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

CRIMINAL APPEAL NO.534 OF 2002

Babu s/o Yeshwant Jadhav
Age 28 years, Occu. Auti-Rickshaw Driver,
R/o Sonwati, Taluka Latur,
District Latur ... APPELLANT
(Original Accused No.2)

VERSUS

The State of Maharashtra
(Copy to be served on
Public Prosecutor, High Court
of Judicature of Bombay,
Bench at Aurangabad) ... RESPONDENT

.....

Shri Vikram R. Dhorde, Advocate for appellant
Shri S.S. Dande, A.P.P. for respondent

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CORAM: SUNIL K. KOTWAL, J.

Date of reserving judgment : 15th December, 2017

Date of pronouncing judgment : 20th December, 2017

J U D G M E N T :

1. This appeal is doirected against the judgment and order of conviction dated 27.8.2002, passed by Additional Sessions Judge, Latur in Sessions Case No.67/1997. Appellant is original accused No.2. Respondent is State of Maharashtra.

2. Facts leading to institution of this appeal are that, accused Nos.1 to 6 were prosecuted for the offences punishable under Sections 147, 148, 452 read with 149, Section 326 read

with 149 and Section 307 read with 149 of the Indian Penal Code. Prosecution case in brief is that, informant Shivaji Pandharinath Dopare (Tribhuwan) used to reside at village Sonwati, with his parents and two brothers namely Hanumant and Balaji. At the relevant time of the occurrence, Balaji was at Parbhani. Two months before the occurrence of incident, autorickshaw of accused No.2 Babu Jadhav was burnt by some unknown persons. However, he suspected that the informant and his brothers were involved in commission of that crime. On 1.10.1996 at about 7.15 p.m., when informant Shivaji Dopare (Tribhuwan) was having his dinner along with his mother Trivenibai (P.W.2) and brother Hanumant (P.W.3), that time, accused No.2 Babu came towards their house, armed with sword and started abusing the informant and his family members. When informant or his family members did not come outside their house, accused No.2 forcibly entered inside the house and dragged Shivaji Dopare (P.W.1) outside the house. By that time, accused No.1 Shivaji Jadhav, accused No.3 Hanmant, accused No.4 Laxman, accused No.5 Jalsabai reached on the spot. Accused No.1 Shivaji Jadhav assaulted Shivaji Dopare (P.W.1) by inflicting sword blows on his head. Accused No.5 Jalsabai was holding stick in her hand. When Trivenibai (P.W.2) and Hanumant (P.W.3) tried to intervene, that time they were also assaulted by the accused persons by sword and sticks. Hearing

shouts, villagers namely Dagadu Walse, Venkat Kurwade and Rajiv Kurwade and uncle of the informant namely Prabhu Dopare rushed on the spot and they tried to rescue the informant and his family members. That time, accused No.1 Shivaji inflicted sword blow on the head of Prabhu Dopare. At last, the informant Shivaji Dopare and his family members managed to get rescued from the clutches of accused persons. They immediately rushed to Rural Police Station, Latur. Shivaji Dopare lodged the F.I.R. (Exh.44) to Rural Police Station, Latur, on the basis of which Crime No.126/1996 was registered under Sections 147, 148, 326, 452 read with Section 149 of the Indian Penal Code. The injured were referred to Civil Hospital, Latur. Medical Officer examined injured Shivaji Dopare, Triveni Dopare, Hanumant Dopare and Prabhu Dopare. During the course of investigation, spot panchanama (Exh.55) was prepared. Blood stained clothes of the informant were seized under seizure memo (Exh.47). Accused were arrested and as per disclosure statement of the accused persons, the weapons of the offences were recovered. After completion of the investigation, charge sheet was submitted before the Judicial Magistrate, First Class, Latur.

