

(2018) 01 BOM CK 0120
In the Bombay High Court
Case No : 350 of 2002

Sheshrao Namdeo Atkare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-01-2018

Acts Referred:

[Indian Penal Code, 1860](#), [Section 34](#), [Section 307](#), [Section 326](#), [Section 326](#), [Section 427](#) - Acts done by several persons in furtherance of common intention - Attempt to murder - Voluntarily causing grievous hurt by dangerous weapons or means - Voluntarily causing grievous hurt by dangerous weapons or means - Mischief causing damage to the amount of fifty rupees

Citation : (2018) 01 BOM CK 0120

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : P.R. Agrawal, Ashish Kadukar

Final Decision : Allowed

Judgement

1. The appellants are aggrieved by the judgment and order dated 15.04.2002 passed by the 1st Ad-hoc Additional Sessions Judge, Nagpur in Sessions Trial 563/1998, by and under which, the appellants are convicted of offence punishable under section 326 of the Indian Penal Code ("IPC" for short) and are sentenced to suffer rigorous imprisonment for four years and to payment of fine of Rs.500/-. The appellants are acquitted of offences punishable under section 307 and 427 of IPC.

2. Heard Shri P.R. Agrawal, the learned Counsel for the

appellant and Shri Ashish Kadukar, the learned Additional Public Prosecutor for the respondent-State.

3. The learned counsel for the accused strenuously urged that the judgment and order impugned militates against the weight of evidence on record. The prosecution case is rendered doubtful in view of the infirmities in the evidence and the failure of the prosecution to explain the injuries which the accused concededly suffered, is the submission. In the alternate, it is urged that the offence made out would be under section 324 of IPC and not under section 326 of IPC since the injured witnesses did not suffer grievous hurt within the mean of section 320 of the IPC.

4. Per contra, the learned A.P.P. Shri Kadukar supports the judgment and order impugned. The evidence of the injured witnesses is implicitly reliable is the submission. The prosecution has explained the injuries suffered by the accused and in particular the injuries suffered by accused Ankush, is the submission. In view of the fracture of the nasal bone suffered by P.W3. Mangala, the cut injury to the tip of her nose and the disfiguration caused to the injured witness Ajabrao due to cut in the lobule of ear, the finding that the accused caused grievous hurt is unexceptionable, is the submission. I have closely scrutinized the evidence on record and the judgment and order impugned, and have given anxious consideration to the submissions of the learned counsels, and having done so, in my view although the prosecution has proved that the accused caused injuries to the injured witnesses, the offence proved would be under section 324 of IPC and not under section 326 of IPC as is held by the learned Sessions Judge.

5. The case of the prosecution, briefly stated, is thus:

P.W.2 Ajabrao owns a house at Naik Nagar. P.W.1

Naresh Tiwari and his brother P.W.4 Mahesh Tiwari occupy the

adjoining block as tenant. Accused 1 Sheshrao is the father of accused 2 Ankush and are neighbours of P.W.2 Ajabrao.

P.W.2 was repairing a bicycle in the tenanted block of

P.W.1 Naresh at 09:30 p.m. on 28.01.1998. P.W.4 Mahesh was present. Accused Sheshrao entered the house and dragged P.W.2 Ajabrao out by holding his baniyan (vest). Sheshrao asked Ajabrao as to why foul water from Ajabrao's house flows in front of his house. Sheshrao started assaulting Ajabrao by fist blows.

Accused 2 Ankush arrived at the scene of the incident armed with a dagger and started assaulting P.W.2 Ajabrao with the dagger, causing injuries on neck, face and right knee. P.W.1 Naresh sought to intervene and suffered injuries on face and head due to dagger blows inflicted by accused Ankush. P.W.4 Mahesh who also attempted to intervene was assaulted by Ankush with dagger and suffered injuries to fingers and back. P.W.11 whose name is also Ankush, the son of Ajabrao, called his mother P.W.3 Mangala.

She attempted to rescue her husband Ajabrao and while doing so suffered injury to her nose and upper lip. Ajabrao and Naresh went to Police Station Ajni, Nagpur while the other witnesses remained in the house after closing the door. Accused Ankush broke the door panes and lost panes of window causing damage.

Ajabrao and Naresh were referred to Medical College and Hospital, Nagpur. Naresh lodged report Exh.12 on the basis of which offence under sections 307, 326 and 427 read with section 34 of IPC were registered by P.W.12 PSI Waghmare.

