

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

**CRIMINAL APPEAL NO.87 OF 2013
WITH
CRIMINAL APPLICATION NO. 1302 OF 2015**

1. Maruti Bhaurao Phad

Age : 44 years,

R/o : Old CIDCO, N9/B2/14/4
CIDCO, Nashik

2. Nitin Pradip Khairnar

Aged about 23 years,

R/o : Shantinagar, Shivaji Chowk,
Old CIDCO, Nashik

.... Appellants
(Ori. Accused 1 and 3)

Vs.

The State of Maharashtra

(at the instance of PSO Bhadrakali

Police Station, CR No. 316/2009)

.... Respondent
(Ori. Complainant)

**ALONGWITH
CRIMINAL APPEAL NO. 65 OF 2013**

1 Bhushan Bhagwan Bacchav

Aged : 29 years, Indian inhabitant

Occ.: Service,

Permanent R/o 29/12-C, Konark Nagar,
Panchavati, Nashik

.... Appellant
(Ori. Accused no.2)

Vs.

The State of Maharashtra
(at the instance of PSO Bhadrakali
Police Station, CR No. 316/2009)

.... Respondent
(Ori. Complainant)

Mr. Tushar Narayan Sonawane for the Appellant in Appeal No. 87 of 2013.

Mr. Aashish Satpute a/w Mr. Nihal Mansuri for the Appellant in Appeal No. 65 of 2013

None for Intervenor.

Mr. S.R. Agarkar, APP for the State- Respondent.

Coram : Smt. Sadhana S. Jadhav, J.

Date : 8th April 2019

JUDGMENT :-

1 Heard the respective counsel.

2 The appellants hereinabove are convicted by the learned 5th Additional Sessions Judge, Nashik vide judgment and order dated 21st December 2012 for the offence punishable under Section 307 of Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of seven years, to pay a fine of Rs.3,000/- in default to suffer rigorous imprisonment for six months.

The appellant-Maruti Bhaurao Phad (in Criminal Appeal No. 87 of 2013) is further convicted for the offences punishable under Sections 392 and 419 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for a period of two years, to pay a fine of Rs.1,000, in default to suffer further rigorous imprisonment for a period of three months and sentenced to suffer rigorous imprisonment for a period of six months, to pay a fine of Rs.500/-, in default to suffer rigorous imprisonment for fifteen days respectively.

3 Such of the facts necessary for the decision of these appeals are as follows :

One Sayyed Javed Abdul Hamid (PW-1) was serving as a Driver with Corporator, Sayyad Mushir Muniruddin and was driving his Innova vehicle. On 9th September 2009 at about 4.00 pm. As as soon as Sayyad Mushir Muniruddin (PW-7) entered his house, Maruti Bhaurao Phad (appellant no.1 in Criminal Appeal No.87 of 2013) had

challenged him over his victory in the elections. At that juncture, Nitin Pradip Khairnar (appellant no.2 in Criminal Appeal No.87 of 2013) had caught hold of him from behind, thereby facilitating the assault by Maruti Bhaurao Phad. Maruti Phad had assaulted him with a chopper on his stomach and Nitin Pradip Khairnar, who is appellant no.2 in Criminal Appeal No. 87 of 2013 had assaulted Sayyad Mushir on the occipital region of his head. That, thereafter Sayyad Mushir was taken to Walkeshwar Hospital by his driver, Sayyad Javed.

4 Javed Abdul Hamid Sayyad had then lodged a report with Bhadrakali Police Station alleging therein that PW-7 Sayyad Mushir Maniruddin was assaulted by three unknown persons. A statement of the injured was recorded in Walkeshwar Hospital on 10th September 2009. The injured had named Maruti Phad as one of the assailants, since he knew him. However, he had not named accused (appellants) Nitin and Bhushan. In fact, the injured was knowing all the three accused prior to registration of an F.I.R. The injured was discharged

from the hospital on 16th September 2009. His supplementary statement was recorded on 20th September 2009.

5 PW-1 and PW-7 were called to Central Jail, Nasik Road for the purpose of identification of the accused. The injured as well as his driver, PW-1 had identified all the three accused persons. The investigation was completed, charge-sheet was filed and case was registered as Sessions Case No.9 of 2010. The prosecution had examined as many as 12 witnesses to bring home the guilt of accused. The defence of the accused is of total denial.

