R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF FEBRUARY, 2024

BEFORE

THE HON'BLE MR JUSTICE SHIVASHANKAR AMARANNAVAR

CRIMINAL APPEAL No. 1328 OF 2012

BETWEEN:

SRI JUNAID B
S/O MOOSA
AGED ABOUT 20 YEARS
R/AT MADALA QUARTER HOUSE
PERAJE VILLAGE
BANTWAL TALUK – 570 097.

...APPELLANT

(BY SRI S BALAKRISHNAN, ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY VITTAL POLICE STATION

...RESPONDENT

(BY SMT. N ANITHA GIRISH, HCGP)

THIS CRL.A IS FILED U/S.374(2)CR.P.C PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION PASSED BY THE II – ADDITIONAL DISTRICT AND SESSIONS JUDGE, D.K., MANGALORE DATED 31.10.2012/2.11.2012 IN S.C.No.2/2012 - CONVICTING THE APPELLANT/ACCUSED No.1 FOR THE OFFENCE P/U/S 326 OF IPC AND ETC.,

THIS APPEAL COMING ON FOR DICTATING JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

1. This appeal is filed by the appellant - accused No. 1 praying to set aside the judgment of conviction dated 31.10.2012 and order on sentence dated 02.11.2012 passed in S.C. No. 2/2012 by II Additional District and Sessions Judge, D.K., Mangaluru. Appellant - accused No. 1 has been convicted for offence under Section 326 of IPC and sentenced to undergo simple imprisonment for a period of 3 years and to pay fine of Rs.10,000/- and in default to pay the fine amount, to undergo simple imprisonment for a period of 3 months.

2. Factual matrix of the prosecution case is as under:

The injured Abdul Razak (P.W.2) and Junaid (appellant - accused No. 1) were neighbours and appellant - accused No. 1 - Junaid borrowed Rs.300/- from P.W.2, but, inspite of demanding he had not returned the said amount. That on 24.10.2010 at about 10.30 pm Abdul Razak met accused No. 1 near Budoli junction and at that time P.W.2 asked appellant - accused No. 1 to

return the money. Appellant - accused No. 1 told him that he will not return the money and went to a mutton shop and brought knife (kathi) and tried to give blow on his neck and P.W.2 brought his left hand to protect himself and sustained injury to his left hand; thereafter appellant - accused No.1 assaulted him on his left cheek and left eye and P.W.2 screamed for help and other accused who were present there asked appellant - accused No. 1 not to leave P.W.2. At that time brother of P.W.2 – Adram (P.W.1) came there and accused persons, on seeing them threatened them by giving life threat and went away. P.W.1 and his mother took P.W.2 to Puttur Hospital and from there they were asked to take P.W.2 to Mangaluru as the injury was serious and they took the injured to A.J. Hospital, Mangaluru and there he was admitted in ICU. Thereafter, P.W.1 lodged complaint with Vittla Police Station on 25.10.2010 at about 09.00 am. The Police after investigation filed charge sheet for offence under Sections 341, 326, 506, 307 read with Section 34 of IPC. After committal, the Sessions Court framed charge for offence

under Section 341 read with section 34, Section 307 read with Section 34 and Section 506 read with section 34 of IPC. The prosecution, in order to prove the charges, has examined P.W.1 to P.W.10 and got marked Ex.P.1 to Ex.P.11 and M.O.1 to M.O.3. Two documents were marked on the defence side i.e., Ex.D.1 – certified copy of FIR and Ex.D.2 – certified copy of the charge sheet. Statement of accused came to be recorded under Section 313 of Cr.P.C. The trial Court after hearing arguments formulated points for consideration and after appreciating evidence on record convicted appellant - accused No. 1 for offence under Section 326 of IPC and sentenced him as noted above. The trial Court acquitted accused Nos.1 to 4 for offence under Sections 341, 506, 307 read with Section 34 of IPC. Said judgment of conviction and order of sentence has been challenged in this appeal.