3. Offence punishable under Section 307 of the Indian Penal Code being exclusively triable by Court of Sessions, this case was committed to the Sessions Court, Latur. Charge

(Exh.3) was framed against accused No.1 to 6 for commission of the offences punishable under Sections 147, 148, 452 read with Section 149; 326 read with Section 149; Section 307 read with Section 149 of the Indian Penal Code. Accused pleaded not guilty and claimed trial.

4. Defence of the accused is that, on the date of incident, informant, his brother Hanumant, one Lahu and Balaji assaulted the accused No.2 Babu and when other accused tried to intervene, that time they were also assaulted by the informant and his companions.

5. After considering the oral and documentary evidence placed on record, learned trial Court pleased to convict accused No.1 Shivaji Yashwant Jadhav for commission of the offence punishable under Section 324 of the Indian Penal Code and instead of sentencing him to any punishment, directed to release him on entering into good behaviour bond of Rs.5000/- for the period of three years under Section 4 of the Probation of Offenders Act, 1958. Only accused No.2 was convicted for the offence punishable under Section 452 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs.1000/-. Accused No.2 was also convicted under Section 324 of the Indian Penal Code and he was sentenced to suffer rigorous imprisonment for one month and to

pay fine of Rs.500/-. The substantive sentences were to run concurrently. Remaining accused Nos.4 to 6 were acquitted of all charges.

6. This judgment and order of conviction and sentence is challenged only by accused No.2 Babu Yashwant Jadhav.

7. Heard strenuous and lengthy submissions of Shri Vikram Dhorde, Advocate for the appellant and Shri Dande, learned A.P.P. for the State. Learned counsel for the appellant submits that, there was inordinate delay in lodging F.I.R. and when accused and informant party was of inimical terms, the unexplained delay in lodging F.I.R. is fatal to the prosecution case. He placed reliance on **Thulia Kali Vs. The State of Tamil Nadu** reported in **AIR 1973 SC 501**.

8. Learned counsel for the appellant also raised objection that scribe of the F.I.R. is not examined by the prosecution and, therefore, the contents of the F.I.R. are not duly proved. He also points out that, even the witnesses on recovery panchanama of the weapon under Section 27 of the Evidence Act are not examined by the prosecution.

9. Learned counsel for the appellant also raised objection that, prosecution has withheld important witnesses such as Prabhu Dopare who sustained injuries while trying to

rescue the informant from the clutches of the accused. He also points out that, some other villagers also reached on the spot to rescue the informant and his family members, but they are withheld by the prosecution. His submission is that, when the accused and informant are on inimical terms, corroboration by independent witnesses as well as by spot panchanama is necessary. He placed reliance on **Golbar Hussain and others Vs. State of Assam and another,** reported in **[2015 (11) SCC 242]**, wherein Apex Court observed that, it is the quality of witnesses that matters and not the quantity, when the related witness was examined and found credible. In such case, non examination of an independent witness would not be fatal to the prosecution case.

10. Contention of learned defence counsel is that, the witnesses examined by the prosecution are contradicting their previous statements before the police and they are not trustworthy witnesses. Even spot panchanama does not show that the door of the house of informant was in damaged condition though informant stated that accused No.2 broke open the door. He prayed for acquittal of the accused.

11. Learned A.P.P. for the State submitted that, when the testimony of informant Shivaji Dopare is fully corroborated by prompt lodging F.I.R. and medical evidence in the form of injury

certificate, other corroboration in the form of testimony of independent witnesses is not at all necessary. Learned A.P.P. also points out that, the incident occurred at 7.15 p.m. and police referred the injury to Civil Hospital at about 8.30 p.m. as reflected from M.L.C. Certificate of Shivaji Dopare. This indicates that, after the occurrence, the first information was immediately lodged to police station. According to A.P.P., there is no delay in lodging the F.I.R.

