

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 362/2020

Sheikh Junaid Sheik Rauf
Aged 29 years, Occ. Agriculturist,
R/o. Islampura Zopadpatti, Deulgaon
Mahi, Tah. Deulgaon Raja, Dist. Buldhana,
Presently District Prison, Buldhana.

.... **APPLICANT**

// VERSUS //

State of Maharashtra,
through P. S. O. Police station
Deulgaon Raja, Buldhana.

.... **RESPONDENT**

Shri M. N. Ali, Advocate for appellant.
Shri H. R. Dhumale, A.P.P. for State/Respondent.

CORAM : VINAY JOSHI, J.

CLOSED FOR JUDGMENT ON : 14.10.2020
JUDGMENT PRONOUNCED ON : 22.10.2020

JUDGMENT

Heard.

2. Challenge in this appeal is to the judgment and order of conviction dated 09.09.2020 passed by the Sessions Judge, Buldhana in Sessions Case No. 27/2018 whereby and under which the appellant (accused) was convicted for the offence punishable under Section 326 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 4 years and to pay a fine of Rs. 5,000/-, in-default of payment of fine, to suffer simpler imprisonment for 3 months.

3. The appellant – Junaid was tried along with two co-accused for the offence punishable under Sections 307, 504 and 506 of the Indian Penal Code. The Trial Court acquitted other two co-accused from all charges whilst accused Junaid was acquitted only for Section 504 and 506 of the Indian Penal Code. The Trial Court instead of Section 307 of the Indian Penal Code, convicted accused Junaid for the offence punishable under Section 326 of the Indian Penal Code and passed aforementioned sentence. The State has not challenged acquittal of either of accused on any count. Precisely, the challenge in this appeal remained to the extent of conviction of accused for the

offence punishable under Section 326 of the Indian Penal Code only.

4. The criminal law was set into motion by PW-2, Ajimkhan 23.06.2017. As per his oral report (Exh. 33) around 05.00 p.m., he was near his house along with family members including his young brother Imrankhan (injured). At that time, co-accused – Babu came and started to quarrel at the instance of road divider. As of sudden Accused – Junaid came and by means of crowbar (Pahar) dealt a blow at the head of Imrankhan. As a result, Imrankhan sustained bleeding injury at his head. He was shifted to the Hospital where he took indoor treatment. On the basis of said report, the Police registered crime. PW-14, API Shri Shewale conducted the investigation and on completion thereof filed charge-sheet in the Court of law.

5. Learned Sessions Judge, Buldhana framed charge (Exh. 09) against three accused including accused Junaid for the offence punishable under Sections 307, 504, 506 read with Section 34 of the Indian Penal Code.

6. The prosecution examined in all 14 witnesses. The defence also examined a witness to nullify the prosecution case. After appreciation of the prosecution case and the evidence adduced in the

trial, the Court below by acquitting co-accused, has convicted Junaid for the offence punishable under Section 326 of the Indian Penal Code .

7. Heard Shri M. N, Ali, learned counsel for the appellant and Shri H. R. Dhumale, learned Additional Public Prosecutor for the State. It is the submission of learned counsel for appellant that even accepting the entire prosecution case as it is, the appellant cannot be convicted for the offence punishable under Section 326 of the Indian Penal Code. Inasmuch as the nature of injury is not proved by the prosecution. His prime submission is that, the prosecution evidence is not sufficient to establish the guilt of accused. He would submit that there was strong possibility of injured Imrankhan sustaining injury by way of fall on the hard substance. Alternatively, he made submission that at the most the accused can be convicted for the offence punishable under Section 324 of the Indian Penal Code. He submitted that accused is educated youth. The incident took place at a spur of moment. There are no antecedent, therefore, accused deserves for the benefit under the provisions of the Probation of Offenders Act.

8. Per contra, learned Additional Public Prosecutor has vehemently opposed the submission made on behalf of the learned counsel for the appellant by supporting the impugned judgment. It is

the submission that there are number of eye witnesses in support of the evidence of injured Imrankhan. The injury was on the vital part of the body and therefore, conviction under Section 326 of the Indian Penal Code is inevitable.