3. Heard arguments of learned counsel for appellant - accused No. 1 and learned HCGP for respondent – State.

4. Learned counsel to appellant - accused No.1 would contend that there is no charge for offence under Section 326 of IPC for which the appellant - accused No. 1 has been convicted. He contends that offence under Section 326 of IPC is not a minor offence to offence under Section 307 of IPC. He contends that punishment provided for offence under Section 307 and Section 326 of IPC is same and therefore, offence under Section 326 of IPC is not a minor offence to offence under Section 307 of IPC. He contends that as per sub-section (2) of Section 222 of Cr.P.C. an accused can be convicted only for a minor offence to the offence to which he has been charged with even though there is no charge for that minor offence. On that point he placed reliance on the following decisions:

I. Suramani and others Vs. State by Inspector of Police, Kangayam Police Station, Erode District, Crime No.90 of 2003 – Crl. A. No.363/2005, 2011(3) MWN (Cr.)27.

II. Sangaraboina Sreenu Vs. State of Andra Pradesh- Crl.A. No.182/1990, (1997) 5 SCC 348.

III. Soundararajan Vs. Subramani and another – Crl.r.C776/1983, 1988 (2) Crimes 781(Mad.)

IV. Surendra Rai Vs. State of Bihar – Crl.A (SJ) No.257/2000, 2012 SCC online pat 914.

5. He further contends, that eye witnesses – P.W.3 and P.W.4 have not supported the case of the prosecution and there is only evidence of P.W.1 – brother of injured and P.W.2 – injured. He contends that there is delay in filing the complaint. The incident has taken place at 10.30 pm on 24.10.2010 and complaint came to be lodged on 25.10.2010 at 09.00 am and the delay has not been explained. He further contends that out of 4 injuries, 2 are chop wounds and 2 are stab wounds and they cannot be caused with the same weapon. He contends that M.O.1 – chopper which was found at the spot had no blood stains. There is no recovery from appellant - accused No. 1. On these grounds he prayed to allow the appeal and acquit appellant - accused No.1.

6. Per contra learned HCGP has argued that the trial Court on proper appreciation of the evidence on

record has rightly convicted the appellant - accused No. 1. She has supported the reasons assigned by the trial Court. She has further argued that evidence of P.W.1 and P.W.2 and evidence of P.W.8 – the Doctor who has issued the wound certificate – Ex.P.7 is sufficient to convict appellant - accused No.1 for offence under Section 326 of IPC. She placed reliance on the decision of the Hon'ble Apex Court in the case of ***Pancharam Vs. State of Chattisgarh and another*** reported in ***2023 SCC OnLine SC 394*** wherein the appellant - accused has been acquitted for offence under section 307 of IPC and he has been convicted for offence under Section 326 of IPC. On these grounds she has sought for dismissal of the appeal.

7. P.W.1 is the complainant and P.W.2 is the injured. The incident has taken place at 10.30 pm on 24.10.2010 and Ex.P.1 – complaint has been filed on 25.10.2010 at 09.00 am. Learned counsel for appellant - accused No. 1 has contended that there is delay in filing the complaint and it has not been properly explained.

8. The Hon'ble Apex Court considered the effect of delay in filing FIR in the following decisions:

In the case of ***Amar Singh Vs. Balwinder Singh and others*** reported in ***2003 (2) SCC 518*** the Hon'ble Apex Court has held thus:

> *"There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR."*

Further, the Hon'ble Apex Court in the case of ***Raghbir Singh Vs. the State of Haryana*** reported in ***2000 (2) RCR (Criminal) 717 (SC)*** has observed that the trial Court has taken the view that delaying the filing of the FIR was justified by the need to rush to the hospital in order to preserve the victim's life rather than going to the Police station first and the same view was affirmed by the Hon'ble Apex Court.

