

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.791 OF 2012

DIVAKAR BHAIRAVNATH YADAV @ ROCKY)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Apeksha Vora, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR

**DATE : 17th NOVEMBER 2016 &
18th NOVEMBER 2016.**

ORAL JUDGMENT :

1 By this appeal, appellant / convicted accused is challenging the judgment and order of his conviction passed on 28th December 2011 in Sessions Case No.18 of 2011 by the learned 3rd Ad-hoc Assistant Sessions Judge, Greater Bombay. The appellant / accused was convicted for the offences punishable under Sections 509, 506(II) and 307 of the IPC. For the offence punishable under Section 509 of the IPC, he was sentenced to

suffer rigorous imprisonment for 6 months and to pay fine of Rs.500/-, in default, to suffer simple imprisonment for 15 days; for the offence punishable under Section 506(II) of the IPC, the appellant was sentenced to suffer rigorous imprisonment for 1 year and to pay fine of Rs.500/-, in default, to suffer further simple imprisonment for 15 days; and for the offence punishable under Section 307 of the IPC, the appellant / accused was sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs.3,000/-, in default, to suffer further simple imprisonment for 1 month. He was acquitted of the offences punishable under Section 504 of the IPC and under Section 135 read with Section 37(1)(a) of the Bombay Police Act. Substantive sentences imposed on the appellant / accused were directed to run concurrently. For the sake of convenience, the appellant shall be referred to as the accused.

2 Heard the learned counsel appearing for the appellant / accused. She vehemently argued that evidence of prosecution and particularly that of PW7 Dr.Shams Tabrez does

not show that injured Pravin Padwal had suffered serious injuries which were ordinarily sufficient to cause death of a human being. The learned counsel argued that, though the offence punishable under Section 307 of the IPC does not require causing of even hurt, but intention of the accused is required to be established. Such intention, according to the learned counsel for the appellant / accused can be gathered from the nature of weapon used, nature of injury caused as well as opportunities for the accused for causing injuries. The learned counsel argued that in the case in hand, though according to the prosecution case, the accused was holding rampuri knife having blade of length of 5 inches, injury allegedly caused to PW3 Pravin Padwal is of size 2 cm x 2 cm x peritoneal deep. That, though the accused was having tons of opportunities to inflict several blows of knife, he had inflicted only one blow, and as such, it cannot be said that the accused had assaulted PW3 Pravin with such intention and knowledge, and in such circumstances, that if by that act, he had caused death of PW3 Pravin, then, he would have been guilty of murder. The learned counsel for the appellant / accused further

argued that offence punishable under Section 509 of the IPC is also not made out by the prosecution as the utterances allegedly made by the accused were not even heard by PW2 Priyanka Raorane. According to the learned counsel for the appellant, evidence of the prosecution is suffering from several contradictions and the same is not consistent. Evidence of PW1 Akshay is at variance with evidence of PW5 Prakash Ramugade, the Investigating Officer, in respect of the time when Akshay was present at the spot. Therefore, in every probability, PW1 Akshay is deposing falsely to implicate accused in the crime in question. The learned counsel further argued that the prosecution has suppressed the genesis of the incident as though according to the prosecution case, the accused has caused injury by means of knife, medical papers show that PW3 Pravin had suffered contused lacerated wound. Therefore, according to the learned counsel for the appellant, the appellant / accused is entitled for benefit of doubt in this case, and therefore, the appeal needs to be allowed.

3 I have also heard the learned APP appearing for the respondent / State. He vehemently argued that the accused is identified by the prosecution witnesses and evidence of PW3 Pravin cannot be jettisoned because being an injured witness, his presence on the scene of occurrence cannot be doubted. The learned APP further argued that the weapon used by the accused is knife and the part of body chosen for giving a blow is abdomen. This, according to the learned APP, reflects intention of the accused to commit murder of PW3 Pravin. The learned APP submitted that for proving the offence under Section 509 of the IPC, intention of the accused is relevant, and what is need to be examined is utterances hurled against the victim and not whether such utterances were actually heard by the victim. The learned APP, therefore, submitted that the impugned judgment and order convicting the accused needs to be confirmed.

