

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.667 OF 2010

Dnyaneshwar Chintaram Kadam .. Appellant
Versus
The State of Maharashtra .. Respondent

Mr.Sudam Kale, Advocate for the appellant.

Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 16th OCTOBER, 2015

ORAL JUDGMENT :-

1 This Appeal is directed against the judgment and order dated 12th August 2010 passed by Ad-hoc Addl. Sessions Judge, Malegaon, convicting the appellant of offences punishable under Section 451 IPC and 307 IPC. The learned Addl. Sessions Judge sentenced the appellant to suffer Rigorous Imprisonment (RI) for 10(ten) years and to pay a fine of Rs.5,000/- in default to suffer RI for 1(one) year with respect to the offence punishable under Section 307 IPC and RI for 2(two) years and to pay a fine of Rs.3,000/- in default to suffer RI for 3(three) months with respect to the offence punishable under Section 451 of the IPC. Being aggrieved thereby, the appellant has approached this Court by

filing the present Appeal, praying that his conviction and the sentences imposed upon him, be set aside, and that he be acquitted.

2 The prosecution case, as put forth before the trial Court may, in brief, be stated thus :

Sunita (PW 4) at the material time was residing with her husband in their house situated in the field of her husband Pravin Hirey (PW 3). They had a son – Paresh – aged about 5 – 6 years who was residing with them. On 19th February 2007, her husband had gone out along with Paresh for marketing. Sunita was alone in the house. She completed the household chores and came to the courtyard for washing clothes. While she was washing the clothes, a person – previously not known to her – came there on a bicycle. He asked Sunita for a glass of water for drinking. Sunita observed that he was in the habit of '*opening and closing his eyes frequently*'. Since he had demanded water, Sunita went inside the house for fetching water. That person also entered inside the house. When Sunita noticed this, she asked him as to why he entered in the house behind her, when that person said that he wanted to give his mobile number to Sunita's husband. Sunita gave a glass of water to him which he drank, and then

caught hold of the right hand of Sunita. Sunita tried to bite him. At that time, that person said that he would dislocate Sunita's teeth like he had dislocated the teeth of wife of one Surya. He gave a blow of sickle on the hand of Sunita. Sunita fell down. Thereafter, that person inflicted a number of blows on Sunita with a sharp weapon. Sunita lost consciousness. Her tooth also fell down. The assailant left the place, but Sunita was lying in a pool of blood. When her husband Pravin returned, Sunita regained some consciousness to the extent of noticing the words of her husband. Sunita uttered a word – 'Malegaon', – and lost consciousness. Sunita was then taken to hospital where she was admitted for a number of days. On the next day i.e. 20th February 2007, Pravin lodged a First Information Report against an unknown person on the basis of which a case in respect of offences punishable under Section 452 of the IPC and 307 of the IPC was registered. Investigation commenced.

3 The appellant came to be arrested on 5th March 2007. In the course of investigation, certain incriminating articles such as his own clothes stained with blood and a sickle came to be recovered from him. On completion of investigation, a charge-sheet filed against the appellant who was prosecuted and

convicted, as aforesaid.

4 The prosecution examined totally 11 witnesses during the trial. The first witness Samadhan Hirey is a panch in respect of the spot panchnama. The second witness Dharma Hirey is also a panch in respect of the seizure of the clothes of the victim on 21st February 2007 in the hospital. The third witness Pravin Hire, the First Informant is the husband of the victim Sunita. The fourth witness is Sunita herself. The fifth witness Dr.Sweety is the one in whose hospital Sunita was taken, admitted and treated. The sixth witness is one Shivaji Hirey who is a panch in respect of the seizure of the clothes of the accused on 23rd March 2007. The case of the Investigating Agency is that the bicycle on which the appellant had come to the house of Sunita was also seized in the course of investigation and Pradeep More(PW 7) is a panch in respect of the seizure of the said bicycle. The eighth witness Jitendra Nikam is the one in whose presence the appellant is supposed to have disclosed information leading to the recovery of the weapon of assault i.e. a sickle. The ninth witness Vijaykumar Bhangare is the Executive Magistrate who had held an Identification Parade on 16th March 2007 in which Sunita is said to have identified the appellant as the assailant. The tenth witness

Ashok Bagul, Sub-Inspector of Police is the one who had arrested the appellant on 5th March 2007. He is the one who has done the entire investigation in the case. The eleventh and last witness Sahebrao Khardekar is a panch in respect of the spot panchnama.

