

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
**CRIMINAL APPEAL NO. 645 OF 1996**

Ajay C. Kamulkar, )  
age 32 years, residig at F.Ward, )  
New Saliwada Mordongri Rd., (Behind )  
Octroi), Sawantwadi, Dist. Sindhudurg- )  
416 510. )..Appellant  
(Orig. Accused No.2)

vs.

The State of Maharashtra ... Respondent

WITH  
**CRIMINAL APPEAL NO. 646 OF 1996**

Mahendra Shantaram Dhamnaskar )  
Age 32 years, residing at )  
Room No.11, Ground floor, )  
33L, Nathu Mistry Chawl, )  
Mugbhat Cross Lane, Girgaon, )  
Mumbai 400 004. ).. Appellants

Vs.

The State of Maharashtra ... Respondent

Mr. S.R.Phanase, Advocate appointed for the appellant in Appeal No.645 of 1996.

Mr. Ganesh Gole, Advocate for the appellant in Appeal No.646 of 1996.

Ms. A.A.Mane, APP, for the State.

**CORAM: SMT. SADHANA S.JADHAV, J.**  
**DATE : 3rd May, 2016.**

**JUDGMENT:**

The appellants herein stand convicted for the offence punishable under Section 307 read with Section 34 of the Indian Penal

Code and are sentenced to suffer R.I. for five years and fine of Rs.1,000/- in default further R.I. for six months in Sessions Case No.737 of 1993 by the Addl. Sessions Judge, Greater Bombay, vide judgment and order dated 17.10.1996. Hence, this appeal.

2. Such of the facts necessary for the decision and this Appeal are as follows :-

(a) It is the case of the prosecution that Krishna Mistry was a carpenter by profession. He was residing along with his family at 35/C, Sneha Sadan, Girgaum, Mumbai. he used to manufacture wooden furnitures in one room of his residence. Mahendra Dhamnaskar (accused No.1) was acquainted with Krishna Mistri. Subsequently, the relations were strained. The cause for the quarrel was that Mahendra wanted to marry the daughter of Krishna and Krishna was against the said marriage. It is alleged that Mahendra had threatened Krishna of dire consequences.

(b) Ajay Kamulkar (accused No.2) is the friend of original accused No.1. The accused had left no stone unturned to express his grievances.

(c) According to the prosecution, on 31.10.1992 at about 2.35 p.m., Krishna was polishing the furniture in his shop. His son Rajesh was having meals in the house, whereas his nephew Avinash was in the shop along with Krishna. Krishna was placing the furniture on the road for the purpose of drying. The accused persons were passing by that road. Accused No.2 was having a long chopper in his hand. Both the accused rushed towards Krishna who got scared and rushed into the shop. Accused No.2 followed Krishna in the shop and accused No.2 struck on the head of Krishna with the chopper. Krishna fell down on the ground. Thereafter, accused No.2 once again struck him. Avinash intervened. Arvind had also intervened and caught hold of Ajay i.e. accused No.2. Krishna rescued himself from the attack of accused No.2. They all raised hue and cry. Rajesh i.e. son of Krishna and Anuradha wife of Krishna came to the spot and snatched the chopper from the accused No.2. Ajay escaped from the clutches of all of them and fled from the scene. The other persons caught hold of Mahendra, who was standing near the shop. Police arrived at the scene of offence and had taken Krishna to J.J. Hospital. The PSI of V.P. Road Police Station had received a message from the said area which disclosed that there was a scuffle going on in the said area. A station diary

entry was taken to that effect and PSI Chavan had deputed police staff to the scene of offence. Accused No.1 was taken into custody. Statement of injured Krishna was recorded and on the basis of the said statement, crime No.556/1992 was registered at V.P. Road Police Station against the accused for the offences punishable under Section 307 read with Section 114 of the IPC. After completion of investigation, charge-sheet was filed on 14.7.1993 in the Court of Addl. Chief Metropolitan Magistrate, Girgaum. The case was committed to the Court of Sessions and registered as Sessions Case No.737 of 1993. The prosecution examined as many as 9 witnesses to bring home the guilt of the accused.

3. PW-1 Dr. Mohan Warang had examined the injured Krishna on 31.10.1992. Dr. Warang had deposed before the Court that Dr. Dhaktode had examined Krishna on 31.10.1992. He has clearly stated that he was well acquainted with the handwriting and signature of Dr. Dhaktode as they were colleagues. On perusal of the Injury Certificate, he stated that Krishna had sustained following 3 incised wounds :

- (i) temporal parietal region 5 cm. x 1 cm. x  $\frac{1}{2}$  cm.,
- (ii) scapular region 3 cm. x 1 cm. x  $\frac{1}{2}$  cm.

