

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.212 OF 1996

The State of Maharashtra

.. Appellant
(Orig. Complainant)

V/s.

1] Anna @ Ananda Gundu Kumbhar,
Age 26 years, R/o. Budlapurap,
District - Belgaum.

2] Deoba Gundu Kumbhar,
Age 24 years, R/o. Budlapurap,
District - Belgaum.

3] Maruti Ganpati Mali @ Chavan
Age - 22 years, R/o. Pangire,
Tal - Chikodi, Dist. Belgaum

.. Respondents
(Orig. Accused Nos.
1, 3 and 6)

**WITH
CRIMINAL APPEAL NO.213 OF 1996**

The State of Maharashtra

.. Appellant

V/s.

1] Gundu Ishwar Kumbhar
Age 50 years, R/o. Budlapurap,
District - Belgaum.

2] Ganpati Aba Mali, alias Chavan,
Age 65 years, R/o. Pagire,
Tal.-Chikodi, District - Belgaum.

3] Ananda Ganpati Mali alias Chavan
Age - 27 years, R/o. Pangire,
Tal - Chikodi, Dist. Belgaum

.. Respondents
(Orig. Accused Nos.
2, 4 and 5)

.....
Mr. K. V. Saste, APP for the Appellant – State.
Mjr. Niranjana Mundargi i/b. Mr. A. P. Mundargi, Advocate for
Respondent Nos. 1 and 3.

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CORAM : PRAKASH D. NAIK, J.

DELIVERED ON : JUNE 9, 2016.

JUDGMENT :

These Appeals are preferred by the State of Maharashtra challenging the order of acquittal and seeking enhancement of sentence passed by the trial Court. Criminal Appeal No.212 of 1996 has been preferred challenging the order of acquittal passed by the Assistant Sessions Judge, Kolhapur in Sessions Case No.204 of 1994 vide judgment and order dated 17th November, 1995. Respondents in the said Appeal were originally accused nos.1, 3 and 6. Criminal Appeal No.213 of 1996 is seeking enhancement of sentence against respondents therein who were originally accused nos. 2, 4 and 5 in the aforesaid Sessions Case No.204 of 1994. Criminal Appeal No.212 of 1996 has been preferred by invoking Section 378(1) of the Code of Criminal Procedure and Criminal Appeal No.213 of 1996 has been preferred in exercise of powers under Section 377(1) of the Cr.P.C.

2 Respondents in both the Appeals were impleaded as accused nos.1 to 6 in Sessions Case No.204 of 1994 and were tried before the Court of Assistant Sessions Judge, Kolhapur. The said respondents were prosecuted for the offences punishable under Sections 147, 148, 149, 307, 504 of the Indian Penal Code (for short "IPC") and Section 37(1) read with Section 135 of the Bombay Police Act.

3 The prosecution case in brief is as follows:

 Complainant Bhimrao Krushna Jadhav (injured person) had gone to Nipani on 24th September, 1993 for some work. He was returning to his village on a rental bicycle. On the way at the spot of incident, the accused intercepted him and he was assaulted by them. The accused were holding weapons like swords, axe and sticks. Grievous injuries were caused to his wrists and leg which had resulted in amputation of the palm of injured person. The injured was thereafter taken to hospital by one of the witnesses. Information was given to the police machinery. The injured was thereafter treated in the hospital. Statement of injured person was recorded which was treated as First Information Report (for short "FIR"). Subsequently his

supplementary statement was recorded. The investigating machinery then conducted investigation by recording statements of witnesses as well as various panchanamas in relation to seizure of clothes and weapons. On completing the investigation charge-sheet was filed for the aforesaid offences.

4 Charge was framed on 31st August, 1995 by the trial Court against respondent-accused nos.1 to 6 under, Sections 147, 148, 149, 307 read with Section 149 of the IPC, 504 read with Section 149 of IPC and Section 37(1) read with Section 135 of the Bombay Police Act, 1951.

