

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.7 OF 2000

S T A T E

through Public Prosecutor,
High Court of Bombay at
Panaji

... APPELLANT

VERSUS

1. Shri Prabhakar Sakharam
Vaingankar,

2. Shri Sanjay Prabhakar
Vaingankar,

3. Shri Vijay Prabhakar
Vaingankar,

all residents of
H.No.249/2, Madhalawada,
Arambol, Pernem, Goa

... RESPONDENTS

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

Mr. S.D. Lotlikar, Sr. Advocate, with Mr. J.
Godinho, Advocate, for the Respondents.

CORAM : D.G. DESHPANDE, J.

Dated : January 31, 2003.

ORAL JUDGMENT

This is an Appeal by the State against the
acquittal of all the three accused who were
initially convicted by the Trial Court under
Section 324 of Indian Penal Code. The accused
preferred appeal against the said judgment and

conviction. The Sessions Court, however, acquitted them and hence the State has come in appeal against the acquittal.

2. It is contended by the learned Public Prosecutor that even if the appellate Court came to the finding that in fact the conviction of the accused under Section 324 by the trial Court was not justified, and alternatively came to the conclusion that for want of any evidence of use of any sharp-edged weapon or cutting weapon, the offence under Section 324 could not be proved, then considering the other evidence and the conclusive proof of complainant having suffered as many as seven injuries, the accused could have been convicted under Section 323 of I.P.C. by the Sessions Court. However, the Sessions Court adopted a strange reasoning in Para 11 of its Judgment and observed:-

"...This argument of
Ld. prosecutor could be
sustained if the
investigating agency was
able to substantiate the
matter was of cognizable
nature. Ld. Magistrate has
acquitted the appellants of
the offence of 506 I.P.C.
as it was not sustainable.
If offence of 324 I.P.C.
also could not stand then
the offence at the most
could be of non cognizable
nature. The investigating

agency cannot investigate a case without the authority of the Magistrate a case of non cognizable nature. It means P.W.6 had investigated a case of a non cognizable nature which was not permissible in law. In such a situation the conviction of the appellants under section 323 of I.P.C. would be of irregularity. "

3. The learned Public Prosecutor therefore, pointed out that these reasonings are totally unjustified and have no legal basis. He contended that if the offence under Section 324 of I.P.C. was not proved for absence of evidence regarding use of sharp-edged weapon or cutting weapon, then the Court could have convicted the accused for a lesser offence under Section 323. He contended that the observations about the investigation of a non-cognizable case were totally uncalled for, because the case has reached the stage of trial and it was within the competence of the Sessions Court to convict the accused for a lesser offence.

4. Even the Counsel for the accused could not support the observations and the findings of the Sessions Judge as stated above. He fairly conceded that these observations and findings are contrary to legal position.

5. So far as the facts of the case are concerned, the prosecution case was that the victim P.W.1 was assaulted by all the three accused who were known to him. The assault resulted in about seven injuries, all of which have been proved by P.W.7 the Doctor who has in his evidence testified about the nature of the injuries and their location in his deposition. The injuries are as below:-

1. Contused lacerated wound 2 and 1/2 cms long on the right fronto-parietal region of the scalp, caused by hard and blunt object.
2. C.L.W. 3 to 4 cms long x 1/2 cm. on the right occipital region of the scalp, caused by hard and blunt object. Duration less than 6 hrs.
3. C.L.W. 6 x 6 cms. long x 1/2 cms. in the left side of fronto-parietal region of the scalp hard and blunt less than 6 hrs.
4. Bruises 8 x 4 cms. on the

posterior aspect of the right forearm, caused by hard and blunt object. Duration less than 6 hrs.

5. C.L.W. 1 x 1/2 cm. of the left pinna of the ear.

6. Bruise 5 x 3 cms. in the region of 2nd and 3rd ribs right side close to the sternum caused by hard and blunt object.

7. C.L.W. 5 x 1 cm palm of the left hand within the thumb and left finger.

6. The evidence of P.W.1 is strongly and fully corroborated by P.W.3 and P.W.4 who were eye witnesses to the incident. The defence of the accused as against this positive case was of total denial. I was taken through the entire evidence by both the Public Prosecutor as well as the Advocate for the accused, but the accused has not been able

to dislodge either P.W.1, P.W.2 and P.W.3 or the Doctor P.W.7.

