

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 639 OF 2014**

Machindra Bhagwati Pawar,
Age: 42 years, Occu: Hawker,
Residing at : Tagore Nagar,
Near Old Post Office, Opp. Sandesh
Vidyalay, Kanamvarnagar,
Vikhroli, Mumbai
(Presently lodged in Arthur Road Prison) ...Appellant

Versus

The State of Maharashtra ...Respondent

Mr. Abhishek R. Avachat, appointed Advocate for the Appellant

Mrs. P. P. Shinde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE, J.
THURSDAY, 14th MARCH 2019

ORAL JUDGMENT :

1 By this appeal, the appellant has challenged the judgment and order dated 30th June 2014 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No. 4 of 2013, convicting and sentencing him as under :

- for the offence punishable u/s 307 of the Indian Penal Code ('IPC'), to suffer RI for 7 years and to pay a fine of

Rs. 7,000/-, in default, to undergo further imprisonment for 1 year.

The appellant was, however, acquitted of the offence punishable under Section 324 of the IPC for causing hurt to one Shiva Naidu.

2 Although the appellant had sent a letter through jail, seeking withdrawal of his appeal, this Court observed that the appeal cannot be allowed to be withdrawn and fixed the aforesaid appeal for final disposal.

3 As none appeared for the appellant and since the appeal is of the year 2014 and the appellant is in custody since then, Mr. Abhishek Avachat was appointed by this Court on 26th February 2019 to espouse the cause of the appellant.

4 Mr. Avachat, learned appointed counsel for the appellant challenged the judgment and order of conviction on several grounds;

- (i) that the prosecution had failed to prove its case beyond reasonable doubt;
- (ii) that motive to assault PW 2 – Sachin Bhosale was not proved;
- (iii) recovery of knife at the instance of the appellant was suspicious;
- (iv) that though the incident took place in a busy area i.e. near the Railway Station, no independent witness has been examined;
- (v) that the evidence of the injured (PW 2) as well as the evidence of PW 3, 6 and 7 suffers from several infirmities and inconsistencies;
- (vi) that no injury was found on the left hand palm of PW 2, though PW 2 is alleged to have been assaulted on his palm;
- (vii) that the FIR was filed belatedly i.e. after approximately 6 hours of the incident of assault;
- (viii) that once the appellant has been acquitted of the offence under Section 324 of the IPC, the incident of assault by the appellant on PW 2, raises several questions, which have remained unanswered; and lastly,

(ix) that if the prosecution case, is that a knife was used, the injury ought to have been an incised wound and not a CLW.

5 Learned A.P.P submits that no interference is warranted in the impugned judgment and order dated 30th June 2014. She submitted that the evidence of the injured (PW 2) is amply corroborated by three witnesses i.e. PW 3, PW 6 and PW 7 as well as by the Medical Officer Dr. Naik i.e. PW 5.

6 Heard learned counsel for the parties at length and perused the papers with their assistance.

7 A few facts as are necessary to decide the aforesaid appeal are as under :

 PW 9 – PI Dattatray Pabale, who was attached to the Kurla Railway Police Station, has stated that on the intervening night of 30th September 2012 and 1st October 2012 i.e. at about 12:00 midnight, PW 4 – Mehboob Khan @ Shetty filed a complaint/FIR as

against the appellant. The said complaint/FIR was registered vide C.R. No. 222/2012 as against the appellant for the offences punishable under Sections 307, 324 and 504 of the IPC. He has stated that he commenced with the investigation i.e. prepared the spot panchanama (Exhibit 25), collected small crushed stones from the spot, on which blood was spilled, collected blood which was spilled on the glass door of the Saloon shop where the injured (PW 2-Sachin Bhosale) had gone after the incident of assault and fallen. He has further stated that thereafter, he recorded the statements of the witnesses and the injured and thereafter, arrested the appellant and seized his clothes under a panchanama. He has further stated that pursuant to the disclosure made by the appellant, knife was seized under a memorandum and panchanama was prepared. He has stated that blood stains were found on the blade of the knife (Article `C'). During the course of investigation, PW 9 sent the muddemal to the Chemical Analyser (Exhibit 28). He has stated that he received a report from the Chemical Analyser (Exhibit 29) and that after collecting the injury certificate (Exhibit 20) and after completion of investigation, he filed charge-sheet in the Court of the learned Judicial Magistrate First

Class. Since the case was sessions triable, the case was committed to the Sessions Court.

8 The learned Sessions Judge framed charge as against the appellant for the offences punishable under Sections 307 and 324 of the IPC, to which the appellant pleaded not guilty and claimed to be tried.

