

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

CRIMINAL APPEAL NO. 590-2002

The State of Maharashtra
Through P.I Shani Peth, Police
Station, Jalgaon.
Dist. Jalgaon.

... Appellant.
(Ori. Complainant)

Versus

1. Sunil Vasant Patil,
Age : 26 Years, Occ. Nil,
R/o. Vitthal Borkar's Wada,
Vitthal Peth, Jalgaon.
2. Sunil @ Chinnya Pundalik Tayade,
Age : 23 Years,
R/o. 147, Zilla Peth, Visanji Nagar,
Tayede Galli, Jalgaon
3. Madhur Pitambar Mali,
Age : 19 Years, Occ. Nil
R/o. 444, Vithal Peth,
Baherpura, Jalgaon

... Respondents.
(Ori. Accused)

....

Mr. R.V.Dasalkar, Addl. Public Prosecutor for State.

Mr. Jaydeep Chattarji, Advocate, for Respondent Nos. 1 to 3.

**CORAM : T.V. NALAWADE AND
A.M.DHAVALA, JJ.**

Date of reserving the Judgment : 07.12.2017

Date of pronouncing the Judgment : 12.12.2017

JUDGMENT (PER T.V. NALAWADE, J.) :-

1. Appeal is filed against the Judgment and order of Sessions Case No. in Sessions Case No. 227 of 1999 which was pending in the Court of learned 3rd Additional Sessions Judge, Jalgaon. The Trial Court has acquitted the present respondents of the offences punishable under Sections 307 read with 149, 326 read with 149, and Section 147 148 of the Indian Penal Code. The case was filed as against five persons but the State has filed appeal only against accused Nos. 1 to 3. Both the sides are heard.

In short the facts leading to the institution of the proceedings can be stated as follows :-

2. The First informant Prashant Kuwar is a resident of Jalgaon and he is earning his livelihood by selling Tea at Tea stall near Neri Naka, Jalgaon. In the vicinity of the Tea Stall of Prashant, there is a Tea Stall which is run by brother of accused No.1 Sunil Patil.(by Ashok Patil). There was feeling in the mind of the accused No.1 Sunil Patil that due to Tea stall of Prashant his brother was not getting customers.

3. The incident took place on 13.02.1999 at about 5.15 p.m. Prashant was present on the Tea stall and accused No.1 Sunil Patil came there. Accused No.1 picked up quarrel with Prashant by saying that due to tea Stall of Prashant, customers were not coming to the Tea Stall of his brother Ashok. Then all of sudden he took out a knife and gave blow of knife on left side of abdomen, of Prashant and second blow was given at the right armpit, on the chest. When Sunil Patil attempted to give third blow Prashant obstructed it with his left hand and received an injury on his finger. In the mean time aunt of Prashant viz Indubai and other persons like younger brother Mangesh, Kishor Ramkrushna, Mahendra Koli and Devendra rushed to the spot. They witnessed the incident. After their arrival, Sunil Patil ran away.

4. Prashant was shifted to the Civil Hospital, Jalgaon where his report was recorded by the police. On the basis of this report the crime came to be registered as C.R. No. 6/99 in Shanipeth Police Station, Jalgaon at 18.45 hours. Supplementary statement of the Prashant was recorded on the same day and in the supplementary

statement Prashant took the names of remaining five accused, and attributed some part to them in the incident of assault. He attributed motive also as against accused Nos. 2 and 3, who are present respondent Nos. 2 and 3.

5. Statements of persons who were named as witness by Prashant to the incident came to be recorded. Police prepared spot panchanama and Sunil Patil came to be arrested. Remaining accused were also subsequently arrested.

6. One stab wound was found on left hypochondrium in the middle of size 2 " x 1 " going in the abdominal cavity, omentm seen outside (Omentam is a membramus tissue which supplies blood to intestine). The second injury was found on right axilla of size 2 and ½ " x 1 and ½ " in the middle of axilla and wound of exit was in the right infra axillally area of size 1/2 " x 1/4 " and they were both internal and external wounds. Both the injuries were caused due to sharp and cutting object. Blood was found on the spot of offence and also on the Tea Stall of the first informant.

