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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 33 OF 2017

Sanjay Gaonkar, son of Mahadev Gaonkar, age 28 years, Indian National, Resident of Deul Wada, Pale, Sattari, Goa. Presently in Judicial Custody, through his brother-in-law Mr. Subodh Malik.

... APPELLANT

Versus

1. State, through Office in charge, Valpoi Police Station, Valpoi, Goa.

2. Public Prosecutor, Bombay High Court at Goa, Panaji.

... RESPONDENTS

Mr. Dhaval D. Zaveri, Advocate for the Appellant.

Mr. Gaurish Nagvenker, Additional Public Prosecutor for the Respondents.

CORAM:

B.P. DESHPANDE, J.

RESERVED ON:

20th JULY 2023

PRONOUNCED ON:

27th JULY 2023

JUDGMENT:

1. The Appellant-Accused challenges the impugned judgment and conviction dated 02.06.2017 arising out of Sessions Case No. 20 of 2011, whereby the learned Additional Sessions Judge, Panaji

found the Appellant-Accused guilty for the offence punishable under Section 307 of IPC and sentenced him to suffer imprisonment for a period of five years and to pay a fine of ₹20,000/-.

2. Heard Mr. Dhaval Zaveri, learned Counsel for the Appellant-Accused and Mr. Gaurish Nagvenker, learned Additional Public Prosecutor for the State.

3. With the assistance of the learned Counsel for the respective parties, I have perused the entire record and more particularly, the impugned judgment.

4. The point for determination is as under:

“Whether the Prosecution succeeded in proving that the accused assaulted the victim with the intention to kill ?”

5. In a nutshell, it is the case of the Prosecution that on 29.12.2010 between 16:00 to 17:00 hours at Zambliche Temb, Pali, Sattari, Goa, the accused assaulted the complainant's daughter, Ms. Shakuntala @ Sakhu with stone and hit on her face

causing grievous injuries to her eye, head and thereby attempting to kill her.

6. During the trial, 16 witnesses were examined. Though, initially, it was claimed that there was one eyewitness, he did not support the Prosecution's case. The victim deposed and was cross examined at length. The Doctors who treated the victim were also examined and through them, respective hurt certificates and final medical certificates have been proved in evidence. The complaint was lodged by Mr. Ganesh, PW-1/father of the victim. From the contents of the complaint produced through PW-1, the relationship between the complainant, victim and the accused could be spelt out so as to find out the intention or the knowledge on the part of the accused while inflicting the injuries on the victim.

7. The complaint filed on 29.12.2010 by Ganesh, PW-1 reveals that he along with his wife, daughters and sons are residing at Deulwada, Pali, Sattari, Goa. The accused is also a resident of the same place. The complainant became aware five months prior to the date of the incident that his daughter Sakhu was having a love relationship with their neighbour/accused. The accused started insisting to get married to Sakhu, however, the complainant and

his family members were opposing the same as the accused was not employed, was addicted to liquor and was an irresponsible person. Even the victim refused to marry the accused and discontinued her relationship with him. Due to such refusal and frustration, the accused started abusing the complainant and his family members under the influence of alcohol. The accused also started harassing the victim and was pressurising her to continue the relationship with him.

8. The complaint further disclosed that on 29.12.2010, the complainant along with his wife, elder daughter-Anju and the victim went to their paddy field at Panas Sare, Thane, Sattari, Goa. At around 16:00 hours, he asked the victim to return home to milk the cows. Accordingly, she left the paddy field. At around 17:30 hours, the complainant's younger son-Mahesh came to the paddy field and informed them that the victim was assaulted by the accused at Zambliche Temb at Pali on the pathway while she was returning home and such an incident was witnessed by their neighbour's wife. The complaint further disclosed that the accused caught hold of the hair of the victim and smashed her head on a rough surface and hit a stone on her head. When she shouted, the accused ran away from the spot.

9. Admittedly, PW-1 being the complainant was not present at the spot and therefore, what he has stated is on the basis of the information given to him by his son-Mahesh.

