

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

CRIMINAL APPEAL NO.63 OF 2002

1. Jumma Khan s/o Maheboob Khan,
Age : 26 years, Occu.: Labour,
R/o.: Sainagar, Nanded
2. Sk. Ajgar s/o Sk. Maheboob,
(Dead, hence abated) APPELLANT

VERSUS

The State of Maharashtra,
Through Police Station,
Itwara, Nanded, Dist. Nanded ... RESPONDENT

.....
Advocate for Appellant No.1 : Mr. Zia-Ul-Mustafa &
Mr. T. A. Quadri
Advocate for Respondent-State : Mr. R. B. Bagul

....

CORAM : SANDIPKUMAR C. MORE, J.

**RESERVED ON : 12/10/2023
PRONOUNCED ON : 10/11/2023**

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JUDGMENT :

1. The appellants, who are original accused Nos.2 & 3, have preferred this appeal for challenging their conviction recorded upon them by the learned IInd Additional Sessions Judge, Nanded (hereinafter referred to as 'the learned trial court') in Sessions Case No.151 of 1994 under judgment and order dated 24/01/2002. The

learned trial court has convicted the present appellants for the offence punishable under Section 326 r.w. 34 of the Indian Penal Code and sentenced them to suffer R.I. for 5 years each and to pay fine of Rs.4,000/- each i.d. to suffer R.I. for one year each. The learned trial court has acquitted original accused No.1. However, during the pendency of this appeal, present appellant No.2 i.e. original accused No.3 died and appeal stood abated under order of this court dated 21/10/2016 to his extent.

2. According to the prosecution story, Syed Younus s/o Syed Yousuf, Abdul Majid s/o Abdul Raheman, Abdulla s/o Shaikh Hussain and Abdul Majid carpenter had gone to one 'Kundan Beer Bar' at Nanded on 17/04/21993 at about 7.00 p.m. for having liquor. They ordered liquor, but when they saw their another friend Mohiuddin sitting in another cabin, they called him with them. Thereafter, they started consuming liquor. Since there was no sufficient place for sitting in their cabin, Moiuddin was sitting on the chair at the door of said cabin. At about 9.15 p.m., present appellant No.2 came there as he was not having sufficient passage to cross the chair of Mohiuddin, he pulled his chair and caught hold the collar of Mohiuddin. Then there was exchange of hitting words but Abdul Majid pacified the situation. Thereafter, Abdul

Majid and others came out of the bar and at that time present appellant No.1 Jumma Khan obstructed them and slapped Abdul Majid and asked why he resolved the dispute between appellant No.2 and Mohiuddin. Mohiuddin also came there and there was exchange of words. After arrival of original accused No.1, the present appellants and he assaulted Abdul Majid. Appellant No.2 took out a knife and gave two blows of same on the abdomen and thigh of Abdul Majid, which resulted in to bleeding injuries. The persons with Abdul Majid, intervened but the appellants and other accused ran away from the spot. Abdul Majid was taken to the hospital at Nanded and then his friend Syed Yousuf lodged the report of the incident. Accordingly, the PSO at Itwara Police Station registered a crime under Section 307 r.w. 34 of IPC alongwith Section 135 of the Bombay Police Act. Thereafter, the investigating officer Shri Mandhane started the investigation and on completion of investigation, charge sheeted the appellants and other accused. The learned trial court then conducted the trial and found the present appellants guilty for the offence punishable u/s 326 r.w. 34 of IPC as aforesaid.

3. The learned counsel for the appellants submits that the main act of inflicting knife blows to Abdul Majid was by appellant No.2,

who is already expired and therefore, considering the act of appellant No.1 Jumma Khan, who only slapped initially, it cannot be inferred that he was having intention to commit murder of Abdul Majid. He pointed out that appellant No.1 was not having any knowledge that appellant No.2 was having a knife. He pointed out that there was no convincing evidence against this appellant - Jumma Khan and the learned trial court had even framed subsequent simplicitor charge under Section 307 of IPC only against appellant No.2. Thus, according to him when appellant No.1 Jumma Khan was not charged with any offence on framing subsequent charge, his conviction by the learned trial court is apparently illegal. He pointed out that all the witnesses, who were with Abdul Majid, have not supported the prosecution but still the learned trial court convicted the appellants only on the basis of uncorroborated testimony of the injured. According to him, there was no enmity between the complainant party and the appellants / accused and there was no predetermination by this appellant - Jumma Khan, who had in fact came after the incident. As such, he prayed for quashing of impugned judgment and order. In support of his submissions, the learned counsel for the appellants relied on following citations.

- I) Rambilas Singh and others vs. State of Bihar, AIR 1989 Supreme Court 1593 &*
- II) Kashmira Singh vs. State of Punjab, AIR 1994 SC 1651.*

4. On the contrary, the learned APP strongly opposed the submissions made on behalf of appellant No.1. According to him, charge under Section 307 of IPC was framed against all the accused persons initially and it was only simplified later on against present appellant No.2. According to him that does not mean that there was no charge against present appellant No.1 after framing such simplicitor charge only against appellant No.2. He pointed out that present appellant No.1 had in fact restrained the complainant from saving the injured and therefore, such act definitely come under purview of Section 34 of IPC. As such, he prayed for dismissal of the appeal by supporting the impugned judgment and order.

5. Heard rival submissions. Also perused entire documentary and oral evidence on record alongwith impugned judgment and order.

