

(2018) 02 BOM CK 0045

Bombay High Court (Nagpur Bench)

Case No: 529 of 2002

Nana s/o Shivram
Kokare

APPELLANT

Vs

State of Maharashtra
through PSO Police
Station Morshi

RESPONDENT

Date of Decision: Feb. 12, 2018

Acts Referred:

- Indian Penal Code, 1860, Section 34, Section 326 - Acts done by several persons in furtherance of common intention - Voluntarily causing ievious hurt by dangerous weapons or means

Hon'ble Judges: Rohit B. Deo

Bench: Division Bench

Advocate: D.M. Kale, Ashish Kadukar

Final Decision: Partly Allowed

Judgement

1. The appellants are aggrieved by the judgment and order dated 09.09.2002 rendered by the Additional Sessions Judge, Amravati in Sessions Case 93/1994, by and under which, the appellants-accused are convicted for offence punishable under Section 326 read with Section 34 of the Indian Penal Code (" IPC " for short) and are sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.1000/-.

2. Heard Shri D.M. Kale, the learned counsel for appellants-accused and Shri Ashish Kadukar, the learned Additional Public Prosecutor for the respondent-State.

3. The prosecution case, as is unfolded during the trial, is thus:

P.W.1 Bhimrao @ Bhiwaji Kokare faced trial on the charge of having murdered the brother of accused Nana, he was acquitted and the appeal is pending before this court. In view of the intense enmity, accused Nana and his sons accused Dadarao and Sahebrao assaulted Bhimrao on 13.01.1994 at 02:30 p.m., near the water reservoir at village Ambada. Accused Nana dealt an axe blow and when P.W.1 Bhimrao fell down he was assaulted by accused Dadarao and Sahebrao with sticks. Nasir Musalman and Dharmu Dhole who were present at the reservoir intervened due to which intervention the accused left the scene. P.W.1 Bhimrao was taken to the Morshi Hospital by Dharmu Dhole, Raghoba Kokare and Pandurang Kokare. The oral report was recorded by the police at Morshi Hospital (Exh.42) on the basis of which offence punishable under Section 324 read with Section 34 of IPC was registered. Investigation ensued, statements of witnesses were recorded, spot panchnama Exh.47 was drawn, an axe and sticks were seized on 19.01.1994, and upon completion of the investigation charge-sheet was submitted in the court of Judicial Magistrate First Class, Morshi under Section 307 read with Section 34 of the IPC, who committed the proceedings to the Sessions Court.

The learned Sessions Judge framed charge (Exh.23) under Section 307 read with Section 34 of IPC. The accused abjured guilt and claimed to be tried. The defence is of total denial and false implication.

4. The prosecution examined as many as ten witnesses to bring home the charge. P.W.1 Bhimrao @ Bhiwaji Kokare is the injured, P.W.2 Raghoji Kokare is the brother of the injured, P.W.3 Dharmu Dhole is examined as an eye witness, P.W.4 Sahebrao Mundare is the panch witness to the memorandum statement, P.W.5 Dr. Baban Sable is the Medical Officer, Rural Hospital, Morshi, P.W.6 Ramdas Thakre is the PSI, P.W.7 Haribhau Kokare the panch witness to the seizure memo Exh.43 evidencing the seizure of the clothes of the complainant, P.W.8 Mahadeo Dhanade ASI the Investigating Officer, P.W.9 Dr. Sham Rath, who was then attached to the General Hospital, Amravati and P.W.10 Dr. Seema Sune, who was also attached to the General Hospital, Amravati.

5. P.W.3 Dharmu Dhole did not support the prosecution, was declared hostile and cross examined on behalf of the prosecution. His evidence does not take the case of the prosecution any further. The only witness to the assault is P.W.1 the injured himself. P.W.4 Sahebrao Mundare and P.W.7 Haribhau Kokare the panch witnesses to the memorandum statement and the seizure memo respectively did not support the prosecution. The learned A.P.P. fairly does not dispute, that the seizure of the axe and sticks is not proved. The prosecution is relying substantially, if not entirely, on the evidence of the injured P.W.1 Bhimrao Kokare and the corroborative medical evidence, to prove the offence.

6. Before I proceed to appreciate the testimony of the injured witness, it would be

apposite to consider the medical evidence on record to determine the nature and extent of injury suffered by P.W.1.

7. P.W.5 Dr. Baban Sable examined P.W.1 Bhimrao Kokare on 13.01.1994. He has proved the injury certificate Exh.49. P.W.5 noticed following injuries on the person of P.W.1 Bhimrao Kokare:

1. Lacerated wound on upper part of scalp of size 1" x 1/2" x bone deep, bleeding was there.
2. Confused swelling on dorsal side of left forearm 4" x 3" vertical reddish in colour, just below elbow joint.
3. Contused swelling on medial side of the right leg of size 4" x 4" irregular reddish colour.

Age of the injuries within 24 hours caused by hard and blunt object it would heal within 10 days if no complications arises.

P.W.5 has deposed that the injured was referred to the General Hospital, Amravati for radiological examination of left forearm and right upper leg. In the cross-examination, P.W.5 admits that injury 1 cannot be caused by the blade side of the axe. However, he denies the suggestion that injury 1 was simple in nature.

