

(2016) 03 GUJ CK 0066
In the Gujarat High Court
Case No : Criminal Appeal No. 818 of 2006

State of Gujarat

APPELLANT

Vs

Abbasbhai Rahimbhai Arodia and Others

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Arms Act, 1959 — Section 27, Section 27(1)

Bombay Police Act, 1951 — Section 135

Criminal Procedure Code, 1973 (CrPC) — Section 313, Section 378

Penal Code, 1860 (IPC) — Section 232, Section 307, Section 323, Section 324, Secti

Citation : (2016) 03 GUJ CK 0066

Hon'ble Judges : M.R. Shah and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : L.B. Dabhi, Addl. Public Prosecutor, for the Appellant; Ramnandan Singh, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

M.R. Shah, J.—1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 16.01.2006 passed by learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No. 31 of 2002, by which learned trial Court has acquitted original accused No. 1 for the offences punishable under sections 307, 323, 324 of the Indian Penal Code (IPC) and section 27(1) of the Indian Arms Act, however, convicted original accused No. 1 for the offence punishable under section 325 of the IPC and sentenced to undergo two years rigorous imprisonment with fine of rupees one thousand, in default to undergo further three months simple imprisonment; and has acquitted original accused No. 2 for the offences under sections 307, 34, 232, 324 of the IPC and section 135 of the Bombay Police Act and section 27(1) of the Indian Arms Act, the State has preferred the present appeal under section 378 of the Criminal Procedure Code.

2. At the outset it is required to be noted that as such the conviction of original accused No. 1 for the offence under section 325 of the IPC for having caused

injury by original accused No. 1 on eye witness Abdulrazak Noormohmad has not been challenged. Therefore, the short question that arises for consideration in the present appeal would be, whether the case would fall under section 307 of the IPC or section 324 or section 326 read with section 335 of the IPC ?

3. Brief facts of the case are that on the date of incident i.e. 29.10.2001, the complainant Noormohamad Nathubhai Arodia and his son were at their home at village Bhankhari and at that time at about 8.00 hours, the complainant was going to pour water to the cattle and his son Abdulrazak had gone for water in the open land behind the house. At that time, accused No. 1 Muman Abbasrahim was cutting wood with an axe and his wife Jenafben was also there and the woods of Abbasbhai were lying near the cattle of the complainant and therefore the complainant had asked accused No. 1 to put his woods at some distance. At that time, accused No. 1 and his wife Jenafben had become angry and started giving abuses and both have rushed to the complainant and started giving fist and kick blows to the complainant. At that time, son of the complainant Abdulrazak who had gone for water has seen the said incident and had rushed to save the complainant and had intervened. At that time, accused No. 1 Abbasbhai had given an axe blow on the head of complainant's son Abdulrazak and therefore, he had fallen down. At that time, complainant had started shouting and therefore complainant's son Mahamadbhai and Israil had also come and intervened. Accused No. 1 had also given axe blows to Mahamad and Israil and therefore they received injuries on their hands. Akbarbhai Noormohamad Nandolia and complainant's brother Jamalbhai had rushed and intervened and therefore both the accused had run away from the spot. According, accused had given a fatal blow on the head of Abdulrazak, son of complainant and accordingly committed an attempt to murder and the witnesses were given injuries by an axe and given fist and kick blows. Thus they had abetted with each other in committing the offences and accordingly the accused has also committed breach of the notification of Additional District Magistrate. The complainant had given a complaint to that effect to Danta Police Station and the said complaint was registered as I-C.R. No. 78/01.

4. The aforesaid complaint/FIR was investigated by the Investigating Officer Shri Bijesinh Umedsinh Songara, Police Sub Inspector of Danta Police Station. At this stage, it is required to be noted that the injured eye witness Abdulrazak Noormohmad was initially taken to the Civil Hospital, Palanpur and thereafter he was shifted to the Civil Hospital, Ahmedabad for further treatment. At this stage, it is also required to be noted that the said injured eye witness sustained injury by an axe on his skull and at the time when he was taken to the Civil Hospital, Ahmedabad, he was semi-conscious.

