

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

CRIMINAL APPEAL NO.336 OF 2020

WITH

**INTERIM APPLICATION NO.1060 OF 2020
IN
CRIMINAL APPEAL NO.336 OF 2020**

Rohit Vijay Borade

Age – 21 years,

Add – t/o Pathardi Gaon, Rajwada,

Tal Dist – Nashik

(At present Nashik Road Jail)

.... Appellant

versus

State of Maharashtra

Through Police Inspector

Indiranagar Police Station,

Tal – Dist – Nashik

(C.R.No.189/2017)

.... Respondent

.....

- Mr. Pratik R. Kalantri a/w Mr. Vivek Arote, Advocate for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 04th JANUARY, 2023

JUDGMENT :

MANUSHREE
V
NESARIKAR

1. The Appellant has challenged the Judgment and Order dated 26/02/2020 passed by the Additional Sessions Judge-4,

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Nashik, in Sessions Case No.363 of 2017. The Appellant was the original accused No.2. There were two more accused namely accused No.1 Pravin @ Pavan Sunil Donde and accused No.3 Vishal Raju Donde. At the conclusion of the trial, all the accused including the Appellant were convicted for commission of offence punishable u/s 307 r/w 34 of the IPC and were sentenced to suffer rigorous imprisonment for five years each and to pay fine of Rs.5,000/- each and in default of payment of fine to suffer simple imprisonment for two months. They were acquitted from the charges of commission of offence punishable u/s 135 of Maharashtra Police Act. They were granted set off u/s 428 of Cr.P.C.

2. Heard Mr. Pratik R. Kalantri, learned counsel for the Appellant and Mr. S. R. Agarkar, learned APP for the State.
3. The prosecution case is that in one marriage ceremony there was quarrel between the accused Pravin @ Pavan Donde and the injured in this case Prakash Donde. On 15/07/2017, at about 10.15 p.m., outside the Gaming zone in Pathardi this

incident took place. There was quarrel between the injured Prakash and the accused with reference to previous quarrel during marriage ceremony. It is alleged that the Appellant tried to assault the injured Prakash with a Koyta but Prakash removed that Koyta and threw it away. It is further alleged that accused No.3 Vishal Donde held the injured Prakash from behind and accused No.1 Pravin @ Pavan gave blows with the Koyta on the centre of his head causing grievous injuries. Prakash was taken to a hospital. The police were informed. They recorded his statement and registered C.R.No.189/2017 at Indira Nagar police station on 16/07/2017 at about 03.20 a.m. The accused including the Appellant were arrested on 18/07/2017. Their clothes were seized. In the meantime Spot Panchanama was conducted and Koyta found on the spot was seized. Weapons and clothes were sent for chemical analysis. Statement of witnesses were recorded. The statement of eyewitnesses were also recorded u/s 164 of Cr.P.C. At the instance of accused No.1 one Koyta was recovered. After conclusion of the investigation charge-sheet was filed and the case was committed to the Court

of Sessions. The defence of the accused was of total denial. After considering the evidence and after hearing the parties, learned Judge convicted and sentenced the Appellant and other accused as mentioned earlier.

4. During trial the prosecution examined nine witnesses including the victim Prakash Donde, two eyewitnesses, the Panchas for various Panchanamas, Medical Officers who had treated the victim and finally the Investigating Officer.
5. P.W.1 Prakash Donde is the main witness. He had suffered injuries. He has deposed as follows:

