

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

CRIMINAL APPEAL NO. 671 OF 1997

Anwar Hussain Jaidar Hussain

..Appellant
(Org. Accused No.3)

v/s.

The State of Maharashtra

..Respondent

Mr. Aalekh Wagh a/w. Priyanka Tiwari i/b. Mrs. Rohini Wagh for
the Appellant .

Mr. S.V.Gavand, APP for the Respondent State

**WITH
CRIMINAL APPEAL NO. 696 OF 1997**

1. Ashrafalli Abdul Shakur Sheikh & Ors.

..Appellants

v/s.

The State of Maharashtra

..Respondent

Mrs. Megha Bajoria, Advocate appointed for the Appellant.

Mr.PH. Gaikwad, APP for the Respondent-State.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 26th NOVEMBER, 2021.**

ORAL JUDGMENT.

1. This is an appeal under Section 374 of Cr.PC. directed
against the judgment dated 7.9.1997 in Sessions Case No.692 of
1993 along with Sessions Case No. 704 of 1994, Gr. Bombay.

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2. By the impugned judgment learned Addl. Sessions Judge, Gr. Bombay has held the Accused Nos.1 to 5 in the said case guilty of offence under Section 324 r/w. 34 of IPC and sentenced them to undergo rigorous imprisonment for two years with fine of Rs.3000/- I.d. to undergo rigorous imprisonment for six months.

3. The crime against the Accused in both these Sessions Cases was registered pursuant to the first information report lodged by PW1 Nasiruddin Khan who was a partner of a Sweet Mart shop situated at Shivaji Nagar, Govandi, Mumbai. The Complainant had alleged that on 7.11.1991 the Accused Nos.1 Ashraf Ali, Accused No. 3 Anwar Hussain and Accused No. 5 Abdul Kasam had asked him to deliver 4 kgs of sweet and tea in their lane. He sent the sweets and tea with his employee by name Achhelal. Said Achhelal complained of non-payment of money and assault by the accused which led to the complainant summoning the accused to his shop.

4. It is alleged that the Accused came to the shop with Achhelal

and abused and threatened to assault the Complainant for demanding the money and raising such demand in future. It is the case of the prosecution that the Accused with common intention assaulted the Complainant with Soda Water bottle and bamboo sticks. The Complainant sustained grievous injuries and was treated in Shatabdi Hospital. The Complainant also alleged that the Accused had taken money from his cash counter and damaged his shop. He thereafter lodged the FIR against the accused, pursuant to which Crime No.716 of 1991 was registered against the Accused for offences under Section 395 r/w. 397 of IPC and section 326 and 427 r/w. 34 of IPC.

5. The Accused Nos.1, 2 and 3 were arrested on 13.11.1991 and Accused Nos.4 and 5 were arrested on 22.11.1991 and 1.5.1992 respectively. Chargesheet was filed against these Accused and upon committal, the case was registered as Sessions Case No.692 of 1993. Accused No.6 was arrested subsequently on 3.4.1994 and chargesheet against him was filed, on the same day which was subsequently registered as Sessions Case No. 704 of 1993. The Accused No.6 absconded during pendency of the

trial and hence the trial was separated against him.

6. Charge was framed against the accused for offences under Section 395, 306, 427 r/w.34 of I.P.C. They pleaded not guilty to the charge and claimed to be tried. Prosecution in support of its case examined 11 witnesses. Statements of the Accused were recorded under Section 313 Cr.P.C. Their defence was of total denial. Upon considering the evidence on record, the learned Judge acquitted the Accused of offence under Section 395 r/w.397 and 427 IPC, the learned Judge held the accused guilty of the offence under Section 324 r/w. 34 of IPC and convicted and sentenced them as stated above. Being aggrieved by this conviction and sentence, the Accused have filed these appeals.

7. The Appellant (Accused No.4) in Appeal No.696 of 1997 was not represented by any Advocate. Hence Ms. M.S.Bajoria, Advocate from Legal Aid Panel was appointed to represent the Appellant-Accused No.4 Shaikh Abdullah Latif.

8. Heard learned Counsel for the Appellants, learned APP for

the State. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

9. Accused No.2, the sole Appellant in Criminal Appeal 647 of 1997 and the Accused Nos. 1 and 5 (Appellant Nos.1 and 5) in Criminal Appeal No. 696 of 1997 expired during the pendency of the Appeal and as such the Appeal is dismissed as abated as against the Accused Nos.1 , 2 and 5.

