

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.848 OF 2015

PAPA @ VAKIL SHAMIM PATHAN)
Aged about 23 years, Adult,)
Indian Inhabitant of Thane,)
Residing at Arif Nagar, Faridabad,)
Bhiwandi, District – Thane.)
Presently lodged at Nashik Central Prison)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Parth Pandey h/f.Mr.Akhilesh Singh, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 4th DECEMBER 2018

ORAL JUDGMENT :

1 The appellant/accused by this appeal is challenging the judgment and order dated 16th June 2015 passed by the learned Additional Sessions Judge-4, District – Thane, in Sessions

Case No.418 of 2013, thereby convicting him of the offence punishable under Section 307 read with Section 34 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years apart from imposition of fine of Rs.3,000/- and default sentence of simple imprisonment for 3 months.

2 Briefly stated, the facts leading to the prosecution of the appellant/accused are thus :

- (a) It is the case of the prosecution that the appellant/accused was residing in the neighbourhood of PW1 Abdul Kasim Shaikh. The incident in question took place on 21st April 2013. On that day, after returning from the marriage ceremony, PW1 Abdul Kasim Shaikh was in his house. This witness is an auto rickshaw driver by occupation. He got a phone call from his client and had left the house. According to the prosecution, PW1 Abdul Kasim Shaikh was returning to Bhiwandi near brick-kiln of one Shelke. He noticed three persons chasing his auto rickshaw by motorcycle. They stopped his auto rickshaw. The

appellant/accused then warned PW1 Abdul Kasim Shaikh that PW1 Abdul Kasim Shaikh is acting over smart and lodging report against him. Thereafter, appellant/accused Papa @ Vakil Pathan assaulted PW1 Abdul Kasim Shaikh by means of a chopper on several parts of his body, causing bleeding injuries to him. PW1 Abdul Kasim Shaikh tried to seek help of the passers-by. Ultimately, one Omni vehicle stopped and he was taken to his home by Salim.

- (b) According to the prosecution case, injured PW1 Abdul Kasim Shaikh was initially taken to IGM Hospital and then to Siraj Hospital. Ultimately, he was taken to J.J.Hospital for further medical treatment.
- (c) Report of the incident came to be lodged by PW4 Shabnam Abdul Shaikh, who happens to be wife of the injured. On the basis of this report Exhibit 39 lodged on 21st April 2013, Crime No.I-111 of 2013 for the offence punishable under Section 307 read with 34 of the Indian Penal Code came to

be registered with Police Station Bhiwandi. During the course of investigation, the Investigating Officer visited the spot along with the panch witness and recorded Spot panchnama Exhibit 53. Sample earth as well as blood stained earth came to be seized from the spot of the incident. Clothes of the victim/ PW1 Abdul Kasim Shaikh were seized vide Panchnama Exhibit 30 on 21st April 2013 itself. Statement of witnesses came to be recorded. Medical Certificates came to be collected. Seized articles were then sent for chemical analysis and on completion of investigation, the charge-sheet came to be filed against the appellant/accused for the offence punishable under Section 307 read with 34 of the Indian Penal Code. Co-accused Faiyaz Hafizullah Ansari and Faiz could not be traced out.

- (d) The learned trial court framed Charge for the offence punishable under Section 307 read with 34 of the Indian Penal Code. It was explained to the appellant/accused. He abjured his guilt and claimed trial. In order to bring home

the guilt to the appellant/accused, the prosecution has examined in all ten witnesses. Injured Abdul Kasim Shaikh is examined as PW1. His brother Mehboob Kasim Shaikh is examined as PW2. Medical Officer of IGM Hospital Dr.Jayashree Mhaske is examine as PW3. Exhibit 36 is the Medico Legal Certificate issued by her. First Informant Shabnam Abdul Shaikh is examined as PW4 and the First Information Report (FIR) lodged by her is at Exhibit 39. Shashikant Patil who registered the crime in question is examined as PW5. Panch witness Ram Damodar Bhoir is examined as PW6 and voluntary disclosure statement as well as the resultant Recovery Panchnama of chopper at the instance of the appellant/accused are at Exhibits 46 and 47 respectively. Dr.Shakil Kazi, Medical Officer working in Siraj Hospital of Bhiwandi is examined as PW7. Exhibit 50 is the Medico Legal Certificate issued by him. Investigating Officer Sukhadev Rakh is examined as PW8. The Spot panchnama is at Exhibit 53. Sandeep Shelake is examined as PW9. He turned hostile to the prosecution. Panch

witness to the Spot panchnama Rahul Kalan is examined as PW10.

