

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

CRIMINAL APPEAL NO.677 OF 2017

1. Popat Bajirao Kotwal
Age – 38 years, Occ – Agriculturist
R/at – Post – Ashtapur,
Tal – Haveli, Dist – Pune
2. Amol Popat Kotwal
Age – 19 years, Occ – Education
R/at – Post – Ashtapur,
Tal – Haveli, Dist – Pune
(At present Yerwada Central Prison) Appellant

versus

1. State of Maharashtra
(At the instance of
Lonikand Police Station,
Dist. Pune)
2. Ashok Baburao Kotwal
Age 42 years, Occ – Agriculturist
Village & Post – Ashtapur
Taluka – Haveli, Dist – Pune Respondent

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- Mr. Daulat G. Khamkar, Advocate for Appellant.
- Smt. J. S. Lohokare, APP for the State/Respondent.
- Ms. Megha A. Gowalani, (Appointed Advocate), for Respondent No.2.

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CORAM : SARANG V. KOTWAL, J.
DATE : 13th SEPTEMBER, 2022

JUDGMENT :

1. The Appellants are the original accused Nos.1 and 2 in Sessions Case No.244 of 2014 on the file of Additional Sessions Judge at Pune. The Appellants have challenged the impugned judgment and order passed by the learned trial Judge on 19/07/2017 in that case.

2. The Appellants were convicted and sentenced as follows;

- (1) Both were convicted for commission of offence punishable u/s 307 r/w 34 of the Indian Penal Code and each of them was sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.25,000/- each and in default of payment to suffer rigorous imprisonment for one year each.
- (2) Both of them were convicted for commission of offence punishable u/s 326 r/w 34 of the Indian Penal Code. Each of them was sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- each and in default to suffer further rigorous imprisonment for one year each.

(3) Both of them were convicted for commission of offence punishable u/s 324 r/w 34 of the IPC, but no separate sentence was imposed under this section.

(4) Both of them were convicted for offence punishable u/s 341 r/w 34 of the IPC and each of them was sentenced to suffer rigorous imprisonment for 3 months and to pay a fine of Rs.10,000/- each and in default to further suffer rigorous imprisonment for 15 days each.

3. The substantive sentences of both the accused were directed to run concurrently. Both of them were granted set off u/s 428 of Cr.P.C. for the period which they were in jail as under trial prisoners.

4. Out of the fine amount deposited, 50% amount was directed to be given to the injured Ashok Kotwal.

5. Heard Mr. Daulat G. Khamkar, learned counsel for the

Appellant, Ms. Megha A. Gowalani, learned counsel for Respondent No.2 and Smt. J. S. Lohokare, learned APP for the State.

6. The prosecution case is that the Appellants had an agricultural land adjoining the land of the first informant Sachin Dadasaheb Kotwal. There was some dispute regarding the boundary. In the night of 29/10/2010 Sachin had given water to his crop. According to Appellants that water had seeped in their land and had caused damage to their crop. On the next date i.e. on 30/10/2010 at about 07.30 a.m. Sachin was returning from his field, at that time, the Appellant No.1 confronted him in front of the Appellant's house. A quarrel started. Sachin's uncles Ashok and Chandrakant came to help him. The Appellant No.1 was joined by his son, the Appellant No.2. During the quarrel both the Appellants went inside the house. The Appellant No.1 brought an axe. The Appellant No.2 brought a Koyta. The Appellant No.1 gave blow of that axe on the head of Ashok. The Appellant No.2 assaulted the other two injured on their hands

with Koyta. One Nitin Memane came there and took the injured to hospital. They were initially taken to Balaji Hospital. Ashok had suffered serious head injury and therefore he was referred to Ruby hospital. The FIR was lodged on the statement given by Sachin. The offence was registered vide C.R.No.191/2010 at Lonikand police station u/s 326 of IPC. The investigation started. The Appellants were arrested. Statements of witnesses including those of the injured witnesses were recorded. The Spot Panchanama and Seizure Panchanama of the injured's clothes were made. During investigation weapons were recovered at the instance of the Appellant No.1 on 11/10/2010. After completion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions. The Appellants pleaded not guilty to the charges. It was their case that because of the land dispute, they were falsely implicated.

