

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 213 OF 2001

1. Shabbir Khan s/o Mustafa Khan,
Age : 35 years, Occu. Business,
R/o Rohelagalli, Deodibazar,
Aurangabad
2. Irfan @ Saijad Khan s/o
Mustafa Khan,
Age : 37 years, Occu. Business,
R/o Rohelagalli, Deodibazar,
Aurangabad

APPELLANTS

VERSUS

The State of Maharashtra

RESPONDENT

Mr. S.S. Kazi, Advocate for the appellants
Mr. S.R. Palnitkar, A.P.P. for the respondent-State

[CORAM : M.T. JOSHI, J.]

RESERVED ON : 14th August, 2015
PRONOUNCED ON : 2nd September, 2015

JUDGEMENT :

1. The present appellant No. 1 – Shabbir was convicted by the learned Additional Sessions Judge, Aurangabad in Sessions Case No. 354 of 1992, vide judgement and order dated 16th April, 2001, for the

offence punishable under section 332 of the I.P. Code and was sentenced to suffer simple imprisonment for one year with direction to pay fine of Rs. 500/-, in default, to undergo simple imprisonment for 15 days.

. The appellant No. 2 Irfan, vide the aforesaid judgement and order, was convicted for the offence punishable under section 332 read with section 511 of the I.P. Code and was sentenced to undergo simple imprisonment for six months and to pay fine of Rs. 500/- in default to undergo simple imprisonment for fifteen days.

. Aggrieved by these convictions and sentences, the present appeal is preferred by the original accused Nos.1 and 2.

. In fact, both the present appellants, who were original accused Nos. 1 and 2, respectively, alongwith twenty other co-accused were charged of commission of riot as members of unlawful assembly who had attempted to commit murder and cause injuries to the public servant i.e. the offences punishable under section 147, 148, 149, 307, 332 and 333 of the I.P. Code. Rest of the accused as well as the present appellants were acquitted of these offences.

2. The FIR filed by police constable Changdeo Tambde as well as the investigation carried thereafter would show that on 17th January, 1986, riot took place in the city of Aurangabad, after an incident of pelting of stones on a morcha of political party Shivsena. In the said incident, ice factory of one Baba Farjan was set on fire and in retaliation, certain shots were fired from the house of said Baba Farjan. A mob of around 300 to 400 persons had gathered in front of the ice factory. The then M.L.A. Amanulla Motiwala was also present in the mob. The higher police officials like the Commissioner, Superintendent of Police, Additional Superintendent of Police and police force had also gathered at that time. The complainant - police constable Changdeo Tambde had also gone to the said spot.

. The complainant found that one person was marching towards Superintendent of Police Mr. Wankhede. Therefore, he (complainant Tambde) caught his hand and tried to take the said person towards the police jeep. The person started raising slogans. While said person was being taken towards the jeep, the then M.L.A.

Amanulla Motiwala intervened and asked the complainant to leave him. In the said incident, the said person took out gupti (a sword) concealed in a sheath (appearing like a stick). The said person stabbed the complainant with the said gupti in his right chest. The said person was disclosed to be appellant/accused No.1 – Shabbirkhan.

. During investigation, it was found that appellant/accused No. 1 had also injured prosecution witness police constable Rambhau Mhaske.

. So far as appellant No. 2 Irfan is concerned, the allegations are that he had marched towards the Additional Superintendent of Police Mr. More. When he was apprehended, in his pocket, a dagger was found. In the circumstances, the present appellants alongwith some other members of the mob were charged, as detailed earlier.

3. Before the learned Sessions Judge, in all eleven witnesses were examined. The record would show that while the incident has occurred on 17th January, 1986, the sessions case was committed in the year 1992 and recording of evidence of the prosecution witnesses

had started from 15th January, 2001. Though the prosecution has not examined the complainant who was one of the injured police constable Changdeo Tambde, the another injured police constable Rambhau Mhaske as well as other eye witnesses were examined. Further, the medical officer was examined. The evidence regarding seizure of police uniform of police constable Mhaske was also placed.

4. The learned Sessions Judge came to the conclusion that the present appellants individually committed the alleged acts. It was not found that the injuries, in the ordinary course of nature, were sufficient to cause death and therefore, according to the learned Sessions Judge, the offence punishable under section 307 of the I.P. Code was not made out, as against appellant No. 1 Shabbirkhan. Therefore, the conviction and sentence, as detailed supra, came to be recorded.

