
(2011) 09 BOM CK 0067
In the Bombay High Court
Case No : Criminal Appeal No. 57 of 1993

Sunil Alias Pona Tolaram Pore (Varma)	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 360, 360(1), 562
General Clauses Act, 1897 — Section 8(1)
Penal Code, 1860 (IPC) — Section 307, 326, 34, 364
Probation of Offenders Act, 1958 — Section 19, 19(1)

Citation : (2012) BomCR(Cri) 430

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : Indu Verma, for the Appellant; V.R. Bhosale, APP, for the Respondent

Judgement

A.M. Thipsay, J.—The Appellant and three others were prosecuted on the allegations of having committed offences punishable u/s 364 of the Indian Penal Code and Section 307 of the Indian Penal Code read with Section 34 of the Indian Penal Code, or, in the alternative, Section 326 of the Indian Penal Code read with Section 34 of the Indian Penal Code. After holding a trial, the learned Additional Sessions Judge for Greater Bombay found the Appellant (the original Accused No. 2) and the other accused guilty of an offence punishable u/s 326 of the Indian Penal Code read with Section 34 thereof. He sentenced the Appellant (original Accused No. 2) and the original Accused No. 1 - Jamaluddin alias Shendya Sayyed Hussein - to suffer R.I. for seven years. He directed the original Accused Nos. 3 and 4 - Anwar Khan alias Annu Rafiq Khan and Mohamed Ayub Mohamad Isaq Shaikh - to be released on probation of good conduct on their executing a personal bond in the sum of Rs. 5,000/- each, as contemplated u/s 360 of the Code of Criminal Procedure (hereinafter "the Code" for brevity). The said original Accused No. 1 Jamaluddin had filed a separate Appeal, being Criminal Appeal No. 716 of 1992, but he died during the pendency of the said Appeal. That Appeal, therefore, stood abated.

2. Since the Advocate, who had been appearing for the Appellant in this Appeal, sought discharge, it was duly given and Ms. Indu Verma, Advocate, was appointed for the Appellant under the Free Legal Aid Scheme.

3. I have heard Ms. Indu Verma, the learned Advocate for the Appellant, and Smt. V.R. Bhosale, the learned APP for the Respondent-State. I have gone through the impugned Judgment and Order. I have been taken through the evidence adduced before the trial Court.

4. The case of the prosecution, in brief, as put forth before the trial Court, was as follows:

The Appellant and the other accused were known Gundas and known as such, in the locality where the First Informant Nafajat Hasmat Pathan (PW-1) lived with his wife Tajbibibi (PW-2). The Appellant and even the other accused were known to the said Nafajat (PW-1) and Tajbibibi (PW-2) since prior to the incident. That, on 11th April, 1988, the Appellant went to the house of Nafajat at about 4:00 p.m., when Nafajat was not at home. The Appellant enquired with Tajbibibi (PW-2) about Nafajat (PW-1). Thereafter, in the night, again, the Appellant and the original Accused No. 1 Jamaluddin went to the house of Nafajat (PW-1) and enquired about him, but at that time also, Nafajat (PW-1) was not at home. That, at about 6:00 a.m. on the next day, i.e. 12th April, 1988, while Nafajat (PW-1) and Tajbibibi (PW-2) were sleeping in their house, the Appellant and other Accused went there. On the Appellant calling him by his name, Nafajat opened the door. Nafajat (PW-1) and Tajbibibi (PW-2) noticed the Appellant and the other accused standing in front of the door of their house. The original Accused No. 1 had a revolver in his hand and the Appellant and the other accused were having choppers with them. The original Accused No. 1 placed the revolver on the back of Nafajat (PW-1). The Appellant tied the hands of Nafajat by a rope. All the four accused then dragged Nafajat to a nearby place i.e. near Munshi Grocery Stores. The original Accused No. 1 Jamaluddin - who was already holding a revolver in one hand - took the chopper, which was in the hand of the original Accused No. 4, and assaulted Nafajat (PW-1) on his shoulders. The Appellant and the other two accused joined the original Accused No. 1 in the assault. All the accused - including the Appellant - assaulted Nafajat (PW-1) with choppers all over his body. Nafajat (PW-1) started bleeding from the injuries sustained by him on account of the said assault. He fell on the ground. All the four accused then ran away. While he was being assaulted, Nafajat (PW-1) had raised an alarm, but his mouth was gagged by the Appellant. Tajbibibi (PW-2) and one Hanif Shaikh came to the spot where Nafajat (PW-1) was lying in an injured condition. Tajbibibi (PW-2) rushed to Jogeshwari Police Station and reported the incident to PSI Nikam (PW-8). PSI Nikam (PW-8) and the other Police staff went to the spot along with Tajbibibi (PW-2). The Police removed Nafajat (PW-1) to Cooper Hospital. Dr. Satish Dharap (PW-3) examined Nafajat (PW-1) and noticed 39 wounds on his person. Nafajat (PW-1) was admitted in the Emergency Ward of the Hospital. While Nafajat (PW-1) was being treated, PSI Nikam (PW-8) recorded his

