

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

CRIMINAL APPEAL NO.183 OF 2002

Shaikh Pappu s/o Kalimuddin Jahagirdar  
Age 25 years, Occu. Business (Pan Tapari),  
R/o Rengatipura, Aurangabad,  
Taluka and District Aurangabad ... APPELLANT  
(Original Accused No.1)

**VERSUS**

1. The State of Maharashtra  
through Jinsi Police Station,  
Aurangabad, Dist.Aurangabad  
(Copy to be served on A.P.P.,  
High Court of Judicature at  
Bombay, Bench at Aurangabad)
2. Syed Ayub s/o Syed Yaqub,  
Age major, Occu. Business,  
R/o Aurangabad ... RESPONDENTS

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Shri R.B. Deshmukh, Advocate for appellant  
Mrs. D.S. Jape Ansingkar, A.P.P. for Respondent No.1/ State  
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CORAM: SUNIL K. KOTWAL, J.

Date of reserving judgment : 6th February, 2018

Date of pronouncing judgment : 13th February, 2018

**JUDGMENT :**

1. This appeal is directed against the judgment and order of conviction dated 15.3.2002, passed by learned III Adhoc Additional Sessions Judge, Aurangabad in Sessions Case No.425/1999, wherein accused Nos.1 and 2 were convicted for

the offence punishable under Section 307 read with Section 34 of the Indian Penal Code and they were sentenced to suffer rigorous imprisonment for three years and fine of Rs.500/-. Respondent is the State of Maharashtra.

2. The prosecution case in brief is that, the informant Syed Ayub (P.W.4), resident of Nizamgunj Colony was Welder by occupation and on 14.2.1999, at about 2.00 p.m., when he was returning to his home for lunch, on way accused No.2 Aleem met him at the Pan Stall of accused No.1 Pappu. Accused No.2 Aleem threatened the informant on account of non payment of money to him for drinking liquor at the eve of marriage of one Kadir. Thereafter, on the same day, at about 7.00 p.m., when the informant Syed Ayub (P.W.4) was returning to his home, when he was passing by Chambharwada, both the accused Nos.1 and 2 intercepted him on road and asked him as to why he did not pay money for drinking liquor. Accused No.1 Pappu Jahagirdar caught hold of the informant by his hand and at that time, accused No.2 Aleem inflicted number of knife blows on the back of shoulder area of informant. The informant sustained bleeding injuries. Thereafter both the accused bolted away from the spot. After some time, the mother of informant rushed on the spot and took him to the hospital in injured condition. Dr. Dinesh Pagaria (P.W.10), Medical Officer, Government Medical College &

Hospital, Aurangabad, known by local name "Ghati Hospital", Aurangabad examined the injured Syed Ayub and found number of incised wounds on the body of informant. He issued Medico Legal Certificate Exh.46 and referred the injured to Surgery Department in the same hospital. Dr. Vijay Kandewad (P.W.11), the then Surgeon, operated the injured informant. By that time, P.S.I. Madhav Patil (P.W.9), Police Station, Jinsi, Aurangabad was informed. Therefore, he rushed to the Civil Hospital, Aurangabad and obtained F.I.R. (Exh.29) in the hospital. In the result, Crime No.28/1999 was registered under Section 307 read with Section 34 of the Indian Penal Code. P.S.I. Patil (P.W.9) prepared spot panchanama (Exh.35) and collected blood stained earth sample from the spot. During the course of investigation, both the accused were arrested and blood stained clothes were seized from their person. As per disclosure statement of accused No.2 Aleem, blood stained knife was seized. After completion of the investigation, charge sheet was submitted before the Judicial Magistrate, First Class, Aurangabad against both the accused for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code.

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

Aurangabad.

4. Charge Exh.14 was framed against accused Nos.1 and 2 for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code. In support of prosecution case, prosecution examined total 11 witnesses. After considering the oral and documentary evidence placed on record, the trial Court pleased to convict the accused for the punishable under Section 307 read with Section 34 of the Indian Penal Code. Therefore this appeal arises.

5. Heard arguments submitted by learned counsel for the appellant and learned A.P.P. for the state. The appellant is referred as per his original status (accused No.1). Learned counsel for the accused No.1 submits that, at the time of first part of the occurrence i.e. demand of money near the Pan Stall of accused No.1 Pappu, no money was demanded by accused No.1. It was the act of only accused No.2. According to learned counsel for the appellant, the accused No.1 did not inflict knife blow on the body of the informant and, therefore, it cannot be held that he shared the common intention along with accused No.2 to commit the attempt of murder of informant.

6. His next limb of argument is that, no independent

witness is examined by the prosecution and, therefore, only on the basis of sole testimony of informant (P.W.4), conviction cannot be based. He has drawn my attention towards the injury certificate (Exh.46), which indicates that, the informant sustained 7 simple injuries. According to learned counsel for the appellant, as all the injuries are inflicted on the back portion of the body of informant, "intention to kill" cannot be gathered from the evidence on record. Therefore, no offence is made out under Section 307 of the Indian Penal code. He has also pointed out that, no blood stains were found on the clothes seized from accused No.1 Pappu.

