

(2018) 02 BOM CK 0140
In the Bombay High Court
Case No : 495 of 2002

Sanjay Sukhdeo Pawar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-02-2018

Acts Referred:

[Indian Penal Code, 1860](#), [Section 34](#), [Section 307](#), [Section 326](#), [Section 325](#), [Section 506](#), [Section 504](#) - Acts done by several persons in furtherance of common intention - Attempt to murder - Voluntarily causing ievious hurt by dangerous weapons or means - Punishment for voluntarily causing grievous hurt - Punishment for criminal ,intimidation - Intentional insult with intent to provoke breach of the peace

Citation : (2018) 02 BOM CK 0140

Hon'ble Judges : T. V. Nalawade, A. M. Dhavale

Bench : Single Bench

Advocate : Pratik Kothari, R. V. Dasalkar

Final Decision : Dismissed

Judgement

1. Criminal Appeal No. 495 of 2002 is against conviction of accused nos. 1 - Sanjay and 2-Rajendra for offence punishable u/s 326/34 IPC and conviction u/s 307 IPC against accused no.4. Criminal Appeal No. 263 of 2002 is preferred by the State challenging acquittal of accused nos. 1 and 2 u/s 307 and holding them guilty for minor offences u/s 326/34 IPC .
2. Both the appeals arise out of the common judgment passed by Id. IInd Addl. Sessions Judge, Shrirampur in Sessions Case No. 73/96, whereby accused nos. 1 and 2 were convicted u/s 326/34 and

sentenced to suffer RI for three years and to pay fine of Rs. 500/- each, in default, SI for one month and accused no. 4 was convicted u/s 307 IPC and sentenced to suffer RI for seven years and to pay fine of Rs. 500/-, in default, to suffer simple imprisonment for one month.

3. The facts relevant for deciding these appeals may be stated as follows :

The prosecution was initiated on the basis of FIR lodged by PW8 Babasaheb on 22.09.1995 at Newasa Police Station, which was registered as C.R. No. I-137/95 u/s 326, 323, 504 IPC . As per the FIR, PW8 Babasaheb was having agricultural land at Utsalkhalsa and he was residing with his parents and brothers in a farmhouse.

Accused no. 4 - Sukhdeo is father of accused nos. 1-Sanjay and accused no. 2- Rajendra and they are residing together along with their family members in a house constructed in land adjacent to the land of PW8 Babasaheb. Accused no. 4 Sukhdeo is 1st degree cousin of PW7 Dashrath. The accused were having their electric wire of 900 ft. length passing through the field of PW8 Babasaheb. On 22.09.95 at 05:30, accused no.4 - Sukhdeo assaulted PW7 Dashrath and inflicted blow of axe on his skull. Accused nos. 1 and 2 assaulted him with iron bars. Dashrath sustained injuries on his head, hands and legs. One Laxman Pawar had intervened and rescued Dashrath. He was taken to Government Hospital at Newasa for treatment.

4. On the basis of FIR, the crime was registered and was investigated into. The Investigating Officer drew spot panchanama in presence of PW1 Rohidas. The accused were arrested and on 28.09.1995, accused no.1 - Sanjay showed willingness to discover the weapons of offence axe and iron bars. His statement was recorded. He then led police and pancha PW2 to his farmhouse and he discovered one axe, two iron bars and one stick in his hut and those

were seized by the police. The police seized clothes of injured Dashrath produced by his brother Babasaheb and those were sealed. The Investigating Officer recorded the statement of eye-witnesses PW4-Dinkar and PW5-Dnyaneshwar. Medical papers of the injured were collected from Dr. Sangle. The seized muddemal were sent for chemical analysis. After completion of investigation, the charge-sheet was submitted in the court.

5. In due course, the case was committed to the court of Sessions. The Id. trial Judge framed charge against 4 accused at Exh.

