

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
APPEAL NO. 440 OF 2014**

Sajid Shabbir Ahmed Shaikh	... Appellant. (Org. Accused No.3)
V/s.	
The State of Maharashtra	... Respondent.

**WITH
APPEAL NO. 1158 OF 2019**

1. Gaffar Illiyas Sayyad	
2. Abdul Rahim Abdul Latif Khan	... Appellants. (Org. Accused Nos.1 and 2)
V/s.	
The State of Maharashtra	... Respondent.

Mr. S.G. Kudle for the Appellant/Applicant in Appeal No. 440 of 2014.
Ms Snehal S. Chaudhary a/w. Mr. Shashikant Chaudhary,
Appointed Counsel for the Appellants in Appeal No. 1158 of 2019.
Ms P.P. Shinde, APP for the Respondent – State in both Appeals

**CORAM : SMT. SADHANA S. JADHAV &
N.R. BORKAR, JJ.**
RESERVED ON : 04.02.2021.
PRONOUNCED ON : 08.04.2021.

COMMON JUDGMENT (*PER N.R. BORKAR, J.*)

1] Both these appeals are filed against one and same judgment and order dated 21.01.2014 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 568 of 2012. Both these appeals were therefore, heard together and are being disposed of by this common judgment.

2] By the impugned judgement and order, the appellants in Criminal Appeal No. 1158 of 2019 (original accused Nos.1 and 2) and the appellant in Criminal Appeal No. 440 of 2014 (original accused No.3) have been convicted for the offence punishable under section 302 read with 34 of the Indian Penal Code (for short "IPC") and sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.10,000/- each, in default of payment of fine to suffer further Rigorous Imprisonment for one year.

3] It is the case of the prosecution that on 01.05.2012, PW-1 Kakasaheb M. Ghadge, who was attached to Shivaji Nagar Police Station as Assistant Sub-Inspector, was on night patrolling duty alongwith other police staff. On 02.05.2012, at about 2.20 a.m., he was asked to reach at Kamlabai Zopadpatti, near Jane Rehman Masjid, Baingawadi, Govandi as one person was lying there in injured condition. Accordingly, PW-1 came there and saw that one person was lying there in injured condition. The injured was then taken to the Sion hospital and was admitted in I.C.U. The complaint was then lodged by PW-1.

4] On the basis of the complaint lodged by PW-1, Crime No.140 of 2012 for the offence punishable under section 307 of IPC was registered against the unknown persons. The investigation of the crime was handed over to PW-9 PI Bharat Pardeshi. It transpired during the investigation that the injured was Javed Islam Khan @ Munna. It further transpired during the investigation that accused Nos.1 to 3 along with

one juvenile offender assaulted the injured Javed Khan by stone.

5] On 18.5.2012, the injured succumbed to his injuries. Section 307 of the IPC was thus converted to 302 of the IPC. On completion of investigation, the charge-sheet was filed against the accused.

6] The accused were charged and tried for the offence punishable under section 302 read with 34 of the IPC. The trial court, as stated earlier, convicted the accused persons for the said offence by the impugned judgement and order.

7] We have heard Mr. S.G. Kudle, the learned counsel for the appellant/org. accused No.3 in Appeal No. 440 of 2014 and Ms Snehal S. Chaudhary a/w. Mr. Shashikant Chaudhary, Appointed counsel for the appellants/accused Nos.1 & 2 in Appeal No. 1158 of 2019 and Ms P.P. Shinde, the learned APP for the respondent – State in both the appeals.

8] The trial court has found the accused persons guilty on the basis of the evidence of the following eye-witnesses:

- (i) PW-2 Mohammed Kayum Naeem Shah; &
- (ii) PW-3 Raziabanu Kalim Shaikh.

