

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 50 OF 2002

1. Dhaktu Sadashiv Naik,  
Of full age,  
Unmarried,  
Presently in the  
Central Jail,  
At Aguada, Goa.
2. Sadashiv Dhaktu Naik,  
Of full age, Unmarried,
3. Yethesh Sadashiv Naik,  
Of full age, Married,  
Presently in the  
Central Jail,  
At Aguada, Goa.

All R/o Varchawada, Arambol,  
Pernem, Goa.

... Appellants.

versus

State of Goa  
(represented by Public  
Prosecutor).

... Respondent.

Mr. S. D. Lotlikar, Senior Advocate with Miss S.  
Dessai, Advocate for the Appellants.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : P. V. HARDAS, J.

DATED : 28TH AUGUST, 2003.

**ORAL JUDGMENT**

The Appellants/Original Accused Nos.1 to 3 have filed the present Appeal challenging their conviction and sentence for offences punishable under Sections 324 and 326 r/w Section 34 of the Indian Penal Code, passed by the Additional Sessions Judge, Mapusa, by Judgment dated 8th November, 2002, in Sessions Case No. 52 of 1999. The first Appellant/Original Accused No.1 and third Appellant/Original Accused No.3 were sentenced to undergo Rigorous Imprisonment for a term of two years for an offence punishable under Section 324 of the Indian Penal Code and a sentence of Rigorous Imprisonment for four years for an offence punishable under Section 326 of the Indian Penal Code. In addition to the substantive sentence Appellant Nos.1 and 3 were also sentenced to pay fine of Rs.2000/- each with a default stipulation of undergoing Simple Imprisonment for three months for non prosecution. The second Appellant/Original Accused No.2 was sentenced Rigorous Imprisonment for one year for an offence punishable under Section 324 of the Indian Penal Code and Rigorous Imprisonment for three years in respect of an offence punishable under Section 326 of the Indian Penal Code and was also sentenced to pay fine of Rs.2000/- in default Simple Imprisonment for three months. It is this aforestated conviction

and sentence which is assailed by the Appellants in the present Appeal.

2. The facts in brief as are necessary for the decision of this Appeal are set out hereunder:-

On 22nd April, 1999, P.W.2, Umesh Sawant, went to the Pernem Police Station and lodged a complaint at Exh.PW2/A with P.W.11, the then P.I. Mohan Karekar. On the basis of the complaint, an offence against the Appellants and Original Accused No.4, Tara Sadashiv Naik, came to be registered. The Appellants/Accused came to be arrested on the same day by P.W.8, Gyanba Bamane. On 24th April, 1999, on the basis of the Disclosure Statement made by Original Accused No.1 in the presence of P.W.7, Prabhakar Raut, at Exh.31, two spades, 2 tapis, one moz and one bamboo stick came to be attached from the house of Accused No.1. The scene of the offence panchanama came to be drawn by P.W.9, Head Constable Ambaji Parab, at Exh.21 in the presence of P.W.5, Uday Thakur. The investigation was thereafter handed over to P.W.11, Mohan Karekar. The Hurt Certificates in respect of the injured are at Exh.PW1/A colly. After completion of the investigation, charge-sheet against the Appellants came to be filed.

3. On committal of the case to the Court of Sessions, charge vide Exh.7 for an offence punishable under Sections 307, 323, 427, 379 r/w 34 of the Indian Penal Code came to be framed against the Appellants and Original Accused No.4, Tara Sadashiv Naik. The Appellants denied their guilt and claimed to be tried. The prosecution examined 12 witnesses in order to establish the offence against the Appellants. The learned Trial Court on consideration of the evidence convicted and sentenced the Accused as aforestated.

