

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.581 OF 1998**

The State of Maharashtra

...

...Appellant

v/s.

Saleem Balabhai Chipa

r/o Achole Road,

Lalabhai Chawl,

Nallasopara(East),

District: Thane

...Respondent

...

Mr.Ajay Patil APP for the Appellant-State.

Ms.V.P.Deshmukh h/f Mr.Yashodeep Deshmukh for the Respondent.

...

CORAM : A.A. SAYED &**SARANG V. KOTWAL, JJ.****DATED : 7 JULY 2018****ORAL JUDGMENT:** *(Per Sarang V. Kotwal, J.)*

This Appeal is filed by the State of Maharashtra against the Respondent who was convicted by the learned Judicial Magistrate, First Class, Vasai for commission of an offence punishable under section 326 of the Indian Penal Code (IPC). For the said offence the Respondent was sentenced to pay a fine of Rs.2,000/- and in default to suffer simple

imprisonment for three months. The Respondent was also convicted for the offence punishable under section 504 of IPC and was sentenced to pay a fine of Rs.500/-, in default to suffer simple imprisonment for one month. The Respondent was further convicted for the offence punishable under section 506 of IPC and was sentenced to pay a fine of Rs.500/-, in default to suffer simple imprisonment for one month. The amount of fine, if paid, was directed to be paid to the injured in the case.

2. The State of Maharashtra preferred this Appeal under section 377(1) of the Criminal Procedure Code 1973 (Cr.P.C.), which provides for an Appeal by the State Government against the sentence, on the ground of its inadequacy.

3. We have heard Shri Ajay Patil, learned APP for the State of Maharashtra and Ms.Vaidhahi Deshmukh h/f Mr.Yashodeep Deshmukh, who was appointed through the Legal Aid Services. Shri Patil submitted that considering the conviction under section 326 and punishment under the said section, the sentence awarded to the Respondent is grossly inadequate and this Appeal deserves to be allowed and the Respondent should be sentenced suitably in accordance with law.

4. With the assistance of the learned Counsel for the parties, we have gone through the entire evidence and record & proceedings of the case. The prosecution case is in respect of an incident dated 18-11-1990. The Respondent was son of the landlord of one Akbarali. On that date at around 5 p.m. there was some quarrel between the landlord and Akbarali. The Respondent was present there and in the heat of anger he picked an iron pipe and gave a blow of the same on the head of the aforesaid Akbarali causing injuries. Akbarali was taken for medical treatment by his son who was present at the spot. The FIR was lodged by Akbarali's son vide C.R.No.473/90 at Vasai Police Station. The investigation was carried out. During the investigation, statements of various witnesses were recorded and the weapon of assault i.e. iron pipe was recovered at the instance of the accused. At the conclusion of the investigation, charge sheet was filed and the case was tried as RCC No.438/90 before the Judicial Magistrate, First Class, Vasai.

5. During the trial, the prosecution examined six witnesses including injured himself, his son-in-law and another witness as eye witnesses, the pancha who was present during the spot panachanama and the Investigating Officer. After recording the evidence and statement of the

Respondent under section 313 of Cr.P.C., the learned Trial Judge heard both sides and passed the impugned judgment and order as mentioned earlier.

6. The prosecution's case obviously rests heavily on the evidence of the injured himself. The injured Akbarali Patanwala was examined as witness No.3 in this case. According to him, the Respondent was his landlord's son. On 18-11-1990 at about 5 p.m., P.W.3 came on the ground floor to take water. At that time the Respondent was standing near the tank and two other persons were working. P.W.3 then asked the Respondent that water tank was obstructing the children in the building. It is further the case of P.W.3 that the Respondent abused him in filthy language and threatened him of assault. P.W.3 has further deposed that he told the Respondent not to abuse and at that time the Respondent picked up a pipe lying nearby and gave a blow of the same on his head. Due to which P.W.3 sustained bleeding injury. The persons present at the spot took him to the police station and under a 'yadi' given by the police he was taken for medical treatment. There the medical officer sutured his wound. He was cross-examined at length on behalf of the Respondent. However, nothing favourable to the Respondent was brought on record through his cross-examination.

7. P.W.3's evidence is supported by the evidence of P.W.1-Husain Painter, who was the son-in-law of the injured P.W.3. P.W.1 has supported the version of P.W.3 and in all material particulars. He was amongst one of the persons who took P.W.3 to police station. After giving a treatment to P.W.3, according to P.W.1, he came back to the police station and then this witness has lodged his FIR. The FIR is produced on record at Exh.17. He was also cross-examined by the defence, but his evidence remained consistent with that of P.W.3.

8. P.W.4-Yusuf Patanwala, who was another eye witness, had witnessed the incident when he was standing in his gallery in the same building. He has deposed about the incident and has specifically deposed that the Respondent gave a blow of pipe on the head of P.W.3.