statement; which was treated as the First Information Report (Exhibit-13). Thereafter, the statement of Tajbibi (PW-2) was recorded. Nafajat (PW-1) was treated in the hospital till he was discharged on 28th May, 1988.

After the registration of the crime, PI Puri (PW-9), PSI Avhad (PW-7), PSI Save and other Police staff visited the spot of incident and drew a Panchnama (Exhibit-18), with Subhash Baliram Mestry (PW-4), acting as one of the Panchas. Samples of blood were collected from the spot. Inquiries were made with certain persons and their statements were recorded. Then the blood stained clothes of Nafajat (PW-1), i.e. Shirt (Article 1) and Lungi (Article 2), were taken charge of under the Panchanama (Exhibit-32).

5. During the course of investigation, the original Accused No. 1 disclosed certain information pursuant to which the chopper (Article 5), which had been allegedly used in commission of the offence, was recovered by the Police under a Panchanama (Exhibits 36 and 36A) in the presence of Panch Umashankar Prajapati (PW-6). The articles, which had been seized in the course of investigation, including the clothes of Nafajat (PW-1), were sent to the Chemical Analyzer for examination and opinion.

On completion of investigation, a report u/s 173(2)(i) of the Code of Criminal Procedure was submitted, on the basis of which the Appellant and the other accused were prosecuted and convicted, as aforesaid.

6. The prosecution examined ten witnesses during the trial. Originally, the charge, that had been framed against the Appellant and the other accused, was only with respect to the offences punishable under Sections 364 of the Indian Penal Code and 307 of the Indian Penal Code read with Section 34 of the Indian Penal Code. After the entire evidence was recorded, however, the learned Additional Sessions Judge framed a charge in respect of an offence punishable u/s 326 of the Indian Penal Code read with Section 34 of the Indian Penal Code as an alternative to the charge of an offence punishable u/s 307 of the Indian Penal Code read with Section 34 of the Indian Penal Code.

7. The main witnesses in this case are Nafajat (PW-1) and Tajbibi (PW-2). I have carefully gone through the evidence of these witnesses. That, all the accused persons, including the Appellant, were known to Nafajat (PW-1) and Tajbibi (PW-2) since previously, is not in dispute at all. Nafajat (PW-1) has identified all the accused including the Appellant in the Court. He has narrated the incident. According to him, in the night between 11th April, 1988 and 12th April, 1988, he returned home at about 12:30 a.m. and at that time Tajbibi (PW-2) told him that the Appellant had come to enquire about him at about 4:00 p.m. and, thereafter, at about 11:00 p.m. He has then stated that at about 6:00 a.m., he heard a knock at the door and also heard the Appellant calling him by his name. He has further stated that when he opened the door, he saw all the four accused standing in front of his door and when he came out of his house, immediately, the original Accused No. 1 placed a revolver on his back. He has also stated

