

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 634 OF 1995

Kailash Maruti Hande
Mukkam Post Pimpalgaon,
Joga, Taluka – Junnar,
Dist. Pune.

.....Appellant

V/s.

The State of Maharashtra

....Respondent

Ms. Yogita Deshmukh appointed Advocate for Appellant
Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : JANUARY 20, 2016.

JUDGMENT :

The appellant herein is convicted for the offence punishable under Section 325 read with Section 34 of Indian Penal Code and is sentenced to suffer R.I. for five years by the Addl. Sessions Judge, Greater Bombay, in Sessions Case No.874 of 1991 vide judgment and order dated 30.10.1995. Hence, this appeal.

2) Such of the facts necessary for the decision of this appeal are as follows:-

(i) On 28.6.1991, Anil Mhatre lodged a report at the police station alleging therein that his father runs a Vada-Pav Stall in front of Building No.6, Linking Road Extension, Shastri Nagar, Santacruz, Mumbai. That he and his brother assist their father between 8 p.m. to 1 a.m. That on 27.6.1991, his brother Santosh was at the Stall. At about 12 midnight, he and his father joined Santosh at about 12.15 a.m. Akhil, resident of the same area, came to the stall and ordered egg Bhurjee. His brother Santosh had asked for the earlier payment wherein he had taken eatables on credit. Akhil had returned quietly only to be followed by Parag who also demanded the same dish. Santosh had reacted in the same manner. They were followed by Kailash Hande and Santosh had demanded the credit amount which remained unpaid earlier. All three were followed by Suresh Nechkar. Initially, all four of them had returned quietly only to come back armed with deadly weapons. As soon as they came, they mounted assault upon his father. Upon seeing the assault, Santosh rushed to the police station and informed the police. Anil got scared and rushed home to inform his mother. By the time Anil returned, his injured father was taken to the hospital. He went to Cooper Hospital. There his statement was recorded by the police. The father of Anil and Satish had

succumbed to the said injuries within four hours.

(ii) On the basis of his statement, Crime No.462 of 1991 was registered against the accused persons for the offence under Section 307 read with Section 34 of Indian Penal Code. Investigation was set in motion. The original accused Nos. 1 and 2 were arrested on 28.6.1991, whereas the original accused Nos. 3 and 4 were arrested on 15.7.1991. Investigation was completed and charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No.874 of 1991. The prosecution examined eleven witnesses to bring home the guilt of the accused.

3) PW-1 Anil Mhatre is the son of the deceased. He is the first informant. He has deposed before the Court in consonance with the First Information Report which is marked at Exhibit 12. He has specifically stated that the spot Panchanama was not prepared in his presence. It is elicited in the cross-examination that at the time of incident, the hand cart was in front of Snehkunj Building i.e. his cart is adjoining to gate no. 1 and the accused persons had pushed his father by the side of the cart. It is admitted in the cross-examination that on the day of incident, P.W. 1 was also running Vada Pav stall at another place from morning 7.30 to 7.30 p.m. and both his

brothers were assisting him in running the said stall. On the day of incident, the father of P.W. 1 was selling Vada Pav at about 8.00 p.m. and at about 8.15 p.m., he had been to Vada Pav stall to help his father. Santosh had then followed and thereafter his father had gone home for dinner. After dinner, they had again reached the stall. When they reached Vada Pav stall, accused were not present. Akhil had been to his stall about 12.15 a.m. alone. From the stall, Akhil had gone inside gate no. 1. Kailash had come to the stall from gate no. 1. A specific omission has been brought on record that P.W. 1 has stated that upon arrival, the accused persons had objected him from demanding the credit amount. Learned counsel for the appellant submits that there are inherent omissions in the substantive evidence of P.W. 1. Father of P.W. 1 has sustained injuries and died at about 5.00 a.m. It is elicited that on 28/06/1991, P.W. 1 had not been to the police station. It is also admitted that police had recorded the statement of P.W. 1 in the hospital before the death of his father. That brother and mother of P.W. 1 were not present when his statement was recorded by the police in the hospital as it was recorded on the ground floor. The defence had suggested enmity of father of P.W. 1 with the accused which was denied. According to P.W. 1 there was a verbal altercation between

his father and the accused persons before toppling the cart by accused Kailash and at that time, Suresh was near the Pav Bhaji stall. According to him, at the time when his father had fallen as a result of a push, Suresh was present at the distance of 2 to 3 feet. P.W. 1 has admitted that he had not inquired with his brother Santosh as to whether he had informed the police about the incident nor there was a dialogue between both the brothers after the statement of P.W. 1 was recorded by the police in the hospital. P.W. 1 had identified the choppers at article nos. 1 & 2 before the Court.

