

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.902 OF 2002

STATE OF MAHARASHTRA

)...APPELLANT
(ORIG. COMPLAINANT)

V/s.

1) SHRI HAJIMALANG LALASAHEB MULLA)
Age 27 years, R/o. Telgaon,)
Taluka South Solapur)
)

2) SHRI.MAHADEO BALKRISHNA SUTAR)
Age 19 years, Occupation – Nil)
R/o. Telgaon, Taluka South Solapur)
)

3) SHRI.MAHIBOOB JOKUBA SHAIKH)
Age 35 years, Resident of Mandrup)
Taluka South Solapur)
)

4) SHRI.BABULAL LALASAHEB MULLA)
Age 43 years, Resident of Marwade)
Taluka South Solapur)
)

5) SHRI.REVAN CHANBASU BERUNGI)
Age Adult, Resident of Telgaon)
Taluka South Solapur)
)

6) SHRI.MAHADEO KALAPPA BIRAJDAR)
Age Adult, Resident of Telgaon)
Taluka South Solpaur)

)...RESPONDENTS
(ORIG. ACCUSED NOS. 1 TO 6)

.....

Mr.H.J.Dedhia, APP for the Appellant – State.
Mr.S.G.Kudle, Advocate for Respondent Nos.1 to 6.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

**RESERVED ON : 16th DECEMBER 2020
PRONOUNCED ON : 19th JANUARY, 2021**

JUDGMENT : (PER : V. G. BISHT, J.)

1. This appeal is filed by the State challenging judgment and order of acquittal dated 17th April 2002 passed in Sessions Case No.58 of 1996 by the learned IVth Additional Sessions Judge, Pandharpur, for the offence punishable under Section 395 read with 397 of the Indian Penal Code, 1860 ('IPC' for short).

2. It is the case of prosecution that the informant at the relevant time was a practicing doctor of Village Marwade, Taluka Mangalvedha, Pandharpur. One Dr.B.N.Mulla was an old practicing doctor there. As the informant started getting more patients than Dr.B.N.Mulla, the latter got annoyed.

3. On 3rd November 1995, while the informant was closing his dispensary, one unknown person came and requested him to examine a patient by name Sangolkar, aged 70 years of Mouze Kagasht, who was suffering from Asthma. The informant along with that person and his assistant namely Sukhdev Tipanna Kengar (PW5) on his bike started

proceeding towards the said village. It was around 7.00 p.m.

4. The prosecution next contends that after covering a route of 4 km., the said unknown person requested the informant to stop the motorcycle as he wanted to attend call of nature and accordingly the informant stopped his motorcycle. The prosecution alleges that at that point of time, all of a sudden, four persons came in front of him. One of them was armed with a stick and another one removed the keys of the motorcycle. The person who was having the stick was recognized by the informant as Dr.Khaja Mulla of Village Telgaon. The prosecution alleges that Dr.Khaja Mulla then inflicted blow of stick on the head of informant and uttered “मेरे भाई के पेट पर लात मारता है क्या ? तू कैसा डॉक्टरी चलाता है तुझे देखता हूं.” The prosecution further alleges that he then exhorted his companions in Kannada language and thereafter all of them assaulted the informant by means of fist and kick blows. An unknown person who was accompanying the informant also came along with one more person and they also started assaulting the informant by means of fist and kick blows.

5. The prosecution further alleges that Dr.Khaja Mulla then removed the locket from the neck of the informant and rest of the persons removed wrist watch, gold ring and cash amount from the pant

pocket of the informant. They all even stripped the informant. When informant started crying and those persons saw a vehicle coming, they ran away on two motorcycles.

6. The informant and his assistant then took a lift from the driver of a jeep who was known to the informant and chased those persons but could not apprehend them as all of them had fled away after leaving their motorcycles.

7. Later on, the informant and his assistant went to the residence of one Gopal Rathod and narrated the incident, who rang up Mangalvedha Police Station and the informant was treated at a Government hospital at Marwade.

8. The informant accordingly lodged the report with Mangalvedha Police Station on the basis of which Crime No.95 of 95 under Section 395 of the IPC came to be registered against those persons.

9. It appears from the record that PW7 Dhanraj Shankar Gaikwad, the then Assistant Police Inspector of Mangalvedha Police Station recorded the First Information Report (FIR) of informant and registered the said crime. During the course of investigation he seized two motorbikes and recorded statement of witnesses.

10. It further appears from the record that the latter part of the investigation was carried out further by PW8 Shahaji Dhondiram Jadhav, Assistant Police Inspector. During the course of investigation he arrested accused Haji Malang Mulla (A-1) and seized a gold ring and cash amount of Rs.1,000/- at his instance. After completion of investigation he submitted the charge-sheet against the accused.

11. The prosecution, in order to prove its case, has examined as many as eight witnesses and exhibited number of documents. The respondents/accused were questioned under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) about the incriminating evidence and circumstances and they denied all of them as false. According to them, the wife of accused no.2 was the President of Taluka unit of Shivsena and because of political rivalry a false case is filed though no such incident happened.

