

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.125 OF 2016

Husainbin Hasan Yafai @ Chous,
Age: 42 years, Occu.: Business,
R/o. Panjeshah Gurunna Galli,
House No.22-696,
Near Char Minar, Hyderabad (A.P.)

...APPELLANT
(Orig. Accused)

VERSUS

1. State of Maharashtra
2. Khalid Fajil Chaus,
Age: 76 years, Occu.: Agriculture,
R/o. Chaubara, Udgir, Tq. Udgir,
Dist. Latur

...RESPONDENTS
(Respondent No.2 -
Orig. First Informant)

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Shri. Rajendra Deshmukh, Advocate for Appellant;
Shri. S.W. Munde, A.P.P. for State;
Shri. S.R. Choukidar, Advocate for Respondent No.2

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CORAM: P.R. BORA, J.

DATE : 23/08/2017

ORAL JUDGMENT:

1. The appellant has filed the present appeal against the order of conviction passed by the Court of Additional Sessions Judge at Udgir in Sessions Case No.5/2014, decided on 1st of March, 2016, whereby the

appellant has been convicted for an offense under Section 307 of IPC and has been sentenced to suffer rigorous imprisonment for seven years and fine of Rs.15,000; in default to suffer rigorous imprisonment for further seven months. Though the appellant has also been held guilty for the offenses punishable under Sections 504 and 506 of IPC, no separate sentence has been awarded for the said offenses.

2. The appellant was prosecuted for the offense punishable under Sections 307, 504, and 506 of I.P.C., by Police Station, Udgir, on the complaint lodged by one Khaled Fazil Chaus, resident of Chaubara road, Udgir, Taluka and district Latur. According to the report lodged by said Khaled, on 15th of June, 2013, at about 6.30 a.m., the appellant made an assault on him with knife and caused him severe injuries on his chest as well as to his neck. It was complained by Khaled that the appellant first made assault on his chest by the aid of the knife and then pierced the said knife in his neck. As is revealing from the prosecution material, the knife, allegedly pierced by the appellant from one side of the neck of the informant,

had come out from the other side. The informant approached the Police Station in the said condition whereupon he was immediately sent to the Sub District Hospital at Udgir. On report of Khaled, an offense was registered against the appellant vide Crime No.20/2013 and the investigation was carried out. From the spot of occurrence, election card of the appellant was seized. The knife was removed in the hospital and then it was seized by the Police. The accused was arrested on 28th of August, 2013. The statement of the necessary witnesses were recorded by the investigating officer. The clothes on the person of the victim as well as on the person of the accused were seized by the Police. After completing the investigation, chargesheet was filed against the appellant.

3. In order to bring home guilt of the accused, the prosecution examined as many as eight witnesses and also placed on record the Chemical Analyzer's report pertaining to the articles seized in the crime. The defense of the appellant was of total denial and false implication. The defense of alibi was also raised by the appellant. It was

the contention of the appellant that out of previous enmity between him and the informant, he was falsely implicated by the informant in the alleged crime vindictively. The learned Sessions Court, after having assessed the oral as well as documentary evidence brought before it, held the appellant guilty for the offenses punishable under Sections 307, 504 and 506 of I.P.C. and sentenced the appellant to suffer rigorous imprisonment for seven years with fine of Rs.15,000/-; in default, to undergo the further rigorous imprisonment for seven months. Aggrieved thereby, the present appeal is filed by the original accused.

4. Shri R.S.Deshmukh, learned Counsel for the appellant, submits that the trial Court has utterly failed in appreciating that there was previous enmity between the accused and the informant which has resulted in filing a false report by the accused. Learned Counsel submitted that sufficient evidence was placed on record to prove that the appellant and the informant were on inimical terms on account of a land dispute in between them. Learned Counsel further submitted that the Sessions Court has erred in holding the appellant guilty relying on the sole

testimony of the informant. Learned Counsel, placing reliance on the judgment of the Honourable Apex Court in the case of Vadivelu Thevar Vs. The State of Madras (AIR 1957 SC 614) submitted that, in absence of any corroboration to the testimony of the victim informant, the Sessions Court shall not have based the conviction upon the sole testimony of the informant. Learned Counsel submitted that though the prosecution did not prove the fact that the election card seized from the spot of occurrence was of the present appellant, the trial Court has relied upon the said evidence to base the conviction of the accused. Learned Counsel further submitted that the Sessions Court has erred in not appreciating that the informant did not disclose name of the appellant to Alwin, PW 5 who, according to his story, took him first to the Police Station and then to the hospital. Learned Counsel further submitted that the Sessions Court has further erred in not considering the fact that the Police Inspector Kendre had recorded the dying declaration of informant wherein he had made complaint against unknown person and subsequently, the name of the appellant came to be falsely implicated. Learned Counsel further submitted that the

learned Sessions Court has also failed in not taking into account the material omissions and contradictions in the oral evidence of the witnesses examined by the prosecution. Learned Counsel further submitted that without there being any cogent and sufficient evidence, the Sessions Court has held the appellant guilty. Learned Counsel, therefore, prayed for setting aside the order of conviction and to acquit the appellant of the charges levelled against him.

