

THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL REVISION NO. 61/2020

Anil Purushottam Kumare ..Versus... State of Maharashtra and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. A.A.Dhawas, Advocate for applicant.
Mr. S.M.Ghodeswar, APP for Respondent/State

CORAM : AVINASH G. GHAROTE, J.

DATE : 28/06/2022

1] Heard Mr. Dhawas, learned counsel for the applicant, who challenges the judgment dated 27.2.2013 passed by the JMFC, Bhadrawati, whereby the applicant along with other three accused have been convicted for the offence under Section 323 r/w 34 of the IPC and sentenced to suffer one month S.I. and Rs. 500/- as fine and the judgment dated 26.02.2020 of the appellate court, whereby the appeal filed by the original accused No.1 Suresh Dadaji Bahade and Accused No. 2 Mahesh Dadaji Bahade is quashed and set aside and the conviction of the present applicant who was the accused No. 4 and that of the accused No. 3 Pradip Dadaji Bahade has been maintained.

2] Mr. Dhawas, learned counsel for the applicant submits that there are several lacunae which have been overlooked by the Courts below. He submits that though case

under Section 324 of IPC was registered, there has been no seizure of any weapons, in spite of the allegation that the complainant Sandip has been assaulted by the present applicant/accused No.3 Anil Purushottam Kumare by way of a rod and his brother Sanjay Kumare has been assaulted by a stick by the accused No. 3 Pradip Dadaji Bahade.

3] Mr. Dhawas, learned counsel for the applicant further submits that there is discrepancy in the evidence of PW-1 Sandip Sukhdev Telang, inasmuch as though he attributes an assault by the present applicant on the back of his head by a rod, the assault is actually on the left hand side of the head and therefore on this count, the evidence of Sandip PW-1 is infirm. He further submits that evidence of Sandip is not supported by that of Sanjay PW-2. He further submits that since there was an old enmity between the complainant and the accused, there was every possibility of a false implication and considering that the incident had occurred at a public place, an independent witness ought to have been examined. He further submits that since PW-2, the punch to the spot panchnama has turned hostile, the spot of the incident was not proved. Relying upon **Ku. Rita Rameshkumar Rathod vrs. Vinod Laxmnikant Gupta and anr; 2015 ALL MR (Cri) 4844, Rajkumar Dagadu Jadhav vrs The State of Maharashtra, 2013 ALL MR (Cri) 533; Ashok B Mhatre vrs. State of Maharashtra, 2020 ALL MR (Cri) 649** and

Sujit Biswas vrs. State of Assam (2013) 12 SCC 406, it is contended that recovery of the weapon was essential considering the nature of the offence alleged and where there were two views possible, the benefit ought to go to the accused. He therefore, submits that the impugned judgments ought to be quashed and set aside and the applicant be acquitted of the offence under Section 323 of the IPC. He further submits that the offence under section 323 is not a minor offence of Section 342 of the IPC for the reason that the necessary ingredients for establishing them are distinct and different, for which he relies upon **Shamnsahen M Multtani vrs. State of Karnataka, (2001) 2 SCC 577** (para 16). He further places reliance upon the illustration to Section 222 of Cr.PC and also contends that it was not permissible for the learned trial Court, without any material on record or any explanation whatsoever regarding the absence of seizure of stick and the rod, to have converted the offence under section 323 of the IPC.

4] Learned APP opposes the submissions and contends that it is not necessary that in all cases where there is an absence of recovery of a weapon, the conviction cannot be maintained. He further submits that if the evidence of PW-1 is clear and specific and is backed by medical evidence, there is no reason why the conviction cannot be based upon the sole testimony of the complainant. He submits that the offence

under Section 323 would be a minor offence to Section 324 of the IPC and therefore, the conviction by the learned Magistrate under section 323 of the IPC was proper. He therefore submits that this having been done, the application needs to be rejected.