7. During trial, the prosecution examined 8 witnesses including the three injured witnesses, Pancha for recovery and seizure of Ashok's clothes, two doctors who had treated the

injured and the Investigating Officer. After recording the prosecution evidence, statements of the Appellants were recorded u/s 313 of Cr.P.C. Learned Judge after hearing the parties convicted and sentenced the Appellants as mentioned earlier. He believed the evidence of the injured eyewitnesses. He also observed that both the Appellants had acted in furtherance of their common intention and therefore both of them were convicted and sentenced as mentioned earlier.

8. The prosecution case depends on the evidence of the three injured witnesses. PW.1 Sachin had lodged the FIR. He is examined as PW.1. He has deposed that he was resident of Ashtapur. He was residing with his parents and brother. He had an agricultural land at Ashtapur. The Appellants' land was adjoining to his land. The Appellants used to reside near their land. On 29/10/2010 in the night he gave water to his sugercane crop in his land and then went home. On 30/10/2010 in the morning he took the labourers to his field and started returning to his house at around 07.30 a.m. When he was

passing in front of the Appellant's house, both the Appellants stopped him. They told him that the water he had given the previous night had damaged their crop. They started abusing him. He told the Appellants that he would compensate them. While this conversation was going on, his uncles Ashok Kotwal and Chandrakant Kotwal rushed there. They all tried to pacify the Appellants. They did not listen. They went to their house. The Appellant No.1 came back with an axe and the Appellant No.2 carried a sickle with him. The Appellant No.1 gave a blow with Axe on Ashok's head. The Appellant No.1 then tried to give another blow to Ashok. P.W.1 and his other uncle caught Appellant No.1. The Appellant No.2 gave blow with sickle on right hand of P.W.1 and the Appellant No.2 also bit the P.W.1 on his right hand. After that they ran away. One Nitin Memane came there and took all the injured in his car to Balaji Hospital, Chandan Nagar. They were advised that Ashok should be taken to Ruby Hall, Pune. He was taken there. Ashok had suffered fracture on his skull bone. He was operated for that injury. The police came to Ruby Hospital in the evening and recorded P.W.1's

FIR. The FIR is produced on record at Ex.39. PW.1 identified both the Appellants and both the weapons in the Court.

9. In the cross-examination, PW.1 was asked about the details of the crime. He has further stated that their land was situated on the backside of the house of the Appellants. He denied the suggestion that there was boundary dispute between the Appellants and these witnesses. However, he admitted that subsequently the Appellants had filed complaint regarding the same. There is a specific suggestion given in respect of the details of the incident. Similar suggestions were given to the other injured PW.2 and PW.6 as well. It was suggested to these witnesses that, at the time of incident, PW.1 caught the Appellant No.2 from his backside at his neck. PW.1's mother Shobha and PW.6 Chandrakant caught both the hands of the Appellant No.2. At that time, to save himself, the Appellant bit his right hand and in the process the PW.1 removed his hand forcibly. PW.2 fell on the ground and suffered injuries. All these suggestions were denied by PW.1 and the other witnesses i.e.

P.W.2 and P.W.6. P.W.1 has deposed in the cross-examination that the incident lasted for about 2-3 minutes. He had not disclosed the names of the Appellants at Balaji hospital. He clarified that since it was necessary to take the patient to the hospital, he did not go to police station immediately. He denied the suggestion that he himself and P.W.2 entered the house of the Appellants and assaulted them. He denied the suggestion that Ashok sustained injury as he fell on fodder cutting machine.

10. P.W.1's FIR is produced on record as Ex.39. It was registered at 06.40 p.m. on 30/10/2010. The contents of the FIR corroborate his deposition.

11. P.W.2 Ashok Baburao Kotwal is the person who had suffered the serious injury. He has described the incident in the same manner as is described by the P.W.1. He has added that when he went to the spot, he heard the noise of quarrel between Sachin and the Appellant No.1, both the Appellants abused them. They tried to pacify the Appellants. The Appellant No.1

threatened them. Both the Appellants then went to their house and brought weapons. The Appellant No.1 gave blow on his head. The rest of the incident is described in the same manner as his deposed by the P.W.1.

In the cross-examination he deposed that he was discharged from the hospital on 06/11/2010. His statement was recorded on 08/11/2010 and till then he did not go to police station, neither the police came to him. He was an indoor patient at Ruby Hall hospital. He also denied the suggestion that P.W.1 had held the Appellant. He denied all the further suggestions as mentioned earlier while discussing P.W.1's evidence.

