

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 323 of 2013**

Durgesh Dongare, son of Late Shri Laxman Dongare, aged about 25 years, resident of Sharda Chowk, Shankarpur, Police Station, Chikhali, Tehsil and District Rajnandgaon Chhattisgarh

---- Appellant

Versus

State Of Chhattisgarh Through Station House Officer, Police Station City Kotwali, Rajnandgaon Chhattisgarh

---- Respondent

For Appellant	: Shri M.K. Bhaduri and Ms. Sarina Khan, Advocates
For State/ Respondent	: Smt. Shobha Kashyap, Dy. G.A.

HON'BLE SHRI JUSTICE CHANDRA BHUSHAN BAJPAI**JUDGMENT****13/12/2016**

1. Challenge in this appeal is to the judgment of conviction and order of sentence dated 21.3.2013 passed by the 2nd Additional Sessions Judge, Rajnandgaon (CG) in ST No.13/2011, whereby and whereunder the learned trial Judge after holding the appellant guilty for attempting to take life of PW6, Ritesh Kumar Yadav and also inflicting PW5, Hemant Kumar, convicted him under Sections 307, 323 of the Indian Penal Code (for short the 'IPC') and sentenced to undergo R.I. for 7 years and to pay fine of Rs.200/-, in default of payment of fine to undergo R.I. for 4 months; R.I. for 1 year with a

direction to run both the sentences concurrently. Further directed that the period already remained in jail during trial till the judgment be set off under Section 428 Cr.P.C.

2. The conviction is impugned on the ground that without there being any iota of evidence, the Court below has convicted and sentenced the appellant as aforementioned and thereby committed illegality.

3. As per case of the prosecution on 17.10.2010 about 6.00 pm, PW5, Hemant Kumar and PW6, Ritesh Kumar Yadav, the accused/appellant and many other persons were returning after immersion of goddess Saraswati, on account of some earlier dispute, the accused/appellant assaulted Hemant Kumar and when Ritesh Kumar Yadav intervened, he assaulted with the help of a club over the head of Ritesh Kumar Yadav, due to which, he fell down and remained unconscious. PW5, Hemant Kumar lodged the report before outpost Chikhli, P.S. Rajnandgaon. Police had registered unnumbered FIR under Sections 294, 506, 323, 307 IPC and sent PW5, Hemant Kumar and PW6, Ritesh Kumar Yadav for medical examination. PW9, Dr. Dinesh Gupta conducted CT scan and noticed blood clot over the head and haemorrhage over right side of the head, swelling over the head and fracture of 3 points over the head. He gave CT scan report Ex. P/13. PW2, Dr. K. Thakur examined the victim PW6, Ritesh Kumar Yadav on 18.10.2010 and conducted operation of the head. Bone of the head was fractured.

The victim/injured was operated. After treatment he was discharged on 26.10.2016. The Doctor had prepared discharge summary Ex. P/4. Also prepared note in the history sheet Ex. P/5, P/6, P/7 & P/8. PW12, Y.K. Tiwari examined Hemant Kumar and noticed one abrasion near the left eye-brow and advised for x-ray and gave his report Ex.P/20. He also examined PW6, Ritesh Kumar Yadav and noticed one lacerated wound and one semi circular wound over the scalp and as per Doctor the patient's condition was serious. He gave his report Ex.P/21. Also taken x-ray of the head on 18.10.2010, noticed fracture over the left parietal bone and gave his report Ex. P/22. On query he gave his report Ex.P/17. Police recorded the statement of the witnesses under Section 161 Cr.P.C., prepared spot map, seized articles and arrested the present accused/appellant and co-accused Robin @ Robis. After completion of investigation, charge sheet was filed before the Judicial Magistrate First Class, Rajnandgaon (CG), who registered the case as Cr. Case No. 613/10 and committed the same vide committal order dated 7.2.2011. The learned Additional Sessions Judge, received the case on transfer and conducted trial. The accused/appellant and the co-accused were charged for the offence under Sections 294, 506B, 323 and 307 IPC. Against the present accused/ appellant charges were also framed under Sections 294, 506 Part II, 323/114, 307/114 IPC.

4. In order to prove the guilt of the appellant, prosecution examined as many as 12 witnesses. Statements of the accused

were recorded under Section 313 Cr.P.C. in which they denied the circumstances appearing against them, pleaded innocence and false implication in the crime in question. The accused also examined DW1, Deepak Dubey and DW2, Tilak Dewangan. As per these defence witnesses, the injured Ritesh Kumar Yadav received injuries when he came into the contact of a pole and the accused/appellant and the co-accused have not assaulted PW5, Hemant Kumar and PW6, Ritesh Kumar Yadav.

5. After affording opportunity of hearing to the parties, the learned Additional Sessions Judge acquitted co-accused Robin @ Robis for all the charges, acquitted the present accused/appellant for the offence under Sections 294 & 506 Part II IPC and convicted and sentenced the appellant as above.

