

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.302 OF 2018

1. Navnath s/o. Raghunath Pathare,
Age : 34 years, Occ. Agri.,
2. Kalyan s/o. Rajendra Pathare,
Age : 32 years, Occ. Agri.,
3. Madan s/o. Raghunath Pathare,
Age : 33 years, Occ. Agri.,
4. Rajendra s/o. Vishwanath Pathare
Age : 56 years, Occ. Agri.,

All r/o. Banpimpri, Tq. Shrigonda,
Dist. Ahmednagar

..Appellants

Vs.

The State of Maharashtra

..Respondent

Mr.N.B.Narwade, Advocate for appellants
Mr.S.P.Sonpavale, APP for respondent

**CORAM : R.G. AVACHAT, J.
RESERVED ON : APRIL 22, 2022
PRONOUNCED ON : APRIL 28, 2022**

JUDGMENT :-

The challenge in this appeal is to the judgment of conviction and order of sentence dated 29.03.2018 in Sessions Case No.282 of 2012. Vide the impugned judgment and order, the

appellants herein have been convicted for the offence punishable under Section 307 read with Section 34 of Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs.25,000/-, in default, to suffer rigorous imprisonment for six months.

Appellant no.2 (original accused no.2) has also been convicted for the offence punishable under Section 326 of Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.10,000/-, in default, to suffer rigorous imprisonment for two months

2. The facts, giving rise to the present appeal, are as follows:-

PW 1 – Kalidas was resident of village Banpimpili, Tq. Shrigonda. He was professional auto rickshaw driver. He returned home with his auto rickshaw by 7.30 pm. On 22.05.2022. Then, he had been to a temple in the village for darshan. PW 2 – Satish had been to the house of PW 1 – Kalidas 2-3 times. Both PW 1 – Satish and PW 2 – Satish are cousin *inter-se*. Again by little past 10.30 p.m., PW 2 – Satish came home of PW 1 – Kalidas.

The appellants herein came together in the front yard of the house of PW 1 - Kalidas. Appellant no.1 - Navnath and appellant no.3 - Madan were armed with swords. Appellant no.2 - Kalyan had with him iron rod and appellant no.4 - Rajendra was armed with wooden log. All of them took up a quarrel with Satish on account of previous enmity between them. The appellants questioned him whether he had come to the house of PW 1 - Kalidas with a view to beat them up. Both appellants - Navnath and Madan assaulted Satish on his face and leg with swords. Rajendra beat him up with wooden log. PW 1 - Kalidas intervened to save Satish. Kalyan, thereupon, assaulted Kalidas with iron rod on his left elbow. On hearing hue and cry, Sunita (PW 3), wife of Kalidas came. The appellants thereupon fled. Both Kalidas and Satish were first rushed to Civil Hospital, Ahmednagar. Both of them took discharge against medical advice. Kalidas was admitted to Anand Rushiji Hospital at Ahmednagar. Satish was shifted to Sancheti Hospital at Pune. Kalidas lodged FIR (Exh.59) on 24.05.2012.

3. Crime came to be investigated. Statements of the persons acquainted with the facts and circumstances of the case were recorded. The medical papers of both the injured were

obtained. The appellants, thus, came to be proceeded against by filing charge sheet.

4. Learned Addl. Sessions Judge framed charge. The appellants pleaded not guilty. They claimed to have been falsely implicated in view of the previous enmity. The prosecution examined five witnesses and placed on record various documents to establish the charge. Learned Addl. Sessions Judge, on appreciation of the evidence, convicted and sentenced the appellants, as stated above.

5. Learned counsel for the appellants made submissions, initially, for allowing the appeal in toto. On appreciation of the evidence in the case, when this Court expressed disinclination to allow the appeal in toto, learned counsel came around to submit that the evidence on record fell short to make out it to be an offence of attempt to commit murder. According to him, the crime, at the most, may be punishable under Section 326 of Indian Penal Code. He would further submit that the sentence of imprisonment of ten years is grossly disproportionate. He, therefore, urged for reducing the sentence to the period already undergone.