5 Prosecution examined 15 witnesses in support of its case. P.W.1 Uvraj Desai is a panch witness for spot panchanama. P.W.2 Smt. Radhabai Jadhav is the relative of the injured person who visited the spot after the incident. P.W.3 Bhima Krishna Jadhav is the injured person who is also the first informant. P.W.4 Balwant Suryawanshi is an eye witness to the incident who has referred to the assault on the injured person. P.W.5 Chandrakant Patil is the panch witness for arrest, recovery of clothes and recovery of weapons at the instance of the accused. P.W.6 Prabhakar Chougule is the witness who had seen the injured after

he was assaulted. P.W.7 Mukund Rawan is owner of a bicycle shop with whom the injured person had hired the bicycle on the day of the incident. P.W.8 Baburao Makane is also owner of a bicycle shop with whom accused no.6 had hired bicycle on the day of incident. P.W.9 Baburao Kadakane is the witness who had taken the injured to the hospital. The injured had purportedly informed him about the assault by accused no.2 and his two sons. P.W.10 Sidgonda Jadhav is the witness who had given the report to the police and then the injured was taken to the hospital. According to him the injured had disclosed to him that accused no.2 and his two sons as well as accused no.4 and his two sons had assaulted the injured. P.W.11 Chandrashekhar Chandekar is the Medical Officer who examined the injured person and issued medical certificate. P.W.12 Dhondiba Parit referred to the enmity between the injured and the accused. P.W.13 Appaso Shinde is ASI attached to the concerned police station at the relevant time. He was informed about the assault on the injured by P.W.10 and he had issued Yadi for medical treatment of the injured. P.W.14 Nurmahamad Gadkari is the Police Head Constable attached to concerned police station. He recorded statements of complainant/injured. P.W.15 Vasant Powar was the investigating officer who conducted investigation.

6 The Assistant Sessions Judge, Kolhapur by his judgment and order dated 17th November, 1995 convicted accused nos. 2, 4 and 5 for offence punishable under Section 326 of the IPC and they were sentenced to suffer R/I for three years and to pay fine of Rs.1000/- each and in default to suffer further R/I for a period of six months each. Accused nos.1, 3 and 6 were convicted for the offence punishable under Section 323 of the IPC and were sentenced to suffer R/I for six months each and to pay fine of Rs.500/- each and in default to suffer further R/I for one month. Accused were acquitted for the offences punishable under Sections 147, 148, 149, 307, 504 of IPC and Section 37(1) read with Section 135 of the Bombay Police Act.

7 As stated herein above, State has preferred criminal Appeal No.212 of 1996 against order of acquittal in favour of accused nos.1 , 3 and 6 and criminal Appeal No.213 of 1996 was preferred seeking enhancement of sentence imposed upon accused nos.2, 4 and 5. However, there is no Appeal challenging the acquittal of the said accused under Section 307 of the IPC which would mean that the State is seeking enhancement of sentence imposed by the trial Court for an offence under Section 326 of the IPC.

8 From the record, it is observed that the accused had challenged their conviction awarded by the trial Court by preferring an Appeal before the Sessions Court which was numbered as Criminal Appeal No.100 of 1995. This Court vide order dated 4th February, 2009 directed that the concerned Sessions Court at Kolhapur to dispose of criminal Appeal No.100 of 1995 on or before 15th April, 2009. It was observed that propriety requires that before the present Appeals are heard, Appeal against the order of conviction should be heard by the concerned Sessions Court. During the pendency of these Appeals, report was called from the Sessions Court to ascertain the outcome of Appeal against conviction preferred by the accused before the said Court. This Court received a report dated 18th August, 2015 wherein the operative part of the order passed by the Sessions Court was enclosed. In the report it was mentioned that criminal Appeal No.100 of 1995 was decided by the Sessions Court on 15th April, 2009. Operative part of the said Appellate Court order which is enclosed with the said report reads as follows:

"1 The Appeal is dismissed.

