
(2001) 02 BOM CK 0020

In the Bombay High Court

Case No : Criminal R.A. No. 158 of 1990

Syed Shafiq Ahmed

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 09-02-2001

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 324, 326, 34, 436

Citation : (2002) CriLJ 1403

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : N.H. Patil, for the Appellant; K.S. Patil, Assistant Public Prosecutor (for No. 1), for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard learned advocate for the petitioner and the learned Additional Public Prosecutor, for the State.

2. Perused the records.

3. The petitioner challenges the judgment and order dated 29th Oct. 1988 passed by the Chief Judicial Magistrate Aurangabad in Regular Criminal Case No. 195 of 1987 and confirmed by the learned Sessions Judge Aurangabad in Criminal Appeal No. 52 of 1988 by his judgment and order dated 6th August, 1990. The learned Chief Judicial Magistrate by the said order dated 29-10-1988 had convicted the petitioner for offences punishable under Sections 326 and 324 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of 3 years and to pay a fine of Rs. 5000/-, in default, rigorous imprisonment for a 9 months while acquitting the other accused in the said case by name Mirza Mohammed Baig for the same offences for want of evidence against him.

4. The accusation against the petitioner was that on or about 13-3-1987 between the 20.00 hours and 22.00 hours the petitioner came on a motorcycle on a public

road in front of the B and C Rest House at Kannad and voluntarily caused grievous hurt to Zaibunnisa d/o Abdul Gafoor and Azra Sultana w/o Syed Shafiq by throwing an acid on their persons causing disfiguration of the face of both Zaibunnisa as well as that of Azra Sultana and loss of vision of right eye of Zaibunnisa and thereby committed offence punishable under Sections 326 as well as that under 324 of the Indian Penal Code. It was also alleged that the petitioner was accompanied by another accused by name Mirza Mohammed Baig, who was riding the motor cycle.

5. It is the case of the prosecution that on the relevant day and time Zaibunnisa, Azra and Mushirunnisa were returning to their house from that of Professor Karbhari by Tilak Road at Kannad and when they had been in front of the B and C Rest House and the building of Civil Court at Kannad on Kannad Chalisgaon Road, while they were walking parallel to each other, with the Zaibunnisa being in the centre and Mushirunnisa on her right and Azra Sul tana on her left, the traffic on the road being minimum, two persons came on a motor cycle driven from the opposite direction and as it reached near the spot close to Azra on her left side, the pillion rider all of a sudden threw some liquid, from a container which he was carrying, on the person of the girls as a result the liquid fell on the person of Zaibunnisa on her right side portion of the body as well as near the chest and on the left shoulder. Some portion of the liquid also fell on the left side of the face of Mushirunnisa as well as on her shoulder and back. Thereafter, the pillion rider applied some liquid to the face of Azra Sultana. Immediately thereupon all the three girls raised alarm and started shouting. The girls could identify the persons who had thrown acid on them as being the husband of Azra namely the accused No. 1, the petitioner herein. As a result of throwing of acid, the clothes on the person of all the 3 girls were partially burnt and spoiled. Mushirunnisa immediately narrated the incident to her father when they reached her house and thereupon proceeded to the police station. As a result of burns suffered from acid, the girls started getting restless and were shouting and, therefore, Kudrat Ali, the brother of Mushirunnisa and Zaibunnisa and some neighbours took the girls to the dispensary of a doctor by name Patil who expressed his un-ability to provide any medical assistance and advised them to proceed to the Medical College Hospital forthwith. Therefore, they had to return to their residence. Meanwhile the father of the girls accompanied by P.S.I. Deshmukh and C.P.I. Kannad and one Dr. Shinde, Medical Officer, came to their house and the said doctor examined all the injured girls and directed them to be taken to the Medical College Hospital, Aurangabad for the necessary treatment. Accordingly, the girls were referred to the Medical College Hospital Aurangabad at mid night and were admitted in the hospital. At Kannad, Mushirunnisa reported the incidence orally to the P.S.I. Deshmukh. Subsequently the investigation was carried out and the petitioner and said Mirza Mohammed Baig were charge sheeted for the offence punishable under Sections 326 and 324 read with Section 34 of the Indian Penal Code. After examining 14 witnesses, including the investigating officer, the trial Court convicted the petitioner but

acquitted the said Mirza Mohd. Baig. The appeal preferred against the same was dismissed by the impugned order. Hence, the present criminal revision application.

