

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

CRIMINAL REVISION APPLICATION NO. 427 OF 2004

Rameshwar S/o Baburao Shelke,
Aged 31 years, Occ.: Agriculturist,
R/o Yesegaon, Taluka Jintoor,
District Parbhani.

... **APPLICANT**

Versus

The State of Maharashtra

... **RESPONDENT**

...

Advocate for Applicants : Mr. R.N. Chavan h/f. K.V. Sharma

Advocate for Respondents/State : Mr. P.K. Lakhotiya

Assist to PP : Mr. Prashant Deshmukh

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CORAM : MANGESH S. PATIL, J.

RESERVED ON: 30.09.2019

PRONOUNCED ON: 07.11.2019

JUDGMENT :-

The applicant is the original accused invoking the powers of this Court under Section 397 read with Section 401 of the Cr.P.C., taking exception to the order of his conviction and sentence.

2. Briefly stated the facts leading to the filing of the revision are as under:

(i) The prosecution version is to the effect that the respondent original complainant Deelip (PW-1) and the applicant are the adjoining land holders.

There was dispute between the two families. Deelip's father had lodged a complaint against the applicant's father and the case was pending trial before the Court of J.M.F.C., Jintur. The case was posted on 18.07.1996. It is alleged that on account of such animosity and with a view to deter Deelip (PW-1) from deposing, on the previous day i.e. on 17.07.1996 at about 7.45 a.m. when he was proceeding from his village to Jintur for getting a fan repaired the applicant arrived there on a bicycle, he threw chilli powder on Deelip's face, fell him to the ground and gave few blows of stones on his knees, arms and head. It is alleged that the applicant also assaulted Deelip with a bicycle chain. Ramkishan (PW-6) and few school going boys who were passing by rescued Deelip (PW-1). He was taken to a hospital. Dr. Ketan Chavan (PW-3) examined him and noted following injuries:

1. Contused lacerated wound at scalp on middle parietal region of size 3 x 1 x 1 cms.
2. Congestion of both eyes.
3. Contusion over right shoulder of size 2 x 1.5 cms.
4. Abrasion over left middle finger of size $\frac{1}{2}$ x $\frac{1}{2}$ cms.
5. Abrasion right nostril of size $\frac{1}{2}$ x $\frac{1}{2}$ cm.

He opined that the age of injuries was within six hours. Injury no.1 could have been caused by hard and blunt object, injury no.2 could have been caused by irritant material and injury nos.3 to 5 could have been caused by

hard and blunt object. He further noted that except injury no.2 others were simple in nature. For injury no.2 which was to the eyes, he referred Deelip (PW-1) for further examination by an Ophthalmologist in Civil Hospital, Parbhani. Accordingly he issued a Medico Legal Certificate (Exhibit-48).

(ii) It is further alleged that Deelip's statement was recorded while he was being treated in the hospital by Dr. Chavan (PW-3). It was treated as F.I.R. (Exhibit-41) and Crime no. 79 of 1996 was registered for the offences punishable under Section 326, 341 and 323 of the I.P.C. A.S.I. Pathan (PW-7) then started investigation. He went to the spot and recorded a spot panchanama (Exhibit-50) in presence of Panch Namdeo (PW-4). Blood stained shirt of Deelip (PW-1) was seized under panchanama (Exhibit-45) in presence of Shivshankar (PW-2). It is further alleged that during the course of spot panchanama the stone and the bicycle chain used in commission of the crime were also seized. In due course of time A.S.I. Pathan (PW-7) submitted the charge-sheet.

(iii) The learned Magistrate framed the charge (Exhibit-35) for the aforementioned sections. The applicant pleaded not guilty. The trial was conducted. By the impugned judgment the learned Magistrate held the offence to have been proved beyond reasonable doubt, however in the process he held that the offence punishable under Section 326 was not made out and

only the offences punishable under Section 324 and 341 of the I.P.C. stood proved. For the offence punishable under Section 324 of the I.P.C. he sentenced the applicant to rigorous imprisonment for one year and fine of Rs.2,000/- in default of payment of fine to further rigorous imprisonment for three months. For the offence punishable under Section 341 he sentenced the applicant to suffer simple imprisonment till rising of the Court and fine of Rs.1,000/- in default to suffer simple imprisonment for one month. He further directed the substantive sentences for both the offences to run concurrently. He also directed that out of the fine of Rs.3,000/- Deelip (PW-1) shall be paid Rs.2,000/- by way of compensation under Section 357 of the Cr.P.C.