6. Learned APP would, on the other hand, submit that the evidence on record establishes offence of attempt to commit murder. A lower limb of PW 2 – Satish had to be amputated. He would have died but for the timely medical treatment. Learned APP would, ultimately, urge for dismissal of the appeal.

7. Considered the submissions advanced. Perused the evidence on record.

8. Both the injured namely, PW 1 – Kalidas and PW 2 – Satish, gave evidence consistent with each other. It is in their evidence that by 10.30 p.m. on 22.05.2012, the appellants had come together in the front yard of the house of PW 1-Kalidas. Appellant no.1 – Navnath and appellant no.3 – Madan were armed with swords. Appellant no.2 – Kalyan had with him iron rod and appellant no.4 - Rajendra was armed with wooden log. All of them picked up a quarrel with Satish on account of previous enmity between them. The appellants questioned him whether he had come to the house of PW 1 – Kalidas with a view to beat them up. Both appellants - Navnath and Madan assaulted Satish on his face and leg with sword. Rajendra beat him up with wooden log. PW 1

– Kalidas intervened to save Satish. Kalyan, thereupon, assaulted Kalidas with iron rod on his left elbow.

9. The evidence of both the witnesses has been corroborated by the evidence of PW 3 – Sunita, wife of informant – Kalidas(PW 1). Their evidence has further been reinforced by PW 4 – Dr.Ashok and PW 6 – Dr.Atul.

10. It is in the evidence of PW 4 – Dr.Ashok that he was Casualty Medical Officer at Civil Hospital, Ahmednagar. On that day, he examined PW 1 – Kalidas and PW 2 – Satish. On examination of PW 1 – Kalidas, this witness found compound fracture to his left humerus. On examination of PW 2 – Satish, he found following injuries his person:-

- (1) Crushed right leg below knee, all tendons and vessels are exposed;
- (2) Fracture of left tibia and fibula, upper 3rd portion;
- (3) Incised wound on left cheek ad-measuring 3x1x½ inches;
- (4) Incised wound near left eye ad-measuring 2x1x1 inches;
- (5) Incised wound near right eye ad-measuring 2x½x½ inches;

- (6) Linear incised wound on abdomen at epigastric region, 5 inches, in length.

The medico-legal certificates in respect of PW 1 – Kalidas and PW 2 – Satish are at Exhibit-73 and Exhibit-74, respectively. According to him, the injuries suffered by both of them were grievous in nature. It is further in his evidence that the injuries suffered by PW 2- Satish were collectively sufficient, in the ordinary course of nature, to cause death.

11. The evidence of PW 6 – Dr. Atul indicates that he had examined PW 2 - Satish in Sancheti Hospital, Pune, on 23.05.2012. He found following injuries on his person:-

- (1) Right IIIrd compound fracture upper 3rd tibia and fibula with left upper 3rd Grade II compound fracture with bye-lateral humerus shaft fracture with right middle middle 3rd radius ulna fracture;
- (2) Left first metacarpal fracture.

Based on the evidence, the injury certificate (Exh.82) came to be admitted in evidence. It is further in his evidence that the right leg of Satish had to be amputated above knee. According to him, the injuries suffered by Satish were possible by a weapon like sword, iron rod or wooden log.

12. No x-ray film of the injury suffered by PW 1 – Kalidas was tendered in evidence. He (Kalidas) was confronted with his affidavit (Exh.60). He admitted to have had named Shivaji Jagtap and Sachin Wable as assailants along with the appellants herein in the FIR. He gave clean breast to state to have named them in the FIR falsely in view of previous enmity with them. It appears that based on his such affidavit, those two persons were not charge-sheeted by the Investigating Officer. PW 2 – Satish admitted to have been an accused along with the then M.L.A. in the offence punishable under Section 302 of Indian Penal Code. He has also admitted to have been an accused in 6-7 serious cases for the offences under Sections 326 and 307 of Indian Penal Code. Be that as it may.