10. PW-4, Anju Ganesh is the sister of the victim, who also supported the version of the complainant and claimed that the victim left the paddy field at around 4:00 p.m. to milk the cows at their residence. At around 5:15 p.m., her brother- Mahesh came and informed them that the victim was assaulted by the accused.

11. PW-2, Shripad is the brother of the victim and the son of the complainant. He deposed that on 29.12.2010 at around 5:00 p.m., he was at his residence and at that time, one Gokuldas, their neighbour came and informed his brother-Mahesh that the accused assaulted their sister/victim and she was lying unconscious at Zambliche Temb at Pali. Accordingly, he along with Mahesh rushed to the spot and noticed their sister/victim in a bleeding condition and was unconscious. She had sustained injuries on the right side of the face and blood was oozing out. They called the ambulance and shifted her to Valpoi Hospital whereas Mahesh went to the paddy field to inform their parents.

12. PW-3, Gokuldas Gaonkar, who is the neighbour of the complainant deposed that in the month of December 2010 at around 3:00 p.m., he went to his plantation. At around 3:00 to 4:00 p.m., he heard shouts and accordingly, proceeded to the spot where he saw the victim lying unconscious and bleeding from her head. Accordingly, he went to the residence of the victim and informed her brother-Shripad (PW-2) who then called the ambulance.

13. This witness was allowed to be cross examined by the learned Public Prosecutor as it was found that he was resiling from the part of his statement. During the cross examination conducted by the Public Prosecutor, the portion marked 'A to A' in his statement wherein he stated that when he went to the spot, he saw the accused assaulting one girl, upon which, the witness stated that he did not say so to the Police. Accordingly, the confrontation is marked. It thus shows that PW-3, though claiming to be an eyewitness, resiled from such a statement partly. Thus confrontations marked at 'A to A', 'B to B', 'C to C' and 'D to D' were proved by putting it to the Investigating Officer.

14. The star witness is the victim herself, who is examined as PW-5. She specifically stated that the accused is their neighbour

and the father of the accused had come to their house with a proposal to marry his son. Her family members refused such a proposal as the accused was not doing any work and was addicted to liquor. She then deposed that the incident took place on 29.12.2010 when she had gone to the paddy field and while returning alone, the accused suddenly came in front of her at the cashew plantation of one Gokuldas, caught hold of her hair started giving slaps and banged her head on the stones. She started shouting for help by calling the name of Gokuldas as 'Dadu'. She then states that after the assault she started bleeding from the right eye and right side face due to which she lost consciousness. She regained her consciousness only in GMC after six days. She described the injuries and the fact that her right eye is still not fully cured. The victim has identified the clothes and also the stone, by which, she was assaulted by the accused as M.O. No. 3.

15. During cross examination, she denied of having any love relationship or physical relationship with the accused prior to the proposal of the marriage. A specific suggestion was put to her with regard to refusal to get married to the accused as he was not in gainful employment and was addicted to liquor. Thus, it shows that there was some proposal for marriage from the accused to

marry the victim and such proposal was refused by the father of the victim on two grounds i.e. the accused was jobless and addicted to liquor.

16. PW-6 is the Draftsman who prepared the sketch of the spot of the incident wherein it is clear that there are hard rocks.

17. PW-7, Sanjeev Shetty has a hotel at Belgaum by the name Durga Residency. He deposed that the accused came to his hotel about eight months back and told him that he was hungry and required some work. He also told PW-7 that he would work till his brother came with money and clothes. The Police from Karnataka State as well as Goa came to the hotel and after noticing the Police, the accused ran away from the hotel.

18. PW-8, Mahesh is the son of the complainant and brother of the victim who deposed that on 29.12.2010 at about 5:15 p.m. when he was at the residence, his neighbour Gokuldas came and informed that his sister Shakuntala was assaulted by the accused at Zambliche Temb, Pali. Accordingly, he and his brother Shripad proceeded to the spot. They saw the victim with injuries on her face and bleeding. The ambulance was called and their sister was

taken to the hospital and thereafter, he went to the paddy field to inform his parents.