5. Accused pleaded not guilty. The prosecution examined 12 witnesses. The defence of the accused is of total denial. They have filed written statement. They claimed that, accused nos. 1, 2 and 4 were not present in the village at the relevant time. That time, Dashrath came under the influence of liquor and started outraging modesty of accused no. 3-Padmavati. Padmavati warned him, still he did not listen. Hence, Padmavati in exercise of right of private defence assaulted him with sickle. She then filed FIR against him for offences u/s 354, 447, 323, 504 IPC . They denied the entire incident and claimed it to be as concocted. The Id. trial judge partly accepted the case of prosecution and he convicted accused no. 4 - Sukhdeo u/s 307 of IPC and sentenced him to suffer RI for 7 years and to pay fine of Rs. 500/-, in default, SI for one month. He convicted accused nos. 1 and 2 u/s 326 r/w 34 and sentenced them to suffer RI for three years and to pay fine of Rs. 500/-, in default, SI for one month. He acquitted accused no. 3 Padmavati of all charges and acquitted accused nos. 1 to 3 of the remaining charges.

6. Heard Shri. Pratik Kothari, learned advocate appointed for the appellants/accused and Shri. R. V. Dasalkar, learned APP for the State.

7. Shri. Kothari has submitted that,

a) the motive or cause of the incident given by PW7 is not acceptable.

b) the evidence of injured witness and eye-witnesses is not cogent, consistent and reliable.

c) The ocular evidence is not consistent with the medical evidence.

d) The evidence is very vague. There are no specific allegations regarding the weapon used by each accused and the spots on the body of the victim which were selected for assault.

e) There are counter allegations by the accused against PW7 Dashrath. A case u/s 354 IPC is filed against him. The evidence regarding consciousness or otherwise of PW7 is not consistent. There is no reliable, corroborative evidence. He has placed reliance on judgment in Joseph v. State of Kerala AIR 2003 SC 507. He argued that, the Id. trial Judge has not properly appreciated the facts, he should have given benefit of doubt to the accused. Hence the appeal be allowed.

8. Learned APP Shri. Dasalkar supported the judgment but claimed that, accused nos. 1, 2 and 4 had a shared common intention and injuries were caused in furtherance of the common intention. Therefore, all the four accused should have been held guilty u/s 307/34 IPC and should have been adequately punished.

9. The points for our consideration with our findings thereon are as follows :

Sr.No.	Point Finding
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1	Whether the prosecution has proved Not proved. that accused nos. 1, 2 and 4 in furtherance of their common intention attempted to commit murder of PW7 Dashrath by inflicting blow of axe and blow iron bar.
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2 Whether any interference is called In the affirmative. for in the conviction and sentence passed by the Id. trial Judge.

3 What order? Cri. Appeal No. 495/2002 is allowed. Cri. Appeal No. 263/2002 by State is dismissed.

REASONS

10. The prosecution has examined 12 witnesses as follows:

Eye witnesses : -

(i) PW7 Dashrath, the injured witness.

(ii) PW4 Dinkar, the eye witness.

(iii) PW5 Dnyaneshwar Auti, eye-witness.

Medical Evidence : -

(i) PW9 Dr Ashok Zarekar of Newasa, Certificate Exh.30 (7 incised wounds and fracture).

(ii) PW12 Dr. Rangnath Sangle (Case papers Exh. 45) of Ahmednagar (Injury Report Exh. 46).

Panchas : -

(i) PW1 - Rohidas, spot panch. Seizure of blood mixed soil from the field of PW1 Dashrath (spot panchanama Exh. 14).

(ii) PW2 - Ramdas Nalage, panch to the memo by accused no. 4 Sukhdeo, Exh. 16 and discovery of one axe, two iron bars and one stick (panchanama Exh. 17).

(iii) PW3 Asaram, Seizure of clothes of the injured PW7 produced by his brother Balasaheb (Exh.19). Article 5 blood stained Paijama, article 6 Nehru Shirt.

(iv) PW10 - ASI Karnawat, who has investigated into the crime and deposed about drawing of spot panchanama Exh. 14. Discovery of Weapon Exh. 16 & 17. The seizure of clothes of the injured (Exh. 19) and recording of further investigation was handed over by him to PW11 - Head Constable. He has deposed about recording of FIR of PW8 Balasaheb, Exh. 27. Absconding of A4 Sukhdeo and filing of charge-sheet.

