

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

**CRIMINAL APPEAL NO. 702 OF 2008**

1. Bhimrao s/o Natthuji Meshram, (Abated)  
aged around 57 years, Occ. Labourer  
(Since dead, hence abated).
2. Suresh s/o Ramaji Gajbhiye,  
aged around 39 years, Occ. Labourer.  
(He is in jail, original accused No.1)
3. Yuvraj s/o Natthuji Meshram,  
aged around 44 years, Occ. Labourer.

All are R/o Kolura, Tah. Ner,  
District Hinganghat.

...APPELLANTS

**Versus**

State of Maharashtra,  
through Police Station Officer, Ner,  
Tah. Ner, District Yavatmal.

...RESPONDENT

Shri A.V. Wankhede, Advocate for the appellants.  
Shri M.J. Khan, A.P.P. for the respondent.

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**CORAM : PUSHPA V. GANEDIWALA, J.**

**ARGUMENTS WERE HEARD ON : JANUARY 29, 2021.**

**JUDGMENT IS PRONOUNCED ON : APRIL 09, 2021.**

**JUDGMENT :**

The challenge in this appeal is to the judgment and  
order dated 11/09/2008 passed by the Additional Sessions

Judge, Darwha in Sessions Trial No. 172/2004, whereby the appellants/accused stand convicted for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code, 1860 (for short “IPC”), and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.500/- (rupees five hundred) each, in default, to suffer simple imprisonment for one month each.

2. The case of the prosecution, in brief, is as under :

(i) On 25/09/2002 at about 7.30 to 8.00 pm, the appellants/accused, in furtherance of their common intention, dragged Ajay Meshram (PW- 6) from his house on the road, poured kerosene on his body and ignited him with a stick of matchbox, as a result of which, he received injuries on his chest, hands, left side of face and back. He ran towards his brother's house in hutment and informed about the incident to his mother. He was taken to the hospital at Ner and thereafter shifted to District Hospital, Yavatmal. On the next day of his admission in the hospital, his statement came to be recorded by the Naib Tahsildar-cum-Executive Magistrate in the expectation

of his death. On the basis of this statement, the First Information Report bearing No. 127/2002 dated 26/09/2002 came to be registered against the appellants/ accused for the offence punishable u/s 307 r/w 34 of Indian Penal Code.

(ii) After investigation, the charge sheet came to be filed before the Court of Magistrate, who in turn, committed the case to the Additional Sessions Court, Darwaha, as the offence punishable under Section 307 of the IPC is exclusively triable by the Court of Sessions. The Additional Sessions Court, Darwaha framed charge against the appellants/ accused. The same was read over and explained to them to which they pleaded not guilty and claimed to be tried. Their defence was of total denial. To establish the charge against the appellants/ accused, the prosecution examined in all six witnesses. They are as under :

**PW1** – Prabhakar – the panch witness for spot panchanama and seizure of articles from the spot.

**PW2** – Vasanta – the Naib Tahsildar-cum-Executive Magistrate, who recorded the statement of the injured Ajay on 26/09/2002 in the hospital in

contemplation of his death.

**PW3** – Dr. Manjusha – the Medical Officer, who issued certificate for recording the statement of the injured Ajay in the hospital.

**PW4** – Deonand, who registered crime on the basis of the statement of the injured Ajay, recorded by the Naib Tahsildar-cum-Executive Magistrate.

**PW5** – Panchafulabai – the mother of the injured Ajay.

**PW6** – Ajay – the injured.

(iii) The Sessions Court recorded the statements of the appellants/ accused under Section 313 of the Code of Criminal Procedure, 1973. In their statements, apart from denying incriminating evidence against them, they have also filed on record their additional statements in writing. They stated that the injured Ajay has implicated them in a false case as the appellant Yuvraj refused to stand as a surety for the injured Ajay. That many criminal cases have been registered against him, and that he being of criminal mentality, involved many

people in false cases. They have also stated that the injured Ajay himself dropped the idol of Maruti and involved his own sister's husband in a false case. They have also taken the stand of attempt to commit suicide by the injured Ajay. In support of their stand, the appellants/ accused examined two defence witnesses, viz., DW1 Damodhar and DW2 Wasudeo.

