

(2013) 03 KAR CK 0097
In the Karnataka High Court
Case No : Criminal Appeal No. 3544/2008

Shivakumar, Raju and Raghu Nayak

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 21-03-2013

Acts Referred:

Citation : (2013) 03 KAR CK 0097

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Judgement

Jawad Rahim, J.—Convicted accused are in appeal against their conviction for the offences punishable under sections 323, 324, 307, 506(ii) r/w section 34 of IPC. Heard learned counsel Sri. Chaitanya Kumar Chandraki for the appellants and Sri. S.S. Aspalii, HCGP for State.

2. The material allegation on the basis of which the police arraigned tried and ultimately convicted is based on report submitted by PW 2 Durgappa seeking action against the appellants for homicidal attack on his son-in-law Hanamaesh examined in the case as PW 4. In the report which he lodged at the jurisdictional police station on 13.07.2007 he mentioned that while he was in his house PW 5 Ranganath informed him that the accused were assaulting his son-in-law Hanamesh and thus he rushed to the spot. PW 7 Muttu alias Shivalingappa alias Channamallappa was at the spot who helped him to shift the injured to the hospital at Hutti Gold Mine. He alleged that the appellant No. 1 Shivakumar used club and hit on the head of Hanamesh while accused No. 2 Raju and accused No. 3 Raghu Nayak assaulted him with stones causing injuries in a homicidal attempt. He cited other persons as witnesses to the incident. It was registered in Cr. No. 130/2007 and after investigation final report was filed before learned JMFC in CC No. 22/2008 which after committal was registered in S.C. No. 45/2008 on the file of Prl. District Judge, Raichur. The case was assigned to Fast Track Court who put the accused to trial. The accused pleaded not guilty to the charge and in the trial that ensued, the prosecution examined 12 witnesses and

relies on 08 documents and 03 material objects.

3. The accused/appellants put up the defence of denial of simplicitor and lead no evidence in defence.

4. Learned trial judge, relying on the testimony of PW 4 Hanamesh corroborated by the evidence of PW 7 Muttu alias Shivalingappa alias Channamallappa accepted the evidence tendered by PW 6 Dr. Ravindranath and PW 9 Dr. Vishwanath Reddy as establishing the injuries to be grievous in nature and likely to be homicidal. On this base, the learned trial judge held prosecution has succeeded to establish in charge not only for offence u/s 506(ii) of IPC but also for offence u/s 307 of IPC regarding attack on PW 4. He also found him guilty of causing injury to other witnesses and thus convicted them for the said offences. Assailing it they are in appeal.

5. The finding of the learned trial judge is assailed basically on the ground the evidence has not been examined and appreciated in the correct prospective. The insufficiently evidence through eye witnesses account does not inculcate them but the trial judge in his attempt to find them guilty has misconstrued it. The learned counsel would submits prosecution case as brought out in the chargesheet is that the appellant used stick and appellant nos. 2 and 3 used stones to kill PW 4 Hanamesh and caused injuries. He submits the injury certificates Ex. P-3 issued by Hutti Gold Mine hospital and Ex. P-4 issued by Raichur hospital do not establish that there was fracture of parietal bone or any bone of the skull to consider such injury as grievous in nature. He submits both medical officers have spoken about the injuries as grievous but have admitted to the fact he was not subjected to X-ray to prove that there was fracture.

6. He seeks citation to support this contention relying on judgment of this court in the case of State Vs. Sheenappa Gowda and Others, wherein the Division Bench of this Court taking note of the charge for the offences punishable under sections 326, 307 of IPC examined the medical evidence which was in the form of injury certificate recording there was injury to the phalanx and the Doctor PW 1 had merely suspected there was a fracture, without referring him for radiological examination for ascertainment as to whether there was a fracture of the bones of the phalanx. Therefore, the Division Bench opined mere suspicion that bone was fractured is not substitute for substantive evidence. If the prosecution wants conviction for offences under sections 326 and 307 of IPC it should establish it was grievous in nature. The opinion of the Division Bench undoubtedly is based on the facts in that case. This is not applicable to the case on hand.

7. In the instant case the case relates to attack on PW 4 by accused No. 1 with stick on head in homicidal attack. The prosecution case is, consequent to such injury, the victim has suffered (1) fracture of left parietal bone and underlying extra dural haematoma. (2) Intra cerebral haematoma in left parietal bone (3) Scalp haematoma over left parietal bone (4) Extra dural haematoma over left

parietal region and (5) contusion in left frontal and parietal region. The injuries noticed by the doctors are or, clinical examining and thereafter the victim was referred to major hospital for CT scan which has confirmed the fractures and haematoma as referred in both wound certificates. Accused did make an attempt to dilute this incriminating medical evidence eliciting from the doctors that X-ray report is not produced to confirm X-ray, on this basis it is urged that the injury cannot be described as grievous in nature. Even if it is accepted, that the prosecution has not produced X-ray film but there is direct evidence to prove fracture through CT scan made available which shows fracture and subdural hemorrhage. Whether such injury is grievous in nature or not could be tested referring to the definition of grievous hurt as defined in section 320 of IPC which is as follows;

320. Grievous hurt-The following kinds of hurt only are designated as "grievous".

First - Emasculation.