7. During the course of the investigation, on 18.02.1999, accused No.1 gave statement to the Police in the presence of panch witnesses. After that accused No.1 took police and panchas to his house and the knife was seized from him by drawing a panchnama. During the investigation article taken from the spot of offence and also the clothes of Sunil Patil which were taken over during the investigation came to be sent to the C.A. Office. Blood was detected on the Banian of accused No.1 Sunil Patil. One injury of abrasion was also found on the chest of Sunil Patil. Charge sheet came to be filed against aforesaid five persons. Charge was framed against all the accused and they pleaded not guilty.

8. Prosecution examined in all 12 witnesses for proving the offences. The Trial Court has not believed eye witnesses including the first informant. The Trial Court has considered inconsistencies in the versions given by the eye witnesses and also improvements made by the first informant in relation to first report given by him to the Police.

9. Prashant (P.W. No.1) has given evidence that on 13.02.1999 at

about 5 to 5.15 pm when he was present at Tea Stall accused No.1 and 2 came on motor cycle and other accused were in the Auto Rikshaw. He has given evidence the accused No.1 got down from motor cycle and picked up quarrel by starting to give abuse to him and even said that he would kill him on that day. He has given evidence against the accused No.3 that he handed over knife to the accused No.1 and gave instigation and after that accused No.1 gave blow of knife on his abdomen. He has given evidence that his aunt Indubai who was present there rushed forward and one Gajanan also came there and they admitted him in the civil Hospital Jalgoan. He has given reason for the incident as the business rivalry. He has deposed that Tea stall of accused No.1 was not doing good business when his Tea stall was doing good business and that was the reason for the incident. He had produced clothes like Banian and Trouser before the police and those articles are identified by him. The report given by him is duly proved at Exh. 33.

10. In the cross-examination of Prashant (P.W. No.1) it is brought on record that he had not even named accused Nos. 2 to 5 in

the F.I.R at Exh.33. This report was recorded immediately by the police. Due to omissions which were confronted to the first informant (P.W. No.1) in Exh.33 there is no corroboration to the substantive evidence given by the P.W. No.1 as against the accused No.2 to 5 of Exh. 33.

11. In the evidence of Investigating Officer (P.W. No.11) it is brought on record that, supplementary statement was recorded but the reasons for the same is not given. It can be said that before recording supplementary statement, statements of the other witnesses who are mentioned in the F.I.R ought to have been recorded and if there was inconsistency, he ought to have recorded supplementary statement of the P.W. No.1. Though statements of witnesses like Mangesh Kuwar brother of first informant and Kishor Rane were recorded on 13.2.1999 evidence of the Investigating Officer shows that there is probability that supplementary statement of first informant was recorded first.

12. In the cross-examination, Prashant (P.W. No.1) suggestions are

given to the effect that Ashok brother of accused No.1, was running Tea stall owned by Ravindra Satpute. P.W. No.1 has admitted that prior to that day he had no quarrel with Ashok. He has admitted that prior to opening the Tea stall he used to ply Auto rikshaw and other accused are drivers of the Auto rikshaw and there was grievance against them that they used to park Auto rikshaw in front of Tea Stall and that was not liked by the first informant i.e. P.W. No.1. In any case, the evidence brought on record in the cross-examination shows that, there was dispute between first informant and the accused on the ground of business rivalry. The evidence of P.W. No.1 remained unshattered and there is corroboration of contents of the F.I.R. Exh.33.

13. Kishore Rane (P.W. No.3) is examined as another eye witness and he has given evidence that accused Nos. 1 and 3 came on M-80 motor cycle of accused No.2 and they started quarreling. He has tried to say that the accused No.3 gave knife to accused No.1 and then accused No.1 beat with knife to first informant in his armpit and stomach causing bleeding injuries. After seeing this assault he ran

away. This witness was used by the police on panchnama also when the police when the clothes of P.W. No.1 were seized were by the police in civil Hospital. Seizure panchnama is at Exh. 38. He acted as panch witness on the spot panchnama and that panchnama is at Exh.39. These panchnamas are duly proved in the evidence of P.W. No.3.

