

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

CRIMINAL APPEAL NO. 579 OF 2002

- 1) Santosh Dattatraya Londhe,
Age 26 years, Occ. Driver,
- 2) Dattatraya Bhimaji Londhe,
Age 48 years, Occ Auto
Rickshaw-Driver,
**(Appeal abated against Appellant
No. 2).**
- 3) Ganesh Dattatraya Londhe,
Age; 23 years, Occ Student,
- 4) Shakuntala w/o Dattatraya Londhe,
Age; 43 years, Occ Household,

All resident of Northern Branch
Shrirampur, Sangamner Road,
Shrirampur, Ward No. 7,
Tq. Shrirampur, District Ahmednagar.

APPELLANTS.

VERSUS

The State of Maharashtra

RESPONDENT.

Mr. V.R. Dhorde, Advocate for the appellants.
Mr. Y.G. Gujrathi, A.P.P. for the State/respondent.

CORAM : SUNIL K. KOTWAL,J.

Date of Reserving Judgment : 13th March, 2018.
Date of Pronouncing Judgment : 23rd April, 2018.

JUDGMENT :

1) This appeal is directed against the judgment and order of conviction of accused Nos. 1 to 4 for the offences punishable under Section 324 and 323 read with Section 34 of the Indian Penal Code, passed by the 2nd Additional Sessions Judge, Shrirampur in Sessions Case No. 193 of 1996. Appellants are original accused Nos. 1 to 4. The Respondent is the State of Maharashtra.

2) The prosecution case in brief is that the informant Saraswati Thorat (PW 1) used to live at Murgewasti, Tq. Shrirampur along with her husband and children. One Ushabai Pote was the neighbour of the informant. Said Ushabai had dispute with accused No. 2 Dattu Londhe. On 25/02/1995, at about 3.30 p.m., Saraswatibai (PW 1), her husband Dayaram and neighbour Ushabai Pote sat in front of their house. That time, accused Nos. 1 to 6 reached on the spot. Accused No. 1 Santosh and accused No. 3 Ganesh were armed with steel bars. Initially, accused No. 4 Shakuntalabai started abusing. At her instance, accused No. 1 Sahtosh inflicted Iron Bar blow on the head of Ushabai Pote. When the husband of informant Saraswatibai tried to intervene, that time, accused Shakuntalabai pulled hair of Saraswatibai and started abusing her. Accused Dattu Londhe started scuffling with Dayaram Thorat. Ganesh Londhe pierced Iron Bar in the right ankle of

Saraswatibai and Dattu Londhe inflicted Iron Bar blow on the head of Dayaram Thorat. As the informant and her husband as well as Ushabai sustained injuries, they went to the police station, Shrirampur. Saraswatibai lodged First Information Report (Exh. 29) against all the accused persons. In the result, Crime No. 60/1996 was registered for the offence punishable under Sections 143, 147, 148, 323, 324, 307, 504 read with Section 149 of the Indian Penal Code. The injured were referred to the Hospital at Shrirampur for medical examination. Dr. M.S. Jadhav examined the injured persons and issued injury certificates. API, Shaikh Husain (PW 7) conducted investigation of this crime. He prepared spot panchanama (Exh. 32) and seized blood mixed earth and unearth from the spot of incident. Blood stained Banian of injured Dayaram was seized under panchanama (Exh. 34). Blood stained clothes of Ushabai Pote were seized under panchanama (Exh. 35). One Iron Bar was also seized as per the disclosure statement given by accused Santosh. The seized muddemal articles were referred to Chemical Analyser, Aurangabad and after completion of the investigation, charge-sheet was submitted in the Court of Judicial Magistrate, First Class, Aurangabad.

3) The offence punishable under Section 307 of the Indian Penal Code being exclusively triable by the Court of Sessions, this

case was committed to the Sessions Court, Aurangabad.

4) The Charge (Exh. 3) was framed against accused Nos. 1 to 6 for the offences punishable under Sections 143, 147, 148, 307 read with Section 149, under Section 324 read with Section 149 and under Section 504 read with Section 149 of the Indian Penal Code. Accused pleaded not guilty and claimed to be tried. The defence of the accused is of total denial.

5) After considering the evidence placed on record by the prosecution, the learned Trial Court pleased to convict accused Nos. 1 to 4 for the offences punishable under Section 324 and 323 read with Section 34 of the Indian penal Code. Accused were sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 500/- for the offence punishable under Section 324 read with Section 34 of the Indian Penal Code and rigorous imprisonment for six months and to pay fine of Rs. 500/- for the offence punishable under Section 324 of the Indian penal Code. Therefore, this appeal.

6) Heard strenuous arguments submitted by the learned counsel for the Appellants and the learned A.P.P. for the State. For the sake of convenience hereinafter appellants are referred as accused nos. 1 to 4.

