

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 45 OF 2013

Anand Kale,
Age : 50 years,
R/o H.No.62, Kadtari Sonal,
Sattari Goa.

... Appellant
(Original Accused)

V e r s u s

The State of Goa,
through Sr. P.I.,
At the instance of Valpoi
Police Station, Valpoi Goa,
Dist. North Goa.

... Respondent

Mr. Prasheen Lotlikar, Advocate for the appellant.

Mr. S. R. Rivonkar, Public Prosecutor for the respondent.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 06.02.2015

JUDGMENT PRONOUNCED ON : 26.02.2015

J U D G M E N T :

The present appeal is directed against the judgment/order passed by the learned Additional Sessions Judge, F.T.C., North Goa, Panaji in Sessions Case No. 44/2011 dated 31.07.2013 by which the accused no.1 is convicted for the offence punishable under Section 326 of Indian Penal

Code and sentenced to undergo simple imprisonment for a period of one month and to pay a fine of Rs.10,000/- or in default to undergo simple imprisonment for four months. Hence, the present appeal by the accused no.1.

2. The brief facts of the case may be summarised as follows :

On 20.02.2009 at around 3.00 p.m. five buffaloes of the appellant/accused entered into the farm of the complainant Nandini and started grazing. Hence, her husband Dattatray and son Dineshwar caught the buffaloes and tied them to their rubber tree. The incident was reported to the village panchayat and the members of the village panchayat assured to look into the matter.

3. At about 4.30 p.m the appellant/accused and his wife i.e. accused no. 2 came to the farm house when the complainant was cleaning the cashew plantation, at that time Dattatray informed the appellant and his wife that the matter has been reported to the panchayat on which the appellant started abusing Dattatray. It is further alleged that the accused no.2 threw chili powder into the eyes of Dineshwar

and accused no.1 assaulted Dattatray with the help of koita and thereby the accused persons with their common intention assaulted Dattatray with intention to commit his murder.

4. The matter was reported to the police by the complainant Nandini on the basis of which Crime No. 12/2009 was registered against the appellant and his wife initially for the offence punishable under Sections 504, 324, 326 read with 34 of Indian Penal Code. Thereafter, the accused persons were arrested and after completion of the investigation the charge-sheet was submitted against the accused persons in the Court of Judicial Magistrate First Class, Valpoi. Subsequently, after framing the charge under Sections 324, 326 read with 34 of Indian Penal Code and recording of evidence, the charge came to be altered and Section 307 of Indian Penal Code was added against the accused persons. Thereafter, the case was committed to the Court of Sessions. The charges were framed against the appellant/accused and his wife which they pleaded not guilty and claimed to be tried.

5. To establish the case of the prosecution, the prosecution has examined in all 14 witnesses. After hearing both the sides, the learned Additional Sessions Judge, Panaji,

convicted the appellant/accused for the offence punishable under Section 326 of the Indian Penal Code as referred to above.

6. In order to prove the guilt of the accused, the prosecution has examined the following witnesses.

PW1 - Dr. Shubhangi Bandekar to prove the injuries on the person of PW7 Dattatray and PW9 Dineshwar.

PW2 - Dr. Poonam Gaonkar to prove the injuries on the person of PW7 Dattatray and to prove the hurt certificate at Exhibit 20.

PW3 - Prakash Gawas, pancha witness to prove the recovery of weapon at the instance of the appellant/accused.

PW4 - Maria Lucia Caldeira to prove the sample of chilli.

PW5- Nandini Jog - complainant, wife of PW7 Dattatray Jog.

PW6 - Dr. Rohit Chodankar to prove the nature of the injuries sustained to PW7 Dattatray

PW7 - Dattatray Jog, injured witness.

PW8 - Ashok Chari, Sarpanch of the village to prove the previous incident of damages to the crops of the complainant.

PW9- Dineshwar Jog, a witness and injured in the incident.

PW10- Satyawati Savordekar, a worker on daily wages on the farm of the complainant to prove the fact that the cattle of the accused persons were tied.

PW11 - Vithoba Thanekar, witness who has not

supported the case of the prosecution.

PW12- Sameer Naik, eye witness to the incident.

PW13 – Anandi Naik, maid servant who has not supported the case of the prosecution.

