

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

CRIMINAL APPEAL NO.472 OF 2022

1. Rafiqe Umar Shaikh
Age : 39 years, Occ.: Nil
2. Firoz Gulam Husen Shaikh
Age : 43 years, Occ.: Service
3. Afjal Umar Shaikh
Age : 43 years, Occ.: Service
4. Muddasar @ Sonu Sabir Khan
Age : 41 years, Occ.: Service
5. Munavar @ Monu Sabir Khan
Age : 40 years, Occ.: Service
6. Saddam Umar Shaikh
Age : 39 years, Occ.: Service

All r/o Dias Plot Zopadpatti, Pune
(At present Yerwada Central Jail, Pune) Appellants

versus

The State of Maharashtra Respondent

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- Mr. Sachin H. Deokar, Advocate for Appellants.
- Mr. P. H. Gaikwad, APP for the State/Respondent.

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CORAM : SARANG V. KOTWAL, J.
DATE : 16th SEPTEMBER, 2022

JUDGMENT :

1. This Appeal is preferred by the Appellants challenging the Judgment and Order dated 21/04/2022 passed by the Sessions Judge, Pune, in Session Case No.198 of 2012. The Appellant Nos.1 to 6 were the Original Accused Nos.1 to 6 in the trial Court. They were convicted and sentenced as follows ;

- (i) They were convicted for offence punishable u/s 143 of the Indian Penal Code and were sentenced to suffer simple imprisonment for one month and to pay a fine of Rs.300/- each and in default of payment of fine to suffer simple imprisonment for 10 days.
- (ii) They were convicted for offence punishable u/s 147 of the Indian Penal Code and were sentenced to suffer simple imprisonment for six months and to pay a fine of Rs.500/- each and in default of payment of fine to suffer simple imprisonment for one month.
- (iii) They were convicted for offence punishable u/s 148 of the Indian Penal Code and were sentenced

to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/- each and in default of payment of fine to suffer rigorous imprisonment for one month.

- (iv) They were convicted for offence punishable u/s 307 r/w 149 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.8,000/- each and in default of payment of fine to suffer rigorous for six months.
- (v) They were acquitted from the charges of commission of offence punishable u/s 37(1) r/w 135 of Maharashtra Police Act and u/s 4 r/w 25 of the Indian Arms Act.

They were given benefit of set off u/s 428 of Cr.P.C.

All the sentences were directed to run concurrently.

Out of the fine amount Rs.30,000/- were directed to be paid to the injured Krishna Londhe as compensation u/s 357 (1) of Cr.P.C.

2. The prosecution case in brief is that, on 21/10/2011, in the evening there was quarrel between the Appellant Afjal Umar Shaikh and the victim Krishna Londhe on a petty issue because Afjal had spat near Krishna's house. That quarrel ended there. However, in the night all the Appellants and some more persons came at the spot carrying weapons like sword, iron rods, sticks, sickles etc. Krishna and his cousin Govardhan Khude started running. They were chased. Krishna was assaulted with weapons. He suffered three injuries on the head. The assailants then went away. Krishna was taken to Sassoon Hospital, where he was admitted. In the night at about 02.00 a.m. Govardhan Khude lodged his FIR against all the Appellants and others. The investigation was carried out and the FIR was lodged vide C.R.No.393/2011 at Swargate Police Station.

3. The Appellants were arrested on 22/10/2011. The Spot Panchanama was carried out. Police statements of different witnesses were recorded. During investigation the weapons were recovered at the instance of Afjal Umar Shaikh. They were sent

for chemical analysis. However, C.A. Report is not on record. At the conclusion of the trial, the charge-sheet was filed.

4. During trial, the prosecution examined 9 witnesses, including the victim Krishna Londhe, the first informant Govardhan Khude, eyewitness Vilas Yadav, Pancha for recovery of weapons, medical officer who examined the injured and the police officers, who had investigated the crime. The defence of the Appellants was of total denial. They examined Dr. Shivaji Bharati, attached to Sassoon Hospital. After recording of evidence and the statements of the accused u/s 313 of Cr.P.C., at the conclusion of the trial, the impugned Judgment and Order was passed.

