

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

CRIMINAL APPEAL NO.481 OF 2021

Indubai wd/o Ashok Dandge,
Age-57 years, Occu:Household,
R/o-Dongargaon, Tq-Sillod,
Dist-Aurangabad.

**...APPELLANT
(Orig. Complainant)**

VERSUS

- 1) The State of Maharashtra,
The Police Inspector,
Sillod (Rural) Police Station,
Sillod, Dist-Aurangabad,
- 2) Shaikh Mohd. Jakir s/o Sk. Mohd. Umar,
Age-37 years, Occu:Advocate,
- 3) Shaikh Shakir Sk. Umar,
Age-27 years, Occu:Driver,
- 4) Shaikh Farooq S/o Sk. Umar,
Age-43 years, Occu:Labour,
- 5) Shaikh Mohd. Ahmed S/o Sk. Mohad Umar,
Age-47 years, Occu:Driver,
- 6) Shaikh Mohd. Issaq S/o Sk. Mohd. Umar,
Age-51 years, Occu:Labour,
- 7) Shaikh Mohd. Imran S/o Sk. Mohd. Issaq,
Age-23 years, Occu:Labour,

All Respondent Nos.2 to 7
R/o-Dongargaon, Tq-Sillod, Dist-Aurangabad,
At present Respondent Nos. 6 & 7
R/o-Sneha Nagar, Sillod, Tq-Sillod,
Dist-Aurangabad.

...RESPONDENTS

...
Mr. A.L. Kanade Advocate for Appellant.
Mrs. V.S. Choudhari, A.P.P. for Respondent No.1-State.
Mr. N.S. Ghanekar Advocate for Respondent Nos.2 to 7.
...

**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE OF RESERVING ORDER : 12th APRIL 2023

DATE OF PRONOUNCING ORDER : 6th JUNE 2023

ORDER [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed under Section 372 of the Code of Criminal Procedure by the original informant. Thought it has been wrongly mentioned that it is under Section 378(4) of the Code of Criminal Procedure, but in view of the fact that now a statutory right is made available under Section 372 of the Code of Criminal Procedure, present Appeal has to be treated under the said Section. If it would have been under Section 378(4) of the Code of Criminal Procedure, then it ought to have been an application and not the Appeal. When this fact was pointed out to the learned Advocate appearing for the appellant – original informant, he accepted the said position of law. Accordingly, the matter is taken up for an admission. Further, it

will not be out of place to mention here that original accused i.e. respondent Nos.2 to 7 have appeared in the matter through learned Advocate Mr. Ghanekar. Criminal Appeal No.373 of 2021 has been filed by original accused Nos. 2, 5 and 6 challenging their conviction under Section 302 read with Section 34 of the Indian Penal Code. Those accused are also represented by learned Advocate Mr. Ghanekar.

2. Original accused Nos. 1 to 6 are the present respondent Nos. 2 to 7 (hereinafter they are referred to as 'accused Nos. 1 to 6' i.e. with their original number before the trial Court). Original accused No.7 in the case was juvenile in conflict with law. All of them stood prosecuted in Crime No.240 of 2016 registered with Sillod (Rural) Police Station, Aurangabad for the offence punishable under Sections 302, 307, 324, 323, 506, 120-B, 143, 147, 148 read with Section 149 of the Indian Penal Code and under Sections 3(1)(r), 3(1)(s) and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (for short "the Atrocities Act"). The First Information Report (for short "FIR") was lodged by the present appellant, who is admittedly a member of scheduled caste. The prosecution story, in short, was that the informant was residing

with her two sons, Amol and Ravi and married daughter Vaishali. There is an open land adjacent to her house which she claimed that she is using since many years. There was dispute between her and accused Issaq Umar Shaikh in respect of the said open land and civil suit was filed against her in Sillod Civil Court. Even earlier to the incident in question, about a year ago accused Nos.1 to 7 had assaulted the informant and her daughter and abused them in the name of the caste, therefore, offence was registered at that time also. Accused persons were arrested at that time. That is how the accused persons knew that the informant was belonging to a scheduled caste.

