

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

Criminal Application No. 04597 of 2016

District : Aurangabad

The State of Maharashtra,
through
Osmanpura Police Station,
District : Aurangabad.

.. Applicant
(Original
complainant)

versus

1. Shobhabai w/o. Laxman Pagore,
Age : 55 years,
Occupation : Labour,
R/o. Kashmir Nagar,
Kanchanwadi, Aurangabad.
2. Manoj s/o. Laxman Pagore,
Age : 30 years,
Occupation : Labour,
R/o. Kashmir Nagar,
Kanchanwadi, Aurangabad.

.. Respondents
(Original
accused
nos.02 &
03)

.....

*Ms. V.S. Choudhari, Additional Public Prosecutor,
for the applicant.*

Mr. P.M. Gaikwad, Advocate, for respondent no.01.

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With

Criminal Appeal No. 0846 of 2018

District : Aurangabad

The State of Maharashtra,
Through
Osmanpura Police Station,
District : Aurangabad.

.. Appellant
(Original
complainant)

versus

Rahul Laxman Pagore,
Age : 19 years,
Occupation : Education,
R/o. Kashmir Nagar,
Kanchanwadi, Aurangabad.

.. Respondent
(Original
accused
no.01)

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*Ms. V.S. Choudhary, Additional Public Prosecutor,
for the appellant.*

Mr. P.M. Gaikwad, Advocate, for the respondent.

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**CORAM : T.V. NALWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 05TH DECEMBER 2018

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

01. Present application as well as appeal are arising out of the same judgment. Hence, taken up together for hearing and final disposal.

02. Criminal Appeal No. 846 of 2018 has been filed by the prosecution against the respondent - original accused no.01 for enhancement of sentence

imposed by the judgment and order passed by the Additional Sessions Judge-4, Aurangabad, in Sessions Case No. 0422 of 2009 on 11-05-2016. Criminal Application No. 04597 of 2016 is also filed by the prosecution seeking leave to file appeal against the order of acquittal recorded by the said judgment and order as against respondents therein - original accused nos. 02 and 03 for offences punishable under Section 307, 323, 504, 506, read with Section 34 of the Indian Penal Code.

03. All the three accused stood prosecuted for offences punishable under Section 307, 323, 504, 506, read with Section 34 of the Indian Penal Code. The prosecution case before the trial Court was that, the injured Shaikh Javed and all the accused persons are resident of the same vicinity. One Shafiya Begum is the relative of injured who resides in the neighbourhood. There is a raised platform (Ota) in front of house of Shafiya Begum. The boys in the vicinity used to sit on the said platform and used to play songs on their mobile in loud voice thereby causing nuisance to Shafiya Begum. Shafiya Begum asked the boys not to play songs. At that time, those boys had given abuses to her. On the day of the incident i.e. on 19-11-2008 at about 07.00 to 07.30 p.m., injured Shaikh Javed was proceeding towards his house from the road which was in front of house of Shafiya Begum. At that time, accused no.01,

one Avinash More and Banti Salve were giving abuses to Shafiya Begum. Shaikh Javed, therefore, intervened and asked Shafiya Begum as to why those persons are abusing her. She explained the circumstances and specifically told that she had asked accused no.01 not to play songs in loud voice in his mobile. She had also told that those persons were knocking the door of her house. Thereupon, Shaikh Javed asked accused no.01 as to why he is abusing Shafiya Begum. Thereafter, accused no.01 abused injured in filthy language. Thereupon, Shaikh Javed gave a slap on the face of accused no.01. Thereafter, there was hot exchange of words between Shaikh Javed and accused no.01. Accused no.01 started beating him and in the meantime, he also went to his house and brought some sharp edged weapon like knife. He thereafter stabbed Shaikh Javed in his stomach and back. At that time, accused Bunti Salve and Avinash More caught hold hands of Shaikh Javed. In the meantime, family members of accused no.01 also came i.e. accused nos.02 and 03. They had also caught hold hands of Shaikh Javed. As a result of assault by accused no.01, Shaikh Javed sustained bleeding injuries to his stomach and back. His maternal aunt and father took him to Government Hospital. On the next day, he had narrated the incident to his father and thereafter his father had lodged report vide C.R. No. 277 of 2008.

04. The investigation was carried out. Report under Section 169 of the Code of Criminal Procedure was filed against Avinash More and Bunty Salve and, therefore, charge-sheet came to be filed only against accused nos.01 to 03.

