

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 547 OF 2000

State of Maharashtra

...Appellant
(Orig. Complainant)

Versus

Anil Jagannath Bahirat
Age 25 years, Occ. Agriculturist
R/at. Chimbali, Tal. Khed,
Dist. Pune

...Respondent
(Orig. Accused)

.....
Mrs.M.M.Deshmukh, APP for the Appellant -State.
Mr.D.S.Mhaispurkar i/b. Ms. V.S.Mhaispurkar for the Respondent.
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**CORAM : S.S. SHINDE &
V.G.BISHT, JJ.**

RESERVED ON : 3RD FEBRUARY, 2020

PRONOUNCED ON: 24TH FEBRUARY, 2020
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JUDGMENT (PER: V.G.BISHT, J.)

1. This Criminal Appeal has been preferred by the Appellant -State against the judgment and order dated 27th March, 2000 passed by the learned 13th Addl. District Judge, Pune in Sessions Case No.130 of 1999 whereby the Respondent-accused has been acquitted of the charge under Section 307 of the Indian Penal Code (for short, "IPC").

2. The prosecution case in brief is that, the informant and accused are from village Chimbali, Taluka Khed. According to prosecution, 15 days before the incident, accused had approached the informant and requested him to lend money as he was in need of moneys but the informant expressed his inability. However, again after two days, accused again approached and when the informant expressed his inability, it is alleged, the accused threatened that he would see him.

3. The prosecution contended that on 5th July, 1998 while informant was returning to his village after meeting his sister at Alandi and had reached the village, the accused and his two companions came from the side of Savata Mali Temple. It is alleged that the accused was armed with a sword and after abusing him, started assaulting him by means of sword while his two companions were exhorting him. When the informant raised his hands to ward-off blows, he sustained injuries on his both hands and fell down. According to prosecution, the informant's wife, namely, Smt. Nanda and brother Suresh Jaid came running and seeing this accused and his companions fled away from the spot. According to prosecution, there were 5 to 6 injuries on the head and both the hands of the informant. The informant was rushed to Sasoon Hospital where he was treated.

4. It appears that the police recorded the statement of informant in Sasoon Hospital on the basis of which Chakan Police Station registered C.R.No. 85 of 1998 under Sections 307 and 506 read with 34 of the IPC. After necessary investigation, the accused came to be chargesheeted along with two unknown persons.

5. Accused abjured his guilt and pleaded false implication.

6. Smt.Deshmukh, learned APP, submitted that despite there being sufficient corroboration between the versions of informant and his wife and the fact that the injuries sustained by informant are duly established by the Medical Officer, the learned trial Court failed to appreciate the evidence properly and wrongly held that the guilt of the accused is not duly established. Similarly, according to learned APP, it was also wrongly held by the trial Court that there was unexplained delay in filing the First Information Report (for short, "F.I.R.") since the statement of informant was recorded in the hospital itself by the concerned police official. There was no delay at all on the part of informant in filing the F.I.R. Therefore, on this count also the finding of the trial Court is erroneous. Since there is overwhelming evidence, the accused deserves to be convicted in accordance with law, argued learned APP.

7. Mr.Mhaispurkar, learned Counsel for the Respondent -accused, on the other hand, has supported the impugned judgment. Assailing the statement made by learned APP that the version of informant is duly corroborated by his wife, according to him, wife could not have been a witness inasmuch as admittedly she had not witnessed the alleged incident. The learned Counsel criticized the alleged discovery of weapon allegedly used in the offence as also the delay in filing the F.I.R. Thus on these counts as the prosecution was found wanting, the trial Court is justified in acquitting the accused, submitted learned Counsel.

8. We have carefully gone through the evidence of prosecution witnesses with the assistance of learned APP and learned Counsel for the accused.

9. PW-1 Vitthal Tukaram Jaid, informant, stated in his evidence (Exh.- 7) that accused is from his village. He was acquainted with him. 15 days prior to the incident, the accused had demanded Rs. 15,000/- from him as a hand-loan and he was not able to lend him money. Accused had threatened him that he would see him.