4. P.W.2, Umesh Sawant, the first informant, states that the Accused are his relatives. Accused Nos.1 and 3 are the sons of Accused No.2 and Accused No.4 is the daughter of Accused No.2. He had purchased his part of the property from his landlord Desh Prabhu. In that portion, he was constructing a house. The Accused had filed several proceedings in the Court at Pernem and on 22nd April, 1999 at 3.30 p.m. the Accused No.2 had offered to compromise the dispute. P.W.2, Umesh Sawant, after his return home informed the other family members that since the Accused No.2 was intending to compromise they should start the construction work only after the compromise is entered into. He went to Tinto on scooter and returned after 5.45 p.m. and saw a number of persons

gathered on the spot. He saw P.W.3, Raghunath Thakur had a bleeding injury on his leg and on being questioned, P.W.3, Raghunath Thakur told him that Accused No.1 had dealt a blow of koita on his leg. Thereafter within 5 to 10 minutes, Accused No.1 armed with koita, Accused No.2 armed with spade, Accused No.3 armed with stick and Accused No.4 armed with stone came at the scene of the offence and Accused No.4 flung a stone which hit P.W.2, Umesh Sawant, on his head. Accused No.1, thereafter went inside the house and dealt a koita blow on the head of P.W.4, Narayan Thakur and also dealt a koita blow on P.W.3, Raghunath Thakur. Accused No.1, ran after P.W.2, Umesh Sawant but P.W.2, Umesh Sawant, successfully fled from the scene. Accused No.1 thereafter started demolishing the construction. Accused No.2 took P.W.4, Narayan Thakur, out of the house and hit the blunt side of the spade on the head and Accused No.3 dealt a stick blow on the knee of P.W.4, Narayan Thakur. Accused No.1, damaged the kolso, aluminium and plastic buckets and a ghamela. P.W.4, Narayan Thakur and P.W.3, Raghunath Thakur were taken to the Police Station and thereafter to the hospital. P.W.2, Umesh Sawant, then lodged his complaint at Exh.PW2/A.

5. P.W.3, Raghunath Thakur and P.W.4, Narayan

Thakur have also deposed about the incident with slight variation.

6. P.W.10, Dr. Shyam Sadanand Talwadkar, states that in the year 1999, he was attached to the Asilo Hospital as Senior Orthopaedic Surgeon and had examined P.W.3, Raghunath Thakur. He had issued the certificate at Exh.42. He had also examined P.W.4, Narayan Thakur who was admitted in the hospital on 22nd April, 1999 and discharged on 30th April, 1999. The Hurt Certificate is at Exh.43. The X'ray and the Report of P.W.4, Narayan Thakur, is at Exh.45 colly. The Report at Exh.45 colly shows that there was a fracture of the upper end of fibula of P.W.4, Narayan Thakur. Prosecution has examined P.W.12, Dr. Agnes Mascarenhas, who has proved her report at Exh.45 colly. She has stated that inadvertently, in the Report at Exh.45 colly, the date 22nd April, 1996 was written which was incorrectly written by the Technician.

7. Mr. S. D. Lotlikar, learned Senior Counsel appearing for the Appellants has urged before me that the Appellants and the injured are relatives. The alleged incident had occurred on account of property dispute and Appellants/Original Accused Nos.1 and 3 were aged about 28 and 18 years when the

charge was framed. Mr. Lotlikar, learned Senior Counsel has further urged that Appellant No.1 is in employment and, therefore, a lenient view may be taken. It is also urged before me that the alleged weapon i.e. koita had not been recovered and in such circumstances, the offence would fall under Section 324 of the Indian Penal Code and not under Section 326 of the Indian Penal Code. It is next urged that the Appellants be given the benefit of the Probation of Offenders Act.

8. Mr. S. N. Sardessai, learned Public Prosecutor appearing for the State while countering the submissions of the learned Counsel appearing for the Appellants has stated that a F.I.R. was promptly lodged and there is overwhelming evidence about the guilt of the Appellants. He has further submitted that an offence under Section 326 of the Indian Penal Code may not be made out but an offence under Section 324 of the Indian Penal Code is clearly spelt out.

9. This Court by its Order dated 14th August, 2003, had called for a Report in respect of the present Appellants from the Probation Officer. The Report from the Probation Officer was received and was taken on record and marked "X" for the purpose of identification.