13. An offence of attempt to commit murder can be made out on the basis of the nature of weapons used and part of body assaulted with. PW 6 – Dr. Atul had noticed only two grievous injuries on the person of Satish, who was, allegedly, attempted to be murdered. Both of these injuries were on his lower limb. True, there was C.L.W. near eye brow and head. Had the appellants really intended to commit murder of Satish, one or two sword blows on the

head of Satish, would have been sufficient to translate their intention into accomplishment. No doubt, Satish was brutally assaulted.

14. It is reiterated that had the appellants really intended to finish off Satish, the assaults would have been on the head, face or chest. In view of this Court, the nature of injuries suffered by Satish and the manner and nature of the assault, suggest that it was not attempt on the life of Satish. This Court is not, therefore, at one with the findings recorded by the trial Court for convicting the appellants for the offence under Section 307 of Indian Penal Code. The injuries suffered by both Kalidas and Satish and the manner of the assault do indicate it to be an offence punishable under Section 326 read with Section 34 of Indian Penal Code.

15. The Apex Court in the case of **Dilip Singh and ors. Vs. The State of Punjab, AIR 1953 SC 364** has observed thus:-

“40.In cases where the facts are more fully known and it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment. It is an equally sound exercise of judicial discretion to refrain from sentencing all to death when it is evident that some would not have been if the facts had been more fully known and it had been possible to determine, for example, who hit on the head or who only on a thumb or an ankle; and when there are no

means of determining who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in all the cases. We make it plain that a Judge is not bound to do so, for he has as much right to exercise his discretion one way as the other.
.....”

In the case in hand, the appellants – Kalyan and Rajendra have wielded iron rod and wooden stick, respectively. The injuries, which are serious in nature, suffered by Satish appear to have been caused with swords. It is reiterated that the informant – Kalidas (PW 1) had, admittedly, falsely named Shivaji Jagtap and Sachin Wable in the FIR as assailants. This Court is, therefore, inclined to discriminate the appellants herein over the quantum of sentence.

It appears that appellant no.2 - Kalyan has been behind the bars for little over 4 years and 11 months and appellant no.4 – Rajendra has been behind the bars for little over 4 years.

16. In view of the above, the appeal partly succeeds. Hence, the following order:-

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and order dated 29.03.2018, passed by learned Addl. Sessions Judge, Ahmednagar, in Sessions Case No.282 of 2012, convicting and sentencing the appellants for the offence punishable

under Section 307 of the Indian Penal Code is hereby set aside. Instead, the appellants are convicted for the offence punishable under Section 326 of the Indian Penal Code.

- (iii) For the offence punishable under Section 326 of Indian Penal Code, appellant no.1 – Navnath and appellant no.3 – Madan are sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.25,000/- each. In default of payment of fine, they are directed to suffer simple imprisonment for one month.
- (iv) For the offence punishable under Section 326 of Indian Penal Code, appellant no.2 – Kalyan and appellant no.4 – Rajendra are sentenced to suffer rigorous imprisonment for the period already undergone by them. They are directed to pay a fine of Rs.25,000/- each. In default of payment of fine, they shall suffer simple imprisonment for one month.
- (v) The impugned judgment and order further convicting appellant no.2 – Kalyan (original accused no.2) for the offence punishable under Section 326 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for three years and to pay a fine of Rs.10,000/-, is maintained. In default of payment of fine, he shall undergo simple imprisonment for one month.

- (vi) The direction in the impugned judgment and order that the substantive sentence of appellant no.2 – Kalyan shall run concurrently, to stand unaltered.
- (vii) Appellant no.2 – Kalyan and appellant no.4 – Rajendra be released forthwith, if not required in any other case.

[R.G. AVACHAT, J.]

KBP