12. To substantiate charges against accused, prosecution examined 5 witnesses including informant Shivaji Dopare (P.W.1), his mother Smt. Trivenibai (P.W.2), brother Hanumant (P.W.3) and investigating officers Madhavrao Dhere (P.W.4) as well as Police Inspector Shankar Mankkawar (P.W.5). Out of these 5 witnesses, Police Inspector Shankar Mankkawar (P.W.5) only recorded statement of one witness at the fag end of investigation and filed charge sheet. Therefore, his evidence does not carry much importance.

13. The important fact which must be noted at the outset is that, the defence has admitted all injury certificates of the injured persons at Exh.32 to Exh.35. Therefore, the objection raised by learned defence counsel regarding non examination of medical officer, who examined the injured, does not carry any importance. Admitted fact need not be proved by examining

medical witness.

14. After going through the oral evidence of Shivaji Dopuare, Triveni Dopare (P.W.2) and Hanumant Dopare (P.W.3), it emerges that, these three witnesses have categorically and consistently deposed on oath that on the date and time of incident, at about 7.15 p.m., accused No.2 initially abused and they forcibly entered inside the house of informant Shivaji Dopare and other witnesses and forcibly dragged Shivaji Dopare outside his house and injured him by inflicting sword blow. When Trivenibai (P.W.2) and Hanumant (P.W.3) tried to rescue Shivaji Dopare, that time they were assaulted by accused No.1 to 3 by sharp cutting weapons. Shivaji Dopare (P.W.1) specified that, accused No.1 Shivaji Jadhav inflicted sword blow on the right palm of this witness and accused No.3 Hanmant inflicted sword blow on his right knee, Hari Jadhav inflicted sword blow on right hand wrist joint and on biceps of right hand. Shivaji Dopare (P.W.1) is specific regarding sword blow by accused No.2 Babu on his right leg toe. This version is fully corroborated by MLC certificate Exh.32 of Shivaji Dopare, which shows that, total 5 incised wounds and one abrasion was found on the body of Shivaji Dopare as described below :-

Sr. No.	Details of Injury/ Site Injury	Size of Injury	Nature of Injury	Weapon used	Age of injury
1	Incised wound on Rt. Side of body on scapular region	6 cm. x 1.0 cm. x 1.0 cm.	Simple	Sharp weapon	Within 12 hrs.
2	Incised wound on Rt. Leg M/3	2 cm x 1 cm. x 1 cm.	--"--	--"--	--"--
3	Incised wound obliquely on Rt. Hand on dorsum Dorsal tendered severed	6 cm x 4 cm x 1 cm	--"--	--"--	--"--
4	Incised wound on Rt. Foot on dorsum	3 cm x 1 cm x 0.5 cm.	--"--	--"--	--"--
5	Incised wound on Lt. Middle finger	2 cm. x 1 cm x 0.5 cm.	--"--	--"--	--"--
6	Abrasion on Rt. Scapular	4 cm x 0.5 cm. x 0.5 cm.	--"--	--"--	--"--

15. The injuries found on the body of Triveni are described at MLC Certificate Exh.33 as under :-

Sr. No.	Details of Injury/ Site Injury	Size of Injury	Nature of Injury	Weapon used	Age of injury
1	Incised wound on Lt. middle finger	3 cm. x 0.5 cm. x 0.5 cm.	Simple	Sharp weapon	Within 12 hrs.
2	Abrasion on Rt. arm	4 cm. x 2 cm.	--"--	Hard and blunt object	--"--
3	Contusion on Rt. breast	3 cm. x 2.5 cm.	--"--	--"--	--"--
4	Incised wound upto muscle deep oblique on lateral aspect of Lt. Leg M/ 3 per	6 cm x 3.5 cm. x 2.5 cm.	--"--	Sharp weapon	--"--

