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Court : Karnataka Gulbarga

Decided On : Feb-11-2013

Judge : Anand Byrareddy

Appeal No. : Criminal Appeal No.1194 of 2008

Appellant : Sharnabasappa, and Others

Respondent : The State of Karnataka, Through Kamalapur Police Station, Represented by the High Court Public Prosecutor, High Court of Karnataka

Judgement :

(Prayer: Gulbarga-585 101. ... Respondent. (By Shri S.S. Aspalli, Government Pleader) This Criminal Appeal is filed under Section 374(2) Cr.P.C. praying to set aside the order of conviction and sentence dated 23.10.2008 passed by the II Additional Sessions Judge, Gulbarga, in Special Case NO.131/2004, convicting the appellants / accused Nos.1, 2 and 3 for the offences punishable under Sections 323, 324, 325, 326 read with Section 34 of the IPC and each accused are sentenced to pay a fine of Rs.500/- and in default to undergo simple imprisonment for 15 days for the offence punishable under Section 323 read with Section 34 of the IPC and further, each accused are sentenced to undergo simple

imprisonment for one month and to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for 10 days for the offence punishable under Section 324 read with Section 34 of the IPC and further, each accused are sentenced to undergo simple imprisonment for one month and to pay a fine of Rs.2,000/- and in default to undergo simple imprisonment for 15 days for the offences punishable under Section 325 read with Section 34 of the IPC and further each accused are sentenced to undergo rigorous imprisonment for a period of 3 years, and to pay a fine amount of Rs.3,000/- in default to undergo simple imprisonment for three months for the offence punishable under Section 326 read with Section 34 of the IPC and all the sentences shall run concurrently.)

1. Heard the learned counsel for the appellants and the learned Government Pleader.

2. The appeal is filed by the several accused who were before the Trial Court facing trial, for offences punishable under Sections 323, 324, 325, 326 and 504 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC' for brevity) and Sections 3(1)(x), 3(xi) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'SC and ST Act' for brevity).

3. The case of the prosecution was to the effect that, one Mannu who was the complainant, had alleged that on 17.01.2004, at about 11 p.m., when he was in his house at Nelkot Tanda, the present appellants - accused persons, had come and picked up a quarrel with him stating that they had obtained sanction of a sum of Rs.3,60,000/- from the State Government for construction of a three room school building and that it is they who would construct it. If anybody else was interested in putting up the construction, that the accused would have to be paid commission and since they believed that the complainant and others were seeking to put up the construction, had assaulted the complainant and one Bhoju with a stone and stick, causing bleeding injuries. When Mahadevi, Chandibai and Dasalabai came to their rescue, they were also assaulted, causing bleeding injuries. They were abused as 'Bhosadi Maklya Lamani sule Makkale' and used force to Mahadevi, Chandibai and Dasalabai in order to outrage their modesty and therefore, they had

committed an offence knowing that they also belonged to a Scheduled Caste and intentionally insulted intending that such provocation would cause them to break public peace. It is on the intervention of one Laxman and Kashiram that the accused relented. It is then that the injured were sent to Hospital for treatment on the police having informed of the incident. On the basis of the said complaint, proceedings having been initiated, the accused having denied the allegations and charges being framed, the accused having pleaded not guilty and having claimed to be tried, the prosecution went to trial and examined 13 witnesses PWs 1 to 13 and marked Exhibits P1 to P9 as well as MOs 1 and 2. On recording the statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.' for brevity), who denied of an incriminating circumstance appearing against them, the court below had framed the following points for consideration:

"1. Whether prosecution proves that on 17.01.2004 at 11 p.m. at Selakhod village tanda, in furtherance of the common intention, accused persons have voluntarily caused hurt to complainant Mannu, C.W.5 Bhoju, C.W.6 Mahadevi, C.W.7 Chandibai and C.W.8 Dshalabai by means of sticks and thereby committed offences punishable under Sections 323 and 324 read with Section 34 of the Indian Penal Code?

2. Whether prosecution further proves that on the above said date, time and place accused persons in furtherance of the common intention, have voluntarily caused grievous hurt by dangerous weapons causing bleeding injuries to C.W.1 Mannu, C.W.5 Bhoju, C.W.6 Mahadevi, C.W.7 Chandibai and C.W.8 Dshalabai and thereby committed offences punishable under Sections 325 and 326 read with Section 34 Indian Penal Code?