4) P.W. 2 Santosh Mhatre happens to be brother of P.W. 1 and the son of the deceased. According to him, at about 12.15 a.m., accused Akhil had been to Vada Pav stall and placed an order for Egg Bhurji and left the stall. After sometime, Parag had also placed the order and at that time, P.W. 2 had asked him to pay the balance amount and therefore Parag left the stall. Same incident re-occurred with Kailash and at that time, P.W. 2 and his father had asked him to pay the arrears of credit. Soon thereafter, at about 12.30 a.m., all the 4 accused returned to the stall. Suresh was armed with a broken glass bottle in his left hand and chopper in his right hand, Kailash was armed with iron bar, Parag was armed with wooden rod and Akhil was armed with

chopper. According to P.W. 2 all the 4 accused had mounted assault upon his father. People had gathered. They did not intervene as Suresh had threatened the people not to interfere. According to P.W. 2 when the accused were assaulting his father, Anil had gone home to call his mother and after sometime, P.W. 2 had also gone to Santacruz Police Station and informed the police about the incident and assault upon his father. Police officer accompanied P.W. 2 to the spot, only to find the father of P.W. 2 lying in a pool of blood. He had sustained several injuries. Father of P.W. 2 was admitted in Cooper Hospital in the emergency ward. According to P.W. 2, the incident had occurred at Shastri Nagar, near gate no. 1, building no. 6 by the side of the road.

5) It appears from the cross-examination that the defence has challenged the very scene of the offence. P.W. 2 has stated that they were also running a tea stall at a distance of 12 to 15 feet from the Pav stall. Tea stall was closed at 7.30 p.m. Learned counsel for the appellant has demonstrated that there are inherent omissions and contradictions in the evidence of P.W. 2 as well. He has admitted in the cross-examination that his father was taken to Cooper Hospital in a police van. That the police had recorded the statement of P.W. 2

in that hospital. That his brother P.W. 1 and his mother were present in the hospital, much before recording of his statement. His statement was recorded by P.S.I. Ravi Sawant. He has further admitted that he had talked with his mother about the incident only when she reached the hospital and that she was not called at the police station in the night of 28th June & 29th June. It is admitted that they used to sell Pav Bhaji on credit to known customers. That they did not maintain any account for the credit. It is also admitted that at the time of incident, all the adjoining shops were closed and that there was a petromax on his stall.

6) P.W. 2 has given the sequence of events and the same are reiterated in the cross-examination that Kailash had firstly come to the Pav stall, gave a blow on the cart. There was no verbal altercation at that time. That when father of P.W. 2 was pushed, P.W. 2 and his brother had attempted to resist the accused Kailash, accused Kailash was giving blows on the leg of father of P.W. 2.

7) P.W. 3 Sunil Joshi acted as a Panch for seizure of clothes of the accused. He has admitted in the cross-examination that police officer prepared seizure panchanama after the seizure of the clothes and had obtained his

signature and that he had signed only on one document. It cannot be said that the said Panchanama is proved.

8) P.W. 4 Baban Amrale had also acted as Panch for scene of offence Panchanama. He has admitted in the cross-examination that he was acquainted with Kashinath Mhatre as he was the owner of the Chawl where P.W. 4 was residing.

9) P.W. 5 Subhash Mandle was declared hostile by the Prosecution.

10) P.W. 6 Shailesh Gamare was also declared hostile by the prosecution.

11) P.W. 7 Vinaykumar Roy was called upon as a Panch for recovery of weapons from Kailash & Parag. That police officer had asked Shailesh to produce weapons and accordingly Shailesh had obliged. Accused had not asked Shailesh to produce the weapons and that the police officers had obtained his signature on the papers and that he had not read the seizure panchanama. Hence, the genuineness of the panchanama is doubtful.

12) P.W. 8 Rajaram Marathe had conducted the post-mortem on the dead body of Kashinath Mhatre. That he had sustained 12 injuries. He has described the injuries before the Court. According to P.W. 8, injury nos. 1 to 4 & 12 of coloumn no. 17 are on the vital part of the body and that injury no. 12

alone is sufficient to cause the death in ordinary course of nature. Similarly injuries nos. 1 to 4, collectively, are also sufficient to cause death in the ordinary course of nature.

13) In the cross-examination, it is stated that except injury no. 12, no other injury by itself is sufficient to cause death.

14) P.W. 9 Dr. Prashan Purandare was working as Registrar at Cooper Hospital. He has deposed before the Court that Kashinath Mhatre was admitted in the hospital in the night on 27/06/1991. He was admitted in the I.C.U. P.W. 9 had examined him and found that injured had sustained a bone deep fracture, C.L.W. on head, bleeding from the nose, injury on the right and left leg, blood pressure was not record-able. He had found that the blood was accumulated in the abdominal cavity. There was haemorrhage of blood inside of the abdominal cavity and it was required operation. At the time of when the patient was being operated, he had succumbed to the injuries. There was severe liver injury. As per the case-papers Kashinath had died at about 3.20 a.m. of 28/06/1991. P.W. 9 had informed the police station about the demise of Kashinath and had sent the dead body for post-mortem. He has admitted in the cross-examination that he could not recollect as to whether he had sutured

the external injuries as the same is not mentioned in the medical case-papers.