05. After committal of the case, all accused persons appeared before learned Additional Sessions Judge-4, Aurangabad. Trial was conducted after they pleaded not guilty. At the conclusion of the trial, statements of the accused persons under Section 313 of the Cr.P.C. were recorded. After hearing arguments, learned trial Court has convicted accused no.01 for offence punishable under Section 307 of the IPC and sentenced him to undergo rigorous imprisonment for five years and to pay fine of Rs. 1000/-, in default of payment of fine, to undergo further rigorous imprisonment for three months. Accused no.01 has been acquitted of the offences punishable under Section 323,504, 506, read with Section 34 of the Indian Penal Code. Accused nos.02 and 03 have been acquitted of all the charges levelled against them i.e. Section 307, 323, 504, 506, read with Section 34 of the IPC. Hence, the State has filed present appeal for enhancement of sentence imposed on accused no.01 as well as application seeking leave to file appeal against the order of acquittal in respect of accused nos.02 and 03.

06. Heard learned Additional Public Prosecutor Ms. V.S. Choudhary appearing for the appellant / applicant. So also, heard learned Advocate Mr. P.M. Gaikwad appearing for respondent - original accused no.02. Both of them have argued in support of their respective contentions.

07. The testimony of PW 01 Shaikh Javed would show that his examination in chief is as per the prosecution story. He has stated that accused no.01 was abusing him after he made enquiry as to why accused no.01 was giving abuses to Shafiya Begum. In the meantime, accused no.01 had ran from the spot to his house and brought the weapon from his house. That weapon was like knife. According to him, family members of accused no.01 also came there and they had assaulted him. Bunti Salve and Avinash More had caught hold his hands. Accused no.02 had also caught hold his hands and then accused no.01 had again stabbed him with knife on his back. Thus, it is to be noted that, he intended to say that accused no.01 without taking any help from other accused or in any manner, involvement of other accused, had given a blow in the stomach of Shaikh Javed, as per his examination in chief and the second blow to his back is stated to have been given after Shaikh Javed was caught hold by other accused persons. As regards Bunti Salve and Avinash More are concerned, police

had already filed report under Section 169 of the Cr.P.C. and, therefore, we are not required to take into consideration statement by the injured involving these two persons. As regards accused no.03 is concerned, testimony of PW 01 Shaikh Javed is very much silent. No role has been attributed by him to accused no.02. Only omnibus statement has been made as regards accused no.02 is concerned. It is stated that she had caught hold his hands. In fact, at one place, he says that he was caught hold by Bunti Salve and Avinash More. Then what was the reason for accused no.02 to caught hold of Shaikh Javed. This appears to be the improbability just to implicate. Further, no other overt act is attributed to her. It is also hard to believe that she would have any knowledge as to what was going on between Shafiya Begum, accused no.01 and Shaikh Javed, in front of Shafiya Begum's house. Her presence is shown after accused no.01 allegedly brought knife from his house. It is also further not possible that while bringing knife, accused no.01 would have told his mother as to what purpose he is taking the knife with him and ask her to accompany him. Under this circumstance, testimony of injured witness himself is not convincing as regards involvement of accused nos.02 and 03 are concerned.

08. PW 02 Farzana Begum is stated to be an eye witness. She has stated that accused nos.02 and 03

had caught hold of Shaikh Javed. When PW 01 Shaikh Javed is silent about the act allegedly done by accused no.03, statement of PW 02 Farzana Begum involving accused no.03 cannot be taken into consideration. Her testimony is also silent as regards presence of accused no.02 since beginning at the spot. Common intention, even if for the sake of arguments, can appear at a spur of moment, but here in this case, circumstances have not been shown that there would have been a common intention of accused no.01 on one part and accused nos.02 and 03 on the other part. Therefore, taking into consideration such type of evidence, no case is made out to grant permission to file appeal as against accused nos.02 and 03.

09. Accused no.01 has been convicted for the offence punishable under Section 307 of the IPC and has been sentenced to undergo rigorous imprisonment for five years. The weapon that is used and evidence that has been produced on record in the form of memorandum *panchanama* under Section 27 of the Indian Evidence Act, show that accused no.01 had discovered knife. The injury certificate which is on record at Exhibit 51 would show that immediately after Shaikh Javed was admitted to hospital, two injuries were noted, one was incised wound (stab injury) on the right side of abdomen which is stated to be simple. The second injury is CLW over back and it is also

stated to be simple. There was no stab injury to his back. Therefore, taking into consideration the said medical evidence and the weapon used, sentence of five years can be said to be adequate and no case is made out for enhancement of sentence imposed by the trial Court upon respondent - original accused no.01. Therefore, both application as well as appeal are required to be dismissed.

10. Hence, the following order :-

(a) Criminal Application No. 4597 of 2016 is hereby dismissed. Consequently, leave to file appeal against the order of acquittal in respect of respondents - original accused nos.02 and 03 stands refused.

(b) Criminal Appeal No. 0846 of 2018 for enhancement of sentence is also hereby dismissed.

(c) Criminal Appeal No. 0335 of 2016 pertains to the Bench of learned Single Judge and, therefore, same be placed before appropriate Bench.

(**Smt. Vibha Kankanwadi**)
JUDGE

(**T.V. Nalawade**)
JUDGE

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