PW14 Chandrakant Hazare – Investigating Officer to prove the contents of the complaint at Exhibit 27, panchanama of scene of offence at Exhibit 45, recovery of weapon at the instance of the accused no.1 and its attachment at Exhibit 22. Attachment of clothes of the accused no.1 vide panchanama at Exhibit 46. To prove the panchanama of the attachment of the clothes of Dattatray vide Exhibit 47. To prove the panchanama of the attachment of the clothes of accused no.2 vide Exhibit 48 and to prove the CA/CFSL report at Exhibit 50.

7. I have heard Mr. P. Lotlikar, learned counsel appearing for the appellant/accused and Mr. Rivonkar, learned Public Prosecutor appearing for the respondent at length. With the help of both the learned counsel appearing for the parties, I have gone through the entire evidence on record. Considering the facts and circumstances of the case and material on record, the following point arises for my determination.

POINT FOR DETERMINATION

Whether the prosecution has proved
that accused no.1 has committed
offence punishable under Section 326
of the Indian Penal Code ?

8. While referring the evidence on record, Mr. Lotlikar, learned counsel appearing for the appellant/accused has argued that the prosecution has failed to establish two incidents i.e. incident of throwing chilli powder and tooth bite by the accused no.1 to Dineshwar PW9 because there is no evidence on record to establish this fact. Looking to the reasons recorded by the learned Trial Court, it appears that the above referred two incidents have not been established as correctly submitted by Mr. Lotlikar. The learned Trial Court has also held that the aforesaid two incidents are not established.

9. Mr. Lotlikar, learned counsel further argued that partial evidence of the witness cannot be believed because some of the facts deposed by the witnesses found to be incorrect. Therefore, no reliance can be placed upon the testimony of such witnesses. Secondly, Mr. Lotlikar, learned counsel has argued that the accused persons have right of their private defence and they have properly exercised their right of private defence to protect themselves from the assault by PW7 Dattatray. Mr. Lotlikar, learned counsel has argued that no charge for the offence punishable under Section 326 of Indian Penal Code has been framed against the accused

persons. Initially the charge was framed for the offence punishable under Section 324 of Indian Penal Code. Therefore, the conviction cannot be inflicted upon the accused for the severe offence than the charge framed.

10. As against this, Mr. Rivonkar, learned Public Prosecutor appearing for the respondent has argued that the learned Trial Court has subsequently framed the charge against the accused persons for the offence punishable under Section 307 read with 34 of Indian Penal Code and the offence punishable under Section 326 of Indian Penal Code is offence of lesser punishment. Therefore, it is not necessary to frame an independent charge for the offence punishable under Section 326 of the Indian Penal Code and the learned Trial Court has rightly convicted the accused for the offence punishable under Section 326 of the Indian Penal Code. With regard to the evidence on record, Mr. Rivonkar, learned Public Prosecutor has argued that there is direct as well as circumstantial evidence on record. According to Mr. Rivonkar, there are four witnesses, amongst them two are the injured in the incident itself i.e. PW7 Dattatray and PW9 Dineshwar, besides the injured PW5 Nandini and PW12 Sameer are the eye witnesses to the incident. The evidence is found to be

reliable and supported with medical evidence adduced by way of examining PW1, PW2 and PW6. Mr. Rivonkar, further argued that the recovery of the weapon at the instance of the accused no.1 has been established through the evidence of PW3 Prakash and Investigating Officer PW14. The previous incident of damage to the crops of the complainant was established by examining PW10 Satyawati.

11. Mr. Rivonkar further argued that when the buffaloes of the accused entered into the field of the complainant, immediately PW7 Dattatray has reported the matter to the sarpanch and according to Mr. Rivonkar this is quite natural conduct of the witness. So according to Mr. Rivonkar, there is direct evidence of the eye witnesses corroborated by the medical evidence coupled with recovery of weapon at the instance of the accused no.1.

12. Mr. Lotlikar, learned counsel appearing for the appellant/accused further argued that the recovery of the weapon allegedly used by the accused while committing offence has not been proved in consonance with the provisions of Section 27 of the Evidence Act. Mr. Lotlikar, learned counsel further pointed out that the recovery of the

alleged weapon at the instance of the accused is from the place accessible and open to all. Therefore, the possibility of plantation of the weapon at the place from where it was recovered cannot be ruled out. Keeping in mind the arguments advanced by both the parties, now it is necessary to scrutinize entire evidence on record.

