

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

CRIMINAL APPEAL NO.538 OF 2014

Ashish Bharat Jadhav
Age 25 years, Occ:Student,
R/a. Yashodeep Chowk, Kadu Chawl,
Behind Joshi STD, Warje Malwadi,
Pune. (At present lodged in Yerawada
Central Prison, Pune).

...Appellant
(Original Accused No.1)

Versus

1. The State of Maharashtra
2. Naina Shivprasad Naik
Age-adult, Occ:housewife,
R/a. C/o. Ramprasad Babanrao Naik,
Ganpati Matha, Naik Building,
Warje, Malwadi, Pune.

...Respondents

***WITH
CRIMINAL APPEAL NO.484 OF 2014***

1. Sameer Ashok Bhagwat
Age: 33 Years,
Residing at: Sinhagad Road
Anand Nagar, Ganesh Baug,
Bldg No-C, Flat No 3, Pune
2. Kapil Vinod Ramteke
Age: 27 Years
Residing at:

Chaitanya Chowk,
Kakde Residency ...Appellants
Flat No 10, Warjermalwadi, Pune. (Original Accused Nos 2&3)

Versus

The State of Maharashtra
[Through The Warjermalwadi Police
Station, Pune] ...Respondent

Mr. Priyal G. Sarda a/w Ms. Seema Dighe, for the Appellant in
Appeal/538/2014.

Mr. Ashish Vernekar i/b Mr. Satyavrat Joshi, for the Appellants in
Appeal/484/2014.

Mr. R. M. Pethe, A.P.P for the Respondent – State.

Ms. Farhana Shah, Appointed Advocate for the Respondent No.2 in
Appeal/538/2014.

***CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.***

DATE : 3rd JANUARY 2024

ORAL JUDGMENT (Per Revati Mohite Dere, J.) :

1. The aforesaid appeals are directed against the Judgment and Order dated 26th May 2014, passed by the learned Additional Sessions Judge, Pune in Sessions Case No.438 of 2008. By the said Judgment and Order, the appellants have been convicted and

sentenced as under;

- Appellant – Ashish Bharat Jadhav is convicted, for the offence punishable under Section 302 of the Indian Penal Code ('IPC') and is sentenced to suffer imprisonment for life and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for 1 year. On realization of fine amount, compensation was directed to be paid to the wife and minor children of deceased - Shivprasad Babanrao Naik, under Section 357(1) of the Code of Criminal Procedure;
- Appellant – Ashish Bharat Jadhav, Appellant – Sameer Ashok Bhagwat and Appellant – Kapil Vinod Ramteke, are convicted, for the offence punishable under Section 307 r/w 34 of the Indian Penal Code. Appellant – Ashish Jadhav, is sentenced to suffer simple imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for 1 year and Appellant – Sameer Bhagwat and Appellant – Kapil Ramteke, are sentenced to suffer simple imprisonment for 3 years each, and to pay fine of Rs.2,000/- each, in default, to undergo simple imprisonment for 3 months each;

- Appellant – Ashish Jadhav is also convicted, for the offence punishable under Section 4(25) of the Arms Act, and is sentenced to suffer simple imprisonment for 3 years, and to pay a fine of Rs.2,000/-, in default, to undergo simple imprisonment for 6 months;

All the sentences were directed to run concurrently.

2. The prosecution case in brief, is as under :-

The incident is alleged to have taken place on 14th March 2008 at about 10:00 p.m., in front of Jaibhavani Dhaba on Highway Road, Warje, Malwadi, Pune. In the said incident, accused No.1 – Ashish Bharat Jadhav, is alleged to have assaulted Shivprasad Naik (deceased), and Ajit Godambe (PW6) with a sword, whereas accused No.2 - Sameer Ashok Bhagwat and accused No. 3 - Kapil Vinod Ramteke, are alleged to have assaulted Shivprasad and Ajit, by fists and kick blows. The said incident is alleged to have been witnessed by 3 persons i.e. by Rakesh Rajkumar Tiwari (PW2); Mahesh Chakankar and Rahul Godse. According to PW1 – Ramprasad Babanrao Naik

(brother of deceased – Shivprasad), he learnt of the incident of assault on his brother from his sister-in-law, pursuant to which, he asked his friend – Rohan Tiwari to find out what had happened; and that accordingly, Rohan had informed him of an assault on his brother and that his brother was severely injured and was shifted to Deenanath Mangeshkar Hospital. On reaching the hospital, the police arrived and recorded the statement of Ramprasad (PW1), which was treated as an FIR (Exhibit – 70). The said FIR was lodged as against unknown persons. According to PW1 on 16th March 2008, he learnt from Rakesh Tiwari (PW2); Mahesh Chakankar and Rahul Godse, that they had witnessed the incident and that in the said incident, Ashish Jadhav (A1) had assaulted Shivprasad with a sword and Sameer Bhagwat (A2) and Kapil Ramteke (A3) had assaulted Shivprasad by fists and kick blows. Pursuant thereto, PW1's supplementary statement came to be recorded.

