

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

CRIMINAL APPEAL NO.51 OF 2014

- 1 Umesh Sheshmani Upadhyay
Age : 19 years, Occ.: Labour,
Residing at Sainath Metre Repairing Work,
Opp. Kamakshi building,
Ramgadnagar, Goshala Road,
Mulund (West), Mumbai – 400 080
- 2 Vilas Ramchandra Kamle
Age : 28 years, Occ. : Labour
Mulebai Chawl, Galli No. 2,
Ramgadnagar, Goshala Road,
Mulund (West), Mumbai – 400 080 Appellants

Vs.

The State of Maharashtra
Through Mulund Police Station Respondent

**WITH
CRIMINAL APPEAL NO.449 OF 2016**

Rakesh Sheshmani Upadhyay Appellant
@ Paksha @ Laksha

Vs.

The State of Maharashtra Respondent

Ms. Gunjan Thakkar I/by Mr. Rishi Bhuta for the Appellants in Appeal No. 51 of 2014.

Mr. Subir Sarkar, appointed advocate for the Appellant in Appeal No. 449 of 2016.

Mr. V.V. Gangurde, APP for the State.

Coram : Smt. Sadhana S. Jadhav, J.

Date : 12th December 2018

JUDGMENT :

1 Heard the respective counsel.

2 The appellants herein are convicted for the offence punishable under Sections 307, 326 read with 34 of Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5,000/-, in default to suffer rigorous imprisonment for six months respectively.

3 Such of the facts necessary for the decision of this appeal are as follows :

 The complainant, Amol Chandrakant Satpute was residing in Mulebai Chawl, Ramgad Nagar, Goshala at Mulund. He was arrested for causing the homicidal death of one Ashok Kamble

alongwith other accused who was a juvenile in conflict with law and was sent to Children Shelter Home at Dongri. Thereafter he was residing with his elder brother at Taluka Mendha, District Osmanabad. On 29th July 2011, he had been to Mumbai to meet his parents. At about 11.15 pm., he had left the house for answering nature's call. He went to the public toilet and while he was returning, he met his friend Prakash alias Pakya Kachru Ahire in front of the office of one Parshuram Mirekar. While they were chitchatting, accused Vilas Ramchandra Kamle and Paksha @ Laksha @ Rakesh Upadhyay, his brother Umesh @ Umya and Kiran Sathe @ Jaleli had approached him. Suddenly Rakesh had inflicted a sickle blow on the head of the complainant from behind and at that time Vilas Kamble had attempted to stab him. However, he managed to dodge the same. Prakash, friend of Amol had intervened to rescue Amol but was restrained by Umesh and Rakesh had assaulted Prakash with a blow of sickle on his head and Vilas Kamble and Jaleli had assaulted Prakash. In the meanwhile, Amol had escaped from the scene. While he was running, he saw that Umesh had caught

hold of Prakash and Vilas and Rakesh were assaulting him by sharp weapon. Jaleli was armed with a stump and he was assaulting Prakash with the same. No bye-passers had intervened. Thereupon, the complainant had approached Mulund police station and lodged a report. He was forwarded to the hospital for medical examination.

4 On the basis of report lodged by Amol Satpute, Crime No. 265 of 2011 was registered at Mulund police station. The case was committed to the Court of Sessions and registered as Sessions Case No. 865 of 2011.

5 The prosecution has examined as many as nine witnesses to bring home the guilt of the accused. The case mainly rests upon the evidence of PW-1 Amol Chandrakant Satpute, PW-2 Prakash Kacharu Ahire, PW-3 Raju Ramesh Jadhav, who happen to be eye witnesses. PW-5, Dr. Manisha Andrew Bhosale, Medical Officer, M.T. Aggarwal Hospital, Mulund, who had examined the injured PW-1 Amol Satpute and P.W. 6 Dr. Manisha Bhupinder Singh, Senior Registrar, Lokmanya Tilak Municipal General Hospital, Mumbai who

had examined the injured, PW-2 Prakash Ahire on the day of the incident and PW-9 Ravidatt Raghunath Sawant, the investigation officer.

