

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO.213 OF 2012

Ravi s/o Deobaji Bhandurge,
Aged about 22 years,
R/o. Dhande Chowk, Ganeshpeth,
Washim.

...

Appellant

.. Versus ..

The State of Maharashtra,
Through P.S.O., P.S. Washim,
District-Washim.

...

Respondent

.....

Shri Avinash Gupta, Senior Advocate assisted by Shri Akash Gupta, Advocate for the appellant,

Shri S.D. Sirpurkar, Additional Public Prosecutor for the respondent-State.

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CORAM : N.B. SURYAWANSHI, J.

RESERVED ON : 17.06.2021.

PRONOUNCED ON : 22.06.2021.

JUDGMENT

1. The appellant is convicted for the offence punishable under Section 307 of the Indian Penal Code and is sentenced to

suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/-, in-default to suffer simple imprisonment for 6 months and under Section 452 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.2,000/- in-default to suffer simple imprisonment for 3 months by the learned Additional Sessions Judge, Washim in Sessions Trial Case No.38/2008. By this appeal, the appellant challenges the conviction.

2. The prosecution case, in short, is that injured Vivek Sahoo owned xerox center at Sindhi Camp, Bordi Naka, Washim. On 12.2.2008 at 6.15 pm, there was no electricity supply in his shop due to load-shedding, however, the generator was switched on. Accused no.1 Ravi came to the shop for getting photo copies of the documents. Vivek accordingly took out the photo copies and handed it over to Ravi. Then Vivek asked Ravi as to whether he wanted any more photo copies, Ravi replied in negative. Hence, Vivek switched off the generator. After the generator was switched off, Ravi again asked for photo copies. Vivek then told him that he had just switched off the generator and, therefore, Ravi would have to wait for sometime. Ravi was

annoyed and said that “Dukan Gheun Basla, Dukan Band Kar” (You are running a shop, close it forthwith). Vivek then told Ravi that he always behaved in pressurizing manner and further said why he would close the shop. Ravi then told him that he would bring 2-3 persons and then take out the photo copies and he left the shop. After 5 to 7 minutes thereafter, Ravi came along with three persons. Out of them, Ravi and Sudhir came there on bicycle and other two accused came on motorcycle. Ravi caught hold the collar of Vivek and tried to drag him outside the shop. All the accused persons entered into the shop ascending on the counter. Three accused persons caught hold of Vivek and Ravi gave knife blow on the right side of his abdomen. At that time, Jaggu Vyas, the friend of Vivek, came there. Vivek and Jaggu tried to catch hold of accused persons, but they fled away leaving their motorcycle and bicycle. Vivek thereafter was taken to the hospital of Dr. Pande by Jaggu Vyas and medical aid was provided to him. Vivek sent Jaggu to the Police Station, Washim to inform the incident. Thereafter, the concerned Police Officer rushed to the hospital of Dr. Pande and recorded the statement of Vivek, which was treated as report. On the basis of the report, Crime No.74/2008 for offences under Sections 307,

452 r/w 34 of the Indian Penal Code and 3 r/w 25 of the Arms Act was registered against the accused persons. After completion of the investigation, charge-sheet came to be filed and the case was numbered as Sessions Trial Case No.38/2008.

3. The charge for offences under Sections 147, 148, 452, 307, 506 r/w 149 of the Indian Penal Code was framed against five accused persons. The Sessions Court, after recording evidence, acquitted accused nos.2 to 5 of all the offences, however, convicted the appellant. Hence, the present appeal.

4. Heard Shri Avinash Gupta, the learned Senior Advocate for the appellant and Shri S.D. Sirpurkar, the learned Additional Public Prosecutor for the respondent-State.

5. Learned Senior Advocate for the appellant has taken me through the evidence on record and submitted that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. The trial Court, considering the same evidence, has acquitted accused no.4 Sudhir s/o Marotirao Ghuge, however, relied upon it to convict the present appellant.