4.1 After registration of the aforesaid FIR, the Investigating Officer Bijesinh Umedsinh Songara started investigation. During the course of investigation, the Investigating Officer recorded statements of concerned witnesses. He also prepared panchnama of the place of incident. He also recovered the weapon/axe

used by original accused No. 1 in commission of the offence. After completion of the investigation and having found prima facie case against the accused, the Investigating Officer filed chargesheet in the Court of learned Judicial Magistrate, First Class (JMFC), Danta. As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Sessions Court of Banaskantha at Palanpur which was then transferred to the Court of learned Presiding Officer, 7th Fast Track Court, Palanpur which was numbered as Sessions Case No. 31 of 2002. Learned trial Court framed charges against both the accused for the offences under sections 307, 34, 323, 324, 504 of the IPC, section 135 of the Bombay Police Act and section 27(1) of the Indian Arms Act. Both the accused pleaded not guilty and, therefore, they came to be tried by learned trial Court for the aforesaid offences.

4.2 To prove the case against the accused, the prosecution examined the following witnesses:

4.3 Through the aforesaid witnesses, the prosecution also brought on record following documentary evidence:

5. After closing the pursis submitted by the prosecution, further statements of both the accused came to be recorded under section 313 of the Cr.P.C. in which both of them denied to have committed any offence.

5.1 After conclusion of the trial and on appreciation of the evidence brought on record, learned trial Court has acquitted original accused No. 2 from all the charges for which she was tried and has acquitted original accused No. 1 for the offence under sections 307, 323, 324 of the IPC and section 27(1) of the Arms Act, however, has convicted original accused No. 1 for the offence under section 325 of the IPC and sentenced him to undergo two years rigorous imprisonment with fine of rupees one thousand in default to undergo further three months simple imprisonment.

5.2 Feeling aggrieved and having dissatisfied with the impugned judgment and order passed by learned trial Court acquitting both the accused for the offences under sections 307, 323, 324 of the IPC, the State has preferred the present criminal appeal.

6. Shri Dabhi, learned APP appearing on behalf of the State, has vehemently submitted that in the facts and circumstances of the case, learned trial Court has materially erred in not convicting the original accused, more particularly original accused No. 1, for the offences under sections 307, 323, 324 of the IPC. It is submitted that learned trial Court has materially erred in convicting the original accused, more particularly original accused No. 1 for the offence under section 325 of the IPC only. It is vehemently submitted that considering the fact that original accused No. 1 gave blow by axe (a deadly weapon) on the vital part of the body of the injured eye witness Abdulrazak Noormohamad, i.e. on the head/skull, and that the injured eye witness Abdulrazak Noormohamad sustained 4? -1.5? inch borne deep cut and even he was required to be hospitalized for

approximately eleven days, learned trial Court ought to have convicted original accused No. 1 for the offence under section 307 of the IPC and ought not to have convicted original accused No. 1 for the offence under section 325 of the IPC only.

6.1 In support of his above submissions, Shri Dabhi, learned APP has heavily relied upon the decision of the Hon"ble Supreme Court in case of State of Madhya Pradesh v. Imrat & Anr. reported in , AIR 2008 SC 2967. In the alternative and without prejudice to his above submissions, Shri Dabhi, learned APP vehemently submitted that in any case the present case may fall under section 326 of the IPC. He has, therefore, requested to convict original accused No. 1 for the offence under section 326 of the IPC and impose the maximum punishment provided for the offence under section 326 of the IPC.

7. Present appeal is vehemently opposed by Shri Ramnandan Singh, learned advocate appearing for original accused. It is submitted that in the facts and circumstances of the case and considering the nature of injuries sustained by the victim, learned trial Court has not committed any error in acquitting the original accused for the offences under sections 307, 324 & 324 of the IPC and convicting original accused No. 1 for the offence under section 325 of the IPC imposing sentence of two years R.I.

7.1 It is further submitted by Shri Ramanand Singh, learned advocate appearing for original accused No. 1 that, as such there were no serious injuries sustained by the victim. It is submitted that only one blow by an axe was given by original accused No. 1 on the victim which itself is suggestive of the fact that there was no intention on the part of accused No. 1 to cause death. It is submitted that if the intention of accused No. 1 was to cause death, in that case he would have given multiple blows.

7.2 It is further submitted that even the cause for the incident is also required to be considered. It is submitted that even the place of incident is also required to be considered. It is submitted that even the place of incident was outside the houses of the accused as well as the victim and, therefore, when all of a sudden on the spur of moment and on sudden provocation the incident has taken place, the case would fall within section 335 of the IPC. It is submitted that, therefore, no error has been committed by learned trial Court in acquitting the original accused for the offences under sections 307, 324 & 324 of the IPC and convicting original accused No. 1 for the offence under section 325 of the IPC only.