(iv) Being aggrieved by such conviction the applicant preferred Criminal Appeal No. 41 of 203 before the Sessions Court, Parbhani. After hearing both the sides, the learned Additional Sessions Judge allowed the appeal partly. He upheld the conviction for the offence punishable under Section 324 of the I.P.C. and reduced the substantive sentence to six months but maintained the quantum of fine. The learned Additional Sessions Judge acquitted the applicant of the offence punishable under Section 341 of the I.P.C. The learned Additional Sessions Judge also correspondingly reduced the compensation to be paid to Deelip from Rs.2,000/- to Rs.1,500/-. Hence this

revision.

3. I have heard the learned advocate for the applicant, the learned A.P.P. and the learned advocate Mr. Prashant Deshmukh for the original complainant Deelip (PW-1) who has been allowed by this Court by the order dated 17.10.2013 in his Criminal Application No. 2621 of 2012 to argue the matter.

4. The learned advocate for the applicant vehemently submitted that even according to the prosecution there was previous animosity and the applicant has been falsely implicated to wreak vengeance and he has not committed any offence. Except the highly interested words of Deelip (PW-1) which also suffer from inherent improbabilities and contradictions, there is no other corroborating piece of evidence. The school going children who had witnessed the incident were not called as witnesses. Both the Courts below have failed to appreciate the evidence in proper perspective. The observations of the two Courts below are perverse and the conclusions drawn are erroneous. They failed to appreciate the animosity while testing veracity of Deelip (PW-1). The evidence was too deficient to come to a reasonable conclusion of guilt. In any event the guilt was not proved beyond reasonable doubt and thus both the Courts below have erred in convicting the applicant.

5. The learned advocate for the applicant in the alternative also submitted that both the Courts below have failed to assign any reason as to why the benefit of the Probation of Offenders Act could not be given to the applicant. There was no criminal history and considering his age and the decision in the case of **Chandreshwar Sharma V/s. State of Bihar; (2000) 9 Supreme Court Cases 245** the applicant deserves to be given benefit of the Probation of Offenders Act particularly when since the year 1996 he is under mental stress of the impending prosecution.

6. The learned A.P.P. and the learned advocate for the respondent original complainant Deelip (PW-1) supported the judgments of the Courts below. They submitted that there are concurrent findings of facts. Both the Courts have reasonably appreciated the ocular version of the witnesses. They have been able to sift the evidence to separate grain from chaff. The Magistrate has meticulously scanned the evidence and even the learned Additional Sessions Judge has re-appreciated the evidence afresh. The view taken by the Courts below is clearly substantiated by the evidence. There is no apparent error which could enable this Court to cause any interference while exercising the limited jurisdiction of revision under Section 397 read with Section 401 of the Cr.PC.

7. The learned A.P.P. and the learned advocate for respondent

complainant further submitted that though the Courts below have not assigned any reason for not extending the benefit of the provisions of the Probation of Offenders Act to the applicant, this Court can re-appreciate the evidence and in the peculiar facts and circumstances can decide if such a benefit can be extended. However they submitted that the offence has not been committed on the spur of moment. There has been history in the form of a previous complaint filed by Deelip's father against applicant's father which was in fact pending before the Magistrate and the trial was posted on the next day of the incident. The applicant had arrived with pre-meditation. He was carrying chilli powder and also a bicycle chain. He intercepted Deelip (PW-1) and had assaulted him. Thus according to them there was a strong motive, criminal history and due preparation for commission of the crime. It cannot be said that the incident had occurred on the spur of moment and therefore the applicant is not entitled to seek any benefit of the provisions of the Probation of Offenders Act. They submit that in fact there was no sufficient and cogent reason for the Appellate Court to reduce the substantive sentence for the offence punishable under Section 324 of the I.P.C.

