



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 315 OF 2003

Mahendra s/o Arvind Ganjewar,
Age 21 years, occupation Education,
R/o Kaleji Tekdi, Old Mondha,
Nanded.

... Applicant
[Orig. Accused No.1]

Versus

State of Maharashtra

... Respondent

.....

Mr. A. M. Gaikwad, Advocate for the Appellant.
Mr. R. D. Raut, APP for the Respondent-State.

.....

**WITH
CRIMINAL APPEAL NO. 353 OF 2003**

State of Maharashtra
through Police Station,
Vazirabad, Tq. Nanded,
Dist. Nanded.

... Appellant

Versus

Mahendra s/o Arvind Ganjewar,
Age 18 years, Occu: Education.
R/o Kaleji Tekdi, Old Mondha,
District Nanded.

... Respondent

.....

Mr. R. D. Raut, APP for the Appellant-State.
Mr. A. M. Gaikwad, Advocate for the Respondent.

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 11.06.2024

Pronounced on : 18.06.2024

JUDGMENT :

1. Both above appeals are arising out of the judgment dated 07.03.2003 passed by learned Joint District Judge and Additional Sessions Judge, Nanded in Sessions Case No. 74 of 1999. Appellant, who is convict, has taken exception to his conviction on the ground that case has not been proved beyond reasonable doubt, whereas State is dissatisfied on account of extension of benefit of Section 6 of the Probation of Offenders Act, 1958 [for short, "the Act"] on the ground that, offence having been proved and it being serious offence, though appellant was 17 years of age, considering the gravity of the offence committed by him, above benefit ought not to have been given by the trial court and on such count, State has also come up in appeal.

FACTUAL MATRIX GIVING RISE TO THE TRIAL

2. Complainant PW1 and accused no.2 Arvind were at loggerheads, on account of removal of courtyard tiles. Dispute travelled up to civil court and proceedings were pending. In this background, there used to be quarrels amongst them. On 16.03.1999, in above backdrop, initially there was quarrel involving present appellant (son of accused no.2), accused no.2 himself and his wife

accused no.3. Present appellant assaulted wife of informant i.e. PW6 with knife causing her bleeding injuries. After shifting her to hospital, PW1 lodged report Exhibit 19 which was entertained by PW8 PSI Shelke and he registered crime bearing no. 50 of 1999. PW14 PSI Ramtirth, who was entrusted with investigation, after gathering evidence, chargesheeted all three accused for offence under Sections 307, 452, 506 r/w 34 of the Indian Penal Code [IPC] and they were made to face trial which was conducted by learned Joint District Judge and Additional Sessions Judge, Nanded vide Sessions Case No. 74/1999.

3. During trial, prosecution examined as many as 15 witnesses and relied on documentary evidence like FIR, panchanama, medical certificate, CA report etc. On analyzing oral and documentary evidence, learned trial Judge reached to a finding that prosecution failed to bring home the charge as against accused nos. 2 and 3, however, trial Judge concluded that accused no.1 (present appellant) is guilty of commission of offence under Section 308 of IPC.

However, considering the age of appellant and the attending circumstances, learned trial Judge invoked Section 6 of the Act and passed following order:

“01. Accused no.1 Mahendra s/o Arvind Ganjewar is convicted for the offence punishable under section 308 of Indian Penal Code and instead of Sentencing him at once, he be released on his executing a bond of Rs.5000/- for a period of 3 years with one surety, to keep peace and to be of good behaviour with a direction to appear and receive the sentence whenever called and during that period to be of good behaviour and to maintain the peace.

02. Accused No.2 Arvind s/o Bhagwanrao Ganjewar and accused No.3 Sunandabai w/o Arvind Ganjewar are acquitted of the charge levelled against them.

03. Accused no.1 Mahendra is acquitted of the offence punishable under Section 452 and 506 of IPC.

04. Seized property be destroyed, being worthless, after the appeal period is over.”

4. As stated above, appellant has questioned his guilt on the ground that prosecution has failed to establish the case beyond reasonable doubt and there is improper appreciation of evidence.

5. On the other hand, State vide its Appeal No. 353 of 2003 is assailing the above judgment on the ground that extension of benefit under Section 6 of the Act was unwarranted in view of nature of charge and guilt proved.