12. P.W.6 Chandrakant Baburao Kotwal was the third injured witness. He has also narrated the incident exactly in the same manner as is deposed by P.W.1 and P.W.2. There is one minor omission from his police statement, which is part of the record, where his own name was taken as a third person in his police statement. He also denied the similar suggestion that

P.W.1 Sachin had held Appellant No.2 and that he himself i.e. P.W.6 had caught the Appellant No.2's hands and that in the scuffle Ashok suffered head injury and he suffered injuries to his hand.

In the cross-examination he admitted that Nitin Memane who had taken them to hospital was his relative.

13. P.W.3 Dadasaheb Govind Avale was a Pancha witness in whose presence, the Appellant No.1 gave his memorandum statement on 11/11/2010 showing his willingness to point out the place where he had concealed the axe and the sickle. That memorandum statement and the recovery Panchanama is produced on record at Ex.49 and 50. The weapons were recovered from the Appellant's agricultural field concealed in the crop.

14. P.W.4 Sharad Ramchandra Kotwal was a Pancha in whose presence the P.W.1 produced blood stained clothes of Ashok.

15. P.W.7 ASI Madhukar Narayan Khilare was the Investigating Officer. He has deposed that he investigated the offence from 30/10/2010 onwards. He conducted the Spot Panchanama which is produced on record at Ex.66. The Spot Panchanama shows that the incident took place in an open space in front of the house of the Appellants. He then deposed about seizure of clothes of the P.W.2 Ashok, recovery of axe and sickle at the instance of the Appellant No.1 and collection of injury certificates from Balaji hospital and from Ruby Hall. He then filed the charge-sheet. Significantly, he has not spoken a word about sending the articles i.e. weapons and clothes for chemical analysis. The prosecution has not led any evidence to connect these articles with the offence through C. A. reports.

16. P.W.5 Dr. Sunil Satav was running Balaji hospital. On 30/10/2010 all the injured came to his hospital in injured condition. He examined them and found following injuries :

- (1) PW.1 Sachin Kotwal had suffered one CLW over right thumb 1 x 2 cm. and a bite mark on right arm with bleeding.
- (2) PW.6 Chandrakant Kotwal had suffered one CLW on right wrist 1 x 1 cm with bleeding. The injury was described as fresh and could have been caused by tip of an axe corner.
- (3) PW.2 Ashok Kotwal was in serious condition and therefore he was referred to Ruby Hall Hospital.

In the cross-examination he deposed that while going to hospital, the injured persons did not disclose the names of the accused. The patient informed him that the injuries were caused by an axe corner. The injuries to PW.1 Sachin, PW.6 Chandrakant were simple in nature. He opined that the bite mark from other person was possible if any person tries to rescue himself and bites another person.

17. This Doctor had sutured Ashok's injuries and then had referred him to Ruby Hall hospital.

18. P.W.8 Dr. Sanjay Shantilal Vhora was an important witness. He has deposed that he was attached to Grand Medical Foundation and Ruby Hall Clinic. On 30/10/2010 P.W.2 Ashok was admitted to Ruby Hall at around 10.00 a.m. P.W.8 operated on the patient. He found that the patient had compound depressed fracture of left high parietal region with extra dural haematoma. The medical certificate was produced on record at Ex.68. According to him, the injury was possible by an axe. The injury was grievous in nature. P.W.2 has deposed that the patient would not have survived if treatment was not given in time. The patient required another operation for replacement of skull cap.

In the cross-examination he deposed that when the patient was brought to him, his wound was sutured. He was conscious and oriented. The patient was operated at 01.30 p.m. on the same day. He was discharged from the hospital on 06/11/2010. He denied the suggestion that the injury was possible by accidental fall on any hard or rough substance. He denied the suggestion that the injury was not possible by an axe

or that the injury was not grievous. He further admitted that when the history was narrated, the name of the assailant was not mentioned.

This in short was the prosecution evidence.

19. Learned counsel for the Applicant submitted that there was no corroborating piece of evidence supporting the version of the alleged eyewitness. The prosecution has not explained as to why the articles viz. clothes of the injured and the weapons were not sent to chemical analyst for forensic examination. He submitted that, admittedly there was enmity between the parties and therefore the possibility of false implication cannot be ruled out. The conviction u/s 326 of IPC separately was not proper, particularly when the Appellants were convicted and sentenced for the commission of offence punishable u/s 307 of the IPC.

