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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.49 OF 2017

EKNATH NAIK,
Son of Gangadhar Naik,
56 years old, Indian National,
Resident of Talaulim, Ponda-Goa. ... Appellant.

Versus

1. STATE
Through Police Inspector,
Ponda Police Station,
Ponda, Goa

2. The Public Prosecutor
High Court of Bombay at Panaji, Goa. ... Respondents.

Mr Pavithran A.V. with Mr P. Kholkar, Advocates for the Appellant.
Mr Pravin Faldessai, Additional Public Prosecutor for the
Respondents.

CORAM:	BHARAT P. DESHPANDE, J.
RESERVED ON:	28 September, 2023
PRONOUNCED ON:	12 October, 2023

JUDGMENT:

1. Appellant being dissatisfied and aggrieved by the impugned Judgment and Conviction dated 31.08.2017 passed by the learned Additional Sessions Judge, Panaji in Sessions Case No.36/2012, preferred present appeal amongst various grounds as found mentioned in the memo of appeal.

2. The appeal was admitted on 29.09.2017 and thereafter, the records and proceedings have been called. Paper book was prepared and accordingly, the matter was placed for final hearing.

3. Heard learned Counsel Mr Pavithran A.V. appearing for the Appellant and learned Additional Public Prosecutor Mr Pravin Faldessai appearing for the State at length.

4. In nutshell, the Appellant/Accused was found guilty for the offences punishable under Section 307 and 452 of IPC and accordingly, he has been sentenced to suffer 3 years and 1 year's respective imprisonment along with a fine.

5. The case of Prosecution, as revealed from the charge sheet discloses that on 06.01.2011, the victim being an Advocate was assaulted with an iron pipe on his face by the Accused, with an intention to kill. Such incident took place at around 6:45 p.m. in the office of the victim situated at First Floor, Fonseca Arcade, Near Civil Court Building, Ponda, Goa.

6. On committal of the matter to the Court of Sessions, an order was passed on 20.10.2014 thereby directing to frame charge against the Accused for the offences punishable under Section 452 and 307 of IPC. Accordingly, the charges were framed and explained to the Accused to which he pleaded not guilty and claimed to be tried. In all, 13 witnesses were examined including the victim. The statement of the Appellant/Accused was recorded under Section 313 CrPC, to which he denied entire case of the Prosecution and claimed that he has been falsely implicated. Neither the Accused nor any witness stepped into the witness

box in defence. By the impugned Judgment, the learned Additional Sessions Judge found that the Prosecution has proved the case against Accused on both counts and accordingly, sentence was passed which is challenged by way of present appeal.

7. Learned Counsel Mr Pavithran strongly contended that first of all, charges were not framed by the learned Trial Court and that there is no document on record which shows the exact ingredients of charges explained to the Accused. He submits that this is not an irregularity as such and therefore, the entire trial stands vitiated.

8. Mr Pavithran would then submit that since the victim is an Advocate, the Accused did not get proper representation and that the cross examination conducted during the trial would suggest that proper defence was not put forth on behalf of the Appellant and the relevant contradictions and omissions were not brought on record.

9. Mr Pavithran would then submit that even otherwise, there are serious discrepancies about the identification of the Accused by the witnesses, the motive which the Prosecution has claimed, the lacunae in the entire Prosecution case, which has not been considered by the learned Trial Court. He submits that presence of the so-called witness who had seen the Accused entering the office of the victim is a planted witness and his testimony is seriously doubtful. He submits that the findings of the Trial Court are perverse as material brought on record clearly goes to show that there are serious doubts in the case of the Prosecution and benefit ought to have been given to the Accused. He then would submit that delay in arrest of the Accused, the so-called recovery at the instance of Accused

is also doubtful. He then submitted that the Accused was not sent for medical examination and more so for blood examination and therefore, the blood found on the clothes of the Accused cannot be confirmed as that of the victim only. He finally submitted that there is no conclusive proof that the Accused is the perpetrator of the said crime as witnesses clearly deposed that there were two other persons present at the spot near the said building out of which, one left the said building immediately after the assault on a motorcycle. Lastly, Mr Pavithran would submit that the motive when claimed by the Prosecution in the charge sheet itself ought to have been proved. He placed reliance on the following decisions:-