(iii) left knee joint laterally 6 cm x 1 cm x ½ cm.

According to him, the injured had given history of assault by chopper, but had not disclosed the names of the assailants. The patient was conscious and well-oriented. There was history of giddiness. The patient was admitted in the hospital for 8 days. The injuries were moderate to serious. It is specifically stated by the doctor that only in the eventuality that injuries had not healed within 15 days, then it would have caused the death of the patient. The injuries were on vital parts of the body. It is also stated that Anuradha wife of Krishna was also referred to the hospital on the same day. She had sustained abrasion over the left fore-arm and tenderness in the left knee joint. Avinash Mistri was also examined on the same day. he had sustained small abrasion over right hand dorsum. The injury certificate of Krishna is at Exhibit 7. The injury certificate of Anuradha is at Exhibit 8 and the injury certificate of Avinash is at Exhibit 9. All the three certificates are proved by PW-1.

4. PW-2 Krishna is the injured who had narrated the incident before the Court and has deposed that on 31.10.1992, at about 2.35 p.m. he was polishing the furniture. His nephew Avinash was on the loft. He had

seen the accused coming towards the shop. Accused No.2 was holding a chopper. Upon seeing the chopper in the hand of accused No.2, Krishna had rushed into the shop. Both the accused followed him in the shop and accused No.2 mounted assault. PW-2 had lifted a table to protect himself but unfortunately it had fallen down. His nephew had caught hold of accused No.2 and in the said altercation, the chopper had automatically fallen on the ground. He caught hold of the same, raised hue and cry and thereafter his wife Anuradha and son Rajesh had come into the shop. His statement was recorded in the hospital. He has proved the contents of the first information report which is marked at Exhibit 11. He has identified the accused before the Court as they were well known to him. He has deposed before the Court that accused No.1 – Mahendra Dhamnaskar @ Maya wanted to marry his daughter Pratibha, but he had not accepted the proposal. Subsequently Pratibha was not willing to marry him. According to him, Pratibha had filed several complaints against accused No.1 and, therefore, the relations between accused No.1 and Krishna were strained. He has admitted in the cross-examination that his house consists of 3 parts. The shop is located in the front part and he resides in the rear part. He has also admitted that the marriage of his daughter was solemnized two years prior to the incident. He has also admitted that he did not even wish to see

the accused in closed proximity of his house. It is also admitted that he had filed several complaints against accused No.1 only because he did not wish to see his face. It is specifically admitted that all the three strokes were given by accused No.2. The neighbours had not intervened.

5. PW-3 Avinash Mistry is also an eye-witness. He has also deposed before the Court as per the narration of PW-2. He has admitted in the cross-examination that his aunt Anuradha had informed the V.P. Road Police Station about the incident due to which police arrived at the spot. According to him, at the time of incident, he was sitting on the loft in the shop. The witness was confronted with his previous statement and the omissions and contradictions were brought to his notice.

6. PW-4 Rajesh Mistry is the son of injured Krishna. He has deposed before the Court that at the time of incident, he was having meals in the house. His mother and grandmother were present. He had heard hue and cry of his father and hence rushed to rescue him. It is admitted by him in the cross-examination that his cousin had caught hold of accused No.1 on the road in front of the shop. He has also narrated the incident as per the version of PW-2 and PW-3.

7. PW-5 Anuradha is the wife of Krishna. She has also narrated the incident as per the version of PW-2, 3 and 4. She was confronted with her previous statement. She has admitted in the cross-examination that accused No.2 was residing in the same locality and had to pass from the road passing in front of her house to reach his house.

8. PW-6 Vijay Wadekar is residing in the same building as that of Mistry. He is the panch for the scene of offence panchnama which is at Exhibit 19. He has admitted in the cross-examination that Exhibit 19 was not drawn in his presence and that he had signed it at the instance of the police later on. Hence, it is clear that the contents of the scene of offence panchnama are not proved by the prosecution.

9. PW-7 Sanjay Ghadi was working as the labour with Krishna Mistry. He was working as screen printer. He has narrated the incident as per FIR and the other witnesses. It is elicited in the cross-examination that he had not named both the accused in his previous statement recorded on 31.10.1992.

