

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.559 OF 1998**

1. Prakash Dattaram Kolge,	]	
	]	
2. Ashok Dattaram Kolge	]	
both residing at Village Nevare,	]	
Bazarpeth, Taluka and Dist.	]	
Ratnagiri.	]	
	]	..Appellants

VERSUS

1. The State of Maharashtra	]	
	]	
2. Nandkumar Anant Kher	]	
	]	.. Respondents

Mr.Rakesh R. Bhatkar with Mr.Mohan N. Devkule and
Mr.Mohit Dalavi for the Appellants.

Mr.Y.Y.Dabake, APP for the State/Respondents.

CORAM : BHARATI DANGRE, J.

RESERVED ON	: 23rd MARCH, 2021
PRONOUNCED ON	: 09th APRIL, 2021

JUDGMENT :-

1. The two appellants have filed the present appeal, being aggrieved by their conviction for the offence punishable under Section 325 read with Section 34 of the Indian Penal Code (for short, “the IPC”) and on being sentenced to suffer R.I. for a period of two years and assail their conviction under Sections 504, 506 read with Section 34 of the IPC.

2. I have heard learned counsel Mr.Bhatkar for the appellants and learned APP Mr.Dabake for the State.

3. The present appellants are the original accused Nos.1 and 2 in Sessions Case No.8 of 1994, tried by the Additional Sessions Judge, Ratnagiri, for the offences punishable under Sections 307, 504 and 506 read with Section 34 of the IPC. The prosecution case can be briefly narrated as under :-

The complainant-Nandkumar and the three accused are the residents of village Nevare, Taluka and District Ratnagiri. It is the case of the prosecution that some 15 years back, the grand-father of the complainant had given a portion of a land to the grand-father of the accused for the purpose of constructing a house. The said house was occupied by the father of the accused and the accused persons. The landed property on which the house was built continued in possession of the complainant. The case of the prosecution is that father of the accused persons demanded some portion of land from the father of the complainant and on refusal to oblige, as there was a mango plantation standing on the said land, the dispute arose between the two families. It is the complainant's version that on account of this discord, there were attempts to assault and abuse by the accused persons, in short, the relationship between the two families ceased to be cordial.

4. On 7th August, 1993, at about 6.30 p.m., when the complainant was enroute his house from market, when he reached upto Pakhadi, which is surrounded by mango trees,

three persons crossed his path. Since he was carrying a torch , he identified the three persons as accused Prakash, Ashok and Vikas. The complainant alleged that he was assaulted by the three accused persons and he was also abused. The assault resulted into a bleeding injury and he became unconscious. He was admitted in Civil Hospital at Ratnagiri where his statement was recorded by the police. The complaint came to be lodged on 8th August, 1993 and he was interrogated on two occasions by the police. The complainant remained admitted as an indoor patient in Civil Hospital, Ratnagiri for 15 days and, thereafter, he was shifted to J.J.Hospital, Mumbai where he underwent the treatment for 15 days.

5. In the backdrop of this case of the prosecution, the appellants were charged of causing grievous hurt to the complainant in furtherance of an common intention by means of stick and iron bar and by assaulting the complainant on his head, hand and back side with such an intention and under such circumstances, that if by that act they could have caused the death of the complainant and, therefore Section 307 read with Section 34 of the IPC was invoked alongwith Sections 504 and 506 of the IPC. All the three accused persons pleaded not guilty and preferred to be tried.

6. The prosecution, in order to establish the guilt of the accused, examined four witnesses. Prosecution Witness No.2 (P.W.2) is the Medical Practitioner, who was attached to the Civil Hospital Ratnagiri and who examined the complainant on the date of incident i.e. 7th August, 1993 and issued a

certificate, which refer to the following injuries:-

“1) Incised wound right temporal region behind right ear 3cm x 2 cm on muscle deep.

2) Incised wound 2 cm x 1 cm on bone deep. behind right ear. with outer table crack fracture felt.

3) Incised wound over left occipital region. 3 cm x 1 cm on muscle deep.

4) Bruise marks over the upper back. 25 cm x 4 cm and 15 cm x 4 cm.

5) Diffuse Hematoma over neck of neck. 6 cm x 4 cm.

6) right zygoma depressed fracture.