20. Learned counsel submitted that, Nitin Memane who had taken the injured to the hospital is not examined. There

were independent witnesses available but the prosecution has not examined any independent witness. He further submitted that in any case the role of the Appellants is distinguishable and from the evidence it does not appear that the Appellant No.2 shared common intention with the Appellant No.1. Both should be dealt with for their individual acts. He further submitted that even if eyewitnesses' evidence is believed, absolutely minor role is attributed to the Applicant No.2 and therefore he should be acquitted from the charges for commission of offence punishable u/s 307 r/w 34 of the IPC. As far as the Appellant No.1 is concerned, admittedly, the incident had taken place in front of his house. The prosecution witness P.W.1, P.W.2 and P.W.6 were the aggressors and therefore it cannot be said that the Appellant No.1 had premeditation or preparation or even the requisite intention necessary to prove that offence u/s 307 of IPC or even u/s 326 of IPC.

21. Learned APP as well as learned counsel for the Respondent No.2 opposed these submissions. According to them,

there was no reason to disbelieve the injured eyewitness P.W.1, P.W.2 and P.W.6. The injury suffered by the P.W.2 was grievous. Part of his skull bone had to be removed and it cannot be said that the provisions of section 307 of IPC were not attracted. Doctor had opined that the patient would have died if timely treatment was not provided. The injury was endangering his life. The Appellants had gone to their house and had brought deadly weapons. Therefore it is clear that they had shared common intention of commission of offence punishable u/s 307 of the IPC. The prosecution witness i.e. the P.W.1, P.W.2 and P.W.6 were not armed with weapons and yet they were assaulted with deadly weapons.

22. I have considered these submissions. The prosecution case mainly depends on the evidence of P.W.1, P.W.2 and P.W.6. As far as seizure of clothes of Appellants and recovery of weapons are concerned, the prosecution has failed to connect these articles with the offence through evidence of Forensic Science Laboratory. There is no explanation as to whether the

articles were sent for chemical analysis and if not why they were not sent. The case depends on the ocular evidence of the injured eyewitness. Considering the nature of evidence given by PW.1, PW.2 and PW.6 I do not find that there is any inconsistency in their depositions. They were injured eyewitnesses. Therefore their presence at the spot is established. They have supported each other on all material aspects. PW.2 has suffered a serious head injury. Each of them has described the assault caused by the Appellants and the injuries suffered by these witnesses. Therefore there is no reason to disbelieve these witnesses. The cause of this incident is deposed by the PW.1. There was some dispute between the parties. It escalated because of the previous night's event when PW.1 had watered his crop, which according the Appellants had caused damage to the Appellant's crop. When PW.1 was returning home from his agricultural field, the Appellants picked up quarrel with him and then the incident occurred.

23. However the crucial question which needs to be

considered as to whether the Appellants intended to commit murder of any of the injured witnesses and whether they had shared any such common intention. The description of the incident shows that the Appellants had not gone to the house or the field of the P.W.1. When he was walking across the road in front of the Appellant's house, there was a quarrel in respect of the damage caused to the Appellant's crop. At that time, the Appellants did not have any weapon. They were not even waiting for P.W.1 to arrive. When they saw him, the quarrel started. As the events took place further, it is clear that P.W.1 Sachin had suffered absolutely minor injuries. Therefore he, in particular, was not the target. P.W.2 who has suffered serious injury, was not part of the quarrel between Appellants and P.W.1 Sachin. After the quarrel went on for some time, the Appellants went to their house and brought the weapons. Thus, there was no premeditation or preparation to commit any such offence. Though both the Appellants were carrying the weapons, it is only the Appellant No.1 who had given severe blow on the head of the P.W.2 Ashok. The Appellant No.2 was also carrying Koyta.

But there are certain factors in his favour. He is alleged to have caused injuries to P.W.1 and P.W.6 on their respective right hands. Both of these injuries were absolutely minor and of small size. The Medical Officer has admitted that both these injuries were simple injuries. The Appellant No.2 had caused bite marks on the hand of P.W.1. It also indicates that the Appellant No.2 was trying to free himself, though it is alleged that he was having Koyta. Doctor was told by the injured witnesses that the injuries were caused by tip of an axe. Though even accepting prosecution case that the Appellant No.2 was carrying the Koyta, yet the fact remains that he has not assaulted any of the injured witnesses with that Koyta on their vital parts causing grievous injuries. Therefore it cannot be said that he had any intention to cause grievous injuries or he attempted to commit murder of any of the injured witnesses. Therefore his role is clearly separate from that of the Appellant No.1. In the background of these facts it cannot be said he was having common intention with the Appellant No.1 to commit murder of any of the witnesses and in particular of P.W.2 Ashok who had

