

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.22 OF 2021

Anis @ Akhilendra Kumar Singh Thakur,
s/o Devendrakumar Singh,
28 years of age,
Presently in Judicial Custody of Colvale Jail,
native of H.No.47, Basuchakl,
Thana Karanda, Saipur,
District Gajipur, Uttar Pradesh,
Presently residing at Karambor,
District Mangalore, Karnataka. ... Appellant

Versus

STATE
(Through Ponda Police Station) Respondent

Mr. Anthony D'Silva, Advocate for the Appellant under Legal Aid Scheme.

Mr. Shailendra Bhobe, Public Prosecutor for the Respondent.

**Coram:- SUNIL P. DESHMUMH &
M. S. SONAK, JJ**

Date:- 7th August 2021.

ORAL JUDGMENT (Per M. S. Sonak, J)

Heard Mr. Anthony D'Silva learned counsel appointed under the Legal Aid Scheme for the appellant and Mr. S. Bhobe, learned Public Prosecutor for the State.

2. This appeal is directed against the judgment and order dated 11.03.2020 made by the Additional Sessions Judge, Panaji, sitting at Ponda in Sessions Case No.17/2018 convicting the appellant for an offense punishable Section 307 of IPC and sentencing him to rigorous imprisonment of 10 years and to pay a fine of Rs.20,000/- and in default to undergo further rigorous imprisonment for two years.

3. Mr. Silva pointed out that though the incident is alleged to have taken place on 17.11.2017, the FIR was lodged only on 19.11.2017. He submits that there are serious discrepancies in the prosecution version and the defense version has not been appreciated by the learned Sessions Judge. He submits that the burden of establishing defense is much lighter and learned Sessions Judge has erred in requiring the appellant to prove his case beyond a reasonable doubt. He submits that the prosecution has attempted to unfairly invoke the provisions of Section 27 of the Evidence Act in this matter. He submits that the version of the victim PW11 inspires no confidence. He submits that even the medical evidence on record does not support the case of the prosecution. For all these reasons he submits that the impugned judgment and order may be set aside.

4. Mr. Bhohe, learned Public Prosecutor defends the conviction based on the reasoning reflected in the impugned judgment and order. He submits that at the highest some reduction in the sentence may be considered.

5. The rival contentions now fall for our determination.

6. The prosecution case is that in the night between 17.11.2017 and 18.11.2017, the appellant, on account of prior enmity assaulted PW11 with a wooden stool and hammer, attempting to murder him and thereby committing an offense punishable under Section 307 of IPC.

7. The FIR, in this case, was filed only on 19.11.2018, even though, the prosecution claims to have got the information about the assault on the morning of 18.11.2017 itself. There is no explanation whatsoever for this delay. The FIR refers to the appellant as "suspect". This is based on the complaint of Manturam, the brother of the victim PW11. In the complaint, Manturam states that he suspected the appellant because he was missing and not answering the call made on his cell phone.

8. The prosecution claims to have arrested the appellant on 23.11.2017 at 23.00 hours at Mangalore. It is significant to note that the prosecution version is that PW11 attained consciousness only on the 26th or 27th of November, 2017. Therefore, there was no question of PW11 implicating the appellant by 23.11.2017.

9. As contended by Mr. Silva, there are indeed several discrepancies in the prosecution version. The prosecution claims that PW11 was assaulted with a wooden stool and a hammer on his head, thereby rendering him unconscious. However, the medical evidence relied upon by the prosecution does not support this prosecution version.

10. Dr. Sonali Gosavi (PW9) deposed that she examined PW11 at around 8.45 a.m. on 18.11.2017 with a history of assault by some unknown person. She deposed that this history was given by the brother of PW11 i.e Manturam. She has produced the hurt certificate and deposed to the following injuries found on the body of PW11.

“1. Patient was responding only to deep pain and drowsy, he had hematoma on left eye and there was bleeding from the mouth which was coffee coloured.