Other witnesses :-

(i) PW6 Harischandra has taken a Jeep near the spot and carried the injured PW7 fro the spot at Utsalkhalsa to Rural Hospital at Newasa in his jeep. He deposed about the injuries seen by him on PW7 and his unconscious condition.

(ii) PW8 Balasaheb is brother of injured witness PW7 Dashrath. On the day of incident, he received information about assault on his brother from somebody whose name is not disclosed. He had gone to the Hospital at Newasa, met

Laxman Pawar and learnt about nature of incident. Then he lodged FIR Exh. 27.

11. Broadly speaking, the prosecution case is quite simple. The accused and the informant are resident of Utsalkhalsa, Tq. Newasa. They have their lands near Godavari river, which is at some distance away from residential locality. Accused no. 4 is first cousin of the injured witness Dashrath and his brother informant PW8 Balasaheb Pawar. Accused no. 4 Sukhdeo is real brother of Kadu Namdeo who is referred in the evidence of the witnesses. Accused no. 3 Padmavati is wife of accused no. 4 and accused nos. 1 and 2 are their sons, then aged 19 and 24 years respectively. Prior to the date of incident 22.09.95, they were no disputes between the accused and the injured.

12. On 22.09.1995, at about 5:00 to 5:30 p.m. PW7 Dashrath and his friends PW4 Dinkar and PW5 Dnyaneshwar Auti, both r/o. adjacent village Suregaon had gone to the field of Dashrath PW7 for taking a round in the sugarcane crop. PW7 Dashrath switched on electric motor while the second motor could not be switched on as the electric supply was stopped. He went to his neighbour Kadu Namdeo to request him to switch on electric supply of electric motor. Thereafter, accused nos. 1 to 4 came there. Accused no. 4 was armed with axe, accused nos. 2 and 3 were armed with iron bars and accused no. 4 was armed with stick. They started assaulting PW7 Dashrath. The first blow was given by accused no. 4 Sukhdeo of axe on his head. Thereafter, PW7 Dashrath started running away but the accused caught them at a distance of 100 to 200 ft and again assaulted him by means of axe, iron bars and sticks. PW7 Dashrath became unconscious and then he was first brought in bullock-cart upto the boundary of Utsalkhalsa village and, thereafter, he was taken in Jeep to Rural hospital at Newasa where he was examined and treated. Then he was referred to Civil Hospital at Nagar for

better treatment. His brother PW8 has lodged FIR at Newasa Police Station on the same night at 10:00 p.m.

13. On carefully considering the evidence on record in the light of the facts, we find following material discrepancies which have not been considered by the Id. trial Judge.

14. As per evidence of PW9 Dr. Ashok Zarekar, PW7 Dashrath had sustained following injuries.

1. Incised wound on forehead/fresh 6 cm x 2 cm.
2. Incised wound above left eye brow fresh wound oblique, 3 cm x 1 cm.
3. Incised wound left parietal region oblique fresh 7 cm x 2 cm.
4. Incised wound on intrascapula region oblique 6 cm x 2 cm.
5. Incised wound on lumber region vertical 3 cm x 2 cm.
6. Incised wound on right side of chest 9 cm x 3 cm.
7. Swelling and tenderness over the wrist fracture of both radiation ulna left and right.
8. Incised wound on right cheek 3 cm x 1 cm.

(i) Out of 8 injuries, 7 are incised wounds and one is swelling and tenderness over the wrist fracture. It is a common knowledge that, incised wounds can be caused by sharp weapons like Blade or Razor. The witnesses have stated that, PW7 was assaulted by accused no. 1 by axe and by accused nos. 2 & 4 by iron rods. Their evidence shows that, PW7 Dashrath was assaulted at two places for a sufficient length of time. The assault by iron bars and sticks would have produced several contusions but except injury no. 7, a swelling on the wrist with fracture, no contusion was found on the person of PW7 Dashrath.

(ii) It is defence case that, PW7 Dashrath tried to molest accused no. 3-Padmavati and, therefore, she had given blows of sickle. This story is substantiated by admission of

PW9 Dr. Ashok. He has stated that, he was given history of alleged assault one hour back by sickle and sticks.

(iii) In the first place, the incised wounds could not have been caused by blows of axe. The axe blows would have caused contused lacerated wounds and the blows of axe could have caused injuries having depth. In the present case, not a single incise wound is shown to have any depth. the blows of axe would not produce such type of superficial incised wounds.