6. While assailing the conviction of the petitioner, it has been submitted by the learned advocate that the first information report lodged in the case in hand did not disclose the name of the petitioner being the person who had thrown acid on the person of the girls and it appears that his name figured for the first time nearly 4 days after the alleged incident. Undisputedly the assailants were riding on the motor bike with their faces were covered with clothes and there was no occasion for the girls to identify the said persons nor any description of the assailants was disclosed by the girls in the first information report. Therefore, considering the law laid down by the Apex Court in the matter of K. Ashokan and Others Vs. State of Kerala, , the Courts below could not have convicted the petitioner in the absence of proper identification of the petitioner to be the assailant. The benefit of doubt ought to have been given to the petitioner. It is further submitted by the learned advocate for the petitioner that the narration of incidence given by the so called eye witnesses is full of contradictions and, therefore, the evidence on record does not justify the finding regarding the guilt of the petitioner arrived at by the Courts below. Besides there being total absence of any materials establishing the motive of the petitioner to commit the alleged offence and since the matter rests totally upon the circumstantial evidence and the same being not sufficient to establish the chain of events to connect the petitioner with the alleged offence, the Courts below ought to have held that the evidence on record is not sufficient to convict the petitioner. It is further submitted that considering the fact that the accused No. 2 has been acquitted for want of evidence and the accusation against the petitioner being of similar nature, applying the law laid down by the Apex Court in the matter of Sukhram Vs. State of M.P., , the Courts below ought to have considered that in the absence of strong circumstantial evidence clearly establishing the case against the petitioner, he was entitled for benefit of doubt. It is lastly contended that considering the conduct of the petitioner, even subsequent to the alleged incident and that he was arrested at Aurangabad and did not even make any attempt, to abscond from the date of the alleged incident, by all probability, the petitioner had no connection whatsoever with the alleged incident and, therefore, ought to have been acquitted. The Courts below having ignored the important pieces of evidence as well as the fact that the circumstantial evidence does not establish the involvement of the accused in the alleged offence, the Courts below erred in convicting the petitioner for the offences punishable under Sections 326 and 324 of the Indian Penal Code. The learned Additional Public Prosecutor, on the other hand, referring to the judgments of the Courts below, has submitted that the injuries suffered on the neck and left palm of the accused and certified by the medical officer on his arrest clearly disclose the involvement of the petitioner in the incident of throwing of acid on the person of the 3 girls. He has further submitted that the enmity between the petitioner and Azra has been

clearly brought on record and that establishes the motive behind the offence committed by the petitioner. According to the learned A. P. P. Mushirunnisa has identified the petitioner and had, in fact, disclosed his name to the investigation officer on the day of the incident itself and that is apparent from the record including the analysis of evidence by the Courts below.