5 I have heard Mr.Sudam Kale, learned counsel for the appellant at length. I have heard Deepak Thakre, learned APP for the State. With the assistance of the learned counsel for the appellant, I have gone through the entire evidence adduced during the trial and the impugned judgment.

6 The learned counsel for the appellant contended that the order of conviction of the appellant is not in accordance with law. He submitted that the case rested solely on the testimony of the victim Sunita which was not reliable, and that the identification of the appellant as the assailant made by Sunita, was not free from doubt. He also submitted that the evidence about the recovery of the sickle at the instance of the appellant, was not reliable, and that, even the evidence regarding seizure of the shirt of the appellant on the same being produced by his father, is not reliable. He submitted that there were a number of defects in the Test Identification Parade, and the possibility of the appellant

having been shown to the sole identifying witness Sunita, could not be ruled out.

7 The learned counsel for the appellant also contended that no motive behind the assault was brought on record and as to why the appellant had assaulted the victim could not be ascertained by the Investigating Agency in the course of investigation.

8 Indeed, in this case, the motive behind the alleged assault has not been brought on record. Nobody has suggested as to the cause behind the assault.

9 It is also a fact that, as per the prosecution case, the assailant was not previously known to the victim, or even to her husband.

10 The case, therefore, rests primarily on the evidence of the victim as to the identity of the appellant as the assailant and two other circumstances i.e. recovery of a sickle – which is the weapon of the assault – at the instance of the appellant, and the fact that on the shirt of the appellant, stains of blood were found.

11 I have carefully gone through the evidence of the victim Sunita. Sunita identified the appellant as the assailant. The way things had happened have been described by Sunita. It cannot be doubted that she had sufficient opportunity for observing the assailant. Since the appellant was not previously known to Sunita or to her husband, obviously, there is no possibility of the appellant being falsely implicated. The only possibility that remains is the possibility of the appellant being mistakenly being identified as the assailant. Indeed, this possibility needs to be carefully seen, and in that regard, the evidence of Sunita and that of Vijaykumar Bhangare (PW 9) assumes importance.

12 Before proceeding further, it may be observed that, that Sunita was indeed assaulted in her house at the given time on 19th February 2007, cannot be doubted at all. There is overwhelming evidence in that regard. The spot panchnama indicates what was the place where the assault took place, and there is no challenge to this aspect of the matter. That, Sunita had sustained injuries, also cannot be doubted as the evidence of Dr.Sweety who treated Sunita after the incident about the

existence of injuries on Sunita's body has not been shaken in any manner. Sunita appears to have sustained multiple stab wounds over different parts of her body, including the chest, thigh, buttocks and forearms. She was found bleeding from the right ear, and also from the left temporal region. Thus, Sunita had indeed been attacked on the given date at the given point of time, cannot be doubted.

13 Coming back to the question of identity of the appellant as the assailant, indeed, the evidence needs to be carefully seen. This is particularly because the Investigating Officer has not stated as to *how and on what basis*, the appellant came to be arrested. The appellant came to be arrested only on 5th March 2007 i.e. after about 15 days from the incident, and it might have been easier for the Court to determine the question of identity, had the basis on which the appellant was suspected or was apprehended, been available in the testimony of the Investigating Officer.

14 Sunita, as aforesaid identified the appellant as the assailant, before the Court, and categorically stated so in her evidence. She also said about her having identified the appellant

as the assailant in the Test Identification Parade that was held.

According to her, about 3 – 4 days after getting a discharge from the Jeevan Hospital, she was called to the Tahsil office at Malegaon for attending an Identification Parade. She categorically stated that she identified the assailant in that Parade and pointed out the appellant who was before the Court as the same person.

