

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

CRIMINAL APPEAL NO. 301 OF 2000

- 1) Ishaq Chand Khan Pathan,
Age: 35 years,
- 2) Sharif Mohd. Pathan,
Age: 37 years,
- 3) Ayyub Fakir Pathan,
Age: 40 years,
- 4) Layak Mohd. Pathan,
Age: 40 years,
All R/o Manik-Daundi,
Tal. Pathardi, Dist. Ahmednagar. .. **Appellants**

Versus

The State of Maharashtra .. **Respondent**

Ms. A.N. Ansari, Advocate for Appellants.
Mr. D.R. Kale, A.P.P. for Respondent-State

with

CRIMINAL APPEAL NO. 391 OF 2000

The State of Maharashtra,
through Pathardi Police Station,
Tq. Pathardi, Dist. Ahmednagar. .. **Appellant**

Versus

- 1) Ishaq Chand Khan Pathan,
Age: 30 years,
- 2) Sharif Mohd. Pathan,
Age: 32 years,

- 3) Ayyub Fakir Pathan,
Age: 35 years,
- 4) Layak Mohd. Pathan,
Age: Major,
All R/o Manik-Daundi,
Tal. Pathardi, Dist. Ahmednagar.

.. **Respondents**

Mr. D.R. Kale, A.P.P. for Appellant-State
Ms. A.N. Ansari, Advocate for Respondents.

**CORAM : S.V. GANGAPURWALA &
MANGESH S. PATIL, JJ.**
RESERVED ON :11/08/2017
PRONOUNCED ON : 12/10/2017

JUDGMENT:- (Per S.V. Gangapurwala, J.)

. Criminal Appeal No. 391 of 2000 is filed by the prosecution against the judgment of the Sessions Court acquitting accused nos. 2, 3, 4 and 40 of the offence punishable under Section 324 and 148 of the Indian Penal Code. Appeal No. 301 of 2000 is filed by accused nos. 2, 3, 4 and 40 challenging the judgment of the Sessions Court convicting them for the offence punishable under Section 323 and 341 of the Indian Penal Code.

2. The case of the prosecution is that on 17.09.1994 at about 5.00 pm the procession for immersion of idol of Ganpati was taken out at village Manik-Daundi, the procession culminated at about 8.30 pm. Thereafter, the complainant Popat had meal and was sleeping. At about

9.00 pm the people from Muslim community as named by the said complainant came to the house of the complainant and asked him as to why he had taken out procession of Ganpati, on that count the accused persons pelted stones at his house. The complainant was injured, the complainant came to know that on the way to Manik-Daundi to Shelke Wada in Kund near river one Jagannath Murlidhar Shelke and Shankar Uttam Shelke resident of Shelke Wada, Taluka Pathardi were also beaten by the said accused persons with knife and stones. The mob had broken glasses of the Hanuman temple by pelting stones. Pursuant to the complaint the offence came to be registered against the number of accused persons under Section 143, 147, 148, 149, 324, 341, 452, 337, 338, 427 and 307 of Indian Penal Code. In the trial all the accused persons were acquitted of all offences except accused nos. 2, 3, 4 and 40. These accused were convicted for the offence punishable under Section 323 and 341 of Indian Penal Code. There were acquitted of all other offences.

3. As we are concerned with accused nos. 2, 3, 4 and 40, we are discussing the evidence relevant to these accused only.

4. The prosecution to establish the guilt of accused nos. 2, 3, 4 and 40 is mainly relying on evidence of PW-15 i.e. Jaganatth Shelke and

PW-9 i.e. Dr. Ramprasad Purshottam Kulkarni, who is the Medical Officer at Rural Hospital, Pathardi.

5. It would be worthwhile to consider that PW-15 injured Jagannath Shelke could not identify accused no.2 in the Court nor any identification parade was conducted.

6. The evidence of PW- 15 will have to be appreciated on the touchstone of the fact that alleged incident had taken place at about 9.00 pm in the night and further the said witness had specifically stated that there was no electricity facility on the way leading to his Vasti from the village i.e. where the Kund is situated and the alleged incident had taken place. The counsel for the accused laid emphasis on the omissions in the statement and submits that the said witness is improvising the case. It is also the contention of the learned counsel for the accused that the articles as alleged to have been used in the commission of the offence are not at all recovered from accused nos. 3, 4 and 40. The recovery from the accused no.2 is also shrouded with suspension and the Article which is said to have been recovered from the house of accused no.2 would be of no avail, for the reason that such article i.e. iron bar would be found in all houses of agriculturists. It is further the contention of the accused that, said PW-15 Jagannath even could not state in his

statement before the Police as to which weapons were allegedly used in the said offence. The said witness admitted that the police had told him that as the earlier statement was not properly recorded a fresh statement was being recorded. According to the learned Counsel, the evidence on record is not sufficient to convict the accused for the offence punishable under Section 323 and 341 of the Indian Penal Code.