7. There is no doubt that the statement, which has been referred to as the first information report, deponent disclosed the name of the petitioner. However, the Courts below have clearly observed about certain dereliction of duties by the police officer on duty at the relevant time. From the analysis of the evidence on record disclosed florally both the judgments passed by the Courts below, it is apparent that Mushirunnisa had disclosed the name of the petitioner to her father immediately after the incident and he had disclosed the said name to the police officer. It has been clearly established from the records that immediately after the incident when the girls proceeded to the house of Mushirunnisa they met their father and the father proceeded to the police station and thereafter returned to the house along with P.S.I. Deshmukh. The Police Officer himself arranged for Dr. Shinde to examine the girls and on his advice the girls were referred to the Medical College Hospital at Aurangabad at midnight of the 13th March, 1987. The findings arrived at by the Courts below are based on analysis of record and disclose that the P.S.I. Deshmukh had recorded the statement of Mushirunnisa on the very day before the girls were sent to the hospital and immediately thereafter had directed Head Constable Dabhade to proceed to Aurangabad in search of the petitioner. There is nothing on record to suggest that the P.S.I. Deshmukh had any reason to send Head Constable in search of the petitioner otherwise than in relation to the offence in question. This fact of deputing Dabhade to arrest the petitioner clearly discloses that the P.S.I. Deshmukh was aware of the involvement of the petitioner in the offence and the source of such information to P.S.I. Deshmukh was none other than the statement of Mushirunnisa and it is she and she alone had informed P.S.I. Deshmukh the name of the petitioner as being the assailant. It was sought to be contended that such an inference may be possible only on suspicion in that regard but the suspicion cannot take place of proof and, therefore, would not be sufficient to hold that the prosecution has established the identity of the petitioner to be the assailant. The contention would have been of some substance but for the fact that petitioner happened to be the husband of one of the victims. Undisputedly the petitioner is the husband of Azra Sultana. It is difficult to believe that Azra who happened to be the wife of the petitioner would have found it difficult to identify the petitioner when he tried to throw acid to her face and further applied some liquid, to her face and that too when the motor bike on which he came as a pillion rider was stopped close to her. All of them, thereafter proceeded to the house of Mushirunnisa where Mushirunnisa narrated the whole incidence to P.S.I. Deshmukh. Besides the petitioner was well known to all the three girls including Mushirunnisa.

8-9. The Apex Court in K. Ashokan and Others Vs. State of Kerala, has held that

the first information report is not required to contain graphic details but non disclosure of names and identification of miscreants who were known to the informant cannot be equated with graphic details. That was a case wherein the accused owe allegations to the Communist Party of India (Marxist) and the complainant belonged to the Muslim League. There was political rivalry between the two parties which had resulted in occasional clashes. Prior to the day of incident one member of the Muslim League had sustained a gunshot injury and was admitted in the medical college hospital at Kozhikode. On the 23-10-1988 the deceased C.P. Abdulla and three prosecution witnesses, namely, Moidu, Kannan and Kunhabdulla Haji had gone to see the injured person in the hospital. After visiting the injured, on their way, to Kakkad while going in a bus and when they reached Chelakkad they found a crowd gathered there and sensing some trouble, the bus driver refused to proceed further. Finding no other alternative, they alighted the bus and started walking. After covering some distance they found two of the accused standing on the road. Little later, when they were near the village Naripatta they heard a sound of explosion. Apprehending trouble they ran and took shelter in the nearby house of one of the prosecution witnesses. They then saw a mob armed with various weapons coming towards his house. Meanwhile PW Kunhikannan had bolted the front door of the house from inside. The mob broke open the door and, after entering, caught hold of Abdulla and dragged him to the verandah. To save their own lives PW 2 Kannan ran away and took shelter in his own house in that village and the other two, namely, Moidu and Kunhabdulla Haji went to the top of the house of Kunhikanna. Moidu thereafter climbed a tree and perched himself there. When Kunhabdulla Haji tried to escape, he was caught hold of by some miscreants. He, however, extricated himself and ran to the house of one Pokkar of that village. After about 15 minutes when the mob left, he came to the courtyard of Kunhikannan and saw Abdulla lying near the gate of his house in a pool of blood with multiple injuries on his person.

