

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.608 of 1996

SAMPAT DAGDU SANDHBOUR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.V.Kotwal a/w. Mr.Ashish Sawant, Amicus curiae, for the Appellant.

Mr.Deepak Thakre, APP for the Respondent – State.

WITH

CRIMINAL APPEAL NO.613 OF 1996

NATHURAM VITHAL MULIK)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.V.Marwadi, Advocate for the Appellant.

Mr.Deepak Thakre, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 31st AUGUST 2015.

ORAL JUDGMENT :

1 Both these appeals can be conveniently disposed of by this common order as both the appellants were convicted in the same trial that was held by the Sessions Judge for Raigad, at Alibaug. The appellants were prosecuted on the allegations of their having committed an offence punishable under Section 302 of the Indian Penal Code (IPC) read with Section 34 of the IPC. The learned Sessions Judge, after holding a trial, concluded that the offence allegedly committed by the appellants was not the one punishable under Section 302 of the IPC but the offence of causing simple hurt, punishable under Section 323 of the IPC. As such, he convicted them of the offence punishable under Section 323 of the IPC read with Section 34 of the IPC, and sentenced each of them to suffer Rigorous Imprisonment for 6 months and to pay a fine of Rs.1,000/-, with a default sentence of one month. Being aggrieved by their conviction and the sentence imposed by the learned Sessions Judge, the appellants have approached this court challenging the impugned judgment and order, by filing two separate appeals.

2 The appellant in Criminal Appeal No.613 of 1996 is the original accused no.1 and the appellant in Criminal Appeal No.608 of 1996 is the original accused no.2. For the sake of convenience and clarity, they shall be referred to as such in the body of this judgment.

3 The facts of the case, as put forth before the trial court, ma, in brief, be stated thus :

 The accused no.1 was a driver and the accused no.2 was a conductor, working in the State Transport Corporation. On 14th December 1993, they were on duty in S.T.Bus No.MH 12 4461, which was going to Mumbai from Rajguru Nagar. Shabbir Yakub Patel, the deceased, was driving a truck bearing no.MTL 6373 belonging to on Babubhai Mujawar. The truck was loaded with salt bags and was proceeding towards Karad from Bombay by Bombay-Pune Highway. At Village Kalote, a collision between the said truck that was being driven by Shabbir Patel and the S.T.Bus which was being driven by the accused no.1, took place. It appears that after the collision, some quarrel took place. The

accused no.1 as well as accused no.2 as also some passengers got down from the bus and assaulted Shabbir Patel, the driver of the said truck. The incident of the accident was reported by the accused no.2 to the police. The truck driver Shabbir Patel also lodged a report with the police, which was treated as a non-cognizable case. Shabbir Patel was sent to Primary Health Centre and the doctor who examined him found injuries on the body of Shabbir Patel. The doctor specifically noted that Shabbir Patel had complained of pain in abdomen and on the back.

4 After the incident, the truck proceeded further and Shabbir Patel went to his native place. It appears that after going home, he complained to his wife Banubai (PW11) and son Javed Patel (PW10) of pain and told them that he had been beaten by the driver and conductor of the S.T.Bus. Shabbir Patel had swollen eyes. He was taken to Dr.Jahangir Sayyad (PW2) on 17th December 1993, where also he complained about the assault on the Highway. Dr.Jahangir Sayyad noticed the injuries on the person of Shabbir Patel and as he had swollen eyes, asked him to

see an eye specialist. On the next day, Shabbir Patel was taken to Dr.Vijay Karambelkar (PW1), an eye specialist.

5 Shabbir Patel died on 23rd December 1993 and was buried. After the report of his death was received by Khalapur Police Station, where a case in respect of a non-cognizable offence had been registered on the report of Shabbir Patel, PSI. Shaikh, (PW12) attached to that police station, obtained an order from the Magistrate to investigate into the matter as contemplated under Section 155(2) of the Code of Criminal Procedure (Code) and carried out further investigation. The dead body of Shabbir Patel was exhumed from the graveyard, under a panchnama, after obtaining necessary orders from the Executive Magistrate. Postmortem examination on the dead body was carried out. The death was opined to have been caused by 'circulatory collapse due to rupture of liver.' Since this death was believed to be homicidal, after investigation, a charge-sheet alleging commission of an offence punishable under Section 302 of the IPC read with Section 34 thereof came to be filed by the police. There were others, who

had also, supposedly, assaulted the deceased, but they could not be traced by the investigating agency. As such, only the present appellants were prosecuted, as aforesaid.