7. The learned A.P.P. submits that the prosecution has proved the guilt as against the accused nos. 2, 3, 4 and 40, beyond all reasonable doubt. Recovery has been made from accused no.2. Minor contradictions and omissions in the statement would not be fatal to the prosecution case considering that the statement was recorded after a long gap. The incident as narrated by PW-15 and injury sustained by him are corroborated by the evidence of PW-9 and the said evidence is sufficient to convict the accused. Considering the weapons used and the injuries sustained by PW-15, the accused nos. 2 to 4 and 40 are required to be convicted under Section 324 of the Indian Penal Code. The case for the offence punishable under Section 148 has also been made out. It has been proved that they were the members of the unlawful assembly.

8. We have considered the submissions canvassed by the learned counsel for respective parties and have also gone through the

evidence on record. At the outset, it is required to be observed that PW-15 Jagannath Shelke could not identify accused no.2 though he was given repeated opportunity in the Court. Though, the said accused was present in the Court, PW-15 stated that said Isak Chand Khan Pathan was not before the Court. A pointed question was also put to him thereafter still he could not identify accused no.2. Admittedly no identification parade was concluded.

9. Upon consideration of the evidence of PW-15 threadbare, it would be seen that he has imputed the act as against accused nos. 2, 3, 4 and 40 only. Whereas, the complainant had named various persons including the present accused. The prosecution did not examine Shankar Shelke who according to Jagannath was accompanying him at the time of the incident and said Shankar had also received injury. It is also not brought on record as to whether his statement is ever recorded under Section 161 of the Criminal Procedure Code. According to prosecution, he was an eye witness. The best witness is withhold, therefore adverse inference can be drawn for withholding best evidence. We will have to appreciate the evidence of PW-14, PW-15 and PW-9 while considering the offence as alleged against accused nos. 2, 3, 4 and 40.

10. As far as injuries to Jagannath PW-15 is concerned, PW-9

stated that he did not mention the nature of injuries in the certificate because he could not receive the documents from Civil Hospital, Ahmednagar. He has stated that Jagannath Shelke has received following injuries:

- “1) Contused lacerated wound on left parital region 6 x 2 c.m. bone deep.
- 2) Abrasion on left forearm upper 1/3rd measuring ½ x ½ cm.
- 3) Contusion over left lower back measuring 10x2 cm. reddish in colour.”

11. He further states that injury no. 1 could have been caused by pelting stone. Injury no.2 could have been caused by brushing aside. Injury no.3 could have been caused by stick or thick iron bar. The injuries as quoted above are in the nature of contused lacerated wound on the left parital region, abrasion on left forearm and contusion over left lower back. PW-15, states that he was beaten on head with Stiletto(Gupti), with stick and iron bar on his back. He further states that out of these four persons two of them were armed with sticks in their hand i.e. Ayub Fakir Pathan and Sharif Mohd. Pathan. Layak Mohd. Pathan was armed with Stiletto and Isak Chand Khan Pathan was armed with iron bar.

12. The Doctor PW-9 said that injury no.1 could have been

caused by pelting stones. The Doctor's evidence does not suggest that any of the injuries could have been caused by Stiletto. The other injuries he has stated could have been caused by thick iron bar and or stick. The evidence of PW-15 and 9 will have to be read in tandem to come to a definite conclusion.

13. PW-14 in his evidence categorically states that amongst other accused, accused nos.2, 3 and 40 were also pelting stones at him at Manikwadi near Maruti temple and the mother and father at the same time were beaten by sticks. As per the evidence of PW-15 accused nos. 2, 3, 4 and 40 attacked him near the Kund both the places are distinct and same accused persons cannot remain present at two different places at the same time.

14. It also needs to be considered that the recovery allegedly was made from accused no.2, whom the witness even failed to identify in the Court. No recovery of any articles is made from the accused nos.2, 3, 4 and 40. Moreover, even as per the evidence of PW-9 Doctor the injuries sustained by PW-15 could not have been caused by Stiletto.

15. In view of the anomalies and inconsistency as appearing, such as PW-15 could not identify accused no.2 in the Court, no

identification parade being conducted, Shankar who is alleged to be accompanying PW-15 at the time and who also had received injury as per the prosecution case is not examined. The only eye witness is not examined, as such, adverse inference can be drawn from withholding the best witness. So also no recoveries have been made from accused nos. 2, 3, 4 and 40. PW-14 attributing presence of accused nos.2, 3, 4 and 40 at Manikwadi near Maruti temple and PW-15 at the same time alleging acts as against accused nos. 2, 3, 4 and 40 near the Kund and absence of any electricity at dark night at about 9.00 pm at the said place, making it impossible to recognize accused persons. All these factors taken cumulatively raises a doubt about acceptance of the case of the prosecution. The accused, as such, are entitled to the benefit of doubt.

16. In view of the above, the accused persons deserve to be acquitted and are hereby acquitted of all the offences charged against them. The criminal appeal no. 301 of 2000 is allowed and criminal appeal no. 391 of 2000 stands dismissed.

[MANGESH S. PATIL, J.]

[S.V. GANGAPURWALA, J.]