

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 569 OF 2019

Bhingresh @ Babsaheb S/o Pandurang Jogdand
Age:- 39 Years, Occu:- service,
R/o Nagoba Galli, Peth, Beed.
Taluka and District Beed.

. . . Appellant
(Informant)

Versus

- 1] The State of Maharashtra
- 2] Sundar S/o Tatyaram Waghmare
Age:- 50 Years, Occu:- Business,
R/o Balbhimnagar, Beed,
Taluka and District Beed.
- 3] Vishal S/o Sundar Waghmare
Age:- 30 Years, Occu:- Business,
R/o Balbhimnagar, Beed,
Taluka and District Beed.
- 4] Bharat @ Bhalya S/o Bhaskar Kamble,
Age:- 28 Years, Occu:- Labourer,
R/o Balbhimnagar, Beed,
Taluka and District Beed.
- 5] Akshay S/o Rajesh Kokate,
Age:- 28 Years, Occu:- Labourer,
R/o Balbhimnagar, Beed,
Taluka and District Beed.

. . . Respondents
(R. Nos. 2 to 5 Original Accused)

WITH
APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 169 OF 2019

The State of Maharashtra
through Police Station Officer,
Police Station, Peth-Beed,
Taluka and District Beed.

. . . Applicant

Versus

- 2] Sundar S/o Tatyaram Waghmare
Age:- 46 Years, Occu:- Business,
R/o Balbhim Nagar, Beed,
Taluka and District Beed.
- 3] Vishal S/o Sundar Waghmare
Age:- 26 Years, Occu:- Education,
R/o As above.
- 4] Bharat @ Bhalya S/o Bhaskar Kamble,
Age:- 24 Years, Occu:- Labour,
R/o As above.
- 5] Akshay S/o Rajesh Kokate,
Age:- 24 Years, Occupation
and R/o as above.

. . . Respondents

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Mr. H. V. Tungar, Advocate for the Appellant in Cri/Appeal/569/2019
Mr. R. V. Dasalkar, APP for State in both appeals
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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATED : 15 FEBRUARY 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Criminal Appeal No. 569 of 2019 is at the instance of original informant who had lodged FIR on the strength of which crime no. 27 of 2015 for the offences punishable under Sections 307, 325, 341, 336, 337, 147, 148, 149

and 323 of the Indian Penal Code (IPC) was registered at Peth Beed Police Station. Upon trial present respondents came to be acquitted from all charges and hence the appeal.

2. Informant appellant set law in motion alleging that while he and one Sushil were returning home in the night of 21.03.2015 on motorcycle, in the backdrop of a quarrel which took place one day prior, accused persons intercepted them and mounted assault on them by means of iron rod and wooden sticks. That, informant suffered grievous head injury and a fracture injury to leg whereas, his companion also suffered injury and therefore, while taking treatment, report was lodged and the same was registered vide above crime number. Upon trial, prosecution adduced oral as well as documentary evidence. Defence also adduced evidence. After appreciating the same, learned trial Judge reached to a finding that prosecution has failed to establish the charge and thereby, vide its judgment and order dated 24.04.2019, acquitted the accused in Sessions Case No. 120 of 2015.

Feeling aggrieved by the order of acquittal, original informant is questioning the maintainability and sustainability of the judgment by raising following grounds:

- i] That, findings arrived at by learned trial Judge are contrary to the facts and circumstances on record.
- ii] Learned trial Judge seems to have failed in appreciating the evidence of PW1 Bhingresh (informant) and his injured companion PW2 Sushil.
- iii] Learned trial Judge has not taken into account the manner of assault and nature of injuries sustained by the informant and his companion.
- iv] The medical evidence, though indicated grievous injuries and in spite of there being use of deadly weapons like iron rod, learned trial Judge has unfortunately disbelieved medical evidence also.
- v] That, learned trial Judge failed to appreciate that testimony of PW1 informant and PW2 Sushil had remained unshaken in spite of lengthy cross-examination and thereby had erred in disbelieving them and that the entire judgment is based on surmises and conjectures. That, minor variances and inconsistencies are given undue importance.
- vi] That, learned trial Judge has failed to appreciate that there was memorandum of disclosure and seizure of weapons and therefore prosecution had built strong case but unfortunately, in spite of availability of evidence to that extent, learned trial Judge has acquitted accused persons.

Therefore, for all above grounds, it is submitted that, prayers made herein are required to be allowed.

3. On behalf of State also, there is application for leave to file appeal and on similar grounds, learned APP submitted that there was injured witness account. The informant and his companion were both assaulted and they had duly deposed to that extent in their testimony. The ocular account was supported by medical evidence and that apart, evidence of recovery was proved. However, learned trial Judge has failed to appreciate such quality of evidence. There are other several legal points and aspects which are required to be raised for questioning the sustainability of judgment and order of acquittal and therefore State intends to file appeal and hence leave be granted.

4. This being the first appellate court, we are expected to re-appreciate, re-examine and re-assess the entire evidence adduced by prosecution in the trial court to ascertain whether, as contended before us, the judgment and order of learned trial Judge is erroneous, perverse and not sustainable in law.

