

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

CRIMINAL APPEAL NO.586 OF 2008

Mohd. Rehan Sk. Rahim
Aged about 28 years,
R/o Civil Lines, Paratwada,
Taluka - Achalpur, District - Amravati.

..... **APPELLANT**

V E R S U S

State of Maharashtra, through
Police Station Officer,
Police Station Paratwada,
District - Amravati.

..... **RESPONDENT**

Mr. S. I. Ghatte, Counsel for the appellant.
Mr. N. R. Rode, Addl.PP. for the respondent/State.

CORAM : ROHIT B. DEO, J.
DATE : 5th OCTOBER, 2021.

ORAL JUDGMENT:

The appellant–Mohd. Rehan Sk. Rahim (hereinafter referred to as the accused) is challenging the judgment dated 28-7-2008 rendered by the learned Ad-hoc Additional Sessions Judge, Achalpur in Sessions Trial 95/2004 whereby the accused is convicted for offence punishable under Section 307 read with Section 34 of the Indian Penal Code (IPC) and is sentenced to

suffer rigorous imprisonment for three years and to payment of fine of Rs.5,000/- (Rupees Five Thousand) and in default of payment of fine, to suffer further rigorous imprisonment for six months.

2. Four accused Ghanshyam Shankar Nandwanshi, Pawan Shankar Nandwanshi, the appellant–Mohd. Rehan Sk. Rahim and Raju Bansilal Baradi were charge-sheeted under Section 307 read with Section 34 of the IPC. Accused 3-Mohd. Rehan, accused 1-Ghanshyam Nandwanshi and accused 2-Pawan Nandwanshi are convicted while accused 4 Raju Baradi is shown as absconding.

3. The prosecution case is that Mohan Babulal Chavan lodged report with the Paratwada Police Station on 26-4-2001 stating that on 25-4-2001 the marriage of Gopi Nandwanshi's sister was solemnized. At 11:00 p.m. or thereabout when the wedding procession reached the Bhayanak Chowk, his brother Santosh who was walking fifty feet ahead of him, was assaulted by accused 1 to 3. Mohan alleged that accused 1 was armed with sword, accused 2 was armed with sword-stick (*gupti*) and the accused 3-Mohd. Rehan was armed with dagger. Santosh sustained bleeding injuries on the stomach and collapsed. Mohan went to the Police Station

with Santosh, lodged report and then Santosh was taken to the Cottage Hospital, Achalpur and then shifted to the Amravati General Hospital.

4. On the basis of report lodged by Mohan, Crime 57/2001 was registered for offence punishable under Section 307 of IPC. Accused 1-Ghanshyam and accused 3-Mohd. Rehan were arrested on 26.04.2001 and on the basis of the disclosures made, the sword and dagger used as weapons of offence were recovered. The blood stained clothes of accused 1-Ghanshyam and Mohd. Rehan were seized. The injury certificate of Santosh, who was examined by Dr. Sandhya Salkar, was obtained. Accused Ghanshyam had also sustained an injury and he was referred to Medical Officer and an injury certificate obtained. The spot panchanama was drawn and the sample of plain earth and blood stained earth collected from the spot of the crime. Accused Pawan was then arrested and his disclosure led to the recovery of the sword-stick. The statements of witnesses were recorded, and on completion of the investigation the charge-sheet was submitted in the court of the jurisdictional Magistrate who committed the case to the Sessions Court.

5. The learned Sessions Judge framed charge (Exh.4) under

Section 307 read with Section 34 of the IPC. The accused pleaded not guilty and claimed to be tried. The defence is of total denial and false implication.

6. The prosecution examined thirteen witnesses. PW 1-Santosh Babulal Chavan is the injured. PW 2-Kishor Tarachandji Sakhare is an eyewitness. PW 3-Ashok Nandlal Tiwari is *panch* to the memorandum statement of accused Pawan. PW 4-Mohan Babulal Chavan is the informant. PW 5-Dharmendra Shambhudayal Verma is the *panch* to the seizure of the clothes of accused Pawan and Ghanshyam and seizure memo Exhibit 29, 30 and 31. PW 6-Suresh Namdeorao Lakhode is the Head Constable who recorded the statement of the injured at the Cottage Hospital and seized blood stained clothes of accused 2-Pawan. PW 7-Rupesh Dhepe and PW 8-Vinod Purohit are panch witnesses to the disclosure statement of accused 1-Ghanshyam and accused 3-Mohd. Rehan. PW 9-Pravin Agrawal and PW 10-Rajendra Lohiya are eyewitnesses. PW 11-Dr. Sandhya Salkar examined injured Santosh and issued certificate Exhibit 49. She has also given opinion Exhibit 51, which is to the effect that the injuries sustained by Santosh were possible due to the weapons forwarded for her examination. PW 12-Harishankar Tiwari is *panch* to the

