

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 187 OF 2003

The State of Maharashtra
through Police Station
Kotwali, Parbhani.

....Appellant.

Versus

Shaikh Matin Javed s/o.
Shaikh Khaja Moinoddin,
Age 40 years, Occu. Service,
R/o. Masoom colony,
Parbhani.

....Respondent.

Mr. S.J. Salgare, APP for appellant/State.

Mr. S.S. Kazi, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
K.L. WADANE, JJ.**

DATED : JUNE 04, 2018.

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 207/2001, which was pending in the Court of 4th Additional Sessions Judge, Parbhani. The Trial Court has acquitted the respondent accused of the offences punishable under sections 307 and 201 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and also of the offences under Arms Act and Bombay Police Act. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal

can be stated as follows :-

First informant Masood Khan was working as the Headmaster in Gulam Nabi High School, Jintur at the relevant time. The wife of the accused was serving in the same school since the year 1993 as Assistant Teacher and due to that the first informant knew the accused. The Education officer has refused to give approval to the appointment of the wife of the accused in the said school and as this problem cropped up in the year 1997, the school management transferred the wife of the accused to other school situated at Pusad, District Yawatmal. She was relieved from the school of Jintur. The accused became angry with the first informant as he started feeling that only due to the first informant his wife was transferred to distant place from Jintur.

3) The accused started visiting the school of the first informant and started giving threats of life to the first informant. At the time of election to State Legislature, accused had visited the school of first informant, but on that occasion, the first informant was not available in the school and on that occasion, the accused had given beating to school peon. The school peon had given report to Jintur Police Station out of that incident. The accused then begged for pardon and police had started only chapter proceeding under section 107 of Criminal Procedure Code (hereinafter referred to as

'Cr.P.C.' for short) against the accused. Accused then started defaming the first informant and his institution due to the aforesaid dispute by publishing news against them in newspapers.

4) The incident in question took place on 9.8.2000 at about 10.00 a.m. On that day, the first informant left home for Jintur at about 9.55 a.m. and he was passing by the side of a Masjid of Parbhani. The accused came out of Masjid with a weapon which was concealed by him in piece of cloth. After coming close to the first informant, the accused removed the cloth, gave threat of life and started giving blows of weapon. That weapon is generally used for cutting mutton. There were two persons in the company of accused, but they were not known to the first informant. The blows of knife caused bleeding injuries to the limbs and other parts of the body of first informant. The first informant collapsed there and he was about to become unconscious. Some persons from Masjid and others who were passing thereby rushed to the spot. They had seen the accused assaulting the first informant. They shifted the first informant first to the Government Hospital, Parbhani. He was indoor patient in Government Hospital, Parbhani and there, his F.I.R. was recorded by police. The crime was registered on the basis of this F.I.R. in Kotwali Police Station, Parbhani for the offences punishable under section 307 r/w. 34 etc. of IPC at C.R. No. 99/2000. As condition of the first

informant was serious, he was shifted to Aurangabad Hospital. He was indoor patient till 28.8.2000 due to multiple injuries caused to him. In all 13 injuries were found on his person. M.L.C. was prepared by the hospital of Parbhani and the discharge card was collected by police from the Civil Hospital, Aurangabad. Opinion was given that the injuries were sustained within six hours.

5) During the course of investigation, statements of witnesses came to be recorded on the day of incident and subsequently. The accused came to be arrested. During investigation, accused gave statement to police about the place where he had concealed the weapon, where he had thrown his clothes which were burnt by him as there were blood stains on his clothes. On the basis of this statement, weapon like Katti came to be recovered and the partly burnt clothes of the accused also came to be recovered. On 10.8.2000 the clothes of the first informant were taken over as there were blood stains on the clothes. Blood samples of both the first informant and the accused were collected. The aforesaid articles were sent to C.A. office. During the course of investigation, the panchanama of the spot where the incident had taken place was prepared and the spot is situated near the Masjid and it was shown by the eye witness who was living in the vicinity of Masjid. After completion of investigation, chargesheet came to be

filed for aforesaid offences.

6) Charge was framed for aforesaid offences in the Trial Court. The accused pleaded not guilty. Prosecution examined in all twelve witnesses for proving the offences. Accused took the defence of total denial. No defence witness is examined by the accused. Prosecution relied on the evidence of eye witnesses including injured witness and other circumstances. The Trial Court has disbelieved the injured witness and other eye witnesses and has held that other circumstances are not convincing in nature.

