



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 40 OF 2004

. Jitendra S/o Badrinaryan Toshniwal,
Age: 27 years, Occu.: Business,
R/o. L-9, Arihant Nagar, Aurangabad .. Appellant
(Original Accused No.1)

Versus

. The State of Maharashtra,
Through the Police Sub Inspector,
Police Station, Karmad, Aurangabad .. Respondent

...
Advocate for Appellant : Mr. Milind M Joshi
APP for Respondent/State: Mr. N. D. Batule
...

CORAM : ABHAY S. WAGHWASE, J.
Reserved on : 02.07.2024
Pronounced on : 08.07.2024

JUDGMENT:

1. Conviction recorded for offence under Section 307 of the Indian Penal Code, 1860 (IPC) by the learned First Adhoc Additional Sessions Judge, Aurangabad, in Session Case No.246 of 2002, dated 07.01.2004 is hereby assailed by the appellant by filing instant appeal.

2. Informant PW-5 initially worked as an Agent in a credit society along with one Bharti. There used to be quarrel between both ladies. Informant was also required to quit job. On 18.01.2001, Dayanand

Toshniwal brother of Bharti developed contact and issued threats if she troubles his sister Bharti. On 27.01.2001, informant received offer to work as Editor. On 14.04.2001, she received phone call from Sushant Patil and she was called in hotel at Akola with certificates and photographs and, then, she was told that they have to go to Nagpur to attend conference. In the said hotel she met with Sushant Patil, who was accompanied by one Rane. Sushant Patil also told informant that they have to go to Nagpur in the same night, however, they could not go.

On 18.04.2001, informant received phone call from Sushant Patil and she was again called at Akola in a hotel. There again she saw accused Rane with Sushant Patil. For attending conference they travelled in a car but it broke down and so further journey was called off.

On 20.04.2001, informant was called for attending the conference at Pune. She was taken by Sushant Patil and Rane in Ambassador car. After the vehicle crossed Karmad, Rane introduced himself and told that he is brother of Bharti and that he would finish her if she troubles his sister Bharti. She was beaten in the running car and hit with a heavy object causing bleeding injury and was then thrown out of the vehicle. She took lift from a truck driver and managed to reach CIDCO Police Station. Police took her to Ghat Hospital and reduced her complaint in writing Exhibit 20, on the basis of which crime was registered.

3. PW-9 Vyankat Andhale, who was entrusted with investigation collected evidence and charge-sheeted accused.

Both accused Jitendra and Deepak were tried by First Adhoc Additional Sessions Judge, Aurangabad by his judgment and order dated 07.01.2004 convicted appellant Jitendra alone for offence under Section 307 of IPC and sentenced him to suffer 5 years imprisonment and fine. Accused no.2 Deepak came to be acquitted.

Said judgment of conviction of appellant / accused no.1, is questioned in the instant appeal.

SUBMISSIONS

4. Appraising this court about the prosecution case and charge, learned counsel for the appellant pointed out that there is no convincing, truthful and reliable evidence on behalf of prosecution except testimony of PW-5 victim. According to him, complaint is motivated one, as complainant was on cross term with Bharti. Appellant who is brother of Bharti is therefore made a scapegoat. He pointed out that considering the informant's evidence in its entirety her very conduct being abnormal creates doubt about veracity of her testimony in the court. He pointed out that it is surprising to find a lady visiting various hotels on mere phone calls. He also questions, whether she had any qualifications to work as an Editor of a newspaper. He pointed out that the lady readily visiting

several places without knowing the person who allegedly called her. He pointed out that there is no distinct evidence about informant receiving any such calls or about she responding to the same. Learned counsel took this court through the testimony of PW-5 as well as her cross and pointed out that her version is not worthy of credence. He submits that informant claimed that she was hit with a heavy object and she did not specify the nature of article, but investigating machinery claims to have recovered hammer, of which there was no reference. According to learned counsel, PW-5 claimed to have been thrown out of the moving car, but there are no abrasion or scratches on her person in spite of she was examined by medical expert. He also emphasized that medical expert who examined and treated informant has only noticed simple injuries. That, though, recovery of hammer is shown, he submitted that panch to recovery has not supported prosecution. He further pointed out that prosecution has examined the truck driver who allegedly gave lift to informant but he could not identify the informant. Therefore, according to learned counsel, evidence on behalf of prosecution was very weak in nature and not convincing to record guilt.