6 During the pendency of the appeal, the original accused no.2 (appellant in Criminal Appeal No.608 of 1996) passed away. However, as the sentence imposed by the learned Sessions Judge upon him was also of fine, the appeal would not abate. In the circumstances, Mr.S.V.Kotwal was requested to act as an *amicus curiae* and assist the court in the disposal of the appeal.

7 I have heard Mr.S.V.Marwadi, the learned counsel for the appellant in Criminal Appeal No.613 of 1996. I have heard the learned *amicus curiae*. I have heard Mr.Deepak Thakre, the learned APP for the State. I have gone through the entire evidence adduced during the trial. I have also carefully considered the impugned judgment.

8 That, the accused no.1 was the driver of the S.T.bus and the accused no.2 was the conductor of the said bus, is not in

dispute at all. That, on 14th December 1993, there was a collision between the said S.T.Bus and a truck, which was being driven by the deceased Shabbir Patel, is also not in dispute.

9 Mr.Marwadi, the learned counsel for the accused no.1 submitted that there was no evidence to hold any of the accused guilty. He submitted that the statements of the witnesses were recorded belatedly. He submitted that the deceased, when examined by a doctor on 14th December 1993, had not given the history of assault by any of the appellants. He also submitted that two witnesses, who were the passengers in the said S.T.Bus had not supported the case of the prosecution. The substance of his contention is that the evidence adduced by the prosecution during the trial was not reliable and hence the accused persons should have been acquitted.

10 A reading of the impugned judgment shows that the learned Sessions Judge specifically came to the conclusion that Shabbir Patel had died a homicidal death. He also held that it was

satisfactorily proved that the accused nos.1 and 2 had assaulted the deceased on 14th December 1993, and that, the deceased had died on 23th December 1993, as a result of the said assault. In spite of this, the learned Judge held the accused persons guilty only of an offence punishable under Section 323 of the IPC on the reasoning that the prosecution could not prove that the assault by accused nos.1 and 2 was with the intention of causing death or with the knowledge that death would thereby be caused.

11 Much could be said about the consistency of the reasoning in the impugned judgment, but since the State has not sought to challenge the impugned judgment on the ground that it acquitted the accused persons of a graver and more serious offence, I do not wish to go into that aspect of the matter. Since the accused persons have been convicted only of an offence punishable under Section 323 of the IPC, the point that would need consideration is quite limited. It is, whether the accused persons or any of them, in furtherance of the common intention of both of them, or otherwise, assaulted the deceased Shabbir Patel.

12 The prosecution examined a number of witnesses, who could depose about the assault. Suresh Titkar (PW5) and Naresh Bhandurge (PW6), who were travelling by the said bus, were examined to establish this aspect, but they did not support the prosecution case and were declared as hostile. Their evidence is of no assistance, either to the prosecution, or to the accused persons. Salim Mulla (PW9), who was working as a cleaner on the truck of which the deceased was the driver, is an important witness in the matter. His presence on the truck at the time of the incident is not in dispute at all. In his evidence, he has mentioned about the collision between the S.T.Bus and the truck, and has stated that thereafter, the truck was stopped and he came out of the truck. While he was checking the damage to the truck, the S.T.Bus driver i.e. the accused no.1, came towards the truck, caught the shirt of the truck driver and dragged him out of the driver cabin. The truck driver fell down and then stood up. The S.T.Bus driver i.e. accused no.1 gave one slap to the truck driver on his face, due to which the truck driver again fell down. By this time, the conductor of the S.T.Bus and two passengers also came

there and started assaulting the truck driver by giving fists blows and kicks. By then, one police van came there from Bombay side. The police took the truck driver to Khalapur Police Station. Salim Mulla had met the deceased at Vaghire after two days. At that time, he noticed that the eyes of Shabbir Patel were red and there was swelling on his face. Shabbir Patel was also complaining of pain in the stomach. Since most of the happenings viz., of the collision between the said two vehicles, that the matter being reported to the police after the collision, and a non-cognizable case having been registered at the instance of Shabbir Patel on 14th December 1993 itself are not in dispute, the only question that needs determination is whether the testimony of Salim Mulla (PW9) is such, as cannot be accepted, believed and acted upon.

