

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.744 OF 1996

1. Mehboob Babumiyan Shaikh,
Age 40 years, Occ. Business;

2. Mehmood Babumiyan Shaikh,
Age 36 years, Occ. Business;

3. Maqsood Babumiyan Shaikh,
Age 34 years, Occ. Business;

4. Ayyub Babumiyan Shaikh,
Age 28 years, Occ. Driver;
Nos.1 to 4 r/o.334, Guruwar Peth,
Pune-411 002.

5. Asif Islam Sayyed,
Age 43 years, R/o.Indira Nagar zopadpatti,
Gul-Tekadi, Pune-411 002.

Appellants

versus

The State of Maharashtra

Respondent

Mr.Sudhir S. Hardikar, Advocate, for Appellants.

Mr.A.R.Kapadnis, Assistant Govt.Pleader, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 22nd February 2017

JUDGMENT :

1. The Appellants have preferred this appeal challenging the judgment and order dated 5th December 1996 passed by Additional Sessions Judge, Pune in Sessions Case No.572 of 1992.

2. During pendency of this appeal, Appellant no.1 (original accused no.1) and Appellant no.5 (original accused no.5) have expired. Police report in that regard has been placed on record along with death certificates. By order dated 5th August 2016, this Court has directed that appeal against said Appellants-accused stand abated.

3. The brief facts of prosecution case are as follows :

(a) The complainant Abdul Rehman Shaikh Papa (PW-3) had lodged first information report with Swargate Police Station, Pune on 28th September 1991 against the Appellants-accused. It is alleged that the accused nos.1 to 4 are brothers. Accused no.5 is related to them. The complainant had previously married with one Rabiya. Thereafter he was married to Rashida. Mehmuda and Abida are the sisters of Rashida. Abida and Mehmuda had married to Ramzan and they were residing together. Ramzan died about one and half year prior to incident;

(b) The complainant was visiting the house of Mehmuda and Abida. The complainant has alleged that the accused were suspecting that the complainant was giving information against them to Police about business of liquor and this police used out carry on raid;

(c) On 28th September 1991, the complainant was intercepted by the accused. Accused no.5 caught hold of his leg and pulled him down. Accused no.4 gave blow by knife on his head and

left leg. Accused no.1 brought acid in a german pot and poured the same on the person of the complainant. As a result of that, the complainant sustained acid burn injuries on his face, chest, back etc.. He was also assaulted by the accused. The complainant was taken to hospital. His statement was recorded. First information report was registered vide CR No.672 of 1991.

4. The charge was framed on 3rd September 1996 by the Trial Court, for offences under Sections 147, 148, 324 read with 149, Section 304 read with 149 of Indian Penal Code (`IPC').

5. The prosecution examined five witnesses. PW-1 Abidabi Shaikh (sister of accused nos.1 to 4), PW-2 Faimida Shaikh (sister of accused nos.1 to 4), PW-3 Abdul Rehman Shaikh Papa (complainant), PW-4 Dr.Deepak Ranade, Medical Officer, and PW-5 Dilip Panse, Investigating Officer. The defense examined one witnesses DW-1 Mrs.Rashidabei Abdul Rehman Shaikh (wife of complainant).

6. The prosecution relied upon the oral testimony of the aforesaid witnesses, documents such as dying declaration, first information report, medical certificate, medical case papers and C.A.reports in support of its case.

7. The Additional Sessions Judge, Pune by judgment and order dated 5th December 1996 convicted the accused nos.1 to 5 for the offences under Sections 307 read with 149, 324 read with 149, 148 and 147 of IPC. The accused were sentenced to undergo rigorous

imprisonment for three years and to pay a fine of Rs.2,000/- each for the offence under Section 307 read with 149 of IPC. They were sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,000/- each for the offence under Section 329 read with 149 of IPC. They were further sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.500/- each for the offence punishable under Section 148 of IPC and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.500/- each for the offence punishable under Section 147 of IPC. The Appellants challenged the aforesaid judgment and order convicting them by preferring this appeal.

8. I have heard learned counsel representing the Appellants-accused and learned APP representing the State. I have also perused the evidence on record.