7) right cheek Diffuse Hematoma about 8 cm x 6 cm.

8) Bruise marks over anterior side of neck. 2 cm x 2 cm. four in number.

9) Diffuse Hematoma over anterior side of neck.

10) Bruise marks over the chest Horizontal in direction 10 cm x 2 cm.

11) Degloving injury right pinna 1cm x 1cm.

12) Right ear minimal bleeding plus.

13) Both nostrils blood clot present. No active bleeding at present.

14) Left side of Mandible fracture felt.

15) Friction abrasion 2cm x 2cm over right side of cheek.

16) Bruise marks behind left ear 5 cm x 3 cm”

7. The age of the injuries was opined by P.W. 2 to be within six hours. Injury Nos.1, 2, 3, 6 and 14 were classified as grievous injuries whereas other injuries were found to be simple injuries. P.W. 2 categorically stated that all the 16

injuries are possible either by an iron rod or by a stick and he also deposed that cumulative effect of all the injuries would result into death, if no treatment is given to the patient. P.W.2 further deposed that when X-Ray was taken, it revealed fracture of right and left mandible and also fracture of 9th and 10th rib. Further, X-Ray of skull also revealed fracture of right zygoma. Injury Nos.1 to 3, 6 and 14 were described as surface injuries with corresponding fracture internally. The certificate issued by P.W.2 is exhibited as Exhibit 14. In the cross examination, the expert witness has answered that to cause an incised wound, a sharp object would be required and he also stated that some injuries shown in Exhibit 14 are possible by a fall.

Exhibit 14 speak of the injuries sustained by P.W.1 (the complainant) and the nature of injuries, according to the medical expert, were sufficient to result into death, if no medical treatment was administered. The assault has also resulted into fracture, as noted above.

8. In order to establish that the injuries in Exhibit 14 are caused by the accused persons, the prosecution has relied upon the two witnesses being the complainant as P.W.1 and another eye witness as P.W.3.

In sync with the statement recorded on being injured, P.W. 1 deposed before the trial court. After referring to the previous enmity, he has referred to the incident dated 7th August, 1993, when he was assaulted by the accused persons and he identified the accused persons in the light of the torch flashed by him. In the deposition before the Court,

P.W.1 stated that Prakash Kolge (accused No.1) and Ashok Kolge (accused No.2) were armed with iron rods whereas accused No.3 was holding a stick in his hand. In his statement under Section 161 of the Criminal Procedure Code, he had revealed that when he was suddenly assaulted, from behind the mango trees, he saw Prakash and Ashok being armed with sticks and they hurled abuses and threatened him. In the said statement, he allege that both the accused persons had assaulted by means of sticks in their hand, on his head, chest and back, resulting into a bleeding injury in his head and he became unconscious.

9. There appear a contradiction about the weapons in the hand of the accused persons and also the involvement of accused No.3. Before the court, accused Nos.1 and 2 are said to be armed with iron rods and it is the version of P.W.1 that the two accused persons started beating him by iron rod, all over his body right from head, chin to toe, resulting in bleeding injuries. The said contradiction has been sought to be encashed by the learned counsel for the appellants as he submit that this amounts to material discrepancy as in the First Information Report (FIR), the weapon of assault has been described as a stick whereas in the deposition it is mentioned to be the iron rod.

10. No doubt, the version of P.W.1 is at variance, but only on the weapon of assault. One can imagine a status of mind of a person, who has suffered multiple injuries on account of the assault, which was sudden and he lost his conscious on account of the said assault. When he regained

the consciousness in the hospital, his statement is recorded on the next day where he referred to the assault being caused by means of sticks by accused Nos.1 and 2. There is no discrepancy in the statement of P.W.1 and his deposition before the Court on the manner of assault, at the instance of accused Nos.1 and 2 and the portion of his body on which the assault was mounted. The assault resulted into the injuries, which have been certified by P.W.2 in Exhibit 14, on being examining the complainant on the very same day of incident i.e. 7th August, 1993. The injuries are described to have been caused within 6 hours and the weapon used has been described to be a sharp object. The medical expert has specifically deposed that all these injuries mentioned in Exhibit 14 are possible either by an iron rod or by a stick. Mere suggestion that to cause an incised wound, the object has to be sharp, does not create any doubt in the prosecution case that P.W.1 was assaulted either by a stick or by an iron rod. P.W.1 has specifically attributed the said assault to accused Nos.1 and 2 and since the discrepancy about the weapon used for assault occurred on account of the first hand version, immediately after the incident when his statement was recorded in the hospital and when he entered into the witness box, he clarified that he was assaulted by means of an iron rod, does not in any case create any doubt about the prosecution case of assault by accused Nos.1 and 2.