7) First informant Masood Khan (PW 2) stuck to his version given in the F.I.R. He has given evidence on motive, on previous incidents and also on the incident in question. Masood Khan has deposed that on the day of incident he had left home from Parbhani at about at about 9.55 a.m. for going to Jintur and on foot he was proceeding towards bus stand. He has deposed that when he reached Inayat Nagar locality Masjid, he saw that accused was coming out of the Masjid and he was holding weapon, Katti in his hand. He has deposed that accused then said that it would be last day of life of the first informant and then accused caught hold of his neck and started giving blows of Katti, weapon to the first informant. He has described the sites of the body where blows were given. He

has given evidence that two persons were in the company of the accused, but they were not known to him and they had not actually assaulted him. He has given evidence that one of the two persons had asked the accused to give blow on the testicles of the first informant and after that one blow was given on the upper part of both the thighs by accused. He has deposed that due to the injuries he collapsed and the injuries caused were bleeding injuries. He has given evidence that accused started running away when he started raising shouts after the first blow given by the accused. He has given evidence that due to his hue and cry, persons like Shaikh Rasool, Shaikh Chand rushed to the spot and Advocate Sikandar and also other persons rushed to the spot. He has deposed that he was shifted to Government Hospital, Parbhani by those persons in auto-rickshaw.

8) First informant Masood Khan (PW 2) has given evidence that the wife of the accused was initially serving in a school from Jintur where the first informant was working as Headmaster and due to some problems with regard to the approval of the appointment of the wife of the accused by the Education Officer, the wife was transferred to the school from district Yawatmal. He has given evidence that due to the transfer of the wife from Jintur, the accused had become angry with him as the accused was thinking that for

transfer of his wife, the first informant was responsible. He has given evidence that in the past, accused had given threats of life to him and on the day of incident also, threat of life was given to him. He has given evidence that on one occasion, the accused had come to the school to assault him, but on that occasion, he was not available and on that occasion, the accused had assaulted peon of the school namely Hakim Shah. He has deposed that out of that incident, police had filed chapter case against the accused. Thus, the first informant has given specific evidence that out of suspicion that first informant was responsible for the transfer of the wife, the accused assaulted him.

9) The F.I.R. given by Masood Khan is duly proved in his evidence as Exh. 16. He has given evidence on the treatment which he received in Government Hospital, Parbhani and also in Aurangabad. He has given evidence that till 28.8.2000 he was indoor patient due to injuries sustained by him in the incident. He has identified the weapon Katti shown to be recovered from the accused by the police.

10) The tenor of the cross examination of the first informant and other witnesses shows that the defence has not disputed that the incident took place near aforesaid Masjid of Parbhani. The first

informant has satisfactorily described the spot where the incident took place.

11) In the cross examination of Masood Khan (PW 2), it is brought on the record that the control over the management of the institution was of the relatives of the first informant. It is brought on the record that there were complaints of irregularities against the institution and the concerned department has called his explanation. It is also brought on the record that a civil suit was filed in the year 2000 by the wife of the accused against the school, but copy of the said suit was not produced to show the date of filing of the complaint. It is brought on the record that one lady teacher had filed complaint against the first informant and crime was registered under the provisions of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act. He has admitted that many persons had disputes with the institution with regard to regularisation of their services. It is also brought on the record that on 18.8.1998 he had complained to the department about the mismanagement of the institution by the Chairman and due to mismanagement, he was also suffering harassment. It is suggested to the first informant that there was dispute between him and the Chairman and due to that he had filed complaint against the Chairman. This suggestion is denied. He has, however, admitted that the management had directed him to hand

over the charge of post of Headmaster to one lady teacher and he was reluctant to hand over the charge. He has admitted that the Education Officer then gave charge of said post to the said lady teacher. It is brought on the record in the cross examination of the first informant that he had given complaint against the accused in Jintur Police Station due to threat given by the accused.

12) The aforesaid tenor of the cross examination of the first informant shows that the first informant was not acting to support the management, but he had also grievances against the management. Though it appears that some staff members had made complaints against him, it does not look probable that he had any reason to act against the wife of the accused. However, it can be said that the accused was thinking that the first informant was responsible for transfer of his wife from Jintur to distant place like Yawatmal. The evidence on the record which is of aforesaid nature is sufficient to show that there was motive for the crime. The Trial Court has unfortunately held that the evidence on motive is not convincing. The circumstance that wife of the accused had filed suit in the year 2000 for recovery of salary against the school, cannot be treated as circumstance against the first informant. Even copy of said plaint was not produced. But, the Trial Court has considered these circumstances against the first informant for disbelieving the

first informant.