He was a resident of Pathardi. He knew the accused before the Court as they were residents of his village. The incident had taken place on 15/07/2017 at about 10.15 p.m. near a temple in village Pathardi. At that time he was walking with his friend Rohit Soundarya (P.W.2), Pritam Shardul (P.W.3) and Dilip Pradhan. The Appellant and accused No.1 Pravin @ Pavan came there. On account of their dispute in the Haldi

programme, the Appellant took out a Koyta. P.W.1 snatched it and threw it away. Accused No.3 Vishal Donde was already present near the gaming zone. The other accused came subsequently. After that accused No.3 Vishal caught P.W.1 and accused No.1 Pravin @ Pavan assaulted him with Koyta on his head. He also assaulted P.W.1 on right side of the chin, left side of the head and on his chest. After that P.W.1 became unconscious. He was taken to Civil Hospital, Nashik. His statement was recorded by police in the hospital. It was treated as FIR. It is produced on record at Ex.46. On 16/07/2017, he was shifted to Life Care Hospital and then to Sopan Hospital. The police again recorded his statement at Sopan hospital. He identified the two Koytas produced before the Court as Articles 'A' and 'B'.

In the cross-examination, he admitted that he was externed from Nashik district at the time of his deposition. There were three cases pending against him and therefore he was externed. He further admitted that in the Haldi programme he

had quarrelled with Pavan (i.e. accused No.1 Pravin @ Pavan). He further admitted that, on that day, the Appellant had not assaulted him. According to him there were street lights. He denied the suggestion that he was assaulted from backside and therefore he could not see the assailants. He further admitted that, on the date of incident also, there was no quarrel between him and the present Appellant. He further admitted that there were two cases pending against him u/s 302 and 376 of the IPC. Those cases were over. In the sketch map of the spot produced at Ex.54, there was no mention of street light or other source of light. His FIR is produced on record at Ex.46. It specifically corroborates what he had deposed before the Court.

6. P.W.2 Rohit Soundarya was an eyewitness. His version is different on material aspects from that of P.W.1. He has deposed that, at the time of incident, he was present with P.W.1 and other friends. They had reached near a Gaming Zone. At that time, all the three accused came there. Accused No.1 Pravin @ Pavan started quarreling with P.W.1 Prakash on account of the

earlier dispute. He has deposed that the Appellant took out a Koyta to assault P.W.1 Prakash. At that time Prakash snatched the Koyta and threw it away. Accused No.3 Vishal caught Prakash and then accused No.1 Pravin @ Pavan assaulted P.W.1 Prakash on his head by means of Koyta. Prakash fell down. Thereafter, the Appellant took the Koyta from accused No.1 Pravin @ Pavan and assaulted P.W.1 Prakash on his head and face. This particular deposition is materially different from the deposition of P.W.1. P.W.1 has not attributed any such assault to the present Appellant. After the assault, the accused ran away and Prakash was taken to hospital. This witness's statement was also recorded u/s 164 of Cr.PC.

7. In the cross-examination, certain portions from his statement recorded u/s 164 of Cr.PC. were brought to his notice. They were contrary to his deposition. He accepted those contrary statements. One important statement which he had made before the Magistrate u/s 164 of Cr.PC. was that, when they were standing by the side of the Gaming Zone, the

Appellant came there and went inside the Gaming Zone. When he came out, P.W.1 Prakash came to know that the Appellant Rohit was possessing a Koyta. Prakash then caught the Appellant. The prosecution case is that after that Prakash threw away that Koyta. This particular statement shows that the injured P.W.1 had gone to the Appellant and had removed Koyta. There was no mention of the Appellant trying to assault P.W.1. This contrary version is important in the context of this case to see whether section 34 of the IPC is attracted against the present Appellant. This is important, because, P.W.1 Prakash himself has stated that all the blows causing injuries were given by the accused No.1. P.W.2 further admitted that he did not try to help Prakash because he had panicked and that he did not know what had happened inside the gaming zone.

8. P.W.3 Pritam Shardul was another eyewitness. He has deposed in the same manner as deposed by P.W.1 as far as the incident is concerned. He has stated that the Appellant picked up a Koyta. Prakash i.e. P.W.1 had caught that Koyta and threw it

away. After that, accused No.3 Vishal caught hands of PW.1 and accused No.1 gave blows with Koyta on PW.1. This witness has not attributed any blow with Koyta on PW.1 to the Appellant.

