



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 488 OF 2004

The State of Maharashtra,
Through Police Station Officer,
Jawaharnagar Police Station,
Aurangabad

... Appellant

(Orig. Complainant)

Versus

1. Sheikh Jamir Sheikh Fakruddin,
Age : 31 yrs. Occu. : Business,
R/o. HUDCO, N-12, G-151,
Aurangabad
2. Abdul Kadar @ Khadu s/o. Abdul Aamodi
Age : 30 years, Occu. : Business,
R/o. Katkat Gate, Opp. Maksud Plasticwala,
Aurangabad.
3. Sayyed Kutubuddin S/o. Sayyed Shabir,
Age : 30 years, Occu. : Business,
R/o. Jafarnagar, Kiradpura behind
Ellora Steel, Aurangabad.

... Respondents.

(Orig. Accused)

...

Mr. S. M. Ganachari, APP for Appellant – State
Mr. D. S. Manorkar, Advocate for Respondent Nos.1 and 3
Mr. Rajendrraa Deshmukh, Senior Counsel i/b. Mr. D. R.
Deshmukh, Advocate for respondent No.2

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 11th JANUARY, 2024

PRONOUNCED ON : 19th JANUARY, 2024

JUDGMENT :

1. By way of instant appeal, State has taken exception to
the judgment and order dated 29.03.2004, passed in R.C.C. No. 33

of 2003 tried for offence punishable under sections 324, 148 and 506 read with 34 of Indian Penal Code (IPC).

2. According to learned APP, all three respondents in furtherance of common intention had assaulted complainant on 18.07.2002 by use of articles like base ball bat, fighter and knife etc. That, in support of its case prosecution had examined in all 7 witnesses. Medical witness was also examined, who had placed injury certificate on record. However, learned trial court has failed to consider and appreciate the consistent direct eye witness account and injured eye witnesses i.e. PW1 Piyush Naik and PW2 Chunnilal Jadhav. Acquittal is on the ground that, there are material omissions, inconsistencies and variances which in fact were either not at all appearing in the testimonies and were material one so as to affect the case of prosecution.

3. He further pointed out that, though there is recovery at the instance of accused, such evidence is disbelieved and discarded on petty count like absence of signature of panchas. That, in fact learned trial court has adopted hyper technical approach. Occurrence was cogently proved, complaint was promptly lodged, still case of prosecution has not been accepted and therefore, it is prayed that, on re-appreciation impugned judgment be set aside by allowing the appeal.

4. Learned counsel for respondent No.1 and 3 (accused No.1 and 3) would submit that, prosecution miserably failed to prove the charges by adducing cogent and reliable evidence. That, there is inconsistencies in the prosecution witnesses including that of complainant and so called eye witnesses, each of them is giving distinct version and not corroborating each other. That, their evidence is bereft of material particulars like actual place of occurrence, date of occurrence, roles and site of assault. Consequently, it is his submission that, case not being proved reasonable doubt, learned trial court rightly acquitted accused.

5. Learned Senior Counsel representing respondent no.2 (i.e. accused no.2) would also submit that, there is weak and fragile evidence. Complainant's evidence is not finding support or corroboration from other witnesses. Accused persons were not identified by conducting T.I. parade. Seizure of weapon is not proved beyond reasonable doubt and is rather surrounded by suspicion. According to him, medical evidence is about simple injury and possibility of it being caused on account of fall has not been ruled out by him. That, entire evidence of prosecution being full of material omissions, improvements, variances and is rightly discarded by the learned trial Judge and he thereby prays to dismiss the appeal for want of merits.

6. After considering the submissions of respective parties and on going through the papers, it seems that, prosecution was launched against present respondents for commission of offence under sections 324, 148 and 506 read with section 34 of IPC.

The sum and substance of the prosecution case is that, on 18.07.2002, accused persons in furtherance of common intention voluntarily caused hurt to the complainant by use of weapons like fighter and base ball bat, which were instruments for cutting and were likely to cause death. That, they had formed unlawful assembly and were armed with deadly weapon and had put it to use and further had intimidated complainant and hence the above charges.

7. On going through the trial papers, it is emerging that to prove the charges in all 7 witnesses have been examined i.e. PW1 Piyush Naik complainant; PW2 Chunnilal an eye witness; PW3 Dr. Archana Bhosle, medical expert; PW4 Nilesh an eye witness; PW5 Laxman and PW6 Gajansham panchas to spot panchanama and memorandum of disclosure respectively and PW7 PSI Kotiye, the Investigating Officer.