5. The FIR in this case was lodged by Govardhan Khude. He was examined as P.W.1. He has deposed that Krishna was his cousin. On 21/10/2011 he and Krishna were standing outside P.W.1's house. At that time, the accused Saddam spat there. There was some quarrel between Krishna and Saddam. (Though he had named Saddam as the person with whom Krishna had

quarreled in the evening, the FIR itself shows that the quarrel was between Afzal and Krishna). That quarrel was over and everybody went home. In the same night, at about 11.00 p.m., P.W.1 and Krishna were standing outside their house. They came walking on the road. At that time, some boys came there and abused them. Krishna and P.W.1 started running. When Krishna reached near Narendra Medical Store, he was assaulted. He was assaulted with sword, sickle, wooden rods. He suffered injuries on head, legs and back. Then the assailants ran away. P.W.1 then took Krishna to Sassoon hospital. On 22/10/2011 P.W.1 gave his FIR. The FIR is produced at Ex.74. He has further named the accused/Appellant Nos.1, 2, 3, 4 and 6. He produced Krishna's clothes before the police, which were seized. He identified the weapons in the Court. He also identified the accused/Appellants in the Court.

In the cross-examination he deposed that when they were at the police station at the time of lodging of FIR, he had not seen any accused in the police station. Swargate police

station is about 1 to ½ kms. distance from Narendra Medical Stores. In the evening at around 06.00 to 07.00 p.m. on the next day, they had gone to that medical store for conducting Spot Panchanama. That shop is surrounded by other medical stores. He admitted that the medical stores were open till about midnight. He accepted that no blood stains were found at the spot. According to him, 30-35 persons had gathered there. But he had not given names of those eyewitnesses to the police. He added that he did not know those eyewitnesses. The incident was over within 2-3 minutes. Krishna was lying on the spot for about 5-10 minutes. His clothes were stained with blood. On that day Krishna was not in a position to speak. Krishna's statement was recorded after he regained consciousness. But at that time P.W.1 was not present. The evidence shows that the FIR was lodged at 02.00 a.m. in the night on 22/10/2011. The names of the Appellants are mentioned in the FIR.

6. P.W.2 Krishna Sudhir Londhe was the most important witness in this case. He has deposed that he knew all the

Appellants. They were residents of the same locality. On 21/10/2011 at about 05.30 p.m. to 06.00 p.m. he had some quarrel with Afjal Shaikh because Afjal had spat outside his house. That quarrel was over, but in the night, at 11.00 p.m. when P.W.1 and P.W.2 came in Govardhan Chowk, at that time all the Appellants came there carrying weapons like sword, Koyta, Bamboo and iron pipes. P.W.1 and P.W.2 started running from there. The Appellants chased them. When P.W.2 reached Narendra Medical Store, accused/Appellants caught him. They started assaulting him. He has deposed that the Appellant No.1 Rafiq Umar Shaikh and absconding accused Avesh were having swords. Accused No.3 Afjal was having a Koyta. Accused No.6 Saddam was having an iron rod and others were carrying wooden sticks. They started assaulting him. In the assault, he suffered injuries to his head, hands, back and thigh. He fell down. Govardhan came there. Accused ran away from there. His cousin took him to Sassoon hospital. According to him, after 5-6 days he regained consciousness. Then police recorded his statement. He identified the Appellants in the Court.

In the cross-examination he deposed that besides the absconding accused Avesh Shaikh and Yunus Shaikh, there were 4-5 unknown persons. He further stated that the accused had come to assault him with weapons. They had concealed those weapon in their pants and shirts. Whey they saw P.W.1 and P.W.2, they removed the weapons to assault him. When he was running, they came from behind and assaulted him. He denied the suggestion that the injuries were caused whhile he was running and when he fell down on the divider. Before the incident, there were no complaints between the parties. He had not told the police that he had suffered injuries on his back and thigh. He had not mentioned in his police statement that accused Saddam was having a rod.

7. P.W.8 Vilas Yalanna Yadav was another eyewitness. He has deposed that he knew P.W.1, P.W.2 and all the Appellants. They were residents of the same locality. In the night of the incident he came out of his house at around 11.00 to 11.30 p.m. He saw the quarrel and the assault near Narendra Medical Store.

He saw that the accused were assaulting Krishna. They were 10-12 assailants. They were assaulting Krishna with sword, Koyta and wooden sticks. Accused No.3 Afjal was having Koyta. Accused No.2 Firoz was having sword. Others were having iron rod and wooden sticks. After assaulting they ran away. Krishna had suffered injuries. P.W.1 Govardhan called Rikshaw and Krishna was taken to Sassoon hospital. He was serious. The police recorded P.W.8's statement on the next date. He identified the weapons and the accused in the Court.