SUM AND SUBSTANCE OF THE EVIDENCE ON RECORD

6. Prosecution has examined the following 15 witnesses to bring home the charge :

PW1 Prabhakar deposed about his occupation and family. He claims that while he was at his shop on 16.03.1999, he received a phone call from his daughter-in-law about assault on his wife by appellant. He rushed home. He claims to have seen appellant giving knife blows on the person of his wife. When he intervened, blow was also given on his chest by appellant. Accused Arvind and Sunanda also dealt kicks and fist blows. He deposed that accused Arvind had removed floor tiles from the common courtyard, i.e. the portion over which he had a way. There was dispute in that background and accused were hurling threats for withdrawing the litigation instituted by him. He lodged report of the above occurrence while in hospital i.e. at Exhibit 19.

PW2 Balaji, a neighbour deposed that on 16.03.1999 between 1.00 p.m. to 2 p.m. hearing shouts he came out of his shop and saw accused persons as well as complainant and his wife. He saw

complainant's wife had bleeding injury on her abdomen. He heard exchange of words between accused Arvind and complainant Prabhakar. He saw present appellant armed with small knife in his hand.

PW3 daughter-in-law of complainant deposed that on 16.03.1999 at 1.30 p.m. appellant came to the house and assaulted her mother-in-law with knife. She telephoned father-in-law, who reached there immediately. Appellant dealt blow on him also and remaining accused dealt kicks and fist blows. Accused were insisting to withdraw the court proceedings. She identified accused as well as knife.

PW4 Mahesh is pancha to seizure of clothes of appellant Exhibit 25.

PW5 Dr. Ballewar is the Medical Officer who examined and treated informant PW1 and his wife PW6 issued certificates Exhibits 29 and 30.

PW6 Sarojani is the wife of informant. She testified that on 16.03.1999 at about 1.30 p.m., she and her daughter-in-law were busy doing household work. Appellant came near her, took out a knife and gave blows on her person. Daughter-in-law telephoned her husband and when he came, appellant dealt blow on him also, whereas accused nos. 2 and 3 gave kicks and fist blows. She was taken to the hospital and treated. According to her, accused had removed tiles from the floor of the courtyard regarding which there was dispute and litigation. She testified that she was treated for 15 days.

PW7 Pravin, pancha to memorandum of disclosure and recovery of knife at the instance of appellant vide Exhibits 33 and 34.

PW8 PSI Devidas Shelke, who registered crime no. 50/1999.

PW9 Ganesh is pancha to spot panchanama Exhibit 45.

PW10 Radhesham is pancha to seizure of clothes of injured PW6.

PW11 Police Constable Chavan and **PW12** Police Constable Kokare acted as carriers of muddemal.

PW13 Sanjay is second pancha to memorandum of disclosure and seizure of knife.

PW14 PSI Ramtirth and **PW15** PSI Ovhal are the Investigating Officers, who carried out respective investigation and cahrgesheeted accused.

ANALYSIS

7. Initially, charge was framed for commission of offence punishable under Sections 307, 452 and 506 r/w 34 of IPC. Trial court reached to a conclusion that offence under Section 308 of IPC i.e. attempt to commit culpable homicide not amounting to murder is made out and not offence under Section 307 of IPC. The appeal by State is precisely taking exception to such finding by the trial court.

Therefore, entire evidence is to be first re-appreciated to ascertain whether prosecution has succeeded in establishing offence under Section 307 IPC or whether trial court was justified in holding guilt for offence under Section 308 and not 307 of IPC.

8. Here, there is no dispute that complainant party and accused party are sharing common courtyard. Since 8 to 10 years, there was civil litigation over the flooring and way, which fact is not disputed. Secondly, while chargesheeting accused no.1-present appellant, who is alone convicted, he is shown to be of 17 years of age and prosecution has not seriously challenged him to be a minor at the time of incident. With these uncontroverted facts, the evidence is put to scrutiny and re-appreciation.

9. It seems that star witnesses or material witnesses for prosecution are injured PW6-Sarojani, her husband informant PW1 Prabhakar, who also is an injured and PW3-Rupali i.e. daughter-in-law of PW1 and PW6. PW2-Balaji is a neighbour. Case of prosecution is that accused entered the house of PW6 and thereafter he assaulted her. It is obvious that there may not be other independent witnesses, as occurrence has taken place in the very house.