5. On going through the prosecution evidence, it seems that in all nine witnesses were examined by prosecution to establish its case and reliance was also sought on various documentary evidence like FIR, medical reports, panchanamas etc.

6. Before examining and scrutinizing the oral account, it would be appropriate to first define the status and role of each of the witnesses examined by prosecution. **PW1** Bhingresh seems to be the informant and victim who has lodged the FIR. **PW2** Sushil seems to be the companion of PW1 informant and even he claims to have become victim of assault at the hands of accused persons. **PW3** Dhammapal is brother of PW1 informant. **PW4** Subhash-pancha to spot panchanama has not supported prosecution. **PW5** Sandip and **PW6** Sachin are panchas to seizure of cloths. **PW7** Dr. Amol and **PW8** Dr. Suresh are medical officers who had occasion to examine and treat PW1 informant. **PW9** API Pavra is the investigating Officer.

EVIDENCE

7. **PW1** informant is the crucial witness and therefore it would be appropriate to first visit his deposition which is at Exhibit 50. It is emerging that according to him, on 21.03.2015 while he and Sushil (PW2) were returning home on motorcycle from the Ginning Mill of one Sarda and when they had reached near Totla flour-mill, their motorcycle was intercepted by accused no.1 Sundar. According to PW1 informant, son of accused no.1 was also accompanying him. Accused no.1 allegedly inquired the informant as to

why quarrel was raised by him one day prior to the incident. Thereafter, accused No.1 assaulted the informant by means of iron rod on his head. This was followed by assault by his son Vishal (accused no.2) also by iron rod on his head, as a result of which he collapsed and thereafter, again accused no.2 Vishal inflicted blows of iron rod on his right leg below knee. At that time, accused no. 3 Bharat and accused no.4 Akshay, who were said to be accompanying accused nos. 1 and 2, also hit him by means of stones as well as sticks. Thereafter, PW2 Sushil managed to rush home and call brother of PW1, who reached there and thereafter accused persons fled and injured PW1 informant was brought to hospital. This witness in witness-box has stated about identifying the iron rod which was used as weapon by the accused in the assault. He has also identified clothes to be the same on his person at the time of assault and were said to be blood stained.

8. Now, let us see whether his testimony is as per his own statement Exhibit 51 on the basis of which crime was registered. We find that in Exhibit 51 he has reported that accused no.1 Sudar gave blow of iron rod and he also spoke about accused no.2 Vishal giving blow of iron rod on his head. However, he has not stated that he collapsed. His statement Exhibit 51 is also found to be silent about assault by accused no.2 on his legs. The persons named by him to be present as per Exhibit 51 were not stated by him while in witness-box. Even in Exhibit 51 he is silent about stones being pelted on them while they

were arriving at the spot. Therefore, *prima facie* material appearing in Exhibit 51 is not narrated in the oral testimony before the court.

In the lengthy cross-examination of PW1 informant, in the initial part, there are questions about incident which allegedly took place prior to the incident in question and about crime being registered against him (informant) for commission of offence punishable under Section 394 of IPC. Crimes and his antecedents, including his involvement in an offence punishable under Section 302 of IPC, are also brought in cross-examination. He answered that on the day of incident he was on duty up to 5.00 p.m. and he met PW2 Sushil between 6.00 p.m to 6.30 p.m. and since then they were both together. He denied that prior to the incident he and PW2 Sushil had consumed liquor. He answered that when they reached the spot at that time PW2 Sushil was the rider and that after 10 to 15 minutes of the occurrence he was taken to hospital. He answered that at hospital police approached him and he gave information. Then he again stated that next day i.e. on 22.03.2015 police had again approached him and that time he gave report Exhibit 51. He is unable to state by what means accused nos. 3 and 4 assaulted him. He denied that on account of falling from motorcycle, he had suffered injuries.

9. Now, let us visit evidence of **PW2**, who according to prosecution is also an injured eye witness. It has come in his testimony that accused Sundar gave blow of iron rod on the head of informant whereas, his son Vishal also gave blows of iron rod upon back and legs informant. He has not stated that accused No.2 Vishal gave blow on head. According to him, accused nos. 3 and 4, who were also present at the spot, had assaulted informant by means of wooden stick and iron rod. He stated that accused no.1 Sundar assaulted this witness upon his back and arm by iron rod. He claims that due to fear he fled from the spot. While under cross-examination on the point of occurrence, he speaks that after assault he went home and he met informant on the next day morning at about 10.00 a.m. to 10.30 a.m. He admitted about questioning informant as to who brought him to the hospital. He denied having stated the portion marked "A" and "B" in his statement to police.