10. PW-8 Kailash Chavan was attached to the V.P.Road Police Station on 31.10.1992. According to him, he had received a telephonic call from Mugbhat Cross Lane, Sneh Sadan saying that mara-mari was going on. A station diary entry was taken to that effect. They rushed to the scene of offence and had accosted accused No.1. He has deposed about the steps taken by him in the course of investigation. He has admitted that although it is shown in the panchnama at Exhibit 19 that the chopper was blood stained, the same was not mentioned in the panchnama. It is elicited in the cross-examination that he had not taken the station diary entry in respect of the telephonic message.

11. PW-9 Ramesh Wairagar was the Police Inspector attached to V.P. Road Police Station. He had filed the charge-sheet after completion of investigation. He has specifically admitted in the cross-examination that prior to the incident he had not received any complaint either from Anuradha or Pratibha.

11A. Upon perusal of the evidence adduced by the prosecution, it is clear that the prosecution has proved the incident to the effect that the accused-appellants had assaulted the injured Krishna. Accused No.2 is the

author of the injuries sustained by the complainant. That the chopper was used by accused No.2 and that accused No.1 was standing outside the shop on the road and was apprehended from the scene of offence.

12. It is an admitted position that accused No.2 had no grudge against the injured. That he was a friend of original accused No.1 who had nurtured a grudge against him on the ground that PW-2 had turned down the proposal by accused No.1 to marry Pratibha, the daughter of PW-2.

13. The evidence of PW-1 Dr. Warang assumes importance. It is specifically stated that the injured was under treatment for a period of 8 days and that only in the eventuality that the injuries were not treated in the nickp of time they would have been fatal. It is, therefore, clear that the injuries by itself were not sufficient in the ordinary course of nature to cause death.

14. The learned counsel appearing for the accused vehemently submits that the injuries sustained by PW-2 are not in consonance with the definition of Section 320 of the IPC. Both counsel rightly submit that it cannot be said that PW-2 had sustained grievous hurt. It is also rightly

submitted that from the nature of injuries sustained by PW-2, it cannot be said that accused No.2 had attempted to murder PW-2 as the act was not committed with an intention or knowledge that it would have resulted into death.

15. Once the prosecution has established that the incident had taken place as narrated by the eye-witnesses, what needs to be taken into consideration at this stage is as to whether there was any intention to cause death or that the assault was mounted with the knowledge that it should result into death. The logical inference would be answered in the negative and hence the appellants herein deserve to be acquitted of the offence punishable under Section 307 of the IPC.

16. Since the incident is admitted, the appellants deserve to be convicted for an offence punishable under Section 324 of the Indian Penal Code as the accused No.2 had voluntarily caused hurt to PW-2 by a dangerous weapon. Section 324 of the IPC is punishable for a term which may extend to three years or with fine or with both. It appears from the records that accused No.2 was in custody from 16.6.1993 to 17.10.1996 i.e. for a period of more than three years. He has completed the substantive

sentence. Accused No.2 happened to be the friend of accused No.1 and had drawn into action the grievance and the grudge of accused No.1 and at the behest of accused No.1. Therefore, accused No.1 also deserves to be convicted along with accused No.2 for an offence under Section 114 of the Indian Penal Code.

17. Section 114 of the IPC reads as follows :-

***“114. Abettor present when offence is committed – Whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.”***

In fact, accused No.1 has committed an offence under Section 114 of the Indian Penal Code. However, he is convicted along with accused No.2 for an offence punishable under Section 307 read with Section 34 of the Indian Penal Code. It is in these circumstances that the conviction of the appellants for the offence punishable under Section 307 read with Section 34 of the IPC is quashed and set aside. They are convicted for the offence punishable under Section 324 read with Section 34 of the IPC.

### **ORDER**

(i) Both the appeals are partly allowed.

- (ii) The conviction of the appellants for the offence punishable under Section 307 r/w 34 of the Indian Penal Code recorded by the Addl. Sessions Judge, Mumbai in Sessions Case No.737 of 1993 vide Judgment and Order dated 17.10.1996 is hereby quashed and set aside.
- (iii) The appellants are convicted for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code and are sentenced to the period already undergone.
- (iv) Sentence of fine is maintained.
- (v) Bail bonds of appellants stand cancelled.
- (vi) Legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Shr S.R.Phanase is quantified at Rs.3,000/-.

The Appeals stand disposed of.

**(SMT.SADHANA S.JADHAV, J.)**