Secondly-Permanent privation of the sight of either eye.

Thirdly-Permanent privation of the hearing of either ear.

Fourthly-Privation of any member or joint.

Fifthly-Destruction or permanent impairing of the power of any member or joint.

Sixthly-Permanent disfiguration of the head or face.

Seventhly-Fracture or dislocation of a bone or tooth.

Eighthly-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

8. The injury, keeping in mind description of injuries recorded by the doctors in the wound certificates shows injury to left parietal bone and the head region. It was life threatening. Even if fracture was not proved by the prosecution it has proved cerebral haematoma within the skull and even haematoma at the site of injury showing of impact on the head caused by injury. Thus, the description of the injury in Ex. P-3 and P-4 comes within the definition of grievous hurt as defined in section 320 eighthly which read as under;

Eighthly-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

9. Therefore, even if fracture of parietal bone is not proved by prosecution, the injury in effect was life threatening and fortunately victim has escaped. It is therefore, a grievous hurt as defined u/s 320 of IPC and if he was not treated it would have resulted in imminent death. Thus the author of the injury has to answer the charge for the offence u/s 307 of IPC which in this case is the appellant No. 1. Therefore, the finding recorded by the trial judge convicting him

of offence u/s 307 of IPC cannot be faulted on any ground as canvassed. Being satisfied that the finding recorded is based on the evidence and it has translated into clinching proof, of the guilt, the conviction as recorded against him is affirmed.

10. However, I find the conviction for the offence punishable u/s 324 does not find material support as victim himself has not stated that the accused/appellant No. 1 has indulged in any act other than attacking him on other witnesses nor there is any proof that he caused injury to anyone else. Therefore, the conviction of 1st appellant for the offence u/s 324 of IPC being not on sufficient evidence is set aside.

11. So far as appellant nos. 2 and 3 are concerned, the trial court has convicted applying provisions of section 34 of IPC only on the basis that PW 7 eye witness has stated the appellant nos. 2 and 3 caused injuries to PW 4 initially and after he fell again they assaulted him with stone. The learned High Court Government Advocate laid emphasis on such testimony of PW 7, but it is only assumption without such incriminating aspect in the evidence.

12. As this is a first appeal, I have re-appreciated the evidence of PW 4 victim and also in particular the evidence of PW 7. PW 4 victim describes the overt-act of appellant No. 1 and with clarity and holds him to be the author of the injury to his head. But so far as appellant nos. 2 and 3 are concerned the only assertive statement is they threw stones. He does not say they cause injury with stones which are produced in this case marked as MO 2 and 3. Whereas, PW- 7 the eye witness goes one step further in alleging that appellant nos. 2 and 3 "assaulted" to PW 4 with MO 2 and 3. This undisputedly is exaggeration compared to the version of victim himself and also when compared to the medical evidence led before the court. In the circumstances when the alleged overt-acts attributed to appellant nos. 2 and 3 are not proved by prosecution, there applying section 34 of IPC to the overt-acts of appellant No. 1 in causing homicidal attempt on the person of PW 4, cannot be used to convict appellant nos. 2 and 3, in the result, conviction of appellant nos. 2 and 3 is not legal but appears to be only moral, therefore, needs interference and accordingly the conviction of appellant nos. 2 and 3 as recorded by the trial court for offence punishable u/s 506(ii), 324 and u/s 307 of the IPC is set aside. They are absolved of all the charges against them. As regards punishment is concerned the trial court has considered all attenuating circumstances and sentenced the appellant no. 1 to imprisonment for a period of three years. Though the law prescribes he could be visited with imprisonment upto life. The sentence imposed by the trial court is lenient and therefore, I find no reason to interfere to scale down it further. In the result, the appeal succeeds in part, and I pass the following order.

The appellants succeed in part. The conviction of appellant nos. 2 and 3 is set aside. The conviction of appellant No. 1 is affirmed as also order regarding sentence. Appellant No. 1 has to surrender before the trial court to undergo remaining period of the sentence, but he is entitled to set off period for detention

already undergone as per section 428 of Cr.P.C.

Fine amount of appellant nos. 2 and 3 is directed to refund to them.

The bail bonds of the appellant nos. 2 and 3 are cancelled.