about the Appellant and the other accused having choppers in their hands. According to him, Tajbibi (PW-2) came out and asked the accused persons as to what was the matter when the original Accused No. 1 told her that they all had some work with Nafajat (PW-1), and that Nafajat (PW-1) would be coming back soon. He then states that the Appellant tied both his hands by rope, and that, then all the accused dragged him to a place near Munshi Grocery Shop. According to him, the original Accused No. 1 then asked him as to where one Mohd. Shah was, when Nafajat (PW-1) stated that he did not know his whereabouts. It is thereupon that the original Accused No. 1 took the chopper from the hands of the original Accused No. 4 and assaulted Nafajat (PW-1) with it on his shoulders. That, then all the accused joined him in assaulting Nafajat (PW-1) with choppers all over the body. Nafajat (PW-1) has also stated about the Appellant gagging his mouth, when Nafajat raised an alarm. That, Tajbibi (PW-2) and one Hanif Babu Shaikh came to the spot where Nafajat (PW-1) had been lying in an injured condition. He has then stated about Tajbibi (PW-1) going to the Police Station, Police coming there and taking him to Cooper Hospital. He has also stated about his statement being recorded by the Police in the hospital. The F.I.R. (Exhibit-13) was read over to him in the Court and he stated that it had been correctly recorded. He has also identified the Shirt (Article 1) and Lungi (Article 2) as his, when they were shown to him in Court.

8. In the cross-examination, a suggestion was given to him that he was staying with one person by name Habib, but this suggestion has been denied by Nafajat (PW-1), as "not true". It was also suggested to him that Tajbibi (PW-2) was not his lawfully wedded wife, and that, prior to her marriage with Nafajat (PW-1), Tajbibi (PW-2) was residing with Habib, and that, they were in love. The attempt in the cross-examination is to suggest that Nafajat (PW-1) had a quarrel with Habib, and that because Nafajat (PW-1) had married Tajbibi (PW-2), Habib had threatened to kill him. All these suggestions have been, however, denied by Nafajat (PW-1). A suggestion was also given to him that a person by name Jafar had also threatened to kill Nafajat, and that Jafar and Tajbibi had plans to marry. Nafajat (PW-1) denied such suggestion and stated that he did not even know any such person. It was also suggested to him that he was a contract killer, and that he was involved in several cases of extortion, theft and robbery at several Police Stations in Mumbai. It was also suggested that Tajbibi (PW-2), her brother and her parents were involved in several Narcotics cases. It was suggested that Tajbibi's family members were supplying Brown Sugar to several persons in Jogeshwari area. All sorts of suggestions, that the Appellant had arranged for an accommodation for Nafajat in Jogeshwari, that Nafajat had borrowed monies from the original Accused No. 1, etc., were given to Nafajat (PW-1); and all such suggestions have been denied by him. It was ultimately suggested to him that Habib and Jafar had assaulted him, and that he had not seen any of the accused assaulting him. It was suggested that he and even Tajbibi (PW-2) had suppressed the name of Habib and Jafar and both of them had falsely implicated the accused persons.

9. In the cross-examination, Nafajat (PW-1) was further questioned as to how he knew all the four accused, to which he had replied that they were residents of the same locality as his, and that he used to see them often in the locality itself. It was also suggested that Tajbibi (PW-2) had not informed him that original Accused Nos. 1 and 2 had come to enquire about him at his house on 11th April, 1988, and that the Appellant/original Accused No. 2 did not knock at his door at 6:00 a.m. etc. These suggestions have been denied by Nafajat (PW-1).

10. Nafajat (PW-1) was sought to be contradicted with reference to the F.I.R., as regards whether he had told the Police that, when all the four accused had come to his house, his wife had came out and asked all the accused as to what was the matter, by pointing out the omission to specifically state so in the F.I.R. I am not impressed by this attempt. The story of Nafajat (PW-1) as well as of Tajbibi (PW-2) is that Tajbibi (PW-2) was present in the house when Nafajat (PW-1) was taken away from his house by the accused persons and nothing turns on whether Tajbibi (PW-2) had asked all the accused as to what was the matter and further whether that Nafajat (PW-1) had stated before the Police that she had so asked. Thus, even if it is assumed that it was not stated to the Police by Nafajat (PW-1), it cannot lead to the inference that Tajbibi (PW-2) had actually not witnessed the knock at the door and taking away of Nafajat (PW-1); and that what has been stated before the Court by Nafajat (PW-1) is, therefore, an improvement.

11. In her evidence, Tajbibi (PW-2) has narrated the facts in conformity with the deposition of Nafajat (PW-1). She has stated that she knew all the four accused since prior to the date of incident. She has identified all of them in Court by pointing out towards them and by giving their names.