19. PW-9, Manda is the sister of the victim. However, her deposition is only on a hearsay basis.

20. PW-10, Tulshidas is the panch witness of the spot of the incident. Through him, the panchanama and the sketch were proved. Tulshidas deposed that the spot was shown to them by Ganesh on 30.12.2010. The spot of panchanama is slightly away from the pathway and there are rocks, and stones available at the said spot. During the panchanama, he saw the stone with blood stains which was attached by the Police. He also saw that the whole area appeared to be disturbed. He saw a pair of black colour chappals and one single chappal of the right leg at the spot. All these articles were attached during the panchanama.

21. PW-11, Dr. Ruppo Gaunder, who was attached to CHC Valpoi, had examined the victim at around 6:15 p.m. with the alleged history of being hit on the head by a stone. He noticed injuries to the right eye and the patient was unconscious. She was bleeding from the mouth and nose and on local examination, there was a contused lacerated wound on the right frontal area.

On giving first aid, he referred the patient to GMC for further management. During cross examination, he disclosed that the injuries were less than one hour in duration. Thus it corroborates with the testimony of the victim and proves the hurt certificate.

22. PW-12, Arvind Patil acted as a panch witness in two panchanamas out of which one was conducted on 02.01.2011 and the second one on 05.01.2011. The first panchanama was conducted regarding the attachment of the clothes of the accused while he was being arrested. The second panchanama is regarding the attachment of one chappal of the accused at his instance. The accused disclosed that he was ready to show the chappal which is at village Pali, Sakal Wadda and then took them to the said spot and after crossing the lake, from the bushes, the accused removed the chappal which was attached.

23. PW-13, Dr. Girish Kamat was attached to the Department of Forensic Medicine, GMC, when he received a request for blood grouping of the victim and accordingly, he found the blood group as 'A Rh positive'.

24. PW-14, Dr. Rohan Mardolkar deposed that he examined the victim at GMC and found the following injuries:

“1. Contused lacerated wound measuring 6 x 1 x 1 cm over the right frontal regional skull. With CT scan of the head (10/15511) showing EDH in the left parital region, contusion in the left temporal region, SDH in the right frontal region, fracture of left parital and right frontal wound. The injury is caused by blunt force. Duration of injury is within 6 hrs. nature of injury is grievous injury.

2. Swelling and echymosis of the right eye caused by blunt force within 6 hrs with CT scan of the head as described above in injury no.1 and open globe injury as per eye expert opinion to the nature of injury is a grievous one.

3. Leading from right ear caused by blunt force within 6 hrs. with CT scan of the head. Nature is grievous injury.”

25. He then deposed that the patient was referred to neurosurgery, ENT and ophthalmic department. The patient was admitted to the neurosurgery department. When M.O. No. 3 (stone) was shown to him, the Doctor opined that the injuries found on the victim could be caused by such stone. He deposed during cross examination that when the patient was brought to GMC on 29.12.2010, she was not conscious and she was alerted. He explained the medical term “alerted” means the patient is not fully conscious. The hurt certificate at Exhibit-65 was proved through this witness.

26. PW-15, Dr. K. Sundaram attached to the neurosurgery department deposed that the patient by the name of Shakuntala was admitted to their department on 29.12.2010 and the cause of injuries was on account of alleged assault. On examination, he found that the victim had a right black eye, nasal bleeding and fracture of the right mandible and maxilla. There was a lacerated wound 7 x 4 x 2 over the right frontal region underline fracture. The patient was semi-conscious and the CT scan of the brain showed a left partial bone fracture, right frontal depress fracture, right orbital fracture, extradural hematoma, left parietal area, subdural hematoma right frontal, and small contusion left temporal lobe. Subsequently, the victim was diagnosed with a right open globe injury (eyeball injury). He then claimed that the patient was treated by different departments and was discharged on 07.01.2011. He denied the suggestion that the injuries caused to the victim could not have been caused by M.O. No. 3 i.e. the stone when it was shown to the witness.