15 It may be recalled, that in her evidence, Sunita had stated about a peculiar habit of the assailant i.e. '*of opening and closing eyes frequently.*' The cross-examination of Sunita was directed to a number of aspects including the possibility of the assailant being noticed by neighboring occupiers. There were a number of suggestions given to Sunita with respect to the actual incident of assault, and it was brought on record that some of the facts stated by her in her evidence had not been stated by her before the police. Indeed, there are some discrepancies in the evidence of Sunita, but they appear to be on account of the severity of the assault. Clearly, the assault was unexpected and Sunita had no proper opportunity to see the precise nature of the weapon used by the assailant. Sunita has said about the assailant attacking her with a sickle, but thereafter, has said that he took out another knife like weapon from his pocket. Sunita's evidence

shows that she is mixing facts actually experienced by her with the facts which obviously she learned from others after regaining consciousness. This, however, by itself would not be sufficient to discard the evidence of the identity of the appellant, as given by Sunita. The suggestions given to Sunita in the cross-examination that the Police Officers were present when the Test Identification Parade was held, or that she had not gone to the Tahsil office at all, and had not taken part in the Test Identification Parade at all, were denied as false by her. It is true that she could not give the date or the day of the Test Identification Parade, but in my opinion, that does not shatter her testimony, in any manner. She was not expected to remember the date of the Test Identification Parade.

16 I have also examined the evidence of Vijaykumar, Executive Magistrate (PW 9) carefully. Comparing the evidence of Sunita with that of Vijaykumar, Executive Magistrate (PW 9), and considering the same, I find that reliance can safely be placed on the fact that, in a Test Identification Parade duly held, Sunita had identified the appellant as one of the assailants. According to Vijaykumar (PW9) when the appellant was brought to his office for the Test Identification Parade, his face had been covered by a

cloth. He denied any suggestion that the help of the police was taken by him in holding the Test Identification Parade. Though Vijaykumar (PW 9) ought to have asked a question to Sunita as to whether she had seen the assailant after the incident and before the Parade, and though he also ought to have asked a question to the appellant as to whether he had been shown to her after the incident and before the Parade, failure to put such question would not be, by itself, fatal. In this case, Sunita had noticed the assailant when he came from the bicycle. The assailant had spoken to her, and had demanded a glass of water. Thereafter, the assailant had entered inside her house, walking behind her when she went for fetching a glass for water. There was proper and sufficient opportunity for Sunita to have observed the features of the assailant. The peculiar habit of the assailant i.e. '*of opening and closing the eyes frequently*', as stated by Sunita, indicates that she had properly seen the assailant. Though there is no evidence that the appellant was also having a similar habit, there is also no attempt to show that the appellant did not display any such habit.

17 Considering the evidence of Sunita and that of Vijaykumar Bhangare (PW 9), I do not find any obvious weakness or defect in the Test Identification Parade. In my opinion, the

testimony of Sunita about the identity of the appellant as the assailant, can safely be accepted.

18 The learned counsel for the appellant submitted that there was nothing to show that the appellant's face had been covered by the police while he was in their custody. It is also submitted that the Ashok Bagul - Investigating Officer (PW 10) admitted that the face of the appellant had not been covered, and that, therefore, there was a possibility of the appellant being shown to Sunita before holding a Test Identification Parade. The learned counsel for the appellant placed reliance on a number of authoritative pronouncements wherein, the identification of the accused made by the eye witnesses was doubted because the Investigating Agency had failed to show that the face of the accused had been covered while in the custody of the police, or while taking him to the Court, or bringing back therefrom. However, it must be clearly understood that these decisions do not lay down any law. These decisions which deal with the appreciation of evidence would depend on the facts of each case. Indeed, that the fact of the suspect is not covered after his arrest, and till the time the Test Identification Parade is held, would be a factor tending to create a doubt about the value to be attached to

the identification, but it cannot be accepted as a rule that the evidence of the Test Identification Parade must necessarily be rejected in all such cases. It cannot be ignored that the substantive evidence consists in the identification of the culprit, as such made by a witness in the Court, and the evidence about having identified the culprit in a Test Identification Parade held previously only seeks to corroborate the same. In the instant case, considering the evidence of Sunita – more particularly the cross-examination of Sunita with respect to the question of identity – I am of the opinion that it can be safely accepted.