P.W.9 Dr. Sham Rathi was then attached to the General Hospital, Amravati. He states that P.W.1 was admitted in General Hospital, Amravati in Ward 3 on 13.01.1994. P.W.1 was shifted to Ward 15, of which Ward P.W.9 was in-charge, on 18.01.1994 and P.W.1 was examined on 19.01.1994. P.W.9 states that he diagnosed undisplaced fracture of upper third right tibia and undisplaced fracture to left olecranon. He states that he applied plaster to the right leg and the left upper limb. P.W.1 was discharged on 20.01.1994. P.W.9 has proved the x-ray plates bearing numbers 572 and 573 (Exh.68) and (Exh.69).

P.W.10 Dr. Seema Sune, who was then attached to the General Hospital, Amravati, has proved the bed head ticket (Exh.71). She is not cross examined.

8. The medical evidence reveals that the deceased suffered three injuries. Injury 1 is not possible due to the blade side of the axe, is the deposition. Injuries 2 and 3, which evidently caused the fracture, are possible due to sticks, is the medical evidence.

9. The learned counsel for the accused and the learned A.P.P. are in unison in submitting is that, other than the corroborative medical evidence, the only evidence is that of the injured P.W.1. The learned counsel for the accused submits that in view of the intense enmity, the possibility of false implication is not excluded. The injured P.W.1 was accused of having murdered the brother of accused Nana and though acquitted, the appeal was pending before the High Court. P.W.1 is falsified on material aspects since the medical evidence rules out use of the blade side of the axe in the assault, is the submission. The evidence of P.W.1 must be subjected to extremely close scrutiny since the only other eye witness P.W.3 Dharmu Dhole did not support the prosecution, is the further submission. Per contra, the learned A.P.P. would submit that the testimony of the injured must be placed on a higher pedestal than that of other witnesses. Enmity is a double edged sword and may as well furnish a motive for the assault, points out the learned A.P.P. The omission of P.W.1 to specifically state that he was assaulted by the blunt side of the axe is not suggestive of falsehood, is the submission.

10. The pivotal issue, is whether the testimony of the injured P.W.1 is reliable, credit worthy and confidence inspiring. His deposition is broadly consistent with the contents of the First Information Report, which is lodged with promptitude. P.W.1 states that at 02:30 p.m. on 13.01.1994 he went to the house of Nasir Musalman to hire his bullock-cart. P.W.1 then came near the water reservoir. He was assaulted by accused Nana with axe, he fell down and thereafter was assaulted by accused Dadarao and accused Sahebrao with sticks. The statement in the examination-in-chief that accused 1 was instigating accused 2 and 3 to kill P.W.1, is brought on record as an omission. The evidence is not shaken in the cross-examination. Nothing is elicited in the cross-examination to dent the credibility of the testimony. The conscious of this court is satisfied that the evidence of the injured P.W.1, which is more than amply corroborated by the medical evidence on record, is reliable and confidence inspiring and can be the basis of conviction.

11. All the accused are convicted under Section 326 with the aid of Section 34 of the Indian Penal Code. The prelude to the actual assault is blurred. The evidence of P.W.1 is when he was standing near the water reservoir he was assaulted by the accused. The statement in the examination-in-chief that P.W.1 instigated P.W.2 and P.W.3 is an omission. It is difficult to record a finding, with any degree of certainty, that the prosecution has established that the accused shared a common intention to cause grievous hurt. The individual act and role of the accused needs to be examined to determine the offence committed by the accused. Concededly, the fracture suffered to the left forearm and the right leg are due to the stick assault which is attributed to accused 2 and 3. The injury to the head, which appears to be due to the blunt side of the axe, is not proved to be grievous hurt within the meaning of Section 320 of the Indian Penal Code. In the teeth of the evidence on record, the conviction of accused Nana under Section 326 of IPC is unsustainable, instead accused deserves to be convicted under Section 324 of IPC. In so far as accused Dadarao and Sahebrao are concerned, whether a weapon is

likely to cause death, would essentially depend not only on the weapon but the part of the body on which the blow is inflicted. In the present case, I am not persuaded to hold that lathi is such a weapon as would attract Section 326 of IPC. Accused Dadarao and Sahebrao are liable to be convicted under Section 325 of IPC.

12. In so far as the sentence is concerned, the incident occurred 24 years ago. The motive was deep and intense hatred for the injured P.W.1 who was accused of murdering the brother of accused Nana. Accused Dadarao and Sahebrao, who are the sons of accused Nana in every probability, could not restrain themselves when their eyes fell on P.W.1 who had come to the water reservoir along with Nasir Musalman. In view of the facts of the case, I am inclined to grant the benefit of Section 4 of the Probation of Offenders Act, 1958. Sentencing the accused to prison may result in the accused degenerating into hardened criminal. In the totality of the circumstances, the accused be released on their entering into a bond, to the satisfaction of the Sessions Judge, to appear and receive sentence when called upon during period of one year and in the meanwhile to keep the peace and be of good behaviour.

13. The bail bonds of the accused shall stand discharged.

14. The appeal is partly allowed.