3. As per the prosecution story, the incident has taken place around 2.30 p.m. on 14th August 2016. Informant's two daughters and two sons as well as informant were present in the house. All the accused persons went in the disputed open land and started constructing a wall. As the dispute was pending in the Civil Court, daughter Vaishali started taking photographs of the said activity of constructing a wall with an intention to produce the said evidence before the Civil Court. Thereupon accused Ahmed picked up a brick and assaulted it on her waist. Son of Farooq Umar Shaikh pulled the hairs of Vaishali and

dragged her on the ground. He assaulted her by means of fist and kick blows. Accused persons were abusing her in the name of the caste by saying “ धेडानी बहोत मस्ती आयी तू घर के बाहर निकल तेरे को अभी हम बताते है ” (*Dhedani Bahot Masti Aayi Tu Gharke Bahar Nikal Tere Ko Abhi Hum Batate Hai*). After hearing shouts of daughter Vaishali, the blind son Amol rushed to save her from the assault of the accused, however, at that time all the accused pelted stones towards head of Amol causing him injury. Amol was assaulted by the accused persons with stick. When another daughter Usha tried to separate quarrel, she was also assaulted by the fist and kick blows. Then the informant tried to separate them but accused Shaikh Jakir dragged her on the ground by pulling her hairs. Such kind of FIR was then lodged by the first informant and then the investigation was undertaken. Amol was seriously injured and therefore, he was referred to Ghati Hospital, Aurangabad. Though medical treatment was given to him, he succumbed to the injuries on 17th August 2016. The inquest panchnama was carried out and the postmortem was done. The cause of death was given as head injury and therefore, Section 302 of the Indian Penal Code came to be added.

4. The investigation has been carried by the Deputy Superintendent of Police PW-9 Bajirao Mohite. Panchnama of the spot was carried out and then the clothes of the deceased as well as accused persons after their arrest, were seized by drawing separate panchnamas. Statements of witnesses have been recorded under Section 161 of the Code of Criminal Procedure. After completion of the investigation, charge-sheet came to be filed before the learned Special Judge under the Atrocities Act, Aurangabad.

5. After the accused persons appeared, charge was framed. They have all pleaded not guilty and claimed to be tried. In all 9 witnesses were examined to bring home the guilt of the accused. From the statements under Section 313 of the Code of Criminal Procedure of the accused persons, it could be gathered that the defence of the accused persons is of total denial. They have also given separate written submissions under Section 313 of the Code of Criminal Procedure. After considering the evidence on record and hearing both the sides, the learned Special Judge held accused Nos.2, 5 and 6 guilty of committing offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they have been sentenced to suffer rigorous

imprisonment of life and to pay fine of Rs.10,000/- each, in default to suffer rigorous imprisonment for three months. Accused No.3 came to be convicted for the offence punishable under Section 324 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for one month. Accused Nos.1 and 4 have been acquitted from all the charges. Accused No.3 has been acquitted from the other charges, so also accused Nos.2, 5 and 6 have been acquitted from other charges. Thus, present Appeal under Section 372 of the Indian Penal Code challenges the acquittal of accused Nos.1 and 4 from all the charges and as regards the other accused are concerned, it challenges their acquittal from other offences (except under those Sections they have been held guilty).

6. Heard learned Advocate Mr. Kanade appearing for the appellant, learned APP Mrs. Choudhari appearing for the State and learned Advocate Mr. Ghanekar appearing for respondent Nos.2 to 7. With the help of learned Advocates appearing for the respective parties and learned APP, we have gone through the record and proceedings. We are considering the evidence only with a view, as to whether the present Appeal under Section 372

of the Code of Criminal Procedure can be admitted. We will not go into the details so as to affect any merit of the another matter i.e. Criminal Appeal No.373 of 2021.

7. Out of the said 9 witnesses who have been examined by the prosecution, PW-2 Indubai is the informant. PW-3 Vaishali is the injured daughter of the informant. PW-4 Dr. Santosh Bhosale is the medical officer who had conducted autopsy. PW-5 Dr. Babu More is the medical officer who had examined the injured witnesses. PW-6 Sachin Jogdande has been posed as eye witness to the incident. PW-1 Narayan Katare is the panch to spot panchnama whereas PW-7 Dnyaneshwar Panchal is the panch to seizure of clothes of informant as well as accused. PW-8 API Shankar Shinde and PW-9 then Deputy Superintendent of Police Bajirao Mohite are the investigating officers. Thus, it can be seen that only the informant and her daughter Vaishali are the main eye witnesses. Though another eye witness, injured daughter Usha could have supported the prosecution story, she has not been examined.