He further urged that admittedly the shop of injured-informant PW-3 Vivek is on the main road, however, not a single independent witness is examined by the prosecution. By pointing out the injury certificate Exh.107, he submitted that it is a specific case of PW-3 injured-informant that the appellant dealt a single blow of knife on his abdomen, however, taking into consideration the evidence of Doctor, who treated the injured-informant, the injured had suffered three injuries. Hence, there is material discrepancy in the evidence of the injured and the medical evidence. PW-8 Jagdish has turned hostile and, in fact, in his cross-examination, he has given admission supporting the defence. He, therefore, submitted that the impugned conviction is unsustainable and the same is liable to be quashed and set aside and the appellant be acquitted. He relied upon the following authorities in support of his argument.

- (i) Mukhtiar Ahmed Ansari .vs. State (N.C.T. of Delhi), 2005 ALL MR (Cri) 1775 (S.C.),
- (ii) Balaji s/o Vithal Kinhale .vs. The State of Maharashtra, 2018 ALL MR (Cri) 4038.
- (iii) Vinod Babanrao Naik and another .vs. The State of Maharashtra, 2020 ALL MR (Cri) 1039.

6. *Per contra*, the learned Additional Public Prosecutor supported the judgment and conviction stating that there was recovery of knife from the appellant and in the CA report, the blood traces were found on his blade. The said circumstance supports the case of the prosecution. He further submitted that the trial Court has properly appreciated the evidence and has rightly convicted the appellant, therefore, submitted that there is no merit in the appeal and the same may be dismissed.

7. Heard Shri Avinash Gupta, the learned Senior Advocate for the appellant at length and Shri S.D. Sirpurkar, the learned Additional Public Prosecutor for the respondent-State. With their assistance, I have gone through the record.

8. The prosecution, in support of its case, has examined eleven witnesses.

9. PW-3 Vivek Sahoo is the injured-informant. He deposed that on the day of incident i.e. on 12.02.2008 at about 6.15 pm, he was present in his shop. There was no electricity supply due to load-shedding, however, the generator was on.

The appellant came there to get the photo copies, which he took out and handed it over to the appellant. He asked the appellant whether he wants any more photo copies of the documents, the appellant said no. Therefore, he switched off the generator. After the generator was switched off, the appellant asked him to supply photo copies of other documents. He, therefore, told that he had just switched off the generator and the appellant would have to wait for sometime. The appellant, therefore, said “Dukan Gheun Basla, Lawakar Dukun Band Kar” (You are running a shop, close it forthwith). He, therefore, told the appellant that he always behaved in pressurizing manner and why he should close the shop. The appellant then told him that he would bring 2-3 persons and they would take photo copies of the documents. The appellant left the shop, saying so. Within 5-7 minutes thereafter, the appellant brought three persons at his shop. The appellant and accused Sudhir Ghuge came on the bicycle and other two came on the motorcycle. The appellant caught hold of his collar and tried to drag him outside the shop. However, he stirred back. Thereafter, all four accused persons entered into his shop by jumping over the counter. The other three accused had caught hold of his hands and legs. The appellant took out a

knife and dealt with a blow on the right side of his abdomen. The accused Pappu assaulted him by fist and kick blows. He was not aware of the names of the persons who had caught hold of his hands and legs, but later-on, he came to know their names as Amjad Khan, Mujaffar Khan and Sudhir Ghuge. He stated that he was knowing the names of these persons. After the assault, he fell down. Prior to it, he and his friend Jaggu Vyas attempted to apprehend five accused persons, but they fled away leaving bicycle and bike there. His friend Jaggu came to his shop after a while when he received knife blow. He then along with Jaggu Vyas rushed to the hospital of Dr. Pande by auto, which was situated 300 meters away from his shop. He sent Jaggu to the Police Station from the hospital and within half an hour, police came there and recorded his statement, which was treated as his report (Exh.55). Printed FIR is at (Exh.56). He was admitted in the hospital for ten days, where he had undergone surgery and he was given 27 stitches.