2. Pupils sluggishly reacting and there was swelling present on left side of chest measuring 3 x 1 cms.

3. The patient had midline scar present on abdomen which was measuring around 10 x 1 cms. Hence scar present on left side of chest 5 x 1 cms.”

11. Neither in the hurt certificate nor in her deposition PW9 has bothered to comment on whether the aforesaid injuries amount to simple or grievous injuries. PW9 was neither questioned nor has offered any opinion on whether the above injuries could result from a murderous assault with a wooden stool and a hammer. At least the medical evidence, therefore, does not support the prosecution version that PW11 was attempted to be murdered by assaulting him with a wooden stool and a hammer on his head. Neither the hurt certificate nor the deposition of PW9 makes any reference to head injuries with some object like a wooden stool and a hammer.

12. The prosecution has attempted to invoke the provisions of Section 27 of the Evidence Act, in a bid to link the wooden stool and

hammer and the incident of assault. Here again, the prosecution has failed.

13. The prosecution examined Bhika Kerkar (PW1) as the recovery Pancha. The recovery was allegedly made on 5.12.2017 and again, there is no explanation for the delay. PW1 claims that the appellant made a statement and led the Pancha witnesses to some bushes and removed one hammer from the bushes and handed it to PSI Nitin. He has deposed that the hammer was of iron and was having blood stains and was also covered with mud. This witness has not deposed anything about the recovery of the wooden stool. However, he has deposed that there was one wooden stool which was wrapped in a white cloth bag and was packed and sealed, and then, his signatures were obtained on it along with that of the other Pancha. PW1 has accepted that he was called in as many as five times by the police for panchanamas.

14. The prosecution has examined one Shivanand Rathod (PW2) as the second recovery Pancha. This Pancha has also referred to the recovery of the hammer from the bushes. This Pancha also admitted that he has acted as a Pancha in another case at the request of PSI Nitin Halarnkar.

15. The testimony of the two recovery- pancha witnesses PW1 and PW2 is quite at odds with the testimony of Manturam (PW3), the brother of PW11 and the complainant in this matter. PW3, in his cross-examination, has deposed that when he reached the room of PW11 at 7.30 a.m. on 18.11.2017, he saw a metal hammer which was lying near

Lalbahadur-victim (PW11). He deposed that he had not noticed whether there were bloodstains on the hammer but the hammer was at a distance of two meters from Lalbahadur. He has deposed that soon thereafter he dialed 108 Ambulance and accompanied PW11 to the hospital and that he did not come back to the said room of Lalbahadur at any time thereafter.

16. Now, if the version of Manturam (PW3), the brother of the victim is to be believed, then, the hammer was lying near PW11 at 7.30 a.m. on 18.11.2017. It is also the case of the prosecution supported by Manturam PW3 that the appellant after the murderous assault absconded and was arrested at Mangalore only on 23.11.2017. If this is the position, then it is inconceivable that the very same hammer should be recovered from the bushes behind some huts based on the statement of the appellant. This is, at highest the case of rediscovery, and based upon such rediscovery the alleged statement of the appellant could not have been admitted in evidence by resort to provisions of Section 27 of the Evidence Act.

17. The forensic evidence refers to the presence of human blood on the hammer but does not link this blood to that of PW11. There is no explanation for the delay in the alleged recovery. Above all, there is no explanation for the contradictory versions of PW3 on one hand and PW1 and PW2 on the other. In such a state of evidence, the learned Sessions Judge should have declined to extend the benefit of Section 27 of Evidence Act to the prosecution.

18. The Sessions Judge has referred to the several contradictions in the testimony of PW4, who had rented out a room in which the appellant and PW11 were staying along with one Chottu Kumar. This witness turned hostile and was extensively cross-examined by the prosecution. Based on her evidence, we do not think that the learned Sessions Judge was justified in concluding that PW4 had witnessed the appellant assaulting PW11 but had thereafter resiled from her statement. Such inference could not have been drawn from the testimony of PW4. In any case, based on the testimony of PW4, the conviction of the appellant would be extremely unsafe.