5] The incident in the instant matter is dated 3.9.2005, when the complainant Sandip Sukhdev Telang alleged that when he was going towards Bhadrawati to see the POLA festival, the accused Mahesh Bahade had caught hold of the collar of his shirt on enquiring as to why the complainant was looking at him and gave a kick to his motor-cycle which fell down, however, the complainant PW-1 did not enter into any altercation and went away to Bhadrawati. Thereafter at about 7.50 p.m. after witnessing the POLA festival, when he was coming back to his residence at Vijasan, he met his brother Sanjay Telang on the way, who also had a motor-cycle with him and they started the return journey together. At the gate of Buddha caves, accused 1 to 4 met them and obstructed them on account of the earlier tiff and after abusing the complainant and his brother Sanjay, assaulted them by stick and rod. It is contended that PW-1/ Complainant Sandip was assaulted on the back of his head by a rod and his brother Sanjay was also assaulted by a stick on his left leg. They were also threatened. The complainant PW-1 thereafter lodged a complaint, whereupon the offence under

Sections 294, 323, 506 r/w 34 of the IPC was registered against the accused in Crime No. 3056/2005.

6] In the trial, Sandip Sukhdeo Telang was examined as PW-1 at Exh. 37, Sanjay Sukhdeo Telang was examined as PW-2 at Exh. 39, Ashok Dadaji Mankar was examined as PW-3 at Exh. 40 (panch witnesses to the spot panchnama). Dr. Mayura Auvtade was examined as PW-4 at Exh. 42 and Lankeshwar Baliram Nagrale was examined as PW-5 at Exh. 49 (I.O).

7] The learned trial Court upon consideration of the evidence laid, acquitted all the accused of the offence under Section 294 and 506 of the IPC, however, convicted them under Section 323 r/w 34 of the IPC as indicated above. The appellate Court in appeal filed by the original accused 1 and 2 allowed the same and set aside their conviction on the ground that no action was attributed to them, however, maintained the conviction of the present applicant (accused no. 4) and that of accused No. 3.

8] It is an admitted position on record that though the initial charge was framed under Section 324 r/w 34 of the IPC (page 84), the learned trial Court for the reason that there was no recovery of the weapon of assault i.e. the rod or the stick, convicted the accused 3 and 4 under Section 323 (para

27 page 27). Merely because there was no recovery of any weapon, that by itself, without the circumstances for the non recovery/seizure of the weapon being explained, cannot lead to conversion of the offence from Section 324 of the IPC to Section 323 of the IPC. A perusal of Section 323 of the IPC would indicate that, it contemplates voluntary causing hurt, as against which Section 324 of the IPC contemplates voluntarily causing hurt by dangerous weapons or means. There is therefore a marked distinction between Section 323 and 324 of the IPC inasmuch as the use of a dangerous weapon or means is contemplated by Section 324 of the IPC, whereas the same is absent in Section 323 of the IPC. The illustration (b) to Section 222 of Cr.PC which is in relation to Section 325 of the IPC makes the position clear in as much as it indicates that if the ingredients of Section 325 of the IPC are not brought on record then in case, the accused proves that he had acted on grave and sudden provocation, he may be convicted under section 335 of the IPC. What is also material to note is that Section 325 of the IPC itself contemplates Section 335 of the IPC by creating an exception as indicated therein, as a result of which Section 335 of the IPC can be said to be a minor offence of Section 325 of the IPC. Addressing the question in issue in the light of what has been stated above, it would be apparent that the minor offence for Section 323 of the IPC would be the offence under Section 334 of the IPC. Even Section 324 of the IPC does not include Section 323 of the

IPC. That apart, as indicated above, Section 324 of the IPC requires the causing of hurt by means of an instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal. In **Shamnsaheb Multtani** (supra) the Hon'ble Apex Court while considering what is meant by a minor offence for the purpose of section 222 of the Cr.PC. has held as under;

16. What is meant by “a minor offence” for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code, it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-a-vis the other offence.