10. Evidence of the informant thus shows that on 5th July, 1998 when he reached in front of Savata Mali Temple, accused came with two

unidentified persons from the side of said Temple. Accused had a sword in his hand and gave blows on his both hands. As he raised his hands, he sustained about 7 to 8 sword blows on his hand and started bleeding profusely. He fell down. According to him, after a short while, his wife and brother came and carried him to Sasoon Hospital where police recorded his statement. He then proved his F.I.R. at Exh. 7A.

11. If we read the evidence carefully, it would be seen that his story is in two parts. Firstly, according to him, 15 days prior to the incident, accused had approached him with a request to lend him Rs. 15,000/- but the informant expressed his inability. It is then the accused allegedly threatened him with consequences. If this part of his evidence is juxtaposed the contents of F.I.R., then we do not find accused urging informant specific amount of Rs. 15,000/-. All that is alleged is that accused simply demanded moneys. This is one thing.

12. Secondly, the evidence shows that when the informant expressed his inability to lend him Rs. 15,000/-, the accused threatened him with consequences, whereas, the F.I.R. shows that after first incident of demanding of moneys, the accused again had repeatedly demanded moneys after two days and when informant again expressed his inability, accused threatened him with consequences. Thus, this part of substantive evidence of informant is far from what is alleged in the F.I.R.

13. Second part of the evidence of informant shows that the accused had given 7 to 8 blows of sword on his hand thereby caused bleeding injury. As against this contrarily, the F.I.R. shows that the accused had also assaulted 5 to 6 blows on his head, which is not deposed to and therefore, this is a major omission which certainly affects his testimony.

14. Now what is to be seen is how far and to what extent the version of informant is supported and corroborated by his wife and medical evidence.

15. PW-5 Nanda Vitthal Jaid, wife of the informant, stated in her evidence (Exh. 33) that on 5th July, 1998 while she was walking towards grocery shop near her house to buy sugar, a boy of aged 8 to 10 years came from the brook side and told her that her husband is being assaulted by accused by a sword. She went running towards the brook at the spot of incident and saw accused was assaulting her husband with a sword. Two other persons were standing near the accused. It is further stated in her evidence that her brother-in-law Suresh came running towards them and accused and other two persons ran away from the scene of offence. Her further evidence is that her husband sustained injuries on his hand. A cycle and the case of a sword were lying. Her husband then told her that before 15 days, accused had demanded moneys. As he did not give, so the accused assaulted him.

16. A simple inference which can be drawn from the evidence of this witness, who is none other than wife of the informant, is that she was told by a boy of 8 to 10 years old that her husband is being assaulted by the accused by means of sword. This simply suggests that the said boy was knowing the accused. It is not her evidence that the boy told her that some unknown person is assaulting her husband. The disturbing evidence is that the said boy has not been examined by the prosecution. This is a serious infirmity from the point of view of prosecution.

17. The evidence of wife also shows that when she reached the place of incident, she personally saw accused assaulting her husband by means of a sword. As against this, if the evidence of PW-1 informant is seen, then it nowhere reveals that incident was witnessed by his wife also. On the contrary, he specifically stated in his evidence that after he fell down because of the assault, his wife and brother came after some time. It is not at all his case that they very much witnessed the incident.

18. Lastly, evidence of PW-5 shows that she was told about cause of incident and it was that of non-lending of moneys by her husband to accused as told to her by her husband at the place of occurrence. Interestingly, the evidence of informant is totally silent to this material aspect where he apprised his wife when she reached there as to how

and under what circumstances the incident took place. Therefore, we have our own serious doubt about this witness. Being an interested witness to the incident, we are not prepared to accept that she witnessed the incident of assault on her husband. One more thing. Her evidence clearly shows that this witness noticed lying of case of a sword at the place of occurrence, which is not at all the evidence of informant. For all these reasons, it would not be safe for us to act on her version and trust the testimony.

