

Vivek Kumar Tiwari @ Ashu Vs State of U.P.

Court: ALLAHABAD HIGH COURT

Date of Decision: Oct. 6, 2016

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 360
Penal Code, 1860 (IPC) - Section 307, Section 323, Section 34, Section 34

Citation: (2016) 10 ADJ 13 : (2016) 6 AILJ 460

Hon'ble Judges: Mrs. Ranjana Pandya, J.

Bench: Single Bench

Advocate: Manoj Kumar Mishra and Akhilesh Kumar, Advocates, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Partly Allowed

Judgement

Mrs. Ranjana Pandya, J.- Challenge in this appeal is to the judgment and order dated 02.07.2016 passed by learned Additional Sessions

Judge, Court No. 6, Faizabad in ST No. 472 of 2013 : State v. Vivek Tiwari and others arising out of Crime No. 48 of 2010 under Sections 307,

323, 504, 506 IPC, Police Station, Haiderganj, District Faizabad whereby accused were acquitted for the charges under Sections 504, 506 IPC.

Accused appellants were found guilty under Sections 307 read with Section 34 IPC and sentence to seven years" rigorous imprisonment and fine

of Rs.5,000/- each and six months imprisonment each under Section 323 read with Section 34 IPC with default stipulation.

2. Filtering out unnecessary details, the prosecution case in brief is that a report was lodged by Yogesh Pathak stating that on 20.12.2009 he was

going to Kujariyapur at about 3:30 PM, when he reached near Haiderganj market, he met Suresh and Vimal and started talking to them. Suddenly,

the accused Ashu Tiwari spat at him, when the informant resisted, Ashu abused him badly. He further said that due to the informant, mother of

accused Ashu had lost the Pardhani election. He further said that he had only spat over the informant. He would further murder him. With the aid

of Om Prakash and one unknown person with intention to kill the informant, he dropped him down on the floor and tried to throttle him. During the

scuffle nails of Ashu caused injuries on the neck of the informant. Suresh and Vimal who were present on the spot intervened, only then, the life of

informant could be saved. A written report was given by the informant but the police did not lodge the report. On the next day, the informant went

to the police station when an incorrect NCR was lodged. Investigation was not fairly conducted in the matter. Hence, an application was moved

before the Court on the basis of which the Court directed the Investigating Officer to conduct the investigation. Investigation was conducted in the

matter vide direction by the Court dated 11.01.2010.

3. PW-3, SSI Prem Prakash Pandey, conducted the investigation. He copied the report, injury report in the Case Diary and recorded the

statement of the chik writer. He further recorded the statement of Yogesh at whose pointing out the spot was inspected and site plan was prepared

which was proved by him as Ext. Ka-2. On the same day i.e. 21.01.2010 he recorded the statement of Suresh Tiwari, Vimlesh Tiwari and other

witnesses. On the basis of the statements of informant injured and his injury report, the NCR was converted into a case under Sections 307, 506

IPC bearing Crime No. 48 of 2010. This fact was scribed in the GD vide report No. 26 at 18:15 hours. He proved the copy of GD as Ext. Ka-3.

On the basis of the statement of witnesses the name of accused Om Prakash Yadav came into light. On 28.02.2010 accused Vivek Tiwari was

apprehended and his statement was recorded. On 6.3.2010 attempts were made to arrest Om Prakash Yadav who surrendered before the Court.

Investigation ended into a charge sheet which was proved by this witness as Ext. Ka-4. Further, this witness proved the copy of NCR as Ext. Ka-

5.

4. PW-4 Dr. Amit Kumar Singh examined the injuries of injured Yogesh on 21.04.2009 at 1:30 PM and found the following injuries on his body :-

(1) Abrasion 3 cm x 1 cm present on forehead 2 cm above from root of nose.

(2) Contusion 2 cm x 1 cm present on right side of face just below right eye.

(3) Abrasion 1 cm x 0.2 cm present on left sterno clavicular joint.

(4) Abrasion 6 cm x 0.2 cm present on mid point of front of neck.

(5) Contusion 4 cm x 2 cm present on left side of back 2 cm below from left inferior angle of scapula.

5. He proved the injury report as Ext. Ka-7.

6. Besides this witness, the prosecution examined the informant being the injured person as PW-1. This witness proved the written report as Ext.

Ka-1. PW-2 is Suresh Tiwari being an eye witness.

7. After examining four witnesses the prosecution closed its evidence and proceeded to record the statement of the accused under Section 313

Cr.P.C in which accused stated that they had been falsely implicated in the case. It was further stated that the informant is a political person. He

collects money from people. He demanded money from accused who refused to pay any money, hence they were falsely implicated. The accused

did not adduce any evidence in defence.