11. The assault has resulted into fracture on left and right mandible, fracture of 9th and 10th rib and also the fracture of right zygoma. The doctor has categorically opined that the surface injuries had corresponding fracture internally. In light

of the evidence of P.W.2, which corroborate the version of the complainant (P.W.1) about the assault by the two accused persons on his head, chest and back, which is further corroborated by the injuries on the head, chest and back, the submission of the learned counsel for the appellants that the prosecution has failed to prove the case beyond reasonable doubt cannot be accepted.

True it is that P.W.1 is the sole witness on whose deposition, the conviction has been based as the testimony of P.W.3 is discarded by the trial court since in the cross-examination, he had admitted that he was in a drunk condition, the testimony of P.W.1 in the wake of minor discrepancy about the weapon of assault either a stick or an iron rod, is not at all fatal to the case of the prosecution. It has to be kept in mind that P.W.1, who is the injured and sustained such injuries, which would have been sufficient to cause death if timely treatment was not administered, is a witness who would ensure that his assailants are not set free. Moresoever, the doctor has opined that the incised wounds and rather all injuries mentioned in Exhibit 14 can be caused either by an iron rod or by a stick. Nothing has been brought on record except a bald suggestion to the medical expert, which prompted him to respond by stating that some of the injuries in Exhibit 14 are possible by fall.

12. Though the learned counsel for the appellants has vehemently argued that the discrepancy in the version of P.W.1 goes to the root of the matter and his credibility becomes doubtful, I do not agree with the said proposition. The reliance

placed on the judgment of this Court in case of *Shripati Kashinath Ambede & Ors. v. The State of Maharashtra*¹ is, therefore, of no assistance to the learned counsel. The judgment of the Apex Court in the case of *Joseph v. State of Kerala*², which has been cited by the learned counsel, is decided on the peculiar facts of the case and the proposition of law led down is to the effect that the Court can sustain a conviction on the evidence of solitary eye witness, but only when such evidence is found to be cogent, reliable and in tune with the probabilities and inspire implicit confidence and, therefore, by applying the ratio of the said judgment to the effect that prosecution can rests its case on the sole testimony of the eye witness provided he is found to be reliable, in my considered view, there is no material discrepancy in the evidence of P.W.1 and the only discrepancy qua the weapon used has been in fact explained by the prosecution by examining P.W.2 and another additional factor being the recovery of the weapons at the instance of accused No.2, the principle in the said judgment leads me to record a finding that the testimony of P.W.1 inspires confidence and there is no reason to disbelieve his testimony as an injured person himself and his testimony coupled with the evidence of P.W.2 and P.W.4 leading to discovery of the weapon, leads to conviction of the appellants.

13. During the course of investigation, a memorandum under Section 27 of the Indian Evidence Act is drawn and P.W.4 is a panch on the said memorandum. By the said memorandum, there is a discovery of two iron rods which

1 1997(1)Bom.C.R.621

2 2003 AIR(SC) 507

were concealed in a cattle shed, at the instance of accused No.2-Ashok. P.W.4 has deposed that accused No.2 expressed his willingness to lead the investigating team to the iron bars, used as a weapon of offence. Accused No.2 led the team to his cattle shed from where he produced two iron bars kept on the loft of his cattle shed. The said iron bars came to be seized by drawing a panchanama to that effect.

The said discovery has been discarded by the trial court by referring to the admissions in cross-examination of P.W.4 where it is brought on record that the cattle shed was of a make sheet bamboo door and was not locked and it is accessible to anybody. The discovery has been discarded by the trial court on a specious ground that there is a general tendency amongst the police officers to misuse the provisions of Section 27 and also as there was no search of the house or the cattle shed immediately after the arrest. Further, pancha (P.W.4) is disbelieved as accidentally when P.W.4 had been to the police station, he was made to act as panch witness.