- i. *Willie (William) Slaney vs The State of Madhya Pradesh; AIR 1956 SC 116,*
- ii. *Shahaja alias Shahajan Ismail Mohd. Shaikh vs. State of Maharashtra; 2022 SCC OnLine SC 883,*
- iii. *Sunil Kundu and Anr. Vs. State of Jharkhand; (2013) 4 SCC 422.*
- iv. *Ram Chander vs. State of Haryana; (1981) 3 SCC 191*

10. Per contra, the learned Additional Public Prosecutor Mr Faldessai strongly contended that the question of motive becomes irrelevant when the victim clearly identifies the Accused and gives a first-hand version of the assault. He would then submit that minor discrepancies have been properly dealt with by the learned Additional Sessions Judge in its Judgment and that such discrepancies will not help the Accused in the present matter.

11. Mr Faldessai would then submit that the learned Additional Sessions Judge passed a specific and detailed order before framing of the charge which gives the entire history along with the reasons as to why the matter required to be dealt with under Sections 452 and 307 of IPC. He then submits that there is document which shows that the copy of charge was handed over to Accused, the charges were explained and that Accused understood the contents of the charge and only thereafter, he pleaded not guilty. Thus, only because the document containing the details of the charge is not found in the file of the Trial Court, would not in any manner conclude that the charge was never framed. According to him, it is at the most considered to be an irregularity which could be cured when the Accused himself admits about explaining the charge and handing over a copy of the charge.

12. Mr Faldessai then would submit that there is no discrepancy with regard to identification of the Accused. The witness who saw the Accused while entering the chamber of the victim clearly deposed about it. The victim also corroborated about the visit of the witness just prior to the Accused entering the chamber. Even the Accused did not dispute his presence at the site. There is no material to disbelieve the Prosecution witnesses on this count. The other two persons are also identified out of which one was examined by the Trial Court and therefore, there is absolutely no doubt about the involvement of the Accused in the said offence.

13. Mr Faldessai then would submit that only after the name of the Accused was disclosed by the victim, he was arrested and within a period

of 5 days, weapon of assault, clothes of Accused with bloodstains were recovered.

14. As far as applicability of Section 307 of IPC is concerned, Mr Faldessai would submit that it is not the case of a single blow and therefore, intention and knowledge of the Accused writ large. He further claimed that since the Accused is the nephew of the victim, there is no question of disbelieving the victim qua the identification and therefore, there is no need to interfere with the findings of the Trial Court.

15. The points for determination are as under together with findings against it.

- i. Whether Prosecution succeeded in proving that the Accused committed criminal trespass into the office of the victim with an intention to assault?
- ii. Whether Prosecution succeeded in proving that the Accused attempted to commit murder of the victim and in that process caused grievous injury to the victim?

16. In order to ascertain the contentions raised on behalf of Appellant, first of all, it is admitted fact that the original record called from the Trial Court, if perused, shows that there is no document containing the charges framed against the Accused, However, it is also a fact that a detailed order was passed on 28.10.2014 vide Exhibit 11 by the learned Additional Sessions Judge and that too, after hearing the learned Public Prosecutor and the learned Counsel for the Accused in connection with framing of charges. In this order at Exhibit 11, the learned Trial Court considered the

arguments on behalf of the learned Public Prosecutor and the learned Counsel for the Accused about framing of charges and whether prima facie ingredients of Sections 452 and 307 of IPC are made out against the Accused so as to frame charge. Para 5 of this order clearly goes to show that the learned Trial Court was convinced that there is material to frame charge against the Accused for the offences punishable under Section 452 as well as Section 307 of IPC. The Trial Court then ordered that charges be framed against the Accused under Sections 452 and 307 of IPC.

17. The Roznama dated 12.12.2014 reads thus:-

“Called out today.

PP Shri L. Fernandes for State present.

Accused present.

