IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO.306 OF 2005

Baki Abdulgani Patel,
Age : 35 years, Occupation : Trade,
R/o. Inamdar Galli, Naldurg,
Tq. Tuljapur, District Osmanabad. ...Applicant

VERSUS

1. The State of Maharashtra
(Copy to be served on Public Prosecutor
of High Court of Judicature of Bombay,
Bench at Aurangabad.

2. Abdulali Mehboobali Patel,
Age : 67 years, Occu : Pensioner,
R/o. Inamdar Galli, Naldurg,

3. Riyazali Abdulali Patel,
Age : 30 years, Occu : Trade,
R/o. As above.

4. Hafiz Abdulali Patel,
Age : 24 years, Occu : Trade,
R/o. As above.

5. Jilani Abdulali Patel,
Age : 37 years, Occu : Trade,
R/o. As above. ...Respondents

...

Mr. V.S. Tanwade, Advocate for the applicant.
Mr. S.B. Narwade, APP for the respondent/State.
Mr. V.M. Humbe, Advocate for respondent Nos.2 to 5.

...

CORAM : S.G. MEHARE, J.

DATED : APRIL 18, 2023

ORAL JUDGMENT :-

1. The complainant/injured has preferred this revision against the judgment and order of acquittal of the learned Judicial

Magistrate First Class, Tuljapur, District Osmanabad in R.C.C. No.153 of 2000 dated 06.07.2005.

2. The applicant would be referred to as the 'complainant', and respondents nos.2 to 5 would be referred to as the 'accused' for convenience.

3. The complainant lodged the report against the accused on 07.08.2000 with Police Station Naldurg, District Osmanabad. On his report, F.I.R. No.118 of 2000, the offence under Section 324, 323, 504, 506 r/w 34 of the Indian Penal Code was registered. After investigation, a report under Section 173(2) of Cr.P.C. was submitted to the Court of Judicial Magistrate. The Judicial Magistrate, after the cognizance, framed the charges, and the accused faced the trial. The prosecution examined six witnesses in all. Thereafter, the statement of the accused under Section 313 of Cr.P.C. was recorded. After hearing the respective counsels, the impugned judgment and order has been passed.

4. Learned counsel for the complainant has vehemently argued that absolutely no reasons have been assigned for discarding the injured witnesses. The learned Magistrate did not utter a single word from the testimony of the injured, which was supported by the medical evidence. Discarding the direct evidence completely, the learned Magistrate has committed a grave error of law in acquitting the accused, observing that the investigating officer was not

examined, the alleged weapons used in the crime were not seized, and Section 27 of the Indian Evidence Act has not been complied with. He would argue that the judgment written by the Court is without giving reasons. Hence, it is like a human body without a heart. Apparent errors and illegalities are on the face of the record. Therefore, the impugned judgment and order is liable to be quashed and set aside.

5. Per contra, learned counsel for the accused has vehemently argued that the non-examination of the investigating officer had materially affected the rights of the accused to prove the omissions and contradictions. In the absence of recovery of the weapons, it would be most difficult to believe the prosecution witnesses that the injuries were caused due to the weapons allegedly used in the crime. These two aspects were material to arrive at a conclusion that the accused were the author of the crime. Therefore, the learned Magistrate correctly believed the defence and did not believe the prosecution case. The slightest doubt in the criminal case gives benefit to the accused. The enmity was admittedly there. These circumstances have also been considered in the impugned judgment and order. He supported the impugned judgment and order and prayed to dismiss the revision.

6. The learned Magistrate in the judgment has given only the list of witnesses examined by the prosecution. He did not discuss a

single word from the evidence of the witnesses, particularly the injured, who have directly led the evidence against the accused.

7. The learned Judge has also recorded the finding in Para 8 of his judgment that in the complaint itself, it is not mentioned that the accused, in furtherance of common intention, committed the offence in question. In the testimony of prosecution witnesses also, it is not tried to place on record or to establish that the accused, in furtherance of their common intention, have committed the offence in question.

8. The learned Magistrate seems to have misread Section 34 of the Indian Penal Code. Section 34 is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. In the case of *Nandu Rastogi alias Nandji Rastoji Vs. State of Bihar, 2003 SCC (Cri.) 177*, the Hon'ble Supreme Court has observed that to attract Section 34 of the Indian Penal Code, it is not necessary that each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence, and in furtherance thereof, each one played his assigned role by doing separate acts, similar or diverse. In the case of *Sewa Ram Vs. State of U.P., 2008 SC 628*, the Hon'ble Supreme Court has held that direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of

the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime.