6. The culmination of investigation led to filing of charge-sheet in the court of Additional Chief Judicial Magistrate, Nagpur who committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge under sections 307, 326 and 427 read with section 34 of IPC. The accused abjured

guilt and claimed to be tried. The defence of the accused was of false implication in view of dispute pertaining to flow of foul water from the house of Sheshrao to the house of accused. The defence is also that the accused sustained injuries due to physical assault, they attempted to lodge a police report which was not recorded.

7. The prosecution examined 12 witnesses. P.W.1 Naresh Tiwari, P.W.2 Ajabrao Kaikade, P.W.3 Mangala Kaikade and P.W.4 Mahesh Tiwari are injured witnesses. The corroboration is sought from medical evidence inter alia injury certificates Exh.41, 42, 43 and 27 and evidence of Medical Officer P.W.8 Dr. Avinash Gedam and P.W.10 Dr. Ramesh Pounikar who examined the injured.

8. The informant P.W.1 Naresh has deposed that he saw accused Sheshrao dragging P.W.2 Ajabrao out of the house. He has deposed that P.W.2 Ajabrao was assaulted by Sheshrao by fist and was thereafter assaulted with dagger by accused Ankush.

He corroborates in entirety the testimony of P.W.2 Ajabrao. P.W.3 Mahesh and P.W.4 Mangala have deposed on similar lines.

The evidence of four injured witnesses receive corroboration from the evidence of P.W.11 who is the son of P.W.2 Ajabrao.

Having closely scrutinized the ocular evidence on record, it is difficult to agree with the submission of the learned counsel Shri Agrawal that the finding recorded by the learned Sessions Judge that the four injured witnesses suffered injuries due to dagger assault launched by accused Ankush, is against the weight of evidence. Au contraire, the injured witnesses have withstood the test of cross-examination. The presence of the accused on the scene of incident is not seriously challenged and as a fact the defence of the accused is that they were assaulted by the prosecution witnesses. No compelling reason is demonstrated to disbelieve the injured witnesses whose testimony is

jurisprudentially considered to be on a higher pedestal than that of other witnesses.

9. The learned counsel for the accused submits that since the accused concededly suffered injuries, the failure of the prosecution to explain the injuries would indicate that the genesis of the incident is suppressed. The fact that the accused suffered injuries, is not in serious dispute. P.W.1 Naresh states that accused Ankush dashed against the iron pole while running away from the scene of assault. The injury to accused Ankush is admitted by P.W. 12 Waghmare. Concededly, both the accused were medically examined and the injury certificates were collected. The injury certificates are not produced on record. No attempt is made even by the defence to produce on record the injury certificates or to adduce any other evidence to show the nature and extent of injuries. A suggestion is given to P.W.12 Waghmare that the accused attempted to lodge report and the police did not record the same, which suggestion is denied. The defence has indeed brought on record a possibility that the accused may also have suffered some injuries, may be in retaliation. However, such possibility would not be sufficient to disbelieve the four injured prosecution witnesses whose testimonies are reliable, credit worthy and confidence inspiring.

10. Both the accused are convicted under section 306 of IPC. In so far as accused Sheshrao is concerned, no role is attributed to Sheshrao in the dagger assault. Section 34 of IPC is not invoked. The evidence on record, even otherwise, is not indicative of shared common intention. Accused Sheshrao could not have been convicted under section 326 of the Indian Penal Code. The accused Sheshrao assaulted P.W.2 Ajabrao with fist blows is the evidence on record. Accused Sheshrao is acquitted of

offence punishable under section 326 of IPC and is instead convicted for offence punishable under section 323 of IPC.

11. In so far as accused Ankush is concerned, the learned Sessions Judge has recorded a finding, and the finding is unexceptionable, that injuries suffered by P.W.2 Ajabrao were superficial and not on vital part of the body. The injury suffered by P.W.1 Naresh is again held to be not on vital part of the body. The discussion in paragraph 36 and 37 of the judgment would reveal that the injuries suffered by P.W.1 Naresh and P.W.2 Ajabrao are held to be simple and not grievous. In the teeth of medical evidence on record, the finding recorded by the learned Sessions Judge in paragraph 36 and 37 of the judgment impugned cannot be faulted with.