12. Mr.Dedhia, learned APP for the appellant-State, assailing the impugned judgment and order of acquittal submitted that despite there being clear and cogent evidence of PW1 – informant and the medical evidence in support thereof, the learned Judge wrongly disbelieved the testimony overlooking the factum of recovery of gold ring and cash

amount at the instance of A-1. According to the learned APP, the evidence on record is sufficient to connect the accused with the offence and in the circumstances, the present appeal deserves to be allowed.

13. Mr.Kudle, learned counsel for the respondents-accused, on the other hand, has supported the impugned judgment and order of acquittal. According to the learned counsel there is absolutely no satisfactory evidence on record to prove the involvement of accused in the alleged offence. There being no merit in the appeal, the same is liable to be dismissed, argued learned counsel.

14. We have perused the record very carefully and in our opinion, the main prosecution witnesses are PW-1 informant and PW-5 Sukhado Tippana (Nippana) Kengar who at the relevant time was the assistant of informant and had accompanied the former and witnessed the incident.

15. PW-1 Bhimrao Tamma Javir, informant, in his evidence (Exh. 15) states that he has been practicing Medicine in the area of Marwade and prior to him one Haji Mulla (A-1) was practicing there. As the patients of A-1 became less because of his practice, the latter was annoyed with him.

16. It is his further evidence that on 3rd November, 1995 at about 7.00 p.m while he was closing his dispensary one person came and told that one aged patient of Asthama was at Sangolkar Vasti. He then took that man and one Sukhadeo Nippana Kengar (PW-5) on his motorcycle. After some time that unknown person asked him to stop the bike as he wanted to attend the call of nature. He got down from the motorcycle though the engine was on. That person then brought 5 to 6 persons who encircled him by putting the hands with each other. He recognized Dr. Haza (A-1) who gave a blow of a stick on his head by saying that he (informant) was affecting his brother's means of subsistence. A-1 also snatched a locket from his neck and took away his ring and also the cash amount of Rs. 5000/- from his pocket.

17. It is his further evidence that his motorcycle was taken to the side of the road and he was beaten severally. His clothes were removed and he was beaten in nude condition. He became unconscious and regained consciousness after half an hour.

18. It is his further evidence that he gave a signal to stop the jeep belonging to Shri Bhuse which was passing by the road. Its driver was Lahu Jadhav (PW-6) who is known to him. He told him the entire episode. He and Sukhadeo then boarded the jeep. Shri Jadhav started

to chase the assailants. The assailants were going by motorcycle. When the focus of the head lights of the jeep fell on them they ran away by leaving their motorcycles on the road. They were taken to the house of one Gopal Rathod and the said Gopal Rathod then informed the police about the incident. He then proved his FIR at Exh. 16.

19. If the evidence of this material witness is read carefully in the light of accusations made in the FIR then we find anything but satisfaction. The evidence of the informant shows that when the said unknown person requested him to stop the motorcycle so as to enable him to attend the call of nature and he accordingly stopped the motorcycle, that unknown person got down and after some time he returned with 5 to 6 persons who encircled the informant. But this sequence of events does not find any mention in the FIR. What the FIR shows is that when the said unknown person went ahead to attend the call of nature, all of a sudden four persons came in front of informant of which one was armed with a stick while another removed the key of motorcycle from the ignition.

20. The interesting part of evidence then shows that when those persons encircled, as per evidence, the informant could recognize one

of them as Dr. Haza i.e. A-1 having a stick in his hand and who later on gave a blow of the same on his head. The FIR, on the other hand, reveals the name of Dr. Khaza Mulla and not Dr. Haza as is deposed in the evidence and when the attention of this witness was drawn as to this material discrepancy in the cross-examination, this witness replied that he had not mentioned the name of Dr. Khaza Mulla while lodging the FIR but had given the name of Dr. Haza and failed to assign the reason as to why the police wrote the name of Dr. Khaza instead of Dr. Haza.

21. Even he went to the extent of stating that the police did not record his report as per his say. There is no explanation as to why, if he was knowing that the report was not recorded as per his say, he did not make complaint to the superior authority in this regard. This material infirmity cannot be now cured by giving unsatisfactory responses.

22. The evidence of informant also shows that apart from snatching a locket from his neck, A-1 also removed a ring and also the cash amount of Rs. 5000/- from his pocket. This is again inconsistent with the FIR wherein it is alleged that the ring and cash amount were robbed from him by others.

23. What is most perplexing aspect of his evidence is that he was unconscious for about half an hour and when he regained consciousness, he sought the help of a passing jeep, the driver of which was known to him and then with the help of that jeep they all chased the robbers. If he was unconscious for about half an hour and the fact that those robbers were having motorcycles with them then by no stretch of imagination it can be said that those robbers would have waited for the informant to regain consciousness and then only they would have taken to their heels only to be chased later on by the said jeep, as is claimed by informant. Even there is no murmur in the FIR that because of alleged beating he had lost the consciousness.