8. First and foremost fact is that PW-2 informant was admittedly not present when PW-3 Vaishali was allegedly abused

in the name of the caste by the accused. The alleged abuses ought to have been heard by some other third person, but PW-6 Sachin Jogdande appears to have gone to the spot some time after the incident. He does not say about any specific abuses in the name of the caste heard by him. Therefore, the ingredients of the offence under the Atrocities Act could not have been attracted and proved at all on the basis of the said evidence. Sole testimony of PW-3 Vaishali cannot be relied upon. Another aspect to be noted by the alleged abuses that the accused were calling PW-3 Vaishali out of the house (----- तू घर के बाहर निकल तेरे को अभी हम बताते हैं). It means that she was inside of the house. If she would have been already out of the house, these words calling her outside the house could not have been uttered. If she was inside the house and no independent witness had heard the abuses, it cannot be said that those abuses were within the public view. Even if we accept that the accused persons might be knowing the caste of the informant and her daughters, yet the basic lacuna in the prosecution evidence is that except PW-3 Vaishali, to whom the said abuses were given; it has not been supported by anybody else. Therefore, no fault is found in the acquittal of all the accused persons from the charges under the Atrocities Act. Another fact can also be considered that it does

not appear from the fact that as Amol was from scheduled caste he was murdered. The prosecution story itself is that he tried to intervene and at that time he was assaulted. From that angle also the provisions of the Atrocities Act are not applicable.

9. From the evidence of the witnesses, it has come on record that accused No.1 was not at the spot at the relevant time. Accused No.1 is a legal practitioner. He contended that on the day of incident around 2.30 to 3.00 p.m. he was in the hotel taking a cup of tea with police constables Mundkar and Dandage as well as other two police constables. Though he has taken this defence in his statement under Section 313 of the Code of Criminal Procedure, this rather supported byway of cross-examination of PW-3 Vaishali and PW-6 Sachin Jogdange. PW-6 Sachin, who is the independent eye witness, has stated that he had returned from Sillod Bazar and was taking tea in hotel Nizam. In his cross-examination he has admitted that prior to his entry in the hotel accused Jakir i.e. accused No.1 and two police constables were already present in the hotel. He also admitted that he proceeded towards the rush of the people, at that time two police constables and accused Jakir followed him. The presence of four police persons at the spot is admitted by PW-2

Indubai also. The police persons were deployed in view of the fact that an application was made for the police protection. Therefore, the plea of alibi is established by accused No.1 from the cross-examination of the prosecution witnesses themselves. When accused No.1 has not taken active participation in the incident, he has been rightly acquitted from all the charges by the learned Special Judge.

10. Learned trial Judge has also taken note of the fact that original accused No.8 - Takki Umar Shaikh was also prosecuted, however, he died during the pendency of the trial. It has come on record even through the testimony of the investigating officer that accused No.8 Takki was admitted in M.G.M. Hospital on the day of incident, rather prior to the day of incident. Therefore, falsity on the part of the original informant, in implicating accused No.8, has been rightly considered.

11. Now as regards the other Sections, especially Sections 143, 147 and 148 read with Section 149 of the Indian Penal Code are concerned, the prosecution should establish the common object. Mere presence of all the accused persons will not be sufficient. The testimony of PW-2 Indubai and PW-3

Vaishali falls short from establishing the alleged common object. The dispute was already pending with the Civil Court and therefore the ownership of the land was in question. It cannot be said that the act of construction of wall was allegedly undertaken to instigate the informant and her family members to raise quarrel. No doubt they might be having right to protect their property, but the equal right can be said to have been there to the accused persons also when the ownership was not yet decided finally. The learned trial Judge has rightly considered as to how all these Sections are not applicable and how those have not been proved. Same is the case as regards Section 120-B, 504, 506 of the Indian Penal Code. Further it can be seen from the fact that deceased Amol was a blind person and then it is stated that he went to rescue his sister. This is some what surprising. Though he might be having feelings to protect his sister, the fact remains that he had physical disability which could have prevented him from going in a particular direction. The accused persons have taken the defence that the injuries sustained by Amol might be accidental, which has not been accepted by the learned trial Judge. However, we cannot go into those aspects as it is beyond the scope of this Appeal under Section 372 of the Code of Criminal Procedure.

12. After churning the entire evidence, we are of the opinion that no case is made out for admitting the Appeal under Section 372 of the Code of Criminal Procedure. There was no error or illegality in acquittal of accused Nos.1 and 4 from all the charges and as regards the other accused are concerned from all the other charges than in which they have been convicted. The Appeal, thus stands dismissed.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/JUNE23