4 In order to bring home the guilt to the accused, the prosecution has examined in all seven witnesses. Akshay Raorane is examined as PW1 at Exhibit 10. FIR lodged by him is at Exhibit

11. Priyanka Raorane is examined as PW2 at Exhibit 12. Injured Pravin is examined as PW3 at Exhibit 14. Panch witness B. Gupta is examined as PW4 at Exhibit 15. Exhibit 16 is the Spot cum Seizure panchnama, whereas, Exhibit 17 is Seizure panchnama of clothes of the victim, namely, Pravin Padwal. Investigating Officer Prakash Ramugade is examined as PW5 at Exhibit 18. Another Investigating Officer, namely, M.S. is examined as PW6. Dr.Tabrej, who was present at the time of operation of PW3 Pravin is examined as PW7 at Exhibit 25 and Exhibit 26 are the papers of medical treatment of injured PW3 Pravin.

5 Considering the nature of charge leveled against the accused, fate of the prosecution case to a large extent hinges on testimonies of PW1 Akshay, PW2 Priyanka and PW3 Pravin. It is the case of prosecution that on 18th December 2009, PW1 Akshay Raorane accompanied by his aunt PW2 Priyanka Raorane and one Nikita Raorane had returned from Churchgate to Dahisar Local Railway Station. When they were passing from near the subway of the local railway station, looking at PW2 Priyanka Raorane, the

accused uttered “*kya ball hai*” intending to outrage her modesty. PW1 Akshay took exception to this conduct of the accused. The accused pushed him. Therefore, PW1 Akshay telephonically contacted PW3 Pravin, a home-guard, who happens to be his maternal uncle. PW3 Pravin immediately reached on the spot and questioned the accused. Thereupon, according to the prosecution case, the accused whipped out a rampuri knife and dealt a blow thereof on abdomen of PW3 Pravin causing bleeding injury to him. Pravin was then taken to Bhagwati hospital for medical treatment where he was operated.

6 Careful scrutiny of evidence of PW1 Akshay and PW2 Priyanka goes to show that in unison both these witnesses deposed that when they came out of Dahisar local railway station, the incident in question took place. As per version of PW1 Akshay, the accused uttered obscene words “*kya ball hai*” for PW2 Priyanka. Evidence of both these witnesses further goes to show that the accused abused Akshay, and therefore, PW1 Akshay called his maternal uncle PW3 Pravin, who happens to be a home-guard.

Depositions of PW1 Akshay, PW2 Priyanka and PW3 Pravin then congruously shows that when PW3 Pravin tried to intervene, the accused abused him, took out a knife and stabbed PW3 Pravin on abdomen. Thereafter, as seen from their evidence, the accused threatened them and others by uttering that if anyone dares to come near, he will stab him. Evidence of PW1 Akshay gains further corroboration from the FIR Exhibit 11 lodged by him with promptitude.

7 The incident of assault on PW3 Pravin coming on record through version of these three witnesses gains further corroboration from evidence of PW7 Dr.Tabrej. His evidence shows that he was attached to Bhagwati hospital and he had examined injuries suffered by PW3 Pravin. Version of PW7 Dr.Tabrej shows that PW3 Pravin was having a stab injury of size 2 cm x 3 cm x peritoneal deep at left para umbilical region, apart from an abrasion to his left forearm. This Medical Officer further deposed that PW3 Pravin was operated at Bhagwati hospital. Cross-examination of this witness goes to show that when police came to

the hospital, PW3 Pravin was in post operative sedation. This fact deposed by the Medical Officer finds corroboration from version of PW3 Pravin. As per version of PW3 Pravin, ultimately police recorded his statement on 22nd December 2009 at Bhagwati hospital as before that he was unconscious.

8 Exhibit 26 are papers of medical treatment of PW3 Pravin duly proved by PW7 Dr.Tabrej. It is seen from medical case papers at Exhibit 26 that PW3 Pravin had taken treatment as injured patient with the said hospital from 18th December 2009 to 27th December 2009. Final diagnosis recorded by the Medical Officer is suffering of stab injury by PW3 Pravin. In the wake of this evidence, I find no substance in the contention of learned counsel for the appellant / accused that the documents at Exhibit 26 show that PW3 Pravin has suffered contused lacerated wound. Rather the medical case papers show stab wound suffered by PW3 Pravin and the manner in which it was operated by giving incision to the abdomen of PW3 Pravin.