6. I have heard learned counsel for the parties at length and perused the record of the Sessions Trial.

7. Learned Counsel for the appellant vehemently argued that they are not assailing the appeal on conviction of the appellant under Section 323 IPC, but they are confining their arguments for Section 307 IPC only. Learned counsel would submit that PW6, Ritesh Kumar Yadav had deposed in para 1 that the accused/appellant came with a club and assaulted over his head, with this, he fell down. At para 3 he deposed that he fell down on a corner of the square. The complainant himself has not stated anything regarding the number of assault by the accused/appellant.

The complainant was discharged after successful operation on 26.10.2010. The incident happened on a dispute between the accused/appellant and the victim who were returning after immersion of goddess Sarswati. The incident happened only on a trivial issue. There was no reason to take life of PW6, Ritesh Kumar Yadav and looking to the entire facts, the offence proved, against the accused/appellant may be under Section 326 IPC and not 307 IPC. The accused/appellant is in jail since 30.10.2010 to 23.12.2010 and thereafter, from the date of judgment i.e. 21.3.2013 till date. With this, the accused/appellant served the sentence for 3 years, 10 months and 20 days till date. He is the first offender. The incident is about 6 years old. On a sudden provocation, the incident happened hence, the appellant may be convicted for the offence under section 326 IPC and as he was not having any criminal antecedent he may be sentenced for the period already undergone by him.

8. Per contra, learned Counsel for the State has opposed the arguments advanced on behalf of the appellant and would submit that for no reason a dispute arose after the immersion ceremony. Initially, the accused/appellant assaulted PW5, Hemant Kumar and thereafter when his brother PW6, Ritesh Kumar Yadav, intervened the accused/appellant assaulted by club over the head which is the vital part of the body resulting into many fractures. With this, the Court below has rightly convicted and sentenced the accused/appellant though acquitted co-accused as there is no overt act hence, the appeal may be dismissed on both the counts.

9. In order to appreciate the arguments, I have heard Learned Counsel for the parties, perused the judgment impugned and record of the Court below.

10. Learned counsel for the appellant is not assailing the conviction and sentence of the appellant under Sections 323 IPC. It is argued that the act of the appellant does not come under the ambit of Section 307 IPC.

11. On perusal of the evidence adduced, PW6, Ritesh Kumar Yadav in para 1 simply said that the accused/appellant came with a club and made assault on his head with this, he fell down and became unconscious. In para 3 of the cross-examination, he admitted that he fell down over the corner of the square though denied that he received injuries on account of fall over the said corner. But this witness had not said that how much assault he had received during the incident.

12. On perusal of the statement of PW2, Dr. K. Thakur, the patient was discharged on 26.10.2010, i.e. within 9 days of the incident. There is no evidence regarding any post operative complication for the injured. PW9, Dr. Dinesh Gupta who conducted CT scan had noticed 3 fractures swelling and blood clot as per CT scan report Ex. P/13. PW 12, Dr. Y.K. Tiwari also noticed fracture on the left parietal bone as reported in x-ray report Ex. P/22. Also noticed one lacerated wound and semi circular wound over the head. The condition of the patient was serious. He admitted PW6, Ritesh

Kumar Yadav and gave his report Ex. P/21. After taking the entire material it appears that single blow was inflicted by the accused/appellant. In the background there was some dispute between the parties prior to said immersion ceremony. On perusal of the entire evidence it appears that the accused/appellant had not assaulted twice though he was having club in his hand and as the victim fell down at the hard surface, i.e. corner of the said square, possibility may also not be ruled out that he might have received corresponding injuries after coming in contact of the hard surface and the corner. No further complication was surfaced after the injury to the victim. Entire consideration shows that the prosecution has failed to demonstrate the attempt to take life and absence of any repeated blow. It also shows that he was armed with club but he had not assaulted twice even when PW6, Ritesh Kumar Yadav fell down. In the considered opinion of this Court, the case of the accused/appellant falls under the ambit of Section 326 IPC and not 307 IPC, hence, conviction awarded to accused/appellant requires interference.

13. So far as what sentence would be sufficient for the accused/appellant is concerned, the accused/appellant is the first offender aged about 25 years and the incident is about 6 years old. There was no serious dispute. On a sudden provocation he assaulted only once though the injured received fracture over left parietal bone. But as the accused/appellant is in jail since 3 years 10 months and 20 days till date, the Court below directed to run

both the sentences concurrently. There is no minimum sentence prescribed for Section 326 IPC. In the considered view of this Court, the period already undergone would be appropriate for the act of accused/appellant.

14. Consequently, the appeal filed by the accused/appellant is allowed in part. The conviction and sentence awarded under Section 323 IPC is hereby affirmed. So far as conviction under Section 307 IPC is concerned, the same is reduced for the lesser offence under Section 326 IPC. The accused/appellant is convicted for Section 326 IPC. The period already undergone as stated above is awarded as a sentence for the offence under Section 326 IPC. The Court below directed to run both the sentences concurrently, it is held that the accused/appellant served the entire sentence awarded after modification by this Court. The accused/appellant is in custody. He be released forthwith after deposition of fine amount of Rs.200/-, if he is not required in any other offence. If the appellant fails to deposit the fine amount, the authorities concerned are directed to serve the default sentence and release the appellant immediately thereafter.

Sd/

(Chandra Bhushan Bajpai)
Judge