HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CRA No. 16/2009

Reserved on 02.04.2024.
Pronounced on 20 .04.2024.

Jaswant Singh aged 35 years son of Baj Singh resident of Deol Tehsil Billawar at present lodged in District Jail Kathua ..... appellant (s)

Through :- Mr. Vishal Sharma Advocate with Mr. Anishwar Chatterji Koul Advocate.

V/s

The State of Jammu and Kashmir th. SHO P/S Billawar. .....Respondent(s)

Through :- Mr. Deewakar Sharma Dy.AG

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1 This criminal appeal filed in terms of clause (a) of the proviso to Section 408 of the Code of Criminal Procedure, Svt. 1989 ['Cr.P.C'] is directed against the judgment dated 16.03.2009 passed by the Chief Judicial Magistrate, Kathua ['the trial Court'] in case file No. 95/challan titled 'State vs Jaswant Singh whereby and where-under the accused Jaswant Singh-appellant herein has been convicted and sentenced to undergone simple imprisonment for a period of five years and a fine of Rs.5000/- for commission of offence punishable under Section 326 RPC.

2 The impugned judgment of conviction and sentence is challenged by the appellant primarily on the following grounds:

(a) That the appellant having been charged by the trial Court under Section 336 RPC could not have been convicted for commission of offence punishable under Section 326 RPC ; and,

(b) That even if the entire prosecution evidence on record, as if there is no challenge in cross-examination by the defence, is taken into consideration, the offence under Section 326 RPC would not be made out. The trial Court has erroneously and without appreciating the true import of Section 326 RPC has recorded the conviction under the said Section against the appellant.

3 Mr. Vishal Sharma learned counsel appearing for the appellant argues that the trial Court committed a serious error of law by convicting the appellant for commission of offence under Section 326 RPC when neither the police had challaned him for the said offence, nor a formal charge by the trial Court was framed under Section 326 RPC. He submits that the appellant was seriously prejudiced as he had no opportunity to cross-examine the prosecution witnesses on the charge of Section 326 RPC, nor could he lead his defence keeping in view that the charge he was required to meet was a charge under Section 326 RPC. He argues that the reliance placed by the trial Court on Section 535 Cr.PC is totally misplaced. He submits that in the instant case, the trial Court did not appreciate that because of framing of erroneous charge and by omission to frame the charge under Section 326 RPC for which the appellant was ultimately convicted, the appellant had been seriously prejudiced. He lastly urges that having regard to the facts and circumstances of the case and also having regard to the fact that offence under Section 326 RPC is not made out, it would serve the ends of justice if the appellant is given the benefit of probation.

4 Having heard learned counsel for the parties and perused the material on record, I am in agreement with Mr. Sharma learned counsel for the appellant that in the face of evidence on record, offence under Section 326 RPC is not made out. It is so, notwithstanding the fact that the trial Court had framed a charge under Section 336 RPC and not under Section 326 RPC. The charge which was framed and read over to the appellant would disclose, prima facie, commission of an offence under Section 325 RPC.

5 As the prosecution story goes, ASI Kartar Singh of Police Station, Billawar recorded the statement of complainant on 06.12.2001 in Sub-District Hospital, Billawar. The complainant deposed that he had gone to his fields at 8 am where the appellant, all of a sudden, appeared and trespassed into his land. The appellant then started pelting stones indiscriminately upon the complainant, as a result whereof, one of the stones struck against his right eye. The complainant fell down and was taken to SDH Hospital, Billawar by his son. The complainant stated that in the injury that was caused by the appellant, he lost the sight of his one eye. On this statement made by the complainant, FIR No. 118/2001 under Section 336 RPC was registered in the Police Station, Billawar.

6 Upon completion of investigation, challan was presented before the trial Court on 23.01.2002 and a charge for offence under Section 336 RPC was framed by the trial Court against the appellant on 24.10.2002. The charge was read over to the appellant who pleaded not guilty to the charge and claimed to be tried. The prosecution, with a view to proving its case, examined seven witnesses including Dr. Ravinder Gupta Medical Officer,

SDH Billawar and Dr. Shekhar Sharma, Registrar Department of Ophthalmology GMC,Jammu.

7 Upon conclusion of the prosecution evidence, statement of the appellant under Section 342 Cr.PC was recorded on 10.12.2004. The appellant examined DW Raghubir Singh and DW Amar Singh in defence.

8 The trial Court upon consideration of the evidence on record, came to the conclusion that the prosecution had successfully proved that the complainant was injured by pelting of stones by the appellant when the complainant was proceeding towards his land and one of the stones pelted by the appellant hit the right eye of the complainant, as a result whereof, he got seriously injured and ultimately lost the vision of said eye. The trial Court also concluded that the medical evidence on record was sufficient to prove that one of the injuries suffered by the complainant due to pelting of stones was grievous in nature. The trial Court, thus, found the appellant guilty of offence punishable under Section 326 RPC.