13. In order to establish the offence levelled against the accused, it appears that the prosecution has mainly relied upon the direct evidence of PW5 Nandini, PW7 Dattatray, PW9 Dineshwar and PW12 Sameer. Looking to the oral evidence of PW5 Nandini, it appears that on 20.02.2009 at about 3.00 p.m. five buffaloes of the accused entered into her farm and started grazing. Her husband Dattatray and son Dineshwar caught hold of the buffaloes and tied them to the rubber tree and thereafter the incident was reported to the village panchayat.

14. At about 4.30 p.m. both the accused came to the farm to take their buffaloes. At that time, PW7 Dattatray told them that the incident is reported to the panchayat then the accused no.1 told him that he has nothing to do with the panchayat and started abusing. He was carrying koita in his

hand and assaulted Dattatray on his left palm in between thumb and index finger due to which Dattatray sustained injuries to his index finger. The accused no.1 also assaulted on his left shoulder and left side of forehead and also on the left wrist due to which he sustained bleeding injuries. When PW9 Dineshwar came to rescue him at that time the accused no.1 gave tooth bite to the right hand of her son Dineshwar and accused no.2 threw chilli powder in the eyes of Dineshwar.

15. Looking to the oral evidence of the complainant, the incident occurred at the farm of the complainant which is just adjacent to her house. This complainant has given details account of the fact and its events. PW7 Dattatray deposed at Exhibit 32. He has also given details of the incident and more specifically he has deposed that the accused no.1 entered the farm armed with koita. He abused him and accused no.2 threw chilli powder in his eyes and accused no.1 hit him with koita on the left side of his forehead. Since he bent down, the handle of koita hit on his forehead on the left side and the sharp edge of the koita hit on his left shoulder due to which, he received injuries to his left forearm, one injury to his left small finger, one injury to his left index finger and one injury

to his knuckles. He further deposed that his son was behind him who caught hold the accused no.1 tightly. The accused no.1 gave tooth bite to his son to his right arm and accused no.2 threw chilli powder in his eyes. His wife came to the spot. She was cleaning the cashew nuts at the relevant time. One person by name Sameer Naik, (PW12) also came on the spot who had come to check the horoscope. This witness has also more or less narrated the same story as has been deposed by PW5 Nandini.

16. Next witness PW9 Dineshwar stated to be injured in the same incident has deposed at Exhibit 34. More specifically he has deposed that he along with his father went to the cowshed which is at a distance of about 200 metres away from their house. When they reached near the cowshed they saw both the accused removing bamboos and trying to enter their property. His father informed them that he has already given complaint and that they should not enter into their property. But both of them did not listen and forcibly entered their property. The accused no.1 hit his father with koita on the left side of his forehead. Since he bent down, the koita hit on his forehead on the left side and on the left shoulder. This witness was behind the accused no.1 so he

caught hold him and at that time accused no.1 gave tooth bite to his right arm.

17. PW12 Sameer Naik has deposed that on 20.02.2009 he went to the cowshed of PW7 and saw PW7 was being assaulted with koita and one lady was throwing something towards him. He was shocked to see the incident. PW7 tried to save himself from the assault with raising his hand and in that attempt his hand got injured and he sustained bleeding injuries to his palm/fingers. This is the sum and substance of the witness who is stated to be an eye witness. Looking to the evidence of the above four witnesses, overall it appears that the oral evidence of PW5, PW9 and PW12 supports the evidence of PW7. It is in the form of corroboration to the evidence of PW7. No doubt, there are some minor contradictions and omissions in the evidence of the aforesaid four witnesses but I do not think that they will go to the root of the matter so as to disbelieve the entire evidence of the above four witnesses. The evidence of the above four witnesses assumes much importance on the background that the defence of the accused is that he has right of private defence to protect his person and property. Obviously, the accused persons have admitted their presence

at the spot. This is one of the close circumstances. In the light of the defence taken by the accused, the oral evidence of the above four witnesses required to be scanned. As already referred the evidence of the above four witnesses is in the form of corroboration to the evidence of each other.

18. Mr. Lotlikar, learned counsel has relied upon the observations in the case reported in **1989(2) GLT 11** in the case of **Shri Agnelo Fernandes V/s State** and by relying upon the observations in the above cited authority has submitted that since the PW7 and PW9 were trying to assault the accused no.1, he has exercised his right of private defence as to his person and property. I do not agree with the submission of Mr. Lotlikar simply because the accused no.1 is claiming his right of private defence against the person without arm and therefore, it was not available to him.