After investigation, charge-sheet was filed in the said case in the Court of the learned Judicial Magistrate, First Class, Pune. Since the offences were triable by the Court of Sessions, the case came to be

transferred to the Court of Sessions, for trial.

The prosecution in support of its case examined 11 witnesses i.e. PW1 – Ramprasad Babanrao Naik (complainant and brother of deceased – Shivprasad); PW2 –Rakesh Rajkumar Tiwari (eye-witness); PW3 – Kiran Laxmanrao Deshpande, panch to the spot panchanama; PW4 – Dr.Ramesh Sonba Dumbre, doctor who treated Shivprasad at Deenanath Mangeshkar Hospital; PW5 - Dr. Naresh Kantilal Lodha, doctor who treated Shivprasad at Lodha Hospital and Maternity Home, Pune, where he was first taken, soon after the incident; PW6 – Ajit Sopan Godambe, injured eye-witness (hostile); PW7 – Dr. Ajay Anirudh Taware, doctor who conducted the post-mortem on the deceased; PW8 – Maruti Balwant Powar, panch to the recovery of clothes of Ashish Jadhav (A1) and of the sword used by Ashish Jadhav (A1), at the instance of A3 – Kapil Ramteke; PW9 – Shivaji G. Kolpe, the officer who recorded the FIR and the statement of the injured - Ajit; PW10 – Ramdas Rajaram Shelke, Investigating Officer, who arrested the accused and conducted part of the investigation and PW11 – Kisan Malkappa Pujari, also an Investigating

Officer.

The defence of the appellants was that of total denial and false implication. The appellants did not examine any witness in support of their defence.

After a full-fledged trial, the learned Additional Sessions Judge, Pune convicted and sentenced the appellants as stated aforesaid in paragraph 1 of this judgment.

3. Learned counsel for the appellants Mr. Sarda and Mr. Vernekar, both, assailed the judgment and order of conviction and sentence. They submitted (i) that PW2 - Rakesh Tiwari, an alleged eye-witness cannot be treated as a reliable witness, having regard to the evidence that has come on record; (ii) that the prosecution had failed to prove the spot, where the alleged incident had taken place, making the prosecution case doubtful; (iii) that no medical certificate of PW6 – Ajit Godambe i.e. the injured eye-witness was produced by the prosecution to show that the allegation of assault on PW6 was

believable; and (iv) that the recovery of clothes and sword at the instance of the appellant No.3 – Kapil was doubtful, considering that the discrepancy in the weapon used and weapon recovered and other discrepancies in the said evidence.

4. Learned APP as well as Ms. Farhana Shah, learned appointed advocate for the respondent No.2, supported the judgment and order and submitted that no interference was warranted in the same.

5. In order to appreciate the submissions advanced by the learned counsel for the respective parties, it would be necessary to consider the evidence that has come on record. We may note at the outset, that it is not disputed that Shivprasad (deceased) died a homicidal death. There is evidence of PW4 – Dr. Ramesh Dumbre, PW5 - Dr. Naresh Lodha, and PW7 – Dr. Ajay Taware i.e. the doctors who treated Shivprasad and the doctor who conducted the

post-mortem, which clearly show that the deceased died a homicidal death. As noted above, the same is also not disputed by the learned counsel for the appellants.

6. The question that arises for consideration is whether the appellants are the authors of the said injuries caused to the deceased - Shivprasad. Before we proceed to consider the same, we may note that PW6 (injured eye-witness) turned hostile and hence, the learned trial Judge acquitted the appellants vis-a-vis the charge as against the appellants of attempt to cause the murder of PW6 i.e. under Section 307 r/w Section 34 of the IPC. Thus, in the present appeal, the appellant – Ashish Jadhav is facing conviction for the offence punishable under Section 302 of the IPC and the other 2 appellants i.e appellant – Sameer Bhagwat and appellant – Kapil Ramteke, are facing conviction for the offence punishable under Section 307 r/w 34 of the IPC.