7) Accused no. 2 Dattatraya Bhima Londhe died during the pendency of the appeal and the proceeding against him is abated. The learned counsel for the appellants submitted that in the case at hand the star witness Ushabai Pote is not examined by the Prosecution as she died before recording of the evidence. He also pointed out that the Medical Officer who examined injured is also not examined by the Prosecution without assigning any reason. According to the defence counsel, Dr. Anil Shinde (PW 8) did not examine any injured person, therefore, he cannot prove the injuries found on the body of the witnesses.

8) Next submission of the learned counsel for the Appellants is that no incriminating article was seized from accused Ganesh and even the seizure of the Iron Rod from accused Santosh is doubtful because Panch (PW 5) admits in his cross-examination that the seizure was made at 10.00 a.m. when, actually the seizure panchanama shows that the time of the seizure was in between 8.35 a.m. to 9.30 a.m.

9) Learned counsel for the Appellants assailed the evidence of Saraswatibai (PW 1), Dayaram (PW 2) and the eye witness Sunil (PW 6) on the ground of material omissions and conflicting versions of these witnesses.

10) Learned APP for the State has supported the judgment of conviction on the ground that Saraswatibai (PW 1) and Dattatraya (PW 2) are the injured witnesses, therefore, their presence on the spot cannot be doubted. According to the A.P.P., the infirmities pointed out by the defence counsel are minor infirmities and deserve to be ignored.

11) Next limb of the argument of learned APP is that Dr. Jadhav who examined the injured was not traceable at the stage of recording of evidence, therefore, he could not be examined. The last submission of the learned APP is that total six accused persons participated in the commission of the offence, therefore much importance cannot be given to the minor conflicting versions of the prosecution witnesses regarding which weapon was used by which accused and who was assaulted by whom.

12) After going through the evidence on record, it becomes clear that the prosecution evidence is in two forms, i.e. direct evidence and circumstantial evidence. Direct evidence is testimony of informant Saraswatibai (PW 1), her husband Dayaram Thorat (PW 2) and neighbour Sunita Padale (PW 6). Circumstantial evidence is in the form of recovery of weapon of the offence i.e. Iron Bar, as per disclosure statement given by accused Santosh before

the Police.

13) At the outset, I must observe that recovery of Iron Bar at the instance of accused No. 1 Santosh Londhe is doubtful piece of the evidence because, though Pancha Vilas Shejwal (PW 5) deposed that in his presence disclosure statement of accused Santosh (Exh. 37) was recorded and thereafter, Santosh produced one Iron Bar which was seized under panchanama (Exh. 38), the cat has come out of the bag when this witness was subjected to the cross-examination. In cross-examination, he admits that the recovery was made at about 10.00 to 10.15 a.m. However, the memorandum (Exh. 37) and recovery panchanama (Exh. 38) show that everything was completed in between 8.15 a.m. to 9.30 a.m. Thus, the testimony of Pancha Vilas (PW 5) is not believable to prove the recovery of weapon of the offence at the instance of accused No. 1 Santosh. Otherwise also the evidence available on record shows that the Iron Bar was not properly sealed and it was not sent to Chemical Analyser to establish that it bears blood stains of the blood of injured witnesses. Therefore, this important piece of circumstantial evidence has become useless.

14) So also, though prosecution has brought on record evidence to prove that blood stained clothes of injured witnesses

were seized and referred to Chemical Analyser, no evidence has been placed on record to show that those clothes were properly sealed and in the same condition were referred to the Chemical Analyser. Therefore, though Chemical Analysis report shows human blood of Group- AB on Banian of Dayaram and Group-O on the blouse and brassiere of Usha Pote, in absence of examination of carrier of the muddemal to the Chemical Analyser, prosecution cannot rule out possibility of tampering of muddemal and therefore this important piece of the evidence has become useless.

15) So also, evidence of Dr. Shinde (PW 8) who can only identify the signature of Dr. Jadhav, who actually examined the injured persons is of no help to the prosecution to prove the exact injuries sustained by injured witnesses. No doubt, Dr. Jadhav was not available despite sufficient attempt by prosecution to serve him. However, on that count alone, Dr. Shinde who had no occasion to examine the injured cannot prove the nature of the injuries and its age, which were alleged to be found on the body of injured witnesses. Thus, even the medical evidence placed on record is of no help to the prosecution to establish the guilt of the accused.

16) In the circumstances only direct evidence of injured witnesses (PW 1) and (PW 2) the eye witness (PW 6) is available to

establish the guilt of the accused. Legal principle is absolutely clear that if, direct evidence is trustworthy and free from every infirmities, it can be relied upon to base the conviction without corroboration.

17) No doubt, from the cross-examination of Saraswati (PW 1) it emerges that, she carried grudge against the accused persons because, in the past they submitted complaint against this witness to Police Station regarding quarrelsome nature of this witness. However, only because the relations in between Saraswatibai (PW 1) and accused are strained, on that count testimony of Saraswatibai cannot be dis-believed, if otherwise it is believable.