9 The prosecution in support of its case, examined 9 witnesses i.e. PW 1 Santosh Gupta (panch to the seizure and recovery of clothes and knife at the instance of the appellant); PW 2 Sachin Bhosale (injured); PW 3 Suraj Bhosale (brother of the injured and an eye-witness to the incident); PW 4 Mehboob Khan @ Shetty (complainant and an eye-witness); PW 5 Dr. Rajesh Yadav, who examined PW 2 Sachin Bhosale; PW 6 Shambhuram Harjan (friend of the injured and an eye-witness); PW 7 Mohd. Awas Rais Ahmed (Saloon owner, where PW 2 ran after the assault and fell unconscious); PW 8 Anis Shaikh (panch to the spot panchanama as well as seizure of clothes of PW 2 Sachin Bhosale); and PW 9

Dattatray Pabale, the Investigating Officer, who was attached to Kurla Railway Police Station at the relevant time.

10 The defence of the appellant was that of denial and false implication.

11 With regard to the evidence of assault by the appellant with a knife on PW 2-Sachin Bhosale, the prosecution has examined four witnesses i.e. PW 2 Sachin Bhosale (injured himself), PW 3-Suraj Bhosale (brother of the injured), PW 4-Mehboob Khan @ Shetty (complainant), PW 6-Shambhuran (friend of the injured and an eye-witness) and PW 7-Mohd. Awas Rais Ahmed (Saloon owner).

12 PW 2 – Sachin Bhosale has, in his evidence, stated that he was in the business of selling cutlery articles in local trains between Kurla Railway Station and Mumbra Railway Station; that like him, his friends Sonu, Vajinath, Shetty (PW 5), Mannie and 40 to 50 other persons were doing the business of selling of articles in the local trains in the same area. He has stated that some of his friends were running

a *bhisi* and that everybody would contribute Rs. 500/- per week towards the same on every Sunday and as such, the total contribution would be around Rs. 10,000/-. He has stated that the appellant was one of the members of the *bhisi*. He has stated that the amounts so collected would be given to the appellant and after the draw every Sunday, the amount would be paid to the winner.

13 He has further stated that on 29th September 2012, as there was Ganesh immersion, none of them were going to attend work and hence, it was decided that the *bhisi* would be drawn on 29th September 2012 i.e. on Saturday itself. He has stated that on 29th September 2012 at 8:00 p.m, *bhisi* was drawn in the house of one of the members and he (PW 2) was declared as the winner of that draw. He has further stated that the appellant did not pay him the amount of Rs. 10,000/- that day and instead told him that he will pay the amount on 30th September 2012 at about 6:00 p.m. He has further stated that thereafter, all of them participated in the Ganesh immersion procession and that while participating in the said procession, the appellant hit one lady, pursuant to which, other boys in the procession

assaulted him. He has further stated that the dispute/quarrel was settled and apology was tendered to those boys, however, the appellant was enraged and asked them as to why they had not assaulted the boys, who assaulted him. According to PW 2, on the way home, the appellant threatened him and others, saying that they had not helped him, resulting in him sustaining injuries from the boys in the procession. PW 2 – Sachin Bhosale has further stated that on 30th September 2012, he purchased some cutlery items at Kurla and came to Vikhroli at about 3:00 p.m, where he met Shetty (PW 5), his brother Sonu (PW 4), Anand, Shiva, Mannie, Vaijnath and the accused; that Shambu (PW 6) arrived there; that they had tea, after which, the appellant demanded cash of Rs. 100/- for consuming liquor. According to PW 2- Sachin Bhosale, he refused to pay Rs. 100/-, however, when the appellant told him that if he gave him Rs. 100/-, he would give him the *bhisi* amount of Rs. 10,000/-, he paid him Rs. 100/-. He has stated that the accused went to consume liquor and after some time, returned and sat near him and immediately thereafter, took out a knife and assaulted him thrice on his neck. He has stated that Shambhu (PW 6), Shetty (PW 5), and Shiva were present on the spot.

He has stated that Shiva intervened, as a result of which, he sustained an injury on his hand. He has stated that when he tried to ward off the blow, he too sustained an injury on his left hand palm. PW 2 has further stated that he ran out of the Station, looking for a hospital and as he did not find a hospital nearby, he entered a Saloon shop and after seeing his injury, became unconscious and fell down and regained consciousness in Rajawadi Hospital, Ghatkopar. He has further stated that he was in the hospital for a month and that the police seized his blood stained clothes. He has also identified the clothes (Article D colly.). He has also identified the knife (Article C) with which he was assaulted.

14 The evidence of PW 2 – Sachin Bhosale (injured) with respect to the incident of assault has been corroborated by PW 3 – Suraj Bhosale (his brother) and PW 6. PW 3 – Suraj Bhosale has given evidence on similar lines with respect to the incident that took place in the Ganesh immersion procession. As far as the incident on 30th September 2012 is concerned, he has stated that Sachin (PW 2) had given him Rs. 1,000/- for bringing change, however, as he did not

get the change, he returned back, where he saw the appellant assaulting his brother Sachin (PW 2) with a knife. He has stated that when he rushed to the spot, he saw Sachin running to save his life and the appellant chasing him. He has stated that later, he found Sachin lying in an unconscious condition in a Saloon shop near the Station, after which, he took him to Rajawadi hospital.