(iv) The trial court, on the basis of submissions made on behalf of both the sides and on the basis of evidence available on record, found the appellants/ accused guilty of the charge framed against them, and convicted and sentenced them as above. This judgment is impugned in this appeal.

3. I have heard Shri Wankhede, learned counsel for the appellants/ accused, and Shri Khan, learned A.P.P. for the respondent/ State. I have also perused the record with the assistance of learned counsel appearing on behalf of both the sides.

4. During the pendency of this appeal, appellant/ accused No.1 Bhimrao is reported to be dead, and hence, the

appeal against him stands to be abated.

5. At the outset, apart from the injured witness, there is no other eye-witness to the incident. No doubt, the sole testimony of the injured witness is sufficient to bring home the charge against the accused person/s, provided the testimony is free from any doubt and inspires the confidence of the Court. In the instant case, on careful scrutiny of the evidence on record, there is absolutely no corroboration to the testimony of the injured witness Ajay. There are material inconsistencies in the testimonies of injured witness Ajay and his mother, PW-5, which I would be discussing in the later part of this judgment. There are material admissions too in the testimony of PW-5.

6. PW1 Prabhakar is the panch witness for the spot panchanama and seizure of articles from the spot. He preferred not to support the case of the prosecution. Nothing could be elicited from his cross-examination by the learned A.P.P. He has only admitted his signature on the spot and seizure panchanama. The Investigating Officer Shri Vanjari could not be examined, as he was reported to be dead. The second panch

for the spot and seizure panchnama was also not examined. In such circumstances, the contents in the spot and seizure panchnama, though exhibited, could not be established and therefore the same could not have been read as an evidence. The learned trial court committed gross error in considering the contents in the spot panchnama and the seized articles while appreciating the evidence.

7. PW2 Vasanta is the Naib Tahsildar-cum-Executive Magistrate, who recorded the statement of the injured Ajay in the hospital in expectation of his death. On the basis of this statement, the First Information Report came to be registered. As the injured Ajay survived, his statement cannot be read as a dying declaration under Section 32(1) of the Indian Evidence Act and would be used only for the purpose of corroboration and contradiction. Surprisingly, the learned trial court considered this statement as a dying declaration under Section 32 (1) of the Evidence Act.

8. In this regard the Hon'ble Apex Court in the case of Gajula Surya Prakasarao Vs. State Of Andhra Pradesh reported

in (2010) 1 SCC 88 reiterated that when a person who has made a statement, may be in expectation of death, is not dead, it is not a dying declaration and is not admissible under Section 32 of the Evidence Act, however, is admissible under Section 157 of the Evidence Act as former statement made in order to corroborate his/her testimony in court.

9. PW3 Dr. Manjusha is the Medical Officer, who deposed about the admission of the injured Ajay in burn ward at the Government Hospital, Yavatmal, and that he had received 35% burn injuries. As per her advice, the dying declaration was recorded. The prosecution failed to bring on record a single medical paper with regard to the treatment given to the injured in the hospital, even though it is the case of the prosecution that the injured was admitted in the hospital for more than one month.

10. PW4 Deonand is the Police Inspector, who registered crime on the basis of the statement recorded by PW2 Vasanta – Naib Tahsildar-cum-Executive Magistrate. The further

investigation was completed by late PSI Shri Vanjari. His testimony is formal in nature.

11. PW5 Panchafulabai is the mother of the injured Ajay. She is not an eye-witness to the incident. She deposed that her husband and the injured Ajay were residing with her. The incident occurred at around 8:30 pm. At that time, the injured Ajay had come to the house. He was in a burnt condition. He told her that the appellants/accused burnt him. She had taken him to the District Hospital, Yavatmal, where he was admitted for one month and four days.

In her cross-examination, she has admitted that at the time of the incident, she was present in the house of her elder son Satyawar while in her chief she deposed that she was present in her house. She has also admitted that the injured Ajay was having habit of consuming liquor. She has admitted that a report was lodged against the injured Ajay alleging therein that he burnt the house of one Khobragade. She has also admitted that previously, one case was pending against the injured Ajay in the Sessions Court, Darwaha.

She states that she had given report of the incident to the Police Station and it was reduced into writing as per her say. However, as per prosecution, the FIR came to be registered on the basis of the statement recorded by the Executive Magistrate in the hospital on the next day of the incident. In this fact situation, the defence of the appellants that she lodged report at the police station for an attempt to suicide by her son Ajay assumes importance.