In the cross-examination he denied the suggestion that he had quarreled with many people at Akola, where he was residing prior to coming to Washim and he is facing criminal

cases and due to the quarrel, he had to leave Akola. He admitted that there were 10 to 12 shops near to his shop. On the southern side of his shop, there was a taxi center and a road passes to Sindhi colony. The road passes from in front of his shop was the main road of Washim. There were two shops in front of his shop beyond the road. He denied the suggestion that at the time of incident, neighbouring shop owners had gathered. He denied the suggestion that he caught hold of Ravi's collar and there was a scuffle between him and Ravi, in which he fell down on the lamination machine and sustained injury to his abdomen. He admitted that accused Sudhir was running a xerox center and there was only one shop between his shop and Sudhir's shop. He denied that there was business competition between him and Sudhir. The shop of Sudhir was 12 ft. away from his shop and pan kiosk of Jaggu Vyas was near Hanuman Temple i.e. 2 kms away from his shop.

10. Jagdish Vyas was examined as PW-8, however, he has not supported the prosecution case. He was cross-examined at length by the learned APP, however, nothing supporting to the prosecution case could be brought on record.

In the cross-examination on behalf of the accused persons, he admitted that the appellant pushed PW-3 Vivek as PW-3 Vivek had caught hold the collar of appellant and due to the said push, PW-3 banged against the tin-sheet attached to the table and then fell on the lamination machine. He further stated that prior to the incident, PW-3 picked up dispute on many occasions and he was called for mediation. He also admitted that PW-3 had no cordial relations with neighbouring shop owner and appellant did not assault Vivek (PW-3) by means of knife.

11. PW-11 is Dr. Rajendra Pande, who treated PW-3 Vivek. He deposed that PW-3 came in his hospital in injured condition at about 6.45 pm on 12.2.2008. He admitted and treated PW-3. He noticed lacerated wound on right lumbar, size 15 x 5 cm, extending transverse. Bleeding was present. Laceration of muscles was noticed. There was no internal visceral injury. He, therefore, prepared injury certificate (Exh.107). According to him, the injury can be caused by sharp object only. PW-3 was hospitalized between 12.2.2008 to

21.2.2008. He produced discharge card (Exh.109). According to him, the injury of PW-3 was possible by the knife.

In the cross-examination, he was shown three photographs of the injuries caused to PW-3, which were marked as Exh.110, 111 and 112. He admitted that injuries shown in the photographs were not possible by a single blow of knife. He further admitted that no internal injury was found by him. He also admitted that the injuries may be possible if someone rubbed to the iron sheet attached to the table and due to the subsequent fell on a lamination machine. He deposed that in his injury certificate he has not mentioned the nature of injury.

12. PW-10 Karbhari Ware was Assistant Police Inspector at the relevant time. He went to the hospital and recorded the statement of injured PW-3 Vivek and registered the offence vide Crime No.78/2008 under Sections 307 and 452 r/w 34 of the Indian Penal Code and under Section 3/25 of the Arms Act. He prepared spot panchanama (Exh.58) and recorded the statements of the witnesses. He arrested accused Umesh vide arrest panchanama (Exh.96). The accused persons were arrested

by PSI Salwe, as per arrest panchanamas (Exh.92 to 95). He requested the Tahsildar for conducting identification parade and obtained the reports (Exhs.89 and 90). He deposed that PSI Salwe prepared memorandum-cum-seizure panchanama under Section 27 of the Evidence Act.

13. PW-5 Indrapal Baiwar and PW-6 Narendra Wani are the panchas to the memorandum and seizure panchanama. They have not supported the prosecution case. PW-4 Bablu Ahir is the panch to the spot panchanama (Exh.58), who also has not supported the spot panchanama. A spot panchanama was proved by PW-10. PW-9 Niwruiti Asru, is the Naib Tahsildar, who conducted the test identification parade of the acquitted accused.