9. Though the prosecution has examined in all 14 witnesses, the evidence of injured PW-3, Imrankhan and three eye-witnesses is of importance. It is the evidence of PW-3, Imrankhan that at the relevant time, he was breaking the road divider/breaker to shove the rain water. At that time, both co-accused started to quarrel on said count. The accused Junaid came and gave a blow by crowbar at his head leaving him in pool of blood. Informant – PW-2 Ajimkhan is the eye-witness to the occurrence. He similarly, deposed that on the day of incident itself, road divider was built in front of their house because of that the rain water was coming to their house. Injured Imrankhan was breaking the divider. Seeing that co-accused picked up quarrel with Imrankhan in which accused – Junaid arrived and dealt a blow with crowbar at his head. The evidence of these two witnesses is well supported by PW – 4 Atiyabi and PW – 5 Rahimkhan who have seen the occurrence. All these witnesses were cross-examined at length but nothing fruitful has come out to shatter their evidence.

10. The defence has criticized the evidence of these witnesses on the count that all three eye-witness were close relatives of injured, therefore they cannot be believed. True, PW-2 Ajimkhan is brother of injured, PW-4 Aityabia is sister-in-law and PW-5 Rahimkhan is father of injured, however, unless they are in inimical terms, their evidence cannot be discarded solely on the ground of close relationship. Pertinent to note that incident occurred at the doorstep of the injured where all witnesses were residing, therefore, their presence on the spot was quite natural. In absence of any material, their evidence which withstood to the prosecution case cannot be discarded.

11. Though defence examined a witness to suggest that the injured sustained head injury by fall, however it is not believable against the consistent evidence of victim and other eye-witness. Moreover, medical officer has denied the suggestion that the head injury was possible by fall on hard substance. It is not in dispute that on the day of incident itself, injured Imrankhan was initially taken to rural hospital, Deulgaon Raja and then shifted to Vivekanand Hospital, Jalana. It has come in the evidence of PW-13, Dr. Tathe that on 22.06.2017, he has examined injured Imrankhan. On examination, he found one lacerated wound at parital region of scalp with bleeding,

size 10 cm x 1 cm x bone deep injury. Accordingly, he has issued medico legal certificate (Exh.69 and 70). The victim was latter on shifted to Vivekanand Hospital, Jalana. PW-12 Dr. Misal also examined injured and proved medical papers. It has come in the evidence of medical officer that the injury sustained by victim is possible by means of crowbar. The cojoint reading of the evidence of injured, eye-witness and medical officer proves beyond the manner of doubt that injured – Imrankhan sustained head injury as a result of blow given by accused – Junaid at his head. The Trial Court has rightly appreciated the evidence on this point which calls no interference.

12. The Trial Court held that the prosecution evidence fails short to prove requisite intention and knowledge, therefore the act of accused amounts to causing grievous hurt by dangerous weapon. Learned defence counsel would submit that the Trial Court erred in holding that the injury caused was of grievous nature. According to him, the nature of injury was simple hence the act is punishable under Section 324 of the Indian Penal Code.

13. It brings to consider whether the conviction of the accused under Section 326 of the Indian Penal Code for grievous hurt is justifiable. The answer to this question would depend on the nature of

the injury which has been found on the person of PW-3, Imrankhan. In order to justify conviction under Section 320, injuries on PW-3 must satisfy the requirements of Clause (sixthly) and Clause (eightly) of Section 320 of the Indian Penal Code (applicable herein) otherwise, they will be treated as simple injury. The Trial Court held that the head injury amounts to permanent disfiguration and it was endangers to life. By taking aid of the Clause (sixthly) and Clause (eightly) to Section 320 of the Indian Penal Code, Trial Court has recorded the findings of causing grievous hurt. It requires factual scrutiny to determine the nature of injury.

14. As noted above, it was a single head injury on parital region having size of 10 cm x 1 cm x bone deep injury. PW-13 – Dr. Tathe who has initially examined the patient, has suspected about fracture but it was not. He admits that he has never opined that it was a grievous injury. PW-12, Dr. Misal stated in his evidence that the injury was caused by hard and blunt object and it was simple in nature. Medical evidence nowhere discloses that the injury was endengerous to life. Merely because it was head injury, without scrutiny it cannot be said or presumed that it was engenders to life. The Trial Court considered it as disfiguration of head. However, there is no material

to support said conclusion. None of the medical officers have stated either the injury was grievous or it was endangers to life. Neither there is evidence that about 20 days, injured suffered severe bodily pain nor was unable to follow his ordinary pursuit. In absence of evidence to establish that the injury was of grievous nature within the meaning of Section 320 of the Indian Penal Code, the nature of injury can be of simple. Therefore, the conviction for the offence punishable under Section 326 is not sustainable in law. However, the accused is to be convicted for the offence punishable under Section 324 of the Indian Penal Code.

