

Sr. No.105

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRR-1593-2015(O&M)
Date of decision:08.02.2019**

Gurpreet Singh

.....Petitioner

versus

State of Punjab and others

.....Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Animesh Sharma, Advocate
for the petitioner.

Mr. Rajat Bansal, AAG, Punjab.

Mr. Harkirat Singh, Advocate
for respondents No.2 and 3.

Rajbir Sehrawat, J(Oral)

This is a petition challenging the judgment dated 11.02.2015 passed by the Additional Sessions Judge, Ludhiana, whereby the judgment of conviction passed by Trial Court was upheld and order of sentence was modified and the respondents No. 2 and 3 were ordered to be released on probation, and the appeal filed by the present petitioner for enhancing the sentence was dismissed.

The brief facts giving rise to the present petition are that the petitioner lodged an FIR under Sections 323,325,506 and 34 IPC; with the allegation that on 29.10.2010 at about 11:30 pm, the petitioner had been attacked by the accused/respondents No.2 and 3. They had given blows on the arms of the complainant/petitioner with Kurahi 'Belcha'; which resulted in multiple fractures in both arms of the petitioner/complainant. The reason for the attack was that the petitioner's mother was Sarpanch of the village

and the accused were supporting the opposite party. With these allegations, respondents No. 2 and 3 were prosecuted. The Trial Court held respondents No.2 and 3 to be guilty under Section 323 IPC. While dealing with the question of commission of offence under Section 325 IPC, on account of the alleged fractures caused to the petitioner, the Trial Court held that although, the opinion of the Doctor namely, Dr.Harjeet Singh has been led in evidence but the Radiologist who gave this report qua the nature of injuries has not been examined; nor has the X-ray film been placed on record of the case. Since, the Radiologist; who had reported the fractures in the hand of the petitioner was not produced before the Court, therefore, Section 325 IPC was held to be not made out. Further; the Trial Court sentenced respondents No.2 and 3 with the rigorous imprisonment for a period of one year alongwith the fine.

Aggrieved against the order of the Trial Court, the present petitioner; as well as respondents No.2 and 3; both filed separate appeals. The petitioner had filed appeal for conviction of respondents No.2 and 3 under Section 325 IPC and for enhancement of the sentence to seven years, whereas, respondents No.2 and 3 had filed appeal against their conviction and order of sentence. However, the lower Appellate Court vide impugned order dismissed the appeal filed by the petitioner. But, so far as the appeal filed by respondents No.2 and 3 is concerned, the same was dismissed but instead of maintaining the sentence of imprisonment against the respondents No.2 and 3; had modified the order of sentence and Ordered that respondents No.2 and 3 be released on probation for a period of one year. Challenging this Order passed by the lower Appellant Court, present revision petition has been filed by the Complainant. However, learned

counsel for respondents No.2 and 3 has pointed out that pursuant to the order passed by the lower Appellate Court, the petitioners have furnished the due bond and they have since completed the period of probation. As of today, they are not under any bond of probation from any Court.

Learned counsel for the petitioner has submitted that the Courts below have committed a grave irregularity in so far as they have not convicted respondents No.2 and 3 under Section 325 IPC. It is strenuously argued that fractures caused to the petitioner have already been brought on record by way of medical record. Doctor, namely, Harjeet Singh, who had opined the injury to be 'grievous' on the basis of fractures have duly been examined as PW-5. He has categorically deposed that he had given the opinion Ex:PW-5/D. It is further contended that even another private Doctor has been examined; who had opined regarding the fractures at the time when he was giving treatment to the petitioner. Counsel for the petitioner has relied upon judgment of this Court rendered in **1999(2)R.C.R. (Criminal)531; Gokha Singh versus State of Punjab** to contend that the doctors are the experts. Therefore, even if the X-ray film is not on the record then also the opinion of the doctor; who has been examined before the Court should have been taken as a conclusive proof regarding the nature of the injuries. Still further it is contended by the counsel that even if the conviction of respondents No.2 and 3 is to be upheld only under Section 323 IPC; then also lower Appellate Court has committed material irregularity in converting the sentence into probation. Respondents No. 2 and 3 did not deserve to be released on probation in view of the seriousness of the offence.

On the other hand, learned counsel for respondents No.2 and 3

submits that pursuant to the Order passed by the Courts below, respondents No.2 and 3 have already completed the period of probation. Hence respondents No.2 and 3 can not be given any punishment of imprisonment for the same offence. Arguing on the merits, learned counsel for respondents No.2 and 3 has submitted that there is no dispute that the doctors are the expert witnesses, however, in the present case, the relevant expert witness, who had opined about the fracture through radiology examination, has not been examined before the Court. Hence the Courts below have not committed any illegality by not believing the injuries, showing the alleged fractures in the hand of the petitioner.