5. Mr. S.S. Kazi, learned counsel for the appellants, submitted that the complainant – the injured police constable Changdeo Tambde was not examined. There

is a contradiction between the statement of PW1, the then police constable Baburao Kanje. The property involved in the offence was not produced. Further, there is a contradiction as to whether appellant No. 2 Irfan was having dagger in his pocket or as to whether he was brandishing the same during the incident. He further submitted that the rioting had taken place in a thickly populated area where 300 to 400 persons had gathered and therefore, identification of the present appellants directly in the witness box by some of the prosecution witnesses, after a period of fifteen years, as detailed supra, is amazing. PW9 Deepaksingh Gaur was unable to identify appellant No. 1 Shabbirkhan. Even one of the eye witnesses PW8 police constable Krishna Soni was candid enough in making a statement in the examination-in-chief itself that he was unable to identify any of the accused, including the present appellants from the mob. In the circumstances, Mr. Kazi submitted that the appeal be allowed.

. Alternatively, it was submitted by Mr. Kazi that the evidence would show that the complainant – Changdeo Tambde was not in his police uniform and that complaint itself would show that there was no

acquaintance between appellants and the complainant. In the circumstances, not only the offence punishable under section 332 of the I.P. Code i.e. causing injury to the public servant is made out, but considering the incident where a mob of about 400 persons had gathered, even if it is assumed that the appellant No. 1 had tried to rescue himself from the complainant and while doing so, the incident had occurred, the injuries caused on the person of the complainant would show that for saving from one of the members of the mob, the appellant No. 1 may have caused the injuries. Mr. Kazi, therefore, submitted that the appeal be allowed by acquitting both the appellants.

6. On the other hand, Mr. S.R. Palnitkar, learned A.P.P. supported the reasoning forwarded by the learned Additional Sessions Judge.

7. On the basis of above material on record and the submissions advanced on behalf of both the sides, the following points arise for my determination:-

(I) Whether the prosecution has proved that on 17th

January, 1986 in the noon, present appellant No. 1 Shabbirkhan has voluntarily caused hurt to police constable Changdeo Tambde and police constable Rambhau Mhaske, the public servants, with intention to deter them from discharging their duties as public servants ?

(II) Whether the prosecution has proved that the appellant No. 2 Irfan, on the given date, time and place, attempted to cause injury to the public servants with an intention to deter them from discharging their duties ?

My finding to above point No. (I) is in the affirmative and to point No. (II) is in the negative. The appeal is, therefore, partly allowed as regards quantum of sentence regarding appellant No. 1 and the order of conviction and sentence as regards appellant No. 2 is hereby set aside. Instead, he is acquitted of all the offences, for the reasons to follow :

R E A S O N S

8. The deposition of police constable PW1 Rambhau

Mhaske as supported by other police witnesses, who were present at the time of incident would sufficiently show that the present appellant No. 1 – Shabbirkhan had assaulted police constable Changdeo Tambde as well as this witness by gupti (sword stick).

9. The deposition of Medical Officer PW10 Dr. Sunderbabu Sarosiya at Exhibit-74, coupled with injury certificates, proved by him, would show that police constable Changdeo Tambde had suffered one stab injury on his right chest, admeasuring 1 x 1/2 cm, while PW1 Rambhau Mhaske had suffered one incise wound over left arm admeasuring 3 x 1 x 1 cm.

. In that view of the matter, when the injured i.e. PW1 Rambhau Mhaske was able to identify the appellant No. 1 Shabbirkhan as the preparator of the crime while some of the eye witnesses, as detailed, supra, after a period of fifteen years of the incident, failed to identify him would certainly be natural. The person who received the injury would naturally have imprint in his memory of the person who had assaulted him. Further, the prosecution case would show that the appellant No. 1 was apprehended. He tried to get

himself released and at that time, he caused those injuries to these two police constables. Thus, there was sufficient opportunity to PW1 Rambhau Mhaske to watch the features of appellant No. 1. In that view of the matter, I do not find any infirmity in the reasoning forwarded by the learned Sessions Judge as regards the conviction of appellant No. 1 Shabbirkhan.