14. Mangesh (P.W. No.4) brother of first informant has given evidence that accused No.1 and 2 came on M-80 vehicle and accused No.3 picked up quarrel by saying that P.W. No.1 had become arrogant and they would kill him. He has also tried to say that accused No.3 handed over knife to accused No.1 and then accused No.1 made assault by giving blow of abdomen of first informant. Though Mangesh is real brother he has given evidence that he ran away from the spot.

15. The complainant Indubai Saindane (P.W. No.7) who was suggested supposed to give evidence as eye witness turned hostile. The conduct of Mangesh and Kishor Rane was not natural. Further, there is no circumstantial check to the evidence given as against the

remaining accused by all the three witnesses.

16. Dinesh Lovhalekar (P.W. No.2) has given evidence that on 13.02.1999 when the police took over the clothes of accused No.1 from his person he acted as panch witnesses and panchnama at Exh. 35 was drawn in his presence. He has identified the Banian which was taken over from accused No.1. In the cross-examination he has specifically stated that Banian was taken from the person of the accused and after seizure seal was fixed on it by the Police. The panchnama at Exh. 35 is consistent with oral evidence.

17. There is also evidence of the investigating officer Ramakant Jawale (P.W. No.11) on the seizure of this Banian. The panchnama shows that there were blood stains on the Banian, but there was also one injury below the neck of the accused No.1 and blood had come out through this injury. In any case, P.W. No.1 has not given evidence that he had resisted. Thus there was blood on Banian of the accused when he came to be arrested immediately after the incident.

18. The prosecution has examined Leeladhar Patil (P.,W. No.5) to prove the statement of the accused given under Section 27 of the Indian Evidence Act. This panch witness turned hostile. But he has admitted his signature appearing on both memorandum panchnama and seizure panchnama. The other panch witnesses on this incident is not examined but evidence of the incident of the recovery of the weapon by Ramakant Jawale (P.W. No.11), investigating officer. The memorandum panchnama of the seizure shows that one knife, was recovered on 18.02.1999 when accused No.1 was arrested on 13.02.1992. The C.A. Report at Exh. 48 shows that no blood was detected on the knife. Though this circumstance is there when there is direct evidence, not much importance can be given to the circumstance like absence of evidence of recovery of weapon used in the incident.

19. In the spot panchnama at Exh. 39 there is mentioned that blood was lying on the ground (stone) and also on the tea stall but the C.A report shows that no blood was found on the stone taken over from the spot. It appears that articles were sent to the C.A office on

12.05.1999. Though this circumstance is there, this Court holds that the presence of the blood mentioned in the spot panchnama can be used in the present matter. The accused persons took defence of total denial. No probability is created other than the version given by the P.W, No.11.

20. Dr. Kavita Sontakke (P.W. No.9) is examined to prove the MLC prepared by her after examination of the P.W. No.1 on 13.02.1999. She has given evidence that she has found following two injuries

- 1) *"He had a stabbed wound on left hypochondrium in the middle 2 " x 1 " going in the abdominal cavity, omentm seen outside (omentam is a membramus tissue which supplies blood to intestine), bleeding present, caused within 6 hours with sharp and cutting object. Nature of injury grievous."*
- 2) *"Through and through wound in right axilla 2 and ½ " x 1 and ½ " in the middle of axilla and wound of exit in the right infra axillally area 1/2 " x 1/4 ", bleeding present caused within 6 hours with sharp and cutting object, nature- simple. "*

21. The injury certificate is duly proved in evidence of (P.W.9) at Exh.52. Her evidence shows that injured was admitted in the Civil

Hospital as indoor patient from 13.02.1999 to 27.02.1999. The knife shown to be recovered was shown to her and she has opined that the above two injuries can be caused with such knife. She has also given evidence that injury No.1 is sufficient to cause death and is dangerous to human life. In the cross-examination, she has given reasons for aforesaid opinion. In the cross-examination, it is brought on record that history was given in respect to injury as accused Sunil Patil had stabbed with knife before half an hour near Neri Naka. She denied the suggestions that injury No.2 can be caused if person falls on the ground.