18) It is to be noted that, as the incident occurred in front of the house of Saraswatibai (PW 1), the presence of these injured witnesses and eye witness (PW 6) who is neighbour, is absolutely natural. Saraswatibai (PW 1) as well as Dayaram (PW 2) have categorically deposed on oath that, at the time of occurrence accused persons together came to the house of informant Saraswatibai where she was sitting with her husband Dayaram and neighbour Usha Pote. These both witnesses have made it clear that accused No. 1 Santosh and accused No. 3 Ganesh were holding Iron Bar in their hands and accused No. 1 Santosh inflicted first Iron Bar

blow on the head of Usha Pote and subsequently on her leg and hand. The version of Saraswatibai (PW 1) and Dayaram (PW 2) is conflicting with each other only in respect of as to which accused inflicted Iron Bar blow on the head of Dayaram (PW 2). According to Saraswati (PW 1) accused No. 2 Dattatraya inflicted Iron Bar blow on the head of Dayaram by taking that Iron Bar from the hand of Ganesh Londhe. To the contrary, according to Dayaram (PW 2), the accused Dattatraya caught hold him and accused Santosh inflicted Iron Bar blow on his head. According to me, such type of conflicting versions in between these two witnesses is natural one, due to passage of time from the date of occurrence till recording of their evidence. The incident occurred on 25/02/1996 and the evidence of these witnesses is recorded on 04/09/2002. Therefore, over much importance cannot be given to the above contradictions which have come on record regarding the actual blows inflicted on the head of Dayaram (PW 2), when witnesses are firm regarding presence of accused nos. 1 to 4 on the spot and assault by them to Saraswati (PW 1) Dayaram (PW 2) and Usha Pote.

19) The evidence of Saraswati (PW 1) and Dayaram (PW 2) is also corroborated by testimony of Sunita Padale (PW 6), who deposed regarding assault to these witnesses by accused nos. 1 to 4. Only because, Sunita (PW 6) could not recollect as to which

accused assaulted to which injured witness, her testimony cannot be discarded.

20) The evidence of two injured witnesses and one eye witness is fully corroborated by prompt FIR (Exh. 29). So also, the active part taken by each accused nos. 1 to 4 at the time of assault, is sufficient to hold that, all of them shared common intention to assault Usha Pote and above two injured witnesses by deadly weapon. Therefore, though Iron Bar was actually used by accused No. 1 Santosh and accused Dattatraya, all the accused would be liable for commission of the offence of voluntarily causing hurt to Usha Pote, Saraswatibai and Dayaram Thorat by deadly weapon Iron Bar. In other words, the direct evidence placed on record is sufficient to prove beyond reasonable doubt that accused nos. 1 to 4 in furtherance of their common intention committed an offence punishable under Section 324 read with Section 34 of the I.P.C.

21) However, after going through the judgment passed by the trial Court, it has come to my notice that, at the time of occurrence, accused No. 1 Santosh and accused No. 3 Ganesh were below the age of 21 years. In view of the bar imposed under section 6 of the Probation of Offenders Act, 1958, the learned trial court cannot be justified for sentencing them to imprisonment,

without assigning proper reasons for the same. So also, no reasons have been assigned by trial Court for not extending the benefit of Section 4 of the Probation of Offenders Act in favour of accused No. 2 and 4 also.

22) Therefore, in this appeal, report of the District Probation Officer is called.

23) The District Probation Officer has submitted his report and recommended that appellants may be released on entering into good behaviour bond under Section 4 (1) of the Probation of Offenders Act 1958. Considering the circumstances of the case as well as young age of accused nos. 1 and 3, so also, part played by accused No. 4 Shakuntalabai as well as the report of the District Probation Officer, Ahmadnagar, I am fully satisfied that this is a fit case in which benefit of Section 4 (1) of the Probation of Offenders Act can be extended in favour of the appellants.

24) It follows that, this appeal deserves to be partly allowed for extending benefit of Section 4 (1) of the Probation of Offenders Act in favour of appellant Nos. 1, 3 and 4. Hence following order :

ORDER

- 1) Criminal Appeal No. 579/2002 is partly allowed.

- 2) Conviction of appellants for the offences punishable under Sections 324 and 323 read with Section 34 of the I.P.C. passed by 2nd Additional Sessions Judge, Shrirampur in Sessions Case No. 193/1996 is confirmed.
- 3) Instead of sentencing the appellant Nos. 1, 3 and 4, they are directed to be released under Section 4 (1) of the Probation of Offenders Act, 1958 on their entering into a bond in the sum of Rs. 5,000/- (Rs. Five Thousand Only) each with one surety in the like amount to appear and receive sentence whenever called upon by this Court within the period of one year and in the mean time, keep the peace and be of good behaviour.
- 4) Appellant Nos. 1, 3 and 4 are directed to execute a bond in the sum of Rs. 5,000/- (Rs. Five Thousand Only) each with one surety each in the like amount before the Trial Court, within 15 days from the date of this order.
- 5) The bail bonds of the appellants are cancelled.
- 6) The fine amount deposited by appellant Nos. 1, 3 and 4 before the Trial Court be refunded to them after the period of appeal is over.

(SUNIL K. KOTWAL)
JUDGE