16. The injuries on the body of Hanmant Dopare (P.W.3) are described below in the injury certificate Exh.34 :-

Sr. No.	Details of Injury/ Site Injury	Size of Injury	Nature of Injury	Weapon used	Age of injury
1	Incised wound on Rt. leg m / 3	3 cm. x 0.5 cm. x 0.5 cm.	Simple	Sharp weapon	Within 12 hrs.
2	Incised wound on Hand at the site of Head of 3rd metacarpel overlying	3 cm. x 0.5 cm. x 1 cm.	Simple	--"--	--"--
3	Incised wound in middle phalynx of Little finger	Upto bone deep 3 cm. x 1 cm.	Simple	--"--	--"--
4	Incised wound overlying on Rt. ring finger	Upto bone deep 3 cm. x 1 cm.	--"--	--"--	--"--
5	Incised wound on Lt. Forearm	Upto bone deep 6 cm. x 1 cm. x 0.5 cm.	--"--	--"--	--"--

17. From the testimony of Shivaji Dopare (P.W.1), it emerges that, accused caused incised wound by sword on both hands and leg of Hanmant Dopare and incised wound on fingers and right breast and right leg of Trivenibai Dopare. Same wounds are reflected in the above described MLC Crtificate of Hanmant Dopare and Triveni Dopare. Even Trivenibai (P.W.2) corroborated the version of informant by deposing that at the time of incident, accused No.2 forcibly entered in her house and dragged Shivaji outside the house. According to Trivenibai, accused No.2 was armed with sword and Shivaji Dopare was assaulted by sword blows by accused No.1 and 2. According to

this witness, the accused No.3 Hanmant was armed with axe. He has also described injuries sustained by her at the hands of accused No.1 to 3. Even Hanumant (P.W.3) repeated similar occurrence during his evidence.

18. No doubt there is slight variance between the testimony of these witnesses regarding the manner in which accused No.2 made his forcible entry in his house, the number of blows inflicted by each accused etc. However, these discrepancies emerging in the testimony of these witnesses are very minor and those discrepancies do not go to the root of the basic version of these witnesses. I find that, the discrepancies emerging in the testimony of these witnesses do not shake the basic version of these witnesses and, therefore, deserve to be ignored.

19. Learned defence counsel has rightly pointed out that the version of Shivaji Dopare regarding break opening the door of the house by kick by accused No.2 and instigation by accused No.5 is improvement at the stage of evidence. Such version is not mentioned in the F.I.R. However, the improvement at the stage of evidence is absolutely extremely minor. In the F.I.R., it is mentioned that, "Accused No.2 entered in my house, armed with sword and dragged me outside the house and thereafter assaulted me by sword". Thus, the improvement is only

regarding opening of the door by kick. Thus, it cannot be said that the recitals of F.I.R. (Exh.44) are totally in variance with the oral testimony of Shivaji Dopare (P.W.1).

20. Even in the cross-examination of Trivenibai (P.W.2), the improvements have been brought on record are regarding the exact weapon held by accused No.3 Hanmant in his hand, the exact part of the body on which blows were inflicted by accused. However, it cannot be ignored that, these all witnesses are examined after lapse of more than 5 years from the date of occurrence. Therefore, such slight variance is just and natural due to fading of memory, on account of passage of time. Same thing is regarding version of Hanmant P.W.3. Thus, after careful scrutiny of oral evidence on record, I am fully satisfied that the witnesses are neither contradicting each other on material particulars nor their statements are inconsistent with their statements before the police on material particulars. However, in the case of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat** reported in **[AIR 1983 Supreme Court 753]**, the Apex Court ruled that :-

> "Overmuch importance cannot be attached to minor discrepancies emerged in the testimony of prosecution witnesses. The reasons are obvious :-
>
> (1) By and large a witness cannot be expected to possess a photographic memory and to recall

the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which taken place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the

> witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment".

21. On the other hand, though learned defence counsel has tried to show that accused are on inimical terms with informant and his family members, no admission has been brought on record by defence counsel which indicates that, since before the occurrence of the incident, the relations in between accused and the informant family were strained. Even the police report lodged by one Gaikwad against the informant, does not connect the accused in any manner. Thus, the contentions of learned defence counsel that the accused and informant were on inimical terms is only imaginary contention and without any substance on record.