7. F.I.R. was lodged immediately by the victim Luis Fernandes who was 65 years of age at the time of the incident. In the F.I.R. he has given the names of the accused and also the names of the witnesses.

8. Counsel for the accused has contended that the evidence of P.W.1, P.W.2 and P.W.3 is at variance regarding the use of the instrument for assault and the injuries caused to P.W.1. Admittedly, the incident lasted for few minutes and the perspective of each witness is bound to be different. Therefore, even if the three witnesses are differing in some regard as to who used the weapon, stick or "Kam" and who caused which injury, that cannot affect the evidence of the witnesses substantially, particularly when there are no other reasons to disbelieve these witnesses, neither a strong enmity is proved between the accused and them or P.W.1, nor any prejudice or inclination to support the complainant for ulterior motive is brought on record.

9. The most important thing that has to

be considered here is lodging of the report immediately, absence of enmity and proving of the injuries by the victim through the evidence of P.W.1 and through other eye witnesses and the doctor.

10. The appellate Court, while appreciating the evidence, has laid undue stress and importance in the so-called contradictions between the evidence of P.W.1, P.W.2 and P.W.3 about the throwing of stones and use of stick. The appellate Court also held that because of the litigation between the complainant and the accused about the right of way, they were in enmical terms and, therefore, for all these reasons and mostly for want of powers to investigate an offence of non-cognizable nature, the appellate Court acquitted the accused. The reasons given by the appellate Court cannot be sustained. They are perverse, not supported by record and not supported by any legal proposition.

11. The trial Court, on the other hand, has rightly appreciated the evidence in right perspective and has come to the right conclusion about the guilt of the accused. It is true that the weapons that are allegedly used are stones and

some sticks. Therefore, the Section could not be 324, but it should have been 323.

13. The Appeal is, therefore, required to be allowed.

14. The Counsel for the accused, however, submitted that all the accused are members of the same family: the accused no.1 is the father while the accused nos. 2 and 3 are his sons. All the injuries even as per the opinion of the Doctor, were simple in nature and considering all these circumstances, he prayed that imposing substantive sentence of imprisonment would be rather harsh and, therefore, the Court should take a lenient view. He also stated that the accused have learnt a lesson by this incident and he expressed that looking at the age of P.W.1, he could be well compensated by way of substantive amount of fine.

15. So far as this aspect of imposition of fine is concerned, the learned Public Prosecutor left the matter to the discretion of the Court. He, therefore, contended that the compensation awarded against the accused should be substantial.

16. I have given my anxious consideration

to this aspect. Offence under Section 323 I.P.C. prescribes punishment with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. If, however, the compensation is granted from the amount of fine, then it cannot be more than Rs.1000/-. Therefore, at the most, even if the fine of Rs.1000/- is imposed on each of the accused, the victim can get Rs.3,000/-. However, sub-section (3) of Section 357 of Cr.P.C. provides that where a sentence is imposed of which fine does not form a part, the Court can by way of compensation award such amount as has been specified in the Order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced. The Counsel for the accused submits that under Sub-section (3) of Section 357 of Cr.P.C. compensation can be fixed by the Court independently and not with reference to the amount of fine provided under Section 323 of I.P.C..

17. Counsel for the accused submitted that whatever compensation is awarded, the accused shall deposit the same in the Court today only. The statement is accepted.

18. In view of these circumstances, considering the provisions of Section 323 I.P.C. where imprisonment has to be there and considering the provisions of Section 357, sub-section (3) of Cr.P.C., I pass the following Order:-

The Appeal is allowed. Order of acquittal of the accused is set aside. They are convicted under Section 323 read with Section 34 of the Indian Penal Code. They are sentenced to imprisonment till the rising of the Court and to pay a fine of Rs.3,500/- each. If the fine amount is paid today in the Court by the accused as per the statement made by their Advocate, out of that amount Rs.10,000/- will be paid to the complainant (P.W.1) Luis Lawrence Fernandes, resident of Arambol, Pernem, Goa.

Office to issue notice to the said complainant so that he can claim and withdraw the amount from the Court.

D.G. DESHPANDE, J.

ac.