8. After hearing the arguments of the learned counsel for the parties and going through the material available on record, the learned Trial Court

proceeded to convict and sentence the accused appellants as narrated in para -1 of the judgment.

9. Feeling aggrieved, the accused appellants have come up in appeal before this Court.

10. Heard the learned counsel for accused appellants, learned AGA appearing for the State and perused the lower Court record.

11. The learned counsel for the appellants have submitted that the impugned judgment and order of conviction and sentence is bad in the eye of

law and is liable to be set aside.

12. Per contra, the learned AGA appearing for the State has supported the impugned judgment and order and submitted that the appeal is

misconceived and deserves dismissal.

13. Before I proceed to analyse the evidence on record and to appreciate the arguments advanced by the learned counsel for the parties, it would

be in the fitness of things if the statements given by the prosecution witnesses in their examination in chief are noted in brief.

14. The PW-1, informant, has stated that on 20.12.2009 at 3:30 PM he was talking to Suresh Tiwari and Vimallesh Tiwari. Suddenly, accused

Ashu Tiwari and Om Prakash came to the spot. Ashu spat beetle remains on the informant who opposed the same at which Ashu Tiwari abused

him and said that his mother lost election due to the fault of informant and he would kill him. Ashu Tiwari started throttling the neck of the

informant. Om Prakash started pulling his hair and one unknown person caught his feet. Ashu's nails hurt the neck of the informant, he could not

breathe and felt that he would die. Suddenly, Suresh and Vimlesh came to the spot and they saved his life. After sometime, he gave a written

report at the police station. His report was kept by the police and he was sent away from the police station. Many times, he proceeded to the

police station but a proper report was not lodged and his report was written as NCR. After that directions were issued by the Court to investigate

the matter, at which the investigation commenced and he was sent for medical examination to PHC where he was medically examined.

15. PW-2, Suresh Tiwari, is said to be an eye witness who has stated that on 20.12.2009 at 3:30 PM he and Vimlesh Tiwari were talking to

Yogesh Pathak. Suddenly, Ashu Tiwari, Om Prakash and one unknown person came. Ashu Tiwari spat at Yogesh Pathak who opposed this act

at which Ashu Tiwari hurled filthy abuses and said that he would kill the informant. With intention to kill Yogesh Pathak, he dropped Yogesh

Pathak on the ground and started throttling his neck. Om Prakash caught his head and hair and the third accused caught the feet of Yogesh Pathak

who sustained injuries. Vimlesh Tiwari and this witness intervened only due to which the life of the injured could be saved.

16. The medical examination of injured was conducted by Dr. Amit Kumar Singh, PW-4, on 21.12.2009 i.e. on the next day of the incident at

1:30 PM. The aforesaid witnesses namely Dr. Amit Kumar Singh, PW-4, has stated that all the injuries of the injured were simple in nature.

17. To justify the conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted.

Although the nature of injuries actually caused may often give considerable assistance in coming to a finding that as to the intention of accused, such

intention may also be deduced from other circumstances, may even, in some cases, be ascertained without any reference to all actual wounds. The

Section prescribed makes a difference and distinction between an act of accused and its result, if any. Such an act may not be attended by any

result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this Section. I am aware

that it is not necessary that injury actually caused to the victim of assault should be sufficient under ordinary circumstances to cause the death of the

person assaulted. What the Court has to see is where the act irrespective of its result was done with an intention or knowledge and under

circumstances mentioned in this Section. An attempt in order to be a criminal need not be penultimate act. It is suffice in law, if there is present an

intent coupled with some overt act in execution thereof as has been laid down in AIR 1983 SC 305 State of Maharashtra v. Balram Bama

Patil and others.

18. It is true that merely because the injuries are simple in nature, it cannot be said that the offence made out would not fall under Section 307 IPC.

It would all depend upon the facts of a given case but intention has definitely to be seen.

19. In AIR 1982 SC 213 : Kundan Singh v. State of Punjab the Supreme Court in a single para judgment observed as under:-

1. We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that P.W. 6 and

P.W. 7 were in the courtyard of their house when the appellant fired gun shots and he could not, therefore, have intended to injure them, the

conviction of the appellant under Section 307, I.P.C. was not justified. We think that the conviction of the appellant could be maintained only

under Section 324 of the I.P.C. since P.W. 6 and P.W. 7 received simple injuries. We accordingly allow the appeal and alter the conviction of the

appellant to one under Section 324 of the for causing simple injuries to P.W. 6 and P.W. 7 and since the appellant has already suffered

imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already undergone by him and he may

be set at liberty forthwith.