9. PW-1 has not supported the prosecution case and was declared hostile. She is the sister of accused nos.1 to 4. She was cross examined by learned Prosecutor. In the cross examination conducted by defense, the said witness has stated that the complainant was having evil eye on her and her sister Mehmudabi. He was asked by them not to visit their house. The complainant then threatened them that if they do not behave as per his wish, he will involve them somewhere. She further stated that even during life time of her husband, the complainant was having an eye over their property. He had also filed a suit in respect to their property which was decided in her favour. After death of her husband, the complainant was after them and he used to threaten them.

10. PW-2 has also not supported the prosecution case. She is the daughter of PW-1. She was declared hostile and cross examined by prosecution. She stated in the cross examinationn conducted at the instance of accused that complainant was having an evil eye on Mehmudabi and Abidabi.

11. PW-3 is the complainant/injured person. He has stated that he is married to Rashidabi. Accused no.5 is the friend of accused no.4. On the date of incident, he had visited the house of Mehmudabi and Abidabi. At about 7.30 p.m; the accused were present near the public tap, while he was going to the house of Mehmudabi and Abidabi. Accused no.5 caught hold of his leg and pulled him down. Accused no.4 gave blow by sickle on his head and left leg below the knee. Accused no.1 brought acid from the german pot and poured it on his body. Accused no.2 assaulted him by kick blows. Accused thereafter ran away from the place of incident. Aabidabi tried to separate the quarrel. He was taken to Sasoon Hospital. His dying declaration was recorded. His complaint was also recorded by Police. Accused are dealing in business of liquor. Police used to carry on raids and it was suspected by them that the witness was giving information to Police.

PW-3 in his cross examination by defense advocate has deposed that he has filed a civil suit against Abidabi in the Court of Civil Judge, Senior Division, at Pune. He further deposed that he had taken discharge from Sasoon Hospital on his own accord and got himself admitted in Rubi Hall Clinic. The defence has also brought

various omission and contradictions through his cross examination on record. He admitted that he had not stated to the Police that he had taken leading role in marriages of daughters of Abidabi and Mehmudabi and hence, he used to go to their house. There is no mention in the complaint that there were injuries to his hand. There is also no reference to the statement that his tongue was swollen, in the complaint. He also deposed that he cannot understand distinction between knife and sickle. He also admitted that words "sickle" is absent in the complaint, although he had stated before Police that accused no.1 gave blow by sickle on his head and left leg. He deposed that he had not stated to the Police that accused are dealing in business of liquor and on information given by him, the raid was being carried out by Police; and therefore, the accused were suspecting about the same.

His supplementary statement was recorded on 26th March 1992. He had stated names of persons who had seen the incident. He had stated that the persons who are named by him namely Sadique bhai and Raju Mohammad Shaikh were referred to him as he felt that these persons might be present there. The defence had suggested to the witness that he went to the house of Abidabi and Mehmudabi and they told him not to visit their house. Thereafter he came out of the house and in frustration poured acid on himself.

12. PW-4 is medical officer. He was attached to Sasoon Hospital, Pune. He stated that history was given by the patient himself. The patient was having superficial and deep burn injuries to the extent of 40%. The burn injuries were by acid,. If the patient would not have

been treated, on account of septicemia, death could have been resulted. He had issued a certificate. He identified the certificate but stated that it does not have his signature. He was allowed to produce original case papers subject to objection. He stated that medical certificate is not in his hand writing. The certificate Exhibit-22 is not issued by him and he do not know when it was issued. In the cross examination, he stated that except burn injuries, no injuries are mentioned in Exhibit-22. The certificate is silent about other injuries. Nothing is mentioned in the certificate about the history of patient. The affected area of body is not mentioned in the certificate. He admitted that it is not mentioned in the certificate whether the burn injuries are of first, second or third degree. On the basis of certificate, he cannot say on what part of body there were injuries. He cannot state the affected area of the head and its extent. The affected area is not mentioned in the certificate. Considering the part involved of the body on which injuries are caused, it is not dangerous to life. He further stated that certificate Exhibit-22 is baseless. It is not according to procedure and law. Even original case papers are not in accordance with law. Original case papers are also silent about injuries received on which part of the body. According to him, at most, it was a grievous injury. He further deposed that there is difference between CLW, stab wound and puncture wound. The CLW are caused by blunt object like stone, bricks, sticks, dandas, lathis, iron bar and also by fall on the ground. The common site of occurrence of these injuries is head, face and lower part of body. When he examined the patient, only burn injuries were found and except that no other injuries were found on the person of patient. He did not observe any CLW. Hence, in the

case papers he did not mention those injuries. In the case papers, there is no reference of history. The patient sought discharge against medical advise on the next day. In the requisition given by Police, the name of person who caused injury, is absent. The spot of occurrence is also absent.