12. Tajbibi (PW-2) has narrated the incident by stating that on 12th April, 1988, at about 6:00 a.m., the Appellant knocked at the door and called Nafajat (PW-1) by his name. That, when Nafajat (PW-1) opened the door, Tajbibi (PW-2) was also awake and the child had also woken up. Tajbibi (PW-2) has stated that the Appellant asked Nafajat (PW-1) to come out of the house. That, she came out of the house and saw all the four accused, including the Appellant, standing outside the door. She has also stated about the original Accused No. 1 having the revolver in his hand and the other accused being armed with choppers. That, she asked all the four accused as to what was the matter, and that thereupon all the accused told her that they had some work with Nafajat (PW-1) and were taking him along. Tajbibi (PW-2) went inside her house, but after the accused had taken away Nafajat (PW-1), she went out of her house along with the child to look for him. She has stated that she then saw him in an injured condition near Munshi Grocery Shop, which was situated at a distance of about 5 to 10 minutes from her house. She has stated that her husband - Nafajat (PW-1) - was bleeding profusely from the severe injuries, which he had sustained. According to her, while on the way, she was accosted by the original Accused No. 1 and the Appellant, who threatened her that they would kill her, if she would proceed further. She has then stated about going to Jogeshwari Police Station and

reporting the matter to the Police, and that Nafajat (PW-1) was, thereafter, taken in a police van to the Cooper Hospital.

13. In the cross-examination, an attempt was made to suggest that in front of the entrance door of her house, four persons would not be able to stand simultaneously, and that, therefore, she could not have seen all the four accused. This has been denied by the witness. A suggestion was given that she and her husband were on friendly terms with the accused persons, which was also denied by her.

14. Tajbibi (PW-2) was questioned as to when she went out to see what had happened to Nafajat (PW-1), whether she had taken her child with her. Tajbibi (PW-2) had, initially, stated that she left the child with one of the neighbours and went alone to look for Nafajat (PW-1), but has later on stated that she did not remember exactly whether she had taken the child along with her to the spot where Nafajat (PW-1) was lying in an injured condition.

15. Tajbibi (PW-2) claims to have seen that the hands of Nafajat (PW-1) were tied behind the back by a rope. She was also asked about one Habib Talwar and she has stated that she did not know any such person. In the cross-examination, she was confronted with the fact that, that the Accused No. 1 was having a revolver was not appearing in her statement recorded by the Police and she was unable to state why it was not recorded though she claimed to have told the same to the Police. Similarly, the omission to state to the Police about the original Accused No. 1 and the Appellant threatening her when she was proceeding to see where Nafajat (PW-1) was, has also been brought on record. Though Tajbibi (PW-2) was extensively cross-examined, I do not find that her testimony has been shaken in any manner. Several wild suggestions - as were given to Nafajat (PW-1) - were given to Tajbibi (PW-2) also, such as Nafajat (PW-1) was concerned in a murder case, that he had been attested in a robbery case, and that Tajbibi's brother was involved in a rape case, and that he was dealing in brown sugar, etc. It was also suggested to her that one Hanif Khadfa had taken possession of her house and had assaulted her, and that, at that time, she had gone to the original Accused No. 1 for help. These suggestions have been denied by Tajbibi (PW-2) as false.

16. The evidence of Nafajat (PW-1) and Tajbibi (PW-2) is corroborated by the evidence of Dr. Satish Dharap (PW-3), who had examined Nafajat (PW-1) in the Cooper Hospital. Dr. Satish Dharap (PW-3) has mentioned that there were 39 wounds on the person of Nafajat (PW-1), out of which 37 were incise wounds. Out of these wounds, two wounds were on the scalp. He has identified the endorsement on the F.I.R., which he said was in his own handwriting. He had brought the case papers in respect of the treatment given to Nafajat (PW-1) in the Cooper Hospital.