19. I have gone through the cross examination of the above four witnesses except some minor contradictions and omissions, nothing is brought on record to disbelieve the entire version of these witnesses. Apart from the oral evidence of the above four witnesses, there is medical evidence on record given by PW1 Dr. Shubhangi Bandekar,

PW2 Dr. Poonam Gaonkar and PW6 Dr. Rohit Chodankar. Looking to the evidence of PW1 Dr. Shubhangi Bandekar, it appears that she was attached to CHC, Valpoi and on 20.02.2009 she examined Dattatray Jog at about 5.00 p.m. with history of assault and she noticed the following injuries.

- (1) On left hand 2nd finger there was a cut with vascular bleeding and vascular deficit.
- (2) On the same left hand there was a CLW near little finger about 2 x 3 cms.
- (3) On the left forearm there was a CLW about 4 x 2 cms.

This witness has also proved the hurt certificate. Thereafter, this witness was referred to G.M.C. where PW2 Dr. Poonam Gaonkar examined this witness and noted the following injuries.

- (1) laceration 5 x 2 x 1 cm on the left hand,
- (2) near total amputation of left index finger,
- (3) laceration 4 x 1 x 1 cm on left forearm,
- (4) abrasion 1 x 1 cm on left shoulder.

All the injuries were caused by sharp object within six hours of duration and grievous in nature. Thus, from the

evidence of above two expert witnesses, the injuries sustained to the injured PW7 Dattatray have been established. It is material to note that after the incident, immediately, this witness was examined by PW1 at about 5.00 p.m. and again he was examined by PW2 at 6.48 p.m. PW6 Dr. Rohit Chodankar also medically examined this witness and found total amputation of the left index finger at the level of proximal phalynx with extensor tender injury with distal neuro vascular deficit and the patient was operated for the same. So the evidence of the above three witnesses is consistent with the nature of injuries and its location which exactly supports the oral evidence of PW7 Dattatray. So there is corroboration of evidence of PW7 and other three witnesses.

20. Mr. P. Lotlikar, learned counsel appearing for the appellant/accused has argued that there is no evidence to show that the accused no.1 gave tooth bite to PW9 Dineshwar so also there is no evidence that chilli/masala powder threw in the eyes of Dattatray and Dineshwar. It is true that the sample of chilli/masala was sent for chemical analysis to PW4 Maria Lucia Caldeira and this witness has stated that the sample was received in a sealed envelope from P.I. Valpoi Police Station containing 17.850 grams. It was mixture of

lumps of dry cattle dung, dry leaves, bits of dry stem and dry brownish particulate matter. In the opinion of PW4 Maria no chilli or masala was detected in the sample. By referring to the above evidence of PW4, Mr. Lotlikar, learned counsel appearing for the appellant/accused argued that the theory of throwing chilli powder in the eyes of PW7 and PW9 goes away. Therefore, according to Mr. Lotlikar the entire evidence of the above two witnesses is liable to be thrown away. I do not agree with the submission of Mr. Lotlikar because in the next breath this witness has explained the possibility and deposed in the following words :

“ If the sample was in pure form without any mixture of matter as above, the presence of chilly or masala powder could have been detected “.

Admittedly, the sample in the present matter was mixture of some cow dung, dry leaves, dry stem etc. Obviously, it is not pure sample of chilli or masala. In that context, the sample might have not detected the contents of the chilli or masala. That possibility also cannot be ruled out in view of the admission by this witness. The learned Trial Court has not accepted the version of throwing chilli powder

because of non-detection of chilli or masala powder in sample sent to C.A.

21. If some part of the evidence of witness is found to be short in order to establish the guilt, does not mean that the remaining part of the evidence is false or unreliable. If some part of the evidence of the witness is remained uncorroborated by the other evidence, it does not necessarily falsifies the other evidence of the same witness on record.

22. Since the accused persons have admitted their presence at the spot at the relevant time, therefore, this is one of the close circumstances connecting the accused persons with the crime. However, there was no sufficient evidence against the accused no.2. Hence, she was acquitted. But the evidence available on record is sufficient to bring home the guilt of the accused no.1 for the offence punishable under Section 326 of the Indian Penal Code.