*Adv. Shri B. Gurav holding for Adv. Shri A. Dabholkar
for the accused.*

C-13 Charge framed.

Issue summons to complainant.

Matter is adj. for trial.”

18. The record further bears that Statement of Accused was recorded at Exhibit C-13 on 12.12.2014 itself wherein the format shows questions and answers in the following manner:-

*“Sessions Case no. 36/2012
Exh. No.*

STATEMENT OF THE ACCUSED

I State as follows:-

My name is:- Shri. Eknath Naik My father's name:- Gangadar Naik

My Age is about:- 50 years My Occupation is:- Business

I am inhabitant of: Talaulim, Ponda, Goa.

Question No.1:- Have you received the copies referred to in S. 173 Cr.P.C.?

Answer:- Yes

Question No.2:- Did you understand the charge that has been read and explained to you and the copy of which has been given to you?

Answer:- Yes

Question No.3:- Do you plead guilty or claim to be tried?

Answer:- I plead not guilty and claim to be tried.

Before me,

sd/-

(P.V. Kamat)

Additional Sessions Judge, Panaji

Panaji

Dated:- 12.12.2014

sd/-

Accused.”

19. There is no doubt that the Statement of Accused at Exhibit 13 and quoted above is signed by the Accused. This shows that he answered questions No.1 and 2 in the affirmative whereas his answer to question No.3 is as recorded above. Question No.2 is specific wherein the Accused was asked whether he understood the charge that has been read to him and explained and the copy of which has been given to him. This question was answered in affirmative by the Accused. This shows that the charge was explained to him by the Presiding Officer and also a copy of it was handed over to him. Only after properly understanding the contents of the charge, he pleaded not guilty.

20. Apart from this, the ground of absence of the document explaining the charge to Accused was raised for the first time without any such

ground being raised in the memo of appeal. Mr Pavithran, learned Counsel for the Appellant, fairly conceded that only when he perused the record of the Trial Court before arguing the matter, he noticed the absence of the document explaining the charge in the original record. That being so, the contention raised by Mr Pavithran regarding the trial being vitiated in absence of the proper document explaining the charge, needs to be rejected for the simple reason that there is no such ground raised in the memo of appeal and secondly, it is only a defect of placing the document on record.

21. In the case of *Sunil Kundu* (supra), the Supreme Court while dealing with inefficient and incompetent investigating agency, observed in para No.29 as under:-

“29. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW-5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet.

They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eyewitnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order.”

22. Above observations of the Apex Court are only with regard to irregularities in investigating the matter, which is not the case in hand. Even otherwise, to my mind, there is no irregularity as the charge was properly explained to the Accused when only the document containing charge is not found in original record. Only after receiving copy of said charge and upon being explained and more particularly, upon understanding it, the Accused pleaded not guilty and claimed to be tried. Thus, there is absolutely no illegality or even irregularity when the document containing the ingredients of charge is not found in the original record. No prejudice has been caused to the Accused in any manner for the simple reason that a detailed order was passed by the Trial Court followed by explaining the charge and giving a copy of the charge document. Thus, such contention raised by the Appellant will not be of any relevance.

23. Mr Pavithran would submit that every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a Presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. He would submit that in the present matter, Accused had no proper representation of a legal expert since the victim is an Advocate.

24. As far as this aspect is concerned, the same has to be rejected outright. First of all, the Accused was represented by an Advocate of his own choice. All the witnesses examined during the trial were cross examined on behalf of Accused. The question of how to cross examine the witnesses and what questions to be asked is purely depending upon the Advocate representing the Accused. There is absolutely no material on record to show that there was any lapse on the part of Advocate representing the Accused to perform his duty while defending the matter. The important witnesses were cross examined at length. Thus, such submissions on the part of Mr Pavithran has no basis at all. Accused engaged an Advocate of his own choice and continued with the same Advocate during the entire trial. No grievance was raised by the Accused before the Trial Court about the representation by the particular Advocate or even his capacity to conduct the trial. Thus, such issue which has been raised in the present appeal has no basis at all.