While Moidu was inside the house of Kunhikannan, the police reached the spot. They took Moidu to Kuttiyadi Police Station where his statement was recorded and a case was registered. The trial Court convicted the accused and the conviction was confirmed by the High Court. While agreeing with the Courts below that they were fully justified in arriving at the conclusion that the incident took place in the manner alleged by the prosecution, the Apex Court held that the Courts were not correct in holding that the prosecution has succeeded in conclusively proving that the accused therein were amongst the miscreants considering the fact that the names of the accused did not find place in the F.I.R. as the miscreants. While rejecting the contention of the accused persons raised in that regard, the trial Court had observed that (at p 2835 of Cri LJ) :

It is a fact that the names of the accused and their individual overt act has not been specifically stated in the FI statement. This aspect in the FI statement, I may quote what His Lordship Justice Mr. Chettur Sankaran Nair stated in the judgment reported in *Ali v. State of Kerala* 1993 (1) K LJ 14 :

A first information report is not a catalogue nor does one expect a just informant, disoriented in mind and in distress to give such graphic details,

The circumstance from which PW 1 brought to the police station in this case and his own explanation that he was under perplexity and fear has to be considered in appreciating Ext. P-1 (FI statement).

While rejecting the said reasoning by the trial Court, the Apex Court observed thus (at Pp 2835-36 of Cri LJ) :

First because disclosure of the names or identifies of the offenders, if known, (as in the instant case) by a person who figures as an eye witnesses is one of the most material facts and such a fact cannot be equated with narration of graphic details and secondly, because, the plea of perplexity and fear raised by PW 1 is not untenable. The FIR was lodged by PW 1 after about 3 hours of the incident at the police station and therein he has given all the details of the incident, except naming the miscreants. Incidentally we may mention that the High Court has not at all adverted to this aspect. There is another significant fact appearing on the record which leads us to presume that PW 1 purposely - (and not due to fear or perplexity) - did not disclose the names of the miscreants, so that, later on, after discussion and deliberation with their party members the names could be given. It appears that two days after the incident the Investigating Officer (PW 14) submitted a report (Ext. P14) before the local Judicial Magistrate stating that during investigation names of some of the miscreants (as mentioned therein) could be gathered. In that report initially names of 5 persons were given and thereafter a host of others. This subsequent inclusion was found to be an interpolation by the trial Court. Having carefully looked into that document we find that some of those names have been written in different ink and squeezed in, which necessarily means that those were subsequently inserted. In view of the above facts and circumstances appearing on record the defence of the appellants (as stated earlier) cannot be said to be without any substance. We, therefore, feel that the appellants are entitled to be benefit of reasonable doubt.

Apparently the Apex Court was dealing with the case wherein the facts were totally different from the facts in the case in hand. In that case there was rivalry between two political parties and there was assault on the members of one political party by a group of other political party in the front of the house of the victim. Besides the Apex Court has clearly observed that in the facts and circumstances of that case, there was every reason to believe that the names of miscreants were not purposely mentioned initially so that those names can be disclosed later on after discretion and deliberation with the members of the political party to which the complainant belonged. In the case in hand, the petitioner was not a stranger to any of the three girls. That apart, as already observed above it is seen that the PSI Deshmukh has already deputed Head Constable Dabhade in search of the petitioner at Aurangabad immediately after referring the girls for medical treatment to the hospital. Unless the PSI Deshmukh was informed by somebody about the involvement of the petitioner in

the incident in question, there was no reason for PSI Deshmukh to depute Head Constable Dabhade in search of the petitioner at Aurangabad. This clearly shows that either Mushirunnisa or her father himself had disclosed the name of the petitioner as the assailant to the PSI Deshmukh. Undoubtedly the testimony of the father of Mushirunnisa discloses that he had disclosed the name of the petitioner to PSI Deshmukh at the relevant time. Being so, the absence of the name of the petitioner in the FIR cannot be of any advantage to the petitioner. In the matter of appreciation of evidence in criminal trial, one cannot forget the observations of the Apex Court in the matter of State of Himachal Pradesh Vs. Lekh Raj and Another, . The Apex Court therein has clearly observed that the Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a Utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. Again the Apex Court in Ambika Prasad and Another Vs. State of (Delhi Administration, Delhi), has observed that the Court should not only see that no innocent person is punished but should also see that no guilty person escapes unpunished. Defective investigation, negligence of investigating officer should not result in acquittal of accused when prosecution otherwise establishes guilt of the accused. Bearing in mind the law laid down by the Apex Court on the point of appreciation of evidence and considering the evidence on record and the facts and circumstances of the case, it cannot be said that mere absence of the name of the petitioner in the FIR recorded by PSI Deshmukh would be fatal to the prosecution case in any manner.