(iv) PW7 Dashrath has stated that, all the accused had been to the spot near the house of Kadu and he was assaulted by axe, iron bars and sticks. He admitted that, accused no.3-Padmavati lodged FIR against him for outraging her modesty. He admitted that, he stated before police that Padmavati had assaulted him with Chappal on his face. The eye-witness PW4 Dinkar has however not stated anything about the presence of accused no.3-Padmavati and assault by her by means of stick on PW7 Dashrath. PW5 Dnyaneshwar has however stated about presence of accused no.3-Padmavati with a stick.

(v) The witnesses however stated that, after the assault PW7 had become unconscious. Dr. Ashok Zarekar (PW9) has stated that, he was semi conscious and he had given history of assault by sickle.

(vi) According to the evidence of PW4, 5 & 7, the assault took place at 5:30 to 06:00 p.m. Thereafter, he was immediately taken in a Jeep to the Rural Hospital at Newasa. But, Dr. Zarekar (PW9) has stated that, he was brought in the hospital at 09:00 p.m. and in the history it was disclosed that the assault took place one hour back.

Considering the small distance between the spot and Newasa and availability of Jeep, the delay of three hours in taking injured PW7 to the hospital is not explained. If the incident had taken place at 08:00 p.m. there will be doubt about the availability of light on the spot as the spot is situated in a field.

(vii) The evidence of assault by PW4, 5 & 7 is quite vague. PW4 has stated that, accused no. 1 was possessing axe and his sons were possessing iron bars and Sukhdeo assaulted Dashrath on his back, head and hand. the injuries as per medical evidence are however mainly on the face and on the head. He stated that, two sons of Sukhdeo, Sanjay (A1) & Rajendra (A2) assaulted Dashrath (PW7). He did not state that they assaulted by means of iron bars and on which part but they were carrying iron bars. There are no contusions, which would have been produced by giving blows of iron bars.

(viii) PW5 Dnyaneshwar has stated that, Sukhdeo (A3) was having axe, Sanjay (A1) & Rajendra (A2) were having iron bars and Padmavati was having stick and they assaulted Dashrath on head. PW7Dashrath was rescued by them. Then Dashrath ran a distance of 100 to 200 ft and they again assaulted him on head, chest and back by axe and by iron bar on his hand and by stick on his leg till he became unconscious. He admitted in cross that, though he and PW4 had intervened, both of them did not sustain any injury nor their clothes were torn or stained with blood. His evidence that, Dashrath ran a distance of 100 to 200 ft., he was assaulted on his legs by sticks, he informed Laxman about the assault by the accused are omissions. Those do

not find place in the statements and omissions are duly proved.

(ix) PW7 Dashrath, the injured has vaguely deposed that, all the accused had assaulted him with stick and iron bars on his head, chest and back and he became unconscious. He did not state which accused was having which weapon and on which part the blows were given and by which weapon. He has not stated about assault on his face.

(x) PW7 has admitted that, before the police he had disclosed that it was accused no.1-Sanjay who had assaulted him with axe and that too by blunt side on chest and hand. There are no corresponding injuries which could be caused by blunt side of the axe and there is contradiction regarding the accused who was carrying axe. The evidence on record shows that, accused no.4-Sukhdeo is first degree cousin of PW7 Dashrath.

(xi) There is no proper evidence regarding motive. PW7 Dashrath is first degree cousin of accused no.3-Sukhdeo and accused nos. 1 and 2 are sons of accused no.3-Sukhdeo. They had no previous enmity. PW7 has stated that, when he was talking to Kadu Namdeo, the accused apprehended that he was misrepresenting them before Kadu Namdeo, who was brother of accused no.3-Sukhdeo and, therefore, they had assaulted. This does not appear to be reasonable and probable. On this count, there cannot be such a serious attack by axe and iron bar. Besides, Kadu Namdeo has stated that, he had cordial relations with his brother accused no.3-Sukhdeo. Therefore, there is no motive for commission of crime. When the accused are closely related to PW7, the absence of motive becomes

significant.

