

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 384 OF 2021

1. Nikhil Kushkumar Indi
2. Kunal Kushkumar Indi ..Appellants

Versus

The State of Maharashtra ..Respondent

**WITH
INTERIM APPLICATION NO. 2055 OF 2022
IN
CRIMINAL APPEAL NO. 384 OF 2021**

Nikhil Kushkumar Indi ..Applicant
Versus
The State of Maharashtra ..Respondent.

Mr. Kunal Patil a/w. Prashant P. Raul for Appellants.
Smt. J. S. Lohokare, APP for State/Respondent.

**CORAM : SARANG V. KOTWAL, J.
DATE : 8th SEPTEMBER 2022**

JUDGMENT :

1. The Appellants were the original accused Nos.1 and 2 in Sessions Case No.102 of 2013 before the learned Additional Sessions Judge, Kolhapur. Learned trial Judge vide his Judgment and order dated 26/02/2021 convicted and sentenced the

Appellants as follows:

- i) The Appellant No.1 was convicted for commission of offence punishable U/s.307 of I.P.C. and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer S.I. for one month.
- ii) Both the Appellants were convicted for commission of offence punishable U/s.323 of IPC and were sentenced to suffer R.I. for 3 months each and to pay a fine of Rs.500/- each and in default of payment of fine to suffer S.I. for 15 days each.
- iii) The Appellant No.1 was convicted for commission of offence punishable U/s.506 of I.P.C. and was sentenced to suffer R.I. for three years and to pay a fine of Rs.1000/- and in default of payment of fine to suffer S.I. for three weeks.
- iv) The Appellant No.1 was acquitted from the

charges of commission of offence punishable
U/s.504 of I.P.C.

v) The Appellant No.2 was acquitted from the
Charges of commission of offences punishable
under sections 307, 504 and 506 of I.P.C.

All the sentences were directed to run concurrently.
Both the Appellants were given set off U/s.428 of Cr.p.c.

The original accused No.3 who was mother of
Appellant Nos.1 and 2 was acquitted from the Charges of
commission of offences punishable U/s.307, 323, 504 and 506 of
I.P.C.

2. The prosecution case is that the Appellants were
brothers. They were residing near the house of Vikas Sutar. The
Accused No.3 was in touch with Vikas Sutar. The Appellants
suspected that Vikas was keeping illicit relations with their
mother/accused No.3. On many occasions they had warned Vikas
for staying away from their mother. However, they still entertained
suspicion against Vikas.

3. On 08/03/2013, at around 6.30p.m., in front of a hotel in Ganesh chowk at Kolhapur the Appellant No.1 assaulted Vikas with scythe. The Appellant No.2 gave a blow with stone on Vikas's head. When Vikas's father Suresh tried to intervene, he was also assaulted. Vikas and Suresh were injured. They were taken to C.P.R. Hospital. Suresh's statement was recorded and C.R.No.22 of 2013 was registered at Gandhi Nagar police station. The investigation was carried out. The Appellants were arrested on 09/03/2013 at about 7.45p.m. Their clothes were seized. During investigation, spot panchanama was conducted. The clothes of the injured were seized. At that instance of the Appellant No.1 scythe was recovered. The articles were sent for chemical analysis. After conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions. The C.A. reports were also produced on record. The C.A. reports show presence of blood of blood group 'B' on the clothes of both the appellants, as well as, on the clothes of both injured. The same blood of same blood group was also found at the spot and also on the weapon which was recovered at the instance of the Appellant No.1.

4. During trial, the prosecution examined 12 witnesses. The important witnesses were both the injured Suresh and Vikas. Other witnesses were Suresh's wife Sangeeta, the Medical Officer who had examined the injured on that day, the panchas for different panchanamas, some alleged eye witnesses from the locality and the Investigating Officer. The panchas and the independent eye witnesses turned hostile and did not support the prosecution case.