In the cross-examination he stated that besides the 8 persons named by him, he saw that there were unknown persons who were also assaulting Krishna. In the cross-examination he specifically identified accused Nos.4 and 5. He stated that they were known as Sonu and Monu. There were about 50-60 people gathered at the spot at the time of incident. He denied the suggestion that unknown persons were chasing Krishna. He denied the suggestion that Krishna fell on the divider and suffered injuries.

8. P.W.3 Gautam Bansode was the Pancha for recovery of weapons at the instance of the Appellant No.3 Afjal, but he had turned hostile and has not supported prosecution case.
9. P.W.4 Sanjay Gaikwad, was the other Pancha, in whose presence, the weapons were recovered at the instance of the accused Afjal. He has deposed that on 25/10/2011 the police called him at Swargate police station. At that time, the accused No.3 Afjal showed willingness to point out the place where he had concealed the weapons near a canal. After recording his statement which is produced at Ex.86, the police and Panchas went to the place where the weapons were concealed. They were recovered from the bushes. They were recovered at the instance of Afjal. That Panchanama is produced at Ex.87. Nothing much is elicited from his cross-examination.
10. P.W.5 PSI Vasant Vishnu Suryawanshi was the Investigating Officer, under whose supervision, weapons were recovered.

11. API Yashwantrao Kadam was examined as P.W.6. The major investigation was carried out by him. He had recorded the FIR. He had conducted the Spot Panchanama. He arrested the Appellants on 22/10/2011. He had sent the articles for chemical analysis. He had obtained the medical certificate in respect of the injuries suffered by P.W.2.
12. P.W.9 PI Suryakant Kamble was another Investigating Officer. He has deposed about the investigation carried out by him. He had recorded the statements of six witnesses and the articles were sent for chemical analysis under his letter.
13. P.W.7 Dr. Rohan Jagat Chaudhari is an important witness. He was attached to Sassoon hospital. On 22/10/2021, he examined P.W.1. There were CLWs over his parietal region admeasuring 8 x 0.5 c.m, 3 x 0.5 cm and 2 x 0.5 cm. There was sub-dural hemotaoma over right and left parietal region, generalized cerebral edema, frontal right and left bones were

fractured. Those two injuries were grievous in nature. He has deposed that those injuries were life threatening. P.W.2 was admitted in Sassoon Hospital on 22/10/2011 and was discharged on 28/10/2011. The injury certificate is produced on record at Ex.118. He has deposed that if the assault is made by means of sword, sickle, iron pipe and wooden stick, such injuries were possible. On 23/10/2011 P.W.2 was not able to give his statement. P.W.7 had given his endorsement to that effect.

In the cross-examination he deposed that the CLW was possible by blunt object also. The injuries caused to the victim in this case were possible by sharp as well as blunt weapons. He could not tell the exact time at which he had examined the patient. He also denied the suggestion that the injuries were not possible by wooden sticks.

14. The defence examined D.W.1 Dr. Shivaji Dattatray Bharati. He has deposed that he was attached to the casualty section of Sassoon hospital on 22/10/2011. On that day P.W.2

Krishna came in casualty section. D.W.1 had examined him. P.W.2 had come with a history assault at 12.10 a.m. and he came to this witness D.W.1 at 12.30 p.m. As per his narration, P.W.2 had sustained injury to his semi parietal region (lateral side of forehead). He was admitted in Ortho ward block No.7. His medical papers were with Sassoon Hospital. D.W.1 had noticed two injuries on parietal region lateral side. Out of those, one injury was CLW 4 X 2 X 0.5 cm and the other injury was 2 x 3 x 0.5 cm. In the history, he had not mentioned the names of the assailants.

In the cross-examination he admitted that he had not issued any medical certificate that he had examined the patient. He also admitted that both the injuries were on the vital part of the body and were life threatening.