9. PW.4 Bhikaji Sawant was a Pancha for various Panchanamas. He was a Pancha for Spot Panchanama which is produced at Ex.64. At that time, Koyta lying at the spot was recovered. He was also Pancha for the Panchanama under which the clothes of the injured were recovered. He was also Pancha in whose presence clothes of the accused were seized at the time of their arrest. He has proved all these Panchanamas.

10. PW.5 Ashish Ahire was a Pancha in whose presence a Koyta was recovered at the instance of the accused No.1. This witness's evidence is not important as far as the present Appellant is concerned.

11. PW.6 Dr. Mahesh Khairkar was attached to Civil Hospital, Nashik. He had examined the victim in the night of 15/07/2017.

P.W.1 had suffered following injuries ;

- (i) Incised wound on the left parietal region, having size 9 x 2 cms.
- (ii) Incised wound on the occipital region, having size 5 x 2 cms.
- (iii) Incised wound on left temporal region, having size 5 x 2 cms.
- (iv) Incised wound on the frontal region of skull, having size 12 x 2 cms.

12. The C.T. scan of the brain showed a large subdural hematoma of width 13 mm along right frontal convexity with fracture underlined frontal bone. Displaced multiple bony fragments were also noticed in the brain. There were large bony fragments found displaced into subdural hematoma ridge of right orbit and superiorly extends involving vault of skull with displaced fracture in vault of right side, suggestive of right cerebral edema.

13. His evidence is corroborated by P.W.8 Dr. Omkar Muley who was attached to Sopan hospital, Nashik. According to him, the head injury was in the nature of right frontal hemorrhagic contusion on right frontal bone, with right frontal sub-dural hemorrhage. The nature of injuries was grievous and they could have caused death in ordinary course of nature.
14. P.W.7 PSI Vikas Londhe was attached to Indira Nagar police station. He had recorded statement of P.W.1 and registered C.R.No.189/2017. He had prepared Spot Panchanama and had seized the Koyta.
15. P.W.9 PSI Sunil Bodke had conducted further investigation. He had arrested the accused. He had seized their clothes and had sent them for chemical analysis. The C.A. report mentions that the blood of 'B' group was found on both the Koytas as well as on the clothes of the accused.

This, in short, was the evidence of the prosecution.

16. Learned Judge considered this evidence and convicted the Appellant along with other accused as mentioned earlier. The Appellant was convicted with the aid of section 34 of the IPC. He had specifically observed that though the accused Nos.2 and 3 did not assault the victim, they would be liable for the crime as if the same had been committed by them individually. According to the learned Judge they had shared common intention with the accused No.1 to commit this offence.

17. Learned counsel for the Appellant submitted that there was contradiction between the statements of eyewitnesses and they are not consistent. There were contradictions in their statements given to the police and before the Court. Therefore they are not reliable. The injured P.W.1 himself had criminal history. They were having grudge against each other and therefore the Appellant was falsely implicated in this case. The Spot of incident is doubtful as there was no street lamp or street light mentioned in the Spot Panchanama or in the map. Section

34 of the IPC is not applicable as far as the present Appellant is concerned.

18. Learned APP opposed these submissions. According to him, section 34 of the IPC is clearly applicable to the present Appellant as well. He was carrying Koyta and therefore it indicated that he shared common intention with the accused No.1. P.W.1 and P.W.3 have deposed that the Appellant tried to assault the victim and therefore it cannot be said that he had not played any part in the assault on the victim. He further submitted that, P.W.2 had deposed that even the Appellant had assaulted the victim. The C.A. report is incriminating against the Appellant. The Koyta attributed to the Appellant was found at the spot and it also carried blood of 'B' group.

19. I have considered these submissions. As far as injuries to the victim P.W.1 are concerned, there are undoubtedly serious injuries attracting section 307 of the IPC. The nature of injuries and deposition of Medical Officers clearly establish the fact that

the assault on the victim was of serious nature causing very serious injuries attracting ingredients of section 307 of the IPC. The crucial question remains as to whether the present Appellant can be said to be liable for commission of this offence.