- (e) The defence of the appellant/accused was that of false implication. By filing a written statement, he contended that the injured might have received injuries in a vehicular accident and the appellant/accused is falsely implicated in the crime in question.
- (f) After hearing the parties, the learned trial court by the impugned judgment and order was pleased to convict the appellant/accused of the offence punishable under Section 307 read with 34 of the Indian Penal Code, and accordingly, he was sentenced, as indicated in the opening paragraph of the judgment.

3 I have heard the learned counsel appearing for the appellant/accused at sufficient length of time. He has taken me through evidence of all prosecution witnesses and submitted that

evidence adduced by the prosecution is inconsistent and lacunae. It is suffering from several discrepancies in respect of the place as well as time. Even medical evidence adduced by the prosecution is not consistent. It is argued that evidence of the witnesses adduced by the prosecution is hearsay and material witnesses such as Salim is not examined by the prosecution. PW2 Mehboob Kasim Shaikh is saying that the injured was taken to Nizampura Police Station whereas PW4 Shabnam Abdul Shaikh – wife of the injured is stating that he was taken to IGM Hospital. Evidence of both these witnesses, so far as it relates to relationship with Salim, is also contrary. One is saying that Salim is a relative whereas the another is saying that Salim is not a relative. There is discrepancy in respect of the spot of the incident as it is not clear from evidence that the incident took place in front of brick-kiln or adjacent thereto. PW3 Dr.Jayashree Mhaske was unable to identify the patient. The investigation was not done in a proper manner and the blood from the Omni vehicle was not seized during the course of investigation. With this, it is argued that the appellant/accused is entitled for acquittal.

4 The learned APP supported the impugned judgment and order of conviction as well as the resultant sentence by arguing that evidence adduced by the prosecution is clear in so far as the incident of murderous assault on the victim is concerned and the same is corroborated by voluminous evidence adduced by the prosecution. According to the learned APP, minor discrepancies which are not going to the core of the prosecution case need to be ignored. The learned APP, relying on evidence of injured, has submitted that the same is trustworthy and reliable.

5 I have considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution. This is a case of a single eye witness to the incident in question. It is not pointed out that the incident was witnessed by other witnesses, who are not examined by the prosecution. As such, fate of the prosecution case is dependent on evidence of injured PW1 Abdul Kasim Shaikh. What is the value which needs to be assigned to evidence of the injured witness can be found in catena of

judgments of the Honourable Apex Court. In the matter of **Shivalingappa Kallayanappa vs. State of Karnataka**¹ it has been held that the deposition of the injured witnesses should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident. In **State of Uttar Pradesh vs. Kishan Chand**² a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence lends supports to his testimony that he was present during the occurrence. In **Krishan vs. State of Haryana**³ it has been held that in case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon. In the matter of **Bonkaya V/s. State of Maharashtra**⁴ the Honourable Apex Court has held that injured witnesses are stamped witnesses whose presence admits no doubt

1 1994 SCC (Cri) 1694

2 2004 SCC (Cri) 2021

3 (2006) 12 SCC 459

4 1995(2) SCC 447

as being themselves victims of the crime. As such, they would not leave the real assailants and substitute them with innocent persons. It is, thus, clear that evidence of injured witness, if otherwise reliable and trustworthy, it carries more weight and cannot be thrown away because it is not corroborated by any independent witness. Little discrepancy in such evidence is not sufficient to make the prosecution case suspect. Keeping in mind these principles of appreciation of evidence of injured witness, let us examine what the injured is speaking about the incident.