2 However, findings of Ld. Asst. Sessions Judge,

Kolhapur holding the Accused No.2, 4 & 5 guilty individually for the offence P.U.S. 326 of I.P.C. is altered to section 326 r.w. 34 of I.P.C. The sentence imposed by Ld. Asst. Sessions Judge on No.2, 4 & 5 as per the impugned Judgment and order of conviction & sentence for the offence P.U.S 326 of I.P.C. individually would be the sentence to the Accused No.2, 4 & 5 for the offence P.U.S. 326 r.w. 34 of I.P.C.

- 3 *Appeal is already abated against Accused No.3 & Accused No.1 & 6 are already acquitted of the offence P.U.S. 323 of I.P.C. & their bail bonds shall stands cancelled in view of compounding of said offence as per order below exh. 41 & 1.*
- 4 *The Accused No.2, 4 & 5 who are on bail to surrender their bail bonds. They are taken in custody & sent to Jail to under go sentence.*
- 5 *Order regarding disposal of muddemal property as passed by the Ld. Asst. Sessions Judge is confirmed."*

9 From the aforesaid order it was clear that the findings of the Assistant Sessions Judge, Kolhapur holding accused nos. 2, 4 and 5 guilty individually for the offence punishable under Section 326 of the IPC was altered to Section

326 read with Section 34 of the IPC and the sentence imposed by the trial Court on the accused was maintained. Appeal as against accused no.3 is abated and as far as accused nos. 1 and 6 are concerned they were acquitted since the offence was compounded as per the order mentioned at Exhibits 41 and 1. It was also stated that accused nos. 2, 4 and 5 were taken into custody and sent to jail. Thus, conviction and sentence imposed by the trial Court for the offence punishable under Section 326 of IPC was maintained. It is also noticed that parties have compounded conviction for the offence under section 323 of IPC and accused nos. 1 and 6 were acquitted.

10 Thereafter, the present Appeals were adjourned to ascertain whether the accused who are convicted for an offence under Section 326 of IPC had preferred any proceedings before this Court and whether the said accused had undergone sentence of imprisonment. However, nothing is brought on record to show that the said accused had challenged the order of conviction passed by the trial Court and the said Appellate Court. However, from the order dated 15th April, 2009, which was produced on record it appears that accused nos. 2, 4 and 5 were taken into custody and they were sent to jail. It was submitted by

the learned counsel representing accused that they have undergone sentence imposed upon them.

11 Appellant in Criminal Appeal No.213 of 1996 has prayed that the sentence imposed upon accused nos.2, 4 and 5 for conviction under Section 326 of IPC who were sentenced to R/I imprisonment for three years may be enhanced and in Criminal Appeal No.212 of 1996 it is prayed that the order of acquittal as against accused nos.1, 3 and 6 be set aside. It is important to note that State has not preferred an Appeal against acquittal of accused nos.2, 4 and 5 for an offence under Section 307 of IPC and the prayers are only for enhancement of sentence of imprisonment awarded against them for conviction under Section 326 of IPC.

12 I have perused the evidence on record and the documents brought on record by the prosecution before the trial Court. Prosecution is primarily relying upon the evidence of two prime witnesses one of them being the injured person who is also the complainant i.e. P.W.3 and the other witnesses who had seen the injured being assaulted by accused i.e. P.W.4. The other witnesses are relating to the panchanama of spot, recovery of