9 PW1 Akshay, PW2 Priyanka and PW3 Pravin have categorically identified the appellant / accused as the person who has caused stab injury to PW3 Pravin. Identification before the court is a piece of substantive evidence and there is nothing on record to doubt testimonies of these witnesses recording identification of the accused. Even otherwise, evidence of PW1 Akshay and PW5 Prakash Ramugade, Investigating Officer, as well as PW6 Motiram Sable, goes to show that the accused was arrested from the spot of the incident soon after the incident. An attempt was made to show that this evidence of arrest of the accused from the spot soon after the incident is doubtful, by contending that evidence of PW1 Akshay shows that he was at the hospital up to 11 to 11.15 p.m. whereas, that of PW5 Prakash Ramugade shows that at about 10. 45 p.m. on that day, i.e. 18th December 2009, Akshay was at the spot. Such minor inconsistencies in version of a witness needs to be ignored because a witness is not expected to look at the watch on each and every time during happening of events in succession after commission of the crime in question. The time gap is so minimal that it needs to

be ignored and much capital cannot be made out of this small variance in deposition of these two witnesses about the time. Discrepancies which do not go to the root of the matter and shake the basic version of the witness cannot be annexed with undue importance. What is required to be considered is a probability factor. Nothing is brought on record to show that versions of PW1 Akshay, PW2 Priyanka and PW3 Pravin about the incident, suffered from basic infirmities rendering it unworthy of credit. Therefore, cumulative effect of versions of these three witnesses coupled with that of PW7 Dr.Tabrej unerringly points out causing stab injury by the accused to PW3 Pravin on 18th December 2009.

10 Evidence on record shows that half T-Shirt and sando baniyan of injured Pravin was seized vide seizure memo Exhibit 17 which is duly proved by PW4 Bhupen Gupta, panch witness, as well as PW5 Prakash Ramugade, Investigating Officer. It is also seen that the blood stained knife was seized from the accused vide seizure panchnama Exhibit 16, proved by PW4 Bhupen Gupta and PW5 Prakash Ramugade. These articles were sent for chemical

analysis and report of Chemical Analyzer shows that all these articles were stained with blood of “B” Group. Evidence on record shows that PW3 Pravin had suffered bleeding injury causing staining of seized half T-Shirt and sando baniyan by blood. These clothes are having corresponding cut reflecting stab injury. Thus, by applying test of a prudent person, it can be said that half T-Shirt and sando baniyan are stained with blood of PW3 Pravin and the group of his blood is “B”. Finding of blood of “B” Group on seized knife gives corroboration to the prosecution case of assault by means of the said knife by the accused to PW3 Pravin.

11 Now let us examine whether the stab injury inflicted on PW3 Pravin by the accused was with such an intention and knowledge and in such circumstances, that if by that act, he had caused death to PW3 Pravin, then he would have been guilty of murder of PW3 Pravin. It is well settled that for proving the offence punishable under Section 307 of the IPC, causing of hurt is not at all necessary. What is material is the intention coupled with an overt act. All that is necessary, is to establish the intention

with which the act is done. Once the intention is established, the nature of act will be wholly immaterial. Presence of injuries, their number and nature of injuries suffered by the victim are always helpful while gathering intention of the accused in committing the act constituting the offence. Such intention can be gathered from nature of the weapon, the part of body chosen for giving blows and nature of injuries inflicted, apart from opportunities available with the accused. Intention is something which is done intentionally, deliberately and purposely.

12 If evidence adduced by the prosecution in this case is examined in the light of this requirement of the offence punishable under Section 307 of the IPC, then it is seen that the accused who was holding a rampuri knife having 5 inch blade had given only one blow on person of PW3 Pravin. The size of single injury as seen from the evidence of PW7 Dr.Tabrej is merely 2 cm x 3 cm x peritoneal deep. Evidence of prosecution witnesses does not show that there was resistance offered by the victim or other persons to the accused at the time of the incident or soon after the

incident. Still, apart from inflicting one single blow, the accused did not inflict any other injury or blow of knife on person of PW3 Pravin. Though PW1 Akshay was very much present on the scene of occurrence at the time of the incident, the accused had not caused any hurt to him in the incident.