14. On evaluation of the prosecution evidence, it is clear that except the evidence of injured PW-3 Vivek, there is no other evidence brought on record by the prosecution to corroborate his version. PW-3 Vivek has stated that one blow of knife was dealt to him by the appellant. If the photographs Exhs.110, 111 and 112 are perused, the injuries shown in the photographs by PW-3

Vivek do not appear to be possible by a single blow of knife. This fact is admitted by PW-11 Dr. Rajendra Pande in his cross-examination. No internal injury was found by PW-11 corresponding to the injury mentioned by him in the injury certificate Exh.107. He has admitted that the injuries shown in the photographs may be possible if someone rubbed to the iron sheet attached to the table and subsequently fell on a lamination machine. The medical evidence thus appears to be inconsistent with the ocular evidence of the injured.

15. Evidence of PW-8 Jagdish Vyas does not corroborate the version of PW-3, on the contrary, he has supported the defence version.

16. The prosecution has failed to prove the recovery of knife at the instance of the appellant. The panchas to the memorandum and recovery panchanama PW-5 and PW-6 have not supported the prosecution case. The prosecution has failed to examine PSI Salwe, who allegedly recovered the knife at the instance of the appellant. Therefore, the evidence of recovery of knife cannot be relied upon.

17. Admittedly, there were shops around the shop of PW-3 Vivek where the alleged incident had taken place. There was a road in front of his shop and there were two shops beyond the road. However, the prosecution has not examined a single independent witness in support of its case. Adverse inference in terms of Section 114 (g) of the Indian Evidence Act, 1872 therefore needs to be drawn against the prosecution.

18. The learned trial Judge has acquitted accused nos.2 to 5 taking into consideration the same set of evidence which was relied upon to convict the appellant. The trial Court has observed that the presence of accused nos.2, 3 and 5 is not established by the prosecution and the role attributed to accused no.4 Sudhir is not sufficient to convict him for offence punishable under Sections 307, 452 and 506 of the Indian Penal Code. Thus, the version of injured PW-3 that other accused caught hold his hands and leg at time of assault is disbelieved by the trial Court. The prosecution has not challenged the acquittal of accused nos.2 to 5.

19. The learned Senior Advocate was justified in placing reliance in the case of **Sanjaysingh s/o Sitaram Khatwar .vs. The State of Maharashtra, 2018 ALL MR (Cri) 5043**, this Court held :

“when the other accused persons are acquitted by the Court below and their acquittal is not challenged by the State and when there is no independent evidence by which case of the appellant is segregated from the acquitted accused, benefit has to be given.”

The above ratio is applicable to the facts of the present case. There is no independent evidence led by the prosecution by which the case of the appellant can be segregated from the acquitted accused. It is unsafe to rely upon uncorroborated testimony of PW-3 and the prosecution has failed to prove the offence against the appellant beyond reasonable doubt.

20. The learned trial Court, in my view, has failed to appreciate the evidence in the proper perspective and has wrongly relied upon the uncorroborated testimony of PW-3 to convict the appellant. The impugned judgment is, therefore, unsustainable and the same is liable to set aside. The appellant deserves to be acquitted by giving benefit of doubt. Hence, the

following order :

O R D E R

- (i) Criminal Appeal No.213/2012 is allowed.
- (ii) The impugned judgment and order passed by the learned Additional Sessions Judge, Washim in Sessions Trial Case No.38/2008 thereby convicting the appellant for the offence punishable under Sections 307 and 452 of the Indian Penal Code is hereby quashed and set aside.
- (iii) The appellant is acquitted of all the charges.
- (iv) The bail bonds of the appellant stand cancelled.
- (v) Fine amount, if any, deposited by the appellant be refunded to him.
- (vi) The appellant shall furnish bail bond of Rs.15,000/- (Rs. Fifteen Thousand) with one or two sureties in the like amount before the Trial Court in terms of Section 437-A of the Code of Criminal Procedure.

(N.B. Suryawanshi, J.)