clothes, recovery of weapons, hiring of bicycle and witnesses referring to the motive for crime and the investigating officer. P.W.3 is the injured person has stated in the examination-in-chief that accused nos. 2, 4 and 5 had caused grievous injuries to him on the left palm, right palm and leg. The said injuries were caused by the weapon like sickle, sword and axe. He, however, deposed that the other accused had assaulted by sticks. The injuries caused by sticks were simple in nature. P.W.4 has stated that accused nos.1 and 2 had assaulted victim by use of weapons like sickle/sword. He also stated that accused no.3 had threatened him. He had not attributed any role to the other accused. His statement was recorded subsequently. Presence of this witness was reflected in a supplementary statement of injured person which was recorded on 30th April, 1993. From the cross-examination it was brought on record that he did not disclose this incident to anybody although he met the people on the way or on the spot. It was also brought on record that he had not attributed any overact that accused no.1 was holding instruments like sword and accused no.2 was holding sickle was not mentioned in his statement before the police. There was no reference to the threats given to him by accused no. 3 in his statement recorded by police. The evidence of this witnesses is

sticky. Prosecution has examined Smt.Radhabai who is relative of the injured. She has referred to the disclosure made by the injured about the assault upon him. The other witnesses have corroborated the prosecution case. P.W.1 is the panch for spot panchanam who has supported the prosecution case. P.W.5 is another panch for arrest of accused, recovery of clothes of the accused, recovery of weapons at the instance of accused no.4 who has also supported the prosecution case. P.W.7 has referred to hiring of bicycle on the date of incident by the injured person which corroborates the fact that injured was proceeded to his village by bicycle and was pulled down by accused from the bicycle and thereafter assaulted. P.W.8 had referred to hiring of vehicle by P.W.6. The other witnesses have taken the injured to the hospital for treatment. Prosecution has thus, established its case regarding involvement of the accused in committing crime. Accused had resorted to the remedy by challenging conviction under section 326 as well as section 323 of the IPC and the conviction under section 326 has been maintained alongwith the sentence imposed upon accused nos.2, 4 and 5 and the order of conviction against the other accused for an offence under Section 323 has been set aside as parties have compounded the offence. The only question is what offence is being committed by the

accused and whether the sentence of imprisonment awarded against accused nos. 2, 4 and 5 deserves to be enhanced. The trial Court in paragraph 15 of the judgment has observed that there was no evidence to convict the accused for an offence punishable under section 307 of the IPC. It is observed that as per the version of complainant, injury was caused to him on both the hands and legs. Injury nos.1 to 3 which was caused to the complainant was grievous in nature and injury nos. 4 and 5 were simple. The grievous injuries were caused by the weapons of assault like sword, axe and simple injuries were caused by sticks. It is also mentioned by P.W.11, Medical Officer who examined the injured that injury nos.1 to 3 were grievous and possible by article nos. 9, 13 and 33. The said witness, however, has opined that he used the word "May" caused by sharp weapons as the injuries were not clearcut. He also deposed that there was no opportunity for him to see the weapons at the time of examination which was shown before the Court. He further stated that he has not mentioned the nature of weapons by which injury nos. 1 to 3 were caused. However, in the evidence he further deposed that injury nos. 1 to 3 can be caused by sword and article nos. 9, 13 and 33 are having a clearcut edge. In the evidence, however, it is not mentioned that injuries would have caused death of the

injured person. From the oral evidence of medical officer, it cannot be said that there was an intention to kill the injured person and offence under section 307 of the IPC is not made out. This finding of the trial Court does not require interference. In any case, as pointed out herein above, the person whom the role of causing injury nos.1 to 3 has been attributed were convicted under section 326 of the IPC and State had preferred an Appeal for enhancement of sentence for the said conviction and had not preferred an Appeal seeking their acquittal for the offence under Section 307 of the IPC.

13 The injured person had admitted in the cross-examination that there was a criminal case against him and others for removal of eye of one Shamrao Jadhav. The defence has given suggestion that his father was charged for murder of one Gundu Jadhav and that there was a protest against the police station for not arresting the complainant by the police. He admitted that there was a criminal case at Radhanagari Court against him and that he was prosecuted at Chikodi Court for assaulting one Salubai Parit from his village. The defence has also made suggestion about his involvement with Nipani Police and that persons from the adjoining village was accused him for

committing the offence which suggestion were denied.