(emphasis supplied)

It is thus apparent that a lesser punishment is not the only test, and what is necessary to be considered is whether the two offences are cognate offences wherein the main ingredients are common. As indicated above, there is a clear

cut distinction between the ingredients of section 324 of the IPC on the one hand and that of section 323 of the IPC. When Section 324 specifically contemplates causing of hurt by dangerous weapons or means, that being a distinguishing factor apart from the quantum of punishment, the offence under Section 323 of the IPC cannot be termed as a minor offence to Section 324 of the IPC. In that light of the matter, the learned trial court could not have invoked section 222 of the Cr.P.C. to convict the applicant under Section 323 of the IPC, that too on the sole ground that there was no seizure.

9] The factual position narrated above would indicate that voluntary causing hurt by dangerous weapons or means is the necessary requirement of Section 324 of the IPC. In the instant case, the complainant who is PW-1, specifically states that the assault by the present applicant was by way of a rod. The injury which is caused to the complainant/PW-1 is indicated by the injury report at Exh. 43. Though the complainant attributes a single blow to the present applicant, which is claimed to be related to injury No.1 in Exh. 43 i.e. a lacerated wound 1 cm., skin deep over left temporal region and attributes the same by way of a rod, admittedly the rod has not been seized. No doubt, even without a seizure, the conviction can be based upon the testimony of eye witnesses if found credible as has been indicated in **Mrutunjoy Biswas vrs. Pranab @ Kuti Biswas and anr, (2013) 12 SCC 796**, however,

in my considered opinion, the same is not automatic, but the absence of seizure necessarily on record is required to be explained away by a plausible reasoning acceptable to the Court, otherwise it would create a situation that in every case where the weapon is not seized, the same would cease to be of any consequence and a conviction could be recorded without seizure of the weapon used or for that matter any explanation on record. In my considered opinion, this is not what is contemplated by **Mrutunjoy Biswas (supra)**, which merely says that conviction can be based in case there is no recovery or seizure, where clinching and direct evidence is acceptable.

10] In the instant case the evidence of PW-1/complainant indicates that a blow was administered to him from behind and merely because the applicant was one of the persons present there, the blow has been attributed to the applicant. The statement of PW-1 is not substantiated by PW-2 Sanjay, who merely says that Sandip was assaulted on the head by one of those present. Though in his further chief PW-2 Sanjay says that in case the accused is shown to him he would be able to identify him, no such attempt during the course of his evidence appears to have been undertaken. Thus, though the medical evidence indicates by virtue of Exh. 43 that the complainant PW-1 Sandip suffered a lacerated wound on the back of the head, his evidence considering that there is no

corroboration from PW-2 as discussed above, cannot be said to be of a clinching nature so as to convict the applicant under Section 323 of the IPC.

11] The evidence of PW-1 stands uncorroborated. It has also come on record that the spot of incident was on a public place and therefore there could not have been any dearth of any independent witnesses, however no such independent witness has been examined. Due to the PW-3 turning hostile, the spot panchnama also has not been proved. The judgment of the learned appellate Court also does not take the aforesaid position into consideration, but merely reiterates what has been stated by the learned trial Court and relies upon the sole testimony of PW-1 Sandip.

12] In view of the above discussion, it is therefore apparent that the conversion by the learned trial Court for the offence under Section 324 to one under Section 323 of the IPC by invoking Section 222 of Cr.P.C. was incorrect. That apart, on merits also due to the non-seizure of the weapons, absence of any explanation for such non-seizure and the testimony of PW-1 being uncorroborated, the conviction of the applicant as rendered by the learned trial Court under Section 323 of the IPC by the judgment dated 27.2.2013, as confirmed by the appellate Court by the judgment dated 26.2.2020 cannot be sustained and is hereby quashed and set aside and the

applicant is acquitted of the offence under Section 323 of the IPC. The fine amount be refunded to the applicant.

13] The criminal revision is allowed in the above terms and disposed of accordingly.

JUDGE

Rvjalit