suffered grievous injury to his head. Whether all the accused shared common intention; can be gathered from attending circumstances. Therefore the Appellant No.2 deserves to be given benefit of doubt in that behalf. At the same time, it is proved that he was carrying a Koyta and had caused simple injuries to PW.1 and PW.6 and therefore his act would attract section 324 of the IPC individually and therefore he can be convicted and sentenced for commission of that particular offence.

24. As far as the Appellant No.1 is concerned, his case is entirely different. He had brought the axe from his house and had given a severe blow on the head of PW.2 Ashok causing skull fracture. Ashok was removed to hospital and had to be operated immediately. The doctor opined that he would not have survived if timely treatment was not given to him. PW.2 was in hospital till 06/11/2010. The intention of the Appellant therefore is clear. His act also indicates that he intended to cause that particular injury and his act therefore can be described as

an attempt to commit murder of P.W.2. Thus, the ingredients of section 307 of IPC are applicable as far as the Appellant No.1 is concerned. Hence the conviction and sentence recorded by the learned trial Judge against him for commission of offence u/s 307 of the IPC can be upheld. But since as discussed earlier, the Appellant No.2 is exonerated from sharing common intention, the Appellant No.1 will have to be convicted u/s 307 of the IPC simplicitor and not u/s 307 r/w 34 of the IPC. Since this conviction covers his act, the separate conviction u/s 326 of IPC or 326 r/w 34 of IPC is not warranted at all. To that extent, that particular conviction is required to be set aside.

25. As far as the offence punishable u/s 341 r/w 34 of IPC is concerned, both the Appellants have committed that particular offence as is clear from the deposition of the injured eyewitness. Thus, though there are no corroborative pieces of circumstance supporting the deposition of P.W.1, P.W.2 and P.W.6, their ocular evidence is sufficient to prove the facts discussed above beyond reasonable doubt. considering the nature of injury

suffered by P.W.2, no further leniency can be shown to the Appellant No.1 and the substantive sentence of 7 years rigorous imprisonment is maintained against him.

26. Considering this discussion, the conviction and sentence requires to be modified.

27. Hence, the following order :

ORDER

(1) The Appeal is partly allowed.

(2) The conviction of the Appellants and consequent sentence for commission of offence punishable u/s 307 r/w 34, 326 r/w 34 and 324 r/w 34 of the Indian Penal Code, are set aside. Instead they are convicted and sentenced as follows;

(i) The Appellant No.1 Popat Bajirao Kotwal is convicted for commission of offence punishable u/s 307 of the Indian Penal Code. He is

sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.25,000/-, in default to suffer rigorous imprisonment for one year.

- (ii) The Appellant No.2 Amol Popat Kotwal is convicted for commission of offence punishable u/s 324 of the Indian Penal Code. The impugned judgment shows that he was in jail from 08/11/2010 to 24/12/2010 and from 05/11/2015 to 21/12/2015. He had further undergone custody after his conviction for 20 days, as stated by learned counsel Mr. Daulat Khamkar. Considering the minor nature of injuries suffered by P.W.1 and P.W.6 on their hands, this sentence is sufficient. Therefore the Appellant No.2 is sentenced to suffer imprisonment for the period he has already undergone. He is not required to undergo any further substantive sentence for this particular offence.
- (iii) The conviction of both the Appellants for commission of offence punishable u/s 341 r/w 34 of the Indian Penal Code is maintained. However, the sentence imposed on them is

altered to rigorous imprisonment for one month which is covered by the period they have already undergone. They need not suffer further imprisonment for that offence.

- (iv) The substantive sentences of both the Appellants are directed to run concurrently.
- (v) Both the Appellants are given set off u/s 428 of Cr.P.C. for the period which they have undergone as under trial prisoners.
- (v) The Appellant No.1 is in custody and the Appellant No.2 is on bail. The Appellant No.2 need not surrender to his custody. His bail bond stands cancelled.
- (vi) Out of the deposited fine, the amount of Rs.20,000/- shall be paid to P.W.2 Ashok Kotwal by way of Compensation.
- (vii) Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)