19. Similar is the testimony of PW6, who, together with PW5 had rented out the room in which the alleged incident took place. Even PW6 was declared hostile and was extensively cross-examined by the prosecution. The learned Sessions Judge was again not justified in holding that even PW6 was an eye witness to the incident, when this witness, had categorically denied this.

20. PW8 has deposed that PW5 and PW6 were his sisters-in-law who had rented out the room. In his chief, he deposed that he noticed the fight between the appellant and Lalbahadur. However, in his cross-examination, he resiled and stated that he had not witnessed the actual assault but only heard some sound from the room. Surprisingly, PW8 who admitted to not having seen the actual assault but having only heard some sounds of assault such as " *fata fata*", proceeds to identify the wooden stool and hammer with which the appellant alleged to have assaulted PW11. The reasoning of the learned Sessions Judge with

respect, leaves much to be desired, when she accepts these versions of PW8. The learned Sessions Judge has reasoned that unless PW8 had actually seen the assault, there was no question of his identifying MO No.1 (Wooden stool) and MO No.5 (hammer). She then reasoned that since PW8 had identified MO No. 1 and MO No. 5, it is to be presumed that he has actually witnessed the fight and the appellant assaulting PW11. Based on such reasoning, the conviction of the appellant cannot be sustained.

21. In the aforesaid state of evidence, we do not think that it is safe to rely on the practically uncorroborated deposition of PW11-victim. Even PW11 has deposed that the appellant, under the influence of alcohol, assaulted him with a hammer and stool on his head, and further he was also hit on the wall and thereafter fell on the ground. He has deposed that he regained his consciousness in the hospital only after 8 to 9 days of the assault. As noticed earlier, the medical evidence on record does not support all this. There is no reference to any head injury either in the hurt certificate or in the deposition of PW9 Dr. Sonali Gosavi. Further, though PW11-victim has not deposed anything significant about the motive or previous enmity, it is the prosecution version that the assault was on account of the previous enmity. Again, this is far from established.

22. In this case, the accused raised the plea of *alibi* by stating that on the night of the incident he was not in his room at all but rather he was in a room of one Bharatkumar, where a party was being held between 8.00 p.m. to midnight. He has deposed that he together with Chottu

slept in Bharat's room and between 5.30 to 6.00 a.m. of 18.11.2017 he proceeded to Mangalore where he had got a job. In support of such defense, the appellant not only examined himself as DW1 but also examined Bharatkumar (DW2) and one Narendra Singh (DW3).

23. Now the defense evidence has been rejected by the Sessions Judge by pointing out some factors like non-production of train tickets or offer of employment at Mangalore. Learned Sessions Judge has also styled the defense witnesses as interested witnesses. According to us, there is a substance in the contention of Mr. Silva that the learned Sessions Judge carried the impression that even the defense version has to be established beyond a reasonable doubt. It is a settled position in law that the defense has to merely probabalise its version or establish its version by a preponderance of probability. According to us, the defense has probabalised its version. Further, coupled with the gross discrepancies in the prosecution version, the appellant, in this case, ought not to have been convicted. The prosecution has failed to establish the guilt of the appellant beyond a reasonable doubt. Rather, the appellant has probabalised his defense.

24. The Learned Sessions Judge has not even adverted to the statement under Section 313 of Cr. PC made by the appellant. In the statement, the appellant, not only raised the defense of *alibi* but further probabalised the same by examining himself and two other witnesses. Even the evidence of Chottu, who was examined by the prosecution as PW7 corroborates the defense version, rather than lends any support to the prosecution version.

25. For all the aforesaid reasons, we quash and set aside the impugned judgment and order and the conviction recorded therein. The appellant is to be set at liberty forthwith, unless, he is required in connection with any other matters.

26. We appreciate the research and efforts put in by Mr. Anthony D'Silva who was appointed under the legal aid scheme to appear on behalf of the appellant as also the fair approach of Mr. Bhobe, learned Public Prosecutor for the State in this matter. We thank the learned counsel for the assistance rendered.

M. S. SONAK, J

SUNIL P. DESHMUMH, J

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