13 Evidence of PW7 Dr.Tabrej does not show whether the injury inflicted by the accused on PW3 Pravin was a life threatening injury. There is no evidence to the effect that the injury suffered by PW3 Pravin was capable of causing his death or was sufficient in the ordinary course of nature to cause his death. Therefore, in the instant case, the prosecution has not adduced necessary evidence to prove intention of the accused, requisite for making the offence punishable under Section 307 of the IPC.

14 With this, one will have to examine what offence is committed by the accused by stabbing PW3 Pravin by means of a knife. Evidence of PW3 Pravin and PW7 Dr.Tabrej shows that because of stab injury, PW3 Pravin was operated at the hospital,

where he was admitted as an indoor patient for a considerable period. Perusal of medical case papers at Exhibit 26 reflects that PW3 Pravin had undergone surgery and sutured to the wound. This indicates that PW3 Pravin must have suffered because of the stab injury, atleast for a period of twenty days with severe bodily pain. It can be safely concluded that PW3 Pravin might not have been in a position to follow his ordinary pursuits atleast for a period of twenty days after suffering the injury at the hands of the appellant / accused. The prosecution, therefore, has certainly made out the offence punishable under Section 326 of the IPC. As such, the appellant is certainly liable for conviction for the offence punishable under Section 326 of the IPC, and accordingly, he is convicted of the said offence.

15 Learned counsel for the appellant was at pains to argue that, as PW2 Priyanka Raorane had not heard the obscene remark hurled at her by the accused, the accused is not liable for conviction for the offence punishable under Section 509 of the IPC, and at the most, he can be convicted for the offence

punishable under Section 294 of the IPC. Section 509 of the IPC reads thus :

509. Word, gesture or act intended to insult the modesty of a woman — Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Evidence of PW1 Akshay establishes what were utterances of the accused addressed to PW2 Priyanka Raorane, though she might not have heard the same. At the cost of repetition, it needs to be put on record that, the accused, upon seeing PW2 Priyanka Raorane, uttered “*kya ball hai.*” These utterances are obscene remarks on breast of PW2 Priyanka Raorane. Therefore, such utterances are undoubtedly intending to insulting the modesty of PW2 Priyanka Raorane. Section 509 of the IPC provides that

utterances intending to insult the modesty of woman should be with an intention that such words or sound shall be heard. Section 509 of the IPC does not provide that such utterances should be heard by the subject. Hearing such utterances by anybody would amount to the offence punishable under Section 509 of the IPC. Hence, no infirmity can be found in the order of conviction of the accused for the offence punishable under Section 509 of the IPC.

16 Similarly, evidence on record shows that the accused had intimidated the prosecution witnesses as well as public at large after assaulting PW3 Pravin, by branding knife. Therefore, no infirmity can be found in his conviction for the offence punishable under Section 506(II) of the IPC.

17 In the result, the appeal needs to be allowed partly by modifying conviction of the appellant / accused for the offence punishable under Section 307 of IPC to that under Section 326 of the IPC.

Rest of the order of conviction and sentence of the appellant / accused needs to be maintained. The only question left for decision is, now what should be the sentence to which the accused is liable for committing an offence punishable under Section 326 of the IPC. Needless to state that all substantive sentences of imprisonment imposed on the appellant / accused are directed to run concurrently by the learned trial court.

18 So far as the sentence part of the impugned order is concerned, the appellant is reported to be behind the bars from 18th December 2009, and as such, he has suffered rigorous imprisonment for a period of about 6 years 11 months. Similarly, it is seen from the evidence that the appellant is a footpath dweller and as such, there is no propriety in imposing any fine on him for the offence committed by him, because of his extreme poverty.

Therefore, the sentence of rigorous imprisonment imposed upon the appellant / accused is modified to the sentence already undergone by him for all the offences proved against him, including the one punishable under Section 326 of the IPC.

The appeal is partly allowed to this extent and the same is disposed of.

The appellant / accused be set at liberty, if not required in any other case.

(A. M. BADAR, J.)