17. His cross-examination has been quite lengthy, but nothing, which would shake his evidence given in the examination-in-chief, has been brought on

record. Part of the cross-examination was directed towards establishing that the injuries caused to Nafajat (PW-1) were not that serious. Part of the cross-examination was directed towards suggesting that the injuries sustained by him could not have been caused by the choppers. Dr. Satish Dharap (PW-3) has admitted that two of the injuries could not be caused by sharp weapon, and that they would be caused, if one would fall on the ground and, if dashed against any hard or blunt surface. He has categorically stated that considering the loss of blood from the injuries caused to Nafajat (PW-1), the 38 injuries were enough to cause death in all probability. He has, however, admitted that no major blood vessel was actively bleeding except for the injury mentioned at Sr. No. 13 in the Medical Certificate (Exhibit 19) issued by him. The purpose of some of the questions put to this witness in the cross-examination was, apparently, to show that the injuries were quite minor. In my opinion, this has not been successful and the evidence of this witness is not shaken in any manner.

18. I find that though Nafajat (PW-1) and Tajbibi (PW-2) were extensively cross-examined, and that all sorts of suggestions - quite contradictory at times - were given to both of them, their testimony, which is supported by the medical evidence and the evidence of the Police Officers on certain aspects, is not shaken at all. In fact, some of the suggestions in the cross-examination are quite curious, in as much as, it is suggested that Nafajat (PW-1) and Tajbibi (PW-2) were not disclosing the names of the real assailants and they were falsely implicating the accused persons without suggesting any reason for protecting the real culprits and for implicating the accused persons falsely. It would not be possible to accept that after having suffered such a murderous assault, the victim would not name the real assailants, but implicate some totally different persons as the assailants. Interestingly, it was also suggested to Tajbibi (PW-2) that actually she and Nafajat (PW-1) had been helped by the original Accused No. 1; in which case it would be difficult to conceive a reason for the false implication of the original Accused No. 1 and the other accused including the Appellant.

19. The learned Additional Sessions Judge, Greater Bombay, has believed the evidence of Nafajat (PW-1) and Tajbibi (PW-2). He has found their versions consistent and natural. The minor variations in the evidence of these witnesses and the possibility of their having made some improvement on some minor matters have been rightly ignored by the trial Court as not of any consequence.

20. The evidence of PSI Vithal Nikam (PW-8) attached to the Jogeshwari Police Station at the material time, shows that while he was on station house duty from 8 p.m. on 11th April, 1988 to 8 a.m. on 12th April, 1988, at about 7:30 a.m., Tajbibi (PW-2) came running to the Police Station and reported that her husband was assaulted and was lying on the road in an injured condition. PSI Nikam (PW-8) thereafter immediately went to the spot along with Tajbibi (PW-2) and police staff. He has stated that they went near Munshi Grocery Shop where Nafajat (PW-1) was lying in an injured condition. He has then stated that Nafajat

(PW-1) was lifted and put in the Police Jeep and then taken to Cooper Hospital, where he was admitted in emergency ward. According to him, he then recorded the statement of Nafajat (PW-1) after obtaining permission from the Doctor attending to Nafajat (PW-1). The F.I.R. (Exhibit-13) was shown to him and he has identified the same as the said statement of Nafajat (PW-1) which was recorded by him in the Cooper Hospital.

21. PSI Nikam (PW-8) has then stated that he along with Tajbibi (PW-2), PI Puri (PW-9), PSI Avhad, PSI Save and other Policemen went to the scene of offence and, that, under a Panchnama, the measurements of the room of Nafajat (PW-1) were taken. The surroundings were also noted and then the Police Party and the Panchas went to the scene of offence, which was situated at a distance of about 1 furlong from the house of Nafajat (PW-1). He has then stated about collecting samples of blood, mud stain with blood etc. from the place of incident. He was extensively cross-examined on various aspects of the matter, but I do not find anything that would assist the Appellant has been brought out on record as a result of the cross- examination. He has admitted that Tajbibi's name has not been mentioned in the entry made in the Station House Diary (as the person coming to the Police Station), but, in my opinion, this cannot be lead to any doubt as to whether Tajbibi (PW-2) had, indeed, gone to the Police Station. PSI Nikam (PW-8) has given a reason for not mentioning this in the Station House Diary and, according to him, as Nafajat (PW-1) was lying in a seriously injured condition, he left the Police Station immediately and, that, therefore, he did not make any entry in that regard in the Station House Diary. He was then questioned as to whether he mentioned in the Station Diary Entry that he left the Police Station for going to the hospital etc. and the witness has stated that it was not so mentioned. I am unable to accept that this would throw a doubt on the version of Tajbibi (PW-2) and of this witness about Tajbibi (PW-2) having gone to the Police Station and this witness, along with other Police personnel having gone to the place where Nafajat (PW-1) was lying in an injured condition. The omission of Nafajat (PW-1) to state before the Police that when the accused persons had knocked the door of his house at around 6:00 a.m., Tajbibi (PW-2) had also woken up and had come up to the door, was brought on record by confronting PSI Nikam (PW-8) with the same. I am of the opinion that such omission is inconsequential and cannot lead to an inference that in spite of the door of the house being knocked and in spite of the room being a small one, Tajbibi (PW-2) did not wake up and did not see as to who had knocked the door or who had come there. It is unlikely that when the door was knocked at such early hours and when Nafajat (PW-1) had woken up, Tajbibi (PW-2) would continue to sleep and would not try to know who had come.