15. This is the evidence on record.

16. Heard Mr. Sachin H. Deokar, learned counsel for the Appellant and Mr. P. H. Gaikwad, learned APP for the State.

17. Learned counsel for the Appellants submitted that there are vital contradictions in the deposition of the witnesses P.W.1, P.W.2 and P.W.8. He submitted that P.W.8 does not say that P.W.2 was taken to hospital by P.W.1. There are no other independent witnesses examined by the prosecution, though both the witnesses P.W.1 and P.W.8 have admitted that there were atleast 30-40 people gathered at the time of incident. It was a crowded place. The medical stores were open till mid-night. The incident had taken place in front of Narendra Medical Store. Yet nobody from that shop was examined. P.W.2 could not have noticed who had assaulted him because he has deposed that the assault was mounted from the backside. The eyewitness's version is not supported by the medical evidence. There is no C.A. report connecting the weapons with the assault.

18. Learned APP on the other hand, relied on the evidence of the eyewitnesses, recovery of the weapons and the medical evidence in the form of deposition of P.W.7 and D.W.1.

19. I have considered these submissions. The most important witness in this case undoubtedly is P.W.2 Krishna Londhe. He has narrated as to what was the cause of the incident. There was some quarrel between the Appellant Afjal and him at around 05.30 to 06.00 p.m. on 21/10/2011. In the night at around 11.00 a.m. Afjal and other Appellants along with others came near him carrying deadly weapons. They started chasing Krishna and assaulted him. He has named and identified all the Appellants before the trial Court. He has attributed the sword to Appellant Rafiq, sickle to Afjal, rod to Appellant Saddam and wooden sticks to others. There are no omissions except about Appellant Saddam having rod. But Saddam's presence was stated by him in his police statement. His police statement was recorded on 27/10/2011. The record shows that he was seriously injured and the doctor had opined that he was not in a position to give statement even on 23/10/2011. Therefore delay in recording his statement will not help the defence in this case. He is sufficiently supported by the deposition of the P.W.1 and P.W.8.

20. The FIR was lodged by P.W.1 immediately in the night at around 02.00 a.m. and in the FIR, names of the Appellants were mentioned. Those names were mentioned immediately. Though in his deposition, in the earlier part, P.W.1 had not specifically named the assailants, but before conclusion of the examination-in-chief, he has named all the Appellants except Appellant No.5 Munavar @ Monu Sabir Khan. But he had identified all the Appellants before the Court. The omission from his FIR was in respect of the Appellant Afjal's name in respect of the incident in the evening. In his deposition he had attributed that quarrel to the Appellant Saddam. This really will not make any major impact on the prosecution in the light of deposition of P.W.2 and also because the main incident had taken place in night at around 11.00 p.m. In that respect, his evidence is consistent with his FIR and with the deposition of P.W.2.

21. P.W.8 Vilas Yadav has also to a large extent supported the evidence of P.W.1 and P.W.2. He has specifically named the

Appellant Afjal having Koyta and Appellant Firoz having sword. He has identified all the Appellants before the trial Court.

22. Thus, the prosecution has proved beyond reasonable doubt that the incident of assault on P.W.2 had taken place and the Appellants were the assailants. Though a specific role of assaulting P.W.2 on his head is not ascribed by any particular Appellant, but the consistent evidence is that all the Appellants had assaulted the victim P.W.2 with their respective weapons. P.W.2 has described the weapons carried by the Appellants. Though he has stated that he was also assaulted on back and on his thigh, Learned counsel for the Appellants submitted that there are no such injuries. But that will not absolve the Appellants from the allegations of assaulting P.W.2. The main injuries were on the head and those injuries cannot be ignored or even disputed. The evidence shows that all the Appellants had chased P.W.2 with deadly weapons and had actually caused fracture of skull at two places on the head. Thus their common object attracting the ingredients of section 307 r/w 149 of IPC

are made out. Both the doctors i.e. P.W.7 and D.W.1 have deposed that the injuries were life threatening. Thus, the learned Judge did not commit any error in convicting the Appellants for commission of offence punishable u/s 307 r/w 149 of the IPC.

23. Though, learned counsel for the Appellants tried to canvas that D.W.1 had examined the victim only at 12.30 p.m. that would indicate that for about 12 hours there is no explanation forthcoming from the prosecution; this submission cannot be accepted because the FIR was immediately lodged in the night at around 02.00 a.m. and D.W.1 has not proved his noting which was marked only as Article 'A' as it was a photocopy and the original was not produced. Therefore it is not clear from his evidence as to exactly what time, the victim was admitted to the hospital. Hence this particular statement does not help the defence in this case.