spot panchnama and seizure of sample of plain earth and blood stained earth and PW 13-Devendrasing Gautam is the Investigating Officer. On behalf of accused 1 and 2, one Santosh Bankuwale was examined in defence. Mohd. Rehan, the appellant–accused herein did not examine any witness in defence.

7. The learned Sessions Judge was pleased to convict the accused, as aforementioned. The learned Sessions Judge recorded a finding that the omissions in the evidence of PW 1 and PW 4 do not affect the core of the evidence and the evidence of the said witnesses, who are the injured and informant, is believable. The learned Sessions Judge finds that the prosecution evidence that accused 1 to 3 were armed with deadly weapons, is consistent. The learned Sessions Judge then considers the evidence of PW 2, PW 9 and PW 10 who are examined as eyewitnesses and records a finding that although PW 9 and PW 10 did not support the prosecution, they do vouch for the fact that Santosh was attacked by four persons. The seizure of *gupti* from accused Mohd. Rehan is held proved, notwithstanding that PW 7- Rupesh and PW 8- Vinod denied that the memorandum Exhibit 37 was prepared in their presence by PW 13-Gautam. The learned Sessions Judge referred to the settled legal position that even if

the panch witnesses turn hostile, the recovery can be held proved on the basis of the evidence of the Investigating Officer. The learned Sessions Judge then notes that the clothes seized from the accused were found stained with human blood and there is no possible explanation coming from the accused as regards the human blood detected on the clothes and on the weapon seized at the instance of accused 3-Mohd. Rehan.

8. The learned Counsel Mr. S.I Ghatte for the accused Mohd. Rehan would argue that the injury report is inconsistent with the role attributed to the accused Mohd. Rehan. Mr. S.I. Ghatte would invite my attention to the testimony of PW 11-Dr. Sandhya Salkar to buttress the said submission. Mr. S.I. Ghatte would then take me through the entire evidence to buttress the submission that accused Mohd. Rehan is implicated in the crime on the basis of suspicion and there is no cogent material to prove, without reasonable doubt, that accused Mohd. Rehan was one of the assailants. Mr. S.I. Ghatte would emphasis that the evidence of PW 1-Santosh and PW 4-Mohan must be discarded, to the extent the accused Mohd. Rehan is implicated in the crime, since the evidence is tainted with embellishment.

9. The learned Additional Public Prosecutor Mr. N.R. Rode would rebut the submissions canvassed on behalf of the accused and would submit that the judgment of conviction is unexceptionable.

10. The most important witness is the injured Santosh who is examined as PW 1. Santosh states that when the wedding procession reached at Bhayanak Chowk, accused Ghanshyam approached him with sword and inflicted a blow on the head, which Santosh warded off with hand. Santosh has deposed that since accused 1 Ghanshyam pulled the sword which he had caught, his right hand fingers were cut. Santosh then states that he held accused Ghanshyam by the waist, Ghanshyam pressed his head in the arm pit and then inflicted a sword blow on the stomach. Santosh then states that in the meanwhile accused 2 Pawan and accused 3-Mohd. Rehan arrived at the scene. Santosh's head was in the arm pit of accused Ghanshyam and at that time accused Pawan inflicted a sword-stick blow on his stomach and accused 3-Mohd. Rehan also inflicted sword stick blows on his shoulder, waist, thigh and below the arm. According to Santosh, the motive for the assault was previous report lodged by Santosh against accused Ghanshyam Nandwanshi and one Shyam

Nandwanshi. When the weapons seized were shown to Santosh, he has identified one of the two sword sticks as the weapon used by accused Mohd. Rehan.