8. Here, on hearing both sides, crucial evidence seems to be of PW1 Piyush i.e. complainant, PW2 Chunnilal an alleged eye witness and PW3 Dr. Archana Bhosle and PW4 Nilesh. Rest are panchas and investigating Officer.

On steering through the evidence of complainant at Exh.22, he seems to have deposed that, he had given an amount of Rs.2,000/- to accused no.1 two years back and when he demanded, accused refused to pay and threatened to see him tomorrow and on next day while complainant was at his construction site, it is alleged that, accused came along with four persons in a vehicle. According to him, accused and those persons rushed over him, pointed knife on his neck and questioned him for demanding money. According to him, accused No.2 Abdul Kadir hit him with base ball bat by giving 4 to 5 blows. Then accused no.3 Kutubuddin gave a blow of fighter to him, resulting into bleeding injury on the lips of complainant and so he lodged report at Exh.23. But, in cross, he answered that, incident took place on road. Nobody chased to catch hold of accused and even nobody came to rescue him in spite of he shouting. He stated that, when he went to police, at that time, PW2 Chunnilal, one Sunil and one Kardile were present with him. He denied any transaction between him and accused no.1.

9. PW2 Chunnilal deposed that, on that day, he was sitting near hotel around 2:30 p.m. that time, he heard the noise, attracting his attention and so he saw 3 to 4 persons had surrounded the complainant. Out of those, one gave blow with base ball bat and one was holding fighter and he gave blow with it on the mouth of complainant and they fled. According to him, the person who was holding base ball bat is Kutubuddin. According to him, fighter was in the hand of accused no.1 Sheikh Jamir.

In cross he answered that, he does not remember whether he informed the police about the alleged occurrence taking place on 18.07.2003 or not. Omission is brought about all accused surrounding to the complainant and that accused no.1 even gave blow with fighter.

10. PW4 Nilesh, who also claimed to be an eye witness is at Exh.30, stated that, the alleged incident took place on 18.07.2002. According to him, accused no.1 pointed knife to the complainant, whereas remaining accused i.e. Abdul Kadar and Kutubuddin both assaulted by means of base ball bat to the complainant, causing him injury to the hand. Further according to him, accused no.1 assaulted complainant with the fighter. However, in his cross, omissions are brought about accused no.1 showing knife to the

complainant, about accuse no.1 giving blow of fighter on the neck of complainant and about accused Kutubuddin and Kadar assaulting with base ball bat.

11. Therefore, on carefully analyzing evidence of complainant and alleged eye witnesses, it is apparent that, they are not consistent firstly on the point of the year in which the incident took place. Secondly, there is variance regarding who was holding what and who assaulted where. Complainant speaks about knife being placed on his neck, but remaining witness are silent about the same. There is variance about use of fighter, allegations against accused no.1 raised by PW4 Nilesh is about assault on complainant by fighter and allegations against two accused are about assaulting by means of base ball bat. Medical evidence is only regarding abrasion and contusion and there is no injury suggesting use of sharp weapon like fighter.

12. Though spot panchanama is shown to be got drawn on same day, panch in cross stated that, he caused signature as police asked him to sign and no other person was present at the time of signing of panchanama. Therefore, question is who showed the spot.

13. Though prosecution claims that there is recovery at the instance of accused Sheikh Jamir in the backdrop of memorandum i.e. of base ball bat and fighter, it is apparently caused on 27.08.2002. Therefore, recovery is almost after three weeks. However, according to complainant, use of base ball bat and fighter are attributed to accused Abdul Kadir and Kutubuddin. Therefore how recovery of such articles at all can be caused at the instance of accused no.1 is an unanswered question. Thus, there are material variances in the testimonies of prosecution witnesses.

Therefore, on taking survey of prosecution evidence adduced before trial court, there is no convincing and consistent evidence of complainant and rest of the witnesses. They are not lending support to each other on material counts.

Consequently, case cannot be said to be proved beyond reasonable doubt. Learned trial court has correctly appreciated available evidence and has rightly refused to record guilt as prosecution has failed to discharge its burden. There being no merits in the appeal, I proceed to pass following order :-

ORDER

(i) The criminal appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)