7. PW1 – Ramprasad Naik (first informant and brother of deceased - Shivprasad) has stated in his evidence that he knew Rohan Tiwari, Rakesh Tiwari (PW2), Rahul Godse and Mahesh Chakankar, as well as the accused. He has stated that the incident took place on 14th March 2008 and that he learnt of the same, when he was returning to Pune from Satara, from his sister-in-law about the assault on Shivprasad. PW1 has further stated that he requested his friend Rohan Tiwari (brother of PW2 – Rakesh Tiwari), to find out what had happened and to inform him; that accordingly, Rohan informed him that Shivprasad was assaulted on his stomach and hands and being severely injured was shifted to Deenanath Mangeshkar Hospital and that he should reach Deenanath Mangeshkar Hospital; that accordingly, he reached the said hospital and learnt that his brother was in the ICU and was undergoing surgery; that the police arrived at the said hospital, pursuant to which his statement was recorded i.e. Exhibit – 70, which was treated as an FIR. The said FIR was lodged on 15th March 2008 at 2:30 a.m. as against unknown persons. According to PW1, on the next day i.e. 16th March 2008, Rakesh (PW2), Rahul

and Mahesh came to him and informed him that they were present at Hotel Jaibhavani when the incident took place; that they heard commotion; that on hearing the commotion, they came out of the hotel and saw Ashish (A1) assaulting Shivprasad with a sword and 2 other persons i.e. Sameer and Kapil assaulting his brother by fists and kick blows. He has further stated that pursuant thereto, his supplementary statement was recorded by the police.

8. In his cross-examination, PW1 has admitted that Rakesh Tiwari (PW2) and Rohan Tiwari were real brothers and that Rohan was his friend and that Rohan had informed him that somebody had assaulted Shivprasad and Ajit. The said witness has further admitted that on reaching Deenanath Mangeshkar Hospital, he made additional inquiry with his friend i.e. with Rohan. He has further stated that 3 months prior to the incident, there was a dispute between him and Vijay Kale, which dispute was amicably resolved, however he suspected that Vijay Kale and his colleague may have assaulted his brother.

9. The prosecution examined Rakesh Tiwari as PW2. The said witness has stated that he knew the deceased – Shivprasad and the complainant – Ramprasad; that Mahesh Chakankar and Rahul Godse were his friends and that he also knew all the accused. PW2 has stated that the incident took place on 14th March 2008. He has stated that he alongwith his 2 friends Mahesh and Rahul (both not examined), had gone to Jaibhavani Dhaba for dinner, where they met Shivprasad (deceased) and that one person was present alongwith Shivprasad. He has stated that after dinner, he and his friends were talking outside the hotel and that when they were sitting outside the hotel, they heard shouts, pursuant to which, they went in the hotel; that at that time, Ashish (A1), Sameer (A2) and Bunty @ Kapil (A3) were assaulting Ajit Godambe (PW6); that A1 was armed with a sword and A2 - Sameer and A3 - Kapil were assaulting Ajit (PW6) by fists and kick blows; that when Shivprasad went to rescue Ajit (PW6), Ashish (A1) assaulted Shivprasad, with a sword, pursuant to which, Shivprasad fell down and thereafter, all of them are alleged to have pelted from the spot. According to PW2, he was frightened as he wanted to go to

work, he alongwith his 2 friends left the said spot. He has stated that PW1 – Ramprasad was a friend of his brother - Rohan. According to PW2 on 14th March 2008, he went to Kolhapur and returned late on 15th March and that on 16th March 2008, he learnt that Shivprasad was serious and hence, he alongwith Mahesh and Rahul went to Deenanath Mangeshkar Hospital, however, did not meet Ramprasad (PW1), as Ramprasad had gone to his house; that therefore, the 3 of them went to Ramprasad's house and narrated the incident that they had seen in the hotel.

10. In his cross-examination, PW2 has stated that the incident had taken place in the parking area of the hotel. The said witness has denied the portion marked B in his statement, which reads thus; “that I informed about the incident of assault on Shivprasad to his brother Ramprasad” and had stated that he cannot assign any reason as to why the same was recorded by the police. According to PW2, as he was frightened he did not inform the incident to any person including his brother – Rohan or the relatives of Shivprasad, when he left for

Kolhapur. The said witness has also admitted in his cross-examination, that it was true that nobody assaulted Shivprasad by fists and kick blows.

11. As far as PW3 – Kiran Deshpande, the panch to the spot panchanama is concerned, his evidence does not further the prosecution case, with respect to where the incident had taken place. All that the said witness has stated is that the incident took place in front of the Dhaba, Opposite Voyala Society, adjoining to the Service Road. No details with respect to where the incident had actually taken place is deposed to, by PW3.