6 It is in evidence of PW1 Abdul Kasim Shaikh that at about 5 p.m. of 21st April 2013 he was returning to Bhiwandi by auto rickshaw. Near brick-kiln of Shelke, he noticed three persons chasing his auto rickshaw on the motorcycle. Those persons stopped him. PW1 Abdul Kasim Shaikh further testified that then appellant/accused Papa @ Vakil warned him by uttering that PW1 Abdul Kasim Shaikh is acting over smart and lodging complaints against him. As per version of PW1 Abdul Kasim Shaikh, then appellant/accused Papa @ Vakil assaulted him with chopper on

the backside of his head. PW1 Abdul Kasim Shaikh then started running away to save himself. PW1 Abdul Kasim Shaikh further stated that thereafter appellant/accused Papa @ Vakil assaulted him on head, cheek, left hand, right shoulder and right palm by inflicting 14 to 15 blows of chopper. As per his version, he tried to seek help from passers-by by giving signal and ultimately, one Omni vehicle stopped there. There were passengers in that Omni vehicle. By that vehicle, Salim had brought him to his home, and thereafter, his family members took him to IGM Hospital for treatment. Thereafter, as per version of PW1 Abdul Kasim Shaikh, he was referred to Siraj Hospital and he had also taken treatment from J.J.Hospital.

7 The learned trial court while recording evidence of PW1 Abdul Kasim Shaikh has noted the fact that the witness was wearing surgical instrument provided for exercise to the left hand. PW1 Abdul Kasim Shaikh has deposed about the damage caused by injury suffered by him by stating that he is unable to move his left hand which was fractured and the rod is implanted in that

hand. He has deposed that he is unable to drive the auto rickshaw properly.

8 Cross-examination of injured PW1 Abdul Kasim Shaikh is infact vindicating the case of prosecution. The cross-examiner has elicited from cross-examination of this injured witness that he saw three persons coming from behind and they asked him to stop. It is brought on record from cross-examination of injured PW1 Abdul Kasim Shaikh that after he stopped, appellant/accused gave 2/3 blows and then two others, who were on the motorcycle, came near him. It has also surfaced on record through cross-examination of PW1 Abdul Kasim Shaikh that after receiving first blow on backside of his head, blood started oozing from the wound and after receiving that blow, he started running. Thus, presence of appellant/accused at the scene of the incident and the assault by him on injured PW1 Abdul Kasim Shaikh on the spot of the incident is brought on record even through cross-examination of injured PW1 Abdul Kasim Shaikh. With this material coming on record from cross-examination of injured PW1 Abdul Kasim

Shaikh, I see no reason to doubt his version in respect of the incident of assault on him by appellant/accused Papa @ Vakil. Now let us examine whether version of the injured witness is gaining corroboration from the medical evidence on record. PW3 Dr.Jayashree Mhaske is the Medical Officer serving with IGM Hospital, Bhiwandi. Evidence of this witness shows that on 24th January 2013 while on casualty duty, a patient named Abdul Kasim Shaikh was referred to her by Bhiwandi Taluka Police Station and upon examining that patient, she found following fourteen injuries on person of that person :

- 1) Incise wound over occipital bone (a) 4 x scalp deep on left lateral side (b) 3 x scalp deep over right lateral side
- 2) Incised wound over right forearm 5 x 2 cm.
- 3) Incised wound left arm 14 x 7 cm.
- 4) Incised wound over left forearm 7 x 5 cm.
- 5) Incised wound over left side back 4 x 3 cm.
- 6) Grazed abrasion over left cheek 8 x 5 cm.
- 7) Incised wound over right shoulder 5 x 4 cm.
- 8) Incised wound over right arm 4 x 3 cm.
- 9) Incised wound over right hand 3 x 2 cm.
- 10) Incised wound over right index finger 1 x 0.5 cm.
- 11) Incised wound over right thenar region 3 x 2 cm.

- 12) Incised wound over neck 3 x 0.5 cm.
- 13) Incised wound over posterior side of neck 2 x 0.5 cm.
- 14) Incised wound over right scapular region 3 x 2 cm.

9 PW3 Dr.Jayashree Mhaske testified that injury nos.1, 3, 4 and 13 are grievous in nature and sufficient to cause death. She also expressed opinion that all the injuries taken together were fatal in nature. This witness proved the Medico Legal Certificate at Exhibit 36 showing name of the patient as Abdul Kasim Shaikh.

