

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.648 OF 2015

Jagdish @ Jojab Byarist Kale

Age : 20 years, Occ. Vegetable Vendor,

R/s: Range Hill Railway Line Slum

Khadki, Pune

[Presently lodged in Yerawada Jail,

Pune]

..Appellant

Versus

The State of Maharashtra

[Through the Swargate Police Station,

Pune, at Pune]

..Respondent

....

Mr. Satyavrat Joshi, Advocate for the Appellant.

Mrs. P.P. Bhosale, APP, for the State.

....

CORAM : A. R. JOSHI, J.

DATE : 9th JULY, 2015

JUDGMENT :

1. Heard learned Counsel for the appellant. Also heard learned APP for the State.
2. This appeal is taken for expeditious hearing as the application for bail preferred by the appellant during pendency of the appeal was not granted and it was

thought fit to dispose of the appeal itself expeditiously.

3. The case of the prosecution is that in the market yard at Pune in the morning at about 6:00 a.m. to 6:30 p.m. on 27.4.2012 the incident happened. That time PW-2 a vegetable vendor was collecting lemons lying and spread on the ground. That time, the present appellant / original accused No.2 caught hold of said PW-2 from behind and thereafter another co-accused, a juvenile in conflict with law (original accused No.1), came from the front and by using a knife assaulted on the right side shoulder and neck of PW-2 causing bleeding injuries. Hue and cry was raised by PW-1, the wife of PW-2. The injured was taken to nearby Market Yard police station and along with police yadi PW-2 was taken to hospital and was medically treated. He had sustained following injuries, as reported by PW-4 Dr. Vishwakarma :

- [1] CLW over anterior part of neck, extending from lower part near middle part of right clavicle and extending to opposite left pina below about 3 cm., the depth of

the injury : cricoid cartilage and trachea, measuring 18 x 5 x 0.5 cm., the injury was grievous in nature.

[2] CLW over right shoulder over deltoid region measuring 8 x 0.5 cm.. The nature of injury was simple.

4. According to PW-4 Dr. Vishwakarma the injury No.1 was grievous in nature and injury No.2 was simple. Thereafter spot panchnama was conducted and during investigation both the accused were arrested. Apparently for sometime the appellant/accused No.2 was on bail and was also in custody and after his conviction on 30.5.2015 passed by the Additional Sessions Judge, Pune, he is in custody.

5. Present appellant/accused No.2 is convicted for the offence punishable under Section 307 read with Section 34 of IPC and is sentenced to suffer RI for five years and to pay fine of Rs.5000/- in default to suffer further RI for one year.

6. Certain admitted factual position which is important so as to decide the present appeal, is narrated hereunder :

- (i) Original accused No.1, a juvenile in conflict with law, was separately tried before the Juvenile Justice Board and he was acquitted of the charges. Certified copy of said judgment and order was produced before the trial Court, during the trial of the present appellant / accused No.2.
- (ii) It is a factual position that according to the witnesses of the prosecution, the actual assault was attributed to accused No.1, a juvenile in conflict with law, and the role assigned to the present appellant was that of holding PW-2 from the backside.
- (iii) The knife, which was allegedly used by the juvenile in conflict with law, was not produced before the Court during the trial of the present appellant. Moreover no panch witness was examined regarding recovery of said knife recovered allegedly at the instance of juvenile in conflict with law. Admittedly, the knife was not recovered from the present appellant.

(iv) The knife which was allegedly used by the juvenile in conflict with law was not produced before the Court and also not shown to PW-2 (the injured) and PW-4 Dr. Vishwakarma.

7. Bearing in mind the above factual position, the substantive evidence of PW-1 and PW-2 is required to be considered in order to ascertain whether there is establishment of the fact as to applicability of Section 34 of IPC, more particularly when the main accused No.1, a juvenile in conflict with law, has been acquitted of the charges by the Juvenile Justice Board in a separate trial.

8. PW-1 is the wife of PW-2 and she lodged FIR at Exhibit-21. On the actual factum of the incident, the evidence of PW-1 and PW-2 is same as to the role attributed to the present appellant. According to them the present appellant caught hold of PW-2 from behind and the actual assault was inflicted by the juvenile in conflict with law. There was nothing brought on record that the present appellant and the juvenile in conflict

with law were sharing a common intention to assault PW-2. The role attributed to the present appellant is significant as to he holding the injured PW-2 from backside and it happened only in two or three minutes and within that time accused No.1, a juvenile in conflict with law, came from the front side and assaulted PW-2 on his neck and shoulder. Considering the injuries as described earlier, through the evidence of PW-4 Doctor, it must be said that these injuries were CLW and not stab wounds. As such, the way in which the knife was used by the assailants can be ascertained. Though the doctor said that the injury No.1 was grievous in nature, the said word “grievous” is used as apparently to show the seriousness of the injury.

9. So far as involvement of the appellant in the offence which was charged punishable under Section 307 read with Section 34 of IPC, it must be ascertained whether the another co-accused i.e. accused No.1 had in fact committed the offence punishable under Section 307

of IPC. Only in that event the liability of the present appellant under Section 34 IPC may arise. Apparently, it was not the case of the prosecution or for that matter it was also not ascertained by the trial Court while convicting the present appellant that not the juvenile in conflict with law but some other third person, apparently associate of the present appellant had inflicted the assault on PW-2. As such, in view of the factual position as narrated earlier and mainly considering the acquittal of the juvenile in conflict with law and who was allegedly the main assailant, the entire case of the prosecution as against the present appellant becomes doubtful so as to implicate him under Section 34 of IPC.

10. Considering earlier admitted position and considering the substantive evidence of PW-1 and PW-2, it must be said that the trial Court has erred in coming to the conclusion as to establishment of Section 307 read with Section 34 of IPC. This was more so when the juvenile in conflict with law, the main assailant, was

acquitted by the Juvenile Justice Board. In view of this position, the present appeal must succeed. Hence, the order

:: O R D E R ::

- [i] Criminal Appeal No.648 of 2015 is allowed;
- [ii] Impugned judgment and order dated 30th May, 2015 passed by the Additional Sessions Judge, Pune in Sessions Case No.386 of 2012 is quashed and set aside and the appellant/accused is acquitted of the offence charged against him punishable under Section 307 read with Section 34 of I.P.C.;
- [iii] The appellant/accused shall be released from jail custody if not required in any other case. If fine amount is already paid, the same shall be returned to the appellant.
- [iv] Appeal is disposed of accordingly. Certified copy expedited.

(A. R. JOSHI, J.)