5. The specific defence of the Appellant No.1 was that, Vikas was addicted to liquor. He was creating nuisance in the area. He was harassing the women and others in that area and, therefore, there was dispute between Vikas and the residents of the locality. On the day of incident, when the Appellant No.1 was returning home from his work, he saw that there was a scuffle between Vikas and his father on one hand and the residents of the locality on the other. He saw that Vikas had fallen down on the road. Vikas saw the Appellant No.1 and abused him with reference to his mother. After that the Appellant No.1 went home. Then he came to know that a false case was lodged against him.

6. The defence of the Appellant No.2 is that, he had gone to attend his work. He came to know that, since Vikas was troubling the women and children in the locality, the residents assaulted him and caused injuries to him.

7. After recording the evidence and statements of these appellants and after hearing the parties, the learned trial Judge convicted and sentenced the Appellants, as mentioned earlier. He also recorded the order of acquittal for accused No.3 and also for accused No.2 from commission of offence punishable U/s.307 of I.P.C. The Appellant No.1 alone was held responsible for commission of offence punishable U/s.307 of I.P.C. Learned trial Judge believed the depositions of PW-1 Suresh, PW-2 Sangeeta and PW-4 Vikas. Suresh and Vikas were the injured witnesses.

8. The prosecution case depends on the evidence of two injured eye witnesses. PW-2 Suresh was one of them. He had lodged the F.I.R. He has deposed that, he knew the accused. They were residing behind his house. He identified all the accused in the Court. On 08/03/2013, at about 7.00p.m. he was going to a

medical shop for buying medicines. He had reached Ganesh Chowk in front of a hotel. He saw that a quarrel was going on between Vikas on one side and both the Appellants on the other. The Appellant No.1 told Vikas that, in the past, on many occasions he was told to stay away from the Appellant No.1's mother, but Vikas still continued to contact his mother. After saying this, the Appellant No.1 abused Vikas and told him that he would not leave Vikas. The Appellant No.1 then inflicted a blow of scythe on the head, back and left arm of Vikas. Because of this assault, Vikas sustained bleeding injuries. The Appellant No.2 gave a blow of stone on Vikas's head. The Accused No.3 abused them and she instigated both the Appellants to kill Vikas. PW-1 then went to help Vikas. The Appellant No.1 gave a blow of scythe on his back and left upper arm. PW-1 and Vikas then shouted for help. Other people gathered there. They rescued Vikas and Suresh. Vikas had sustained grievous head injury and had become unconscious. They were taken to C.P.R. Hospital. In the hospital, PW-1 gave his statement. The F.I.R. was registered. It is produced on record at Exhibit 29.

In the cross-examination, he admitted that, there were other houses near his house. On that particular day, Vikas had not attended his work. PW-1 did not have prescription for the medicine which he intended to buy. PW-1 admitted that, Vikas was addicted to liquor. He also admitted that, from the people in the locality he came to know that there were illicit relations between Vikas and Appellants' mother. He admitted that, he himself was having grudge against the accused No.3/Appellants' mother because of these illicit relations. There used to frequent quarrels between the Appellants and Vikas. The reason for these quarrels was the same illicit relations. He admitted in the cross-examination that, there was crowd at the time of incident. The spot of incident was 20 ft. away from a hotel. The incident went on for 15 to 20 minutes. The Appellants did not scuffle with others who came to save PW-1 and Vikas. This quarrel was going on between Vikas and the Appellants on the ground of illicit relations between Vikas and the Appellants' mother. He denied the suggestion that, Vikas uttered objectionable words against the Appellant's mother and that, he used criminal force against the Appellant No.1. He deposed that, at least 30 to

40 persons had gathered at the spot. He denied the suggestion that, because of Vikas's obscene utterance the crowd assaulted Vikas. He could not tell the names of the persons who rescued them and took them to hospital.