22. Vijaysing Solanki (P.W. No.10) Police Head Constable is examined to prove that he recorded the report of the first informant in the civil Hospital at 5.15 p.m It is brought on record that Civil Hospital is situated at a walking distance of 10 minutes from the place of incident. Thus the report was given immediately and when FIR was given there was no room for concoction.

23. Injury certificate in respect of the Sunil is on record at Exh.60

and it shows that there were following injuries :-

- 1) Abrassion-Linear on Rt Chest-2nd rib Lat to sternum-transverse, red. 26 cm long.
- 2) Abrassion (Lt) hand palm at base of thumb 1/2 x 1/2 red. Age of injury found to be fresh.

24. It was submitted for the accused that no explanation is given by the first informant about the injury sustained by accused No.1 and so he cannot be believed. This circumstance cannot be considered in favour of accused No.1. Accused No.1 had no reason to go to that Tea stall. Even if it is presumed that two Abrasions were sustained by accused Sunil Patil in the same incident, it is not possible to infer that accused No.1 was exercising right of private defence. On the contrary, the circumstance can be used against the accused No.1 as they were simple injuries.

25. Thus there is evidence of aforesaid nature as against the accused No.1. The Trial Court has acquitted accused No.1 also by giving reason that remaining accused were un-necessarily implicated

in the case. It is true that there is such possibility, but truth is easily separable in the present matter. Trial Court ought to have considered F.I.R as the first disclosure made by the first informant and ought to have considered the evidence of the prosecution. If that is done then inference is easy that it is accused No.1 who assaulted first informant at his Tea stall. FIR was given immediately and there is corroboration of medical evidence to the evidence of the first informant and there is also circumstantial evidence of the spot panchnama. Even if the evidence of other witnesses is ignored, there is sufficient to prove that accused No.1 had gave two blows of knife to the first informant.

26. The question now arises is as to what offence is committed by the accused No.1. In the Section 307 of the Indian Penal Code it is made clear that if the prosecution proves the intention of the accused to murder and there is overt act, then accused can be safely convicted for the offence for attempt of murder. It can be said in the present matter first informant survived fortunately as blow given on the abdomen did not cause injuries to

internal organs and blow given at armpit did not enter chest. When person gives two blows of knife like in the present matter it is very easy to infer that he had intention to finish the first informant. Thus, if exaggeration of incident is ignored, from the nature of weapon used and the number of blows given by the accused No.1, inference is possible that there was intention of murder. Two injuries were also caused by the accused No.1 to the first informant. Thus the accused No.1 is liable for conviction for the offence of attempt of murder punishable under Section 307 of the Indian Penal Code.

27. Respondent Nos. 2 and 3 cannot be convicted as even their names were not mentioned in the FIR and there is no circumstantial check to evidence given against them. Apparently, there was reasons for the first informant to implicate them in the case, for the reasons already given the falsehood is easily separable. Respondent No.2 and 3 are acquitted by the Trial Court and this court sees no reason to interfere in the decision given by the trial Court.

28. This court is convicting the respondent No.1 (original accused

No.1) after about 17 years of the incident. At the relevant time accused No.1 was aged about 26 years. The first informant was also youngster at the relevant time. Considering the reasons behind the quarrel, the age of the accused No.1 this Court holds that, sentencing accused No.1 with imprisonment for three years will be just and sufficient in the present matter. In the result following order.

ORDER

- i). Appeal as against Respondent No.1 Sunil Patil is allowed.
- ii). The Judgment and order of acquittal of respondent No.1 for the offence punishable under section 307 of the Indian Penal Code is hereby set-aside.
- iii). Accused No.1 Sunil Patil stands convicted for the offence punishable under Section 307 of the Indian penal Code.
- iv). The accused No.1 Sunil Patil is sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs. 1,000/- . (rupees one thousand only)
- v). In default of payment of fine, accused No.1 Sunil Patil is to further under go Rigorous Imprisonment for one month.

vi). Accused No.1 will be entitled to get set off in respect of the period for which he was under trial prisoner in the present case.

vii). Accused No.1 is to surrender the bail bonds for under going the sentence.

viii). The appeal as against accused Nos.2 and 3 stands dismissed.

(A.M. DHAVALÉ, J.)

(T.V. NALAWADE, J.)