10. Therefore, on comparing and placing versions of PW1 informant and PW2 Sushil in juxtaposition, it is clearly emerging that in spite of they both claiming to be together and further claiming to have been intercepted and assaulted by accused no.1, their versions as regards actual assault are not found to be consistent. Even role attributed to accused nos. 1 and 2 is not consistent. PW2 Sushil has stated that accused nos. 3 and 4 also mounted assault by means of iron rod and wooden stick, but such is not at all the case of prosecution. Rather, prosecution case is that accused nos. 3 and 4 were

armed with iron rod and not wooden sticks. It is also pertinent to note that alleged occurrence has taken place in the night and there is no material or evidence to indicate that there was source of light at the scene of occurrence. Even PW2 Sushil when claimed that he fled from the spot, it was expected of him to immediately inform the same to the relatives as this witness has admitted in his cross-examination that PW1 was residing at approximately 200 meters. Even PW2 Sushil does not seem to have approached police and taken steps to promptly report in spite of there being alleged assault with iron rod and sticks. This is unnatural conduct on his part. More surprising part is that in spite of he claiming to have been a victim of the assault, he has not approached hospital and has not got him examined or treated. Therefore, such circumstances create doubt, more particularly, when PW1 informant and PW2 Sushil are not found to be consistent as regards the roll of accused nos. 1 and 2.

11. **PW3** Dhammapal, who is undoubtedly brother of PW1 informant, is also examined. However, admittedly he reached the spot after the occurrence. His testimony shows that whatever information he received was from his brother and as such his testimony is based on hearsay information and cannot be taken into account to reach to a conclusion about the actual occurrence.

12. Now let us visit testimony of **PW7** Dr. Amol and **PW8** Dr. Suresh. They both are medical experts. Record shows that PW1 informant first went to PW7 Dr. Amol and thereafter on his own he went to PW8 Dr. Suresh. Both these doctors are speaking about examining and coming across CLW on scalp which is simple in nature and fracture to tibia fibula, whereas PW8 Dr. Suresh spoke about coming across swelling, movement restriction, inability to walk and stand. PW8 Dr. Suresh has taken x-ray of PW1 informant and found that there was commuted fracture of tibia of right side. PW7 Dr. Amol in his cross-examination has admitted that injuries noted by him are also possible on account of fall from motorcycle. Even otherwise, injuries noted are simple and one fracture which is grievous one. However, as stated above, medical expert do not deny possibility of injuries in accident.

13. It is revealed that according to PW7 Dr. Amol, the first Doctor at District Hospital, the history given by PW1 informant is about assault at around 10.30 p.m. However, in FIR time of occurrence is given at 8.30 p.m. That apart, number of injuries stated by PW1 informant do not corroborate with the injuries noticed and detected by PW7 Dr. Amol which are reflected in Exhibit 68.

14. Though panchas are examined, unfortunately **PW4** Subhash i.e. pancha to spot panchanama has not supported prosecution and as such, here, the very scene of occurrence is not proved. Though prosecution claims that clothes over the person of injured PW1 informant were seized, in spite of occurrence taking place on 21.03.2015, surprisingly, as per evidence of pancha witness **PW5** Sandip, his clothes are shown to be seized on 25.03.2015, i.e. after four to five days.

15. Prosecution also asserted that there is seizure upon disclosure of accused by virtue of which there is recovery of weapon. In such support, prosecution seems to have examined **PW6** Sachin. However, on going through his testimony, it is evident that before this pancha witness came in contact with accused, police officer had already informed him that accused was intending to hand over weapons and therefore, so-called disclosure is rendered invaluable and insignificant as regards recovery and discovery is concerned.

16. **PW9** API Pavra is the investigating officer. He has confirmed about PW2 Sushil stating portion marked "A" and "B" in his statement under Section 161 of Cr.PC.

17. On taking survey of entire prosecution evidence as reproduced above, here, in our opinion, there are material inconsistencies between injured

informant himself and his so-called associate PW2 Sushil. They both are not lending support to each other on the crucial aspect of alleged assault. Number of blows and sites of injuries quoted by PW1 informant are mismatching with medical evidence. Spot panchanama and seizure panchanama are also rendered doubtful. Medical experts have not ruled out possibility of accidental fall. Therefore, taking into account the attending circumstances and the oral evidence which fails to inspire confidence, the only conclusion that can be drawn is that prosecution has not established its case beyond reasonable doubt by leading cogent and firm evidence.

18. We have gone through the judgment passed by learned trial Judge. It seems that learned trial Judge has in detail reproduced and discussed the entire prosecution witnesses and by applying judicial mind and applying the settled legal principles of law, the evidence has been appreciated. The conclusion and findings reached at are based on sound reasons. Appellant could not point out as to how learned trial Judge failed to appreciate the evidence on record and that there was non-application of mind and any perversity in reaching to the conclusion of acquittal of accused. Resultantly, finding no merits, in our considered opinion, the appeal deserved to be dismissed.

19. Having dealt with merits of the case in its entirety in the above appeal, no fruitful purpose would be served by allowing the State to prefer appeal and therefore even their application for leave deserves to be dismissed. Hence, we proceed to pass the following order:

ORDER

Both the proceedings i.e. Criminal Appeal No. 569 of 2019 and Application for Leave to Appeal by State No. 169 of 2019 are hereby dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

VRE