3. Whether prosecution further proves that on the above said date, time and place accused persons in furtherance of their common intention, have intentionally insulted complainant and others knowingly that it will provoke them to commit breach of public peace and thereby committed an offence punishable under Section 504 read with Section 34 of Indian Penal Code?

4. Whether prosecution further proves that on the above said date, time and place accused persons have abused complainant and others as "Bhosadi Makkalya, Lamani Sule Makklya" in order to insult them within public view and thereby committed an offence punishable under Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989?

5. Whether prosecution further proves that on the above said date, time and place accused persons have used criminal force to Mahadevi, Chandibai and Dashalabai in order to dishonour or outrage their modesty and thereby committed an offence punishable under Section 3(1)(xi) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989?

6. Whether prosecution further proves that on the above said date, time and place accused persons have committed said offences against complainant and others knowingly that they belong to scheduled caste and thereby committed an offence punishable under Section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989?"

The Trial Court answered Point Nos.1 and 2 in the affirmative and Points 3 to 6 in the negative. The Court, after discussing the evidence on record, observed that there were two victims, namely the complainant and one Bhoju who had sustained grievous injuries as per Exhibit P4 and P8. The complainant had sustained injuries to the central incisor of his right upper jaw which was partially broken and the Doctor who had been examined as PW-10 had given an opinion that the said injury was grievous in nature. However, other injuries of the victim were stated to be simple injuries. In respect of Bhoju, there was a swelling of the left elbow joint and the patient was referred for X-ray examination and it was found that there was a comminuted fracture of the midshaft of left humerus. Thus, it was treated as grievous injury in terms of Exhibit P4, a certificate in this regard. These medical certificates, the court below has found, were not disputed by the defence counsel except stating that the said injuries could not be caused by a fall on a hard surface. There was no suggestion made to the witnesses namely, Bhoju and complainant, by the defence counsel for any such fall, except that there was denial that the first accused had not assaulted him with stone and the second accused

had not assaulted him. It was not suggested that he fell down and got injured or that there was a false case foisted against the accused. Similarly, in respect of the injuries suffered by Bhoju, when there was a specific allegation that the Accused No.1 had assaulted Bhoju with stone on his mouth. All other witnesses had consistently deposed before the Court that the Accused No.1 had assaulted the complainant with stone. It was also exhibited as MO-2. Insofar as Bhoju was concerned, it was claimed that Accused No.3 had assaulted him with stick which was also produced as MO-1. That allegation was not denied in the cross-examination, except a stray suggestion that sticks such as MO-1 would be available in abundance in a village. The panch witnesses had stated of the visit by the police and seizure of the MOs. Though in his cross-examination he had indicated that no written panchanama was made in his presence and that he did not know how to read, but has endorsed the presence of the other panch witnesses. Therefore, the court below has eschewed the evidence of the contradiction in respect of the said panch witness on the ground that he is a rustic who since he has admitted that the police visited the spot and seized the MOs 1 and 2 and has endorsed the presence of other panch witnesses. The drawing up of the seizure mahazar was established and the court below has also observed that all witnesses though belonging to the same community, have consistently spoken about the incident. However, insofar as the allegations of the offence punishable under the provisions of the SC and ST Act is concerned, the evidence was not sufficient to hold that the accused had committed an offence punishable under those provisions. The court below has hence held that the injuries suffered by the complainant and Bhoju being grievous injuries and the same having been caused by the Accused Nos.1 and 3, is established. Insofar as the motive is concerned, the accused were seeking a plot for construction of a School building in Nelkot Tanda, from Honnu Naik. Admittedly, the land belonged to Honnu Naik and it was also not denied that Rs.3,60,000/- was allotted for the purpose of construction of school building and it was obtained at the instance of the accused. That there was a school in Nelkot Tanda village and it is the case of the complainant's group that they told the accused that they would themselves construct the school⁴. But the accused wanted to construct the school building utilizing the Government fund. These assertions, according to the court below,

were not substantiated by production of material documents and therefore, the motive though not completely established, the assault on the complainant and Bhoju was proved and it was quite plausible that it was for the above motive.