25. It is no doubt true that the duty of a Presiding Officer while conducting a Sessions Trial is not that of a referee or umpire to only conduct the contest between the prosecution and the defence. The main purpose is in dispensing justice. The Presiding Officer cannot assume the

role of a spectator or that of mere recording machine. He must be a participant in the trial by evincing intelligent active interest by putting questions to the witnesses in order to ascertain the truth. There are provisions under the Evidence Act which gives wide power to a Presiding Officer to ask questions to a witness at any point of time only with a view to discover the truth. In such scenario, the active participation of a Presiding Officer is must. However, in the present matter, the learned Counsel Mr Pavithran, failed to point out any instance wherein the participation of the Presiding Officer was found lacking. Recording of depositions of all the witnesses clearly goes to show that the same has been done with utmost care and caution and with full participation of the Presiding Officer. Thus, the observation of the Apex Court in the case of *Ram Chander* (supra) as tried to be projected on behalf of the Appellant will not help in the present matter.

26. In the case of *Willie Slaney* (supra), reference was made to para Nos.89 and 90 of the Judgment of the Apex Court. However, this matter will not help the Appellant in any manner as entire procedure was followed of passing an order for framing of charge, explaining of the charges and recording of the plea of the Accused. In that case, the appellant and another accused were charged under Section 302 r/w Section 34 of IPC. However, the co-accused was acquitted. It was urged that in absence of separate and distinct charge framed against the appellant for committing murder, the trial stands vitiated. The Apex Court observed that a composite charge was framed for the offence punishable under Section 302 r/w Section 34 IPC and that the accused understood the said charge

and no grievance was raised during the trial, it was only an irregularity.

27. In this matter also, the fact remains that the Appellant/Accused was represented by an Advocate. The Appellant/Accused and his Advocate throughout the trial did not raise any grievance about the knowledge or the understanding of the charge and depriving him of knowing such charge. The ground was raised only when the document containing the ingredients of charges is not found in the original record of the Trial Court while arguing the matter. Thus, the Accused/Appellant cannot be permitted to take such plea only when the document containing the charge is not found in the records and proceedings of the Trial Court and more specifically, when he admits in writing of receiving such copy before pleading not guilty. Thus, the proposition in the decision of the Apex Court in the case of *Willie Slaney* (supra), will not in any way be helpful to the Appellant.

28. Now coming to the evidence of the witnesses, it is established on record that a formal complaint was lodged by PW1 Shri Datta Tilve who is also an Advocate and having a chamber on the first floor of the building wherein the victim is also having his chamber. PW1 deposed that his chamber exists on the first floor of Fonseca Building whereas the chamber of the victim/PW7 is after another office existing in between. PW1 claimed that on 06.01.2011, he was in his chamber along with his junior colleagues. At around 6:45 p.m., he heard some shout, however, he did not determine from which side the said shout came. He remained in his office for some time. After some time, he again heard a similar shout of a person and therefore, he ran out of his office. At that time, he saw that the door of the office of PW7 was open. PW7 was found sitting on the floor near a sofa

with blood oozing out from his face. His clothes were soaked in blood. On seeing this, PW1 tried to contact an ambulance. However, since no ambulance was available, he called his son who is also an Advocate. He then rushed down the staircase to find out if any person is running away from the building complex. At that time, he met one of his juniors by name Sanit Bandodkar who narrated to him that one person covering his face left on a Splendor motorcycle.

29. PW1 then deposed that he along with his junior Sanit came to the office of PW7/victim and inquired as to what happened. At that time, victim told him that someone assaulted him. PW7/victim was semi-conscious at that time. Accordingly, PW1 with the help of his juniors shifted PW7 to ID Hospital, Ponda. Thereafter, PW1 lodged the complaint at Ponda Police Station.

30. Mr Pavithran would submit that there is hardly any cross-examination of PW1, which prompted him to say that Accused was not properly represented. I am not convinced with such an argument for the simple reason that PW1 was cross-examined. However, since his complaint was against unknown person, the cross examination was restricted. Only on that count, it cannot be said that there was no effective representation of the Accused.