13. PW-5 has conducted the investigation. According to him, the complaint was recorded at the instance of complainant. He completed the investigation after recording statements of witnesses and receipt of medical certificate and C.A. reports. In the cross examination, he admitted that he could not collect the evidence as to the source of availability of acid. The knife was not recovered. The german pot was also not recovered. After arrest of the accused, no incriminating circumstances were found. The public tap and the place of offence is not visible from each other. It did not transpire during the investigation that incident took place near public tap. From the statements of the Abidabi, Rashidabi, Salma, it transpired that accused nos.1 to 3 were not present at the time of incident. It also transpired during investigation that the complainant was trying to pressurize Abidabi and Mehmudabi to have illicit relationship with him. In the supplementary statement, the complainant had stated two names as eye witnesses. Their names were stated in the complaint. He made inquiry with them. It transpired that they were not present there at the time of incident. He also deposed that on 17th October 1991, supplementary statement of the complainant was recorded. At that time, the complainant stated that those persons might be present there. He believed that the complainant was confused. He again recorded a statement of the complainant on 26th

March 1992. In medical certificate Exhibit-22, except burn injuries, other injuries are not mentioned. He could not state as to who has signed the said certificate. On perusal of the said certificate, he could not state as to who examined the patient. There is no mention of burn injuries on the arm, face etc.. He realized that there is difference between two certificates. He was demanding the papers from hospital from time to time to verify but the same were not sent to him. The complainant was taken to Sasoon Hospital at 10.30 p.m.. The dying declaration was not recorded after the complaint has been recorded by him.

14. I have heard learned advocate for Appellants and learned APP for State. Learned advocate for Appellants submitted that the prosecution has failed to establish its case beyond reasonable doubt. He further submitted that PW-1 and PW-2 have not supported the prosecution case. There is no independent witness to support the version of complainant. The prosecution is relying on the sole testimony of PW-3 as regards occurrence of the incident. However, his evidence is full of doubts, infirmities, omissions and contradictions. He further submitted that medical evidence and oral evidence of the witnesses is contradictory to each other. He submitted that dying declaration was wrongly exhibited and relied upon by prosecution and the Trial Court. No reliance can be placed on medical certificate Exhibit-22. Documents reflected in application under Section 294 of Code of Criminal Procedure, which were listed at serial numbers 2,5,6 and 7 of the said application, were exhibited without following due process of law. PW-4 has stated that he is not the author of Exhibit-22. It is neither written by him nor signed by

him. The injuries purportedly sustained by the victim are not supported by medical evidence. Although the Trial Court has relied upon the medical case papers which were referred to by PW-4, there is no record to establish that the same were exhibited in evidence in accordance with law. There is no recovery of knife used in the crime as well as german pot from which the acid was brought and poured on the victim. He further submitted that the complainant has referred to sickle being used in commission of crime in the evidence, although he had stated that he was assaulted by knife in the complaint.

15. Learned APP has countered the submissions of Appellants-accused. He submitted that there is ample evidence on record to establish the case against the accused. He submitted that defense itself has assisted the prosecution to establish the motive of commission of crime by way of cross examination of the witnesses. He submitted that PW-3, the injured person, has categorically stated the overt act of the accused and the manner in which he was assaulted. The identity of the accused was not doubted as they were known to the complainant. He submitted that there was motive of the accused to assault the injured person. He submitted that there is no reason to discard the evidence of PW-3 who has involved the accused by cogent evidence. He submitted that the burn injuries sustained by the victim were spelt out in Exhibit-22. He further submitted that PW-4 who had examined PW-3, has established in his evidence that the complainant had suffered burn injuries on account of acid poured on his person. He submitted that accused has committed a serious crime and they deserved to be punished for the

same. There is no reason to interfere in the judgment passed by the Trial Court by giving reasons for convicting the accused on a detailed analysis of evidence.