15) P.W. 10 Ravindra Sawant was attached as P.S.I. to Santacruz Police Station. In the intervening night of 27/06/1991 he had recorded the statement of Anil Mhatre i.e. P.W. 1 in Cooper Hospital. He had registered the offence after recording of statement of P.W. 1. It is admitted in the cross-examination that Santosh was the informant who had given the information to the police station and had disclosed the name of accused persons as well as the nature of weapons used by them at the time of assaulting his father Kashinath Mhatre. It is elicited in the cross-examination that besides recording of the F.I.R. he has not carried out investigation any further. He has admitted that after Santosh had disclosed the incident, he had not recorded his statement into writing. According to him, it was in the fitness of circumstances that medical aid was a priority to recording to statement. It is also admitted that he had recorded the statement of Anil Mhatre in the hospital. P.W. 10 has proved the omissions and contradictions in the substantive evidence of the witnesses.

16) P.W. 11 Prakash Wadkar was also attached to Santacruz Police Station. That crime no. 462 of 1991 was registered by P.S.I. Sawant. He has deposed before the Court that in the intervening night, at about 12.40 a.m., Anil

Mhatre had been to the Police Station and had reported about the incident. He had disclosed the names of the accused persons. He had caused seizure of the incriminating articles. On the next day, he had received a letter from the hospital which is marked at Exhibit 39 and on the basis of the said letter, he had registered the offence punishable under section 302 of Indian Penal Code. He narrated about the steps taken by him in the course of investigation. There are omissions and contradictions in his substantive evidence. He has denied the suggestion that he had recorded the supplementary statements of Anil & Santosh Mhatre in order to show that they are the eye witnesses.

17) Upon perusal of the evidence adduced by the prosecution, it is clear that P.W. 1 & 2 happened to be sons of the deceased and rather reliable as eye witnesses. That both the witnesses have categorically stated about the prelude to the incident. That their father demanded the amount of arrears and at that time, accused had left the stall only to return with deadly weapons and assault the father of P.W. 1 & 2.

18) It is pertinent to note that in this case, the State has not challenged the acquittal of the accused under section 302 of Indian Penal Code. According to learned Sessions Judge, the substantive evidence of P.W. 1 & 2 would indicate

that accused no. 1 had dealt the blows by iron bar on the legs of Kashinath, but as far as the other injuries are concerned, P.W. 1 & 2 have not stated it clearly, which accused had caused external injuries nos. 1 to 4 & injury no. 12 in coloumn no. 17 of post mortem report. According to learned Sessions Judge, evidence was ambiguous and omnibus statements have been made that all the 4 accused had caused the injuries and therefore, learned Sessions Judge was of the opinion that prosecution has failed to prove the charge under section 302 of Indian Penal Code and therefore, convicted the accused under section 325 r/w 34 of Indian Penal Code and has sentenced them to suffer rigorous imprisonment for 5 years. That at the time of admission of appeal, no notice of enhancement was issued.

19) It is clear from the evidence adduced by the prosecution that prosecution has proved the incident through sterling testimony of sons of the deceased i.e. P.W. 1 Anil Mhatre and P. W. 2 Santosh Mhatre. It is clear that accused had shared the common intention which had developed during the period when the father of P.W. 1 & 2 had demanded the outstanding arrears and the time when they brought weapons. Meeting of minds of the accused to execute the plan to assault the deceased has been clearly made out by the fact

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that they had left the scene of offence only to return with deadly weapons. Hence, it can be safely inferred that accused/appellants are the authors of injuries sustained by the deceased.

20) Needless to reiterate that prosecution has not challenged the acquittal of the accused under section 302 of Indian Penal Code. Accused have undergone rigorous imprisonment for 4 years, 2 months and 15 days. Appeal is of the year 1995. Hence, it would not be appropriate to remand the accused to the custody after a lapse of 21 years. In view of this observation, this Court is inclined to maintain the conviction of the accused under section 325 r/w 34 of Indian Penal Code, however, they are sentenced to the period already undergone, as they would be entitled to remissions also.

21) It would be difficult to part with the Judgment without recording appreciation for the efforts put in by the appointed Advocate for the appellant. Legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Ms. Yogita Deshmukh is quantified at 3000/-.

ORDER

- (i) Appeal is partly allowed as far as sentence is concerned.
- (ii) The conviction of the appellant under section 325 r/w 34 of Indian

Penal Code recorded by Addl. Sessions Judge, Greater Bombay is hereby maintained.

(iii) However, the sentence is modified and appellant is sentenced to the period already undergone.

(iv) Sentence of fine is also maintained.

(v) Bail bonds of the appellant stand cancelled.

(vi) Legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Ms. Yogita Deshmukh is quantified at 3000/-. Legal fees to be paid within three months from today.

22) Appeal stands disposed of accordingly.

(SMT. SADHANA S. JADHAV, J.)