8. I have carefully gone through the judgments of the Courts below as well as the record and proceeding. It is trite that while exercising the powers of revision under Section 397 read with Section 401 of the Cr.P.C., this

Court should be circumspect and on guards while interfering in the concurrent findings of the facts of the two Courts below. The powers have inherent limitation and can only be exercised when the two Courts below have grossly erred in appreciating the evidence and the observations and conclusions are perverse and arbitrary.

9. The prosecution has examined Deelip (PW-1) who is the prime witness. The prosecution did examine Ramkishan (PW-6) who according to the prosecution was also an eye witness but he has turned hostile to the prosecution. While appreciating the evidence of Deelip (PW-1) the Magistrate has specifically observed that on account of previous animosity the applicant had assaulted him with a stone and a bicycle chain causing him various injuries. The Magistrate meticulously scanned his testimony in juxtaposition to the medical evidence of Dr. Chavan (PW-3) and has come to a plausible conclusion that version of Deelip (PW-1) was duly corroborated by Dr. Chavan (PW-3). The learned Magistrate also found that version of Deelip (PW-1) and Dr. Chavan (PW-3) stood further corroborated by the evidence of Dr. Takalkar (PW-5) who was then working as an Ophthalmologist in the Civil Hospital, Parbhani and testified that Deelip (PW-1) was treated as an indoor patient in the Civil Hospital for 21 days from 18.07.1996 till he was discharged on 09.08.1996. He further testified that Deelip (PW-1) was found to have

Subconjunctival hemorrhage with conjunctival congestion. He further stated that there was Papilloedema with maudaroedema with deminision of vision. He further stated to have referred Deelip (PW-1) to Medical College, Aurangabad.

10. The learned Magistrate also dealt with the submission on behalf of the applicant that the testimony of Deelip (PW-1) was not reliable since there were some inconsistencies in the contents of the F.I.R. (Exhibit-41) lodged by him and his testimony before the Court. In the deposition Deelip (PW-1) stated about he having been assaulted on his forearm, shoulder, left hand middle finger and nostril and also stated to have been threatened to kill, which facts do not find place in the F.I.R. (Exhibit-41). In the F.I.R. he stated about the applicant having assaulted him on both the thighs and both the shoulders. The Magistrate held that such inconsistencies were minor and did not affect veracity of Deelip (PW-1). The Magistrate further appreciated the fact that substantive version in respect of the manner of assault was duly established.

11. The Magistrate also relied upon the testimony of Ramkishan (PW-6) who was cited as an eye witness but had turned hostile to the prosecution. The learned Magistrate observed that during his cross-examination by the learned Additional Sessions Judge this witness admitted about occurrence of

some incident and his presence. It needs to be appreciated that though this witness Ramkishan (PW-6) has not admitted anything even during his cross-examination, it was a sincere attempt on the part of the prosecution to examine him as an eye witness. The learned Magistrate also discarded the argument on behalf of the applicant that it failed to examine the school children and any other witness by observing that it had indeed made such an attempt by examining Ramkishan (PW-6), although he had turned hostile to the prosecution. Ultimately, the Magistrate held that the version of Deelip (PW-1) was reliable and cogent and sufficiently established guilt.

12. The Magistrate then found version of Deelip (PW-1) to have been duly corroborated by the medical evidence in the form of testimony of Dr. Chavan (PW-3) and Dr. Takalkar (PW-5). The learned Magistrate also dealt with the apparent contradictions in the Medico Legal Certificate issued by Dr. Chavan (PW-3) and his ocular version particularly while using 'ditto' sign against injury no.2 to both the eyes in column no.7 in respect of type of weapon used. The learned Magistrate correctly appreciated the fact that this sign of 'ditto' was put in a mechanical manner inadvertently since in the last column no.9 Dr.Chavan (PW-3) had specifically noted that the nature of injury to the eyes could not be given as the patient was being referred for Ophthalmologist's opinion.