16. Apart from hearing learned advocate for Appellants and learned Assistant Public Prosecutor, I have perused the evidence of witnesses and the documentary evidence placed on record. On screening the evidence on record I am of the opinion that this is not a fit case to convict the accused for the offences for which they are tried. The evidence of the prosecution is full of discrepancies and cannot be accepted to arrive at a conclusion that the accused had committed the said crime. No doubt, accused nos.1 to 4 were brothers of PW-1 and DW-1. However, the prosecution has not examined any independent witness to support the version of PW-3. Although the complainant is an injured person, but it is difficult to rely upon his evidence for several reasons. His evidence does not inspire confidence. It is not corroborated by any witness. There is no recovery of weapon and the german pot from which purportedly the acid was poured upon the complainant. From the evidence of the defense witness and the evidence of prosecution witnesses, who were declared hostile and were cross examined by the defense, it is implicit that the complainant had reason to implicate the accused in the crime. DW-1 is the wife of complainant. The prosecution has cross examined her but could not discard her evidence. Surprisingly the Trial Court has drawn adverse inference against the accused on the basis of evidence of witnesses qua the reason for false implication of the accused, as deposed by the said witnesses.

17. The complainant has improved his evidence before the Court. There were several omissions which were brought on record by the defense through cross examination. While analysing the evidence of said witnesses hereinabove, I have referred to said omissions and the same are not repeated again to avoid repetition. The complainant has stated that he cannot understand the difference between knife and sickle. The motive attributed by him in the evidence that accused were dealing in the business of liquor and on information being given by him raid was carried out by Police and that they were suspecting the complainant, was not reflected in the complaint lodged by PW-3. In the complaint he had referred to the weapon as knife while in the evidence he has referred to sickle. He also referred to the names of two independent witnesses in the supplementary statement. However, the investigating officer has stated that inquiry was made with the said witnesses and it was revealed that they were not present at the scene of the offence. In a subsequent supplementary statement, he stated that he felt that those persons might be present and, therefore, he had referred to their names. He admitted that there was dispute with regard to property against Abidabi and he had filed a suit in respect to the said property. From the evidence of medical officer PW-4, it can be seen that the ocular evidence of PW-3 is contrary to medical evidence. The said witness has deposed that he has brought original case papers and produced the same. The prosecution has relied upon Exhibit-22, the medical certificate, purportedly issued by Sasoon Hospital. The said medical certificate only refers to the fact of 40% super acid deep burn due to acid. The prosecution has placed heavy reliance on the said

certificate. The Trial Court has also accepted the said document. The said certificate does not refer to the injuries on account of acid specifying the part of body where the victim has sustained injuries. The certificate also does not refer to injury by any weapon on any other part of body. It is pertinent to note that PW-4 has disowned issuance of said certificate. He is not the signatory to the said certificate nor he has written the contents of said certificate. The author of said certificate is not examined. PW-4 has stated that he does not know as to who has written the said certificate. The said document was silent about history of injuries. He deposed that the certificate Exhibit-22 is baseless and not in accordance with the procedure. In the circumstances, no reliance could be placed upon Exhibit-22.

18. PW-4 has deposed that he is relying upon original case papers and producing the same. The Trial Court allowed him to produce the said documents subject to objection. However, from the evidence it does not appear that said documents were exhibited in the evidence. There is no discussion about admissibility of said documents in the judgment of the Trial Court, although during recording of evidence of PW-4, it was stated that production of documents is allowed subject to objection. There is nothing to show that the said case papers were exhibited in evidence. Surprisingly PW-4 himself has stated that original case papers are not in accordance with law and they were silent with regard to which part the injuries were sustained by the injured person. PW-4 also stated that CLW is caused by blunt object like stone, bricks, stick etc.. He also stated that when he examined the patient, only burn injuries were found and no other