9. PW-4 Vikas is an important witness. He was the main target according to the prosecution case. He has deposed that, he knew all the accused. He admitted that, he was having illicit relations with the Appellant's mother since past three years before the incident. Both the Appellants did not like it and they used to threaten him. He has stated that, he had severed relations with the Appellant's mother.

10. On 08/03/2013, at about 6.30p.m. he had reached Ganesh chowk in front of the hotel of Mujawar. At that time, the Appellant No.1 came there and started abusing him on the ground that Vikas still continued to have relations with the Appellant's mother. Vikas denied those allegations. The Appellant No.1 continued abusing him. In the meantime, PW-1 came there. He was trying to pacify both the parties. At that time, the Appellant

No.1 removed *Koyta* and gave a blow on PW-4's head, left hand and on back. The Appellant No.2 came there running and gave a blow of stone on his head. PW-1 was also assaulted by the Appellant No.1 with *Koyta* on his arm and on his back. The accused No.3 came at the spot and instigated both the appellants to kill PW-1 and PW-4. The Appellant No.1 assaulted PW-1 and 4 with kicks and fist blows. The PW-4 then became unconscious.

In the cross-examination, he admitted that, there were many shops near the hotel of Mujawar. PW-1 and PW-4 were carpenters. One year prior to the incident the officers of Gandhi Nagar police station had warned PW-4 and accused No.3 Madhavi regarding their relations. This was done at the behest of Vikas's own family. He admitted that, he was addicted to liquor since 5 to 6 years. He also admitted that, there was crowd of people and traffic on the road. He denied the suggestion that, when the Appellant No.1 was passing from the road, PW-4 himself started abusing him and because of that the crowd had assaulted PW-4. He denied that he left the hospital on his own. He had good relations with the shop owners near the spot of incident.

11. The evidence of this injured witness is corroborative with PW-2 Sangeeta who was the wife of PW-1 Suresh. She has also deposed about the relations between accused No.3 - mother of the Appellants and Vikas - PW-4. At the time of incident, she was passing from that area and she saw that the scuffle was going on between PW-1 and PW-4 on one hand and the Appellants on the other. She then described the incident in the same manner as is described by PW-1 and 4. The PW-2 herself had shown the spot of incident to the police, when PW-1 and 4 were admitted in the hospital.

In the cross-examination, she stated that, both the injured were admitted to the hospital at 8.30p.m. to 9.00p.m. Many people had gathered at the spot of incident. They were from the same locality. Dhiraj Nikam, Dattatray Toraskar and others had taken the injured to the hospital. PW-2's family had good relations with all these people. She herself was told about the quarrel by one Vikas Jadhav. When she reached the spot, Vikas-PW-4 had already fallen down on the ground in a pool of blood and her husband was asking for water. She admitted that, Vikas was

addicted to liquor. She denied the suggestion that the people gathered at the spot assaulted Vikas.

12. PW-3 Dhiraj Nikam, PW-5 Shoukat Mujawar and PW-6 Shahida Mujawar were examined by the prosecution, but they did not support the prosecution case. They were declared hostile and were cross-examined. They denied their statements given to the police; wherein, they had allegedly described the incident. They also denied their statements recorded U/s.164 of Cr.p.c. The prosecution examined only the police officer to prove their contrary depositions from their police statements, however, contradictions from their statements recorded U/s.164 of Cr.p.c. were not proved. Out of them, PW-Shoukat Mujawar was the hotel owner. The spot of incident was in front of his hotel. PW-6 Shahida Mujawar was his wife. PW-3 Dhiraj had taken the injured to the hospital. All these witnesses were important, but they have not supported the prosecution case.

13. PW-8 Dr. Asif Liyakat Mulla was another such witness who had turned hostile. He had Dispensary in the same area. The

prosecution wanted to show that he had witnessed the incident, but even he had not supported the prosecution case.