13. The learned Magistrate also rightly appreciated the fact that Deelip (PW-1) was subsequently referred to Civil Hospital, Parbhani and was treated there as an indoor patient for 21 days as mentioned by Dr. Takalkar (PW-6) and the latter had duly testified about the injuries to the eyes, as mentioned in the Discharge Card (Exhibit-53). The learned Magistrate also appreciated the fact that the defence version about injury to the eyes having been sustained due to insertion of dust particles when Deelip (PW-1) fell to the ground stood disproved by the testimony of Dr. Takalkar (PW-6) who specifically opined that the injury to the eyes was not possible due to fall on the ground and or due to dust entering in to the eyes while driving a bike.

14. The learned Magistrate also found that the testimony of Deelip (PW-1) stood further corroborated by the testimony of Shivshankar (PW-2) and in whose presence his blood stained shirt was seized under a panchanama (Exhibit-45). The Magistrate had also discarded the argument that this witness Shivshankar (PW-2) was not reliable as he was distantly related to Deelip (PW-1).

15. While dealing with the testimony of Namdeo (PW-4) who is a Panch on the spot panchanama (Exhibit-50) the Magistrate also appreciated the fact that though this witness had declined to support the prosecution fully,

he had admitted that some sort of panchanama was conducted in his presence by going to the spot. The contents were read over to him and it is thereafter that he had put his signature. The Magistrate also appreciated the fact that the testimony of this panch Namdeo (PW-4) was not isolated version but was further corroborated by A.S.I. Pathan (PW-7) who was the Investigating Officer and had conducted the panchanama (Exhibit-50). Thus according to the Magistrate recovery of a stone and chilli powder packet from the spot also stood proved and this circumstance further corroborated testimony of the Deelip (PW-1). The learned Magistrate also discarded an attempt by the defence to refer to and rely upon certain circumstances and information elicited during cross-examination of hostile witness Ramkishan (PW-6) during his cross-examination on behalf of the applicant.

16. It is thus apparent that after a meticulous scanning of oral account of the incident as narrated by Deelip (PW-1) and all other circumstances corroborating his version in the form of seizure of his blood stained shirt, recovery of a stone and chilli powder packet from the spot, testimony of the Medical Officers corroborated his version about having sustained various injuries and duly established the guilt of the applicant.

17. Perusal of the judgment of the learned Additional Sessions Judge shows that he once again reassessed the entire evidence, oral as well as

documentary, and has also objectively dealt with the reasoning given by the learned Magistrate and has upheld the conviction. The learned Additional Sessions Judge in the process has quashed and set aside the conviction for the offence punishable under Section 341 of the I.P.C. by holding that there was no question of any wrongful restraint. The learned Judge once again examined veracity of Deelip (PW-1) and re-appreciated the medical evidence and it is only after such objective assessment of the entire evidence that he has confirmed the conviction of the applicant for the offence punishable under Section 324 of the I.P.C.

18. It is thus apparent that both the Courts below have assessed oral as well as documentary evidence in the proper perspective. There was no apparent error committed by them in analyzing the facts and the evidence and have reached a plausible conclusion and I find no sufficient and justifiable reason to cause any interference in such concurrent findings while exercising the limited powers under Section 397 read with Section 401 of the Cr.P.C.

19. True it is that as observed in the case of **Chandreshwar Sharma** (supra) it was obligatory on the part of both the Courts below to have specifically assigned some reasons for not extending the benefit of provisions of Probation of Offenders Act to the applicant but they have failed to do so. However, in my considered view, even if one decides to ascertain if such a

benefit could be extended to the applicant still the facts and circumstances do not warrant any such indulgence.

