

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.73 OF 2017

Ganesh Subhash Gaikwad,
Aged 24 years, Occ : Agriculture,
R/o. Kadlas, Taluka : Sangola,
District : Solapur,
(At present is in jail Yerwada)

.....Appellant

V/s.

The State of Maharashtra,
Through Sangola Police Station,
Tal.Sangola, District : Solapur.

....Respondent

Mr. Machindra A. Patil, Advocate for the Appellant.

Mr. S.V. Gavand, APP for respondent No.1/State.

CORAM : A.M.BADAR, J.

DATED : 22nd JANUARY 2019

ORAL JUDGMENT :

1. By this appeal, the appellant/accused, is challenging the Judgment and Order dated 29.11.2016 passed by the learned Additional Sessions Judge, Pandharpur in Sessions Case No.83 of 2012, thereby convicting the appellant/accused of the offences punishable under Sections 307 and 506 of the Indian Penal Code. For the offence punishable under Section 307 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous

imprisonment for ten years, apart from direction to pay compensation of Rs.50,000/- and in default, to undergo further rigorous imprisonment for six months. For the offence punishable under Section 506 of the Indian Penal Code, he is sentenced to suffer rigorous imprisonment for six months apart from direction to pay fine of Rs.5,000/- and in default, to undergo further rigorous imprisonment for one month. Substantive sentences are directed to run concurrently by the learned trial Court. The appeal is taken up for final hearing as the appellant/accused is undergoing jail sentence from 12.10.2012.

2. Facts in brief leading to the prosecution and resultant sentence of the appellant/accused can be summarized thus :

(a) First Informant/PW5 Sharda Gaikwad was resident of Village Kadlas in Sangola Taluka of Sangli District. After divorcing her husband, she started residing with her parents and brothers at Village Kadlas. The appellant/accused is her cousin. He used to reside in the neighbourhood of the First Informant/PW5 Sharda Gaikwad.

(b) On 07.10.2012, the appellant/accused had abused and threatened First Informant/PW5 Sharda Gaikwad for the reason that her cattle brushed it bodies against his house.

(c) The incident in question took place at about 9.00 a.m. of 08.10.2012. On that day, First Informant/PW5 Sharda Gaikwad was returning to her house after supplying milk to the dairy of one Samadhan Pawar. When she reached near premises of one Lendve-Pawar, the appellant/accused came from the front direction. He abused and threatened her. Thereafter, he took out a *sattur* from his bag and assaulted her. First Informant/PW5 Sharda Gaikwad warded off the blows of *sattur* by her hands, which caused wounds on her hands as well as forehead. Because of shouts of First Informant/PW5 Sharda Gaikwad, the appellant/accused ran away. The incident was witnessed by Vandana Kedar, Kisan Lendve, Pandurang Gaikwad, Vilas Gaikwad and Anna Jadhav. Injured PW5/Sharda Gaikwad then went to the place of her resident and had suffered a fall there. She was initially taken to the Sub-District Hospital at Sangola and thereafter to

Yashodhara Hospital of Solapur for treatment. PW7/Dr.Sriniwas Yemul had medically treated injured PW5/Sharda Gaikwad and during the course of medical treatment of her, her left hand required to be amputated by elbow. Surgery was required to be done to her right hand.

(d) When injured PW5/Sharda Gaikwad was admitted at Yashodhara Hospital of Solapur, PW9/Khandu Kamble, Police Head Constable was deputed to the Sub-District Hospital, Sangola for recording her statement. Because of absence of injured PW5/Sharda Gaikwad, he could not record her statement.

(e) PW13/Police Head Constable, Naushad Shaikh visited Yashodhara Hospital of Solapur on 09.010.2012 and recorded the FIR lodged by injured PW5/Sharda Gaikwad. He submitted that FIR to the Police, Taluka Police Station where Crime No.00/2012 came to be registered. As the offence took place within jurisdiction of Police Station Sangola, the FIR was then sent to the Police Station Sangola where Crime

No.238/2012 came to be registered against the appellant/accused for the offence punishable under Sections 307, 504 and 506 of the Indian Penal Code.

(f) The appellant/accused came to be arrested on 12.10.2012. The spot came to be inspected on 11.10.2012 in presence of Panch Witnesses including PW1/Popat Pawar and Spot Panchnama (Exhibit 26) came to be prepared. On 15.10.2012, in presence of PW3/Manoj Pawar-Panch Witness, PW6/Sunil Gaikwad–Brother of injured PW5/Sharda Gaikwad had produced her clothes before the Investigating Officer namely PW11/Madhav Shete, API. Those came to be seized under Seizure Panchanama (Exhibit 30).

