

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 701 OF 2002

1. Laxman s/o Namdeo Gode
Age : 47 years, occu.: agri.,

2. Deorao s/o Namdeo Gode
Age : 44 years, occu.: agri.,

3. Govind s/o Laxman Gode
Age : 30 years, occu.: agri.,

All r/o Keli Kotul, Taluka Akola,
District Ahmednagar.

Appellants.

Versus

The State of Maharashtra
(Copy to be served on the Public
Prosecutor, High Court, Bench at
Aurangabad).

Respondent.

Mr. S.S. Wagh, Advocate holding for
Mr. S.T. Shelke, Advocate for the appellants.

Mr. R.V. Dasalkar, A.P.P. for the State/Respondent.

CORAM : SUNIL K. KOTWAL, JJ.

Reserved on : 6th February, 2018.

Pronounced on : 13th February, 2018

JUDGMENT :

1. This appeal is directed by original accused Nos.1 to 3 in Sessions Case No.112/2000 against the order of conviction under Section 323 read with Section 34 of the Indian Penal Code (For short "I.P.C."), passed by Ad hoc Additional Sessions Judge,

Sangamner, dated 15.11.2002. Respondent is the State of Maharashtra.

2. Facts leading to institution of this appeal are that – complainant Bhimabai Narayan Gode (PW-2) filed Criminal Complaint against original accused Nos.1 to 5 for the offences punishable under Sections 302, 323, 504 and 506 read with Section 34 of the I.P.C. Contention of the complainant, in brief, is that her husband Narayan Raghu Gode used to live at Mauje Keli Kotul, Taluka Akola with his wife Bhimabai (PW-2). All accused are also residents of the same village. On 19.11.1997 at about 9.00 p.m. when Narayan Gode was returning to his home, that time on way accused Nos.1 to 5 intercepted him near Pemdara Percolation Tank which is near the house of complainant and started assaulting him by sticks. Hearing shouts of her husband, complainant Bhimabai (PW-2) rushed on the spot. However, accused Nos.1 to 3 also assaulted her. Thereafter accused left the spot while abusing and threatening the complainant. During this incident complainant and her husband sustained injuries. As no conveyance was available at night hours, on next day on 20.11.1997 complainant went to Police Outpost, Kotul with her husband. Narayan Gode lodged report to Police Outpost, Kotul against the accused persons. Complainant and her husband were referred to P.H.C. Kotul for medical

examination. Doctor examined them and issued Medico Legal Certificates (Exhs.25 and 26). However, police did not take any action against the accused persons. According to complainant, her husband succumbed to above injuries on 28.11.1997. Police Outpost, Kotul was informed by brother-in-law of complainant namely Raghu Gode and Village Police Patil. However, police advised them to have last rites of the deceased, and therefore, on 29.11.1997 funeral of the deceased was done. However, thereafter police did not take any action against the accused persons. Therefore, on 09.12.1997 complainant filed private criminal complaint before Judicial Magistrate, First Class, Akole.

3. Judicial Magistrate, First Class, Akole held inquiry and issued process against accused Nos.1 to 5 for the offences punishable under Sections 302, 323 read with Section 34 of the I.P.C.

4. Offence punishable under Section 302 of I.P.C. being exclusively triable by the Court of Sessions, this case was committed initially to the Sessions Court, Shrirampur and subsequently to Sessions Court, Sangamner.

5. The then Additional Sessions Judge, Sangamner framed

charge (Exh.14) against accused Nos.1 to 5 for the offences punishable under Sections 323 and 302 read with Section 34 of the I.P.C. Contents of the charge were read over to the accused. They pleaded not guilty and claimed trial.

6. Complainant examined total five witnesses. After considering the evidence placed on record, the learned trial Court pleased to acquit accused Nos.4 and 5. However, accused Nos.1 to 3 were convicted for the offence punishable under Section 323 read with Section 34 of the I.P.C. and they were sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1,000/- each, in default rigorous imprisonment for two months. Therefore, this appeal arises.

7. Heard Shri S.S. Wagh, Advocate holding for Shri S.T. Shelke, Advocate for the appellants and learned A.P.P. for the State.

8. Learned Counsel for the appellants submits that the testimony of Bhimabai Gode (PW-2) is not corroborated by evidence of independent witness. The learned trial Court erroneously convicted the accused persons.

9. His next limb of the argument is that delay of one day in lodging F.I.R. is not properly explained by the complainant.

10. Learned A.P.P. for the State supports the judgment passed by trial Court on the ground that delay in lodging F.I.R. is explained by the complainant on the ground of non-availability of transport at night hours. Contention of learned A.P.P. is that when testimony of Bhimabai (PW-2), who is one of the injured witness, is corroborated by medical evidence of Medical Officer, Primary Health Centre, Kotul Dr. Sakham Gamhire (PW-1), corroboration by independent witness is not necessary. He points out that otherwise also at night hours independent eye witness would not be available. Therefore, non-examination of independent witness cannot be a ground to acquit the appellants.