5. He further pointed out that there was no intention to kill informant. There was no direct enmity between the appellant and informant. That, considering the nature of injury, offence under Section

307 of IPC cannot be attracted. According to learned counsel, at the most it would attract offence under Section 323 of IPC and nothing beyond it. Therefore, he criticizes the finding arrived at by learned trial judge and submits that, as prosecution failed to prove the case beyond reasonable doubt and failed to adduce independent and corroborative evidence, the judgment and order of conviction is bad in law and the same requires to be set aside. In support of his submission he sought reliance on the following Judgments:

[I] State of Maharashtra and etc. Vs. Harishchandra Tukaram Awatade, 1997 CRI.L.J. 612

[II] Hari Kishan and State of Haryana Vs. Sukhbir Singh and others, AIR 1988 SC 2127(1)

[III] Dhaniram and others Vs. State of M.P., 1999 CRI.L.J. 2221

[IV] Kailash and others Vs. The State of Rajasthan, 2002 CRI.L.J. 390

[V] Tanti Murmu Vs. State of Bihar (now Jharkhand), 2003 CRI.L.J. 2769

[VI] Baby Kumar alias Janardhana Vs. State of Karnataka, 2003 CRI.L.J. 1425

[VII] The State Vs. Dinesh Shastry, 2004 CRI.L.J. 332

6. In answer to above, learned APP pointed out that in trial court prosecution had proved its case beyond reasonable doubt. He pointed out that victim's evidence is trustworthy, reliable and has remained unshaken. He submitted that there is sufficient corroboration in the form of PW-6 who is sister of victim. That, even otherwise, according to him, sole testimony of PW-5, who is injured, as is inspiring confidence,

can safely be relied and that is what precisely done by learned trial judge. Learned APP pointed out that the vehicle in which victim was made to travel and even assaulted, has been seized. Car Owner PW-1 is examined. That, mere failure on the part of truck driver to identify victim due to lapse of huge time gap, there wont be any adverse effect on the prosecution version, more particularly, when victims evidence is inspiring confidence. He pointed out that hammer put to use has been seized. That, clothes of the victim which were immediately seized and carried “B” blood group and even the hammer when put to analysis revealed it to be carrying same blood group “B” and, therefore, according to the learned APP there is overwhelming and incriminating evidence which is correctly appreciated and accepted by the learned trial judge for recording the guilt. Consequently, he submits that no fault can be found in the judgment passed by the learned trial judge and he prays to dismiss the appeal.

STATUS AND SUM AND SUBSTANCE OF THE PROSECUTION EVIDENCE

7. **PW-1** Sukhdeo is the owner of vehicle. According to him on 17.04.2001 present appellant approached him and hired his vehicle to travel to Tuljapur. That, on 23.04.2001, police approached him and his vehicle was seized by police and subsequently he got the vehicle released by virtue of the court’s order.

8. **PW-2** Ramdas police personnel stated that on 21.04.2001, he received report from the police head constable Bodkhe i.e. Exhibit 17. In the backdrop of it he visited Ghati Hospital and, thereafter, he recorded statement of patient namely Rekha Sharma as per her say. He identified compliant at Exhibit 20. He also accompanied injured and conducted Panchanama Exhibit 21.

9. **PW-3** Devidas Panch to Seizure of Clothes of informant did not support prosecution.

10. **PW-4** Dr. Subhash Chief Medical Officer at Exhibit 23 identified that on 21.04.2001 around 01:45 a.m. he examined Rekha Sharma, who was brought in injured condition and he noticed CLW injuries on the occipital region, left parietal region and tip of left middle finger. According to him the injuries were simple in nature and it would be possible by article no. 4. He identified certificate Exhibit 25 issued.

11. **PW-5** Rekha Sharma Informant regarding occurrence stated that on 20.04.2001 while she was travelling with Sushant Patil and Rane, after meals at Karmad in the journey she was threatened by questioning her why she troubled Bharti and assaulted by a heavy object by Rane while Sushant Patil was seating in the front seat. Said Rane threw her out of the running car. By obtaining lift in a truck she reached CIDCO police

station, reported the incident and she had taken to Ghati Hospital thereon she gave report Exhibit 20. According to her, on the night of 24.04.2001. She came to know the real names of Rane to be Jitendra Badrinarayan Toshniwal and that of Sushant Patil as Ujwal Bharat Patil. She identified them in the court.

12. **PW-6** Arunabai sister of PW-5 deposed that she have accompanied her sister to hotel at Akola. Some talks took place between her sister, Rane and Sushant Patil but she is unable to give the details. She deposed that she herd Rane and Sushant Patil saying her sister that they have to go to Nagpur and accordingly her sister and they two put their luggage in car and car left the hotel. After 2 to 3 days it is learnt that her sister is admitted in the Ghati Hospital in injured condition. She identified accused Rane to be the same person whom she and her sister met in Hotel at Akola.

13. **PW-7** Ravi is the truck driver and according to him, while he was transporting wheat in truck from Jalna to Malegaon, a female gave him signal for lift. Her clothes were blood stained. He took her and drop her at CIDCO police station.

14. **PW-8** Narayan Panch to seizure of clothes did not support prosecution.

15. **PW-9** is the Investigating Officer who narrated all steps taken by him during investigation till filing of the chargesheet.