15. Coming to the point of sentence which has become vital in this case, the defence counsel submitted that having regard to the facts and circumstances, benefit under the provisions of the Probation of Offenders Act, 1958 be accorded. He would submit that accused was 29 years of age at the time of occurrence. He has produced school leaving certificate and education certificates to show that the accused was fair in education.

16. The learned counsel for accused in support of his submission to grant benefit of probation has relied on the decision of this Court in cases of *Anna Limbaji keskar & anr. Vs. State of*

Maharashtra & anr., 2018 ALL MR (Cri) 1215 (2) and *State of Maharashtra Vs. Yashwant Govind Shinde & anr., 2019 ALL MR (Cri) 4081 (5)*. In both the cases, though the Court has accorded benefit under the Probation of Offenders Act, however having regard to very young age and other circumstances of the case, the benefit was given. In-fact, on the basis of given facts of each case, one has to independently decide whether the accused in question deserves for benefit under the Probation of Offenders Act or not.

17. The offence punishable under Section 324 of the Indian Penal Code attracts punishment of imprisonment of either discretion for term which may extend to 3 years, or with fine, or with both. True, the legislature has left the discretion with Court to impose the punishment befitting to the facts and circumstances of the case.

18. While imposing sentence, variety of factors like nature of offence under which circumstances it was committed, the injury sustained by victim, the position of accused, his age and so on. In order to grant benefit of the Probation of Offenders Act, the Court must form opinion having regard to the circumstances including nature of offence and character of the offender that it is expedient to release him on probation of good conduct. It is not a case that accused was barely

a youth in between 18 to 21 years to liberally grant benefit of the Probation of Offenders Act. The accused was quite grown up married fellow having understanding about nature of act and its consequences. On a filmsy reason, he intervened the quarrel and without thinking for a moment dealt with a blow by heavy weighted crowbar at the head of victim. Consequence was such that injured – Imrankhan was required to be treated at Vivekanad Hospital, Jalana for one week. Certainly, the injured suffered for physical injury as well as mental pain for days ahead.

19. While imposing sentence, the Court is duty bound to impose appropriate punishment vis-a-vis to the atrocities committed by the accused. The Court should bear in mind the impact and effect of punishment on accused, victim as well as its social impact. Imposing inadequate punishment out of undue sympathy would do more harm to the justice system to undermine public confidence. The object of punishment is dual, firstly to protect the society and to deter the criminal. The accused must learn a lesson for his reminder of life and should think twice before committing any act contrary to law. If such grown up fellow has been released on probation then it may give boon to his anti-social activities as well as would pass a wrong signal.

Therefore, having regard to all these circumstances, particularly the act of causing head injury and consequential hospitalization of victim, I do not deem it appropriate to accord benefit of the Probation of Offenders Act to the accused.

20. The accused was convicted by the Trial Court recently on 09.09.2020 and therefore, hardly he is behind the bars for the period of less than two months. Release of accused by imposing mere heavy fine would also not satisfy the purpose of sentence. Certain amount of corporal punishment is necessary to pinch the accused for his misdeed. In that case only, he would learn a lesson for his life. In view of that imprisonment for the period of one year along with fine of Rs.25,000/- would meet the ends of justice. In view of that the impugned judgment requires modification to that extent.

21. Conviction of appellant/accused under Section 326 of the Indian Penal Code is set aside and accused is convicted for the offence punishable under Section 324 of the Indian Penal Code and sentence to suffer rigorous imprisonment for one year and to pay a fine of Rs. 25,000/-, in default to suffer rigorous imprisonment for three months. The accused is entitled for set off under Section 428 of the Code of Criminal Procedure. The fine amount, if deposited, be paid to

injured Imrankha towards compensation in terms of Section 357(1) of the Code of Criminal Procedure.

22. Appeal is partly allowed and stands disposed of in above terms.

JUDGE

Gohane.