10. Occurrence gets unfolded from the testimony of PW6. What she has deposed is that while she and her daughter-in-law (PW3) were busy doing household work, appellant entered their house. She questioned him. According to her, he asked her to keep mum i.e. by making a gesture i.e. by placing finger across his lips, and then he inflicted blows on her with knife. The sites on which she was allegedly assaulted are, arms, waist, chest and back.

11. PW3-Rupali, who was also present at the time of incident, has also stated that accused came to their house with a knife and he mounted assault on her mother-in-law PW6. She reported the occurrence to her father-in-law PW1 and he reached there. According to her, he was also assaulted by knife.

12. PW1, who was at his shop conducting business, on receipt of phone call from PW3, claims to have rushed home and he also claims to have seen present appellant inflicting blows on his wife and then he was also assaulted.

13. Therefore, here, there is not only eye witness account in the form of PW3, but also injured witness account i.e. of PW6 and PW1. Injuries suffered by them are demonstrated and established by

examining Medical Officer PW5 Dr. Ballewar at Exhibit 28, who has stepped into the witness box and has placed on record injury certificates Exhibits 29 and 30.

14. On carefully going through the cross-examination, more particularly para 10 of the cross of PW1 and para 7 and 8 of the cross of PW6, it is clearly emerging that the manner and line of their cross categorically shows that not only presence of appellant in the house of complainant is admitted, but even assault is admitted. Therefore, on careful re-appreciation and re-analysis of the testimony of PW1, PW3 and PW6, prosecution has established that accused entered the house of complainant and dealt blows with knife. The knife is also recovered and the panchas to memorandum and recovery are also examined i.e. in the form of PW7 and PW13.

15. Though neighbour PW2 has been examined, however, from his testimony it is emerging that he was not a eye witness as his testimony suggests that he had reached the spot after the occurrence, as he claims that he had seen PW6 suffering bleeding injury and exchange of words between both the parties. Therefore, testimony of PW2, an independent witness, is of no avail. However, injured eye witness account i.e. PW6 and PW1 and the eye witness PW3, whose

presence has not been rendered doubtful, can safely be accepted as reliable version as regards to occurrence is concerned.

16. Now, the question which is of prime consideration is whether offence under Section 307 of IPC was made out by prosecution. For attracting Section 307 of IPC, the essential ingredients to be proved by prosecution are as under:

- (i) that the death of a human being was attempted;
- (ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and
- (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as:
 - (a) the accused knew to be likely to cause death; or
 - (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

17. Law is fairly settled that to justify a conviction under Section 307 IPC, it is not at all essential that bodily injury capable of causing death should have been inflicted. It is also not necessary that the injury if caused to the victim of assault should be sufficient under ordinary course of nature to cause death of the person assaulted. What the court is expected to see is whether the act irrespective of its outcome was done with intention or knowledge or under circumstances mentioned in the Section. The Hon'ble Apex Court in numerous judgments has clarified that "it is sufficient in the law if there is presence of intention coupled with some overt act in execution thereof".

18. To bring the case within the ambit of Section 307 IPC, prosecution has to make out the facts and circumstances envisaged under Section 300 IPC. Thus, what is emerging is that the court has to see whether the act, irrespective of its result, was done with the intention or knowledge or under circumstances mentioned in the Section. Only if there is an intention coupled with some overt act in execution thereof, offence under Section 307 IPC can be said to be successfully brought home.

19. Keeping above legal requirements in mind and analyzing the available discussed evidence, here, it is pertinent to note that, what exactly triggered the assault has not come on record. What preceded prior to the said entry of appellant in the house of complainant is also not coming on record. PW3 and PW6, who were the incumbents of the house, have not elaborated or clarified as to what made appellant enter their house. No doubt, there is material suggesting pending/existing civil dispute, but that is also said to be 8 to 10 years old and this has come in the admission of none other than the complainant PW1 while facing cross. Complainant claims that accused persons wanted him to withdraw the court proceedings. It was a court date on 15.03.1999. But since that day or even up to 1.00 p.m. to 2.00 p.m. of 16.03.1999, i.e. the day of assault, what happened between the parties is not coming on record. PW1 was shown to be at his shop. Therefore, the moot question arises is, when the ladies i.e. PW3 and PW6 were busy doing their household work and when PW1 was busy conducting his business, what made appellant enter their house with a knife is a mystery. There is nothing from prosecution side to elaborate this aspect. In the considered opinion of this Court, it was essential for the simple reason that, what Section 307 IPC demands is intention. Here, why appellant developed intention to go armed with

a knife is not established. Therefore, when there is nothing to indicate that appellant entered the house with specific intention to carry out deadly assault or with intention to commit murder, essential ingredients of intention being patently missing, offence under Section 307 IPC cannot be brought home. Even prosecution's own witnesses speak about accused to be armed with a small knife. Such circumstance also contributes to the aspect of intention to kill.