She further admitted that when the injured Ajay was being taken to the hospital at Yavatmal, at that time, her family members and one Manjulabai Khandare were present with her. However, the prosecution has failed to examine any of these witnesses.

She has also admitted that the accused Yuvraj (appellant No.3) had stood surety for the injured Ajay in one criminal case. This material fact is denied by the injured in his cross examination, which creates doubt in the testimonies of these witnesses.

12. PW6 Ajay is the injured witness. He deposed that

the appellants/ accused reside in front of his house. He had received invitation card of marriage of the daughter of accused Yuvraj. As he could not attend the marriage, the accused persons were abusing him. He further deposed that on 25/09/2002, at around 7:30-8:00 pm, he was present in his house. PW5 Panchafulabai – his mother had gone to his brother's house in hutment. The accused Bhimrao (dead) and Yuvraj abused him. At that time, accused Suresh (appellant No.2) came there. He asked to pull him out of the house. Thereafter, all the accused persons pulled him out of his house. The accused Bhimrao (dead) caught hold of him. The accused Yuvraj went to his house and brought a can of kerosene. He poured kerosene on his person. The accused Bhimrao (dead) burnt him by igniting a match stick. At that time, the accused Suresh was present there holding a stick. He received burnt injuries on his chest, hands, left side of face and back. He was wearing red coloured Baniyan and black full pant. He had gone to his brother's house in hutment. He told about the incident to his mother. His mother had taken him in hospital at Yavatmal in an auto-rickshaw.

In his cross-examination, he has denied that the prohibition cases and cases of assault are pending against him at Ner. However, he has admitted that in one case, which was filed on the report of one Madhao Khobragade, he got acquittal. He has also admitted that on 25/09/2002 i.e on the date of incident, he had come to Kolura after taking date in one case. He has denied that on the date of incident, he had consumed liquor in excess quantity. He has denied the case of attempt to suicide by him. He has admitted that Manjulabai Khandare was also present along with his mother, when he was taken to the hospital at Yavatmal. He has flatly denied that once, accused Yuvraj stood surety for him in one case. He has deposed that he studied up to 6<sup>th</sup> standard. He has stated that his mother had given report to the Police Station in respect of the incident. He has stated that the police recorded his statement after he got discharged from the hospital.

13. Now, the question for consideration before this Court is that how far the sole testimony of the injured witness Ajay is trustworthy?

14. Initially, the injured Ajay flatly denied that criminal cases are registered against him, however, he admitted that in one case, he got acquittal, and on the day of incident, he had taken date from the Court in one case. He flatly denied that the accused Yuvraj stood surety for him in one case, while his mother Panchafulabai (PW5) admitted that the accused Yuvraj stood surety for him. Apart from this, the record is absolutely silent with regard to delay of one day in lodging report. Moreover, in the statement recorded by PW2 Vasanta – Naib Tahsildar-cum-Executive Magistrate, he has stated that the persons in the locality extinguished fire and admitted him in the hospital. As against this, in his evidence before the Court, his testimony is silent as to who extinguished the fire, however, he has stated that his mother has taken him to the hospital at Yavatmal in an auto-rickshaw.

15. Moreover, PW5 Panchafulabai – his mother, has admitted that he was having a habit of consuming liquor. That one case was lodged against him for burning the house of one Khobragade, though in that case, he got acquittal, and

therefore, it appears very risky to rely on the sole testimony of the injured Ajay.

16. The learned trial court has erroneously considered the articles seized from the spot. In the absence of proof of contents in the seizure panchanama and the identification of those articles in the Court by the witnesses, the same could not have been considered in the evidence. The prosecution also failed to bring on record the medical papers of the injured Ajay, who was admitted in the hospital for more than a month. The record is also silent as to why the statement of the injured Ajay was recorded after his discharge from the hospital. In the statement recorded by the Naib Tahsildar-cum-Executive Magistrate, he had only said that these three accused persons pulled him from his house, and burnt him, however, in the evidence before the Court, his testimony is full of embellishment. In such circumstances, it is very difficult to rely on the sole testimony of the injured Ajay without any further corroboration.