6 The case rests upon the evidence of PW-1-Sayyad Javed Abdul Hamid, the first informant and the driver of the injured Mushir Sayyad, PW-2 Dr. Altaf Sayyad Abid Sayyad who had examined PW-7 in Walkeshwar Hospital, PW-3 Zahir Usman Sayyad, who had apprehended the accused Nitin on the spot. PW-7, the injured Sayyad Mushir Maniruddin and PW-10 Dr. Sharadchandra Pandurang Pagare.

7 PW-1, Sayyad Javed Abdul Hamid has deposed before the Court about the incident as narrated by him to the Police in his first information report. According to him, his owner had reached home some time after 3.30 pm. His wife had opened the door. When PW-7 Sayyad Mushir Maniruddin was approaching towards his house, he was intercepted by three persons, who had come on Pulsar motorcycle. He had seen all three persons talking to Mushir Sayyad while PW-1 was sitting in the vehicle itself. According to him one of the persons had caught hold of Mushir Sayyad and the other two persons had drawn weapon like knife (sura) from their shirt. One of the persons had assaulted on the stomach of his owner and another person had assaulted him on his head and back. PW-1 had raised alarm. In the meanwhile, the third person, upon hearing the alarm raised by PW-1, was trying to flee on the motorcycle. However, PW-3 Jahir had reached the spot in the nick of time and had apprehended accused-Nitin on the spot. Thereafter the co-accused Maruti Bhaurao Phad and Bhushan Bhagwan Bacchav had fled from the spot. PW-1 was

summoned by the investigating agency for identifying the accused in Central Jail, Nasik Road. He had identified two persons, out of 14 and their names were Bhushan Bhagwan Bacchav and Nitin Pradip Khairnar. He has specifically stated that Bhushan assaulted Mushir Sayyad behind his head near the neck, whereas Nitin caught Mushir Sayyad on the day of the incident. On the second occasion, he was called upon to identify the third accused and he had identified Maruti Phad.

8 PW-2, Dr. Altaf Sayyad had examined the injured in Wockhardt Hospital and found following injuries :

- i) traverse stab wound across the abdomen measuring 8 inch x 2 inch, with visible abdominal viscera like omentum (omentum is covering over the intestine)
- ii) incised wound over right occipital region admeasuring 5 inch x 1 inch, it was subcutaneously deep and;
- iii) incised wound over the right arm admeasuring 2 inch x 1 inch, subcutaneous deep.

According to him, history as narrated by the injured was assault by sharp instrument. The prosecution has not been able to create any dent in the cross-examination of PW-1 and PW-2. It is a fact that Exhibit 41 is issued by Dr. Mahesh G. Rajendra and not by PW-2.

9 PW-3, Zahir Usman Sayyad is also an eye witness to the incident in as much as he had apprehended accused Nitin on the spot. He was also summoned for test identification parade and he has identified accused Nitin, whom he had apprehended on the spot just outside the house of Sayyad Mushir i.e. PW-7. The prosecution has not been able to create any dent in the solemn testimony of the witness by way of cross-examination. All that is elicited in the cross-examination of PW-3 is that after recording his statement on 11th September 2009 and till 26th October 2009, he had not visited the police station. He had not received any letter summoning him to remain present for test identification parade. However, on 26th October 2009, without going to the police station, he had straight-away gone to Central Jail, Nasik Road. He had met police from Bhadrakali police

station, just outside the Central Jail, Nasik Road. However, that by itself cannot be said to be a challenge to the test identification parade neither it can be said that no proper procedure is followed in carrying test identification parade.

10 In the present case, it is pertinent to note that the Special Executive Magistrate, Mrs. Gholap, who had recorded the statement of the injured in the hospital on 10th September 2009 had conducted the test identification parade on 26th October 2009. In any case, that by itself would not cause any prejudice to the accused. In the present case, it is pertinent to note that soon after the incident, accused Maruti had rushed to Gaurav Accident Hospital and had got himself examined and admitted. At the time of admission and examination, he had disclosed his name as “Rohidas Hari Wagh”. However, the Police had reached the hospital, soon after he was treated by the Doctor and had informed the Doctor the real name of the injured as “Maruti Bhaurao Phad” and not as 'Rohidas Wagh'. The injured i.e. accused no.1 had suffered contused lacerated wound over mid palmer area of 4 cm x ½

cm. x ½ cm. with cut long flexor tendor of right ring finger of left hand and the age of the injury was about 3-4 hours. PW-10, Dr. Sharadchandra Pagare has proved the injury certificate which is marked at Exhibit 66. The injury on the stomach could have been the fatal injury in the eventuality that the injured would not be carried to the hospital forthwith.