22. The case of the prosecution cannot be disbelieved merely because this witness did not make any record of what Tajbibi (PW-2) told him after coming to the Police Station. Tajbibi (PW-2) as well as the witness, at that stage, were concerned more with the condition of the injured Nafajat (PW-1) and the explanation of the witness that he noticed that Tajbibi (PW-2) was very much

frightened, and that she did not tell him as to who and how many were the assailants, he did not ask her the same, is quite acceptable.

23. In his evidence, the Investigating Officer PI Shankar Puri (PW-9) speaks about the arrest of the Appellant on 15th April, 1988. According to him, the Appellant was arrested on 15th April, 1988 by one PSI Sankhe in C.R. No. 119 of 1988 of Jogeshwari Police Station and, later, he was arrested in this case. He has spoken about having taken charge of the clothes of the person of the Appellant in the presence of Panchas. His evidence which relates to the other accused is not necessary to be discussed here and it is sufficient to observe that the cross-examination as of this witness had not yielded anything in favour of the present Appellant.

24. The evidence of other witnesses is not significant and, as a matter of fact, not relevant in the context of the case against the Appellant. Therefore, only a brief reference to the same would suffice. Subhash Mestry (PW-4) is the Panch in respect of the Spot Panchnamas. Mohd. Jamil Khan (PW-5) is supposed to be a Panch in respect of arrest of the Appellant on 15th April, 1988. He has, however, not supported the prosecution and was declared hostile. Uma Shankar Prajapati (PW-6) is also a Panch Witness in respect of the recovery of a Chopper at the instance of the original Accused No. 1. This witness did not support the case of the prosecution and was declared hostile. In any case, his evidence was not relevant in the context of the question of guilt or innocence of the present Appellant. Similarly, the evidence of Bhanudas Avahad (PW-7), Police Sub-Inspector attached to Jogeshwari Police Station, at the material time, also is in respect of the involvement of the original Accused No. 4 and does not relate to the present Appellant. The evidence of Narayan Patil (PW-10), who was attached to the Jogeshwari Police Station as Inspector of Police at the material time, is also not relevant in the context of the case against the Appellant.

25. The trial Court has believed the version of Nafajat (PW-1) and Tajbibi (PW-2), which has been corroborated by the medical evidence and also by the evidence of PSI Nikam (PW-8). On an independent re-appreciation and re-evaluation of the evidence, this Court also comes to the conclusion that the assault on Nafajat (PW-1) by the accused persons was clearly proved, and that the role of the Appellant, as alleged by the prosecution, had also been satisfactorily proved.

26. Ms. Indu Verma, the learned Advocate for the Appellant, advanced some arguments with respect to the unreliability of the prosecution version. According to her, the theory of the hands of the Nafajat (PW-1) having been tied by a rope cannot be believed, and that the witnesses are not telling the truth in that regard. She pointed out that no rope had been seized during the investigation. She also pointed out that though the allegation of the original Accused No. 1 having a revolver with him has been levelled, no revolver has been seized. According to her, therefore, the witnesses cannot be termed as wholly reliable. There is undoubtedly some substance in the contentions advanced by the learned Advocate for the Appellant and though it is possible to find out some faults in the

