

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH: NAGPUR

CRIMINAL REVISION APPLICATION NO.129 OF 2004

APPLICANT:

Bhupsingh @ Bablu s/o Kisanlal Baghele, aged 28 years, occupation : Cultivator, r/o Lodhitola, P.S. Dawaniwada, tahsil and district : Gondia.

VERSUS

RESPONDENT:

State of Maharashtra, through P.S. Dawaniwada, district : Gondia.

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Shri D. S. Shrimali, Advocate for the applicant

Shri Ahirkar, A. P. P. for the respondent

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CORAM: S. R. DONGAONKAR, J.

DATE : 27.9.2006

JUDGEMENT

Heard counsel for the parties.

1] The applicant in the present case, is taking exception to the judgment and order passed by the learned Additional Sessions Judge, Gondia in Criminal Appeal no. 16/2001, by which he confirmed the judgment and order of sentence passed by the Judicial Magistrate First Class, Tirora, in Regular Criminal Case No.28/1998 holding the applicant/accused guilty for the offence punishable under section 324 of the Indian Penal Code, while acquitting the other two co-accused under section 397 and 401 of the Criminal Procedure Code.

2] The facts necessary for the decision of this revision petition may be stated thus. The applicant/accused was proceeded in Regular Criminal Case No.28/1998 before the Judicial Magistrate First Class,

Tirora for the offence punishable under section 324 read with section 34 of Indian Penal Code along with other co-accused Kundansingh and Puransingh. It was a case of the prosecution that Roshanlal Lilhare was residing at village Lodhitola. Along with his father in law on 13.3.1998 at about 1.00 p.m. Complainant Roshanlal was assaulted by the accused with bamboo stick on his head whereby he sustained bleeding injuries. The accused no.3 had also beaten Roshanlal. It was alleged that one Chanlal Mahule, Laxman Lilhare and Hiralal had intervened in the quarrel and thereafter Roshanlal lodged report to Police Station Dawaniwada. The matter was investigated. During the investigation, the statement of the relevant witnesses were recorded, the bamboo stick was seized, injury report in respect of the complainant was obtained and after due investigation charge sheet was submitted. During the trial, the prosecution has examined in all six witnesses and after recording the evidence and hearing , the learned Trial Judge found this applicant/accused guilty of the offence under section 324 of the Indian Penal Code and sentenced him to suffer simple imprisonment for three months and to pay fine of Rs.1000/-. He however, acquitted the other two co-accused.

3] The applicant accused carried this matter to the appellate court in Criminal Appeal No.16/2001. After hearing, the appeal was dismissed and the applicant/accused was directed to surrender the bail vide order of the appellate court dated 20.7.2004.

4] This revision petition is directed against that order.

5] To contend that the order of the lower court is illegal, improper and unjust at law, the learned counsel for the applicant has submitted that the complainant if at all he was attacked, he was attacked by stick and by no means it can be called a weapon which is mentioned in section 324 of Indian Penal Code. Further according to him, in this case, the bamboo stick was not produced before the court nor it was identified by the Medical Officer or the complainant. He has further submitted that in this case the Investigating Officer was not examined, so also on account of old enmity the complainant had lodged false report. He has relied on the decision of the Apex Court in (2005) 3 Supreme Court Cases Page 260 [Mathai .vs.. State of Kerala and also in 2000(1) Mh.L.J. Page 549 [Dilip Ramaji Kakde...vs... State of Maharashtra].

6] Therefore, according to the learned counsel, the conviction & sentence imposed by the learned trial court, confirmed by the appellate court are bad in law and liable to be set aside.

7] As against this, learned A. P.P. for the State has submitted that although the stick was seized, it was not shown to the witnesses due to oversight and this fact by itself will not vitiate the trial in view of the fact that eye witnesses have clearly supported the prosecution case and therefore, no adverse inference should be drawn for

non-identification of the stick and further non examination of the Investigating Officer. According to him, although there was old enmity, it was only to instigate the accused to commit the offence and the prosecution has established its case, and therefore the concurrent findings of the lower courts should not be interfered with.

8] On perusal of the judgments and orders of the trial Judge and learned appellate Judge, it would be seen that both of them have relied on the account of eye witnesses regarding the incident. On scrutiny of the record, it does not reveal that in fact the alleged instrument of offence i.e. Stick was identified by the complainant or eye witnesses to the incident or the Medical Officer who has been examined, though it appears to have been seized during the investigation.

9] The question is whether non-identification of this stick in the trial would vitiate the conviction. The answer to this would be in negative in as much as in the present case the Medical Officer has deposed about the injuries found on the person of the complainant. He had found four injuries on the person of Roshanlal when he was examined immediately after the incident. According to the opinion of the Doctor the said injuries can be caused due to blow of bamboo stick. In these circumstances, when there is no evidence to show that the complainant must have suffered injuries due to some other weapon or reason, the prosecution case can not be disbelieved only on that count. No adverse inference in such circumstances can be drawn.

10] My attention was drawn to the observations of this court in 2000(1) Mh.L.J.549 [supra] in paragraph 14. Paragraph 14 reads thus:

14 It is then submitted by Shri Nawab, learned counsel for the appellant/accused, that though the evidence of investigating officer P.W.12 Duddalwar as well as memorandum (Ex.89) and the discovery panchnama (Ex.90) go to show that one heavy stick admeasuring 46 in length and 6 in circumference was recovered at the instance of the appellant/accused. However, this stick was neither produced before the Court nor shown to the doctor conducting the postmortem examination for his opinion and, therefore, no any weight can be attached to such recovery nor it can be said that the alleged offence was committed with the said stick. For this Shri Nawab, placed reliance on the decision in Bhola Nath .vs.. State, 1976 Cri.L.J.1409. It is true that the stick alleged to have been seized at the instance of the appellant/accused has neither been produced before the Court nor shown to Dr. Ejaz Ahmed (P.W.10), who conducted the postmortem examination of the dead body of Murlidhar for his opinion as to whether the injuries sustained by the deceased or by P.W.2 Gunaji are possible by the by the said stick. The prosecution has not offered any explanation for the non production of the said stick before the court and, therefore, we are inclined to accept the submission made by Shri Nawab in this respect, because the apex Court in the decision in Bhola Nath .vs..