5. Shri S.R.Yadav Lonikar, learned A.P.P., supported the impugned judgment and order. Learned A.P.P. submitted that PW 6 Khaled Chaus has given the ocular account of the entire incident. Learned A.P.P. submitted that he is the victim of the alleged assault and he had perfectly identified the appellant to be the assailant. Learned A.P.P. submitted that the testimony of PW 6 Khaled has been corroborated by PW 5 Alwin Karajkar. Learned A.P.P. further submitted that the election identity card of the appellant was seized from the spot of occurrence because of which the presence of the appellant on the spot of occurrence is, undoubtedly,

proved by the prosecution. Learned A.P.P. further submitted that in the statement under Section 313 of Cr.P.C., the appellant though has taken the plea of alibi, has utterly failed in substantiating the said plea. Learned A.P.P. submitted that the Sessions Court has rightly held the appellant guilty for the offense punishable under Sections 307, 504 and 506 of IPC and no interference is required in the order of conviction so passed by the learned Sessions Court. Learned A.P.P. further submitted that having regard to the nature of offense, no leniency needs to be shown to the appellant. He, therefore, prayed for dismissal of the appeal.

6. I have carefully considered the submissions made on behalf of the appellant and on behalf of the State. I have perused the impugned judgment and the evidence on record. The testimony of PW 6 Khaled Chaus is of vital importance in the present matter. He is the victim of the alleged assault. In his testimony before the Court, PW 6 has narrated the entire incident as it had happened. The ocular account provided by PW 6 in his testimony before the Court fully corroborates the facts as were stated by

him in the statement which was given by him to the Police on 15th of June, 2013, on the basis of which the crime was registered against the appellant. The fact that PW 6 was assaulted by knife and the knife was pierced in his neck has been fully established through the prosecution evidence. As has come on record, PW 6 had reached to the Police Station in the same injured condition, having knife inserted in his neck and in the same position, he was taken to the Government hospital where he was operated and the knife was removed. PW 1 Dr.Ranidevi Kadam, in her testimony before the Court, has deposed that she examined PW 6 Khaled on 15.6.2013 and noticed the following injuries on his person:

" 1. Incised wound of size 3 cm on either side of midline over sub mandibular region with weapon in situ. Wound of entry left side. Wound of exit right side. injury is grievous and dangerous to life. Injury is possible by sharp object. Age of injury is withing 6 hours.

2. Incised wound on chest wall on left subclavicular region, margine clean cut, of size 4 cm x 1 cm x 2 cm. Injury is simple. Injury is possible by sharp object. The age of injury is withing 6 hours.

3. Incised wound on chest-wall right

mammary region margins clean cut, size 2 cm x 1 cm 1 cm. Injury is simple. Injury is possible by sharp object. The age of injury is within 6 hours."

7. PW 5 Alwin also corroborated the evidence of PW 6 as about the injuries caused to his neck by a knife. PW 5 has also identified the said knife before the Court. From the aforesaid evidence, the prosecution has, undoubtedly, proved the injuries caused to PW 6. As noted above, the knife with which PW 6 was assaulted, was removed in the hospital and then was seized in the offense. As such, no other proof was required to hold that the injury to the vital organ of PW 6 was caused with the said knife which, according to the statements of the witnesses, was sharp enough to cause the said injury.

8. The next question which now arises whether the prosecution evidence is sufficient to prove that the assault on PW 6 was made by the appellant. In the FIR lodged by PW 6, he has specifically complained that he was assaulted by a knife by the appellant. In his testimony before the Court, PW 6 has reiterated the said fact. There was no question of identification since the appellant is the near

relative of PW 6. As has been deposed by PW 6, the appellant is son of his sister Bilkis. The relationship has not been disputed in the cross examination. It is further not disputed that some civil litigation is going on in between PW 6 and the mother of the appellant viz. Bilkis Begum.