11. During the cross-examination, Santosh was confronted with the portion in the police statement which is to the effect that two brothers of accused Ghanshyam and one unknown person were the assailants. PW 1-Santosh denies having stated so to the police. Portion 'A' was shown to the Investigating Officer who recorded the statement of injured Santosh and the Investigating Officer says that the said portion 'A' was correctly recorded. Several omissions touching the manner in which the assault occurred are brought out in the cross-examination and Santosh explains the same that when his statement was recorded on 26-4-2001, he was not fully conscious. In the cross-examination conducted on behalf of accused Mohd. Rehan, Santosh admits that prior to the incident he had neither friendship nor enmity with Mohd. Rehan. Santosh disclaims knowledge whether Mohd. Rehan is his brother's classmate. Santosh admits that he and Mohd. Rehan are not on visiting terms.

12. I am inclined to agree with Mr. S.I. Ghatte's submission that

to the extent of the appellant's alleged role in the assault, the evidence of the injured is not at all confidence inspiring. The statement of the injured was recorded by PW 6-Suresh on 26-4-2001 at Cottage Hospital. PW 6-Suresh obtained the fitness certificate of the doctor before recording the statement. PW 6-Suresh has proved portion marked 'A' (Exhibit 33) in the statement which is to the effect that the injured was assaulted by Ghanshyam, his two brothers and one unknown person. The evidence of the injured that Mohd. Rehan inflicted sword stick blows on his shoulder, waist, thigh and below the arm, is an omission, which is duly proved through PW 6-Suresh. The omission is material and partakes the character of contradiction and the learned Sessions Judge clearly erred in brushing such material omission aside on the premise that the core of the evidence is not affected. Moreover, the evidence of PW 1-Santosh is inconsistent with the evidence of PW 11-Dr. Sandhya Salkar, who examined Santosh and issued injury certificate Exhibit 49. Santosh suffered six incise wounds. Two are on the right thigh, one is on the abdomen, one is on the right side of the chest, one is on the back and sixth one is the cut to the fingers suffered when accused Ghanshyam allegedly pulled the sword which Santosh had caught with hand. PW 1-Santosh has deposed that accused 1-

Ghanshyam inflicted sword blow on his stomach and then accused 2-Pawan also inflicted sword stick blow on the stomach. Two injuries, i.e. on the stomach and the right side of the chest, can possibly correspond with the said version. Of the three other injuries, two are on the right thigh and one is on the back. The injuries suffered are not consistent with the version that accused Mohd. Rehan inflicted sword stick blows on the shoulder, waist and below the arm, apart from the fact that as noted earlier that in the statement recorded by PW 6-Suresh no such role is attributed to accused Mohd. Rehan. Indeed, Mohd. Rehan is not even named and the reference in the police statement recorded on 26-4-2001 is to accused Ghanshyam, his two brothers and unnamed person.

13. The other material witness is PW 4-Mohan who lodged the report in which the accused Mohd. Rehan is presumably referred to as Rehan Musalman. The report (Exhibit 24) attributes sword assault on the stomach to Ghanshyam and sword stick assault on the stomach to Pawan. The role attributed to Rehan Musalman is that he too assaulted with knife. PW 4-Mohan, who is the younger brother of the injured, has deposed that he alongwith Raju Lohiya, Pawan Agrawal, Kishor Sakhare and injured served

cold drink when the marriage procession came at the TV Tower square. PW 4-Mohan then states that while they were proceeding towards the place of marriage, at 10.30 to 10.45 p.m. accused Ghanshyam and Pawan came from opposite side, Ghanshyam was armed with sword and Pawan was armed with sword stick and they started assaulting Santosh. PW 4-Mohan then states that accused Mohd. Rehan was also with Ghanshyam and Pawan and he too beat Santosh.

PW 4-Mohan was confronted with the statement in the report that since several persons assembled at the Bhayanak Chowk, he rushed there. PW 4-Mohan denied having stated so. However, the relevant portion is duly proved. PW 4-Mohan denies that the portion in the report to the effect that when he reached the spot of the incident, Santosh was lying on the ground with bleeding injuries. PW 4-Mohan admits that he was not knowing accused Mohd. Rehan by name prior to the incident, and that he disclosed the name of the accused to injured Santosh at the hospital. While the witness states that the injured was at a distance of fifty feet behind the wedding procession, he denies the suggestion that it is only when the injured shouted that he looked at him. The witness states that nobody from the wedding

procession came to the spot nor did he call anybody from the wedding procession. The witness denies the suggestion that he did not see any of the accused. The witness admits that he did not give chase to the accused and that when he and others reached the spot, at that time, injured Santosh was lying on the ground.