ANALYSIS

16. Testimony of PW-5 is relevant and of more significance. It has come in her substantive evidence that she had quarrels with one Bharti, who was her colleague, when they both were working in a urban credit society and she had left job. According to her, on 18.01.2001 Dayanand Toshniwal, who is brother of Bharti made her phone call. He allegedly threatened to kill her saying that she should not trouble his sister. After few days i.e. on 27.01.2001 she claims to have received phone call from one Ganesh and in chief itself she states that she did not new him, but he offered job of Editor and she consented. Four months thereafter i.e. in April she again received call from a person namely Sushant Patil informing that she has been selected as an Editor and she was asked to come to meet at Akola in a hotel along with credentials i.e. certificates. Then, she claims on 14.04.2001 she happened to met Sushant Patil and one Rane. According to her, said Rane was in fact Jitendra Toshniwal i.e. present appellant, whereas the person who introduced himself as Sushant Patil was Ujwal Bharat Patil.

Regarding the occurrence of assault, in her testimony, para 6, she has narrated the details i.e. when she was travelling in the car

bearing no. MH-20-A-7712 to go towards Pune and while the vehicle had travelled ahead of Karmad said Rane, whom she had met at Akola was seating next to her, whereas Sushant Patil was occupying the front seat. That time she stated that said Rane told that he is brother of Bharti and questioned her for troubling his sister, he beat her in the running car. She was hit on the head with a heavy object causing her bleeding injury and even thrown her out of the vehicle. She managed to take lift and reached CIDCO police station and, thereafter, to the hospital.

17. On visiting cross faced by her it is pertinent to note that her above testimony has not at all upon touched by defence in the trial court. There are no question or even suggestions about false implication or that accused Rane or Sushant Patil to be not having any concern with Bharti. Very short cross-examination is conducted that too not touching the aspect of occurrence of travelling in the vehicle and beating. Consequently, her testimony i.e. of PW-5 has virtually remained intact and is not rendered doubtful, as is tried to be posed before this court.

18. Evidence shown that she took lift from truck driver. Said truck driver is also examined and he spoke of a lady seeking lift in injured condition and he bring her to the CIDCO police station. Due to lapse of time the driver may have failed to identify the lady but the aspect of he giving lift to the injured lady has come on record. He was travelling on

the same road on which incident allegedly took place. Police referred PW-5 to Medical Examination and the Doctor who had occasion to examine her is also examined by prosecution as PW-4. This Doctor who was posted at Government Medical College has testified on 21.04.2001 he examined PW-5 whose name he gave in the testimony and also narrated 3 CLW injuries and that said injuries to be simple in nature. He identified certificate at Exhibit 25 issued by him. Therefore, there is supportive medical evidence also here. The police officer who on receipt of information visited Ghati Hospital and recorded her statement i.e. Exhibit 20 is also examined by prosecution as PW-2. Even his version has not been rendered doubtful. Even prosecution seems to have taken pains to adduce evidence of PW-1 owner of the vehicle which was allegedly hired by present appellant whose name he gave in the witness box. Therefore, evidence adduced by prosecution is connecting the dots since beginning. Moreover, testimony of PW-5 as stated above is inspiring confidence on the point of being hit with a heavy object. As stated above, there is medical evidence corroborating the incident of assault. Therefore, prosecution version has virtually remained unshaken.

19. Learned counsel for the appellant would submit that even if case of prosecution is accepted the case cannot be said to be attracting charge of Section 307 of IPC, as according to him there was no intention

to kill and, moreover, Doctor has certified injuries suffered by PW-5 to be simple in nature.

20. Doctor who is examined as PW-4, in his testimony has defined the injury to be simple in nature and injury certificate Exhibit 25 is issued. Neither in chief nor in cross of Doctor it has come that the injury was life threatening. Under such circumstances, in the considered opinion of this court, guilt for offence under Section 307 of IPC cannot be fastened, but considering the nature of injury to be simple, there is voluntary infliction of injury and hence, offence under Section 323 of IPC definitely gets attracted.

21. Perused the judgment. Evidence of PW-5 victim has rightly been accepted for recording guilt of appellant alone. However, learned trial judge erred by accepting the case of prosecution on the point of attempt to murder. Finding to that extent, is apparently in absence of evidence and, therefore, interference to that extent is called for. I proceed to pass following order:

ORDER

[I] The Criminal Appeal is partly allowed.

[II] The impugned Judgment dated 07.01.2004, passed by the First Adhoc Additional Sessions Judge, Aurangabad in Sessions case

No.246 of 2002 recording guilt for offence under Section 307 of IPC and sentencing him to suffer R.I. for 5 years is set aside and instead, is modified as under:

“Appellant - Jitendra Badrinaryan Toshniwal is held guilty for commission of offence under Section 323 of IPC and he is sentenced to suffer S.I. for 6 months and to pay fine of Rs.1000, in default, to suffer S.I. for 1 month.”

[III] The Appellant shall be entitled to relief of set off, if any, as prescribed under the provisions of Section 428 of the Code of Criminal Procedure.

[IV] The trial court shall ensure execution of sentence.

[V] It is clarified that there is no change in rest of the order of the trial court.

[ABHAY S. WAGHWASE, J.]

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