11. In the alternate, learned Counsel for the appellants submits that if conviction under Section 323 of the I.P.C. is confirmed, in that event, benefit of the provisions under Probation of Offenders Act may kindly be extended in favour of the appellants.

12. Learned A.P.P. fairly conceded that no criminal history of previous conviction is on record against the appellants.

13. In the case at hand, Bhimabai Gode (PW-2) is the sole eye witness as well as she is the witness who also sustained injuries due to assault by accused. Bhimabai (PW-2) being injured witness,

as per trite law, the testimony of injured witness cannot be discarded unless clinching circumstances have been brought on record by the defence.

14. After going through testimony of Bhimabai (PW-2) it emerges that she consistently deposed that in her presence accused Nos.1 to 3 assaulted her husband by sticks and when she tried to intervene, that time accused Deoram also assaulted her by stick. This witness has made it clear that her husband sustained injury on his head and limbs and she herself sustained injury on the left side of her cheek. From her testimony it emerges that on next day morning alongwith her husband she visited Police Outpost, Kotul and report was lodged. Police referred them to Primary Health Centre, Kotul for medical examination. However, thereafter police did not take any action.

15. It is to be noted that in her cross-examination Bhimabai (PW-2) stood constant and only she has admitted that the spot of the incident is the rocky area and stones were lying there. Nothing could be elicited in her cross-examination to doubt her testimony.

16. Even Medical Officer Dr. Gambhire (PW-1) corroborated the version of complainant, by deposing that on 20.11.1997

complainant Bhimabai and her husband Narayan Gode were referred to Primary Health Centre, Kotul for medical examination and on examination of Narayan Gode, he found (1) contused lacerated wound on forehead above right eyebrow of size $\frac{1}{4}$ th x $\frac{1}{4}$ th x $\frac{1}{4}$ th and (2) tenderness and limited movements around right shoulder. This witness has proved one contused lacerated wound on left maxillary region of size $\frac{1}{2}$ x $\frac{1}{4}$ th x $\frac{1}{4}$ th of complainant Bhimabai (PW-2). According to this witness, these all injuries were sustained by Narayan Gode and Bhimabai Gode within 24 hours from the time of their examination and these injuries were simple in nature. He has duly proved injury certificates (Exhs.25 and 26) which corroborate the oral testimony of Dr. Gambhire (PW-1).

17. Thus, it is evident that the evidence of Bhimabai (PW-2) is fully corroborated by medical evidence. Dr. Gambhire (PW-1) has specifically denied that injuries found on the body of Bhimabai (PW-2) and her husband are possible due to fall on stone. Therefore, admission of Bhimabai (PW-2) that the incident occurred on rocky surface has become redundant.

18. Therefore, I am fully satisfied that testimony of Bhimabai (PW-2) which is fully corroborated by medical evidence of

Dr. Gambhire (PW-1) and injury certificates (Exhs.25 and 26) as well as N.C. report (Exh.33) proved by A.S.I. Pandurang Dhamale (PW-4), is sufficient to prove beyond reasonable doubt that on above-said date, time and place accused Nos.1 to 3 in furtherance of their common intention, voluntarily caused simple hurt to Narayan Gode and Bhimabai Gode (PW-2). As the incident occurred at night hours at small village like Keli Kotul, the delay of few hours for lodging report to Police Outpost, Kotul cannot be termed as “unreasonable inordinate delay”. In the complaint itself, complainant has properly explained the delay.

19. Accordingly my conclusion is that the learned trial Court rightly convicted the appellants for the offence punishable under Section 323 read with Section 34 of the I.P.C.

20. However, after going through the judgment of the learned trial Court, it emerges that rigorous imprisonment for one year and fine of Rs. 1,000/- each to the appellants for the offence punishable under Section 323 read with Section 34 of the I.P.C. is certainly harsher punishment, because for the offence under Section 323 of the I.P.C. this is the maximum punishment prescribed under law. At the relevant time of the occurrence the appellants were in young age and since last 16 years they are on bail and now they

would have attained middle age of their life. Therefore, I find no reason to send them in jail for commission of such simple hurt to the complainant and her husband. I hold that considering overall circumstances of the case and clean history of the appellants, it is desirable that benefit of Section 3 of the Probation of Offenders Act can be extended in favour of the appellants. Therefore, by allowing this appeal partly, only the sentence imposed by trial Court deserves to be modified as under.

21. Hence, the following order.

ORDER

1. Criminal Appeal No. 701 of 2002 is partly allowed.
2. Conviction of the appellants (original accused Nos.1 to 3) for the offence punishable under Section 323 read with Section 34 of the Indian Penal Code is confirmed. However, sentence imposed against them by Ad hoc Additional Sessions Judge, Sangamner is set aside and modified and the appellants are released on due admonition under Section 3 of Probation of Offenders Act, 1958.
3. Bail bonds and surety bonds of the appellants shall stand cancelled.

**(SUNIL K. KOTWAL)
JUDGE**