investigation, it is not possible to accept that no assault, as alleged, had taken place at the time and place mentioned by Nafajat (PW-1) and Tajbibi (PW-2). The number of injuries sustained by Nafajat (PW-1) are wholly consistent with the version of Nafajat (PW-1) and Tajbibi (PW-2). The place where the incident took place also cannot be disputed. Once it is established beyond any reasonable doubt that Nafajat (PW-1) was assaulted at the given time and place, the only possibility required to be considered for exonerating the Appellant, would be that the Appellant was not among the assailants. In that case, the possibility of Nafajat (PW-1) and Tajbibi (PW-2) having falsely implicated the Appellant needs to be considered. I have considered the same and, in my opinion, such possibility has to be forthwith rejected. It is significant that no reason has been suggested for Nafajat (PW-1) to implicate the Appellant falsely. On the contrary, the wild, somewhat reckless and at times contradictory suggestions, that had been given to Nafajat (PW-1) and Tajbibi (PW-2) in the cross-examination, themselves indicate that there was hardly any scope for challenging the evidence of these witnesses.

27. That no rope was taken charge of in the course of investigation and no revolver could be seized in the course of investigation, though may indicate that Nafajat (PW-1) and Tajbibi (PW-2) are not wholly reliable witnesses, their evidence cannot be discarded only on that ground, with respect to the incident of assault and the involvement of the Appellant in the assault. There is a circumstantial guarantee with respect to the version of these witnesses, apart from the fact that the same is fully corroborated by the evidence of Dr. Satish Dharap (PW-3) and PSI Nikam (PW-8), which evidence has remained unshaken.

28. In my opinion, therefore, the finding of guilt of the accused persons - including the Appellant - as arrived at by the learned Additional Sessions Judge is proper and legal. As a matter of fact, the reasoning of the learned Sessions Judge that this assault was not sufficient to conclude the offence to be one punishable u/s 307 of the Indian Penal Code is quite doubtful. This view has been taken only on the basis that there had been no injuries on the vital part of the body of Nafajat (PW-1), which, in my opinion, could not have been the sole criteria to consider what offence the Appellant and the other accused had committed. The number of injuries and the medical opinion that they were - at least collectively - sufficient in the ordinary course of nature to cause death needed to be considered in this context. Anyway, since the State has not preferred any Appeal from the conviction of the Appellant with respect to a lesser offence, I do not wish to discuss this aspect any further and leave it at that.

29. Thus, there appears to be no infirmity in the judgment and order of conviction of the Appellant, as recorded by the Additional Sessions Judge, Greater Bombay.

30. The learned Counsel for the Appellant, however, urged that considering all the relevant aspects of the matter, it would be proper to reduce the sentence imposed on the Appellant.

31. Before considering this aspect of the matter, it would not be out of place to mention an error committed by the learned Additional Sessions Judge, though the same is not relevant in the context of the present Appeal; as a reference to the same would clarify the legal position with respect to the applicability of Section 360 of the Code to the State of Maharashtra.

32. The learned Additional Sessions Judge dealt with the original Accused Nos. 3 and 4, under the provisions of Section 360 of the Code. They were convicted of an offence punishable u/s 326 of the Indian Penal Code, which offence is punishable with imprisonment for life. A reading of Section 360(1) shows that it is not applicable where the conviction is in respect of an offence "punishable with death or imprisonment for life". It has been held that the phrase "punishable with death or imprisonment for life" must be interpreted disjunctively. The said phrase must be read as referring to offences where the punishment would be death, or where the punishment would be imprisonment for life. Thus, even where imprisonment for life is the maximum punishment provided for the offence, of which the accused is convicted, the benefit of Section 360 cannot be extended to such accused. There was, therefore, no scope for extending the benefit of the provisions of Section 360 to the original Accused Nos. 3 and 4, as was done by the learned Additional Sessions Judge.

33. Even otherwise, whether, on facts, it was a fit case to release the offenders on probation of good conduct, regard being had to the factors mentioned in the said Section, does not appear to have been considered at all by the learned Additional Sessions Judge. What was considered as a ground for extending the benefit of probation is that the said accused were in custody for more than two years and more than four years, respectively. This was not a relevant consideration at all, for extending the benefit of probation to them.