9. In the cross examination of PW 6, it was suggested to him that, in his first statement recorded by the Police Inspector Kendre, he had stated that three unidentified persons attacked on him; of course, the said suggestion was denied by PW 6. By giving the suggestion as aforesaid, an attempt was made by the appellant accused to raise a defense that he was not present on the spot of occurrence at the relevant time and he did not make any such assault on PW 6. It is further relevant and most significant to state that, in his statement recorded under Section 313 of the Criminal Procedure Code, a specific plea has been raised by the appellant that on 15.6.2013 i.e. on the day of the incident, he was not in Udgir and he came to know about the assault on PW 6 on 28th of August, 2013, by the Police persons. In short, the

appellant raised the plea of Alibi. It need not to be stated that once a plea of alibi is raised, the burden shifts on the accused to substantiate the said defense and to substantially prove at which place he was when the alleged incident happened, if not on the spot of the occurrence. Admittedly, no such evidence has been adduced by the appellant. In absence of any such evidence, the plea of alibi has to be turned down.

10. As has been stated by the accused in para 8 of his written submission under Section 313 of Cr.P.C., on 15.06.2013, when the alleged incident happened, he was not in Udgir City. It has to be stated that circumstances leading to Alibi were within the knowledge of the Accused and as provided under Section 6 of the Evidence Act, he was to establish the same satisfactorily. It is well settled that the plea of Alibi must be proved by the accused with absolute certainty. I am conscious of the legal position that raising a false plea can not be the sole link or the sole circumstance, on which a conviction of the Accused can be based, however, a false plea of Alibi can certainly be a link in the chain of circumstances. In the present matter, since

the appellant-accused has utterly failed in substantiating the plea of Alibi, the possibility of the presence of the accused on the spot of occurrence at the relevant time, can not be completely excluded.

11. Moreover, as has been noted by me earlier, the appellant happens to be the near relative of PW 6 Khaled. It, therefore, cannot be believed that he would not have identified the person who made assault on him. Merely because the statement, if any, recorded by the Police Inspector Kendre has not come on record, no such inference can be drawn that in the said statement, PW 6 had stated that he was assaulted by three unidentified persons.

12. The further fact that from the spot of occurrence, the election identity card of the appellant was seized is the another incriminating circumstance against the appellant. The finding of the election identity card of the appellant on the spot of occurrence leads to an inference that he was present on the spot of the occurrence. No explanation has been provided by the

appellant in regard to his election identity card found on the spot of the occurrence. It was sought to be canvassed by the learned Counsel that since no such specific question was put to the appellant while recording his statement under Section 313 of the Code of Criminal Procedure, the appellant did not have adequate opportunity to explain the said evidence. However, the contention so raised cannot be accepted. In the statement under Section 313 of Cr.P.C., a question was put to him bringing to his notice the evidence as has come on record through the spot panchnama at Exh.33 showing that one identity card was seized from the spot of occurrence. The appellant has simply stated that the evidence which has come on record is false. The appellant was having an opportunity to explain about the identity card seized from the spot of occurrence but the said opportunity had not been availed by him.

13. More importantly, as noted by me hereinabove, the appellant in his statement under Section 313 of Cr.P.C. has raised the plea of alibi. Once the said plea was raised by him, the onus had shifted on him to prove the said plea beyond reasonable doubt and to bring on record

as to where he was at the relevant time when the alleged incident happened, if not on the spot of the occurrence. Admittedly, no such evidence has been adduced by the appellant.

14. It has to be further stated that through the evidence of PW 6 Khaled, the motive of the appellant in making assault has also come on record. As has been stated by PW 6, there was a property dispute going on between him and the mother of the appellant, namely, Bilkis Begum. Though it is true that a plea of enmity is double edged weapon, having regard to the evidence brought on record in the present case, it appears to me that the prosecution has successfully proved the motive of the appellant in making assault on PW 6 Khaled. There seems no reason for disbelieving the testimony of PW 6 which has been sufficiently corroborated by the medical evidence as well as the testimony of PW 5 Alwin.

15. After having considered the entire evidence on record, it does not appear to me that the learned Sessions Court has committed any error in holding the appellant guilty for an offense under Section 307 of IPC. The appellant has utterly failed in making out any case so as to

set aside the order of conviction passed by the Sessions Court.

16. In so far as the quantum of punishment is concerned, it was alternatively sought to be canvassed that the Sessions Court has awarded harsh punishment which is disproportionate to the offense committed by the appellant. The contention of the appellant does not deserve any consideration in view of the evidence on record. The manner in which the assault was made on the appellant and the location of the injury caused by the appellant, there remains no doubt that it was an attempt made by the appellant to cause death of PW 6. It, therefore, cannot be accepted that the punishment as has been imposed by the learned Sessions Court is any way harsh or disproportionate. No interference is, therefore, warranted in the quantum of punishment also.

. The Criminal Appeal, being devoid of substance, deserves to be dismissed and is accordingly dismissed.

(P.R.BORA)
JUDGE

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AGP/