20. As is mentioned earlier there was previous animosity between the families of the applicant and Deelip (PW-1). Already the trial was going on before the Magistrate and was posted on the very next day. The incident had taken place while Deelip (PW-1) was proceeding to Jintur from his native place. It had taken place in the morning hours. The applicant was found carrying packet containing chilli powder and a bicycle chain. It could not have been a sheer coincidence rather he in all probabilities must have reached there by keeping watch on the moments of Deelip (PW-1) else there was no occasion for him to carry chilli powder and a bicycle chain and to intercept Deelip (PW-1) on the way in the morning hours. It is thus apparent that there was a pre-meditation and a strong motive for the applicant to assault Deelip (PW-1). Therefore in my considered view he is not entitled to seek any benefit under the Probation of Offenders Act.

21. In the case of **Chandreshwar Sharma** (supra) a 3.5 kg of non-ferrous metal was stolen by the accused by carrying it on a tiffin carrier of his bicycle. The accused therein was convicted for the offence punishable under Section 397 of the I.P.C. The appeal preferred by him was dismissed and even the revision filed by him was dismissed without considering his entitlement to

get the benefit of the provisions of Section 360 of the Cr.PC. and looking to the facts and circumstances he was found entitled to that benefit. In the matter before hand though the Courts below have erred in not considering the applicant's entitlement to seek benefit under the Probation of Offenders Act, his request is now being considered by this Court. In the peculiar facts and circumstances mentioned herein-above, he has been found not entitled to get any benefit of the provisions of the Probation of Offenders Act and therefore he is not entitled to derive any benefit from the decision in the case of **Chandreshwar Sharma** (supra).

22. The learned advocate for the applicant then also referred to the decision in the case of **Ramesh Kumar alias Babla V/s. State of Punjab; AIR 2016 Supreme Court 2858** and **Om Prakash and Others V/s. State of Haryana; (2001) 10 Supreme Court Cases 477**.

23. In the case of **Ramesh Kumar** (supra) the accused was convicted for the offence punishable under Section 307, 326 and 324 of the I.P.C. the Supreme Court held that they were not guilty of causing grievous hurt and were only liable to be convicted for the offence punishable under Section 324 of the I.P.C. It was observed in the peculiar facts and circumstances that the incident had taken place in the year 1997, during the cross-examination of the accused under Section 313 of the Cr.PC. recorded in 2002 he had stated his

age to be 36 years, he had claimed that he had gone to the spot only after receiving the information that his brother was being assaulted by the complainant therein and thereafter he took his brother to a police station and lodged a report and that there was civil as well as criminal litigation between the parties. It was also noticed that the accused was not involved in any other case and therefore it was held that he was entitled to the benefit of Probation of Offenders Act.

24. In the case of **Om Prakash** (supra), like in the case of **Chandreshwar Sharma** (supra) the trial Court as well as the Appellate Court had not assigned any reason for not extending the benefit of Section 360 of the Cr.P.C. to the accused and even in the revision before the High Court it was not considered and thus there was a gross miscarriage of justice. Bearing in mind the facts and circumstances the accused therein was found entitled to get the benefit under Section 360 of the Cr.P.C.

25. Though there is some similarity of facts in the case of **Ramesh Kumar** (supra) and the matter in hand in as much as there has been a land dispute between the two families and that the applicant is facing the present case since the year 1996, the facts and circumstances of the matter in hand are peculiar as discussed herein-above. To repeat, there was a strong motive for the applicant to assault Deelip (PW-1). He had made preparation for

causing the assault. On a day prior to the trial he waited for an opportune moment had carried out the assault in a systematic manner. He was carrying chilli powder, threw it on the eyes of Deelip(PW-1) and then assaulted him as a result he was required to be treated as an indoor patient in the Civil Hospital, Parbhani for 21 days and it is under these circumstances that in my considered view the applicant is not entitled to claim any benefit from the decision in the case of **Ramesh Kumar** (supra).

26. So far as the decision in the case of **Om Prakash** (supra), again, it was a case of gross miscarriage of justice and not only the trial Court and the Appellate Court but even the High Court had not considered if the accused therein was entitled to the benefit of Section 360 of the Cr.P.C. It was only in the peculiar facts and circumstances of the case obtaining before the Supreme Court that the accused therein was granted benefit of Section 360 of the Cr.P.C. In the matter in hand, even after an objective assessment of the entire matter, I have come to the conclusion that the applicant cannot be granted any benefit of the provisions of the Probation of Offenders Act and therefore he is not entitled to derive any benefit even from this decision in the case of **Om Prakash** (supra).