10 It is a matter of common knowledge that while working at the Government Hospital, the Medical Officers are examining hundreds of patients day in and day out. In this view of the matter, even if PW3 Dr.Jayashree Mhaske, who had entered in the witness box on 11th March 2015, has stated that she is unable to identify the injured, that aspect of the matter is totally irrelevant. She had examined the patient named Abdul Kasim Shaikh and had issued the Injury Certificate in that name. This evidence coupled with the fact that injured PW1 Abdul Kasim

Shaikh is stating that he was taken to the IGM Hospital for medical treatment, unerringly point out that it was PW3 Dr.Jayashree Mhaske who had examined him on 24th January 2013 and noted fourteen injuries on his person.

11 PW7 Dr.Shakil Kazi, Medical Officer, working with Siraj Hospital, had also examined PW1 Abdul Kasim Shaikh on 21st April 2013 itself. His version goes to show that he noted following nine injuries on person of PW1 Abdul Kasim Shaikh :

- i) On scalp there is occipital injury 10 cm x 3 cm which is bone depth and seen hairline fracture in the skull.
Nape of neck 6 cm x 1 cm and another is 3 x 1 cm both are fat deep.
- ii) Neck anteriorly on the throat which is 6 cm linear
- iii) On face left side chick 8 cm x 3 cm fat deep
- iv) Right shoulder 8 cm x 3 cm which was muscle deep
- v) Left shoulder 3 cm x 1 cm fat deep
- vi) Left arm 3 cm x 1 cm
- vii) Right arm 3 cm x 1 cm
- viii) Right hand palm 10 cm x 3 cm with cut muscle of the first web space
- ix) Left forearm crush multiple CLW of the area of 15 cm x 3 cm

Evidence of this witness is gaining corroboration from the contemporaneous injury certificate issued by him which is at Exhibit 50.

12 PW3 Dr.Jayashree Mhaske and PW7 Dr.Shakil Kazi are unanimous in stating that the injuries found on person of PW1 Abdul Kasim Shaikh are possible by a sharp object like the chopper seized by the prosecuting agency. True it is that in cross-examination of PW3 Dr.Jayashree Mhaske she has stated that limbs and shoulders are not the vital parts of the body, but that aspect is inconsequential as for making out the offence punishable under Section 307 of the Indian Penal Code, causing of any wound is not necessary. Suffice to state that both Medical Officers examined by the prosecution are stating that PW1 Abdul Kasim Shaikh who was examined by them on the day of the incident was found to be having several injuries on his person.

13 Evidence of PW2 Mehboob Kasim Shaikh – brother of the injured is not of much assistance to the prosecution. This

witness has stated that at about 12.30 p.m. of the day of the incident, his brother PW1 Abdul Kasim Shaikh was brought to the house in injured condition in Omni vehicle. Upon being asked, his brother PW1 Abdul Kasim Shaikh had stated that appellant/accused Papa @ Vakil had assaulted him by means of chopper. This witness has proved former statement of the injured made to him soon after the incident giving authorship of injuries suffered, to the appellant/accused. The former statement implicates the appellant/accused in the crime in question and there is nothing on record to show that in the intervening period, mind of the injured was influenced by somebody else to implicate the appellant/accused falsely in the crime in question. There is no such suggestion to PW2 Mehboob Kasim Shaikh.

14 As per version of PW2 Mehboob Kasim Shaikh, initially his brother PW1 Abdul Kasim Shaikh was taken to Nizampura Police Station and thereafter to IGM Hospital.

15 PW4 Shabnam Abdul Shaikh, who is wife of injured PW1 Abdul Kasim Shaikh has stated that her husband PW1 Abdul Kasim Shaikh, upon getting a phone call, left the house, and at about 5 to 5.30 p.m. of the day of the incident, some boys of the locality told her that something had happened to her husband. She then immediately rushed to Metro Hotel and found her husband lying in injured condition in a vehicle. She deposed that she took her husband to IGM Hospital and then to Siraj Hospital. She has spoken about lodging the FIR Exhibit 39.