10. The question for consideration is whether the prosecution has proved that the Accused Nos. 3 and 4 had in furtherance of common intention caused hurt to PW1 by means of dangerous weapons or any other weapon indicated in Section 324 of IPC.

11. In this regard, the evidence of PW1-Nasiruddin, indicates that on 7.11.2019 at about 10.45 p.m. Accused nos.1, 3 and 5 had come to his sweet mart shop and asked him to deliver 4 kgs of sweets and tea in their lane. Accordingly he sent the sweets and tea with his employee Achelal. Said Achelal returned and told

him that the said persons refused to pay the money and that they assaulted him. PW1 has deposed that thereafter he told Achelal to call the accused to his shop. Immediately thereafter the accused Nos.1, 2, 3 and 5 came to the shop along with Achelal. These four persons abused him and threatened to assault him and to damage his shop if he ever demanded money. PW1 has deposed that the Accused No.2 (deceased) went inside the shop and brought two soda bottles and flung one of the bottles at him, which hit against the wall. He claims that when he tried to run away, Accused No.4 Shaikh Abdul Latif Shaikh and one Nazir (absconding Accused No.6) caught him and Accused No.2 Rafiq gave a blow of the bottle on his back. When he fell down, the Accused No.1 Anwar hit him with a bamboo stick on his left wrist. Accused nos.5 Abdul Kasam and Accused No.3 Anwar gave fist blows on his stomach. He claims that Nazir, (absconding Accused No.6) also kicked him on the left side of his stomach. He shouted for help and when the people gathered, all the accused ran away from the spot.

12. The evidence of PW4 Dr. Nandlal Raidas and the Injury

Certificate at Exhibit 21 indicates that the Complainant had sustained a CLW on posterior occipital region, tenderness on left lower forearm and fracture on left radius ulna. The medical evidence thus proves that the Complainant had sustained grievous injury.

13. As stated earlier, all the accused except Accused No.3 and 4 have expired pending hearing of the appeal. The only role attributed to Accused Nos.3 and 4 is that the accused No.3 had assaulted PW1 by giving fist blows whereas Accused No.4 had held him when he was trying to run away. PW1 has not claimed that these two accused had assaulted him by means of a dangerous weapon. They have been held guilty of the offence of Section 324 with aid of Section 34 of IPC. It is to be noted that the evidence of PW1 does not indicate that these Accused had come to his shop with a pre-arranged plan to cause injury to him. On the contrary, his evidence indicates that he had called the Accused to his shop to question them about the non-payment of money. The evidence of PW1 indicates that the incident had occurred on the spur of moment, without there being pre-meditated concert. In the

absence of evidence of 'common intention' Section 34 of IPC cannot be pressed into service. Consequently, conviction of these Accused under Section 324 r/w. 34 of IPC cannot be sustained.

14. The individual allegations against these Accused are that the Accused No.3 had assaulted PW1 by giving fist blows on his stomach. This is an improvement, as it has come on record that no such statement was made in statement under Section 161 Cr.P.C. The evidence of PW1 also does not indicate that the Accused No.4 had come to his shop along with Achelal. He had identified the Accused No.4 as one Shakil, whereas it is on record that the name of the Accused No.4 is Shaikh Abdul Latif Shaikh. There is no evidence on record to indicate that Shakil and Shaikh Abdul Latif Shaikh is one and the same person. Under such circumstances, the Accused Nos.3 and 4 cannot be held guilty of offence under Section 323 of IPC. Under the circumstances, and in view of discussion supra, the prosecution in my considered view has failed to prove the guilt of the Accused Nos.3 and 4 beyond reasonable doubt. Hence the impugned judgment and conviction cannot be sustained. Hence the order:-

. The Appeal is allowed. The impugned judgment and order is quashed and set aside.

. The Accused Nos.3-Anwar Hussain Jaidar Hussain and Accused No.4 -Shaikh Abdul Latif Shaikh are acquitted of offence under Section 324 r/w. Section 34 of IPC.

. Their bail bonds stand canceled.

. Fine amount, if paid by then Accused Nos.3 and 4, be refunded to them.

15. The High Court Legal Aid Committee to pay fees as per rules to learned appointed Advocate Ms. Megha Bajoria, who has espoused the cause of the Accused in Criminal Appeal No.696 of 1997.

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(ANUJA PRABHUDESSAI, J.)