge under sections 323 and 307 read with 34 of I.P.C. was framed and read over and explained to the accused and the accused pleaded not guilty and claimed to be tried. Their defence, as it appears from the statement recorded under section 313 of the Code of Criminal Procedure is that, on the date of incident it is the complainant and injured who assaulted the accused persons. They have also filed complaint to the Police Station and on the basis of their complaint, N.C. was registered against the complainant, his son and daughters. It is defence of the accused that the complainant and other witnesses sustained injuries in road accident.

4. The learned counsel appearing for the appellant in Criminal Appeal No. 591 of 2003 filed by original accused no.1 - Dadu submits that, all the witnesses, who were examined by the prosecution are interested witnesses. None of the independent witnesses have been examined by the prosecution. He invites my attention to the alleged eye witnesses and submits that, they were admitted in their crossexamination that, there is earlier litigation pending between the parties. He submits that, the evidence of Medical Officer or the panch witnesses does not support the prosecution case. He invites my attention to the evidence of Sanjay Vijaykumar Wekhande (PW12) and submits that, he has stated in his crossexamination that, the injury sustained by Nirmala Sanjay Ranshur (PW9) is also possible in motor accident. He submits that, when the evidence of the prosecution witnesses is not reliable, trustworthy and those witnesses are interested witnesses, in that case, the benefit of doubt is extended by the trial Court in favour of all other accused, and the same benefit of doubt should have been given in favour of accused no.1 - Dadu. It is submitted that, Nirmala (PW9) suffered the injuries during accident. The said suggestion was given during her crossexamination. He submits that, the accused has already undergone two

months imprisonment. He placed reliance on the exposition of law by the Supreme Court in the case of Shivaji S/o Guja Pawar V/s State of Maharashtra, 2011 All MR (Cri) 889 and submits that, in case, this Court is not inclined to acquit accused no.1 in that case, the impugned order may be modified holding that, two months imprisonment already undergone by the accused no.1 is sufficient. He further submits that, the benefit of the Probation of Offenders Act, 1958 may be extended in favour of the accused no.1. Therefore, relying upon the grounds taken in the Appeal Memo, defence taken by the appellant, he submits that, the Appeal may be allowed.

5. So far acquittal of other accused is concerned, he submits that, the trial Court has considered the evidence in its entirety and reached to the conclusion that, the evidence of prosecution witnesses against other coaccused is inconsistent, and therefore, the order of acquittal needs no interference.

6. On the other hand, the learned A.P.P. invites my attention to the evidence of the complainant and also medical evidence and submits that, Nirmala suffered grievous injuries and medical officer opined that, but for timely treatment Nirmala survived. He submits that, assault by accused no.1 was with an axe i.e. sharp and dangerous weapon, and therefore, the trial Court ought to have convicted accused no.1 for an offence punishable under Section 326 of the Indian Penal Code. He submits that, the evidence of the eye witnesses and also medical evidence clearly demonstrates the involvement of other coaccused, who are acquitted by the trial Court. Therefore, he submits that, the appeals filed by the State deserves to be allowed by enhancing the sentence of accused no.1 and convicting the other coaccused by setting aside the impugned judgment and order of acquittal.

7. I have given careful consideration to the submissions advanced by the learned A.P.P. appearing for the State and the counsel appearing for the original accused. With their able assistance, I have perused the entire evidence brought on record by the prosecution.

8. Dinkar Arjun Kolge (PW1) lodged the first information report. In his deposition before the Court, he stated that, he is working in soil Conservation Office as a peon at Rahata. He used to go to Rahata to attend his duty at 9 a.m. and used to return back to his village at about 6 p.m. He has five daughters and one son. At the time of incident, his daughters Ujwala and Kamal were unmarried and residing along with him. Nirmala is his elder daughter, who has given in marriage at Niphad taluka. Nirmala came to his house on the occasion of Diwali festival and on the date of incident she was at his house. Incident took place on 1st November, 2000 at about 6.30 p.m. He returned back from his duty. He knows accused. He is possessing the agricultural field. When he reached to home his daughter Ujawala informed him that, accused no.1 - Dadu grazed cattle in his field. The crops of Math and Moog were standing in the field. He went to his field. His wife Kusum, elder daughter Nirmala and Kamal were present there. He made enquiry with them about the incident of grazing cattle by accused no.1 in the

field. Thereafter, he told them to come along with him so as to return to his house. They proceeded towards his house. House of accused is situated on the way to his house. He made enquiries with accused no.1 Dadu and accused no.2 - Rakhama about grazing cattle in his field. Accused no.1 got annoyed and gave blow of axe on the head of Nirmala from sharp blade side, owing to that Nirmala felled down. He tried to intervene and caught Nirmala, at that time, accused no.1 Dadu gave blow of axe on his neck and head. He also fell down. Thereafter, accused nos.2, 3 and 4 caught hold his wife Kusum and daughter Kamal and bet them by stick and stone. The daughter Nirmala sustained bleeding injuries. Accused ran away from the spot. His son Santosh came there and taken them in Jeep to Pravara Hospital at Loni. They treated as indoor patients for about five to six days. He identified axe shown to him.

9. It is true that, in his cross-examination, he stated that, there is dispute in between accused no.2 - Rakhama and his brother Gopal and also between Dadu Waghmare and Gopal Bansode. He denied the suggestion that, he was aggressor and assaulted accused no.2, as a result, he sustained injury on his wrist.