20. Therefore, here, when there is nothing concrete to show that with sole intention to commit murder or attempt to commit murder accused entered the house of complainant and inflicted blows, offence under Section 307 IPC cannot be attracted.

21. Appellant has also questioned his conviction for offence under Section 308 IPC on the ground that said charge has not been proved beyond reasonable doubt and there is improper appreciation. But even such submissions have no force. Taking into consideration the nature of injuries and the nature of article put to use, definitely required ingredients for attracting Section 308 of IPC are available and therefore learned trial court has committed no error in bringing home the offence from Section 307 to 308 of IPC.

22. Another ground of challenge by learned APP is that, considering the gravity of offence, accused appellant was not entitled for benefit of Section 6 of the Probation of Offenders Act. On the other hand, learned counsel for the appellant seeks reliance and support of ruling of the Hon'ble Apex Court in the case of ***Masarullah v. State of Tamil Nadu*** 1982 (3) SCC 458 and ***Daulat Ram v. The State of Haryana*** AIR 1972 SC 2434.

23. Section 6 of the Probation of Offenders Act, which is a statutory mandate, reads as under :

“6. Restrictions on imprisonment of offenders under twenty-one years of age:

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the Court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under S. 3 or S. 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would

not be desirable to deal under Section 3 or Section 4 with an offender referred to in sub-s. (1) the Court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender.”

24. Here, as stated above, in chargesheet as well as before the trial court, there is no dispute that at the time of incident, appellant was studying in 11th standard and was said to be 17 years of age and hence a minor. He has been given benefit of Section 6 of the Probation of Offenders Act by the trial Judge which is now taken exception to.

25. Time and again, the object and reasons of the Probation of Offenders Act as well as rationale for the enactment and its amendment has been highlighted as the legislation is made exclusively for the benefit of releasing offenders on probation of good conduct instead of directly sending them to imprisonment. Precedents show that there has been increasing emphasis on reformation and rehabilitation of those offenders who are of young age, first time offenders and do not have criminal antecedents, they can be given opportunity to become better citizens in stead of making them fall in

the company of hardened criminals in jail. Section 6 reproduced above is a mandatory restriction, more particularly for that class of offenders who are below 21 years of age. In the judgment of the Hon'ble Apex Court in **Masarullah** (supra), which is also heavily relied upon by learned counsel for the appellant herein, the relevant observations are as under :

“In case of an offender under the age of twenty one years on the date of commission of the offence, the Court is expected ordinarily to give benefit of the provisions of the Act and there is an embargo on the power of the Court to award sentence unless the Court considers otherwise, having regard to the circumstances of the case including nature of the offence and the character of the offender.”

It has been elaborated in the above judgment that the underlying purpose of the provision being reformatory and Section 6 being special provision, it was carved out to prevent confinement of persons of young age, who are below 21 years of age, in jail, to protect them from pernicious influence of hardened criminals. Similar views are echoed in the recent judgment of the Hon'ble Apex Court in the case of **Lakhvir Singh v. State of Punjab** (2021) 2 SCC 763 : 2021 SCC OnLine SC 25.

26. In the line of above precedent, here, present appellant was also shown to be barely 17 years of age at the time of the incident. There is no criminal record or bad antecedents. He was moreover said to be taking education and the very line of cross and answers solicited from prosecution witnesses show that he was at the time of incident studying in collage and facing examination. Taking into consideration such attending circumstances and the background in which the incident took place, in the considered opinion of this Court, the learned trial court was justified in extending the statutory and mandatory benefit available to the offender like appellant. Therefore, taking overall view of the circumstances in which the incident took place, the quality of evidence and age of the appellant, he is qualified for benefit of Section 6 of the Probation of Offenders Act and learned trial court has rightly done so. No case being made out to disturb the findings and conclusion, and there being no merit in both, the appeal by State as well as the appeal by convict, I proceed to pass the following order:

ORDER

Both the appeals are hereby dismissed.

[ABHAY S. WAGHWASE, J.]