13) Other cross examination of the first informant is on the incident. He denied some contents of the F.I.R. like weapon was wrapped in a cloth when accused started coming towards him. But, other discrepancies in the evidence are not that material. He admitted in the cross examination that in supplementary statement, he had informed police that two persons were not in the company of the accused. It can be said that as many as 13 injuries were caused by the accused to the first informant and the first informant could not resist. He must have exaggerated the things to show that he was helpless due to presence of other two accused. Though there are such discrepancies, these discrepancies can be ignored by calling them as exaggeration. Truth is easily separable from falsehood and the evidence of the first informant also shows that subsequently, he admitted that only present accused was involved in the incident. The Trial Court has made much against prosecution due to these discrepancies. The F.I.R. at Exh. 16 has given necessary corroboration to the version of first informant on the incident in question.

14) Syed Sikandar Ali (PW 7), one eye witness has supported the case of prosecution. He has given evidence that he is

resident of Parbhani and on the day of incident at about 10.00 a.m. when he was present in the drawing room of the house, he heard hue and cry and so, he rushed out of the house. He has given evidence that he noticed that the first informant Masood Khan had sustained bleeding injuries and the accused was present near the first informant with weapon Katti. He has given evidence that he noticed that the accused was giving blows of Katti to Masood Khan. He has given evidence that when he raised shouts, accused looked at him and then left the place. He has given evidence that 2-4 other persons then shifted Masood Khan to Civil Hospital. His evidence shows that incident in question took place at the distance of 7 ft. from his house.

15) In the cross examination of Sikandar Ali (PW 7), it is brought on the record that his wife is serving in Zakir Naik High School in Parbhani. This circumstance has no relevance with the present matter. He has given evidence that he was practicing as advocate in the High Court Bench at Aurangabad and ordinarily, he used to return to Parbhani on Sunday as his wife was living in Parbhani. Much is made out of this circumstance by the Trial Court and the Trial Court has held that probably he was not present in Parbhani on the day of incident which was not Sunday. The Trial Court has not gone through the record. As per the record, the

statement of this witness was recorded on 9.8.2000 itself, on the date of incident and this circumstance is ignored by the Trial Court. There was no reason for him to give false evidence against the accused or to give evidence in support of the complainant falsely. There was no reason for disbelieving this witness. Thus, the Trial Court has committed serious error in disbelieving this eye witness. His evidence remained unshattered during extensive cross examination.

16) Shaikh Rasool (PW 1) has turned hostile and he has not given complete account of the incident. However, some part of his evidence corroborates the case of the prosecution. His evidence shows that at the relevant time, he was working as Peshimam in aforesaid Masjid and at about 10.00 a.m. he heard that quarrel was going on by the side of Masjid. He has deposed that when he came out, he saw that the first informant was lying by the side of road in injured condition. He has avoided to say that accused was present in the vicinity and he had seen the accused causing injuries. However, aforesaid part of the incident shows that the incident took place near Masjid and the injuries were inflicted on the first informant. This evidence is ignored by the Trial Court.

17) Another witness Abdul Sattar (PW 3) has given some

support to the case of prosecution. He was also present inside of the Masjid. He has given evidence that he came out of Masjid after starting of the incident and he gave evidence that accused was giving beating to first informant and accused was having some weapon in his hand. The names of these witnesses were mentioned in the F.I.R. and so, there was no reason to disbelieve this part of the evidence given by the prosecution. The evidence of Abdul Sattar remained unshattered during extensive cross examination. He is not interested witness. He admits that he had not given the name of the accused in his police statement, but he had described the accused. He identified the accused in the Court. Thus, there is ring of truth in the evidence of Abdul Sattar (PW 2).

18) In ordinary course, the version of injured witness needs to be believed in such a case. Court needs to remember that conviction can be based on the testimony of sole eye witness. So, when there are so many injuries caused to witness in a incident, Court needs to go with presumption that such witness will not spare the assailant who had caused such injuries.

19) Prosecution has given evidence on the spot panchanama by examining Syed Makdum (PW 4) and the panchanama is duly proved as Exh. 19. This panchanama is consistent with the evidence

given by the aforesaid witnesses.