19 Apart from the evidence of identification, there are two other circumstances against the appellant. The first is the recovery of his shirt on 23rd March 2007. In that regard, there is evidence of Shivaji Hire (PW 6), and of course, that of the Investigating Officer. This shows that on 23rd March 2007, this witness had gone to the house of the accused along with the police and another panch, and that, at that time, the father of the accused produced a full sleeve of faint yellow colour of the accused, and gave it to the police. That, the police seized the same by drawing seizure panchnama. In the cross-examination, it was brought on record that no seal was affixed to the said shirt,

and no specific identification mark was made on the shirt by the police. The evidence shows that the shirt was sent for Chemical Analysis, and on this shirt, stains of blood of 'AB' group were found. It is also not in dispute that the blood group of Sunita is 'AB'. Though it is true that the shirt was not sealed in the presence of panchas, the possibility of blood stains being planted on the shirt, is too remote to be accepted as true.

20 Regarding the recovery of a sickle at the instance of the appellant, the evidence of Jitendra (PW 8) assumes importance. According to him, on 25th March 2007, he was called at the Malegaon Taluka Police Station, and that, there was one more person like him already there. That PSI Bagul (PW 10) had called both of them, and that the appellant was seen by them in the custody of the police. He speaks about the appellant making a statement and giving information to the police pursuant to which the police and the panchas going to a field, and the appellant leading them to a heap of fodder arranged under a neem tree and taking out a sickle and handing it over to the police. This witness was extensively cross-examined, but nothing to discredit this version of the witness could be elicited in the cross-examination. It turned out in the cross-examination that the field in question

had been owned by Pravin Hirey (PW 3), husband of Sunita. On this sickle also, stains of blood of 'AB' group were found.

21 It is true that the appellant was apprehended on 5th March 2007, and these recoveries were effected much later i.e. on 23th March 2007 (of the shirt) and on 25th March 2007 (of the sickle). This undoubtedly, would create some doubt about the reliability of these pieces of evidence as contended by the learned counsel for the appellant. That, however, would not mean that such evidence must automatically be rejected, but it would only require the evidence to be examined with great care.

22 I have considered the entire evidence in the case and all the relevant circumstances together, so as to decide whether the conclusion arrived at, by the trial Court, is proper and legal. From the reasoning of the learned Addl. Sessions Judge, it appears that he has placed reliance primarily on the identification of the appellant as the culprit made by victim Sunita. There is no patent infirmity or weakness in the evidence of Sunita, or in the evidence of the Executive Magistrate Vijaykumar Bhangare (PW 9) which would render the evidence of identification in the Test Identification Parade, unreliable. This lends support to the

evidence of identification of the appellant as given by Sunita in the Court, which evidence does not seem to be suffering from any infirmity. The trial Court had an opportunity to observe the witnesses and when no flaw or defect in the evidence of the identifying witness is found, it would not be proper to disturb the finding arrived at by the trial Court on the basis of the belief placed by it on the evidence of the identification of the appellant as the assailant made by the victim Sunita.

23 In my opinion, the conclusion arrived at by the learned Addl. Sessions Judge cannot be said to be erroneous or suffering from any infirmity warranting interference.

24 At this stage, the learned counsel for the appellant submits that the appellant has already remained in custody for a period of more than 8 years and six months. It is pointed out that at the time of the incident, he was of 19 years. It is urged that the substantive sentence imposed upon the appellant be reduced.

25 Considering all the relevant aspects of the matter, I am inclined to reduce the substantive sentence imposed upon the appellant to the period already undergone.

26 In the result, the Appeal is disposed of as follows :

The substantive sentence imposed upon the appellant in respect of an offence punishable under Section 307 of the IPC, is reduced to the period already undergone.

27 Subject to this reduction in the sentence, the Appeal is dismissed.

28 The appellant be released from the Prison forthwith, unless required to be detained in some other case.

(ABHAY M. THIPSAY, J)

CERTIFICATE

***Certified to be true and correct copy of the original signed
Judgment/Order.***