24. Lastly, it appears from the cross-examination of this witness that the incident took place somewhere between 7 to 8 p.m. The informant admits in his cross-examination that the incident took place in the night hours and at that time there was darkness. Not only the FIR but the evidence of informant shows that he was acquainted or knowing only one of those persons and that person was either Dr. Khaza or Dr. Hazi Mulla as the case may be and not the other persons. How he could identify those persons before the Court after a period of more than seven years is really intriguing. It is also not the case that there was test

identification parade conducted by the investigating officer during the course of investigation and during that test identification parade he was able to identify those persons.

25. Now we come to the evidence of assistant of PW-1 informant and eye witness to the incident, namely, PW-5 Sukhadeo Nippanna Kengar.

26. PW-5 states in his evidence (Exh.27) that on the day of incident Dr. Javir (PW-1) told him that one boy had come to call him for examining a patient at Sangolkar Vasti. He, that boy and Dr. Javir (PW-1) started to proceed to Sangolkar Vasti by motorcycle. After traveling 3-4 km. the said boy told that he wanted to attend call of nature and therefore, the motorcycle was stopped. After that boy went to attend call of nature, some persons came there and started beating Dr. Javir and at that time in order to save himself, out of fear, he stood at some distance. As it was 8.00 p.m. he could not realize as to who was beating Dr. Javir. As the engine of motorcycle was on he saw that the brother of Dr. Mulla, namely, Haji (A-1) put off the key of the motorcycle.

27. It is his further evidence that Dr. Javir (PW-1) was beaten by stick. The clothes of Dr. Javir were removed by the assailants and therefore, he gave one of him.

28. The evidence led by this witness is quite contrary and inconsistent vis-a-vis PW-1 informant. While the evidence of PW-1 shows that after the said unknown person alighted from the motorcycle, he returned with 5 to 6 persons and he was encircled whereas the evidence of PW-5 eye witness shows that some persons came and started beating Dr. Javir.

29. The evidence of this eye witness is totally silent and does not in any manner corroborate and support the version of PW-1 informant to the effect that A-1 had come armed with stick and had given a blow on the head of informant. Further, the evidence of this witness shows that in order to save himself, out of fear, he stood at some distance. The informant has not uttered anything about the conduct of this witness but if we read the FIR then we find that in the FIR it is contended that this witness had run away while the informant was being beaten by those persons.

30. The evidence of this witness then shows that he had seen A-1 putting off the engine of motorcycle by taking away the key of the motorcycle. But this has come in his evidence by way of omission and when confronted in the cross-examination that the said fact was

missing from his statement recorded by the police, he failed to assign any reason as to why that fact is missing from his statement. However, PW-7 Investigating Officer in his cross-examination (Exh. 31) has duly proved the omission by stating that this witness had not stated at the time of recording of statement that the brother of Dr. Mulla, namely, Hazi (A-1) had removed the keys of the informant's motorcycle. Therefore, there is absolutely no evidence to show that this witness had seen even A-1 at the time of alleged incident.

31. Although his evidence lastly shows that Dr. Javir i.e. PW-1 was beaten by stick but in the very beginning he stated that he could not realize as to who were assailants.

32. One more significant aspect of the evidence of this witness is that none of the accused was identified by him before the Court.

33. Thus, having regard to the discussion made by us, we conclude, firstly, that the substantive evidence of the informant vis-a-vis FIR is at loggerheads. There is no satisfactory evidence as to how and under what circumstances those unknown persons came to be identified by PW-1 informant almost after a period of more than seven years before the Court. Secondly, the so called eye witness i.e. PW-5 has not in any

manner supported the version of PW-1 informant and testimonies of both these witnesses are quite contradictory.

34. Even assuming for the sake of argument that A-1 and A-4 were known to informant but then still there remains a mystery as to on what basis the investigating officer chargesheeted A-2, A-3, A-5 and A-6. Thus, the investigational aspect of the case also needs to be questioned.

35. Even the evidence of both the investigating officers, namely, PW-7 and PW-8 are silent as to how the above said accused came to be identified during the course of investigation.

36. Thus seen from any angle there is nothing but total failure on the part of prosecution.

37. In view of above, the remaining evidence in the form of medical certificate pertaining to informant and as also the recovery evidence lose its significance and need not be looked into.

38. The above being the nature of evidence and obtaining circumstances the learned trial Court rightly held that prosecution has

failed to prove its case beyond reasonable doubt. This finding of the trial Court could not be said to be perverse. It was based on a proper appreciation of evidence.

39. On perusal of the entire evidence, we are of the considered view that the trial Court was right in holding that the prosecution has failed to prove its case beyond reasonable doubt that the respondents-accused robbed and assaulted the informant on the day of incident.

40. For the aforesaid reasons, we find no merit in the appeal and pass the following order :

ORDER

Criminal Appeal is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)

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