24. Though there was recovery at the instance of the Appellant Afjal, the prosecution has failed to connect those

weapons to the assault on the victim because there are no chemical analysis reports on record. Only to the extent of concealment of the weapons and their recovery can be held against the Appellants. To that extent it is an incriminating circumstance. The evidence of recovery of weapons led by the P.W.4 Sanjay Gaikwad the Pancha and the Investigating Officer is corroborating each other. Therefore that part of circumstances can be held against the Appellant Afjal. The injuries were possible by those weapons as deposed by Medical Officer. Considering all this discussion, I am of the opinion that the prosecution has proved its case beyond reasonable doubt and the conviction recorded against the Appellants is properly recorded.

25. I have heard learned counsel for the Appellants as well as learned APP for the quantum of sentence and I have examined whether it is necessary to impose a major punishment of 10 years rigorous imprisonment in this particular case. Learned counsel for the Appellants submitted that the incident is old. It had taken place 21/10/2011. About 11 years have

passed. In between there are no allegations that the Appellants have in any manner caused any trouble to the victim Krishna and the other two eyewitnesses. All the Appellants are married with small children.

26. Learned counsel for the Appellants submitted that some leniency be shown to them as far as quantum of sentence is concerned.

27. Learned APP on the other hand submitted that there were other incidents against some of the Appellants, though he conceded that there are no allegations that any harassment was caused to the prosecution witnesses. Learned APP submitted that the complainant was also young at the time of incident. He submitted that the injury was serious and therefore the sentence imposed on the Appellants for 10 years of rigorous imprisonment is also proper.

28. I have considered these submissions. The incident indeed is old which had taken place in October 2011. There are

no allegations that the Appellants have caused any harassment to P.W.1 the victim Krishna and or even to other eyewitnesses P.W.1 and P.W.8. One more important feature of this case is that none of the eyewitnesses has ascribed a particular role of assaulting the victim on his head to a particular Appellant. All the Appellants are convicted by taking aid of section 149 of IPC. There are two grievous injuries on the head and there are six Appellants before the Court. Therefore to that extent, some leniency can be shown to the Appellant because it is not known which of the Appellants had caused those two injuries. There were no other injuries on the other parts of the P.W.2. Therefore I am inclined to show some leniency as far as sentence is concerned. I am also taking into account that there was no further trouble to the victim and the eyewitnesses at the hands of the Appellants.

29. Considering all these aspects, in my opinion, major sentence of 7 years of rigorous imprisonment would meet the ends of justice.

30. Hence, the following order :

ORDER

- (i) Appeal is partly allowed.
- (ii) The conviction of the Appellants for commission of offences punishable u/s 143, 147, 148 and 307 r/w 149 of the Indian Penal Code is maintained.
- (iii) The sentence imposed on the Appellants for commission of offence punishable u/s 143 of the Indian Penal Code of simple imprisonment for one month and to pay a fine of Rs.300/- each and in default of payment of fine to suffer simple imprisonment for 10 days, is maintained.
- (iv) The sentence to suffer simple imprisonment for six months and to pay a fine of Rs.500/- each and in default of payment of fine to suffer simple imprisonment for one month for commission of offence punishable u/s 147 of the Indian Penal Code, is maintained.

- (v) The sentence to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/- each and in default of payment of fine to suffer rigorous imprisonment for one month for commission of offence punishable u/s 148 of the Indian Penal Code, is also maintained.
- (vi) Though conviction u/s 307 r/w 149 is maintained, the sentence imposed of rigorous imprisonment for 10 years is reduced to rigorous imprisonment for 7 years. The Appellants are sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.8,000/- each and in default of payment of fine to suffer rigorous imprisonment for six months, for commission of offence punishable u/s 307 r/w 149 of the Indian Penal Code.
- (vii) All the sentences are directed to run concurrently.
- (viii) The Appellants are given benefit of set off u/s 428 of Cr.P.C. for the period which they

have undergone in detention as under trial prisoners during the trial.

- (ix) Out of the fine amount, if paid, Rs.30,000/- shall be paid to the injured Krishna Londhe as compensation u/s 357 (1) of Cr.PC. This part of the impugned Judgment and Order is maintained.
- (x) Appeal stands disposed of accordingly.

(SARANG V. KOTWAL, J.)