20) Dr. Mohammad Jafar (PW 6) had examined the first informant in Civil Hospital, Parbhani. In his evidence, the M.L.C. prepared by him is duly proved as Exh. 27. The first informant had sustained following injuries :-

- (i) Incised wound on left side of the thigh upto the knee with deep muscle cut size 20x5x2.5 inches.
- (ii) CLW on right arm size 4x1½ inches skin deep.
- (iii) CLW on right arm near elbow size 3x1½ deep and skin deep.
- (iv) CLW to the right wrist size 4x1½ skin deep.
- (v) CLW on right side size 6x1 inch skin deep.
- (vi) CLW on face right side size 5x1 inch skin deep.
- (vii) CLW on scalp temporarily region size 7x1 inch skin deep.
- (viii) CLW on right foot below tow size 5x1 inch by skin deep.
- (ix) CLW on left thigh inner aspect size 4x1½ inch by skin deep.
- (x) CLW on left leg 4x2 inch skin deep.
- (xi) Abrasion on left shoulder 3x2 inch.
- (xii) CLW on right clavicle size 3 x1 inch skin deep.

(xiii) CLW on right leg size 3x1 inch skin deep.

21) Dr. Mohammad Jafer (PW 6) has given evidence that all the injuries were sustained within six hours before examination. The first informant was examined at about 10.50 a.m. of 9.8.2000. He has given evidence that first injury can be caused by sharp weapon and other injuries can be caused by hard and blunt object. He has given evidence that all the injuries were bleeding injuries. He has given evidence that all the injuries can be caused by weapon like Katti, Article No. 9, produced in the Court. Considering the nature of injuries like C.L.W. and incised wounds, it can be said that the injuries can be caused by sharp weapon rather than hard and blunt object. He has given evidence that all the injuries can be possible by same weapon. There is evidence of Dr. Sarojini (PW 5) of Aurangabad Hospital and in her evidence, the discharge card is proved as Exh. 25. This evidence is consistent with the version of first informant (PW 2). This evidence shows that from the time of incident till 28.8.2000 the first informant was indoor patient due to aforesaid injuries in Government Hospital. This period was of 20 days. In such a serious case, there was virtually no possibility of false involvement of a person like accused. The interpretation of term 'proved' given in section 3 of Evidence Act needs to be always kept in mind by the Court at the time of appreciation of the

evidence. There is also evidence under sections 7 and 8 of the Evidence Act.

22) Some witnesses examined by the prosecution like Rambhau (PW 8) and Shergul Khan (PW 9), who were colleagues of accused, have turned hostile. Admittedly, the accused was working in S.T. workshop. The witnesses were expected to give evidence against the accused that at the relevant time, he had left the workshop. The relevant portions from their previous statements were confronted to them by the learned APP during their cross examination and relevant portions are proved in the evidence of Investigating Officer Anil Gaikwad (PW 12). It was submitted for the respondent accused that prosecution ought to have produced the record and ought to have proved that the respondent was not available in the workshop as he was on duty on that day. This submission is not at all acceptable. Prosecution has discharged initial burden by examining aforesaid witnesses and involvement of the accused in the offence was made out. When such stage is reached, it is up to the accused to create some probability in his favour as provided by section 103 of Evidence Act. If it was a defence that he was discharging his duty inside of the workshop campus and he could not have been available outside of the workshop, it was necessary for him to give necessary evidence of defence of *alibi*.

That is not done. The evidence of aforesaid two witnesses can be of no use to the defence in view of the nature of evidence given by them and as the previous statements given by them were not consistent with the versions given in the Court. These two witnesses could not have been believed by the Trial Court.

23) Prosecution has given some circumstantial evidence like recovery of weapon and burnt clothes of the accused on the basis of statement made by the accused under section 27 of Evidence Act. Witness Vijay (PW 10) is examined to prove the fact of discovery. The statement of the accused is proved as Exh 32 and the panchanama of discovery and seizure of articles is proved as Exh. 32-A. Though the Medical Officer Dr. Mohammad Jafar (PW 6) has given evidence that the weapon produced by the accused could have caused such injuries, the C.A. report shows that no blood was found on the weapon. Much was argued on this circumstance for the accused. In a case where there is direct evidence, such lacuna or discrepancy cannot come in the way of the prosecution to get the decision in it's favour. If the witnesses are found to be reliable and the Court finds that conviction can be based on the direct evidence, such circumstances can be safely ignored. In the present case, this Court holds that the Trial Court could have easily ignored this circumstance as there is no law to make it compulsory to produce

weapon of the offence in such case. That creates only a circumstance against the accused, but the absence of such circumstantial evidence may not be fatal in each and every case. This Court has no hesitation to hold that the Trial Court has committed serious error in giving much importance to this circumstance. Other evidence of prosecution including the evidence on seizure of bicycle and also of the owner of the said bicycle is of no use in view of the nature of direct evidence.