Insofar as the offence punishable under Section 326 is concerned, the court below has addressed the nature of the injuries suffered by Bhoju and has opined that it was a grievous injury and that the prosecution has proved the offence punishable under Section 326 IPC, beyond reasonable doubt though it was contended that the accused have not intended to cause any grievous injury, in any event, Accused No.2 has not at all been involved in any overt act nor is there any allegation of overt act. The court below has opined that there was a case made out by the prosecution by resorting to Section 34 of the IPC and his presence at the spot at that time of the night was sufficient to find him guilty of the offence under Section 34 IPC. It is the consistent evidence on record that the second accused was very much present at the spot. It is on this reasoning that the court below has acquitted the accused for offence punishable under the provisions of the SC and ST Act, but has held that the prosecution had established its case insofar as the offences punishable under Sections 323, 324, 325 and 326 of the IPC. Consequently, the court below has convicted the accused and imposed a fine of Rs.500/- insofar as Section 323 read with Section 34 IPC is concerned and simple imprisonment for one month and a fine of Rs.1,000/- insofar as Section 324 IPC is concerned, and simple imprisonment for one month and fine of Rs.2,000/- for the offence punishable under Section 325 IPC and rigorous imprisonment for a period of three years and to pay a fine amount of Rs.3,000/- insofar as the offence punishable under Section 326 IPC is concerned, while holding that all the sentences shall run concurrently. Though the learned counsel for the appellants has argued at length to contend that it has not been established beyond all reasonable doubt that the accused have committed the offences, especially insofar as Accused No.2 is concerned. There is not even an allegation of any overtact by the said accused and on the face of it, the said accused ought to be acquitted. Insofar as Accused No.1 is concerned, it is pointed out that the allegation is, the appellant having assaulted the complainant with the stone and thereby breaking his tooth which has been treated as a grievous injury imposing a stringent punishment as aforesaid.

This has resulted in a grave miscarriage of justice, especially since there is inconsistency insofar as the commission of the offence, as evident from the testimony of PW-5 who had inconsistently stated has opposed to the complaint that after the incident, they came to his house and assaulted him, which is not explained by the prosecution and would render the entire episode a false case sought to be foisted against Accused No.1. Insofar as the Accused No.3 is concerned, he would submit that there is solitary evidence of PW-5 and there is no other evidence tendered insofar as the alleged injury, causing a grievous injury of fracture of Boju is concerned and therefore, to place reliance on the solitary evidence of PW-5 who was admittedly inimically disposed against the accused, would result in a miscarriage of justice, especially as there was a case and a counter case and notwithstanding the accused therein have been acquitted, on a parity, the present accused also ought to be acquitted and the court having taken a strict view notwithstanding that there was no role played by Accused No.2 and the injuries caused to the complainant being treated as grievous injury and the absence of any unimpeachable evidence against Accused No.3 to hold that the prosecution had proved its case beyond all reasonable doubt and the accused being visited with the stringent punishment, leads to a complete miscarriage of justice and seeks acquittal of the accused. While the learned Public Prosecutor would point out that the presence of Accused No.2 at the time of the incident which was 11.00 p.m. in the night, by itself would show his active participation along with the accused, which is the reason that the prosecution had invoked Section 34 and his participation would provide the necessary impetus to the other accused who have caused the injuries and to have assaulted the several injured. It is in that fashion that the court below has though it fit to convict the accused No.2. The contention that there is no allegation of any overt act, by itself, would not absolve the guilt of Accused No.2, which is as much as in the case of the other accused. Insofar as the accused Nos.1 and 3 are concerned, as pointed out by the court below, there is no cross-examination insofar as the specific averment of the assault, either by accused No.1 on the complainant or accused No.3 on the said Bhoju, both of whom have suffered grievous injuries, as testified by the Medical Practitioner and demonstrated by the certificates issued in that regard. The punishment prescribed for these offences under the several provisions being what

it is, the punishment actually imposed by the court below is certainly lenient and there is no warrant for interference by this court in the face of the circumstances of the case and having regard to the quantum of punishment and therefore, seeks dismissal of the appeal.