27. During cross examination, the Doctor opined that if the stone is hit on the forehead or anywhere on the head or the eye with sufficient force, the same can render the person unconscious. This itself proves the fact that the stone attached during the panchanama could be used as a weapon, causing grievous

injuries. The final medical certificate at Exhibit-69 gives all the details including the fact that the nature of the injuries was grievous.

28. Finally, the Investigating Officer/PW-16 deposed by giving all the details of the investigations and was cross examined at length.

29. After the evidence of the Prosecution was over, the accused was examined under Section 313 of Cr.P.C. and the only defence he has raised is that the case is false. Neither the accused stepped into the witness box nor examined any witness in defence.

30. The learned Additional Sessions Judge, Panaji after a detailed discussion found the accused guilty and accordingly, sentenced him to suffer imprisonment for five years.

31. Learned Counsel Mr. Zaveri appearing for the Appellant-Accused strongly contended that first of all there was a love affair between the accused and the victim and since the parents of the victim were not ready for the marriage, a false complaint had been lodged against him. He submitted that the entire evidence of the Prosecution is on a hearsay basis. The learned Sessions

Judge failed to consider this aspect and arrived at erroneous findings. According to him, there are serious discrepancies which ought to have been considered in favour of the accused.

32. Mr. Zaveri then would submit that there was no intention on the part of the accused to kill the victim. He then submitted that at the most, if proved guilty, the offence would fall under Section 326 of IPC as neither there was any intention nor knowledge on the part of the accused. He submitted that there is no eye witness to the entire incident and the statements of the victim cannot be believed alone. He then claimed that the spot of panchanama is not proved as PW-1/complainant was not present at the said spot and therefore, he showing the spot to the panchas is out of question. Therefore, he submitted that the accused deserved to be acquitted.

33. Per contra, the learned Additional Public Prosecutor Mr. Nagvenker while supporting the findings would submit that there are no discrepancies in the case of the Prosecution and the statements of the victim cannot be disbelieved. He submitted that there are no contradictions or omissions in the statements of the witnesses except one who turned hostile. The medical evidence corroborates the ocular evidence and therefore, the accused had a

clear-cut intention to kill the victim as she also refused to marry him.

34. First of all, it is clear from the evidence of the Prosecution witnesses that the complainant and his family as well as the accused and his family members are neighbours. The complaint itself shows that there was some love relationship between the accused and the victim. However, when the parents of the accused approached the complainant for marriage, it was refused on the ground that the accused was jobless and that he was addicted to liquor. With this background, admittedly, the relationship between the two families and more particularly, the accused and the victim were strained. Since the victim refused to marry, it was but natural on the part of the accused to try and convince the victim.

35. The incident took place on a pathway near the property of PW-3, Gokuldas. Though this witness partly turned hostile, one thing is clear that he admits the hearing of shouts of the victim and then going to the spot and noticing the victim lying injured and blood oozing out from her face. Accordingly, he went to the house of the victim and informed her brother-Shripad. Though this witness resiled from the statement that he saw the accused

assaulting the victim, his statement that he went to the house of the victim and told about the assault to her brother stands substantially proved. Shripad is examined as PW-2 whereas Mahesh is examined as PW-8. Both these witnesses categorically deposed that PW-2, Gokuldas came to their house and disclosed that their sister/victim was assaulted by the accused at Zambliche Temb Pali. PW-2, Shripad and PW-8, Mahesh immediately went to the spot and they found their sister/victim lying unconscious with bleeding injuries on her face. Thus, it clearly corroborates with the statement of PW-3, Gokuldas that he saw the victim lying with bleeding injuries at the said place. Though PW-3, Gokuldas resiled of seeing the accused while assaulting the victim, the statement of PW-2, Shripad and PW-8, Mahesh that Gokuldas told them that the accused assaulted the victim and that too immediately after the assault, they went to the spot and found the victim unconscious with injuries, is relevant for the purpose of considering that Gokuldas made such statement to Shripad and Mahesh.