7. In this appeal, this Court is unaware regarding filing of appeal by accused No.2 and its result. Learned defence counsel expressed his ignorance about the act of accused No.2. Even learned A.P.P. cannot confirm whether any appeal was preferred by accused No.1 and whether the same is pending is disposed of. Therefore, while deciding the appeal, I need not consider the evidence available against accused No.2.

8. No doubt, from the C.A. Report (Exh.40), it emerges that, blood was not found on the clothes of accused No.1 Pappu. From the C.A. Report, it also emerges that, blood group of informant is 'A' and human blood of Group 'A' was found on

clothes of the informant as well as on clothes of accused No.2 and on the knife blade seized from accused No.2. In the earth sample seized from the spot of the incident, only human blood was detected, but its group could not be determined.

9. Out of 11 prosecution witnesses, Panch Alim Khan Jalal Khan (P.W.1) Amjad Khan (P.W.2), Shaikh Nazir (P.W.3), Shaikh Rafiq (P.W.6), Shaikh Jilani (P.W.7), Abdul Sami (P.W.8) have turned hostile. The evidence of these hostile witnesses is useless piece of the evidence as nothing could be elicited in their cross-examination which is helpful to the prosecution.

10. Therefore, the total prosecution case is based on testimony of informant Syed Ayub (P.W.4), Dr. Dinesh (P.W.10) and Dr. Vijay Kandewad (P.W.11). The investigating officer P.S.I. Patil (P.W.9) has only conducted investigation of this crime. However, no incriminating article is seized from the possession of accused No.1 Pappu. Therefore, the fate of this appeal revolves around the point whether sole testimony of Syed Ayub (P.W.4) is sufficient to convict the accused No.1 for the offence punishable under Section 307 of the Indian Penal Code or not.

11. Trite law is that, even sole testimony of informant

Syed Ayub (P.W.4), who is the injured witness, can be relied upon to base the conviction provided that it is free from all infirmities. Undisputedly Syed Ayub (P.W.4) is not on inimical terms with any accused person and there was no previous dispute between the informant and accused persons. Therefore, false implication of the accused No.1 in the present matter by informant is impossible.

12. Syed Ayub (P.W.4) has categorically deposed on oath that, on the date of incident, at noon hours, when he was returning to his home for lunch, that time the accused persons demanded money from him for drinking liquor, but he did not pay money to them. According to this witness, in the evening at about 7.00 p.m., when he was proceeding towards his home through Chambharwada area, on way, accused met him and asked him that he did not pay money to them for drinking liquor. Thereafter, the accused No.1 caught hold the hands of informant Syed Ayub and accused No.2 Aleem started inflicting knife blows on the left shoulder, right shoulder below neck, below arm pit and on the back and waist. The informant sustained injuries and fell down. After some time, his mother Fatema Begum (P.W.5) rushed on the spot and took him to Civil Hospital where he was examined by Medical Officer. This witness has duly proved his F.I.R. Exh.29 obtained by police in the hospital. According to this

witness, he was admitted in the hospital for about 20 to 25 days. He has also identified his blood stained clothes (Articles 6 and 7).

13. From the cross-examination of Syed Ayub (P.W.4), it only emerges that, prior to the incident, accused never demanded money from him and that was the first occasion that accused demanded money for drinking liquor. He also admits that, no person passing by the road paid any heed to him. Except these stray admissions, nothing could be elicited from the cross-examination of this witness which creates doubt about the truthfulness of his contentions. Learned defence counsel tried to bring on record that prior to this incident, the informant quarreled with the accused persons. However, that suggestion was specifically denied by this witness. Learned defence counsel also suggested that, on the date of incident, informant went to scrap shop and fell down on the scrap tin sheet and thereafter sustained injuries on his back. However, these suggestions are specifically denied by this witness. Even Dr. Dinesh P.W.10) who examined the informant at Civil Hospital has ruled out the possibility of sustaining such injuries due to fall on scrap material. Thus, after careful examination of testimony of informant Syed Ayub (P.W.4), I do not find any circumstance on record which creates doubt about the truthfulness of the version of this witness. I hold that, the entire testimony of Syed Ayub

(P.W.4) is free from every infirmity and conviction can be based even on his sole testimony.

