

Criminal Revision Application No.295 Of 2000.

- Versus.**

Appearance =>

Mr. Devidas Shelke, Advocate for the Applicants.

Mr. V.H. Dighe, Additional Public Prosecutor for the State of Maharashtra.

CORAM : V.M. DESHPANDE, J.

DATE : 19th JANUARY, 2015.

J U D G M E N T :-

The present applicants alongwith one Sanjay Dhansingh Prasad were charged by the learned Assistant Sessions Judge, Aurangabad in Sessions Case No.50 Of 1997 that, on 8th December, 1996 at Kokanwadi near Kali Mosque, Aurangabad, they in furtherance of their common intention, assaulted Sayyad Rafiuddin by means of knife, with an intention to commit his murder and, thereby, they have committed an offence punishable under Section 307 read with 34 of

the Indian Penal Code. They were also charged for the offence punishable under Section 323 read with 34 of the Indian Penal Code for voluntarily causing hurt to Sayyad Isakuddin.

[2] During the trial in order to bring home their guilt, the prosecution has examined in all nine witnesses. The learned Assistant Sessions Judge, Aurangabad on 24th December, 1997 convicted all of them for the offence punishable under Section 307 read with 34 of the Indian Penal Code and directed that they should suffer rigorous imprisonment for three years and to pay fine of Rs.500/- and, in default, to suffer further rigorous imprisonment for six months. They were also found guilty for committing an offence punishable under Section under Section 323 read with 34 of the Indian Penal Code however, no separate sentence was awarded to them.

[3] Feeling aggrieved by such conviction, they preferred Criminal Appeal No.115/1997 in the court of the Sessions at Aurangabad. The learned Additional Sessions Judge, Aurangabad on 21st October, 2000 partly allowed the said Appeal. The conviction for the offence punishable under Section 307 read with 34 of the Indian Penal Code was set aside and instead, they were convicted for the offence punishable under Section 326 read with 34 of the Indian Penal Code and directed to suffer one year's rigorous imprisonment and to pay fine of Rs.500/- by each of them and, in default, to suffer further rigorous imprisonment for six months.

The present Criminal Revision Application is filed to question the correctness of the aforesaid judgments and orders of conviction.

[4] On 13th November, 2000 present Criminal Revision Application was admitted by this court and applicants were released on bail.

[5] I have heard Mr. Devidas Shelke, learned counsel for the applicants and Mr. V.H. Dighe, learned Additional Public Prosecutor for the State of Maharashtra. With their able assistance, I have gone through the Record & Proceedings.

The question is, whether the applicants could be convicted for the offence punishable under Section 326 read with 34 of the Indian Penal Code.

[6] Section 326 of the Indian Penal Code reads as under :-

Voluntarily causing grievous hurt by dangerous weapons or means- Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

What is grievous hurt is defined in Section 320 of the Indian Penal Code. Section 320 of the Indian Penal Code reads as under :-

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 powers of any member or joint.

Sixthly. - Permanent dis-figuration 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.

[7] Injured in this case is Sayyad Rafiuddin. He was medically examined by Dr. Dinesh Misrilal Pagariya (PW No.8). Dr. Dinesh on 8th December, 1996 was attached to M.C.H., Ghati, Aurangabad and he was working as Chief Medical Officer. On examination, he noticed following injuries on his person :-

Incised wound, size 1" x 1 c.m. X 4 c.m. on right side abdomen.

The medical certificate of the injured is at Exhibit No. 34.

[8] From the evidence of Dr. Dinesh, it is clear that injury certificate Exhibit No. 34 was not supplied by him to the Investigating Officer. Perusal of Exhibit No.34, would reveals that injured was examined on 8th December, 1996 however Exhibit No.34 was issued on 3rd December, 1997. PW No.8 Dr. Dinesh in his examination-in-chief itself has stated as under :-

"I have accordingly issued medical certificate which is prepared on the basis of MLC register which is brought by me today in the court. The certificate bears my signature and it is in my handwriting and contents are correct. It is at Exhibit No.34."