6 PW-1 Amol Chandrakant Satpute is the injured witness and the complainant. He has deposed in accordance with the F.I.R. According to him, accused Kiran Sathe and Umesh Upadhyay had caught hold of Prakash and were beating him by sickle and knife. He has deposed before the court that he was treated as an indoor patient for about one month. It is elicited in the cross-examination of all the witnesses that on the day of incident, there was heavy rain. He has admitted in the cross-examination that he had not described the weapons by which he was assaulted while his statement was being recorded by Police. He has further admitted that he does not know Raju Ramesh Jadhav (PW-3). He has admitted that he had not disclosed to the police that Prakash was also admitted for one month. The witness had criminal antecedents. He has stated that accused Vilas happens to be the brother of Ashok Kamble, where the appellant has been arraigned as an accused, who had caused the

homicidal death of Ashok.

7 PW-2, Prakash Kacharu Ahire is an eye witness. According to him, he has sustained injury on his rear side of pinna. Prakash has identified the accused before the Court. According to him, original accused nos. 3 and 4 had also participated in assaulting PW-1 Amol. He could not identify weapons used in the crime. In the course of cross-examination, he has given several admissions for example "It is not true that the accused were arrested when it was raining in Mumbai". He had not been to the Jail to identify the accused and for the first time, he had identified the accused before the Court. He has also admitted that he had not disclosed to the Police that accused no.1 had assaulted him with a sword on his head. According to him, he had stated before the Police that accused no. 2 had assaulted him with a weapon on his ear. He has also admitted his criminal antecedents. There is reference to one Gawatya, who met PW-2 after he was discharged.

8 PW-3, Raju Ramesh Jadhav claims to be an eye witness as he is the resident of Muleybai Chawl, Mulund (West). According

to him, accused Pakshya (Rakesh) was armed with iron fighter, with which he assaulted Prakash. Umesh and Jaleli were carrying stumps and assaulted PW-1 Amol Satpute and PW-2 Prakash Ahire. It is seen from the records and as has been admitted by PW-2 that Prakash Ahire happens to be close relative of Amol. He has also admitted that the complainant Amol is the accused in the murder case of brother of accused no.3. PW-3 was residing in the same slum area. He has stated that one has to cross 10 to 15 rooms to come to the main road from his house. The most important aspect is that according to him, the quarrel was due to the previous quarrel between the two. The Police had enquired with him. There are inherent omissions and contradictions in the evidence of PW-3. He has also admitted that when the Police visited hospital on the day of the incident, he had not disclosed to the Police that he was an eye witness to the incident.

9 PW-4 Pradip Pandurang Shiroadkar happens to be a panch to Exhibits 31, 32, 33 and 34 wherein there was recovery of stump by the Police. He has claimed to have forgotten the cases, in which

he acted as panch. It prima facie appears that he happens to be stock panch of the police. The question is as to whether the narration by PW-1 to 3 has been corroborated by the Medical Officer.

10 PW-5, Dr. Manisha Andrew Bhosale has deposed before the Court that patient, Amol was brought to the hospital by his father at about 12.30 midnight. He had given alleged history of assault by chopper. There was bleeding on his head. He had no history of giddiness, vomiting and unconsciousness. According to Dr. Bhosale she had examined the injured, PW-1 and found clean incised wound over right parietal region over head. She advised him suturing of wound, but the injured had refused. Therefore, she had dressed up the wound and the injured had left. She also admitted that the injury was simple in nature and accordingly issued injury certificate. She has proved the medical certificate. According to her the said injury could be caused by weapon, Articles 2 and 3. In her cross-examination, she admitted that if a person falls on a sharp edged object, such injury would be caused.

11 PW-6, Dr. Manisha Bhupinder Singh has deposed before the Court that the patient was critical and has numerous injuries when he was brought to the hospital. There were multiple incised lacerated wounds in left parietal temporal and mastoid region. According to Dr. Singh, PW-2, Prakash was under the influence of alcohol when he was examined. She has proved the medical case papers. It is elicited in the cross-examination that the nature of injuries sustained by the witness was simple in nature. She has also stated that the injuries as sustained by PW-2 could have been caused by Article 1. That he was brought to the hospital in an unconscious condition from M.T. Aggarwal Hospital. The Doctor has admitted that there is overwriting in the certificate but has claimed that it is unintentional. There is no whisper of fracture in the medical certificate and the witness has reiterated that injury nos. 4 and 5 are simple in nature. According to PW-6, the patient was admitted in the hospital for nine days. The Doctor has refused to give opinion as to whether in the absence of immediate treatment, the injury would have been fatal. It is also admitted that an incised wound could be

caused by any sharp weapon and that is definitely not caused by Article no. 1.