20. Though P.W.2 has deposed that the Appellant had also assaulted the P.W.1 with Koyta, this is directly contrary to the deposition of P.W.1 and P.W.3. Both these witnesses P.W.1 and P.W.3 have not stated that the Appellant had given any blow to the injured P.W.1 causing grievous injuries. To that extent P.W.2's version is not supported and is in fact contrary to the evidence of other two eyewitnesses.

21. In this context evidence of P.W.1 is more important. P.W.1 and P.W.3 have consistently deposed that the blows were given by accused No.1 alone. All the serious injuries were caused by accused No.1 alone. Therefore, it is necessary to see whether there are any circumstances which prove that the Appellant had shared common intention with accused No.1 as is required u/s

34 of the IPC. From that context it is necessary to carefully examine the evidence of P.W.1 and P.W.3.

22. P.W.1's evidence shows that the incident started with a quarrel regarding earlier dispute of the Haldi programme. In the cross examination he has admitted that the present Appellant had no concern with the earlier dispute in the Haldi programme and had no quarrel with P.W.1 even on the date of incident. The quarrel was directly between the accused No.1 and P.W.1. After the quarrel started with reference to the previous dispute, allegedly the Appellant took out Koyta to assault him. P.W.1 has not even stated that the Appellant had tried to assault him. P.W.1 snatched the Koyta and threw it away. The first part of the incident stops there.

23. The next part of the incident took place near the Gaming Zone, where accused No.3 was already present. Accused No.1 and the Appellant came there after the accused No.3. At that point, accused No.3 caught P.W.1 and accused No.1

assaulted him with Koyta on his head and face. Thus in the second part of the incident, P.W.1 himself had not attributed any role to the Appellant. Same is the evidence of P.W.3. In addition, the statement made by P.W.2 in his statement recorded u/s 164 of Cr.P.C. which is brought on record as portion mark 'D' mentions that when the Appellant came out of the Gaming Zone, P.W.1 came to know that the Appellant was having a Koyta. At that time, P.W.1 caught the Appellant and then that Koyta was thrown away. Thus, at no point of time, the Appellant had tried to assault the victim i.e. P.W.1. That was the first part of the incident. The main incident took place after that. In that second part, the Appellant had played no role whatsoever. All the injuries were caused by accused No.1. P.W.1 has added that accused No.3 had caught him. The Appellant did not pick up his own weapon lying at the spot and did not try to assault P.W.1. The prosecution has not proved beyond reasonable doubt that the Appellant had shared common intention as defined u/s 34 of IPC with accused No.1, in causing those serious injuries to the P.W.1.

24. The other circumstances of finding Koyta at the spot is not really incriminating because even as per the prosecution case, the Koyta was taken away from the Appellant by P.W.1 and it was thrown away at the spot. This does not indicate that the Appellant had committed offence u/s 307 of the IPC. Same is the case with the blood stains on the clothes of the Appellant. His presence at the spot is deposed by all the eyewitnesses. The crucial point is about his no role in causing injuries to the victim i.e. P.W.1. Considering all these aspects, the prosecution has not been able to prove beyond reasonable doubt that the Appellant had shared common intention with the accused No.1 who had caused all those serious injuries to the victim P.W.1. In these circumstances the Appellant's conviction and sentence u/s 307 r/w 34 of IPC cannot be justified.

25. The Appellant is already acquitted from the charges of commission of offence punishable u/s 135 of Maharashtra Police Act.

26. Hence, the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The Appellant is acquitted from the charges of commission of offence punishable u/s 307 r/w 34 of the Indian Penal Code.
- (iii) The Appellant is in custody. He shall be released forthwith, if not required in any other case.
- (iv) He shall execute bond u/s 437-A of Cr.P.C. to the satisfaction of the trial Court.
- (v) Appeal stands disposed of accordingly.
- (vi) With disposal of the Appeal, the companion application does not survive and is disposed of as such.

(SARANG V. KOTWAL, J.)