The evidence of PW 4-Mohan, to the extent accused Mohd. Rehan is implicated in the incident, is neither cogent nor convincing. While his brother injured Santosh has improvised and has, for the first time in the evidence attributed to accused Mohd. Rehan various blows with sharp edged weapon on the shoulder, waist, thigh and below the arm and which version I am not inclined to accept, PW 4-Mohan has vaguely deposed that accused Mohd. Rehan also beat Santosh and that he was armed with a knife like weapon. Considering the admission that he did not know the name of accused Mohd. Rehan prior to the incident, the reference to Rehan Musalman in the report has gone unexplained. Accused Mohd. Rehan has succeeded in creating a reasonable doubt as regards Mohan's version that he saw the assault.

14. PW 9-Pravin Agrawal and PW 10-Rajendra Lohiya, who are examined as eyewitnesses, have not supported the prosecution. The only other eyewitness whose evidence will have to be

considered is PW 2-Kishor who deposed that at 11-00 to 11-30 p.m. accused 1 to 3 assaulted Santosh with sword and sword stick, Santosh fell down and PW 2-Kishor and others rushed to the spot, and the accused fled. PW 2-Kishor states that Articles-B and C were held by accused Pawan and accused Mohd. Rehan respectively. It is brought out in the cross-examination that the witness was working at the house of Naval Verma, situated on the Durani Chowk to TV Tower Chowk till 11-00 to 11-30 p.m., alongwith fifty others. The witness denies the suggestion that he heard noise of five to ten persons and then proceeded towards the Bhayanak Chowk. The witness admits that the accused were not chased and that the witness is not in a position to say in which direction the accused fled. While the injured states that the witness was amongst the persons who took him to police station, PW 2-Kishor does not know whether the police recorded the report of Santosh or his brother PW 4-Mohan. Considering that no details, expected from an eyewitness of the assault were deposed, it is doubtful whether PW 2-Kishor saw the actual assault although there is no reason to doubt his presence in the vicinity, and that he did rush to the spot of the incident after Santosh collapsed due to the injuries suffered.

15. The panchas to the memorandum under Section 27 of the Indian Evidence Act and the seizure of the sword stick and the clothes did not support the prosecution. The learned Sessions Judge is right in observing that even if the panchas turn hostile, the evidence of the Investigating Officer may be sufficient to hold the seizure and the recovery as proved. However, considering the fragile nature of the ocular evidence, I am not inclined to uphold the conviction of accused Mohd. Rehan on the basis of the seizure of the clothes stained with human blood or the alleged recovery of the sword stick from accused Mohd. Rehan. Notably, while accused Mohd. Rehan was arrested on 29-4-2001, the clothes are seized from his person, at the police station, on the next day. The recovery of the sword stick is pursuant to memorandum (Exhibit 37) recorded at 5-45 p.m. on 01-5-2001 and the recording of the seizure panchanama commenced within fifteen minutes at 6-00 p.m. The Investigating Officer has deposed that while accused Mohd. Rehan was interrogated on 29-4-2001 and 30-4-2001, no recovery could be effected since accused Mohd. Rehan was naming others as the assailants. Considering that the Investigating Officer has deposed that the clothes were seized from accused Mohd. Rehan after the recovery of the sword stick, the evidence of the Investigating Officer is rendered, not entirely, trustworthy,

since the seizure of the clothes is shown at 10-30 a.m. on 30-4-2001 and the memorandum under Section 27 of the Indian Evidence Act is recorded at 5-45 p.m. on 01-5-2001.

16. I am satisfied, that the prosecution version, as regards the role attributed to accused Mohd. Rehan, is not entirely confidence inspiring and that it would be hazardous to uphold the conviction of accused Mohd. Rehan considering the fragile nature of the ocular evidence and other circumstances noted supra.

17. The judgment and order impugned, to the extent accused Mohd. Rehan is convicted for offence punishable under Section 307 read with Section 34 of the Indian Penal Code, is set aside and accused Mohd. Rehan is acquitted of offence punishable under Section 307 read with Section 34 of the Indian Penal Code.

18. Fine paid, if any, be returned.

19. Bail bond of accused Mohd. Rehan shall stand discharged.

20. The appeal is allowed accordingly.

JUDGE