9 While appreciating the argument of defence that the conviction of the appellant under Section 326 RPC was not permissible, for, the appellant had been charged by the Court under Section 336 RPC, the trial Court relied upon Section 535 Cr.P.C and held that the appellant was well aware of the charge referable to Section 326 RPC which he was going to meet and since there was no failure of justice that has occasioned by the omission of the trial Court to frame charge under Section 326 RPC, as such, the conviction recorded and the sentence imposed is not invalidated in any manner. No exception can be found to the view taken by the trial Court (See: **Soundarajan Vs State, 2023 LiveLaw (SC) 3**14).

10 While the judgment passed by the trial Court with regard to the applicability of Section 535 CrPC cannot be found fault with, yet, the issue that calls for determination is, whether, on the basis of evidence on record, the commission of offence under section 326 RPC is made out or not.

11 It is true that the trial Court framed a charge under Section 336 RPC against the appellant and called upon the prosecution to lead its evidence, but, from a reading of the charge, it clearly comes out that the charge under Section 336 RPC was, on the face of it, wrongly framed. None of the ingredients of Section 336 RPC were existing in the evidence collected by the police. It was clearly a case of, prima facie, commission of offence under Section 325 RPC. The appellant knew fully well the allegations against him in the challan and, accordingly, subjected the prosecution witnesses to cross-examination. Being aware of the allegations constituting offences under Sections 325/326 RPC, the appellant adduced his defence evidence. In these circumstances, it is hard to say that by omission of the trial Court to frame a specific charge under section 336 RPC, the appellant was seriously prejudiced or a failure of justice occasioned because of such omission. Section 535 CrPC takes care of such situation and was fully attracted to the case on hand. The trial Court, therefore, committed no illegality in relying upon Section 535 CrPC and brushing aside the objection of the defence that the appellant was not liable to be convicted and sentenced for the offence he was not charged with.

12 Coming to the question, whether, on the basis of evidence, on record, Section 326 RPC is made out or not. Before delving little deep into

the issue, it would be worthwhile to set out Sections 325 and 326 RPC herein below:

> **"*325. Punishment for voluntarily causing grievous hurt:***
>
> *Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.*
>
> ***326. Voluntarily causing grievous hurt by dangerous weapons or means:***
>
> *Whoever, except in the case provided for by section 335, voluntarily causes grievous 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, 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, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".*

13 From a reading of Section 325 RPC, it clearly transpires that it provides for punishment with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. This punishment is for 'voluntarily causing grievous hurt'. 'Voluntarily causing grievous hurt' is defined under section 322 RPC which reads thus:

> **"*322. Voluntarily causing grievous hurt:***
>
> *Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt.*

Explanation- A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind".

14 It is not in dispute that that the appellant by pelting stones on the complainant knew well that his act was likely to cause a grievous hurt. As is amply proved on record that one of the stones thrown by the appellant hit the right eye of the complainant, as a result whereof, he lost sight of one eye. Deprivation of eye sight is result of a grievous hurt caused to such person. As a matter of fact, learned counsel for the appellant did not dispute this fact, more particularly, in view of clear medical evidence on record indicating that one of the injuries caused to the complainant was grievous in nature. However, with a view to attract Section 326 RPC, the grievous hurt caused to the victim/complainant must be by use of 'dangerous weapons' or means like use 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 etc. etc.

15 Keeping in mind the distinction between section 325 RPC and 326 RPC when the evidence on record is examined, it is clearly seen that the grievous hurt caused to the complainant by the appellant is by use of pelting of stones. The size of stones used for pelting cannot , by any stretch of reasoning, be termed as a 'dangerous weapon' or 'an instrument' used for shooting, stabbing or cutting etc. nor can it be termed as 'any corrosive or 'any explosive substance' or a substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood etc.

16 Having regard to the fact that the fight which resulted into grievous hurt to the complainant was not premeditated and that the injury was caused by pelting of small stones, it is a foregone conclusion that what was used by the appellant for causing grievous hurt to the complainant was not a 'dangerous weapon' so as to bring the act of the appellant within the meaning of section 326 RPC. Once Section 326 is ruled out, the act of the appellant would fall within the purview of section 325 RPC. In the view, which I have taken herein, I am supported by the judgment of the Hon'ble Supreme Court in the case of **Mathai vs. State of Kerala, 2005 (3) SCC 260** in which the Supreme Court has brought out the distinction between section 325 and 326 and has held as under:

> "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 Alias Sukhatha 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 Doctor (PW 5) clearly shows that the hurt or the injury that was caused was covered under the expression 'grievous hurt' as defined under Section 320 IPC. 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 facts of the case. At this juncture, it would be relevant to note that in some provisions e.g. Sections 324 and 326 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.*
>
> *18.In the instant case considering the size of the stone which was used, as revealed by material on record, it cannot be said that a dangerous weapon was used. Therefore, the conviction is altered to Section 325 IPC. No hard and fast rule can be applied for assessing a proper sentence and a long passage of time cannot always be a determinative factor so far as sentence is concerned. It is not in dispute that a major portion of the sentence awarded has been suffered by the appellant. On the peculiar facts of the case we restrict it to the period already undergone".*

17 In the aforesaid case also, the Supreme Court, having regard to the size of stone which was used for causing grievous hurt, came to the conclusion that the weapon of offence i.e stone used was not a 'dangerous weapon' and, therefore, the conviction recorded by the trial Court under section 326 was liable to be altered to section 325.The aforesaid judgment applies, on all fours, to the facts of the instant case.

18. In view of the aforesaid, I am of the considered opinion that the appellant is guilty of commission of offence under section 325 and not the one punishable under section 326 RPC. The trial Court, having regard to the facts and circumstances of the case, has awarded punishment of simple imprisonment of five years and a fine of Rs.5000/- to the appellant for commission of offence under section 326 RPC. Since this Court has found the appellant guilty of offence punishable under section 325 RPC which attracts lesser punishment and, therefore, the appellant convicted under Section 325 RPC is liable to be sentenced to imprisonment for a term which may extend to seven years and fine. The conviction and sentence of

appellant under Section 326 RPC recorded by the trial Court is, thus, set aside and instead the petitioner is convicted under Section 325 RPC.

19 At this stage, an alternate plea is put forth by the learned counsel appearing for the appellant that the appellant, in the given facts and circumstances, should be given the benefit of probation under Section 562 CrPC read with the Probation of Offenders Act, 1966 [‘the Act of 1966’]. Mr. Sharma submits that incident in question happened on 06.12.2001 when the appellant was only 25 years old. The parties have moved ahead in life and are left with no grudge against each other. He submits that the offence for which the appellant has been convicted was the first offence committed by him and thereafter he has lived as a peaceful citizen and has not committed any other act or omission which is an offence under RPC or any other penal law in force.

20 Having considered the submissions made by Mr. Sharma and regard being had to the fact that the offence under Section 325 RPC committed by the appellant for which he has been convicted had its origin to a civil dispute between the appellant and the complainant. Though it has not come in evidence, but is clearly gatherable from the facts and circumstances of the case that the appellant pelted stones upon the complainant for having trespassed on the disputed land. Without there being any intention to cause grievous hurt, the appellant started pelting stones on the complainant and unfortunately one of the stones straightway hit the right eye of the complainant. This is how a serious injury was caused to the complainant by the use of stones. The injury caused may not have been intended by the appellant, but the appellant being a person of ordinary

prudence had the knowledge that indiscriminate pelting of stones may cause grievous injury to the complainant. It is, in these circumstances, the appellant is found to have committed the offence punishable under section 325 RPC. It is not disputed by the prosecution that this was the only offence committed by the appellant. Neither prior to, nor after the commission of offence for which the appellant has been convicted, the appellant has committed any other offence. The prosecution also does not dispute that the appellant bears good reputation and character and has reportedly not indulged in commission of any act or omission which is an offence under any penal law in force. The offence was committed by the appellant when he was of the age of 25 years. He has already remained under arrest for some time. He was convicted on 16.03.2009 and was immediately taken into custody. He was released on bail by this Court o 30.03.2009. He may have also remained under arrest when the impugned FIR was registered against him. The appellant has been facing trial since 2001 and has thus suffered adequately for the offence he committed.

21 Regard being had to the facts and circumstances explained above, I am of the considered opinion that the imposition of sentence is required to be deferred and the appellant entitled to be released on probation of good conduct in terms of Section 562 CrPC read with Section 4 of the Act of 1966. Accordingly, the appellant shall be released on his entering into a bond for an amount of Rs.50000/- with two sureties of the like amount to appear and receive sentence when called upon for a period of two years to the satisfaction of the trial Court. He shall also keep peace and be of good behavior. During the period of probation, the appellant shall report to the SHO concerned once in a month. Additionally, the appellant shall deposit a

compensation of Rs.50,000/- with the trial Court, to be paid to the complainant, within a period of two months. In case of failure, the trial Court shall recover the amount as 'fine' under CrPC and disburse it to the complainant.

The appeal is disposed of accordingly.

Record be sent back to the trial court alongwith a copy of the judgment.

(SANJEEV KUMAR)
JUDGE

Jammu
20 .04.2024
Sanjeev

Whether order is reportable: **Yes**