14 In paragraph 16 of the judgment, trial Court has observed that the prosecution has examined medical officer, but it is not made clear whether injury nos.1 to 3 were of such type that it would have resulted into the death. Injuries have been caused to palms and leg and it is not likely that the same injuries have resulted into the death. There is no satisfactory evidence adduced by the prosecution in that regard. Prosecution has, therefore, failed to prove the guilt of the accused under Section 307 of the IPC. The Court further observed in the same paragraph that complainant has attributed overact to accused nos. 2, 4 and 5. However, he has not attributed any overact to accused no.1. The role assigned to accused nos. 3 and 6 is that they have assaulted the injured by sticks. Presence of accused nos. 1, 3 and 6 at the scene of offence has been established. It is further observed that there is variation in the complaint and deposition of P.W.3 (injured person). There is also variance in the statement of the injured recorded by the police which was at the relevant time recorded as dying declaration. The Court came to the conclusion that accused nos. 2, 4 and 5 have caused injury nos. 1 to 3 which are grievous and caused by sharp weapons. The

others have assaulted the victim by sticks. Hence, accused nos. 2, 4 and 5 are liable to be convicted under Section 326 of the IPC and the others who had caused simple injury are convicted for an offence punishable under Section 323 of the IPC. It is pertinent to note that no charge was framed for an offence punishable under Section 323 and 326 of the IPC. However, the charges being minor, and the major charges was being framed against the accused, the Court is empowered to convict them for the offence under Section 323 and 326 of the IPC. It is pertinent to note that there is variation in the motive for committing crime in the statement of complainant, evidence before the Court and further statement of complainant which was recorded by P.W.14. P.W.4 has not attributed any role to accused nos.4, 5 and 6. The role assigned to accused no.3 is that he is threatened him. In the cross-examination it was brought on record that the role assigned by the said witnesses to accused nos.1 to 3 was not stated in the statement before the police. There is no cogent evidence to establish the offence under section 307 of the IPC against accused nos.1, 3 and 6 who were convicted under Section 323 of the IPC. It has to be considered that the conviction of the said accused was set aside on account of compounding as reflected in order dated 15th April, 2009 passed in Criminal Appeal No.100 of

1995. The trial Court had acquitted all the accused under Sections 147, 148, 149, 307, 504 of IPC and Section 37(1) read with 135 of the Bombay Police Act. As stated above, the State has preferred an Appeal and acquittal qua accused nos. 1, 3 and 6. The reasons given by trial Court for acquittal is not perverse. In view of the circumstances, no interference is warranted in conviction of accused nos. 1, 3 and 6 and it is not justifiable to acquittal them even for higher offence. Although it has not to be noted that the appellant has not sought conviction of said accused for higher offence. The sentence of accused nos. 2, 4 and 5 also does not require interference. The trial Court has imposed sentence of R/I for three years which is apparently undergone by them. The Apex Court in the case of ***State of Punjab Vs. Mohinder Singh***¹ had taken a lenient view while sentencing having regard to long lapse of time although the Court was not happy with the sentence imposed by High Court for an offence under Section 304 II of the IPC. *In the case of Bhaskar Dnyau Shinde Vs. The State of Maharashtra*², this Court has to observed that in the peculiar facts of the case and particularly in the light of the fact that sword of the conviction and sentence had been hanging on the head of the accused for last sixteen years as

1 AIR 1994 SC 113

2 2014-ALL M.R. (Cri.) 1609

well as trauma of the trial from 1988, the Court acceded to request of taking a lenient view while awarding sentence for offence under Section 304, Part II of IPC and confined the sentence to the period of imprisonment already undergone by the accused. The said accused had undergone actual imprisonment of two months. The Court, although found that the sentence was wholly insufficient, in the facts of the case, leniency was shown to the accused.