(g) On 13.10.2012, the appellant/accused made a disclosure statement before PW-11/Madhav Shete, API and in presence of PW4/Shivaji Pawar. The said statement (Exhibit 38) came to be recorded and on the basis of that statement, at the instance of the appellant/accused, weapon of the offence

i.e. *sattur*, so also clothes of the appellant/accused came to be recovered vide recovery panchnama (Exhibit 39). Seized articles were then sent for chemical analysis. On completion of routine investigation, the appellant/accused came to be charge-sheeted.

(h) The learned trial Court framed charge for the offences punishable under Sections 307, 504 and 506 against the appellant/accused. He pleaded not guilty and claimed trial.

(i) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all fourteen witnesses. Panch Witness to the spot panchnama (Exhibit 26) namely Popat Pawar is examined as PW1. Panch Witnesses to the seizure panchnama of clothes of injured PW5/Sharda Gaikwad namely Babasaheb Shinde and Manoj Pawar are examined as PW2 and PW3 respectively. Exhibit 30 is the seizure panchnama of clothes of the victim. PW4/Shivaji Pawar is a Panch Witness to the voluntary

disclosure statement (Exhibit 38) and resultant recovery panchnama (Exhibit 39). Injured First Informant/Sharda Gaikwad is examined as PW5. Exhibit 44 is the FIR lodged by her on 09.10.2012. Her brother Sunil Gaikwad is examined as PW6. Dr. Srinivas Yemul of Yashodhara Hospital, Solapur is examined as PW7. Exhibit 51 is the Medico Legal Certificate issued by him. Police Naik, Shashikant Valekar, who carried the muddemal to the forensic laboratory is examined as PW8. Khandu Kamble, Police Head Constable is examined as PW9. Circle Officer, Tukaram Bidave, who had drawn the map of the spot of the incident is examined as PW10. Investigating Officer, Madhav Shete, API is examined as PW11. Another Investigating Officer, Prakash Satpute, Police Inspector is examined as PW12. Police Head Constable, Naushad Shaikh, who recorded the FIR is examined as PW13. API, Dnyaneshwar Karache is examined as PW14.

(j) The defence of the appellant/accused was that of total

denial. As per the defence version, injured PW5/Sharda Gaikwad had sustained injury in a vascular accident, but on account of property dispute, he is falsely implicated in the crime in question.

(k) The learned trial Court after hearing the parties was pleased to convict the appellant/accused and to sentence him as indicated in the opening para of this judgment.

3. I heard the learned counsel appearing for the appellant/accused at sufficient length of time. He argued that the FIR reflects presence of four witnesses on the spot. Similarly, Sanjay Gaikwad also seems to be an eye-witness. However, they are not examined by the prosecution. He further argued that all panch witnesses are from Village Gopalpur and the prosecution has not availed services of residents of Village Kadlas for acting as panch witness. Police diary is not produced. PW4/Shivaji Pawar is not a real panch as he has not deposed as to what time the police team left the police station for effecting recovery. Talathi as

well as Gramsevak are not examined to prove the recovery of incriminating articles. The learned counsel further argued that the incident happened on a proper moment and there was no intention, preparation or plan of the appellant/accused to commit murder.

4. As against this, the learned APP supported the impugned Judgment and Order of conviction and resultant sentence.

5. I have carefully considered the submissions so advanced and also perused record and proceedings including oral as well as documentary evidence.

6. Considering the nature of allegations levelled against the appellant/accused, evidence of injured PW5/Sharda Gaikwad as fate of the prosecution case to a large extent hinges on her testimony. She herself is a injured witness. The defence is not disputing the fact that PW5/Sharda Gaikwad had suffered wounds, but according to the defenece version, she had suffered

accidental injuries. Evidence of injured PW5/Sharda Gaikwad coupled with that of her brother PW6/Sunil Gaikwad shows that after the incident in question, on 08.10.2012 itself, the injured was taken to the Sub-District Hospital at Sangola and thereafter she was admitted to the Yashodhara Hospital of Solapur. Unimpeachable evidence of PW7/Dr.Sriniwas Yemul of Yashodhara Hospital of Solapur shows that on 08.10.2012 itself injured PW5/Sharda Gaikwad was admitted to the Yashodhara Hospital, Solapur with several wounds. This evidence certainly corroborates version of injured PW5/Sharda Gaikwad, which is to the effect that the appellant/accused assaulted her by means of a *sattur* at about 9.00 a.m. of 08.10.2012. This makes it clear that PW5/Sharda Gaikwad is a injured witness. It is well settled that evidence of injured witness cannot be discarded on the ground of inimical disposition towards the accused or even on account of improbabilities in narrating the details of actual attack. Evidence of such witness is required to be scrutinized with caution taking into account the factum of previous enmity and tendency to exaggerate and to implicate as many as possible. If evidence of