17. Shri Wankhede, learned counsel for the appellants/accused, pointed out some omissions from the testimony of the injured Ajay. However, the said omissions could not be proved, as the Investigating Officer, who recorded the statement of the injured Ajay, was not examined, since he is reported to be dead. In this case, the non examination of the Investigation officer caused prejudice to the appellants. There was no opportunity for the defence to question the delay in registering of the crime and recording statement of the injured after one month of the incident. Furthermore, both the material witnesses of the prosecution PW-5 and PW-6 deposed that PW-5 lodged report at police station, however, the crime was not registered on her report. Record is absolutely silent on this aspect. In such circumstance, the defence of the appellants that the injured is in the habit of involving people in false cases and he is of criminal mentality, once he involved his own brother-in-law in a false case, appears probable.

18. Shri Wankhede, learned counsel for the appellants/accused, in support of his contention, relied on the judgment delivered by the Hon'ble Supreme Court in the case of

Joseph Vs. State of Kerala, reported in 2003 CRI. L.J. 813, wherein it is held that “it is permissible for a Court to record and sustain a conviction on the evidence of a solitary eye-witness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence”. It is further held that “when the prosecution case rests mainly on the sole testimony of an eye-witness, it should be wholly reliable”.

He further relied on the judgment delivered by this Court in the case of Narayan Kanu and ors. Vs. State of Maharashtra, reported in 1997 CRI. L.J. 1788, wherein it is held that *“It is no doubt correct that if a witness is injured, then his presence on the spot at the time and place of occurrence is prima facie established but for basing conviction solely on the evidence of an injured witness, is necessary that the injured witness must be held to be a wholly reliable witness. Wherein in a case there is the sole evidence of the injured witness against the accused and if it is shown that there is material infirmity and falsity in some part of his*

*evidence, then it will not be at all safe to convict the accused solely on the evidence of the injured witness relying upon the eye-witness's account given by him without independent corroboration by material evidence”.*

Lastly, he relied on the judgment delivered by the Punjab and Haryana High Court in the case of **Central Bureau of Investigation Vs. Bibi Jagir Kaur and Ors.**, reported in **2019 CRI. L.J. 452**, wherein it is held that *“It is significant to note that the prosecution never examined these two material witnesses who were in fact, the persons who could have unfolded the truth before the Court. The prosecution has given no explanation as to why these two witnesses were withheld from the Court. We also do not find any explanation on record anywhere. In our opinion, examination of both these witnesses to find out the truth before the Court was essential and the prosecution was not at all justified in withholding the witnesses. It is different matter as to whether they would have supported the prosecution case or not, but then the CBI should have left it to the Court rather than withholding these witnesses. We have, therefore, no hesitation in drawing*

*adverse inference against the prosecution”.*

19. In the instant case, Manjulabai Khandare, who was allegedly present at the relevant time was not examined. She could have thrown light on the case of the prosecution

20. Considering the nature of evidence brought on record, the submission of the learned A.P.P. that the prosecution could prove its case, against the appellants/ accused, beyond reasonable doubt through PW5 Panchafulabai and PW6 Ajay, cannot be accepted. Furthermore, the incriminating articles – kerosene can and matchbox, have not been brought on record by the prosecution.

21. In such circumstances, this Court is of the opinion that the trial Court committed a grave error in considering the spot panchanama and dying declaration on record, as the substantive evidence. The trial Court also lost sight of the major inconsistencies and the material admissions given by the material witnesses, i.e., PW5 Panchafulabai and PW6 Ajay.

22. Given the aforesaid facts and circumstances of the case, this Court is of the opinion that the prosecution has failed to prove its case beyond reasonable doubt, and therefore, the appellants/ accused are entitled for benefit of doubt. Hence, the following order :

**ORDER**

1. The Criminal Appeal is allowed.
2. The judgment and order dated 11/09/2008 passed by the Additional Sessions Judge, Darwha in Sessions Trial No. 172/2004, is quashed and set aside.
3. The appellants stand acquitted of the offence punishable under Section 307 read with Section 34 of the IPC. They are on bail. Their bail bonds stand cancelled. Sureties stand discharged.
4. Fine, if paid, be refunded as per Rules.
5. The muddemal properties, if any, be destroyed, being worthless.

**JUDGE**

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