10. In the present case, it is alleged that Accused No.1 had caused injuries by means of a koita. During investigation, the alleged weapon was not seized. The learned Trial Court accordingly convicted the Appellants for the offence under Sections 324 and 326 of the Indian Penal Code. Section 326 of the Indian Penal Code contemplates the causing of grievous hurt by means of any instrument for shooting, stabbing or cutting or any instrument which if used as a weapon of offence is likely to cause death etc. Section 324 of the Indian Penal Code contemplates of voluntarily causing hurt 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. In the present case, the learned Trial Court has held the Appellants guilty for an offence punishable under Section 326 of the Indian Penal Code on the allegations that the Appellant No.3 had caused grievous hurt to P.W.4, Narayan Thakur, by means of a stick. P.W.4, Narayan Thakur, was examined by P.W.1, Dr. Roshan Nazareth, who had found four injuries which included a bruise 2 x 2 cms. below left knee joint. P.W.1, Dr. Roshan Nazareth, was not shown the stick which is alleged to have been seized as a weapon which could have caused fracture to P.W.4, Narayan Thakur. Similarly, opinion of P.W.10, Dr. Shyam Sadanand Talwadkar, was



also not obtained in respect of the bamboo stick which was seized. In the absence of any medical evidence that the stick if used as a weapon is likely to cause death conviction under Section 326 of the Indian Penal Code is not sustainable. The stick M.O.4, is obviously not an instrument for shooting, stabbing or cutting. The Appellants, therefore, can be said to have committed an offence under Section 325 of the Indian Penal Code.

11. The Report of the Probation Officer in respect of Appellant No.1 is that the family of the Appellants is economically very poor and Appellant No.1 is trying his best in encouraging his brother to study. There is no legal case against him. According to the Probation Officer, Appellant No.1 is honest, humble and hard working and comes from a poor economical status family. In respect of Appellant No.2, it is stated that Appellant No.2 is old and a retired person. He has no antecedents to discredit him. Appellant No.3 is stated to be a young person of 20 years of age who is a shy person and holds good moral behaviour. His antecedents are also clean.

12. Therefore, considering the evidence on record, I am of the opinion that the conviction of the Appellants for an offence under Section 324 r/w

Section 34 of the Indian Penal Code needs no interference. However, the conviction of the Appellants for an offence under Section 326 r/w Section 34 of the Indian Penal Code is unsustainable and instead an offence under Section 325 r/w Section 34 of the Indian Penal Code is made out against the Appellants. In view of the Report of the Probation Officer, benefit of the Offenders Act can be extended to the Appellants. As stated, the incident had occurred on account of dispute of the property between relations. Appellant No.2 is an aged person of about 65 years of age and Appellant Nos.1 and 3 are young persons who are now gainfully employed. Looking to the Report of the Probation Officer that having regard to the circumstances of the present case, it is expedient in the interest of justice to release the Appellants on probation of good conduct.

13. Accordingly, Criminal Appeal No. 50 of 2002 is partly allowed. The conviction of the Appellants and the sentence for an offence punishable under Section 324 r/w Section 34 of the Indian Penal Code is confirmed. The conviction and sentence of the Appellants for an offence punishable under Section 326 of the Indian Penal Code is hereby quashed and set aside and is substituted by conviction for an offence punishable under Section

325 of the Indian Penal Code. Appellant Nos.1 to 3 are sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs.2000/- each, in default Simple Imprisonment for three months. However, the Appellants are released under the Probation of Offenders Act. The Appellants shall execute a bond in the sum of Rs.10,000/- each with one surety in the like amount and undertake to appear and receive the sentence when called upon during the period of two years from today. The Appellants shall during the period of two years keep peace and be of good behaviour. The Accused shall be under the supervision of the Probation Officer during the aforesaid period. The Probation Officer shall visit the residence of the Accused as per Rule 16 of the Goa, Daman & Diu Probation of Offenders Rules, 1974. At the end of the period of probation, the Probation Officer shall submit his report to this Court. The Probation Officer be intimated accordingly.

14. The Appeal is just partly allowed on the above terms.

P. V. HARDAS, J.

RD.