injured witness is otherwise reliable and trustworthy, then it cannot be thrown away merely because some other independent witnesses are not examined. In such situation, the Court is required first to assess the trustworthiness of the evidence adduced and available on record. If it is worthy of reliance, then such testimony has to be accepted and acted upon though there may be other witnesses available, who could also have been examined, but are not examined. However, if available evidence suffers from infirmity and cannot be accepted, in absence of other evidence, which though available has been withheld from the Court, then question of drawing adverse inference against the prosecution may arise. At the same time, it will have to be kept in mind that in a case of a single accused and a single injured, theory of false implication doesn't deserve a moment consideration because it is not possible that the victim will spare the real culprit and rope in an innocent. Keeping in mind these aspects, let us examine what is spoken by the injured about the incident in question.

7. As per version of injured PW5/Sharda Gaikwad, on 07.10.2012 as her buffaloes brushed it body against the house of the appellant/accused, he abused her. Thereafter, on 08.10.2012, after supplying milk to the dairy of Samadhan Pawar, she was returning to her house. The injured further deposed that when she reached in front of the field of Lendve-Pawar at about 9.00 a.m., the appellant/accused came from the front direction. He threatened her that he will finish her as she had abused him. The victim further testified that the appellant/accused then whipped out a *sattur* from the bag, attempted to give a blow thereof on her neck. She warded off by elbow of her left hand and suffered a fall. Then the next blow was directed against her abdomen, but she warded off the blow by her right hand. The victim further deposed that the appellant/accused then gave third blow of *sattur* on her forehead. As per her version, as she attempted to ward off the blows, she suffered injuries to her hands as well as forehead. The victim further testified that she was hospitalized for a period of one month and her left hand was required to be amputated. She further deposed that nailing was done to her right palm and

therefore, she is unable to use that hand also. The victim testified the appellant/accused as the perpetrator of the crime.

8. Though the injured was cross-examined at length, it was not even suggested to her that she had suffered injuries due to some accident. She stated that the incident of assault on her took place at a distance of more than 500 ft. from the dairy. As per her cross-examination, persons such as Vandana Kedar, Kisan Lendve, Pandurang Gaikwad, Vilas Gaikwad and Anna Jadhav were not present when she supplied the milk at the dairy. It is thus clear that even in cross-examination, it was not suggested to the victim that the incident was actually witnessed by other persons. Perusal and consideration of the evidence of the injured as a whole makes it clear that she is a witness of truth and she had not met with any accident other than the incident of assault on her by the appellant/accused on the day of the incident. Therefore, it is not possible to hold that the injured had suffered injuries in the accident. There is nothing in her cross-examination to disbelieve version of injured PW5/Sharda Gaikwad that it was the

appellant/accused, who had assaulted her by means of *sattur*.

9. Evidence of PW7/Dr.Sriniwas Yemul fully corroborates version of injured PW5/Sharda Gaikwas. Evidence of this witness shows that at the time of her admission to the hospital, PW5/Sharda Gaikwad was having double level injury to the lower third left arm with fracture humerus with vascular with nerve injury with evidence of dead forearm muscles. This Medical Officer found 60% cut was there to the circumference of lower third left arm of the injured. He noticed 10 cm muscle deep on left forearm of PW5/Sharda Gaikwad. PW7/Dr.Sriniwas Yemul further stated that the injured was having wound over dorsum of hand with fracture metacarpus with extension tender injury.

10. As per evidence of this Medical Officer, left hand of PW5/Sharda Gaikwad was required to be amputated above elbow. Another surgery was undertaken for metacarpus fracture and tender injury to the right hand of the victim. Evidence of Dr.Sriniwas Yemul is further corroborated by the

contemporaneous Medico Legal Certificate at Exhibit 51. It is thus clear that the injured had suffered serious injuries on her both hands and in all probability, those injuries were caused because the injured had attempted to ward off the blows of *sattur* to be given on her neck and abdomen by the appellant/accused.

