

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1852-1853/2011

RAFIQ BURHAN SHAIKH & ANR.

Appellant(s)

VERSUS

THE STATE OF MAHARASHTRA

Respondent(s)

O R D E R

The appellants are A-6 and A-12. A-2 who was charged and convicted along with these two appellants died and therefore, the appeal stands abated as against him.

The case of the prosecution, in a nutshell, is that on 18.07.2001 about 14-15 persons attacked the informant, namely PW-8, and the two deceased persons and committed the offence punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC').

PW-8 being the informant, gave the complaint which was registered for the offence punishable under Sections 302, 307, 324, 143, 147, 148 and 149 of IPC.

Before the trial Court, 17 prosecution witnesses were examined. The evidence of the other eye witnesses, namely, PWs-3, 5 and 7 were disbelieved by the trial Court. Accordingly, other than the appellants presently before us (A-6 and A-12), the deceased appellant/accused No.2 was also convicted for the offence punishable under Sections 302, 307 read with 34 of IPC.

A fact to be noted is that even the evidence of PW-8, being the only eye witness, was not believed insofar as other acquitted accused are concerned. Thus, the charge under Section 34 of IPC was pressed into service while upholding the conviction for the offence under Section 307 of IPC.

On appeal, the conviction and sentence rendered by the trial Court was confirmed by the High Court.

While doing so, the High Court recorded a finding that the view of the trial Court was a plausible one.

Though arguments have been made on several counts, Mr. R. Basant, learned senior counsel appearing for the appellants pressed into service the primary contention that even assuming the offence punishable under Section 307 of IPC is made out

against the appellants, they cannot be charged for the offence under Sections 302 and 307 read with Section 34 of IPC. He took us through the discussion of the trial Court in this regard.

Learned counsel appearing for the State, while trying to support the impugned judgment, submitted that one has to see the evidence of PW-8, being the injured eye witness as a whole. Admittedly, he has suffered injuries and, therefore, more value has to be attached to his testimony.

We would like to record the following paragraphs of the trial Court's judgment:

"79. The claim of prosecution in respect of number of accused was 14 also does not stand to reasons on the touch stone of medical evidence on record as has been discussed herein above. Thereafter, it seems that the accused were only three or at the most Puli Sharma may be the fourth person who assaulted the informant. They also may be assaulted the deceased. Their presence is established on the spot of incident by P.W.8 and injuries on each person and the medical evidence on record. They were not expected to keep quiet by inflicting only three injuries on the person of injured Jakir Shah. They must have inflicted six more

blows of weapons to the deceased i.e. two more blows may have been given by each of the three accused to the two deceased. Though there is no clear and cogent evidence against these three accused in respect of assault on the deceased, however, their involvement in the assault on informant is established beyond reasonable doubt. They are not expected to give one blow each to informant Jakir. Furthermore sec.34 I.P. Code is squarely attract to the acts of the three accused as at the same time in the same incident both the deceased were seriously injured and ultimately succumbed to the injuries.

80. In this respect, theory of assault by more than five accused is unacceptable, therefore, Sec. 149 is not attracted to the set of facts of the present case. In all 9 injuries were found on the person of two deceased and the informant. The three accused may have inflicted three injuries each on the person of informant and the two deceased. The presence of more accused appears improbable specially from the number of injuries found on the person of the

deceased and the injured.

81. In the incident of like nature it is also usual practice to implicate maximum number of persons of opposite group. This tendency is also required to be taken into account. In this backdrop I come to the conclusion that the prosecution has established their case beyond reasonable doubt as against the three accused. They are accused No.2 Bharat Gavhane, accused No.6 Rafiq Burhan and accused No.12 Asif Mustaq who made an attempt on the life of informant Jakir Shah and they also must have inflicted injuries on the person of deceased Aslam and Ansar Qureshi. From the nature of the injuries on the person of the deceased it is clear that the assailants have intention to cause death of the deceased. Thus, I also hold the accused No.2, 6 and 12 guilty of the offence punishable u/s 302 r/w 34 for intentionally causing death of deceased Aslam Qureshi. I also hold these three accused guilty for the offence punishable u/s 302 r/w s. 34 I.P. Code for intentionally causing death of deceased Aslam Qureshi. I also hold them guilty for

an attempt on the life of informant Jakir Shah and hold them guilty for the offence punishable u/s 307 r/w S. 34 I.P.Code. Rest of the accused are entitled to be acquitted as there is no reliable and cogent evidence against any of them. At this stage, I suspend the dictation and three accused are called upon to say on the point of sentence.