24) The defence has not disputed that the first informant sustained injuries near the Masjid. There is convincing evidence to show that eye witness, advocate was living in the vicinity and he could notice some part of the incident including the presence of the accused on the spot. Thus, there is independent corroboration to the version of the first informant and the evidence on the record is sufficient to prove that it is the accused respondent who is author of all the 13 injuries which were found on the person of first informant. When there is such material, it cannot be discarded by court for hypothetical considerations.

25) The question now arises as to what offence is committed by the accused. The medical evidence shows that the first informant was indoor patient for 20 days due to aforesaid injuries. Considering

the nature of injuries and this circumstance and also opinion given by the doctor that injury No. 1 was grievous in nature, this Court holds that grievous injury was inflicted by the accused. Thus, the accused can be convicted for the offence punishable under section 326 of IPC even if evidence on motive is ignored.

26) The evidence on motive already discussed helps to ascertain the intention of the accused. Similarly, the site of the body where injury is inflicted, the nature of weapon used and the number of injuries inflicted are also circumstances which need to be considered while ascertaining the intention of the accused at the relevant time. The evidence on the record shows that in the past threat of life were given and at the time of incident, the accused said that it was to be last day of life of the first informant. Due to all these circumstances, this Court holds that there was intention of murder. Thus, in case of death of first informant, the accused could have been convicted for the offence of murder. The first informant survived and so, the accused needs to be convicted for the offence of attempt of murder under section 307 of IPC. Inference of 'intention' mentioned in IPC always needs to be drawn from surrounding circumstances.

27) The learned counsel for respondent accused placed

reliance on some observations made by the Supreme Court in two cases reported as **2009 (10) SCC 401 [Dhanpal Vs. State by Public Prosecutor, Madras]** and **2018 (2) SCALE 334 [The State of Madhya Pradesh Vs. Nande]**. In the first case, in view of the facts of that case, the Apex Court held that it was not possible to take different view than the view taken by the Trial Court of acquittal. In the second case, the circumstance like delay caused of 13 days in lodging the F.I.R. and other circumstances were considered due to which doubt was created about the evidence given by so called eye witnesses. The facts and circumstances of each and every case are always different. In the present case, the first informant stuck to his version. The F.I.R. was given immediately. The evidence of the first informant has corroboration of circumstances like medical evidence and also direct evidence. Accused has also not come out with different probability and he has taken defence of total denial. In view of these circumstances, this Court holds that the Trial Court has committed serious error in giving decision of acquittal in favour of the accused respondent. Criminal cases need to be decided on the basis of facts and circumstances of those cases. On facts decisions of Courts of record cannot be referred as precedents.

28) This Court gave an opportunity to the counsel of the respondent accused to have his say on the offence which can be

made out. Similarly, opportunity was given to have say on the quantum of penalty. In view of the nature of dispute and number of injuries caused, this Court holds that sentencing the accused with imprisonment of five years will be just and sufficient. This is the minimum penalty which can be given for the offence of attempt of murder in a case like present one. In the result, following order.

ORDER

- (I) Appeal is allowed.
- (II) Judgment and order of the Trial Court acquitting the respondent of the offence punishable under section 307 of IPC is hereby set aside.
- (III) The respondent stands convicted for the offence punishable under section 307 of IPC only. He is sentenced to suffer RI for five years and to pay fine of Rs.1,000/- (Rupees one thousand). In default of payment of fine, he is to further undergo RI for one month.
- (IV) He is entitled to set off in respect of the period for which he was behind bars and the said period is to be mentioned by the office in the order which is to be sent to the jail.
- (V) The decision of the Trial Court of acquitting the respondent of other offences is not disturbed.
- (VI) The respondent is to surrender to his bail bonds for undergoing sentence.

Copy of the judgment is to be supplied to the accused
free of cost.

[K.L. WADANE, J.]

[T.V. NALAWADE, J.]

SSC/