8. Shri Ramnandan Singh, learned advocate for the original accused, has heavily relied upon the following decisions of the Hon"ble Supreme Court in support of his submission that the present case would fall under section 325 of the IPC and that the sentence imposed by learned trial Court is just and proper punishment:

?(1) Bhanwar Singh v. State of U.P. reported in 1987 (Supp) SCC 148.

(2) Sakharam v. State of Madhya Pradesh reported in (2015)?

9. In the alternative, it is submitted by Shri Ramnandan Singh, learned advocate

for the original accused that as initiation of prosecution was in the year 2001 and by now more than 15 years have passed, it is requested not to interfere with the impugned judgment and order passed by learned trial Court and the sentence imposed by learned trial Court. In support of his above submission, he has relied upon the following decisions of the Hon"ble Supreme Court:

?(I) Shanabhai Dhulabhai Parmar v. State of Gujarat reported in , (1977) 1 SCC 454

(II) Ram Singh v. State of Madhya Pradesh reported in , (2011) 14 SCC 563

(iii) State of Uttar Pradesh v. Siyaram and Another reported in , (2010) 15 SCC 94.?

10. Heard learned advocates for the respective parties at length. At the outset it required to be noted that original accused were charged with the offences under sections 307, 323, 324 of the IPC. By the impugned judgment and order, learned trial Court has acquitted both the accused for the offences under sections 307, 323, 324 of the IPC and section 27 of the Arms Act, however, has convicted original accused No. 1 for the offence under section 325 of the IPC and sentenced him to undergo two years R.I. Learned trial Court has also convicted accused No. 1 for the offence under section 135 of the Bombay Police Act. Learned trial Court has convicted original accused No. 1 under section 325 of the IPC for having caused injury by axe on the injured eye witness Abdulrazak Noormohmad Arodiya. At this stage it is required to be noted that original accused No. 1 has not challenged his conviction under section 325 of the IPC for having caused injury by axe on the injured eye witness Abdulrazak Noormohmad. Under the circumstances, the findings recorded by learned trial Court that original accused No. 1 caused injury on the injured eye witness by an axe has attained finality. Therefore, the short question which is posed for consideration of this Court is whether, in the facts and circumstances of the case, learned trial Court is justified in acquitting the original accused for the offences under sections 307, 323, 324 of the IPC and convicting original accused No. 1 for the offence under section 325 of the IPC only.

11. Now, so far as acquittal of original accused No. 2 is concerned, on re-appreciation of the entire evidence on record and even considering the case of prosecution and deposition of the injured eye witness and others, as such there is no overt act attributable to original accused No. 2. The main allegations are against original accused No. 1 only who gave blow by axe on the injured eye witness Abdulrazak Noormohmad. Even learned Public Prosecutor is not in a position to point out any infirmity in the impugned judgment and order passed by learned trial Court acquitting original accused No. 2. In the facts and circumstances of the case and considering the evidence on record, the impugned judgment and order passed by learned trial Court acquitting original accused No. 2 is hereby confirmed.

12. Now the next question which is posed for consideration of this Court is, what

offence original accused No. 1 has committed. As observed hereinabove, the findings recorded by learned trial Court that original accused No. 1 gave blow by axe on the injured eye witness Abdulrazak Noormohmad has attained finality and the same has not been challenged by original accused No. 1 and he has accepted his conviction.

13. From the above deposition of the injured eye witness as well as the doctors ? Medical Officers of Civil Hospital, Palanpur as well as Civil Hospital, Ahmedabad, it appears that original accused No. 1 gave blow by axe on the injured eye witness Abdulrazak Noormohmad on the vital part of his body, i.e. head/skull. It is also required to be noted that initially the injured eye witness was taken to Civil Hospital, Palanpur and as it was found that his condition was serious, he was taken to Civil Hospital, Ahmedabad. At the time when he was taken to Civil Hospital, Ahmedabad, he was semi-conscious. He remained in hospital as an indoor patient for about 20 to 25 days. That injured eye witness Abdulrazak Noormohmad sustained fracture on the skull and the incise wound was 4? - 1.5? bone deep and he also sustained injury on hand and fingers. The Medical Officer who treated the injured eye witness has specifically stated that the injuries were serious. Considering the aforesaid facts and circumstances, learned trial Court has materially erred in convicting the original accused under section 325 of the IPC only. Learned advocate appearing for the original accused has submitted that, as no serious injuries were sustained by the injured eye witness and as the incident had taken place on sudden provocation, the case would fall under section 335 of the IPC. However, nothing is on record to show that there was any provocation by the injured eye witness. In the facts and circumstances, the case would not fall under section 335 of the IPC and, therefore, section 325 of the IPC shall not be attracted. Considering section 325 of the IPC and considering the fact that original accused No. 1 caused injury on the injured eye witness by a deadly weapon/axe, which is likely to cause death, and that the injured eye witness sustained grievous hurt causing fracture, we are of the opinion that the case would fall under section 326 of the IPC.