Having heard learned counsel for the parties, this Court does not find any illegality or irregularity in the judgments/orders passed by the Courts below. The Constitution guarantees the right to life and liberty to a person, even if he happens to be an accused of an offence. However, his liberty can be curtailed only in accordance with the procedure prescribed under the law. In case of criminal prosecution, 'sentence' is only a modality devised by legal system to put a temporary but limited clog upon the right to life and liberty of a person; after he is convicted of an offence by following the due process of law. He can be confined in legal custody. Beyond that, the sentence has no significance. In the same manner, if a person is, although not confined, however, put under some kind of bond for conducting himself in a particular manner under the orders of the court, that also tantamounts to putting a kind of clog upon right of life and liberty of the individual. He would no more be as free an individual as he would have been without such bond. Hence when a person is put under a bond of assured good conduct on being released on probation, his right to life and

liberty is definitely under an eclipse. Therefore, the probation is also a legally recognized instrumentality of putting the life and liberty of a convict under eclipse for a specified time and the same has to be taken at par with the actual sentence of imprisonment; which the court could have awarded him. Hence once a convict has completed the period of probation; then he can not be sentenced with imprisonment for the same offence, even if the point is raised in court of appeal or revision and the Appellate Court or Revisional Court comes to a different opinion on sentence. After having undergone the period of probation, the convict has every right to say that he can not be put to double jeopardy for the same offence; because he has already suffered the eclipse upon his right to life to liberty. Hence this Court finds that since the petitioner has completed the period of probation, therefore, it is not permissible now to punish him with sentence of imprisonment, even if this court form a different opinion, so far as the offence under Section 323 IPC is concerned. Needless to say that Section 360 Cr.P.C as well as the Probation of Offenders Act, 1958 cast a duty upon the courts to consider a convict for releasing him on probation; in case of his conviction for offences except the specified offence. This has already been so held by this Court in case of ***Karaj Singh vs. State of Punjab;1996 (2)RCR(Criminal)367***. The lower Appellate Court has rightly granted the probation to respondents No.2 and 3 by exercising its power in accordance with law. This Court finds no reason to interfere with the order.

So far as the argument of learned counsel for the petitioner qua conviction of respondents No.2 and 3 for a higher offence under Section 325 IPC is concerned, on this point also this Court does not find any illegality in the order passed by the Court below. Although the petitioner

claims that he was caused fractures by the respondents No.2 and 3 and even some evidence has come regarding the injury being grievous, in the form of opinion of a doctor who has been examined before the Court; to suggest that there could have been fracture in the hand of the petitioner. However, it is not even denied that the said opinion of the doctor was based on another report of Radiologist, who had actually examined the petitioner and had given a report that there were fractures. However, the said Radiologist, namely, Dr. Harinder Pal Singh has not been produced before the Court. Even the X-ray film, on the basis of which the injury is opined to be grievous by the PW-5, has not been produced on record. Hence the opinion of the Doctor PW-5 can not be taken to have proved the guilt of respondents No.2 and 3 under Section 325 IPC beyond reasonable doubt. This view of this Court finds support from another judgment of this Court rendered in case of ***State of Haryana versus Prem Singh;2007(4)Criminal Court Cases 627***. Needless to say that mere suspicion or even preponderance of probability of commission of offence is not a substitute for evidence '*beyond reasonable doubt*'. Hence both the Courts below have rightly arrived at a conclusion that Section 325 IPC is not made out against respondents No.2 and 3.

Although counsel for the petitioner has relied upon the judgment of this Court rendered in ***Gokha Singh's case(Supra)***, however, this Court finds that the present case is distinguishable on the facts of the present case. In the case of ***Gokha Singh's case(supra)***, there was no X-ray done at all. However, the treating doctor who opined about fracture on the basis of physical symptoms was very much produced before the Court. The said doctor had duly proved the fracture as mentioned in his report and still

he was not even cross-examined by the defense. Therefore, the version regarding the offence was treated by this Court as uncontested. In the present case the X-Ray was done and report was prepared by a doctor. However, the doctor, as well as, his X-Ray report has been withheld by the prosecution. Otherwise also, there is no provision under either Evidence Act or under Code of Criminal Procedure(Cr.P.C.) to make the statement of a witness; made before the Court as absolute conclusive evidence of a fact, even if he happens to be an expert. Although Section 293 Cr.P.C provides that the Court can use the report of a government expert as an evidence, however, even that evidence is made subject to being proved by the witness, if the courts so requires. Further, even this sanctity qua admissibility in evidence has been restricted to only the reports mentioned in this section. For all other reports of any kind, the person who prepared the reports, naturally, have to be examined before the Court. Hence a Radiologist giving report of fracture on the basis of X-Ray; has to be produced before the Court. The statement of any other witness can, at the best be taken as a derivative expert opinion, which would be again subjected to assessment by the Court; qua its relevance and qua its evidentiary value. In the present case, the Courts below have not found the evidence of the Doctor/expert; who has been examined before the Court, sufficient to prove the case beyond reasonable doubt. No fault can be found with the appreciation of the evidence by the Courts below.

In view of the above, finding no merit in the present petition, the same is dismissed.

8th February, 2019

Shivani Kaushik

Whether speaking/reasoned

Whether Reportable

Yes/No

Yes/No

[RAJBIR SEHRAWAT]

JUDGE