12 It is surprising that the medical case papers are in variance to the deposition of Dr. Manisha Singh. The patient was admitted at about 2.00 am. and the certificate shows that he was assaulted by a sword. The patient was under the influence of alcohol. That there was bleeding from the ear and nose. The certificate further indicates that there were multiple incised lacerated wounds almost six in numbers in the left parietal and mastoid region. The endorsement on the certificate shows that there was no active bleeding, deformity, tenderness and palpable crepetus. It further shows that there was history of nasal bleeding and oral bleeding. No history of unconsciousness or giddiness. History of cut wound to the left pinna. According to PW-6, Dr. Manisha Singh, the patient was critical and had numerous injuries. There were multiple incised lacerated wound in left temporal and mastoid region. She has further stated that PW-2 was under the influence of alcohol at the time of admission and the date of the injuries could not be assessed.

13 The evidence of PW-1, 2 and 3 needs to be assessed. It is true that the incident of assault had occurred in which PW-1 and PW-2 got injured. The question is as to whether the manner in which the incident had occurred has been narrated correctly or not. Firstly it was raining heavily on that day. According to PW-1, the accused persons, had all of a sudden mounted assault upon him without there being any prelude to the incident. One of the accused is the brother of deceased Ashok Kamble. PW-1 was arrested for causing homicidal death of Ashok Kamble. According to PW-1 the blow was given on his head from the backside. PW-2, Prakash had intervened and therefore PW-1 had started running away. It cannot be believed that while running away from the scene of offence, he had turned back and saw the assault and the role played by each of the accused. Moreover, it appears that there was failure of electricity in that area in that night.

14 PW-3 Raju Jadhav is residing nearby. In fact, even according to her, he had heard the quarrel outside the house and had seen Prakash being assaulted. It can be inferred that he was not an

eye witness of the assault on PW-1. He has exaggerated that Rakesh had given blow of scythe on the head of Amol. Moreover, according to him, Amol already had stitches on his head. Prakash also had stitches on his head. The nose of Prakash was cut and Prakash had fallen unconscious on the spot. He is an interested witness as Prakash Ahire is related to him and Amol happens to be his neighbour. At this juncture, it would be necessary to appreciate the evidence of Amol wherein he had stated that he is not acquainted with PW-3 Raju Jadhav. The statement of Prakash was recorded much later. He has seen the incident, but had neither accompanied the injured to the hospital nor he had informed the family members about the assault on his own cousin i.e. on Prakash. The charge-sheet would show that he is resident of Ekta Mitra Mandal Chawl, Goshala Road, Mulund (West). The question is as to whether he was residing so close to the place of incident that he could just open the door and see the incident. His evidence does not inspire the confidence of the Court.

15 Be that as it may, the injured themselves are eye witnesses and they had identified the accused as they were acquainted with them. The accused are identified in the Court and that would be the substantive evidence. It is apparent on the face of record that the prosecution has suppressed the genesis of the incident and therefore it can be held that the accused-appellants had voluntarily caused hurt to PW-1 and PW-2 Amol and Prakash. The conviction of the appellants therefore needs to be modified. Hence, the following order:

O R D E R

- (i) The appeals are allowed.
- (ii) The conviction of the appellant-Umesh Sheshamani Upadhyay for the offence punishable under Section 307 read with 34 of Indian Penal Code is hereby set aside.
- (iii) The appellant Umesh Sheshamani Upadhyay in Criminal Appeal No. 51 of 2014 is convicted for the offence punishable under Section 326 read with 34 of Indian Penal Code and sentenced to the period which already undergone.

(iv) The sentence of fine is modified. Fine of Rs.5,000/- is confirmed, in default to pay fine, rigorous imprisonment for three months.

(v) The conviction of the original accused no.4, Rakesh Sheshamani Upadhyay for the offence punishable under Section 326 read with 34 of Indian Penal Code is confirmed and is sentenced to the period which he already undergone.

(vi) The appellants shall not reside within the jurisdiction of Mulund police station for the period of six months from the date of release.

(vii) Learned counsel, Mr. Subir Sarkar has assisted this Court to espouse the cause of the original accused no.4 in Criminal Appeal No.449 of 2016 to the best of his capacity and in a fair manner, hence, his professional fees are quantified as per rules to be paid by the High Court Legal Aid Services Committee, within three months.

(Smt. Sadhana S. Jadhav, J)