10. As regards the contention of absence of motive the evidence on record and analysis thereof by the Courts below discloses that the accused petitioner had asked Azra not to move with Zaibunnisa and Mushirunnisa and had warned her that she would repent for moving in their company. The materials on record further discloses that though it was a love marriage between Azra Sultana and the petitioner, she was reluctant to reside with him on account of his misbehaviour with her. Besides though they cohabited as the husband and wife for a period of about 2 months, during that period she was ill-treated by the petitioner and, therefore, she did not leave his company and went to reside with his brothers wife. The materials on record also disclose that inspite of repeated efforts by the petitioner to convince Azra to join him, she had refused to cohabit with him and as a result the petitioner was annoyed. It was also come on record that at the time of death anniversary of the father of the petitioner, he was insulted by the mother of Azra. The record further discloses that though Azra started residing at Kannad and the petitioner at Aurangabad, the latter visited Azra on number of occasions to convince her to join him but without any success. The Courts below, in the circumstances, were justified in holding that the desertion of the petitioner by Azra, her staying separately from the petitioner

and her continuation in employment irrespective of repeated objections in that regard by the petitioner, had resulted in revengeful attitude on the part of the petitioner and the same disclosed the motive behind the offence. The evidence also establishes that the petitioner was well aware of the regular visits of Mushirunnisa to the house of Professor Karbhari and the fact that she was being accompanied on her return by Azra and Zaibunnisa. The Courts below are equally justified in observing that stopping of the motor cycle just by the side of Azra disclosed that she was the main target of the assailants. Otherwise there was no reason to stop the motor cycle by her side when three girls were walking parallel to each other. The findings further disclose that at the first attempt the liquid was thrown when it fell on the person of Zaibunnisa and when she raised alarm it was realised by the petitioner that he had missed the target, he again threw the acid on Azra. The materials on record, which have been thoroughly scanned and correctly analysed in the proper perspective by the Courts below clearly disclose the motive of the petitioner behind the commission of the offence. Hence there is no substance in the challenge by the petitioner on the ground of absence of motive being proved.

11. Benefit is sought to be derived from the acquittal of the co-accused by placing reliance upon the decision of the Apex Court in the matter of Sukhram's case. In Sukhram v. State of M.P.'s case 1989 Cri LJ 838 the Apex Court has held thus (Para 10) :

Though the accused Gokul and the appellant were individually charged under Sections 302 and 436, I.P.C. they were convicted only under the alternative charges u/s 302 read with Section 34 and Section 436 read with Section 34, I.P.C. by the Sessions Judge. Consequently, the appellant's convictions can be sustained only if the High Court had sustained the convictions awarded to accused Gokul also. In as much as the High Court has given the benefit of doubt to accused Gokul and acquitted, it follows that the appellant's convictions for the two substantive offences read with Section 34, I.P.C. cannot be sustained because this is case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held to have acted conjointly with anyone in the commission of the offences.

While arriving at the said finding the Apex Court has observed thus (Para 9, of Cri LJ):

If the inconsistencies noticed in the evidence of PW 3 Chhoteram and PW 1 Gendalal and the totally different version given by PW 6 Badrilal are taken note of, there is considerable room for doubt regarding the appellant being one of the two miscreants who had set fire to the hut belonging to PW 1 Gendalal and PW 3 Chhoteram and about the appellant rendering himself liable for conviction for having committed the offences in question in pursuance of a common intention between him and the other accused. Even if the appellant was seen running away from the scene by PW 3 Chhoteram it may be that the fire had been set by the other miscreant and the appellant had not shared any common intention with

him to commit the offences and had run away from the scene out of fear. In such circumstances, the conviction of the appellant under the two charges cannot be sustained.