6. It is significant to note that the trial court has already found that there was no role of original accused No.1 and therefore, he

was acquitted. However, the learned trial court has convicted the present appellants being original accused Nos.2 & 3 mainly on the evidence of injured Abdul Majid, under section 326 r.w. 34 of IPC instead of Section 307 of IPC as there was no intention to commit murder. However, it is extremely important to note that the prosecution has examined in all 10 witnesses. Out of these witnesses, PW-1 is the bar owner, in front of whose bar, the incident took place. However, this witness has not supported the prosecution. Likewise, PW-2 Yusuf and PW-7 Abdul Sharif, who are the panch witnesses on spot panchanama as well as seizure panchanama of the knife respectively, have also not supported the prosecution. Likewise, PW-3 Rahim Khan, who was the panch witness on seizure panchanama of clothes of the injured, also did not support the prosecution. Moreover, PW-5 Mohd. Moiddin, who is cited as an eye witness, also failed to support the prosecution. PW-6 Mohd. Abdullah, who was with the injured at the time of incident on the spot of incident, also refused to support the prosecution. Not only this, the complainant PW-8 Syed Yunus, who has lodged FIR Exhibit-87 in respect of the incident, also did not support with the prosecution. The evidence of PW-9 Dr. Mohd. Kharshid Ahmed and PW-10 investigating officer is of procedural nature. Thus, it appears that the learned trial court has convicted

the appellants only on the uncorroborated testimony of the injured witness PW-4 Abdul Majid.

7. It is pertinent to note that as per the FIR Exhibit-87 the injured and his friends had gone to Kundan Bar for having liquor and at that time these appellants came there and caught hold of Mohiuddin and thereafter when they came out, appellant No.2 inflicted blows of knife on stomach and thigh of PW-4 Abdul Majid. It is further mentioned in the said FIR that when PW-8 Syed Younus i.e. the complainant had gone to resolve the dispute, this appellant No.1 caught him and appellant No.2 gave knife blows on his left foot but only his pant was torn and no injury caused. On the contrary, PW-4 injured is saying that appellant No.1 had slapped him and appellant No.2 gave knife blows on his stomach and thigh, which resulted into bleeding injuries. As such, there is material contradiction between the version of PW-4 and the FIR. It is to be noted that PW-8 Syed Younus, who had lodged the complaint, has not supported the prosecution case and stated that nothing of that sort as mentioned in the FIR, had occurred. On perusal of the FIR, the role of Jumma Khan i.e. appellant No.1 was only of holding the informant and not the injured. Moreover, nothing is mentioned in the FIR that appellant No.1 had in fact

slapped the injured Abdul Majid. Therefore, the only allegation in the FIR against this appellant No.1 is that he had caught the informant while the informant was trying to resolve the dispute between injured Abdul Majid and appellant No.2 i.e. original accused No.3. Thus, there was no participation of the present appellant No.1 in the incident of assault on Abdul Majid.

8. The injured Abdul Majid though stated in his evidence that appellant No.1 first slapped him and thereafter appellant No.2 assaulted him with knife but there is no corroboration to his version since the eye witnesses have not supported the prosecution case. On the contrary, it appears that whatever active role played in the incident was by appellant No.2. Even if it is presumed that injured Abdul Majid is telling the true facts but even then also the role of appellant No.1 was only of slapping him and there is nothing on record to show that he was intending to kill the injured. The act of giving knife blows thus appeared independent act of appellant No.2 and there was no active contribution in the said act by the appellant No.1.

9. Though the learned trial court has convicted both the appellants by observing that appellant No.1 slapped him and appellant No.2 assaulted him with knife and other witnesses

corroborated the incident by the circumstances that there was a quarrel prior to the incident in the bar and Abdul Majid i.e. the injured had pacified the same, however, this observation appears to be false since the eye witnesses of the incident did not support the prosecution case. Moreover, the panch witnesses on spot panchanama, clothes seizure panchanama and knife seizure panchanama, have also not supported and therefore, the recovery of the knife also appears doubtful.

10. Be that as it may, even if it is presumed that appellant No.2 had given knife blows to the injured Abdul Majid but the evidence on record is not at all satisfactory to establish the fact that appellant No.1 was also having some role in the act of stabbing either directly or indirectly. The learned counsel for the appellants heavily relied upon the judgment in the case of ***Rambilas Singh and others*** (*supra*) wherein it is observed that for recording conviction under Section 34 or 149 of IPC there must be material to show that overt act or acts were done in furtherance of common intention of all accused. Here, the act of stabbing appears to be an independent act of appellant No.2, who is already expired and the proceeding is abated against him. Therefore, in absence of any positive role, appellant No.1 is definitely entitled for a clear-cut

acquittal. Even otherwise also the charge under Section 307 r.w. 34 of IPC framed by the learned trial court earlier against all the accused, was then simplified and charge under Section 307 of IPC, was framed only against appellant No.2, who is already dead. Therefore, the act of convicting present appellant No.1 for the offence under Section 326 r.w. 34 of IPC by the trial court under the impugned judgment and order appears illegal *prima facie* and the same needs to be set aside. In view of the same, following order is passed.

O R D E R

- I) The appeal is hereby allowed and the impugned judgment and order in Sessions Case No.151 of 1994 passed by IInd Additional Sessions Judge, Nanded is hereby quashed and set aside.
- II) The appellant No.1 i.e. original accused No.2 - Jumma Khan Maheboob Khan is hereby acquitted from the offence u/s 326 r.w. 34 of IPC.
- III) His bail bond stands cancelled.
- IV) The fine amount, if deposited by appellant No.1, be refunded to him.
- V) The appeal is accordingly disposed of.

(SANDIPKUMAR C. MORE, J.)