10. Nirmala (PW9) identified the accused, who were present before the Court. She stated that, when her father, other sisters and mother were coming back to their house, near the house of accused no.2 on road accused no.2 was present and PW1 made enquiry from accused no.2 about grazing cattle in his field, at that time, accused no.3 - Alka caught and pulled her hairs and accused no.1 gave blow of handle of axe on her mouth. The blood was coming out from her mouth. Meantime, accused no.1 gave blow on the head. She became unconscious, after accused no.1 hit on her head by the blade of axe and felled down. She regained after six to seven days and she was admitted at Nashik hospital for 2 to 2 1/2 days. It is true that, she admitted in her cross-examination about the enmity between family of accused and family of his father. She denied suggestion that, she suffered injuries in an accident. There is also evidence of other eye witnesses. The evidence of PW1 and PW9 gets corroboration from the evidence of other witnesses. However, on careful perusal of the evidence of witnesses so far other accused nos.2 to 4 are concerned, their evidence is not consistent and suffers from material contradictions, omissions and exaggerations, and therefore, it appears that, the benefit of doubt is extended by the trial Court. Upon an independent scrutiny of the evidence of alleged eye witnesses, this Court is of the opinion that, the trial Court is justified in acquitting those accused.

11. Dr. Apur Ramprakash Tripathi (PW11), in her evidence before the Court stated that, Kamal Dinkar Kolge suffered following injuries :-

(1) C L W 5 x 1 x 1 right parietal region, grievous in nature, might have been caused by sharp and heavy object.

(2) abrasion and swelling 3 x 2, right wrist Xray taken, might have been caused by hard and blunt object. The injury was caused recently. The Xray report was

normal. I issued certificate it bars my signature, contents are correct, it is at Exh. 61.

. It is stated that, the said injuries were recent.

. PW11 also examined Nirmala Sanjay Ranchod and noticed the following injuries :-

(1) C L O 8 x 4 x 3, vertex slightly left side, grievous, by sharp and heavy object, must have been caused recently.

CT Scan of the head of the patient was taken which shows intraventricular bleeding in both the lateral ventricles 3rd ventricle and 4th ventricle, intra haemisphere.

(2) Linear depressed fracture of the occipital bone of left side and left parietal bone.

(3) soft tissues swelling, irregularity in the temporal region bilaterally, basal cistern are shifted and swollen and space are affected. Generalised cerebral oedema. I issued certificate it bars my signature, contents are correct, it is Exh. 63

. She expressed opinion that, injuries found on Nirmala were grievous and dangerous and caused by sharp and heavy weapon and the said injuries might have caused the death of Nirmala. Though suggestion was given to PW11 in cross-examination that, the prosecution witnesses have suffered injuries in an accident, the said suggestion was denied by PW11.

12. Sanjay Vijaykumar Wekhade was examined as PW12. In his evidence, he stated that, Nirmala was indoor patient from 02.11.2000 and 23.11.2000. He treated her. She was referred by the Government Civil Hospital, Nashik to him. He stated that, there was sutured wound over the left occipital and parietal area. She had swelling over lower lip and blood was oozing from her left ear. She had weakness on right side of the body. In his cross-examination, though he stated that, the injuries were also possible in the motor accident, but he reiterated in his cross-examination that, the injuries sustained by Nirmala is due to assault on her head. Therefore, the evidence of eye witnesses gets corroboration from the Medical evidence. Therefore, accused no.1 is rightly convicted by the trial Court. The submission of the learned A.P.P. that, he should have been convicted of an offence punishable under Section 326 of the I.P.C. since he used the dangerous and sharp weapon and therefore, his sentence be enhanced. Admittedly Nirmala survived. Even if, the submission of the learned A.P.P. is accepted, even in that case, maximum punishment provided under Section 326 of the I.P.C. is of 10 years. There is discretion to the trial Court to give sentence upto 10 years. In the present case, the trial Court has given three years punishment for an offence punishable under Section 325 of I.P.C. Section 325 of the I.P.C. provides punishment of maximum seven years for voluntary causing grievous hurt. Accordingly, trial Court has convicted accused no.1 and punished him by directing to undergo three years imprisonment. Since the trial Court has

discretion under Section 326 or 325 of I.P.C. to give sentence upto 10 years or 7 years respectively. Therefore, even if submission of the learned A.P.P. is accepted that accused no.1 used sharp weapon i.e. axe, in that case also the trial Court had discretion to give sentence upto 10 years. In the facts of this case, the trial Court has taken a correct view and ordered that, the accused shall undergo rigorous imprisonment for a period of three years.

13. The contention of the learned counsel appearing for the appellant that, the benefit of the Probation of Offenders Act be given to the accused no.1 is devoid of any substance. The trial Court has observed in para 31 of the judgment that, accused no.1 has been convicted previously, therefore, accused no.1 has criminal antecedent. Keeping in view the antecedent of accused no.1 and nature of offence and injuries sustained by PW1 and PW9, I am not inclined to consider the prayer of accused no.1 for extending him benefit of the Probation of Offenders Act. In view of the provisions of Section 4 of the Probation of Offenders Act, when there is earlier conviction, in that case, the benefit of said Act cannot be extended/given.

14. In the light of discussion hereinabove, this Court is of the opinion that, the conviction of appellant - Dadu Keshav Waghmare deserves to be confirmed and the appeal filed by the State for enhancement of sentence of accused no.1 and for reversal of acquittal of accused nos.2 to 4 deserves to be dismissed.

15. Accordingly, all the Appeals stand dismissed.

16. Bail bonds of accused no.1 - Dadu Keshav Waghmare stands cancelled. He shall surrender forthwith to undergo remaining sentence.

17. The Superintendent of Police, Ahmednagar shall ensure that, accused no.1 - Dadu Keshav Waghmare shall forthwith surrender to undergo remaining sentence and send the report to the Registry of this Court.

18. The office of the Public Prosecutor, High Court of Judicature of Bombay, Bench at Aurangabad to send the copy of this judgment and order forthwith to the office of the Superintendent of Police, Ahmednagar.