11. After arrest of the appellant/accused, on 13.12.2012, he had given a disclosure statement before PW11/Madhav Shete, API in presence of panch witness PW4/Shivaji Pawar. Evidence of both these witnesses shows that the appellant/accused had led them to the field. Initially, he dug the soil of one place in the field and took out a *sattur* stained with blood and mud. Then the appellant/accused dug soil of other place in the field and took out a bag containing his blood stained pant and T-shirt. The articles recovered at the instance of the appellant/accused on the basis of his disclosure statement (Exhibit 38) came to be seized vide recovery panchnama (Exhibit 39). On this aspect, PW4/Shivaji Pawar cross-examined by the defence to demonstrate that he is not aware as to how much time was spend at the police station

and the distance between the Deshmukhvasti and the field. It is also elicited from his cross-examination that, owner of the field was not present, nor he was called. All these are peripheral issues, which are not having bearing to the recovery of incriminating articles at the instance of the appellant/accused. Evidence of PW1/Madhav Shete, API and panch witness Shivaji Pawar so far as it relates to voluntary disclosure statement and resultant recovery of blood and clothes and *sattur* is not at all shuttered in the cross-examination. It was not necessary to call owner of the field for effecting recovery, nor the distance matters in any manner.

12. The prosecution has also proved recovery of seizure of blood stained clothes of injured PW5/Sharda Gaikwad through trustworthy and acceptable evidence of panch witness PW3/Manoj Pawar and Investigating Officer PW11/Madhav Shete. They both have spoken that clothes of the victim were stained with blood. This evidence is natural because PW7/Dr.Sriniwas Yemul has testified that the injured was having serious wounds on her both

upper limbs. Articles seized during the course of investigation including recovered clothes and weapon i.e. *sattur* were sent for forensic examination through carrier PW8/Shashikant Valekar, Police Naik. His evidence shows that in sealed condition, he delivered the articles to the forensic laboratory along with request letter at Exhibit 56. The CA report at Exhibit 82 shows that the articles were received by the forensic laboratory in a sealed condition. Upon examination of seized articles and particularly seized *sattur* as well as clothes of the appellant/accused shows that those were stained with human blood. Thus, the prosecution has established the fact that the appellant/accused was knowing the place where the weapon used in commission of the crime in question, so also his blood stained clothes were kept concealed.

13. In the light of forgoing discussion, it is required to be held that the prosecution has established the fact that it was the appellant/accused, who had caused wounds on injured PW5/Sharda Gaikwad by means of *sattur*. Now one will have to examine whether the prosecution is successful in bringing home

the guilt to the appellant/accused for the offence punishable under Section 307 as well as Section 506 of the Indian Penal Code. If a person who does an act with an intention or knowledge that, if he by that act caused death, he will be guilty of murder, is liable for offence punishable under Section 307 of the Indian Penal Code. The question of intention to kill or the knowledge of death in terms of provisions of Section 307 of the Indian Penal Code is a question of fact. The injury inflicted on the victim, seat of injury, weapon used for assault, force applied for giving blows are relevant for determining the intention. At the same time, the mere fact that the injury actually inflicted by the appellant/accused did not cut any vital organ of the victim is sufficient to take the act out of the purview of Section 307 of the Indian Penal Code. It is to be borne in mind that for making out the offence punishable under Section 307 of the Indian Penal Code, what is relevant is the intention and not the injury. If it is established that there was an intention coupled with some overact in execution of such intention, then the offence punishable under Section 307 of the Indian Penal Code can be made out. Viewed from this angle,

evidence on record unerringly points out that by using heavy weapon i.e. *sattur*, the appellant/accused gave successful blows thereof, which according to the victim were directed against her neck and abdomen. She attempted to ward off those blows by using her upper limbs. The result seems to be obvious. Her left hand was amputated and right hand was fractured. Thus, with this, it needs to be held that the prosecution has established the commission of offence punishable under Section 307 of the Indian Penal Code by the appellant/accused. Similarly, evidence of the victim shows that she was initially threatened by the appellant/accused by hurling threat to her life while the appellant/accused was armed with *sattur*. This evidence is sufficient to hold that the appellant/accused has committed the offence punishable under Section 506 of the Indian Penal Code.

14. So far as quantum of punishment is concerned, the same is certainly in consonance with the proved offence. Nature of the offence and the circumstances in which it was committed are some of the factors taken into consideration while imposing sentence on

the appellant/accused. In the case in hand, the appellant/accused had caused amputation of left hand of the victim apart from fracturing his right hand over a trivial issue of brushing body against his house by the cattle belonging to the injured. As such, it cannot be said that the sentence imposed is disproportionate to the proved offences. In the result, the following order:

ORDER

The appeal is dismissed.

(A.M.BADAR J.)