27. Perhaps anticipating the situation, by way of last resort the learned advocate for the applicant vehemently submitted that considering the

fact that the incident had taken place in the year 1996 and that there was no grievous injury and there were no criminal antecedents and that there has been a hanging sword for past so many years at least substantive sentence be reduced to the period already undergone by the applicant. The learned advocate sought reliance upon the decisions in the case of **Ramdas V/s. State of Madhya Pradesh; 2009 AIR SCW 604, Manjappa V/s. State of Karnataka; (2007) 6 Supreme Court Cases 231 and Bassaya Prabhayya Hallur V/s. State of Karnataka; (2009) 17 Supreme Court Cases 55.**

28. I have carefully gone through these decisions. In the matter in hand the applicant has not undergone substantive sentence like in the case of **Manjappa** (supra) wherein the accused was sentenced to suffer substantive sentence for a month and half and he was in custody for fifteen days and in the facts and circumstances it was held that there was no sufficient and cogent reason to direct him to suffer the remainder sentence of about a month after lapse of ten years. In the matter in hand such is not the case the applicant has been sentenced to suffer imprisonment for six months and he has not undergone substantive part of it. In the case of **Bassaya** (supra) the accused were sentenced to suffer rigorous imprisonment for six months and they had already undergone two months imprisonment and in the peculiar facts and circumstances the sentence was reduced to the period already undergone and

the fine amount was increased. Such is not the case in the matter in hand where the applicant has not undergone substantive portion of the sentence.

29. In the case of **Ramdas** (supra) there was no previous animosity between the accused and the deceased, a single blow of sickle was inflicted on the back which was not found to be sufficient to cause death. In the matter in hand, at the cost of repetition it needs to be remembered that there was previous animosity and a strong motive for carrying out the assault. Some sort of preparation was there and the assault was carried out with pre-meditation. Therefore the applicant is not entitled to derive any benefit even from the case of **Ramdas** (supra).

30. In this context it is necessary to note that the learned Magistrate has held that there was no grievous injury without appreciating the fact that according to the testimony of Dr. Takalkar (PW-6), injured Deelip (PW-1) was required to be treated as an indoor patient for a period of 21 days in Civil Hospital, Parbhani as mentioned in the Discharge Card (Exhibit-53). If definition of grievous hurt contained in Section 320 of the I.P.C. is perused, particularly the eight item, it is apparent that even not being able to follow ordinary pursuits during the space of 20 days constitutes grievous hurt. It reads thus:

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

.....

Eightly – 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.”

Therefore when Deelip (PW-1) was required to be treated as an indoor patient in the Civil Hospital, Parbhani for a period of 21 days, being unable to follow his daily pursuits, it is clearly a case of causing grievous hurt as defined under Section 320 of the I.P.C.

31. Interestingly, without there being any occasion the learned Additional Sessions Judge has held, though not for these reasons mentioned herein-above, that it was a case of grievous hurt. Be that as it may the fact remains that if it is indeed a case of causing grievous hurt, when the applicant was being charged simultaneously for the offences punishable under Section 326 and 324 of the I.P.C., he should have been convicted for the offence punishable under Section 325 of the I.P.C. since a grievous hurt was caused. Of course since the State or the original complainant Deelip (PW-1) has not preferred any appeal or revision, this aspect cannot be considered. The purpose for which I am making these observations is to point out that in the peculiar facts and circumstances, when it is a case of more serious offence

punishable under Section 325 of the I.P.C. for which a person can be sentenced to suffer imprisonment for seven years, this in my considered view is a strong circumstance for refusing to reduce the sentence any further or to extend the benefit of Probation of Offenders Act to the applicant.

32. Considering all these aspects, I find no sufficient and cogent reasons to cause any interference in the concurrent findings of the two Courts below in convicting and sentencing the applicant.

33. The revision is dismissed.

[MANGESH S. PATIL, J.]