

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

CRIMINAL APPEAL NO.1171 OF 2008

Raju @ Riyaz Ahmad Mohd. Amin
Shaikh

...Appellant

Versus

The State of Maharashtra & Anr.

...Respondents

WITH

CRIMINAL APPEAL NO.1178 OF 2008

Mukhtar Ahemad Raziuddin Shaikh

...Appellant

Versus

The State of Maharashtra & Anr.

...Respondents

.....

Mr. Abhaykumar Apte for the Appellants.

Ms A.A. Takalkar, APP for the Respondent No.1-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 15th JANUARY, 2018.

JUDGMENT:-

The Appellants, were the accused Nos.7 and 5 in Sessions Case No.187 of 2003 and who shall be hereinafter referred to as accused Nos.7 and 5 respectively, have challenged the judgment and order dated 8th October, 2008 whereby the learned Ad-hoc Additional Sessions Judge, Greater Bombay, Sewree, has convicted them for offence punishable under Section 324 r/w. 34 of the IPC and sentenced to undergo rigorous imprisonment for three years.

2. The brief facts necessary to decide these appeals are as under:-

The first informant-PW1-Kadar Khan had lodged a FIR dated 27th November, 2002 that at about 7.30 p.m. to 7.45 p.m. while he was proceeding towards his shop, he accidentally dashed against Babloo Shaikh. Said Babloo Shaikh pushed him and slapped him. PW1 narrated the incident to his elder brother PW3-Pappu. Said Pappu went to Babloo Shaikh to enquire about the incident. Babloo threatened him. Pappu thereafter proceeded towards the police station to complain about the incident. Sometime thereafter Babloo Shaikh went to the shop of the first informant alongwith these accused and some others. They were armed with weapons like iron rod, stump, chopper, etc. They assaulted the first informant and his brothers and caused them grievous injuries.

3. PW9-PSI Dilip Gaikwad, who at the relevant time was attached to Malvani Police station, had received an information that there was a fight between two groups and that some persons were injured and were taken to Bhagwati Hospital. He went to the spot alongwith other police personnel and verified that 8 persons were injured. PW10-API-Shinde, who was on night duty at Malvani Police

Station was also informed about the incident. The first informant PW1-Kadar Khan went to the police station at 11.00 p.m. and lodged the FIR against these two accused and five others. PW10-API Shinde recorded the FIR at Exhibit-17. He recorded the statements of the other injured persons, conducted panchanama and seized the incriminating material. Upon completion of the investigation, he filed a charge sheet against these two accused and five others for committing offence under Sections 143, 144, 147, 148, 324, 326 and 427 r/w 149 of the IPC.

4. On the same date the accused had also lodged a report against the PW1- Kadar Khan and his brothers, pursuant to which crime was registered against them for causing death of Mainoddin. Upon completion of the said investigation, charge sheet was filed against PW1-Kadar Khan and his brothers for offence under section 302 of the IPC. The case being Sessions triable, was committed to the Court of Sessions. Since the cross complaint being Sessions Case No.186 of 2003 filed against the first informant was committed to Sessions Court, Sessions Case No.187 of 2003 filed against these accused and others was also committed to the Court of Sessions.

5. Charge was framed and explained to these accused. They pleaded not guilty and claimed to be tried. Prosecution in support of its case examined 11 witnesses. The statements of the accused were recorded under Section 313 of the Cr.P.C.

6. Upon considering the evidence on record, the learned Sessions Judge, acquitted the other accused of offence punishable under Sections 143, 144, 147, 148, 326 and 427 r/w. 149 and 324 r/w. 34 of the IPC and acquitted accused Nos. 5 and 7 of offence punishable under Sections 143, 144, 147, 148, 326 and 427 r/w. 149 of the IPC. The accused Nos.5 and 7 were convicted for offence punishable under Section 324 r/w. 34 of the IPC. Being aggrieved by this conviction and sentence, the accused Nos.7 and 5 have filed these Appeals.

7. Heard Mr. Abhaykumar Apte for the Appellants and Ms A.A. Takalkar, APP for the Respondent-State. Perused the records and considered the submissions advanced by the learned counsels for the respective parties.

8. It is to be noted that the charge against the accused was that they alongwith others had formed an unlawful assembly with a common object of inflicting injury on the first informant and his

brothers. It was alleged that in furtherance of the common object, this accused alongwith five others had assaulted the first informant and his brothers by means of deadly weapons. Having considered the evidence adduced by the prosecution the learned Trial Judge held that prosecution has failed to establish that the accused had formed an unlawful assembly with a common object of assaulting PW1-Kadar Khan and other injured witnesses and hence, acquitted them of offences punishable under Sections 143, 144, 147, 148, 326 and 427 r/w. 149 of the IPC. These accused have been convicted for their individual acts, relying upon mainly on the testimony of the injured witnesses viz. PW1, PW2, PW3, PW4 and PW5.

9. It is to be noted that PW1 has deposed that on 27.11.2002 at about 7.30 to 7.45 while he was proceeding towards his shop, he had accidentally dashed against Babloo Shaikh. When his brother Pappu went to police station to inform about the incident thereafter said Babloo Shaikh came to his shop alongwith these two accused and others. PW1 has stated that all the accused persons started beating them by iron rods, stumps, choppers, etc. According to PW1 the accused No.7-Raju and accused No.5-Mukhtar had given a blow of iron bar on his head. He further claimed that Raju had given a blow of

hockey stick on his head. He had not specified as to which of these accused had assaulted him with an iron rod. He was also unable to give description of the weapon. He further states that he was assaulted from behind and as such he could not see the assailant properly. PW2 further claims that he was assaulted by Raju and Mukhtar by iron bar and wooden sticks.

10. It is to be noted that in his statement under Section 161 of Cr.P.C. PW1 had not stated that Raju and Mukhtar were armed with wooden sticks. This omission had been brought on record. It is pertinent to note that PW2 does not mention as to who had assaulted PW1. PW4 has also given a different version. He claims that all the accused had entered the shop and had assaulted PW1 and others by means of iron rods, hockey sticks, chopper, etc. He claims that he was assaulted by Ibrahim. The testimony of this witness does not indicate that these two accused were involved in inflicting injury on PW1 or PW2.

11. PW5 has also stated that all the accused had come to their shop with hockey sticks, stump, iron rod and assaulted him and his brothers and that they had sustained injuries. This witness claims that he was assaulted by Sajjad Mukhtiyar and Javed. The testimony of this

witness does not indicate that accused No.7 Raju had inflicted injury on him and /or other injured witnesses. He claims that the accused No.5-Mukhtar had assaulted him by stump. Evidence of this witness indicates that accused Mukhtar was armed with stump and the case of the other witnesses is that Mukhtar was armed with iron rod or hockey stick. The evidence of this witness is not consistent with the evidence of the other eye witnesses. It is thus evident that each of these witnesses have given a different version. Suffice it to say that no conviction can be recorded on the basis of such inconsistent evidence. The conviction therefore, cannot be sustained.

12. Under the circumstances, the appeals are allowed. The impugned judgment and order dated 8th October, 2008 is quashed and set aside. Accused Nos.7 and 5 are acquitted of offence under Section 324 r/w 34 of the IPC. Since the accused have already released from jail, no further order is required.

(ANUJA PRABHUDESSAI, J.)