31. PW2 Gokuladas Sawant, the medical officer attached to Community Health Centre, Ponda deposed that on 06.01.2011, he examined PW7 the victim who was brought with a history of assault. He found three injuries which were less than 3 hours duration caused by hard and blunt object. He referred the patient for ENT checkup and X-ray of

the nose. The first two injuries were found on the nose and upper lip which he described as contused lacerated wound whereas the third injury is an abrasion on the right thigh. This witness was cross-examined at length during which he pointed out that injury No.1 is possible by one blow. The cross examination of this witness is with regard to letter from the Police for examination on letterhead of the Hospital. First of all, it is necessary to note here that PW1 clearly deposed that he took the victim directly to ID Hospital, Ponda and therefore, the question of letter from the Police to examine the patient is out of question. As far as the other aspect is concerned, PW2 has explained that he has issued the certificate on a plain paper with the seal of the Community Health Centre and he identified his signature. Thus, doubt raised on such document is of little importance.

32. PW3 is the witness who had seen the Accused entering the chamber of PW7 during that evening. He deposed that he went to the chamber of PW7 for his work and he left the office of PW7 after about 6:30 p.m. At that time, he saw the Accused enter into the office of PW7. During cross examination, a question was put to this witness and his answer reads thus:-

“It is true that accused was carrying one orange color file.”

33. This answer clearly suggests that while entering the chamber of the victim, the Accused was carrying orange colour file. This means that the presence of PW3 at the said spot is admitted by the Accused. It also means that presence of the Accused while entering the chamber of PW7 and that he was seen by PW3 is also admitted. This was a direct question and not only suggestions. Thus, such answer has more value than an answer to suggestions.

34. The next witness examined by the Prosecution is PW4 Parth Prabhu Shastri who acted as a pancha witness on 06.01.2011 while conducting the scene of offence panchanama. The deposition and the details given by this witness clearly prove that the panchanama was conducted between 8:00 p.m. to 9:00 p.m. in the chamber of PW7. However, it is also necessary to note that during cross examination, this witness clearly admitted that no specimen of blood was taken which was lying on the floor in his presence.

35. PW5 Umesh Naik is another witness who claimed that on 06.01.2011, he went to the electric shop situated on the ground floor of Fonseca Building and at that time, he noticed the Accused standing near his scooter in front of the said building. There was one more person along with the Accused. He then saw the Accused and another person entering in Fonseca Arcade building. He remained at the electric shop for about 10 to 15 minutes and at that time, he noticed the person who accompanied Accused while entering the building, going away hurriedly towards Ponda side. After about a minute or so, Accused got out from the building and went on his scooter. Immediately thereafter, he saw one more person with a cloth on his face going away from the said building on his black colour motorcycle. Thereafter, he saw some Advocates carrying PW7 with injuries. He also disclosed the registration number of the Vespa scooter of the Accused as bearing No. GA-01-K-8819.

36. Accused did not dispute about the ownership of said Vespa scooter bearing No. GA-01-K-8819 and that it was parked in front of the said Fonseca Arcade building during evening time on 06.01.2011, which is clear from his answers to specific questions recorded under Section 313 Cr.P.C.

Accused failed to explain as to how his scooter was found parked in front of the said building during that evening. The cross examination of PW5 leads to no other inference but supports the case of the Prosecution.

37. The main witness is the injured himself who was examined as PW7. He deposed about his profession and existence of office on the first floor of Fonseca building. He identified the Accused being his nephew. He claimed that on 06.01.2011 at around 6:40 p.m. after attending his client by name Venkatesh Kulkarni/PW3, he was sitting in his office and looking at some papers. At that time, he sensed someone approaching him and when he raised his head, suddenly he received a violent blow of GI pipe on his nose. At that time, he realised that he was assaulted by his nephew i.e. the Accused. He tried to get up and at that moment, received second blow of GI pipe from the Accused which landed on his shoulder. Due to the said blow, he collapsed on right-hand side.