In the light of the above contentions and on an examination of the record, it cannot be said that the findings of the court below are erroneous nor could it be said that the findings are not supported by reasons assigned by the court below. However, insofar as accused no.2 is concerned, it is not in serious dispute that apart from his mere presence at the time of the incident, there are no overt acts alleged against the said accused. Though his presence could not be treated as a coincidence, having regard to the time of the incident, namely 11 p.m., as on the date of the incident, in the absence of any allegation of the said accused exerting other accused to carry out the assault or allegations of directly instigating accused no.1 and 3 to commit acts complained of and there being no demonstrable common intention and common object made out against the said accused, the court below having held that since Section 34 of the IPC is invoked, he would become as much liable as accused nos.1 and 3 in the commission of the offences, may not be justified. Though there are decided cases where it has even been held that there need not be an allegation of overt acts against an accused in order to make him liable under Section 34 of the IPC, to impute a common intention would not be a hard and fast rule, to hold that accused no.2 in the present case on hand was actively involved in the commission of the offence. Therefore, insofar as accused no.2 is concerned, there was no justification in the court holding that the prosecution had proved its case beyond all reasonable doubt, merely by invoking Section 34 of the IPC. Accordingly, the judgment insofar as accused no.2 is concerned, is set aside in entirety. Insofar as accused nos.1 and 3 are concerned, though no fault could be found with the finding as to their conduct is concerned, the punishment imposed by the court below appears to be disproportionate. This is apparent on the face of it. While the maximum punishment prescribed under Section 323 of the IPC for voluntarily causing hurt may extend to 1 year, the court has thought it fit to impose the punishment of simple imprisonment of 15 days and a fine of Rs.500/-. Insofar as Section 324 of the IPC is concerned, though the punishment may extend to imprisonment of 3 years, the court has thought it fit to

impose a punishment of 1 month and a fine of Rs.1,000/-. Insofar as Section 325 of the IPC is concerned, though the punishment may extend to 7 years, the court has thought it fit to impose a punishment of 1 month and a fine of Rs.2,000/- and in respect of Section 326 of the IPC, where the punishment could extend for imprisonment for life and fine, the court has thought it fit to impose a punishment for a period of 3 years and a fine of Rs.3,000/-. Further, insofar as the punishment imposed under Section 325 as well as Section 326 of the IPC is concerned, having regard to the circumstances of the case, the same visits the accused to suffer the punishment twice over in respect of the same offence, in that, the grievous hurt caused is to the complainant and one Bhoju. The court having found that appellants 1 and 3 have caused grievous hurt with a dangerous weapon, the said offence would be punishable under section 326 of the IPC. Therefore, to have punished the appellants both under Sections 325 and 326 of the IPC, would amount to imposing the punishment twice over, as the punishment under Section 326 of the IPC overlaps the punishment under Section 325 of the IPC. Therefore, the maximum punishment prescribed under the several sections vis--vis the punishment actually imposed by the court below is not uniform, when it comes to the quantum of punishment that is imposed under Section 326 in relation to the maximum punishment that could have been imposed. Hence, there is disproportionate imposition of punishment which will require to be modified. Hence, the punishment imposed for the offence punishable under Section 325 of the IPC was superfluous, when in respect of the same offence, the accused are punished under Section 326 of the IPC and having regard to the maximum punishment that was capable of being imposed under Section 326 of the IPC, it would be appropriate if the punishment is substantially scaled down. Accordingly, the punishment under Section 325 imposed by the court below is eschewed and set aside. Insofar as the punishment imposed under Section 326 of the IPC is concerned, the same shall stand reduced to one year and since the offence punishable under the various sections has been found established, it would be appropriate that the victims are compensated in a substantial amount. Therefore, since the accused have the benefit of a reduced sentence by virtue of this judgment, it would be appropriate to enhance the fine payable. Accordingly, accused nos.1 and 3 are liable to pay an additional fine of Rs.10,000/- each. This

shall be in addition to the fine imposed for committing the offences punishable under Sections 323, 324 and 326 of the IPC, already imposed by the court below. The fine which would total to a sum of Rs.29,000/-. Upon payment of the additional fine now imposed for the offence punishable under Section 326 of the IPC, the victims, namely, the complainant and Bhoju - PW.5, shall be paid as compensation a sum of Rs.10,000/- and Rs.15,000/-, respectively, under Section 357 of the Cr.PC. In the event of default of payment of fine, accused - 1 and 3 shall suffer further simple imprisonment of six months in addition to the punishment already imposed. The sentence, which the court below has held would run concurrently, is not disturbed, except that in default of fine, the accused shall be liable to further imprisonment of six months in addition to the imprisonment already imposed. The fine amount deposited by accused no.2 shall be refunded to him.

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