9. P.W.2-Ali Bhavanagarwala was a pancha. In his presence spot panchanama was conducted. The spot was shown by Yusuf-P.W.4

10. P.W.6- PSI Balkrishna Shankarrao Surve had investigated the said offence, which was registered vide CR No.473/90. He had filed the charge-sheet in the Court. Significantly the judgment mentions that the charge

sheet was filed under sections 324, 504 and 506 of IPC. However, the charge was framed under section 326 of IPC.

11. In this context the evidence of the Doctor who had treated P.W.3 assumes importance. The prosecution has examined Dr.Bapurao Shankarrao Savakhande-P.W.5. He has deposed that on 18-11-1990 at about 5.50 p.m. P.W.3 was brought to him for examination. On examination he found the following three injuries:

1. C.L.W. on head in lambdoid sutur region direction straight oblique size $1\frac{3}{4}$ length $\frac{1}{4}$ x $\frac{1}{2}$ L.B.D.
2. abrasion right elbow size $\frac{1}{2}$ inch x $\frac{1}{2}$ inch oval.
3. Pain and swelling on lower lip right half age of all injuries within 6 hours. Caused for all hard and blunt object.

He further deposed that the nature of first injury was grievous and other two injuries were simple. The injuries were sutured and appropriate treatment was given. He has produced a medical certificate at Exh.21(A).

12. After going through the evidence we are of the opinion that the incident had taken place and there is no reason to disbelieve the injured P.W.3 and the other witnesses. In any case, the Respondent has not filed any Appeal challenging his conviction. Therefore, we have no hesitation in

holding that the prosecution has proved that the incident had taken place and the Respondent had assaulted P.W.3 with iron pipe on his head. We also agree with the submission of Shri Ajay Patil, APP that after the conviction under section 326 of IPC, the sentence directing the Respondent to pay fine and not sentencing him for a substantial period of imprisonment is not correct. For the offence under section 326, only imposing fine is obviously grossly inadequate. However, the question remains as to whether the offence of section 326 is made out by the prosecution in the instant case. Though the Medical Officer has mentioned that injury No.1 was grievous, in our opinion, that opinion of the Medical Officer is not enough to bring the offence within the ambit of section 326 of IPC. The 'grievous hurt' in common parlance may differ from the definition of 'grievous hurt' given in IPC. The 'grievous hurt' is defined in IPC under section 320 as follows:

"320. Grievous hurt

The following kinds of hurt only are designated as "grievous":-

First- Emasculation.

Secondly- Permanent privation of the sight of either eye.

Thirdly- Permanent privation of the hearing of either ear,

Fourthly- Privation of any member or joint.

Fifthly- Destruction or permanent impairing of the powers of any member or joint.

Sixthly- Permanent disfiguration of the head or face.

Seventhly- Fracture or dislocation of a bone or tooth.

Eighthly- Any hurt which endangers life or which causes the sufferer to be

during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.”

13. From the evidence of Medical Officer we do not find that the injury described by him falls within any of the categories mentioned under section 320 of IPC. The Medical Officer has not stated that the injury was endangering life of P.W.3. P.W.3 himself has not stated that for twenty days he was unable to follow ordinary pursuits. Therefore, in our opinion, the injury brought on record does not fall within any of the categories mentioned in section 320 of IPC. In our opinion, therefore, the prosecution has not proved that the Respondent has committed the offence punishable under section 326 of IPC.

14. However, the evidence shows that the incident did take place, the Respondent had assaulted P.W.3 with an iron pipe. Therefore, in our opinion, offence committed by the Respondent would fall under section 324 of IPC. The Respondent has caused hurt to P.W.3 with a weapon as described under section 324 of IPC and therefore is liable to be convicted and punished under section 324 of IPC.

15. Section 386(c) of Cr.P.C. provides that the Appellate Court in an Appeal in enhancing of sentence can (i) reverse the finding and sentence

and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or (ii) alter the finding maintaining the sentence, or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same. Therefore, taking into consideration this provision, we are setting aside the conviction of the Respondent under section 326 of IPC and instead we are convicting the Respondent for commission of offence punishable under section 324 of IPC. Since, the offence had taken place in the year 1990, we are not inclined to award substantive jail sentence to the Respondent. Therefore, we are inclined to maintain the sentence awarded to him. Insofar as conviction and sentence under section 504 and 506 of IPC are concerned, those conviction and sentence under those sections are maintained. Hence, the following order:

ORDER

(i) The judgment and order of conviction under section 326 of IPC passed by the Judicial Magistrate, First Class, Vasai in RCC No.438 of 1990 is set aside and instead the Respondent is convicted for the offence punishable under section 324 of IPC and is sentenced to pay a fine of Rs.2000/- and in default to suffer simple imprisonment for three months. Rest of the conviction and sentence under sections

504 and 506 of IPC are maintained.

(ii) If the Respondent has deposited the fine amount pursuant to the impugned judgment and order of conviction and sentence under section 326 of IPC, the Respondent is not required to deposit the further fine amount.

16. With the aforesaid operative order the Appeal is disposed of.

(SARANG V. KOTWAL,J.)

(A.A.SAYED, J.)

Uday
Prabhakar
Kambli

Digitally signed
by Uday
Prabhakar
Kambli
Date:
2018.07.11
13:25:06 +0530