38. PW7 then deposed that even then the Accused continued hitting him on his body with the said pipe due to which he became unconscious for some time. When he regained consciousness, he found PW1 Advocate Datta Tilve present in his office. With the help of PW1 and his son, he was shifted to ID Hospital and thereafter to GMC wherein he remained in the hospital till 11.01.2011.

39. PW7 categorically disclosed that Accused assaulted him with iron pipe on his nose, face and other parts of the body due to which he sustained fracture injury to his nasal bones. During cross examination, the victim reiterated that it was the Accused who assaulted him and no other person. He also confirmed that just after PW3-Venkatesh Kulkarni left his office,

the assault took place and that too, by the Accused. He admitted that PW1 Advocate Datta Tilve was the first person to enter his office after the assault and he narrated the incident to PW1. He then deposed that though he had no doubt about the complicity of the Accused in the said assault, he did not recollect whether he told PW1 Datta Tilve about the name of the Accused who assaulted him.

40. This was the submission of Mr Pavithran to cast doubt on the involvement of Accused and the possibility of framing of the Accused subsequently. However, it is clear from the material on record that the question of framing of the Accused is clearly ruled out as PW1 has stated that when he went to the office of PW7/victim, he was bleeding from his mouth and that he was semiconscious. The attack was so sudden that it was not expected from the victim to disclose all details to the person who came to his rescue. It is but natural on the part of PW1 Advocate Tilve to lodge complaint immediately by disclosing that unknown person assaulted PW7. However, that by itself will not in any manner help the Accused to claim that he has been framed subsequently. Record bears that statement of PW7 was recorded in GMC on 07.01.2011 i.e. on the next day wherein he clearly disclosed the name of the Accused as the assailant.

41. The cross examination of PW7 nowhere suggests about any mistaken identity as PW7 clearly deposed that he was repeatedly assaulted on his face and other parts of the body by the Accused with the said iron rod and such assault continued for 3 to 5 minutes. This duration is sufficient enough for the victim to identify the Accused. Assault took place in the chamber/office. Thus, the question of identifying the Accused is

clearly established.

42. Learned Counsel Mr Pavithran submitted that the Prosecution has claimed about the motive of assault being some previous enmity. However, no material has been brought on record and, therefore, it is difficult to accept the case of assault. Mr Faldessai on the other hand claimed that in the entire charge-sheet, there is no reference to any motive. However, during cross examination of the victim, the Accused tried to bring in the aspect of motive.

43. On perusal of deposition of PW7 and more particularly the examination-in-chief, there is absolutely no whisper about any motive of the Accused being behind such assault. Such aspect has been brought on record only during cross examination. PW7 categorically stated that there is no enmity between him and the Accused. However, the Accused is not in talking terms with him. He never filed any complaint against the Accused. There is no dispute going on between the family of the victim and the family of Accused. PW7 admits about the complaint dated 28.02.2000 filed by the Accused at Ponda Police Station which was registered under Crime No.53/2000 under Section 341 and 326 of IPC. He also admits that in connection with said FIR, Ponda Police called him to the Police Station. PW7 claimed that he is not aware who filed the said complaint. However, he was told that the Accused filed such complaint against the victim. Thus, it is clear from this cross examination that Accused tried to bring on record the aspect of motive, which is not found in the entire charge-sheet. Therefore, the contention raised by Mr Pavithran in respect of the motive being not proved by the Prosecution,

has no substance at all.

44. Dr. Swati Lambor working with Goa Medical College (GMC), Senior Resident in the Department of ENT was examined as PW8. She treated the victim in ENT Department. She deposed that the victim was brought to GMC on 06.01.2011 with injuries on his nose, left leg. On examination, she found there was external deformity of nose with crepitus was present suggestive of fracture of nasal bones. There was active bleeding and blood clots were present. X-ray findings show fracture of nasal bones. According to PW8, the injuries were grievous in nature. She then referred the victim to Orthopaedic Department for the treatment of leg injury. The victim was then discharged on 11.01.2011. She then opined that the GI pipe could cause such injuries on the nose. During cross examination, nothing adverse has been brought on record and PW8 confirmed that such injury was grievous in nature.