14. The learned Additional Sessions Judge is not right in appreciating the said memorandum under Section 27 of the Indian Evidence Act as it can be seen that the object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. The provision contained in Section 27 is founded on a principle that if any fact is discovered in a search made on the strength of the information obtained from the accused, who is in the custody of the police, such a discovery is a

guarantee that the information supplied by the accused is true. The basic idea embedded under Section 27 is the doctrine of confirmation by subsequent events. The information might be confessional or non inculpatory in nature, but if it results in the discovery of a fact, it becomes reliable information.

15. A perusal of the memorandum drawn on 12th August, 1993 would reveal that accused No.2 accompanied the investigating team and led them to his cattle shed and his statement led to the discovery of the two iron bars. The memorandum describe the cattle shed as constructed by means of bamboo. Though it is an open location, which is accessible to any person, the rods are drawn by the accused from a compartment, which is created in the cattle shed by means of wooden planks and a staircase made of bamboos provides an access to the said enclosure. The memorandum record that the accused entered into the cattle shed and from a door on the northern side, approached the enclosed portion by means of a bamboo ladder and took out two iron rods from the litter stored there. The two iron rods are described as twisted and rusted, admeasuring 29 inch X 2 cm having width of one inch. The said iron rods came to be forwarded to the Regional Forensic Science Laboratory and are found to be stained with blood. The said report of the Assistant Chemical Analyser has been forwarded to the Sessions Court, Ratnagiri on 18th April, 1998. Though the said report is exhibited as Exhibit 22, neither the Investigating Officer nor the Assistance Chemical Analyser from Regional Forensic Science Laboratory has been examined and, therefore, the contents of Exhibit 22 cannot be said to be proved.

16. Looking to the discovery of the weapons at the instance of accused No.2, which the learned Additional Sessions Judge, has completely discarded, which in my considered opinion is not a right approach as the learned Additional Sessions Judge has failed to consider the contents of the memorandum under Section 27 of the Indian Evidence Act and what is recorded therein being that though the cattle shed is an open place, accused No.2 took out the weapons which were concealed in an enclosed portion of the cattle shed and, therefore, the said evidence of discovery of the two weapons at the instance of accused No.2, which have been used as weapons for assault, led further corroboration to the case of the prosecution. The discovery panchanama reflect the iron rods to be rusted and having twist over it, which resulted into the incised wounds reflected in Exhibit 14. In any case, the iron rod if being used as weapon for assault on the complainant, can result into type of injuries which have been described in Exhibit 14 and the doctor has clearly opined that the injuries can be caused either by an iron rod or by a stick and, therefore, the discrepancy in the statement of P.W. 1 and his deposition before the Court loses its significance.

17. The prosecution has, thus, proved its case beyond reasonable doubt and since the testimony of P.W.1 inspires confidence being an injured witness, I see no reason to interfere with the judgment of conviction of the appellants, which is under Section 325 of the IPC whereas the charge was framed under Section 307 of the IPC and, therefore, the appellants have been convicted for a lesser offence and the benefit is already granted to them by the Sessions Court by

holding that the ingredients of Section 307 of the IPC have not been made out since there was no intention to commit murder, but the accused persons only intended to teach a lesson to the injured by the said assault. On the basis of the medical certificate recording that the three injuries sustained by the complainant are grievous and three injuries are fracture injuries, the learned Additional Sessions Judge has already granted leniency in favour of the appellants by convicting them under Section 325 read with Section 34 of the IPC and sentencing them to suffer R.I. for a period of two years for voluntarily cause grievous hurt to the complainant. The conviction under Section 504 and 506 of the IPC has resulted into a sentence of R.I. for a period of one month under each of the relevant section and sentences imposed are directed to run concurrently.

18. I see no legal infirmity in the judgment convicting the appellants and sentence imposed pursuant to the said conviction. The appeal is, therefore, without any merits and stands dismissed accordingly.

SMT.BHARATI DANGRE, J.

19. When the judgment was pronounced in the Morning Session, none appeared for the appellants. However, in the post-lunch session, learned counsel Ms.Rekha Musale appeared and prayed time of 30 days for surrendering in pursuance of the conviction being upheld. The request made being reasonable, is granted. The appellants are granted 30

days time from today to surrender themselves before the trial court.

SMT.BHARATI DANGRE, J.