9] Both the learned counsel for the appellants have submitted that PW-2 cannot be relied upon, as he was picked up as a suspect. It is submitted that even otherwise the

conduct of PW-2 is not natural. It is submitted that the evidence on record will show that enquiry was made by the police in relation to the incident with the people who had gathered at the place of incident, however, at that time neither PW-2 nor PW-3 had disclosed to the police that they had witnessed the incident. It is submitted that ultimately, the report was lodged against unknown persons. It is submitted that according to PW-3, at the time of incident, she was at the house of one Afroz. It is submitted that there is no evidence on record to show that PW-3 at the time of incident was at the house of Afroz. It is submitted that on the contrary PW-9, the investigating officer, has admitted that it did not transpire during the investigation that at the time of incident, PW-3 was at the house of Afroz. It is submitted that even the evidence on record will show that the statement of PW-3 came to be recorded after five days of the incident. It is submitted that PW-2 and PW-3, therefore, appear to be got up witnesses.

10] On the other hand, learned APP for the respondent - State has supported the judgment and order passed by the trial court.

11] PW-2 Mohammed Kayum has stated in his evidence that on the day of incident, he was sleeping on the mezzanine floor of an under construction building near the place of incident. At about 1.30 a.m., he heard cries "*Bachav, Bachav*". He, then, saw that the accused were assaulting one unknown person. In the cross-examination, PW-2 has

admitted that the police enquired with him on the next day at about 12.00 p.m. He has further admitted that he did not disclose about the incident to anybody else, till his statement was recorded. He has further admitted that he was taken by the police as suspect in the present crime.

12] PW-3 Razia Shaikh has stated in her evidence that at the relevant time, she was residing in Room No.9, Road No.12, Bainganwadi, Gowandi, Mumbai. PW-3 stated that on the day of incident, she was at Afroz's house. She further stated that at about 1.00 a.m., she woke up to answer nature's call. At that time, she heard the sound of scuffling. She therefore, peeped through the hole to the door and saw that the accused were assaulting the deceased. She further stated that accused No.1 Gafar and juvenile offender picked up a stone and assaulted the deceased on his head. Thereafter, accused No.2 Abdul Rahim and accused No.3 Sajid picked up the same stone and assaulted the deceased again on his head. She has further stated that the accused then fled from the place of incident.

13] In the cross-examination, PW-3 has admitted that Afroz has four daughters and one son and all the children of Afroz were at home on that day. PW-3 has further admitted that she is a divorcee and stays with her mother. She has further admitted that there is no male members in her family. She has further admitted that the police came at the place of incident at about 2.00 to 2.30 a.m and she was there at that

time. She has further admitted that enquiry in relation to the incident was made with the people, who were there at the place of incident.

14] It is apparent from the evidence of PW-3 that the enquiry was made from the people who were present at the place of incident about the deceased and the assailants. However, it appears that PW-3 has not disclosed anything to the police at that time, though she was present there at the place of incident. It further appears that her statement came to be recorded after five days of the incident. Apart from it, there is no evidence on record to show that on the day of incident, PW-3 was at the house of Aforz. On the contrary, PW-9, the investigating officer, has admitted that, it did not transpire during the course of the investigation that, PW-3 was at the house of Afroz on the day of incident.

15] As regards PW-2, he was picked up by the police as suspect. He too did not disclose to the police what he had witnessed till next day. Considering these facts and circumstances, it would not be safe to rely upon the evidence of PW-2 and PW-3. The trial Court was, therefore, not justified in convicting the appellants/accused on the basis of evidence of PW-2 and PW-3. In the result, the following order is passed.

ORDER

1] Criminal Appeal No. 440 of 2014 and Criminal Appeal No. 1158 of 2019 are allowed.

2] The impugned judgment and order dated 21.01.2014 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 568 of 2012 convicting the appellants/original accused Nos.1 to 3 for the offence punishable under section 302 read with 34 of the IPC is set aside and they are acquitted of the said offence.

3] The appellants/accused Nos.1 to 3 are in jail. They be released forthwith, if not required in any other crime.

4] In view of disposal of criminal appeals, pending Applications, if any, do not survive and they stand disposed off.

(N.R. BORKAR, J.) (SMT. SADHANA S. JADHAV, J.)