45. Prosecution then examined Sen Bandodkar as PW9 who acted as a pancha witness on 07.01.2011 in connection with attachment of the clothes of the victim. This panchanama was carried out at GMC, Bambolim and the clothes of the victim were attached having bloodstains. The witness was cross examined in detail. However, nothing adverse has been brought on record to disbelieve the contention of this witness and ultimately the attachment of the clothes of the victim at GMC.

46. PW10 Gurudas Prabhu is the photographer who clicked photographs during the investigation and more specifically at the time of recovery of the weapon and clothes at the instance of Accused. Copies of photographs along with the certificate is placed on record. However, it is

clear from the certificate produced at Exhibit 36 that the same is not in accordance with Section 65-B of Evidence Act and, therefore, the photographs which are admittedly considered as secondary evidence, cannot be considered as proved in evidence.

47. Sandip Shet was examined as PW11 who deposed that on 06.01.2011 at around 6:30 p.m., he had gone to meet his friend Venkatesh Naik who has a flat on third floor of Fonseca Arcade i.e. building wherein the office of victim exists at first floor. He claimed that since he is having a sinus problem, he covered his nose and mouth with a handkerchief in order to avoid infection. He claimed that on that day after meeting his friend Venkatesh Naik, he got down from the staircase at around 6:45 p.m. while covering his face and went away on his motorcycle towards Durgabhat. This is the witness who has been examined by the Prosecution in order to show that he went away from the spot covering his face and referred by other witnesses but not the suspect, though initially was considered to be a suspect. Mr Faldessai would submit that PW11 was examined only to show that this witness went away covering his face and there should not be any doubt in the mind of the Court that such person who went away covering his face could have been the suspect. This possibility has been ruled out by examining the witness.

48. Prosecution then examined PW12 Sanjay Dhalvi, the PSI attached to Ponda Police Station at the relevant time and who conducted the investigation. This witness has been cross examined at length. During cross examination, he has clearly disclosed that Accused came near the said building on his Vespa scooter. However, there was one more person

along with Accused who came to the office of the victim. It is no doubt true that one of the witnesses also deposed that there was another person present along with the Accused. However, PW3 Venkatesh Kulkarni and PW7 the victim specifically deposed that only Accused entered the office. PW7 the victim though in demur identified the Accused and claimed that he had no confusion at all about the identification of the assailant. Thus, the attempt on the part of Accused to create doubt while cross examining PW12 cannot be considered as successful.

49. Mr Pavithran also submitted that neither PW3 nor any other witness claimed that the Accused was found carrying GI pipe in his hand. It is no doubt true that the Prosecution witnesses who found the Accused present at the said place did not refer to GI pipe in the hand of Accused. However, this aspect will not be sufficient enough to create any doubt in the mind for the simple reason that the GI pipe which was recovered at the instance of Accused and which has been identified by the victim during his examination-in-chief, is found to be only the length of one foot. Similarly, the Accused was found carrying one file in his hand as deposed by PW3. Therefore, concealing such GI pipe behind the file or inside the file is possible.

50. Even otherwise, victim clearly deposed that he was assaulted by the Accused with a GI pipe. Thus, such minor discrepancies will not help the Accused in order to create any doubt.

51. It, therefore, shows that evidence of victim is cogent, convincing and reliable. There is no material to show as to why PW7 the victim will try to falsely implicate the Accused.

52. Apart from it, PW3 Venkatesh Kulkarni clearly identified the Accused while entering the office of the victim. Thus, the Prosecution has succeeded in proving that Accused the office of the victim with intention to commit an offence.

53. Section 441 of IPC defines criminal trespass wherein it is provided that whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence. Section 442 of IPC deals with house trespass wherein it is stated that whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as human dwelling or any building used as a place for worship, or as a place for custody of property, is said to commit “house-trespass”.