The Hon'ble Apex Court in the case of ***State of Himachal Pradesh Vs. Gian Chand*** reported in ***AIR 2001 SC 2075*** has held thus:

> *"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay,*

the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the Court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

9. P.W.1 has deposed that he took his brother P.W.2 who sustained severe injuries in Car to Adarsh Hospital, Puttur and there injured was not admitted and they asked him to take injured to hospital at Mangaluru. Therefore, he took P.W.2 to Mangaluru and got him admitted at A.J. Hospital and he was admitted to the ICU. At that time, he was not in a condition to speak. He further deposes that in the early morning at 05.30 am he came from Mangaluru to his house at Budoli and got written the complaint from his son and thereafter, went to Vittla Police Station and filed complaint as per Ex.P.1. Considering the said evidence it is clear that the delay has been properly explained. It is not the case of the learned counsel for accused that the accused has been falsely implicated after due deliberations and it caused delay in

filing the complaint. Therefore, time spent from the time of incident till the time of filing of complaint as per Ex.P.1 is immaterial and it has been explained properly.

10. P.W.2 is the injured and he has deposed that appellant - accused No.1 assaulted him with kathi which is used for cutting flesh on his head and he held the said kathi with his left hand and it caused injury and thereafter accused No.1 assaulted him on his left side cheek and back and he sustained 4 injuries. Said evidence of P.W.2 is corroborated by the evidence of P.W.1 who has deposed that on hearing the sound of galata he, his mother and sister went there and saw appellant - accused No.1 assaulting P.W.2 with kathi on his face, head and back and causing injury. Ex.P.7 is the wound certificate issued by the Doctor – P.W.8. As per the wound certificate - Ex.P.7 and evidence of the Doctor – P.W.8, P.W.2 has sustained the following injuries:

a. Chop wound, 15cm X 3 cm, over left side of the face directed downwards and slightly outwards, extending from the forehead to lower jaw

involving both upper & lower eyelids, cheek and lower face along with fracture of left frontal bone, orbit and maxilla (CT Scan Head No. 23054)

b. Chop wound, 10 cm X 4 cm, over the back aspect of right forearm, 6cm below the elbow, exposing the cut muscles, fracture of shaft of ulna with dislocation of head of the radius

c. Stab wound, 3 cm X 0.5 cm (on approximation 3.3 cm) over outer back aspect of left lower chest with haemothorax and sub cutaneous emphysema in that region (CT Scan of Chest and Abdomen No. 23055)

d. Stab wound, 2 cm X 0.4 cm (on approximation 2.2 cm) over outer aspect of left side of the abdomen.

11. P.W.8 – the Doctor has opined that injury Nos. 1 to 3 are grievous in nature and injury No. 4 is simple in nature. Said injuries sustained by P.W.2 are on his head, abdomen, hand and back. Said injuries corroborate with

the overt act stated by P.W.2. P.W.8 has opined that M.O.1 – kathi can cause injuries noted in Ex.P.7 – wound certificate. In the cross-examination P.W.8 has stated that injuries can be caused by any sharp weapon similar to M.O.1. It is not suggested to P.W.8 that one weapon cannot cause all the 4 injuries as contended by the learned counsel for appellant - accused No. 1. Even though there is lengthy cross-examination of witnesses, in the cross-examination of P.W.1 and P.W.2, nothing material has been elicited to disbelieve their testimony. Therefore, evidence on record is sufficient to hold that appellant - accused No.1 has assaulted the injured – P.W.2 with kathi and caused grievous injuries.

12. The trial Court considering the evidence on record held that ingredients of Section 307 of IPC are not attracted as intention or knowledge that death will be caused cannot be inferred. The trial Court convicted appellant - accused No.1 for causing grievous injury with deadly weapon for offence under Section 326 of IPC.

13. There was no charge for offence under Section 326 of IPC. Charge was for offence under Section 307 of IPC. The appellant - accused No.1 came to be convicted for an offence even though charge has not been framed for the said offence as has been provided under Section 222 of Cr.P.C. which reads thus:

> **222. When offence proved included in offence charged.** (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
>
> *(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may he convicted of the minor offence, although he is not charged with it.*
>
> *(3) When a person is charged with an offence, he may be convicted of an attempt to*

commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

14. Learned counsel for appellant - accused No. 1 would contend that as per sub-section (2) of Section 222 of Cr.P.C. an accused can be convicted only for a minor offence even though he has not been charged for it. He contended that Section 326 of IPC is not a minor offence to the offence charged against appellant - accused No.1, i.e., Section 307 of IPC. He contended that punishment provided for both offences i.e, for offence under Sections 307 and 326 of IPC is the same and therefore, Section 326 is not a minor offence to that of offence under Section 307 of IPC. Punishment provided for offence under Section 307 is imprisonment of either description with a term which

may extend up to 10 years and shall also be liable for fine; and if hurt is caused to any person by such act, the offender shall be liable for either to imprisonment for life or to such punishment as is hereinbefore mentioned. Punishment provided for offence under Section 326 of IPC is imprisonment for life or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine. A perusal of the punishments prescribed for offence under Sections 307 and 326 of IPC indicates that sentence is the same for both the offences.

15. Learned counsel for appellant – accused No.1 placed reliance on the decision of High Court of Madras in the case of ***Suramani and others vs. State by Inspector of Police, Kangayam Police Station, Erode District,*** reported in ***2011(3) MWN (Cr.)27*** wherein it is held as under:

> *"4. At the outset, Mr.R.Rajasekaran, learned counsel appearing for the appellants would submit that there has been no charge under Section 366A IPC against any of the appellants, whereas, there is conviction*

under Section 366A IPC. The learned counsel would submit that one of the charges framed against all the four accused is under Section 366 IPC simpliciter. But, without there being a charge under Section 366A IPC, according to the learned counsel, the conviction has been recorded against all the accused, which is illegal.

5. On going through the records, Mr. R. Muniapparaj, learned Government Advocate would also concede that there was no charge under Section 366A IPC, instead, there was only a charge under Section 366 IPC.

6. Now the question is in the absence of any charge under Section 366A IPC, whether the conviction of these appellants under the said provision is sustainable.

7. For this, I may usefully refer to Section 222 Cr.P.C., which reads as follows:-

"222. When offence proved included in offence charged.-

(1) When a person is charged with an offence consisting of several particulars, a combination

of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, thought he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

8. Here, in this case, though the offences under Sections 366 and 366A are of more or less similar in nature, still the punishment provided for both the offences is imprisonment for ten years and fine. Therefore, the offence under Section 366A is not a minor offence

to Section 366 IPC, so as to invoke Section 222(2) Cr.P.C. Thus, in my considered opinion, the conviction of these appellants/accused 1 to 4 under Section 366A IPC, without there being a charge, is illegal and therefore, the same is liable to be set aside."

16. In the said case the Madras High Court has held that even though offence under Section 366 and 366A of IPC are more or less similar in nature, as punishment provided for those two offences is imprisonment for 10 years and fine, therefore, offence under Section 366-A is not minor offence to offence under Section 366 of IPC so as to invoke Section 222(2) of Cr.P.C.

17. In the case on hand also punishment provided for offence under Sections 307 and 326 IPC is same and therefore, the offence under Section 326 IPC is not a minor offence to offence under Section 307 of IPC so as to invoke Section 222(2) of Cr.P.C.

18. Learned counsel for appellant – accused No.1 has relied on the judgment of the Hon'ble Apex Court in

the case of ***Sangaraboina Sreenu Vs. State of Andra Pradesh*** reported in ***(1997) 5 SCC 348*** wherein it is held as under:

> *2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC - which was the only charge framed against him - the High Court could not have convicted him of the offence under Section 306 IPC. It is true that Section 222 Cr.PC entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr.PC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death those of Section 306 IPC are suicidal death and abetment thereof."*

19. In the said judgment, the Hon'ble Apex Court has held that offences under Sections 306 and 302 of IPC within the meaning of Section 222 Cr.P.C. are different

and distinct categories and offence under Section 302 IPC is homicidal death, those of Section 306 of IPC are suicidal death and abetment thereof.