14. PW-7 Deepak Shinde was a pancha in whose presence allegedly scythe was recovered at the instance of Appellant No.1. He had turned hostile. The prosecution case is that the scythe was recovered at the instance of Appellant No.1 He had concealed the weapon at Rajarampuri, Kolhapur in a heap of bamboo. The evidence regarding recovery was given by the investigating officer. The memorandum panchanama was produced on record at Exhibit 61.

15. PW-9 Sambhaji Suryavanshi was a pancha in whose presence the clothes of the injured were produced and seized, however, he had turned hostile.

16. PW-10 Sachin Lokhande was a pancha in whose presence the spot panchanama was conducted and the blood mixed earth was collected from the spot. He had also turned hostile.

17. PW-12 Vilas Supe, P.I. attached to Gandhi Nagar police

station was the investigating officer. All the panchanamas, execution of which was denied by the panchas, were proved through his evidence. He has deposed about the investigation carried out in this case, including arrest of the Appellants, seizure of the clothes and recovery of the weapon. He had sent the articles for chemical analysis and had produced the C.A. reports on record.

18. The only other important witness in this case is Dr. Zahir Patvekar who was examined as PW-11. He had examined both the injured at around 8.45p.m.

Vikas had suffered following injuries, according to him.

- i) Incised (penetrating) wound on right posterior chest, admeasuring 4cm x 2cm x 1cm. Nature of the injury was grievous and age of the injury was within 6 hours.
- ii) Incised wound on left lumbar region back side. Size 10cm x 5cm x 2cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- iii) Incised wound over right parietal region. Size 3cm x 1cm x 0.5cm. Nature of the injury was simple and Age of the injury was within 6 hours.

- iv) Incised wound over left side of face over Zygomatic region later to left outer canthus of eye. Size 2cm x 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- v) Incised wound over left arm above elbow back side. Size 2cm x 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- vi) Incised wound over left arm back side over ticeps region. Size 5cm x 2cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.

Vikas was referred to surgery department. Intercostal drain was put. He was under treatment for three days and then he was absconded on 11/03/2013. According to PW-11 all the injuries i.e. Injury Nos.1 to 6 were possible by the weapon article 14 - scythe.

The other injured Suresh had suffered following injuries:

- i) Incised wound over left back side of chest,

admeasuring 3cm x 2cm x 1cm. Nature of the injury was simple and age of the injury was within 6 hours.

- ii) Incised wound over left arm just above elbow. Size 6cm x 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- iii) Abrasion over left side of abdomen. Size 5cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- iv) Abrasion over both knees. Size 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- v) Abrasion over back side of right elbow. Size 5cm x 2cm x 2cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- vi) Abrasion over left side of chest. Size 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- vii) Abrasion over just above left eye. Size 1cm x 1cm. Nature of the injury was simple and Age of the injury was within 6 hours.
- viii) Multiple abrasions on back. Size largest 5cm x

5cm. Nature of the injury was simple and Age of the injury was within 6 hours.

In the Cross-examination, he admitted that both the injured were able to speak with him but they did not mention any history of assault. He admitted that, the injury Nos.3 to 8 suffered by Suresh were possible if a person fell on the ground in the scuffle.

19. Learned counsel for the appellants submitted that the prosecution has not examined any independent witness to support their case. The witnesses PW-3, PW-5, PW-6 and PW-8 have turned hostile. The injured had admitted that, there was a crowd of people and many people had gathered; yet there is no independent witness in support of the prosecution case. Even PW-2's evidence cannot be used for corroboration purpose because she had admitted that, when she reached the spot, Vikas was already lying in the pool of blood. First of all, this is highly exaggerated version and it is impossible that she could have seen the incident. The persons who had brought the injured to the hospital were not examined. The entry which is produced on record at Exhibit 69

shows that the injured were admitted to the hospital by one Savil Lohar who is son in law of the PW-1 and the PW-1 has denied his presence. Learned counsel submitted that, there was motive for the prosecution witnesses to implicate both the appellants falsely. There is no reference as to from where the weapon was brought by the Appellant No.1. There was no premeditation and even as per the prosecution case, the scuffle had occurred at the spur of moment.