19. What is relevant to note here is that despite there being residential houses are at the place of occurrence, not a single witness was brought before the Court by the prosecution. It is not the case that no enquiry of whatsoever nature was conducted by the Investigating Officer. Rather, PW-6 Investigating Officer (Exh. 39) admitted in his cross-examination that adjacent to the brook, there are houses belonging to persons viz. Ram Bankar, Baban Katore, Hanmant Jadhav and Sudam Jadhav. It must be noted that the incident took place nearby the said brook. This fact is also admitted by PW-2 Spot Pancha, who also stated in his cross-examination that near the spot of incident facing the road there are houses of Sudam Jadhav and Hanmant Jadhav. According to him, on the other side of the road, there are houses facing the road of Ram Bankar and Ram Katkar. There is also a water pump in that area from where people fetch water.

20. PW-6 Investigating Officer also stated in his cross-examination that the water pump has been installed near the brook. From the above evidence, it is more than clear that not only there is residential locality but there is also a water pump where public at large fetch water. Even the Investigating Officer himself admitted that he recorded the statement of all persons viz. Ram Bankar, Baban Katore, Hanmant Jadhav and Sudam Jadhav. Neither their statements were brought before the Court nor the witnesses for the reasons best known to the prosecution. Despite there being statements of the said persons and the fact that they were withheld for the reasons known to the prosecution an adverse inference must be drawn in the facts and circumstances of the case.

21. PW-3 Dr. Prafulla Govind Merode, stated in his evidence (Exh. 16) that at the relevant time he was serving in Sasoon Hospital. On 5th July, 1998 at about 3.30 pm., he examined him and noted following injuries :-

"1. Right incised wound 10 X 2 cm. Ulna fracture with tendon injury. The nature of the injury. The nature of the injury was grievous. The cause of injury was sharp object such as sword.

2. CLW over palm 5X5 cm. Simple.

3. The multiple incised wounds over right arm.

4. Incised wound over dorsum of left hand with midcarpal, dislocation with bone crushed. Grievous nature with sharp object.

5. Fracture Ulna with incised wound 7X3 c.m.

6. Fracture on the table of skull. These two injuries were grievous injuries caused by sharp object.

7. Abrasion over left arm. Simple.

8. Multiple incised wound over scalp-Simple”.

He then proved injury certificate at Exh. 16. Pertinently enough, injury Nos. 6 and 8 were issued on the vital part of the body viz. “head”. Intriguingly enough, the informant has nowhere stated in his evidence of he having sustained any head injuries on account of the assault by means of a sword. So how these two major injuries landed on the person of informant, we are unable to comprehend.

22. Even otherwise the fact that ocular evidence to our mind is not forthcoming and convincing as it should have been, medical evidence being evidence of opinion and in absence of positive corroboration cannot alone be based for questioning culpability on the part of the accused.

23. The prosecution has also claimed that there was recovery of a weapon of offence, namely, “sword” at the instance of accused. Before analyzing the evidence on the point of discovery, grounds in law need to be cleared.

24. Section 27 of the Evidence Act (for short, "the said Act") comes into operation only : (1) if and when certain facts are deposed to as discovered in consequence of information received from the accused person in police custody; and (2) if information relates distinctly to the fact discovered.

25. In **State of Punjab Versus Gurnam Kaur and others**¹, it has been held by the Hon'ble Apex Court that if by reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who had made the statement in terms of Section 27 of the Evidence Act.

26. Keeping in mind these requirements of law as well as the pronouncement of the Hon'ble Apex Court, we would like to appreciate the evidence of PW-4 and PW-7 on the point of discovery.

27. PW-4 Atul Ramchandra Lonkar stated in his evidence (Exh. 30) that on 5th February, 1999 he was called in Alandi Police Station. Another panchas, namely, Raju Baban Garud was present. Accused was also there. Accused said to him that he will show the sword which was used in assault. Accordingly, the statement was reduced into writing. He then proved the statement in writing at Exh. 31. It is his further evidence that

1 (2009) 11 SCC 225

he, another pancha witness, accused and police officer went to village Chimabli towards north of the brook. There were bushes. Accused asked to stop the vehicle. All of them got down from the vehicle. Accused removed the sword near the bushes which was buried in the mud. The police accordingly seized the sword under the seizure panchnama. He then proved the seizure panchnama at Exh. 32.