injuries were noticed. He also did not observe about existence of CLW on the person of patient and, therefore, in the case papers, he has not mentioned those injuries. It is therefore ample clear that version of PW-3 that he was assaulted by knife, is not supported by any evidence and it creates doubt about his veracity about evidence. The prosecution has not been able to prove that there were injuries by acid on various parts of body of the victim, as tried to be suggested by prosecution. It is difficult to believe that version of PW no.3. From the evidence of investigating officer, it is apparent that the knife and german pot is not recovered. He could not collect the evidence of source of availability of the acid. He could not collect increminating evidence after the arrest of accused. The statements of witnesses recorded by him did not refer to presence of accused nos.1 to 3 at the time of incident. He also deposed that during investigation it was transpired that PW-3 was trying to pressurize Abidabi and Mehmudabi to have illicit relationship with him. The witnesses referred to by PW-3 in his complaint, were not present at the time of incident. In the light of the above circumstances, the defence of the accused appears to be plausible. the prosecution case is under shadow of doubt.

19. The Trial Court has relied upon the purported dying declaration of PW-3. The said statement was recorded on 28th September 1991. It is the case of prosecution that tongue of the victim was swollen and, therefore, he has written the said document in his own hand writing. It is pertinent to note that the statement of victim was also recorded on the same day by Police, which was treated as a complaint. The so called dying declaration mentions

that the victim was assaulted by knife by one of the accused. He sustained burn injuries by acid poured by the accused. The accused were suspecting that the victim was giving information to Police against them. In the police statement, however, he made reference to the presence of witnesses as well as his sister-in-law Abidabi. The Trial Court has failed to understand that said document which was recorded as dying declaration loses its sanctity as dying declaration. The Trial Court has, however, exhibited the said document vide Exhibit-19 as dying declaration. The basic tenet of law is that when a person is alive, such a statement cannot be treated as a dying declaration. The Trial Court has, however, exhibited the said document and relied upon the said document as a dying declaration, without taking into consideration the fact that it cannot be a dying declaration within the meaning of Section 32 of Indian Evidence Act. Section 32 of Indian Evidence Act relates to the case in which statement of relevant fact by person, who is dead or cannot be found etc; is relevant. Clause-1 of the said section relates to the cause of death. It is reflected therein that when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of dead person's comes into question. Such statements are relevant when the person who made them was or was not at the time they were made under expectation of death. Therefore, in the light of above, the statement of PW-3 who is alive and has been examined as a witness, cannot be treated as a dying declaration. As long as the maker of the statement is alive, such statement would only remain in the realm of a statement recorded during investigation.

20. In case of **Gajula Suryaprakas Rao Vs. State of Andhra Pradesh**¹, it has been observed that it is well settled and needs no restatement that when a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of Indian Evidence Act. In several decisions, the Apex Court has held that unless the statement of the dead person would fall within the purview of Section 32(1) of Indian Evidence Act, there is no other provision under which same can be admitted in evidence. In order to making a statement of a dead person admissible in law, the same must be as to the cause of death or as to any of the circumstances of the transactions which resulted in the death of said person, in cases in which the cause of death comes into question.

21. In case of **Ramprasad Vs. State of Maharashtra**², in paragraph 14, the Supreme Court observed as follows :

"14. We are in full agreement with the contention of the learned counsel that Ext.52 cannot be used as evidence under Section 32 of the Evidence Act though it was recorded as a dying declaration. At the time when PW-1 gave the statement he would have been under expectation of death but that is not sufficient to wiggle it into the cassette of Section 32. As long as the maker of the statement is alive, it would remain only in the realm of a statement recorded during investigation."

22. Taking into consideration all aspects as stated hereinabove, I am of the opinion that prosecution has not been able to establish its case beyond all reasonable doubts. The evidence is full of infirmities.

1 (2010)1-SCC-88

2 AIR-1999-SC-1969

The conclusion drawn by the Trial Court are contrary to the records. Hence, the conviction awarded to the Appellants-accused deserves to be set aside.

23. Hence, I pass following order :

ORDER

(a) The judgment and order dated 5th December 1996 passed by Additional Sessions Judge, Pune in Sessions Case No.572 of 1992 convicting the Appellants-accused nos.2, 3 and 4 for the offences under Sections 307 read with 149, 324 read with 149, 148 and 147 of IPC, is hereby quashed and set aside;

(b) The Appellants-accused Nos.2, 3 and 4 are acquitted;

(c) The appeal as against Appellants/accused nos.1 and 5 stands abated;

(d) No order as to costs.

(PRAKASH D. NAIK, J.)

MST