Thus, Exhibit No.34 – injury certificate was prepared on the basis of MLC register. It appears that date of issuance of said certificate is 3rd December, 1997 though injured was examined on 8th December, 1996. In that view of the matter, primary evidence will be the MLC register. MLC register or its extract are not filed on record. Thus, the primary evidence is not before the court. Further, since the injury certificate Exhibit No.34 is prepared on the basis of MLC register, it must be available. In that view of the matter, best possible and primary evidence is withheld by the prosecution.

[9] In the light of above, following is the most damaging admissions given by PW No.8 - Dr. Dinesh while he was in the witness-box :-

"It is true that, I have not mentioned in MLC register that the injury was grievous."

In the light of the above admission, it is crystal clear that the prosecution has utterly failed to prove that injury suffered by the the injured was grievous one.

[10] Further PW No.8 Dr. Dinesh has stated in his evidence that edges of injury were sharp on both the sides. However, Article 4 - knife which was before the court and which according to the prosecution is the weapon used in the commission of offence, having only one sharp edge and said fact is also admitted by Dr. Dinesh. Article 4 - knife is alleged to have been recovered at the instance of present applicant No.2 Sanjay Amrao.

[11] PW No.9 – A.P.I. Sandu Raoji Dabhade is the Investigating Officer. According to him, during the police custody remand of accused, accused Sanjay Amrao has made disclosure statement under Section 27 of the Indian Evidence Act. In presence of panch - PW No.3 - Babakhan Yusufkhan. Investigating Officer PW No.9 recovered knife from the shrubs of beshram behind the public latrine of Kranti Nagar. Exhibit No. 17 is the recovery panchnama. From the evidence of PW No.3 – Babakhan, it is clear that the place from where knife was recovered is accessible to anybody. It would be useful to refer the following portion from the evidence of PW No.3 – Babakhan :-

“There is public latrine constructed by the Municipal corporation near Beshram trees. It is true that near Beshram trees people go for answering natures call”.

Therefore, it is absolutely clear that the place from where the knife was recovered was not in exclusive domain and control or

within the special knowledge of the person at whose instance the knife was recovered. On the contrary, public at large was having access to the said place. In that view of the matter, it is difficult to believe such recovery.

[12] Further the Investigating Officer did not seize the clothes of other accused. Only one shirt of accused – Sanjay and applicant No.1 – Raju was seized, however the Investigating Officer admitted in his evidence that said shirt was not referred to Chemical Analyzer. Sending of shirt to the Chemical Analyzer and if the same was stained with the blood, it would have been corroborative piece of evidence for the prosecution case against the applicants.

[13] First Information Report is dated 8th December, 1996. From the evidence of PW No.9 Investigating Officer API Sandu Dabhade for three days accused were in police custody remand in another Crime and on 13th December, 1996 they were arrested. All these creates doubt about the disclosure statement.

[14] All above aspects were not at all considered by the learned lower appellate court while reaching to the conclusion that the accused have committed offence punishable under Section 326 of the Indian Penal Code. Once from the available material, it is clear that the injury itself is not grievous one and recovery at the behest of accused is not free from suspicion, in my considered view, the applicants were entitle for benefit of doubt. Therefore, in my view, this is a fit case to set aside the Judgment and Order of conviction passed by the court below. Hence, I pass the following order :-

ORDER

- (i) Criminal Revision Application is allowed.
- (ii) The Judgment and Order dated 21st October, 2000 passed by the learned Additional Sessions Judge, Aurangabad in Criminal Appeal No.115/1997 convicting the applicants – accused for the offence punishable under Section 326 read with 34 of the Indian Penal Code is quashed and set aside.
- (iii) Their bail bonds shall stand cancelled.
- (iv) Fine amount, if any, paid by the applicants be refunded to them.

(V.M. DESHPANDE, J.)