28. PW-7 Investigating Officer, on his part, stated (Exh. 41) that accused was arrested on 5th February, 1999 and was in police custody. He made a statement in presence of two witnesses, namely, Atul Lonkar (PW-4) and Raju Baban Garud that he would produce the sword used in incident while assaulting the informant.

29. After recording memorandum panchnama (Exh.31), all of them went to village Chimbali via Kadgaon by a private jeep. Accused directed to stop the vehicle near the brook. Then accused went near tree and produced the sword which was kept hidden under grass, dry leaf and the earth. The sword was then attached under panchnama at Exh. 32.

30. If the evidence of both these material witnesses are read carefully, then it would be seen that the accused had made a statement in their presence "that he will show the sword which was used in assault". Can it be said that information supplied "that he will show the sword" could have

led to the discovery of fact i.e., place of concealment (of sword) to his knowledge. Our emphatic answer is in negative because that information does not reveal the place and knowledge of accused to that effect. The rest of the words “which was used in assault” are inadmissible since they do not relate to the discovery of the sword from a particular place.

31. We, therefore, hold that necessary conditions as enumerated hereinabove for the application of Section 27 of the said Act having been not fulfilled, the prosecution cannot rely on the discovery statement of the accused.

32. Assuming that the discovery is in compliance with the command of Section 27 of the said Act but then both these witnesses are at loggerheads as to manner of concealment and the place of recovery. While evidence of PW-4 reveals that accused removed the sword from the bushes, which was buried in Mud, the evidence of PW-7 Investigating Officer is all about production of the sword which was hidden under grass, dry leaf and the earth. Thus, there is a sea of difference between the versions of these two material witnesses, which cannot be countenanced by any stretch of imagination and therefore, our inability to accept the same.

33. Last crucial aspect of case of prosecution is delay in lodging of F.I.R. as is claimed by learned Counsel for the respondent.

34. In **Manoj Kumar Sharma & Ors. v. State Of Chhattisgarh and Anr.**², the Hon'ble Apex Court held that delay in lodging FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story.

35. Similarly, in **Dilawar Singh -vs- State of Delhi** ³, the Hon'ble Apex Court observed that in criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is what if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no satisfaction is formed, the delay is treated as fatal to the prosecution case.

² AIR 2016 SC 3930

³ AIR 2007 S.C. 3234

36. Thus, law is settled that if the delay is not satisfactorily explained then in the facts and circumstances of a particular case that becomes fatal to the prosecution.

37. From the evidence of PW -1 informant, it is clear that his statement was recorded in the hospital by the police. Before that it is worth mentioning that it is not at all the case of the prosecution or that of informant that he or the family members were not in a position to approach the police promptly and lodge a report against the incident. Not only his wife but brother was also there and atleast the brother of informant could have approached the police immediately after the incident but that was not done. No explanation is forthcoming from the side of the informant.

38. PW-6 Investigating Officer in his cross-examination stated that neither he had gone to Sasoon Hospital to see the injured nor he recorded his statement. This makes it very much clear that PW-6 had not recorded the F.I.R of informant. Quite contrarily, the evidence of PW-7 shows that the Investigating Officer in C.R. No. 85 of 1998 i.e., present case, Shri Dhormal, PSI i.e., PW-6 had recorded the F.I.R. and statements of the witnesses.

39. We have already pointed out from the evidence of PW-6 that neither he visited the injured in the hospital nor recorded his F.I.R. This being so apparent on record, it is not made clear as to who recorded the F.I.R. of the informant. It is also not borne out from the record as to who informed the police about incident and from the endorsement made on the concluding part of the F.I.R., it is seen that same was recorded in the presence of police constable of Chakan Police Station. It then again that Head Constable has not been examined, who could have thrown light as to the circumstances under which the F.I.R came to be registered after more than six hours. We are therefore unable to persuade ourselves that there was no delay in lodging F.I.R.

40. Taking all above into consideration, we are of the firm opinion that the impugned judgment cannot be faulted and must be upheld. Accordingly, the Appeal fails and it is hereby dismissed.

41. Bail bond, if any, stands cancelled.

(V.G.BISHT, J.)

(S.S. SHINDE, J.)