54. The office of the victim is existing in the building and, therefore, it is part and parcel of the building which is found referred in Section 442 by the definition of house-trespass. The intention of Accused while entering into the said building/office of the victim was to commit an offence. Thus, the Prosecution has proved beyond all reasonable doubt that the Accused committed the offence under Section 452 of IPC.

55. As far as Section 307 of IPC is concerned, the learned Trial Court considered it in para 19 by referring to Section 300 of IPC and observed that it is not only the intention that matters, the knowledge also is required to be taken into consideration. On this basis, the learned Trial Court

observed that the blow was given on nose of the victim and PW8 Dr Lambor clearly opined that such injury could have been fatal in case of delay of treatment.

56. As far as recovery panchanama is concerned, it is clear that even the learned Trial Court did not consider it as proved. Therefore, it is not necessary to discuss the evidence of the pancha witness and the claim of Prosecution regarding recovery of the weapon and the clothes attached at the instance of Accused.

57. Though such recovery is not proved, the fact remains that PW7 the victim clearly claimed that he was assaulted with a GI pipe. The Doctor has opined that the injury was grievous in nature and could have been fatal in absence of immediate treatment. The victim/PW7 claimed that the assault was on his face which landed on his nose causing grievous injury including fracture. This clearly goes to show the use of force by the Accused to give such blow on a vital part of the body i.e. the face and that too by an object such as iron pipe. The victim has claimed that on receiving first blow on his nose, he tried to get up from the chair but at the same time, Accused attempted to give another blow on his face, however, it landed on his shoulder. The victim claimed that while trying to get up, he received second blow and therefore, he fell down. The Accused again attempted to hit the victim on his face with the same pipe but at this time, the victim was trying to avoid it. Due to the bleeding, the victim became unconscious. This itself clearly establishes the intention of the Accused and also his knowledge of giving blow on a vital part of the body. The learned Trial Court considered all these aspects and observed that the

intention and the knowledge on the part of Accused is established to hold him guilty for the offence under Section 307 of IPC. To my mind, such observation cannot be faulted with in the present matter as the ingredients of Section 307 of IPC are clearly established.

58. In the case of ***Hari Singh vs Sukhbir Singh and Ors.***; (1988) 4 SCC 551, the Apex Court observed in para 7 that under Section 307 of IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the Accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of “attempt to murder”. Under Section 307, the intention precedes the act attributed to the Accused. Therefore, the intention is to be gathered from all circumstances and not merely from the consequences that ensue. The nature of the weapon used, the manner in which it is used, the motive for the crime, the severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

59. In the case of ***Vasant Vithu Jadhav vs State of Maharashtra***; (2004) 9 SCC 31, the Apex Court while dealing with applicability of Section 307 of IPC observed that it is sufficient to justify the conviction under Section 307 of IPC if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from

other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances as mentioned in Section 307. Whether there was intention to kill or knowledge that death will be caused is a question of fact and would depend on the facts of a given case. The circumstance that the injury inflicted by the accused was simple or minor will not by itself rule out application of Section 307 of IPC. The determinative question is intention or knowledge, as the case may be, and not nature of the injury.

60. Applying the above-settled propositions to the matter in hand, it is clear from the record and as opined by the expert that the injury was grievous in nature which was capable of being fatal in nature in absence of immediate treatment, coupled with the fact of the part of the body where the injury was caused, the weapon used would amply prove the ingredients of Section 307 of IPC and against the Accused.

61. Having said so, the contentions raised in the memo of appeal challenging the impugned judgment are clearly devoid of merit.

62. In the result, the appeal must fail and hence, I pass the following:-

ORDER

- i. The appeal stands rejected.

- ii. Appellant/Accused shall surrender before the learned Trial Court immediately for serving the remaining sentence.

BHARAT P. DESHPANDE, J.

Judgment Continued

63. Mr Pavithran appearing for the Appellant requests four weeks' time to surrender. He submits that the Appellant wishes to challenge this Judgment and Order before the Apex Court. Considering the above submission, the request for four weeks' time to surrender is granted. However, if no interim order is received, the Appellant shall surrender after the expiry of four weeks before the Trial Court.

BHARAT P. DESHPANDE, J.

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