15 In the case of ***Ramesh Sadashiv Khatpe & Ors. Vs. State of Maharashtra & Ors.***³, this Court had considered the submissions for awarding lesser sentence. Taking into consideration the fact that almost eighteen years have gone by since the accused had committed the offence; the accused had no criminal antecedents and no crimes were reported after the incident in question; the Court had observed that no purpose would be served by incarcerating the accused any further, especially since they have reformed and hence the sentence imposed on the accused was reduced to the term of imprisonment they had undergone.

3 2007- ALL.M.R.(Cri.) 2539

16 Similar view was taken in case of **Walu @ Walmik Popat Khairnar and others Vs. State of Maharashtra**⁴. In the said decision of this Court, a soft view was taken for awarding sentence on the ground that incident taken place sixteen years ago and that there is nothing to indicate that the Appellants have any adverse criminal history. It was felt that uprooting the accused from the main stream of life after a period of sixteen years, would serve no useful purpose.

17 In case of **State of Maharashtra Vs. Mahipal Singh Satyanarayan Singh**⁵, although this Court was of the opinion that sentence awarded to the accused under Section 392 read with Section 34 of IPC was manifestly inadequate, the Court took into consideration the fact that incident had taken place eleven years ago and it would be too harsh to send the accused to jail because he had already served out the period of three months and seventeen days sentence. The Court was pleased to maintain the sentence which was already undergone by the accused and imposed additional fine upon them.

18 It is true that accused have committed a serious

4 2001 (5) Bom. C.R. 604

5 1996(2) ALL M.R. 342

crime and were liable for conviction under Section 326 of the IPC, trial Court has awarded sentence of three years against accused nos. 2, 4 and 5. Accused nos. 1, 3 and 6 were convicted under Section 323 and sentenced to six months. I have considered the factual aspects of the prosecution case, the nature of weapons used by accused, the manner in which blow was given on the palms and leg of the injured person which had resulted in serious injuries and severing of the palm of the injured. Assuming that the sentence of three years imposed on accused nos. 2, 4 and 5 was not sufficient considering the manner of assault it has to be seen that the incident had occurred on 25th September, 1993. The accused were convicted on 17th November, 1995. Appeal preferred by the accused before the Sessions Court were dismissed on 15th April, 2009 and the accused had undergone the sentence. The conviction was maintained by Appellate Court under Section 326 of the IPC and sentence of three years was also retained against the said accused which was not challenged by either parties. After the lapse of about 20 years from passing of the impugned judgment and order of conviction and six years after passing dismissal order in Appeal and apparently accused having undergone the sentence, it would not be appropriate to enhance the sentence imposed against accused nos. 2, 4 and 5

and, therefore, the sentence of three years imposed by the trial Court for the conviction of accused nos.2, 4 and 5 for the offence punishable under Section 326 of IPC is required to be maintained. There is no sufficient evidence to upset the order of acquittal of accused. It is pertinent to note that conviction for offence under Section 323 of the IPC was compounded and they are acquitted. Taking into consideration all the aforesaid circumstances, it is not necessary to disturb the findings of the trial Court. The acquittal of accused persons for the offence punishable under Section 307 of IPC and other offences does not require any interference.

19 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Appeal No.212 of 1996 preferred by the State against the order of acquittal passed by the Assistant Sessions Judge, Kolhapur in Sessions Case No.204 of 1994 vide judgment and order dated 17th November, 1995 against accused nos.1 and 6 stands dismissed;

- (ii) Criminal Appeal No.212 of 1996 preferred by the State against the order of acquittal passed by the Assistant Sessions Judge, Kolhapur in Sessions Case No.204 of 1994 vide judgment and order dated 17th November, 1995 stands abated as against accused no.3;
- (iii) Criminal Appeal No.213 of 1996 preferred by the State/Appellant seeking enhancement of sentence imposed by the Assistant Sessions Judge, Kolhapur vide judgment and order dated 17th November, 1994 while convicting accused nos.2, 4 and 5 for the offence punishable under Section 326 of IPC stands dismissed.

(PRAKASH D. NAIK, J.)