(xii) There are other contradictions as well. PW4 Dinkar has stated that, before the incident, PW5 Dnyaneshwar and PW7 Dashrath came to him at Suregon by Jeep and they invited him to Utsal where PW7 was residing and he came along with them in a Jeep. Then they were taking a round in the field of PW7 Dashrath. Then they had gone to the house of Kadu Namdeo for starting electric motor.

Thereafter, the incident has taken place. He stated that, all of a sudden three accused started assaulting Dashrath. He in cross-examination stated that, three accused did not utter anything at the time of incident. He stated that, after the incident PW5 brought a Jeep (one Jeep was already there). PW4 is a resident of Suregaon. His presence in the field of PW7 Dashrath at evening or late evening is not natural. Evidence of PW5 is on similar line with evidence of PW4. He also stated that, he and Dashrath had gone to house of PW4 Dinkar at Suregaon and Dashrath had informed PW4 to his village for attending Bhajan. He admitted that, he was having a hair saloon at Newasa and it was adjacent to the kerosene shop of PW7 Dashrath. His presence at the relevant time at Utsal becomes doubtful. Contrary to evidence of PW4 & PW5, PW7 did not state that he and Dnyaneshwar had gone to Suregaon and had brought PW4 Dinkar in a Jeep. He stated that, he and PW4 & PW5 were taking a round in his field. He did not state that, they had gone there in a Jeep.

(xiii) The evidence shows that, one Laxman was an intervenor and he had rescued PW7 but he is not examined.

(xiv) The police have not forwarded the clothes of the accused

and the weapons to CA office to show that those were having the blood stains of the blood group of PW7 Dashrath.

15. Considering all the above discrepancies and particularly in view of a medical certificate showing seven incised wounds which are not possible by the weapons allegedly used by accused nos. 1 to 4, we find that though there was incident of assault, the evidence of PW4, 5 and 7 is not trustworthy and reliable. They have suppressed the genesis of the crime. They have deliberately deposed falsely and led vague evidence regarding the assault. Their evidence is inter se and contradictory. There was no acceptable reason for the accused to make such serious assault on PW7 Dashrath in the evidence of PW4, 5 and 7. PW4 and PW5 are resident of Suregaon. PW5 Dnyaneshwar is having a saloon at Newasa near the kerosene shop of PW7 Dashrath. He was not expected to be in village Utsalkhalsa at 5:00 or 5:30 p.m. Both appeared to be chance witnesses. We find the substratum of evidence of PW4, 5 and 7 as untrustworthy and unreliable. We find substance in the defence case that PW7 attempted to outrage modesty of accused no. 3 - Padmavati and therefore Padmavati had inflicted blows of sickle on him. The injuries noted in the injury certificate Exh. 30 are opined to be possible by blows of sickle. One injury to the wrist is possible by fall and PW7 had fallen at the time of incident. It is possible that accused no. 3 Padmavati and any one of the accused might have attacked PW7 by means of sickle. The attack on him by use of iron bars and sticks is not consistent with the nature of injuries sustained by him. We find that, there is a possibility of false implication of some of the accused persons.

16. The evidence shows that, Padmavati must have inflicted blows of sickle but unfortunately the Id. trial Judge has acquitted her.

PW4, 5 and 7 have also not deposed that Padmavati inflicted injuries by sickle and since there were no injuries by sickle allegedly used by her, she was acquitted. We find the evidence of eye-witnesses untrustworthy and unreliable. We rely on *Joseph v State of Kerala* AIR 2003 SC 507, wherein it is held that the evidence of injured witness also cannot be relied upon unless it is found to be trustworthy and reliable. Hence, the conviction is not sustainable. The Id. trial Judge failed to take into consideration these material inconsistencies and reached to wrong conclusion. Hence, we answer the points accordingly and pass the following order.

ORDER

1. Criminal Appeal No. 495 of 2002 is allowed.
2. The conviction of all the appellants/accused is set aside. They are acquitted of all the offences punishable u/s 307, 326, 325, 504, 506 r/w 34 IPC . Their bail bonds stand cancelled. The muddemal property be destroyed after the period of appeal is over.
3. Criminal Appeal No. 263 of 2002 is dismissed.