16 According to the defence, evidence of PW2 Mehboob Kasim Shaikh and PW4 Shabnam Abdul Shaikh is inconsistent and contrary to the prosecution case. However, I am of the opinion that both these witnesses are deposing about the post event happenings on the backdrop that their near relatives had suffered murderous assault. It is well settled principle of law that minor discrepancies in evidence of prosecution witnesses which are due to normal error of observation, normal error of memory due to lapse of time, due to mental disposition such as shock or

horror at the time of occurrence and like that, are not sufficient to make evidence of the prosecution witnesses doubtful. Material discrepancies are those which are not normal and are not expected of a normal person. The prosecution case would fall only when inconsistencies in it go to the root of the case. If there is general agreement and consistency with regard to the substratum of the prosecution case, then minor discrepancies of trivial nature in evidence of witnesses are required to be ignored. The point which needs determination in the instant case is whether the appellant/accused is author of serious injuries to PW1 Abdul Kasim Shaikh. There is nothing on record to suggest that there was any reason for false implication of the appellant/accused in the instant case. PW1 Abdul Kasim Shaikh has attributed wounds suffered by him to the appellant/accused and medical evidence is supporting his version. As such, it is not possible to infer that for some reason, the appellant/accused is being falsely implicated in the case in hand.

17 The spot was inspected soon after the incident by PW8 Sukhadev Rakh, Police Sub-Inspector, in presence of PW10 Rahul Kalan, panch witness. The Spot panchnama dated 22nd April 2013 at Exhibit 53 is duly proved by both these witnesses. Congruous version of both these witnesses as well as recitals in the Spot panchnama makes it clear that the spot of the incident was at the road in front of brick-kiln. Sample soil as well as blood stained soil came to be seized from the spot of the incident and those samples were sent for chemical analysis. The Chemical Analyzer's Report at Exhibit 69 points out that the soil seized from the spot of the incident was containing human blood. This piece of forensic evidence is supporting and corroborating version of injured PW1 Abdul Kasim Shaikh to the effect that he was murderously assaulted near brick-kiln by appellant/accused Papa @ Vakil Pathan.

18 In foregoing paragraphs wounds suffered by PW1 Abdul Kasim Shaikh are already noted. Comparison of injuries noted by PW3 Dr.Jayashree Mhaske and PW7 Dr.Shakil Kazi

would not show that both these Medical Officers have noted different injuries. Infact, the injuries are same but serial numbers of injuries are not the same. Both these Medical Officers have noted injuries on neck and occipital region suffered by PW1 Abdul Kasim Shaikh. PW3 Dr.Jayashree Mhaske has noted incised wounds over occipital region apart from incised wounds to neck and scapular region. In a similar way, PW7 Dr.Shakil Kazi has also noted wounds on occipital region apart from neck and other parts of the body suffered by injured PW1 Abdul Kasim Shaikh.

19 The appellant/accused is found to be guilty of the offence of commission of an attempt to murder PW1 Abdul Kasim Shaikh. For making out the offence punishable under Section 307 of the Indian Penal Code, suffering of any wound or injury is not essential. In the matter of **Vasant Vithu Jadhav vs. State of Maharashtra**⁵ following are the relevant observations :

“To justify a conviction under this section, it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of

5 2004 CRI.L.J. 1786

injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deducted from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.”

“10 It is sufficient to justify a conviction under S. 307 if there is present an intent coupled with

some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. the section makes a distinction between the act of the accused and its result, if any. The Court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, it is not correct to acquit an accused of the charge under S. 307, I.P.C., merely because the injuries inflicted on the victim were in the nature of simple hurt.”

“13 Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstances that the injury inflicted by the accused was simple or minor will not by itself rule out application of S. 307 I.P.C. The determinative question is intention or knowledge, as the case may be, and not nature of the injury”

20 In the light of these observations, if evidence adduced by the prosecution is perused, then it makes it clear that the appellant/accused armed with a chopper had dealt successive

blows all over the body of injured PW1 Abdul Kasim Shaikh. This reflects intention. Part of the body chosen for inflicting wounds were head, neck as well as limbs and other parts. Number of blows were inflicted which are also reflecting the intention. In this view of the matter, I see no fault in conviction of the appellant/accused for the offence punishable under Section 307 of the Indian Penal Code by the learned trial court. Minimum sentence is imposed on the appellant/accused for the proved offence, and hence, no interference is required even in the sentence.

21 In the result, the appeal fails, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)