14. Otherwise also, Dr. Dinesh (P.W.10) has duly proved the M.L.C. Certificate Exh.46 and following incised wounds on the body of informant when he was examined by Dr. Dinesh (P.W.10) were found :

- (1) Incised wound at right middle back region 2 cm x 1 cm x  $\frac{1}{2}$  cm.
- (2) Incised wound at left upper back region 1" x 1 cm x  $\frac{1}{2}$  cm.
- (3) Incised wound at lumber region 2 cm x 1 cm x  $\frac{1}{2}$  cm.
- (4) Incised wound at left index finger 1" x 1 cm x  $\frac{1}{2}$  cm.
- (5) Incised wounds two in numbers at left gluteal region, 2 cm x 1 cm x  $\frac{1}{2}$  cm each.
- (6) Incised wound at left arm 1 cm x  $\frac{1}{2}$  cm x  $\frac{1}{2}$  cm.
- (7) Incised wound at right shoulder region 2 cm x 1 cm x  $\frac{1}{2}$  cm.

15. Dr. Dinesh (P.W.10) has opined that, the above incised wounds found on the body of informant Syed Ayub (P.W.4) were caused due to sharp cutting instrument within 24 hours from the time of examination. Thus, the oral testimony of Syed Ayub (P.W.4) is also corroborated by medical evidence of Dr. Dinesh (P.W.10) and M.L.C. Certificate Exh.46.

16. Though Dr. Dinesh (P.W.10) opined that all the

injuries found on the body of informant are simple in nature. Dr. Vijay Khandewad (P.W.11), the then Surgeon from Civil Hospital, Aurangabad, who treated and operated the injuries found on the body of informant, had also brought on record that the injury on left infra scapular region was grievous and it could have led to the death of the informant. Dr. Vijay (P.W.11) being Surgeon, who operated the informant, the testimony of this witness carried much weightage regarding the nature of injuries found on left infra scapular region of the informant.

17. Otherwise also, the informant Syed Ayub (P.W.4) deposed before the Court that he was admitted in the hospital for about 25 days due to the injuries sustained by him during the occurrence. Therefore, otherwise also, the injury on left infra scapular region of the informant which was dangerous to his life and which caused him to remain in the hospital for more than 20 days and made him unable to follow his ordinary pursuits, is certainly grievous hurt under Section 320 of the Indian Penal Code.

18. Learned counsel for the appellant has placed reliance on the case of Manikappa s/o Ashappa Kalal & others Vs. State of Karnataka (Criminal Appeal No.3651/2010). However, this case is distinguishable on facts.

19. In the circumstances, I have no hesitation to hold that, the prosecution has proved beyond reasonable doubt that, on the above said date, time and place, the accused No.1 and 2, in furtherance of their common intention, voluntarily caused grievous hurt to the informant Syed Ayub (P.W.4). As accused No.1 took active part by holding the hands of the informant during the occurrence to make him easy target for accused No.2 to easily inflict more than 7 knife blows on the back portion of body of the deceased, he also shared the common intention with accused No.2 to cause grievous hurt to the informant.

20. However, it cannot be ignored that, none of the injury was caused on any vital part of the body of the informant. All the injuries are on back side of the body of informant. Therefore, it cannot be said that, accused had intention to commit murder of informant. Therefore, considering the overall circumstances of the case, which indicates that the accused had no motive to commit murder of the informant and there was no pre-plan even to intercept him on road to commit his murder. Only by chance on that day, the informant met to accused on road and on account of previous demand of money for drinking liquor, they assaulted the informant by knife and caused grievous hurt to the informant. Therefore, the accused cannot be convicted for the

offence punishable under Section 307 of the Indian Penal Code. However, it cannot be ignored that, as accused have voluntarily caused grievous hurt to the informant, they deserve to be convicted for the offence punishable under Section 326 of the Indian Penal Code.

21. Question may arise whether the sentence of three years rigorous imprisonment is the adequate punishment, which is already imposed by the trial Court for the offence punishable under Section 307 of the Indian Penal Code. Considering the overall circumstances of this case, I hold that, rigorous imprisonment for three years and fine of Rs.500/- imposed by trial Court is just and proper even for the offence punishable under Section 326 of the Indian Penal Code and it needs no interference. Such punishment cannot be harsher punishment as the unarmed informant was injured by the accused persons with deadly weapon like knife. Therefore, I hold that, this appeal deserves to be partly allowed and the conviction under Section 307 of the Indian Penal Code deserves to be modified into Section 326 of the Indian Penal Code. Hence I pass the following order :

### **ORDER**

1. The Criminal Appeal is partly allowed :

2. Conviction of the accused No.1 Shaikh Pappu s/o Kalimuddin Jahagirdar under Section 307 of the Indian Penal Code is set aside and modified to that under Section 326 of the Indian Penal Code. The accused No.1 Shaikh Pappu s/o Kalimuddin Jahagirdar is convicted for the offence punishable under Section 326 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.500/-, in default to suffer simple imprisonment for two months.
3. On deposit of fine amount, the same be paid as compensation to the informant Syed Ayub (P.W.4).
4. Accused No.1 Shaikh Pappu s/o Kalimuddin Jahagirdar shall surrender to his bail bonds before the trial Court immediately to undergo the sentence.
5. Set off be given under Section 428 of the Code of Criminal Procedure for the period already undergone.

( SUNIL K. KOTWAL )  
JUDGE