11 Learned counsel for the appellants submits that Maruti was injured in another incident and therefore he had rushed to the hospital and no adverse inference could be drawn only because he had disclosed his name as “Rohidas Wagh”. As against this, learned APP submits that the very fact that the injured had rushed to the hospital, was examined within 3-4 hours and was found with an injury on his right hand coupled with the fact that he had disclosed a wrong name is the conduct, which can be appreciated under Section 8 of the Indian Evidence Act.

12 In the case of Vaibhav Khushalrao Tijare and another Vs. The State of Maharashtra, (judgment dated 13th June 2012 in Criminal Appeal Nos. 57 of 2012 and 58 of 2012, Nagpur Bench), this Court had considered the conduct of the accused and had relied upon the judgment of the Apex Court in the case of Anant Chintaman Lagu Vs. State of Bombay, reported in AIR 1960 Supreme Court, page 500 :

“A Criminal trial, of course, is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material.”

Section 8 of Indian Evidence Act reads thus:

8. Motive, preparation and previous or subsequent conduct.—Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

The subsequent conduct of the accused needs to be taken into consideration in the present case as it would be a relevant factor. As far as the original accused Nos. 2 and 3 are concerned, the original accused no.3 Nitin Khairnar was apprehended on the spot by PW-3 and he has deposed before the Court to that effect. He had attempted to flee from the spot on the Pulsar motorcycle when he was apprehended by the witnesses. As far as accused no. 2 is concerned, he has been identified by injured PW-7 and PW-1 in the test identification parade. Moreover, PW-7 has specifically stated before the Court that he was knowing Bhushan Bacchav who had assaulted him on his head. He has identified the accused in the Court and besides that he has also correctly stated the full name of accused Bhushan Bacchav. In view of the above discussions, it can be safely held that the prosecution has proved the guilt of the accused beyond reasonable doubt.

13 Learned counsel for the appellants in Criminal Appeal No. 87 of 2013 has submitted that accused Maruti has undergone sentence

imposed upon him by the trial Court. As far as accused nos. 2 and 3 are concerned, they were in custody for almost three years, one month. The conviction of accused no.1 for the offence punishable under Section 307 of Indian Penal Code deserves to be sustained and the sentence deserves to be modified.

14 As far as the allegations against accused no.3 Nitin Khairnar is concerned, it is the case of PW-1 and PW-7 that he had caught hold of the injured in order to facilitate the assault by the accused no.1. It is also alleged that he had assaulted on the back. Accused no.2 Bhushan Bacchav is alleged to have assaulted on the head of the injured, thereby causing contused lacerated wound over right side. The injured had to undergo exploratory laprotomy for the injury sustained on the abdomen. PW-2 Dr.Altaf has not deposed before the Court that the injury at serial nos.2 and 3 were grievous in nature or would have resulted into the death, if not treated forthwith. It cannot be said that the original accused nos.2 and 3 had any grudge against the injured. Therefore, the accused nos.2 and 3 deserves to be

convicted for the offence punishable under Section 324 read with Section 34 of Indian Penal Code. Hence, the following order :

ORDER

- (i) Criminal Appeal No. 87 of 2013 is partly allowed.
- (ii) The conviction of appellant no.1 Maruti Bhaurao Phad for the offence punishable under Section 307 of Indian Penal Code is upheld.
- (iii) Appellant No. 2 Nitin Pradip Khairnar is convicted for the offence punishable under Section 324 read with 34 of Indian Penal Code and sentenced to the period already undergone.
- (iv) Appellant no.2, Nitin Pradip Khairnar is acquitted of the offence punishable under Section 307 of Indian Penal Code.
- (v) **Criminal Appeal No. 65 of 2013 is partly allowed**
- (vi) The conviction of the appellant, Bhushan Bhagwan Bacchav for the offence punishable under Section 307 of Indian Penal Code is hereby quashed and set aside.

(vii) He is convicted of the offence punishable under Section 324 read with 34 of Indian Penal Code and is sentenced to the period already undergone.

(viii) The conviction of Maruti Bhaurao Phad (appellant no.1 in Criminal Appeal No. 87 of 2013) for the offence punishable under Sections 392 and 419 is maintained, however he has undergone the substantive sentence imposed upon him.

(ix) In both the appeals sentences of fine is maintained.

(x) Bail bonds of Nitin Pradip Khairnar and Bhushan Bhagwan Bacchav stand cancelled.

(xi) In view of disposal of the above Criminal Appeals, the Intervention Application being Criminal Application No. 1302 of 2015 does not survive and stands disposed of accordingly.

(Smt. Sadhana S. Jadhav, J.)