12. However, although the learned Sessions Judge held that the injury suffered by P.W.2 Ajabrao were superficial, in paragraph 37 of the judgment impugned the learned Sessions Judge noted that the lobule of the ear of P.W.2 Ajabrao was cut. The learned Sessions Judge further observes that disfiguration of head and face constitutes grievous hurt. The learned Sessions Judge also records a finding that since P.W.3 Mangala suffered nasal bone fracture and the tip of her nose was cut, the disfiguration constitutes grievous hurt within the meaning of section 320 of IPC. I am afraid, that the said finding of the learned Sessions Judge is unsustainable. There is no evidence whatsoever on record to prove that either P.W.2 Ajabrao or P.W.3 Mangala suffered permanent disfiguration of head or face. The injury suffered are concededly superficial. The oral evidence that P.W.3 Mangala suffered cut in the tip of nose is not sufficient to attract clause sixthly of section 320 of IPC which speaks of permanent disfiguration of head or face. Similarly, the evidence that P.W.2

Ajabrao suffered cut injury to the lobule of the ear would not prove permanent disfiguration. The fracture of the nasal bone, if proved, would attract clause seventhly of section 320 of IPC but then, in the absence of radiological evidence on record, it would be extremely unsafe to hold that the prosecution has proved that P.W.3 Mangala suffered fracture of nasal bone. In Pundlik s/o Mohan Kharkar and others Vs. The State of Maharashtra [Criminal Appeal 43/2006] decided on 22.11.2017. I have observed thus:

10. I have already noted that there cannot be a demur on the fact that injuries 5 and 6 and in the medico legal certificate Exh.61, is a grievous injury since the right hand thumb was required to be amputated. However, the other injuries which are treated by the learned Sessions Judge as grievous are

fractures of the left leg bones and the left arm bone. Concededly, the prosecution has not placed on record any radiological evidence to prove that the injured Vitthal suffered fracture. It is well settled that unless the fact of fracture can be proved by evidence, which is so glaring and obvious, that a finding can be recorded by the Court relying on the clinical examination of the patient, it would be extremely unsafe to hold that the prosecution has proved fracture in the absence of radiological evidence. The factual scenario, in which the Court may record a finding that the injured deem suffered fracture, even in the absence of radiological evidence, would be rare. Ordinarily, the prosecution must prove that the injured suffered grievous injury within the meaning of section 320 of the Indian Penal Code and if the injury is a fracture, the prosecution must ordinarily prove the fracture by adducing radiological evidence. Suffice it to refer to the following observations of this Court in the case of Faizan Ahmed Abdul Wahab Shah vs. The State of Maharashtra reported in 2014 ALL MR (Cri.) 4841.

20. It is seen that the injuries are not proved to be grievous hurt. There cannot be a presumption that the grievous hurt was caused without formal proof of the fact of fracture. The fact of existence of fracture cannot be diagnosed and certified in absence of proof of x-ray plates, unless the fact of fractured bones is perceivable barely of perception by naked eyes and sheerly by clinical examination, its being vivid and palpable. Therefore, proof of x-ray plates was necessary particularly, the appellant had made an attempt to retract the admission of medical certificate/discharge summary.

It is in this view of the matter, that although I am not inclined to disturb the finding of the learned Sessions Judge that the injured Vitthal was assaulted by the accused, I am not persuaded to hold that offence punishable under section 326 of IPC is established.

I would set aside the judgment and order impugned to that extent and instead

hold that the prosecution has succeeded in establishing offence punishable under section 324 of IPC against the accused.

13. The accused Ankush deserves to be acquitted of offence punishable under section 326 of IPC and instead is liable to be convicted for offence punishable under section 324 of IPC.

14. In so far as the sentence is concerned, the incident occurred 20 years ago. Accused Ankush was 18 to 19 years old as on the date of the incident, as is evident from the record inter alia the arrest panchnama Exh.47. The accused have already undergone more than two months detention as under trials and convicts. I do not see any propriety in sending the accused back to prison, at this stage. Hence, I pass the following order:

[i] Accused Sheshrao is acquitted of offence punishable under section 326 of IPC and is convicted of offence punishable under section 323 of IPC.

[ii] Accused Ankush is acquitted of offence punishable under section 326 of IPC and is convicted of offence punishable under section 324 of IPC.

15. Both the accused are sentenced to imprisonment already undergone.

16. The appeals are partly allowed in the above terms.