34. Moreover, there was a basic error in applying the provisions of Section 360 of the Code, as the said section has no application to the State of Maharashtra. It is because the Probation of Offenders Act, 1958 is in force in the State of Maharashtra. It has been brought in force in different parts of the State of Maharashtra on different dates. In some Districts, it was brought in force on 1st November, 1966; in some other Districts, it was brought in force on 1st February, 1970. By 15th August, 1972, it was brought in force throughout the State of Maharashtra. Section 19 of the Probation of Offenders Act, 1958, reads as follows:

Section 19. Section 562 of the Code not to apply in certain areas.- Subject to the provisions of Section 18, Section 562 of the Code shall cease to apply to the States or parts thereof in which this act is brought into force.

35. Undoubtedly, this Section refers to Section 562 of the Old Code i.e. the Code of Criminal Procedure, 1898. The new Code came in force on the 1st day of April, 1974, but Section 19 of the Probation of Offenders Act was not amended in consequence of the same. However, this aspect does not affect the efficacy or

operation of Section 19(1) in any manner. The reason is that the provisions of Section 562 of the Code of Criminal Procedure, 1898 have substantially been incorporated in Section 360 of the new Code of Criminal Procedure, 1973. In other words, the provisions of both the sections are in pari materia. In view of the provisions of Section 8(1) of the General Clauses Act, the reference in Section 19 of the Probation of Offenders Act, to Section 562 of the old Code, has to be construed as a reference to Section 360 of the new Code. The result is that in the States where the Probation of Offenders Act has been brought in force, Section 360 of the Code of Criminal Procedure can have no application. The same view has been taken by the Kerala High Court in the case of *State of Kerala Vs. Chellappan George and Another*, . The Karnataka High Court also, in the case of *B.S.M. Ganganna Vs. State of Karnataka and Others*, , has taken the same view by observing that the Probation of Offenders Act, 1958 being in force in Karnataka, the provisions contained in Section 360 of the new Code are not applicable in that State. Again, a Full Bench of Himachal Pradesh High Court has also taken the same view in the case of *State of Himachal Pradesh Vs. Lat Singh and Others*, .

36. Thus, the learned Additional Sessions Judge was not right in applying the provisions of Section 360 of the Code to the original Accused Nos. 3 and 4. Even otherwise, it does not appear to be a case where the benefit of the provisions of probation, even as per the provisions of the Probation of Offenders Act, could have been given.

37. Since the Respondent-State has not challenged the release of the original Accused Nos. 3 and 4 by adopting appropriate proceedings before this Court, no further action in the matter is warranted, at this distance of time. However, it was thought fit to make the above observation as to the correct legal position, as instances were noticed wherein the Courts in Maharashtra had invoked the provisions of Section 360 of the Code of Criminal Procedure, instead of the provisions of the Probation of Offenders Act, for releasing an accused on probation of good conduct. It is, therefore, felt that the correct legal position with respect to the applicability of Section 360 of the Code needs to be brought to the notice of the Subordinate Courts in Maharashtra.

38. I shall now come back to the question as to whether it would be just and proper to reduce the sentence imposed upon the Appellant by the trial Court. I have taken into consideration the submissions made in this regard by the learned Counsel for the Appellant. The incident had taken place on 12th April, 1988 i.e. more than 23 years back. The Appellant had been on bail during the trial and even during the pendency of the Appeal. He came to be taken in custody only a few months back. The submission of the learned Counsel that no specific role in the incident has been attributed to the Appellant as the author of the any particular injury or injuries suffered by the victim has also to be accepted. Further, during the period of about 23 years, while the Appellant was on bail, he does not seem to have committed any offence. At, least there is nothing to

indicate so and not even a claim to that effect.

39. Considering all the relevant aspects of the matter and, more particularly, that the Appellant shall suffer punishment for something which had been done by him about 23 years back, I am inclined to reduce the sentence imposed on the Appellant by the trial Court.

40. In the result, the Appeal is partly allowed.

41. The order of conviction of the Appellant, as recorded by the Additional Sessions Judge, is maintained. However, the sentence imposed upon the Appellant is reduced to Rigorous Imprisonment for five years.

42. Save and except the aforesaid, no other order in this Appeal, which stands disposed of in the aforesaid terms.