20. In the case of Ramesh v. State of U.P. : AIR 1992 SC 664 where a single injury was found on the back of the injured, the appeal of

accused appellant who was tried along with two others was convicted under Section 307/34 IPC and sentence to undergo rigorous imprisonment

for four years, while two others were acquitted, was partly allowed by the Apex Court. His conviction was altered into Section 324 IPC and the

sentence was reduced to the period already undergone with a fine of Rs.3,000/- which was to be paid to the complainant as compensation.

21. It also emerges that the injuries of injured Yogesh, if any, attributed to the appellants were simple in nature and there is no iota of evidence to

show that they were sufficient in the ordinary course of nature to cause the death of the injured. However, in the facts and circumstances of the

case it is difficult to accept that knowledge or intention can be attributed to the appellants about likely death of the victim by causing the injuries. If

the intention would have been to kill the injured then something more would have been done.

22. A perusal of the report also reveals that there were no intervening circumstances to do away with the life of the appellants, thus, conviction

under Section 307/34 IPC cannot be sustained.

23. PW-1, Yogesh, has stated that he sustained the injuries of the nails, on which there were clots of blood. When the injury report Ext. Ka-1 was

perused in this context, it was noted that the doctor did not find any clotted blood on any of the injuries. Perusal of all the five injuries also reveal

that none of the injuries were on the vital part of the injured. No doubt the informant has stated that he was beaten by the accused persons with

intention to kill but that is not substantiated by evidence on record. Having regard to the oral evidence, medical evidence keeping in view the nature

of injuries, the seriousness of offence has to be looked into. Although the doctor has stated that if injury No. 4 would have been caused by more

pressure only then death was possible. But injury no. 4 is just a mark of scratch 6 cm x 0.2 cm on the mid of the neck towards lower end of the

hyoid bone.

24. It appears that the learned Trial Court misled itself in assessing the injuries of the injured and statement of the doctor.

25. Thus, only conviction of accused under Section 323 read with Section 34 IPC can be sustained and the conviction under Section 307 IPC

read with Section 34 IPC is liable to be set aside.

26. The learned counsel for appellants has further submitted that in the present case the appellants are entitled to the benefit of Section 4 of

Probation of Offenders Act, 1958.

27. The learned Trial Court has not taken care of the mandatory provisions of Sections 360 and 361 Cr.P.C. which read as under :-

Section 360 in the Code of Criminal Procedure, 1973

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of

seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or

imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard

being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient

that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that

he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not

exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour: Provided that where any first

offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the

powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the

first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner

provided by subsection (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such

sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further enquiry or

additional evidence on any point to be necessary, he may make such enquiry or take such evidence himself or direct such enquiry or evidence to

be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian

Penal Code (45 of 1860), punishable with not more than two years" imprisonment or any offence punishable with fine only and no previous

conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or

physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was

committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of

revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is

a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender

according to law: Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have

been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this

section.

(7) The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed

place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the

observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that

the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may

either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such

Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of

1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

Section 361 in The Code of Criminal Procedure, 1973

361. Special reasons to be recorded in certain cases. Where in any case the Court could have dealt with,-

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or

rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.

28. The language employed in Section 360 Cr.P.C shows that stress is upon making an attempt at inflicting convict. To make it obligatory on the

part of the Court to deal with the cases under Section 360 Cr.P.C it has been clearly mentioned in Section 361 Cr.P.C. if a case is not dealt with

under Section 360 Cr.P.C the Court has to record special reasons for not doing so in its judgment. In the instant case there is no earlier offence

alleged or reported against the appellants.

29. Learned AGA could also not bring to the notice of the Court any other depravity in the character of the appellants which may show them to be

a incorrigible nature which is required for declining the benefit of probation to these convicts.

30. In these circumstances considering the age, character and antecedents of the accused appellants the interest of justice would be served if they

are extended the benefit of Section 360 Cr.P.C.

31. The appeal of the appellants is partly allowed.

32. Their conviction under Section 307 read with Section 34 IPC is set aside. However, their conviction under Section 323 read with Section 34

IPC is confirmed. Instead of immediately sentencing them to undergo imprisonment they are directed to be released on probation of good conduct

on each of them entering into a personal bond with two sureties each in the like amount to the satisfaction of the Trial Court concerned for a period

of six months to keep peace and be of good behaviour. The bonds be filed within one month from the date of judgment. The time for filing the

bonds shall not be extended on any ground whatsoever. In case of breach to appear and receive the sentence when called upon during the above

period of keeping peace and good behaviour and in default to execute the bonds, as above, within the stipulated time, the appellants would serve

out the sentence under Section 323 read with Section 34 IPC as imposed by the Court below.

33. Let a copy of this judgment be sent immediately to the Court concerned along with Lower Court record for ensuring necessary compliance

which should be reported to the Court within four weeks.