State 1976 Cri.L.J. 1409 cited supra, held that:

8-The accused is said to have made a disclosure statement (as per Exh.P.W.10(A) to the Police Inspector Bhim Singh (P.W.16) that he had kept the knife near Chhaji Colony Shadara adjacent to a coconut tree in the field in the buses and that he would get the same recovered after pointing it out. This statement is said to have been made in the presence of Shuja Uddin (P.W.10) and Mohd. Asfeen (P.W.11) which was seized under a memo (Ex.P.W.1/C). The said knife was not even sent for serological examination because it was not said to contain blood stains. It was not shown to the doctor who conducted the postmortem or even to any other doctor who was examined. The learned Additional Sessions Judge rightly did not attach any weight to the recovery of the said knife in the view that it did not contain blood stains. Without any blood stains on it there is no guarantee that the same was used in this case. It is needless, therefore, to be detained by the said recovery even though Mr. Frank Anthony, learned counsel for Bholu Nath, went the length of contending that a knife had been falsely planted by the police in this case.

However, in that case the prosecution has not offered any explanation for non-production of the stick before the court. In the present case the stick was produced before the court, though it remained to be identified by the complainant and the Medical Officer. Therefore, unless there is substantial reason to disbelieve the prosecution case, mere fact that the said stick was not identified by

the complainant or the eye witness or the Medical Officer will not vitiate the prosecution case.

Although the Investigating Officer is not examined in the present case, the complainant, eye witnesses and the Medical Officer have been examined. They have supported prosecution case. As such mere non-examination of the Investigating Officer would not make the prosecution case untrustworthy.

11] This takes me to consider the another contention of the learned counsel that the offence under section 324 of I.P.C. is not made out because the alleged offence was committed by stick. Section 324 of the Indian Penal Code reads thus:

324- By means of any 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 it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal

It is clear that for attracting the provisions of section 324 of the Indian Penal Code, the instrument of the offence should be one which out of the instruments mentions in section 324 of I.P.C. It is difficult to hold that the bamboo stick, would be the instrument of offence as required within the meaning of section 324 of I.P.C.

12] Therefore, in this view of the matter the offence under section 324 of the Indian Penal Code cannot be said to be made out. More so, in view of the observations of the Apex Court in Mathia ..vs.. State of Kerla 2005 2005(3) SCC 260. Para 16 & 17 of the said judgment are thus:

16- The expression any instrument which, used as a weapon of offence, is likely to cause death has to be gauged taking note of the heading of the section. What would constitute a dangerous weapon would depend upon the facts of each case and no generalisation can be made.

17- The heading of the section provides some insight into the factors to be considered. The Essential ingredients to attract Section 326 are: (1) voluntarily causing a hurt; (2) hurt caused must be a grievous hurt; and (3) the grievous hurt must have been caused by dangerous weapons or means. As was noted by this Court in State of U.P. V. Indrajeet, there is no such thing as a regular or earmarked weapon for committing murder or for that matter a hurt. Whether a particular article can per se cause any serious wound or grievous hurt or injury has to be determined factually. As noted above, the evidence of the doctor (P.W.5) clearly shows that the hurt or the injury that was caused was covered under the expression grievous hurt as defined under section 320 I.P.C. The inevitable conclusion is that a grievous hurt was caused. It is not that in every case a stone would constitute a dangerous weapon. It would depend upon the fact of the case. At this juncture, it

would be relevant to note that in some provisions e.g. Sections 324 and 326 the expression dangerous weapon is used. In some other more serious offences the expression used is deadly weapon (e.g. Sections 397 and 398), The facts involved in a particular case, depending upon various factors like size, sharpness, would throw light on the question whether the weapon was a dangerous or deadly weapon or not. That would determine whether in the case Section 325 or Section 326 would be applicable.

13] Therefore, the question would be which offence has been made out against the present accused. It would be clear that in such circumstances, although the concurrent findings of the trial court and lower appellate court are accepted, it can not be held that the offence made out against the applicant -accused is the one under section 324 of Indian Penal Code, but in my opinion, it would be under section 323 of Indian Penal Code.

14] In these circumstances, I find that the order of the trial court and the lower appellate court are correct & proper and need to be confirmed to the extent of the conviction of the applicant -accused for the offence under section 323 of I..C.

15] This takes me to consider the sentence part of the order of the trial court confirmed by the appellate court.

16] The accused applicant is sentenced to suffer simple

imprisonment for three months and to pay fine of Rs.1000/-. As has been found that the offence under section 324 is not made out and the accused is found to be guilty under section 323 I.P.C. the sentence will have to be reduced to the suitable extent considering the nature of injuries on the person of complainant. It is difficult to accord benefit of Probation of Offenders Act to accused. In my opinion it would be in the fitness of the things that the accused is sentenced to suffer the sentenced already undergone and with fine amount which he has paid. Therefore, while upholding the conviction of the applicant/accused his sentence is reduced to already undergone and fine which he has paid. Therefore, the revision application stands partly allowed in the aforesaid terms.

JUDGE

smp.