22. Though learned defence counsel has tried to substantiate that there is inordinate delay in lodging F.I.R., the F.I.R. (Exh.44) indicates that it was lodged on 1.10.1996 i.e. on the date of occurrence though offence was registered at midnight i.e. on 2.10.1996 at 00.15 Hrs. Even the MLC certificate of Shivaji Dopare (Exh.32) indicates that, he was taken to Civil Hospital, Latur by Police Constable Kamble from Police Station, Latur at about 8.40 p.m. on 1.10.1996 i.e. the date of occurrence of the incident. It means that, the incident occurred at 7.15 p.m.

on 1.10.1996, and the informant was medically examined at Civil Hospital, Latur at 8.40 p.m. i.e. within two hours from the time of occurrence of the incident. This indicates that, after occurrence, immediately the informant approached the police. Therefore, there was no time for concoction of false evidence against the accused persons. In fact, in absence of previous inimical terms, the informant had no reason to lodge false report against the accused persons by creating false evidence. Therefore, false implication of the accused on account of delay in lodging F.I.R. is absolutely impossible. In the circumstances, the ratio of Thulia Kali Vs. The State of Tamil Nadu (cited supra), is not applicable in the case at hand and it can be distinguished on facts.

23. Regarding objection raised by learned defence counsel about non examination of scribe of the F.I.R., it is suffice to say that, when informant Shivaji Dopare (P.W.1) has deposed before the Court and proved the contents of the F.I.R. (Exh.44), the examination of the scribe to prove the contents is absolutely not necessary. By examining investigating officer (P.W.4), opportunity has been awarded to the defence to prove the omissions which have been brought on record in the cross-examination of Shivaji Dopare (P.W.1). Therefore, due to non-examination of scribe of the F.I.R., no prejudice has been caused

to the accused.

24. Learned defence counsel has raised objection regarding non examination of panchas on recovery panchanama. However, neither the weapon of the offences were shown to the injured witnesses nor those are identified by these witnesses. The prosecution case is totally established on the basis of oral testimony of injured, informant and injured eye witnesses. Therefore, non examiantion of panchas on recovery panchanama does not hold any importance. In the case at hand, Shivaji Dopare (P.W.1), Trivenibai (P.W.2) and Hanumant (P.W.3) are definitely related witnesses. However, on that count alone, their testimony cannot be disbelieved if otherwise they are trustworthy witnesses.

25. Taking into consideration defence of the accused that they were assaulted by informant and his brothers, the presence of the accused on the spot of the incident is an admitted fact by the accused. To prove their defence, accused have neither filed and proved the counter F.I.R. lodged by them to Police Station, Latur nor they have examined any defence witnesses to show that on the date and time of the incident accused themselves were assaulted by informant and his companion. In the circumstances, when accused admit their presence on the spot of the occurrence, but they cannot prove that the informant were

the aggressor party, they cannot claim benefit of doubt only on account of non-examination of independent witnesses.

26. No doubt, from the evidence of Shivaji Dopare (P.W.1) it emerges that his uncle Prabhu Dopare as well as some other villagers reached on the spot to rescue the informant. These persons are not examined by prosecution. However, when testimony of informant Shivaji Dopare (P.W.1) corroborated by Trivenibai (P.W.2) and Hanumant (P.W.3) is trustworthy and when their oral evidence is corroborated by medical evidence in the form of admitted medico legal certificate (Exh.32 to Exh.34), additional corroboration by these independent witnesses is not at all necessary. Even in the case of "*Golbar Hussain Vs. State of Assam*" (supra), the Apex Court has made the legal position absolutely clear that, when related witness was examined and found credible, in such case, non examination of an independent witness would not be fatal to the prosecution case. Therefore, on account of non examination of independent witnesses, the truthful testimony of informant, his mother P.W.2 and brother P.W.3, cannot be disbelieved.