36. Secondly, the victim who deposed as PW-5 stated that when she was alone proceeding towards her house, the accused suddenly came running and caught hold of her hair and banged her head on the stone due to which she called Dadu (Gokuldas),

again confirms the fact that Gokuldas was present. In the deposition of PW-5, the victim is found to be consistent, cogent and without any omissions and contradictions. There is no material on record to show that the victim in any way was in enemical terms with the accused. No doubt she only refused to marry the accused, however, her father admits that there was some love relationship between them. In such circumstances, there was no occasion for PW-5 to falsely implicate the accused in such an offence.

37. The injuries are admittedly grievous in nature and treatment given to the victim further shows that her right eye was affected. There were fractures on the front skull bone. This itself proves the fact about the use of force by which such assault took place on the victim.

38. As far as the Prosecution evidence is concerned, there is no doubt about the involvement of the accused in the said offence. The question now remains as to whether such an overt act on the part of the accused falls within the scope of Section 307 of IPC.

39. It is well settled that any act with such intention or knowledge and under such circumstances if by that act, death is

caused, the offender would be guilty of murder. Therefore, the two ingredients i.e. intention and knowledge are very important. Such an aspect has to be curled out from the facts of each case.

40. In the present matter, admittedly, the accused was not armed with any weapon to show that he had any intention to kill the victim. Secondly, it is found that the head of the victim was banged on the stone which is deposed by PW-5. The victim shouted for help by shouting “Dadu” and thereafter she became unconscious. There is no material on record to show that after the said assault on the victim whether there was any further attempt for assault was made on the part of the accused for the simple reason that the victim became unconscious. The sole eye witness of the Prosecution i.e. PW-3, Gokuldas turned partly hostile and does not support the contentions of the Prosecution of seeing the accused assaulting the victim. However, the fact remains that there is one single injury and that too by banging the head on the stone. The stone i.e. M.O. No. 3 is admittedly a small stone though the dimensions of it are not disclosed clearly. It, therefore, clarifies that the intention on the part of the assailant was only to injure the victim and it did not spell out that he had any intention to kill the victim.

41. As far as knowledge is concerned, M.O. No. 3 i.e. the stone being a small one is not the weapon which could have caused death. On careful perusal of the deposition of the two Doctors from GMC, no question was put to them as to whether the stone M.O. No. 3 is capable of causing death. Therefore, the material brought on record clearly goes to show that there was no intention or knowledge on the part of the accused to cause death.

42. The injuries caused to the victim are no doubt grievous in nature and the same are caused by a stone which cannot be considered as a dangerous weapon that is likely to cause death. At the most, the provisions of Section 325 of IPC could be invoked for voluntarily causing grievous hurt and not even 326 of IPC.

43. Having said so, though the learned Trial Court found that the accused is the preparator of the said offence, the finding with regard to the conclusion that such an offence falls under Section 307 needs interference. Only to that extent, the impugned judgment needs modification. Thus, while holding the accused guilty for the said act, the conviction awarded by the Trial Court under Section 307 of IPC needs to be quashed and set aside and converted into Section 325 of IPC.

44. In view of the above, the following order is passed:

O R D E R

- (a) The Appeal is partly allowed.
- (b) The conviction of the accused under Section 307 of IPC is hereby modified to the one under Section 325 of IPC. Accused is acquitted for the offence under Section 307 of IPC.
- (c) The Appellant-Accused is therefore, convicted for the offence under Section 325 of IPC and is sentenced to undergo imprisonment for a period of two years and to pay a fine of ₹20,000/- and in default to undergo three months simple imprisonment.
- (d) On depositing the fine amount, the same shall be paid to the victim by way of compensation.
- (e) The period of detention undergone during investigation/trial is set off under Section 428 of Cr.P.C.

45. The Criminal Appeal stands disposed of in the above terms.

B.P. DESHPANDE, J.