15 The evidence of PW 4 – Mehboob Khan is also on similar lines. PW 4 has stated that on 30th September 2012, he was along with Sachin (PW 2) and his brother and others on the Vikhroli Railway Station. He has stated that the accused was also present there. He has stated that some altercation took place between PW 2 and the appellant (accused) with respect to the *bhisi* amount, pursuant to which, the appellant left the spot and returned later and assaulted Sachin with a knife by giving him 3 to 4 blows on the neck. He has stated that Sachin ran away from the said spot and that the appellant chased him. He has further stated that thereafter he found Sachin lying in the Saloon shop, after which, he was taken to Rajawadi Hospital.

16 It is not necessary to reproduce the evidence of PW 6-Shambhuras, however, suffice to state that his evidence also corroborates the evidence of PW 2, PW 3 and PW 4.

17 Although learned counsel for the appellant tried to point out a few inconsistencies and improvements in the evidence of the said witnesses, the said inconsistencies/improvements are not so material, so as to affect the credibility of the prosecution case and the witnesses. All the witnesses on the point of assault by the appellant are consistent i.e. the appellant assaulted PW 2 – Sachin with a knife on his neck.

18 The evidence of PW 7 – Mohd. Awas Ahmed also corroborates the evidence of witnesses and is consistent with the evidence on record. PW 7 – Mohd. Awas Ahmed is the owner of the Saloon, where PW 2 – Sachin ran and fell down unconscious. He has stated that one person came inside his Saloon; that he had sustained injury on his neck and was demanding water and that the said person

fell unconscious in his shop. He has further stated that three persons came in his shop and took the injured person to the hospital in a rickshaw.

19 The ocular evidence is consistent with the medical evidence. The prosecution in this regard has examined PW 5 – Dr. Rajesh Yadav, who was attached to Rajawadi Hospital, Ghatkopar as a Medical Officer, at the relevant time. PW 5 – Dr. Yadav has specifically stated that on examining Sachin (PW 2), he found the following injuries:

1) CLW anterior neck 10 x 2 x 2 CM from anterior border of sternocleidomastoid Muscle to anterior border of other side at the level of Thyroid Cartilage Airway was exposed. Strap muscle was scared.

This injury was grievous and fresh and bleeding caused by a sharp object.

2) CLS 2.5 x .5 cm on the right side of the neck, Sharp fresh and simple caused by sharp object.

20 He has stated that after examination, the injured was admitted as an in-door patient in the hospital and that he had issued the injury certificate (Exhibit 20). He has further stated that Sachin was admitted as an in-door patient in the hospital from 30th September 2012 and was discharged on 15th October 2012. He has specifically stated that the injuries mentioned in the injury certificate (Exhibit 20) could be caused by sword, knife, broken glass, etc. and when shown Article C i.e. knife, he has stated that the injuries mentioned in the injury certificate can be caused by the said object.

21 Learned counsel for the appellant submitted that the injuries i.e. CLW as stated by the doctor, could not have been possible by a knife. He submitted that if injuries were caused by knife, the injuries would be incised wounds and not CLW. He relied on Modi's Medical Jurisprudence in support of his submission. The Medical Officer, although has mentioned the injuries as CLW, but has also specifically stated in his evidence that the injury was a grievous and fresh injury caused by sharp object. There is no suggestion in his cross-examination that injuries mentioned were not caused by a knife.

The injury certificate which is at Exhibit 20 and the case papers which are at Exhibit 21 colly., clearly show that the injuries sustained by PW 2 – Sachin on his neck were grievous injuries and were on the vital part of the body. The injury sustained by PW 2 was on anterior neck from sternocleidomastoid Muscle to anterior border of other side at the level of thyroid cartilage. It appears that the airway was exposed and strap muscle was seen. The patient was also unable to speak when he was first examined. PW 2 had to undergo emergency tracheotomy, coupled with neck wound exploration. The size of the injury was 10 x 2 x 2 cm. PW 2 was also required to be admitted as an indoor patient for 15 days. It is thus evident from the evidence on record that the injury sustained by PW 2 was a life-threatening injury and as such was sufficient in the ordinary course of nature to cause his death.

22 As far as motive and other evidence is concerned, it is not necessary to delve into the same, considering the fact that there is overwhelming ocular evidence, coupled with medical evidence to convict the appellant.

23 Having regard to what is stated aforesaid, there is no merit in the appeal. The appeal is dismissed.

24 I would like to record a word of appreciation for the able assistance provided and the efforts taken by Mr. Avachat in conducting the appeal.

25 High Court Legal Aid Services Committee to award fees of the learned amicus curiae as per Rules.

REVATI MOHITE DERE, J.