12. A perusal of the evidence of PW2 and PW3, would reveal that the spot at which the incident is alleged to have taken place has not been proved by the prosecution beyond reasonable doubt. Admittedly, no blood stains/soil were collected from the spot where the deceased was actually assaulted. It is pertinent to note, that PW2 in his

evidence has stated that on hearing the shout, he and his friends entered the hotel and saw the assault on Ajit and thereafter, when Shivprasad intervened, the assault on Shivprasad; whereas, in his cross-examination PW2 has deposed that the incident took place in the parking area of the hotel. It is the prosecution case that the incident actually took place on the service road, however, neither PW3, the panch to the spot panchanma, has spelt out the details of where exactly the incident had taken place. As noted above, admittedly the blood stains/soil from the spot, had not been collected. Thus, we find that the prosecution has not proved the spot where the actual incident of assault on deceased – Shivprasad had taken place. Admittedly, PW6-Ajit (injured eye-witness) has turned hostile. According to the prosecution, the said witness had sustained injuries in the said incident, due to the assault by the appellants on him with a sword and by fists and kick blows, however, the medical certificate of the said witness i.e. PW6, has not been brought on record, by the prosecution.

13. Apart from the aforesaid, i.e. the spot not having been proved by the prosecution, we also find the conduct of PW2 unnatural and his presence at the spot doubtful. According to PW2, he knew deceased – Shivprasad and that his brother – Rohan was a friend of PW1 – Ramprasad. He has stated that soon after the assault on Ajit (PW6) and on Shivprasad, the appellants fled from the spot, however, despite the same, PW2 nor the other 2 alleged eye-witnesses, came forward to help Shivprasad and to take him to the hospital nor informed any of his relatives. According to PW2, he was frightened and as he had to answer call of his duty i.e. to drive the vehicle to Kolhapur, he did not inform the incident to anybody till 16th March 2008. Admittedly, the prosecution has not examined the other 2 alleged eye-witnesses i.e. Rahul or Mahesh. Thus, we find it difficult to place implicit reliance on the sole testimony of PW2, having regard to what is stated hereinabove and more particularly, when there is a clear discrepancy in his evidence, as to where the incident had taken place i.e. in the hotel or in the parking area or on the service road, more particularly, when it is the prosecution case, that the incident

took place on the service road.

14. Apart from the aforesaid, there is recovery of clothes of appellant – Ashish Jadhav and sword used by him, at the instance of the appellant – Kapil Ramteke. It is pertinent to note, that all the 3 accused were arrested by the police on 17th March 2008 at 6:30 p.m. and recovery of the alleged articles at the instance of appellant No.3 – Kapil was at 7:30 p.m. on the very same day. Recovery of a sword and clothes of appellant – Ashish, at the instance of appellant – Kapil, appears to be doubtful, inasmuch as, having regard to the evidence that has come with regard to same i.e discrepancy with respect to the description of the weapon. It is alleged that what was used in the assault was a sword having an iron hilt, whereas, what was produced before the Court was a sword with a wooden hilt. The prosecution has also not proved that the house from where the sword and clothes of appellant – Ashish, were recovered, was in the exclusive possession of the appellant – Kapil Ramteke, more particularly when it has come on record that it was occupied by other family members of the appellant –

Kapil. The CA report shows that the blood of the deceased as well as that of the accused was inconclusive, however, the blood group found on the sword was that of 'O' blood group and as such the learned Judge presumed that the said blood was that of the deceased. This analogy is difficult to comprehend, having regard to the aforesaid evidence vis-a-vis recovery that has come on record.

15. Considering the evidence as stated aforesaid, we hold that the prosecution has failed to prove its case as against the appellants beyond reasonable doubt and as such the benefit of doubt will have to be given to the appellants of the same.

16. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

- i) The Appeals are allowed;
- ii) The Judgment and Order dated 26th May 2014,

passed by the learned Additional Sessions Judge, Pune in Sessions Case No.438 of 2008, convicting and sentencing the appellants, is quashed and set aside;

iii) The appellants are acquitted of the offence, with which they are charged. The appellants are set at liberty forthwith, if not required in any other case.

17. We would like to record a word of appreciation for the able assistance provided and the efforts taken by Ms. Farhana Shah, as an appointed advocate for the respondent No.2, in conducting the appeal. High Court Legal Services Committee to award fees of the learned Appointed Advocate, as per Rules.

18. All concerned to act on the authenticated copy of this judgment.

MANJUSHA DESHPANDE, J.

REVATI MOHITE DERE, J.