14. The submission on behalf of the accused that the injuries sustained by the injured eye witness were not serious and there was no intention or knowledge on the part of the accused that such injury may cause death is concerned, the decision of the Hon''ble Supreme Court in case of State of Madhya Pradesh v. Imrat & Anr. reported in , AIR 2008 SC 2967 is required to be considered. In the said decision, the Hon''ble Supreme Court has observed that it is sufficient to convict under section 307 of the IPC if there is present and intent coupled with some overt act in execution thereof. It is further observed that it is not essential that bodily injury capable of causing death should have been inflicted In para 10 to 15, the Hon''ble Supreme Court has observed and held as under:

?10. To justify a conviction under this Section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a

finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The Section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

11. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The Section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the Section. Therefore, an accused charged under Section 307, IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt.

12. This position was highlighted in *State of Maharashtra v. Balram Bama Patil and Ors.* (, 1983 (2) SCC 28); *Girija Shanker v. State of Uttar Pradesh* (, 2004 (3) SCC 793); *R. Parkash v. State of Karnataka* (, JT 2004 (2) SC 348) and *State of M.P. v. Saleem @ Chamaru and Anr.* (, 2005 (5) SCC 554).

13. In *Sarju Prasad v. State of Bihar* (, AIR 1965 SC 843) it was observed in para 6 that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself sufficient to take the act out of the purview of Section 307.

14. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307, IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury. The basic differences between Sections 333 and 325, IPC are that Section 325 gets attracted where grievous hurt is caused whereas Section 333 gets attracted if such hurt is caused to a public servant.

15. Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may

extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years. The maximum punishment provided for Section 333 is imprisonment of either description for a term which may extend to 10 years with a liability to pay fine.?

15. It is required to be noted that in the present case original accused No. 1 gave blow by axe (a deadly weapon) on the vital part of the body, i.e. head/skull. Thereupon, the injured eye witness immediately became unconscious and his condition was also serious. As observed hereinabove, he was taken to Civil Hospital, Palanpur and thereafter he was shifted to Civil Hospital, Ahmedabad where for a number of days he remained as an indoor patient. Merely because the injured survived and he had not sustained any permanent disability, the same cannot be a ground to impose lesser punishment. The injured survived because of his good luck in spite of the injury on his head/skull.

16. Insofar as the reliance placed on the decisions of the Hon"ble Supreme Court are concerned, on considering the aforesaid decisions and applying the same to the facts of the case on hand, we are of the opinion that none of those decisions shall be of any help to the accused in the present case. As observed hereinabove, the case would fall under section 326 of the IPC and not under section 325 thereof for which the accused has been convicted. Similarly, on the ground that more than 15 years have passed the impugned judgment and order may not be interfered, the same cannot be accepted.

17. In view of the above and for the reasons stated above, the impugned judgment and order passed by learned trial Court convicting original accused No. 1 for the offence under section 325 of the IPC cannot be sustained and, while maintaining the impugned judgment and order passed by learned trial Court acquitting the original accused for the offences under sections 307, 323, 324 of the IPC, original accused No. 1 is convicted for the offence under section 326 of the IPC and is sentenced to undergo five years rigorous imprisonment and fine of rupees one thousand, in default to undergo further three months simple imprisonment. The impugned judgment and order passed by learned trial Court convicting accused No. 1 for the offence under section 135 of the Bombay Police Act is hereby confirmed as even otherwise the same is not challenged by original accused No. 1.

18. Original accused No. 1 be taken into custody forthwith to undergo the remaining sentence. It goes without saying that whatever sentence original accused No. 1 did undergo shall be given set off in accordance with law.

19. Present appeal is partly allowed to the aforesaid extent. Registry to send the Record & Proceedings to the trial Court forthwith.