In the background of the facts of the case it was apparent that the accusation against both the accused was of commission of offence of setting fire of the shed with common intention but Sukhram therein was sought to be convicted only because he was seen running away from the place of scene of offence without any evidence about the actual act by Sukhram of setting fire to the shed. Once Gokul was acquitted of the offences of setting fire of the shed, in the circumstances therefore there was no justification for conviction of Sukhram. Being so, the Apex Court had acquitted Sukhram. The facts of the said case are totally different from the case in hand. The materials on record clearly disclose that the petitioner had grudge against Azra as observed above and has every reason to cause injury to her. The petitioner was clearly identified by the victims as being the person who had committed the offence.

12. It was also sought to be contended that prosecution has failed to establish the presence of the petitioner is Kannad on the day and time of the incident. In that regard attention was drawn to the fact that the petitioner had been to Kannad to answer examination of the 12th Standard on 12th March and therefore there was no justification for his stay in Kannad beyond 12th March. Referring to the testimony of the brother of Mushirunnisa, it was submitted that the said witness clearly disclosed the presence of the petitioner at Aurangabad on 12th night, the petitioner having already returned to Aurangabad on 12th March. It was necessary for the prosecution to establish that he had proceeded to Kannad on 13th of March. In the course of cross-examination an attempt was made by the petitioner to say that the letter was handed over by the said witness to the petitioner on 12th night with a request to give the said letter to his father to Kannad on 13th of March stating that the witness was proceeding to Pune on the next day and would be returning by 20th of March. The evidence sought to be brought on record by the petitioner to justify the contention that the petitioner was in Aurangabad on 12th of March and, therefore, it was necessary for the prosecution to establish that he had proceeded to Kannad on 13th of March. However, the petitioner himself has brought an evidence on record to show that he was to proceed to Kannad on 13th of March and this fact was even known to the brother of Undisputedly the petitioner had dinner at the residence of Mushirunnisa on the day prior to leaving Kannad after the examination. This shows that he had cordial relations with the family of Mushirunnisa and, therefore, the brother of Mushirunnisa had an occasion to know in advance that the petitioner was to proceed to Kannad on 13th of March. The evidence on record, therefore, nowhere established the absence of the petitioner at Kannad on 13th of March and, on the other hand, it establishes otherwise.

13. The contention of the conduct of the petitioner subsequent to the incident does not disclose the involvement of the petitioner in the offence is totally devoid

of substance in the facts and circumstances of the case and the materials which have come on record. Merely because the petitioner did not try to abscond immediately after the incident, that by itself does not establish that the accused is not guilty of the alleged offence. On the contrary, the incidence appears to be well planned. Incidentally it is also to be noted that the injuries which have been suffered by the victims are of very grave and serious nature. The analysis of the evidence in that regard by the Courts below read thus :

In the first assault, the acid appeared at the right side face of Zaibunnisa causing grievous hurt, disfiguration and loss of right eye to her with substantial chemical burns at chest, back, shoulder and fore-arm by damaging her clothings and at the same time some particles of the acid appeared at the left side face, shoulder, upper chest wall and back of Mushirunnisa. It is to be noted that Mushirunnisa alone sustained burns at the left side of the body while most of the injuries on the persons of Zaibunnisa and Azra Sultana are available at the right side of the body. If we go through the medical report on record, it is obvious that Zaibunnisa sustained deep superficial burns on right side face, right eye, both upper extremity right side to neck, upper chest wall and loss of vision of right eye and disfiguration of right ear. Similarly, Azra Sultana sustained injuries at the right side portion of her face, right nostrils upper extremity, chest wall etc. These facts will be very clear from Exhs. 57/1, 57/2 and 57/3 the photographs of Zaibunnisa and Exh. 59 the photographs of Azra Sultana after the incident.

14. In the circumstances, therefore, there is no case made out for interference in the impugned judgment and hence the petition fails and is hereby dismissed. Rule is discharged. Interim relief stands vacated. The bail bonds stand cancelled. The petitioner to surrender within a period of six weeks from today.