20. Learned counsel submitted that, at the time of incident the Appellant No.1 was only 20 years of age. He further submitted that, even as per the prosecution case, the Appellants' mother was harassed by the PW-4 and, therefore, this factor may be taken into consideration.

21. Learned APP submitted that, there was a definite motive for the Appellants to commit this offence. The PW-1, PW-2 and PW-4 are the truthful witnesses; they corroborated each other. The Appellant No.1 in his statement recorded U/s.313 of Cr.p.c. has admitted his own presence at the spot. The blood found on the

clothes of both the appellants is incriminating. The Appellant No.2 has denied his own presence at the spot; yet he could not explain as to how the blood of 'B' group came on his clothes. His own blood group was 'O'. The recovery of weapon has presence of blood of 'B' group and it is an incriminating circumstance.

22. I have considered these submissions. In this case the prosecution has relied on the evidence of PW-1, 2 and 4. The PW-4 was the injured eye witness who had suffered one grievous injury. The PW-2 had also suffered few injuries in the nature of abrasions. This establishes their own presence at the spot at the same time. Therefore, since their evidence corroborates each other on material particulars, it has to be held that, there is hardly any inconsistency in their evidence. Apart from these two injured eye witnesses, there is PW-2 who is related to both of them. She has narrated the incident. She had shown the spot of incident, as well. On close scrutiny of evidence of PW-1, 2 and 4 I do not find any infirmity or inconsistency in their depositions. All these witnesses have in fact admitted illicit relations between the Appellant's mother and PW-4 – Vikas. Their answers are truthful. The defence of the Appellant

that because of the nuisance caused by Vikas the crowd assaulted him can hardly be believable. There was no reason for the injured PW-1 and 4 to have implicated the Appellants falsely. The F.I.R. is lodged immediately once the injured were removed to the hospital. Apart from this direct ocular evidence, the corroborative piece of evidence in the form of recovery of weapon, seizure of clothes and presence of blood of 'B' group on all these articles, as well as, from the earth seized from the spot are also strong, incriminating and supporting circumstances. The injured have described the incident in detail. The Appellant No.1 is attributed a specific role and a specific weapon consistently. Their ocular evidence is supported by the medical evidence. Thus, it can safely be held that the incident as described by the PW-1, 2 and 4 had taken place and the injuries were caused by these appellants. The Appellant No.2 is convicted only U/s.323 of the I.P.C. According to the prosecution case, he had participated in the assault and had assaulted both the injured with kicks and fist blows when they had fallen down. So far as, assaulting Vikas on his head with a stone is concerned, that is not sufficiently proved by the prosecution

against the Appellant No.2 because there is only one head injury to Vikas and the medical officer had opined that the said injury was caused by a sharp weapon. According to both these witnesses, the Appellant No.1 had also given a blow with scythe on the head of Vikas, therefore, Appellant No.2 is held responsible for commission of offence punishable U/s.323 of I.P.C. only. The finding and sentence by the learned trial Judge in that behalf is correct and, therefore, it need not be interfered with.

23. As far as, Appellant No.1 is concerned, it is necessary to examine whether he has committed an offence punishable U/s.307 of I.P.C. or whether that offence would fall within the meaning of 'lesser offence'. To consider this issue, it is necessary to refer to the evidence of PW-1, 2 and 4. All of them have stated that, because of the previous enmity and illicit relations between Vikas – PW-4 and the Appellants' mother, the Appellant No.1 confronted Vikas at the time of incident. Initially, there was a quarrel. The Appellant No.1 abused him and then he removed the scythe and assaulted Vikas. The Appellant No.1 was annoyed with Vikas because of those illicit relations. He was carrying a weapon. Significantly, in spite of that,