23. According to the prosecution, there was recovery of the weapon at the instance of the accused no.1 and such recovery is proved by the prosecution by examining PW3 Prakash Gawas. This pancha witness is examined by the

prosecution at Exhibit 21. However, it appears that he has not supported the case of the prosecution. Therefore, this witness was declared hostile. But during the cross examination, the learned Public Prosecutor appearing in the Trial Court has successfully brought on record the certain facts in relation to the recovery of weapon at the instance of the accused no.1. During the cross examination, this witness has admitted that the accused no.1 said in Konkani that he will show the place of his residence where he had kept the koita. Further, he has deposed in the cross examination by the learned Public Prosecutor as under :

" It is true that accordingly we both panchas along with the police and accused no.1 left the police station in the police jeep to go to Sonal Kadtari. It is true that we left the police station around 12.05 in the noon. It is true that the earlier part of panchanama commenced at 11.50 a.m. I do not remember the jeep no., but it was a sumo and it was driven by a police driver. It is true that HC Hazare was sitting on the left side of the driver, one

PC sat behind the driver and to his left, the accused no.1 was sitting. It is true that the jeep proceeded as per the direction given by the accused no.1. It is true that on reaching Sonal Kadtari main road, the accused no.1 showed direction towards the right side via katcha road leading to his house. It is true that after a distance of around 200 metres. The accused no.1 asked to stop the jeep and we all got down from the jeep. It is true that the accused no.1 showed us his house which was having compound wall made up of wooden poles and bamboos. It is true that we all entered the courtyard of the accused no.1. It is true that the accused no.1 stated in Konkani that he has kept the koita in the window of the verandah. It is true that the accused no.1 showed us the window on the left side of the main door. It is true that there was one more room on the left hand side of the

entrance. It is true that the said house was having roof of mangalore tiles. It is true that as pointed out by the accused at the window we noticed one koita with wooden handle and blade of iron metal.”

24. Looking to the above admission given by the witness, it appears that this pancha witness has admitted the entire theory of the prosecution in his cross examination. So the prosecution has successfully brought on record that the accused had produced koita from his house.

25. By referring certain admissions, Mr. Lotlikar has argued that the place from where the weapon was recovered is an open place accessible to all. Therefore, the recovery of the weapon cannot be said to be in consonance with the provisions of Section 27 of the Evidence Act. It is seen from the record that the koita was recovered at the instance of accused no.1 which was kept in a window. Further, it is seen from the record that the house of the accused no.1 is surrounded by compound of wooden poles and bamboo. Looking to the situation, it appears that it is not easily accessible place to anybody. Therefore, it cannot be said that

it was possible for anybody to enter in the premises where the house of the accused no.1 is situated. Mr. Lotlikar, further argued that the pancha witness has admitted in the cross examination that he has not seen the blood on the koita. Therefore, this is one of the circumstances to show that the accused no.1 has not used this weapon to assault PW7. So according to Mr. Lotlikar, basically the prosecution has failed to establish the weapon used in the crime and that too by the accused no.1. In this behalf, it is material to note that C.A./CFSL report is at Exhibit 50 dated 30.10.2009 which shows that Exhibit B i.e. blood mixed mud with leave, Exhibit C- koita, D(1) Shirt and D(2) pant and human blood was detected on all the above articles. The blood group was not detected as its test was inconclusive.

26. Non detection of the blood group assumes significance in case where totally based upon circumstantial evidence. When there is direct evidence on record relating to the incident of assault and when there is other evidence on record in the form of corroboration i.e. medical evidence, no importance can be given to the non detection of the blood group on the aforesaid articles. Mr. Lotlikar, argued that no charge for the offence punishable under Section 326 of the

Indian Penal Code was framed against the accused and initially the accused was charged for the offence punishable under Section 324 of Indian Penal Code. Therefore, the offence punishable under Section 326 of the Indian Penal Code cannot be treated as lesser offence. Therefore, the learned Trial Court has committed error in convicting the accused for the offence punishable under Section 326 of the Indian Penal Code but from the record it is seen that the charge for the offence punishable under Section 307 of Indian Penal Code read with 34 of the Indian Penal Code was framed which is a serious offence then Section 326 of the Indian Penal Code. Looking to the facts and circumstances of the case and evidence on record, it appears that the learned Trial Court on proper scrutiny and appreciation of evidence on record has rightly convicted the accused. The point for determination is therefore answered accordingly. Therefore, the appeal is liable to be dismissed and accordingly it is dismissed.

K. L. WADANE, J

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27. After the pronouncement of judgment, Mr. Lotlikar, learned counsel appearing for the appellant/accused submitted that the appellant is present in the Court. As such, the appellant/accused is directed to surrender before the learned Trial Court within two weeks.

K. L. WADANE, J

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