10. As far as appellant No. 2 Irfan is concerned, in the immediately filed FIR at Exhibit-84, police constable Changdeo Tambde had alleged that accused/appellant No. 2 Irfan had marched towards Additional Superintendent of Police Mr. More. Therefore, when he was apprehending appellant No.2, in his pocket, a dagger was found. PW4 Prabhakar Rathod, however, has deposed that appellant No. 2 Irfan was seen marching with the dagger in his hand. The learned Sessions Judge has brushed aside this contradiction. PW4 Prabhakar was specific in saying that PSI Gaur and other police officials like Sonwane and Nimbalkar caught appellant No. 2 and Sonwane snatched the sword (gupti) stick from appellant No. 2 Irfan. This contradiction is, however, material. As to whether the dagger was found in the

pocket of appellant No. 2 Irfan or as to whether the sword stick was snatched from appellant No. 2 Irfan are two contradictory facts and cannot stand during the same incident. The learned Sessions Judge, therefore, ought to have extended reasonable benefit of doubt to the present appellant No. 2 Irfan.

11. As regards the sentence awarded to appellant No.1 Shabbirkhan, it is to be noted that according to the prosecution case, the complainant – Changdeo Tambde, police constable was not in his uniform. Both of them were not knowing each other. A mob of 400 people had gathered at the spot due to the incident of setting fire to the ice factory and certain shots had been fired from one house. In the circumstances, if an ordinary citizen catches hand of another person and tries to take him away to certain direction, which, according to the said first person was towards the police jeep not known to the another person, then naturally he would try to rescue himself. In that incident, however, the appellant No. 1 Shabbirkhan having a sword stick and using the same on the person of not only complainant i.e. police constable Changdeo Tambde (not in uniform),

but even on PW1 Rambhau Mhaske, who was in uniform, would clearly show that the prosecution has proved the offence punishable under section 332 of the I.P. Code. The fact, however, would remain that the initial apprehension of the appellant No. 1 was made by a person not in uniform and thereupon, in the grappling between the informant and the appellant No. 1, the person in uniform i.e. PW1 Rambhau Mhaske, had intervened. As per the prosecution case, appellant No. 1 did not use the sword stick during the rioting but only when he was apprehended, he had taken out the sword. If one visualizes all the facts, as detailed supra, from the point of view of a person present in the mob, then directing him to suffer simple imprisonment for one year would appear to be severe one.

12. Mr. S.S. Kazi, learned counsel for the appellants, further submits that the appellant No. 1 Shabbirkhan was 35 years old at the time of occurrence i.e. on 17th January, 1986. Now, he is 65 years old person. Taking into consideration all these facts, in my view, the sentence as awarded in the following order would meet the ends of justice. Hence, the following

order:-

13. (I) The appeal as regards appellant No. 1 Shabbir is hereby partly allowed.

(II) The conviction of appellant No. 1 Shabbirkhan for the offence punishable under section 332 of the I.P. Code is hereby maintained. However, the sentence awarded by the learned Additional Sessions Judge to appellant No. 1 to suffer simple imprisonment for one year and to pay fine of Rs. 500/-, in default to undergo simple imprisonment for fifteen days, for the offence punishable under section 332 of the I.P. Code, is hereby set aside.

. Instead, it is hereby directed that appellant No.1 Shabbirkhan shall suffer simple imprisonment for fifteen days and shall also pay fine of Rs. 500/-, in default to undergo simple imprisonment for ten days, for his conviction for the offence punishable under section 332 of the I.P. Code.

. The set-off as per the Rule be granted to appellant No. 1 Shabbirkhan.

. The learned Sessions Judge to take steps for securing presence of appellant No. 1 Shabbir for serving the sentence now awarded, if required.

(III) The appeal as regards appellant No. 2 Irfan is hereby allowed. The conviction and sentence recorded by the learned Additional Sessions Judge against appellant No. 2, for the offences punishable under section 332 read with section 511 of the I.P. Code is hereby set aside.

. Instead, the appellant No. 2 Irfan is hereby acquitted of the offences with which he was charged. The bail bonds of appellant No. 2 shall stand cancelled.

(IV) The present appeal accordingly stands disposed of.

[M.T. JOSHI]
JUDGE