only one grievous injury is caused to Vikas. Vikas had suffered six injuries. All of them were attributed to the Appellant No.1. All those injuries were caused by the scythe which the Appellant No.1 had used. Except the injury No.1 which was an incised wound on right posterior chest and which was described as grievous injury, all other injuries were on non vital parts and they were specifically described as simple injuries. Those injuries were on back, on face, on left arm and on triceps. The injury to head was also described as simple injury and it's size was minor. None of these injuries was endangering life. The doctor had opined that the injury No.1 only was a grievous injury and during treatment intercostal drain was put. Thus, from the evidence, it is clear that Vikas was unarmed and helpless in front of the Appellant No.1. In spite of that the Appellant No.1 has caused only one grievous injury. He had all the opportunity to cause more grievous injuries on vital parts. Vikas was at his mercy. The incident went on for 15 to 20 minutes and nobody had intervened in that period and yet the Appellant No.1 had not inflicted serious blows on any other vital parts of the body. The Appellant No.1 could have easily caused more harm, if he

intended to commit murder of the injured Vikas. To that extent I am inclined to grant benefit of doubt to the Appellant No.1. The prosecution has not proved the ingredients of Section 307 of I.P.C. At the highest, the Appellant No.1 can be said to have committed an offence punishable U/s.326 of I.P.C.

24. So far as other injured Suresh is concerned, all the injuries were described as simple in nature. The injuries No. 3 to 8 were in the nature of abrasions and they were not caused by any weapon. Two injuries caused by a sharp weapon were on the back and left arm. They were also simple in nature. Therefore, even for those injuries, the Appellant No.1 cannot be said to have committed an offence U/s.307 of I.P.C. With the result, the conviction of the Appellant No.1 needs to be converted from that under Section 307 of I.P.C. to that U/s.326 of I.P.C.

25. I have heard the parties in respect of the sentence. Learned counsel submitted that the Appellant No.1 was 20 years of age at the time of incident. There are no allegations that during entire trial when he was on bail he had committed any other

offence. He had left the place and he is residing in some other area. There was no possibility of any further dispute between the parties. Even as per the prosecution case, the cause of the incident was because of illicit relations between the injured Vikas and the Appellant No.1's mother. The Appellant No.1 has two small daughters and, therefore, some leniency be shown to him.

26. Learned APP submitted that, considering these submissions by learned counsel for the Appellant No.1, sentence of three years would serve the purpose. Considering these submissions, I agree with the learned APP and in this particular case, sentence of three years Rigorous Imprisonment would meet the ends of justice.

27. Hence, the order:

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant No.2 Kunal Kushkumar Indi U/s.323 of the I.P.C. and the sentence imposed on him to undergo R.I. for three months and to pay a fine of Rs.500/- and in

default of payment of fine to suffer S.I. for 15 days is maintained.

- iii) The Appellant No.1 Nikhil Kushkumar Indi is acquitted from the Charges of commission of offence punishable U/s.307 of I.P.C. and consequently the sentence imposed on him for that offence of 5 years Rigorous Imprisonment with payment of fine of Rs.2000/- is also set aside.
- iv) Instead, the Appellant No.1 is convicted for commission of offence punishable U/s.326 of I.P.C. and he is sentenced to suffer Rigorous Imprisonment for Three years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer Simple Imprisonment for one month.
- v) The conviction and sentence U/s.323 of I.P.C. recorded against the Appellant No.1 is maintained. Consequently, his sentence to suffer

R.I. for three months and to pay a fine of Rs.500/- and in default of payment of fine to suffer S.I. for 15 days for commission of offence punishable U/s.323 of I.P.C. is maintained.

- vi) Substantive sentences against the Appellant No.1 are directed to run concurrently.
- vii) Both the Appellants are given set off U/s.428 of Cr.p.c.
- viii) With these observations, the Appeal is disposed of.
- ix) With disposal of main Appeal, nothing survives in the connected application and it is also disposed of.

(SARANG V. KOTWAL, J.)