13 I am unable to hold so. On the contrary, testimony of Salim Mulla is corroborated by the very fact that deceased Shabbir Patel was sent to a doctor by the police on 14th December 1993 itself. This certificate was produced before the court and tendered in evidence (Exhibit 16). This certificate, which has been issued by

Medical Officer attached to Primary Health Centre, Khalapur, shows that deceased Shabbir Patel was brought to Primary Health Centre by a Police Constable attached to Khalapur Police Station and was examined by the Medical Officer at about 5.30 p.m. on 14th December 1993. Shabbir Patel was found to have consumed alcohol but was not under the influence of alcohol. The history that was given by him was of an assault by a hard and blunt object and the record of his examination by the Medical Officer shows that he complained of pain in head region, that there was swelling and some redness in both the eyes and swelling near the right eye was more. Since the learned Sessions Judge has not held the accused persons guilty of having caused the death of Shabbir Patel, it is not necessary to go into the nature of injuries or consider the other medical evidence, which is available in the testimony of Dr.Vijay Karambelkar (PW1), Dr.Jahangir Sayyad (PW2) and Dr.Ranjit Mahanti (PW3). What is significant is that, some injuries had been sustained by the deceased Shabbir Patel, that the police had noticed the same, and had sent him to Primary Health Centre for medical examination and treatment. Obviously,

these injuries had been caused after the accident i.e. collision between the aforesaid two vehicles.

14 The report made by Shabbir Patel on 14th December 1993 which was registered as a non-cognizable case, is also relevant in this context. This report was also produced before the court, tendered in evidence and marked as Exhibit 42. In this report, Shabbir Patel had spoken about he being assaulted by the driver and conductor of the S.T.Bus in question and two other persons. The police had taken action on this report; and the fact that such a report was made is, by itself, relevant.

15 The evidence of Javed Patel and Banubai Patel, son and wife of Shabbir Patel, also shows that Shabbir Patel had informed them of the assault by the driver and conductor of the S.T.Bus and had complained of pain.

16 Irrespective of whether the statement of Shabbir Patel would be admissible under the provisions of Section 32(1) of the Evidence Act, in view of the somewhat unusual reasoning of the

learned Sessions Judge, the fact remains that the lodging of a report by Shabbir Patel immediately after the alleged incident, that he was taken to a Medical Officer at the Primary Health Centre, where the Medical Officer noted the injuries on his person, lends full corroboration to the testimony of Salim Mulla, whose presence at the time of the incident cannot be doubted at all. It is, therefore, clear that the accused persons had assaulted the deceased after the collision.

17 In view of this, the conviction of the accused persons with respect to the offence punishable under Section 323 of the IPC read with Section 34 thereof, cannot be said to be suffering from any infirmity. Rather, there might have been a case for the conviction of the appellants on a higher charge on the basis of the view taken by the learned Sessions Judge, but since that issue is not before me, the matter may be left at that. All that needs to be emphasised is, whatever may be the dispute with respect to the other aspects of the matter, that the accused persons had assaulted the deceased on 14th December 1993 and had caused simple hurt to him, cannot be disputed at all.

18 The only question that now remains to be considered is in respect of the sentence that was imposed upon the accused persons. I find that, it was pleaded before the Sessions Judge that they be given the benefit of the provisions of the Probation of Offenders Act. The learned Sessions Judge declined to do so.

19 I have carefully considered the facts of the case. There is no evidence to show the gravity of the assault and the role of the accused nos.1 and 2 in the assault. There is no evidence to show how long the assault was going on and there is nothing to show that it was of a brutal nature. The assault occasioned because of the collision between the two vehicles and was as a result of the momentary anger felt by the accused persons. There were two others also, who had taken part in the assault, but they could not be traced. The accused no.2 has died during the pendency of the present appeal, and therefore, is not available to undergo the sentence.

20 Mr.Marwadi submits that the accused no.1 is now of 65 years. He has already retired from service.

21 The incident had taken place about 22 years back.

 Considering all the aforesaid aspects, in my opinion, the substantive sentences imposed upon the accused persons should be reduced to the period already undergone.

22 The conviction of the appellants with respect to the offence punishable under Section 323 of the IPC read with Section 34 thereof is maintained.

 However, the substantive sentences imposed upon them are reduced to the period already undergone.

23 Subject to the reduction in the substantive sentences imposed upon the appellants, the appeals are dismissed.

(ABHAY M. THIPSAY, J.)