20. Learned counsel for appellant - accused No. 1 has placed reliance on the decision of the Patna High Court in the case of ***Surendra Rai Vs. State of Bihar*** reported in ***2012 SCC online pat 914*** wherein it is held as under:

> *9. The learned trial court while disbelieved the allegation of rape on the informant, Usha Devi (P.W.3) but held the accused-appellants guilty for the offence under Section 366 of the Penal Code, 1860 under which the charge was not framed and form the offence under Sections 323 and 452 of the Penal Code, 1860.*
>
> *It is true that Section 222 of the Code of Criminal Procedure entitles a Court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 366 of the Penal Code, 1860 cannot be said to be a minor offence in relation to an offence under Section 376 of the Penal Code, 1860 as both the offences are of distinct and*

different categories having different ingredients."

21. Considering the above aspects, an accused cannot be convicted for a minor offence if it is distinct and different and having different ingredients.

22. The term, "minor offence" has to be interpreted in its ordinary sense and not technical sense. The test is not the gravity of punishment. When a person is charged with an offence, consisting of several particulars and if all the particulars are proved then it will constitute the major offence, while if some of those particulars are proved and their combination constitutes a minor offence the accused can be convicted for the minor offence though he was not charged with it. Thus, a minor offence within the meaning of section 222 Cr.P.C, would not be something independent of the main offence or an offence merely involving lesser punishments. The minor offence should be composed of some of the ingredients constituting the main offence and be a part of it. In other words the minor

offence should essentially be a cognate offence of the major offence and not entirely a distinct and different offence constituted by altogether different ingredients.

23. The ingredient of an offence under Section 324 of IPC is voluntarily causing hurt by means of dangerous weapons. Ingredient of an offence under Section 325 of IPC is voluntarily causing grievous hurt. Therefore, offence under Sections 324 and 325 of IPC are not distinct and different than offence under Section 307 of IPC as ingredient of hurt is common in the two offences. Offence under Sections 324 and 325 of IPC can be considered to be minor offences to offence under Section 307 of IPC. Therefore, a person who is charged for an offence under Section 307 of IPC can be convicted for offence under Sections 324 or 325 of IPC as the case may be if the ingredients of the said offence are attracted.

24. In the case on hand prosecution has established that appellant - accused No. 1 has voluntarily caused grievous hurt. Therefore, appellant - accused No. 1 can be convicted for offence under Section 325 of IPC as it is

cognate and minor offence to offence under Section 307 of IPC even in the absence of charge in view of Section 222(2) of Cr.P.C. The trial Court erred in convicting appellant - accused No. 1 for offence under Section 326 of IPC instead of convicting under Section 325 of IPC in the absence of charge for the said offence as it is a minor offence to offence under Section 307 of IPC. Therefore, conviction of appellant - accused No. 1 for offence under Section 326 of IPC requires to be modified to offence under Section 325 of IPC. The maximum sentence that can be imposed for an offence under Section 325 IPC is imprisonment of either description for a term which may extend to 7 years and also fine.

25. Learned counsel for appellant - accused No. 1 submits that sentence may be imposed to the period for which he has already undergone and by imposing fine.

26. Maximum sentence that can be imposed for an offence under Section 325 IPC is imprisonment of either description for a term which may extend to 7 years and also fine. Considering the nature of injuries caused to

P.W.2 by appellant - accused No. 1, age of appellant - accused No. 1, i.e., 20 years as on the date of offence and lapse of time, i.e., 13 years since the date of incident, the appellant - accused No. 1 can be sentenced to undergo rigorous imprisonment for a period of 1 year and to pay fine of Rs.10,000/- and in default to pay the fine amount to undergo simple imprisonment for a period of 2 months.

27. In the result, the following;

O R D E R

I. Appeal is allowed in part.

II. The conviction of appellant - accused No.1 is modified from offence under Section 326 of IPC to Section 325 of IPC.

III. The appellant - accused No. 1 is sentenced to undergo rigorous imprisonment for a period of 1 year and to pay fine of Rs.10,000/- and in default of payment of fine, to undergo simple imprisonment for a period of 2 months for offence under Section 325 of IPC.

IV. The entire fine amount shall be paid to P.W.2 as compensation.

V. Appellant - accused No.1 is entitled for the benefit of setoff under Section 428 of Cr.P.C.

Sd/-
JUDGE

LRS
List No.: 1 Sl No.: 12