27. In view of above discussion, I have come to the conclusion that, on the basis of trustworthy testimony of Shivaji Dopare (P.W.1), Trivenibai (P.W.2) and Hanumant (P.W.3), which is corroborated by medical evidence, Exh.32 to Exh.34,

prosecution has proved beyond reasonable doubt that, on the above said date, time and place, accused No.2 voluntarily caused simple hurt to Shivaji Dopare by committing house trespass in his house and thereby committed offence punishable under Sections 324 and 452 of the Indian Penal Code. The conviction recorded by the learned trial Court against accused No.2 under Sections 452, 324 of the Indian Penal Code is proper and needs no interference.

28. While examining whether the sentence and punishment imposed by trial Court is correct and proper, it has come to my notice that, though benefit of Section 4(1) of the Probation of Offenders Act was extended in favour of accused Nos.1 and 3, the trial Court refused to extend that benefit in favour of appellant – original accused No.2. Only reason assigned by the trial Court is that, accused No.2 had dragged the informant Shivaji Dopare out of his house and assaulted him. No other ground has been assigned by learned trial Court for refusing to extend the benefit of Section 4 of Probation of Offenders Act, 1958.

29. In fact, the offence committed by accused Nos.1 to 3 is almost identicial and all of them used deadly weapon like sword for voluntarily causing hurt to the informant. However, for no reasonable cause, trial Court discriminated in between

accused No.1, 3 and accused No.2. On other hand, even accused No.2 is permanent resident of same village Sonwati, Taluka and District Latur and he has no criminal antecedents. It cannot be ignored that, at the time of commission of the offence, accused No.2 Babu Yeshwant Jadhav was only 23 years old young boy. Since 2002 accused No.2 is on bail. Therefore, after lapse of 15 years, due to pendency of this Criminal Appeal, it will be not proper to send him in jail to undergo the sentence imposed by learned trial Court.

30. Considering the overall circumstances of the case, I hold that, it is desirable that benefit of Section 4(1) of Probation of Offenders Act deserves to be extended in favour of appellant – accused No.2 and he shall be directed to pay compensation of Rs.2000/- (Rupees two thousand) to informant Shivaji Pandharinath Dopare and compensation of Rs.2000/- (Rupees two thousand) to Trivenibai Pandhari Dopare under Section 5(1) of the Probation of Offenders Act.

31. It follows that, this appeal deserves to be partly allowed and the sentence imposed on appellant – accused No.2 Babu Yeshwant Jadhav, deserves to be set aside and order regarding accused No.2 be modified as under :

32. Hence I pass the following order :

O R D E R

(i) Criminal Appeal No.534/2002 is partly allowed.

(ii) Conviction of accused No.2 Babu Yeshwant Jadhav under Sections 452, 324 of the Indian Penal Code is confirmed. However, the order of sentence and punishment passed by trial Court against accused No.2 is set aside and instead, the appellant – accused No.2 Babu Yeshwant Jadhav be released on his entering upon good behaviour bond of Rs.5000/- (Rupees five thousand) without surety, to appear and receive sentence when called upon during the period of next three years and in the meantime, to keep the peace and be of good behaviour.

(iii) Appellant - accused No.2 shall pay compensation of Rs.2000/- (Rupees two thousand) to informant Shivaji Pandharinath Dopare and compensation of Rs.2000/- (Rupees two thousand) to Trivenibai Pandhari Dopare under Section 5(1) of the Probation of Offenders Act, 1958.

(iv) Good behaviour bond be executed before the trial Court and compensation amount be deposited before the trial Court within one month from the date of passing of this order.

(v) Fine amount, if any, deposited by the appellant Babu Yeshwant Jadhav be refunded to him.

(vi) The bail bonds of the appellant shall stand cancelled.

(vii) Copy of this judgment be provided to accused/ appellant, free of costs.

(SUNIL K. KOTWAL)
JUDGE

fmp/