Date: 24.12.2007"

It is this finding of the trial Court which has been approved by the High Court in the impugned judgment inter alia holding that it is a plausible view. Law is quite settled that suspicion, however high it may be, cannot be a substitute for evidence.

Admittedly in the case on hand, the evidence of three eye witnesses namely, PWS-3,5 and 7 were found to be untrustworthy. The trial Court did not agree with the evidence of PW-8 insofar as the other accused who were acquitted are concerned. It is the specific case of PW-8 himself that the appellants attacked him while the other accused attacked the deceased persons. It is also the case of the prosecution that in view of the common object, the appellants are vicariously liable for the offence punishable under Section 302 of IPC.

Once the evidence of PWS-3, 5, 7 and 8 was found

to be not trustworthy, insofar as the charge under Section 302 of IPC is concerned, the appellants cannot be convicted for the very same offence with the aid of Section 34 of IPC. To attract Section 34 of IPC, the foundation of facts will have to be proved.

In such view of the matter, we are of the view that both the Courts committed a serious error in convicting the appellants for the offence punishable under Section 302 of IPC, while acquitting the other accused who allegedly committed the said offence. This is for the very reason that there cannot be a vicarious liability when the persons who allegedly committed the offence have already been acquitted. Hence, the conviction of the appellants for the offence punishable under Section 302 of IPC stands set aside.

That takes us to the other charge, namely, the offence punishable under Section 307 of IPC. It is not in dispute that PW-8 is the injured witness. He has clearly deposed that the appellants attacked him and caused the injuries on his body.

In such view of the matter, the findings of both the Courts being concurrent in nature, and after analyzing the oral evidence of PW-8 whose presence at the scene of occurrence cannot be doubted at least insofar as the offence under Section 307 of IPC is

concerned, we are upholding the said conviction rendered by the Trial Court and affirmed by the High Court.

However, taking into consideration the facts and circumstances of the case, the sentence imposed by the Trial Court and affirmed by the High Court stands modified to the one already undergone, as it is informed that both the appellants were under incarceration for more than six years.

The appeals stand allowed in part accordingly.

The bail bonds stand discharged.

Pending applications, if any, stand disposed of.

.....J.  
[M.M. SUNDRESH]

.....J.  
[PANKAJ MITHAL]

NEW DELHI;  
SEPTEMBER 11, 2024.

ITEM NO.101

COURT NO.12

SECTION II-A

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Criminal Appeal No(s). 1852-1853/2011

RAFIQ BURHAN SHAIKH &amp; ANR.

Appellant(s)

VERSUS

THE STATE OF MAHARASHTRA

Respondent(s)

Date : 11-09-2024 These appeals were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE M.M. SUNDRESH

HON'BLE MR. JUSTICE PANKAJ MITHAL

For Appellant(s) Mr. R Basant, Sr. Adv.  
Mr. Tushar K. Choudante, Adv.  
Mr. Samin Bagwan, Adv.  
Mr. Anand Dilip Landge, AOR  
Mrs. Sangeeta S Pahune Patil, Adv.  
Mr. Dinesh H Godara, Adv.

For Respondent(s) Mr. Aaditya Aniruddha Pande, AOR  
Mr. Siddharth Dharmadhikari, Adv.  
Mr. Shrirang B. Varma, Adv.  
Mr. Bharat Bagla, Adv.  
Mr. Sourav Singh, Adv.  
Mr. Aditya Krishna, Adv.  
Ms. Preet S. Phanse, Adv.  
Mr. Adarsh Dubey, Adv.

UPON hearing the counsel the Court made the following  
O R D E R

The Court *inter alia* directed as under:

"... taking into consideration the facts and circumstances of the case, the sentence imposed by the Trial Court and affirmed by the High Court stands modified to the one already undergone, as it is informed that both the appellants were under incarceration for more than six years.

The appeals stand allowed in part accordingly.

The bail bonds stand discharged."

Pending applications, if any, stand disposed of.

(ASHA SUNDRIYAL)  
ASTT. REGISTRAR-cum-PS

(POONAM VAID)  
COURT MASTER (NSH)

[Signed order is placed on the file]