9. Reading the above case laws, it is explicit that meeting of minds pre-incident is not a pre-condition. The common intention may be shared on the spur of the moment. Playing an active role in the commission of the offence is also not essential to hold the accused guilty for the offence committed in furtherance of common intention. It is also explicit that direct proof of common intention is normally absent. It is to be gathered and inferred from the roles played by each accused in committing the crime and the circumstances. For these reasons, the Court is of the view that the learned Magistrate has committed an error of law in holding that the complainant did not mention in the complaint that the accused, in furtherance of their common intention, committed the offence and the prosecution witness also did not try to place on record or establish that the accused in furtherance of their common intention have committed the offence.

10. Recovery of the weapons is corroborative the evidence. As far as non-recovery of the weapons allegedly used in the crime is concerned, the Judge writing the judgment has to assign the reasons for disbelieving the injured for non-recovery of such weapons. Barely recovering the weapon is also not the sole ground for convicting the accused. The Court has to appreciate the effect of seizure and non-seizure of the weapons allegedly used in the crime.

11. The Hon'ble Supreme Court in the case of *State through the Inspector of Police Vs. Laly @ Manikandan and Another Etc., 2022 LiveLaw (SC) 851*, has observed in Para 7 thus:

> "Similarly, assuming that the recovery of the weapon used is not established or proved also cannot be a ground to acquit the accused when there is a direct evidence of the eye witness. Recovery of the weapon used in the commission of the offence is not a *sine qua non* to convict the accused. If there is a direct evidence in the form of eye witness, even in the absence of recovery of weapon, the accused can be convicted. Similarly, even in the case of some contradictions with respect to timing of lodging the FIR/complaint cannot be a ground to acquit the accused when the prosecution case is based upon the deposition of eye witness."

12. The Hon'ble Supreme Court has clearly laid down the law that non-recovery of the weapon is not *sine qua non* to convict the accused where there is direct evidence. The law is also well

established that the injured is the best witness. However, his testimony may be tested considering the circumstances and the material brought in cross-examination.

13. The third ground, i.e. whether the non-examination of Investigating Officer is fatal to the prosecution case. The injured have led the direct evidence against the accused. Direct evidence has its value. In the absence of any corroborative evidence, if such direct evidence inspires confidence, the Court may convict the accused on the sole testimony of eyewitness. If the credibility of eye witness has not been shaken, then also appreciating the evidence cannot be brushed aside.

14. Let's test the importance of the evidence of the Investigation Officer and his role in investigating the crime. The role of the Investigating Officer is to collect the evidence, investigate the crime and form an opinion that the material collected during the investigation was sufficient to try the accused. On the material collected by him during the investigation, he has to arrest the suspect if required and produce him before the Competent Court for trial. Though he is the witness to the spot of the incident, he has to prepare various panchnamas in the presence of the panchas who are tested before the Court of law. The sole evidence of the investigating officer is not admissible, and it is always supported with some other evidence. The main purpose of examining the investigating officer is

to prove the contradictions and omissions, if any, brought from the evidence of witnesses. The question is whether, in each case, the examination of the investigating officer is essential. It is also not the rule that each and every contradiction and omission is fatal to the prosecution. As per Section 162 of Cr.P.C., the contradictions and omissions should be significant and must have a direct effect on the veracity of the witness and sufficient to raise doubt. It depends on the facts and circumstances of the case whether the examination of the investigating officer was essential in that particular case. Again, the question would be whether, without assigning any reason with the effect for non-examination of the investigating officer, a court can jump to the conclusion that the accused deserves acquittal for non-examination of the investigating officer. In the absence of discussion on the contradictions and omissions in the judgment, it is difficult to believe that the non-examination of the investigating officer had an adverse effect on the prosecution case.

15. In the case of *Bahadur Naik Vs. State of Bihar, (2000), 9 SCC 153*, it has been observed that under the facts and circumstances, if it is shown what prejudice has been caused to the accused for such non-examination of the investigating officer, failure to examine the investigating officer is not fatal. Similarly, in the case of *Behari Prasad and Others Vs. State of Bihar, (1996) 2 SCC 317*, the Hon'ble Supreme Court has observed that a case of prejudice likely to be

suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non-examination of Investigating Officer per se vitiates a criminal trial. Once again, it has been reiterated that prejudice should likely suffer the accused for non-examination of the investigating officer. Whether the non-examination of the investigating officer was prejudiced against the accused has to be recorded by the Court in the judgment was also the matter of appreciation of evidence. The Court is bound to assign the reasons for discarding and receiving the evidence produced by the prosecution. The direct evidence of the injured cannot be discarded by a single line that the prosecution has failed to examine the investigating officer. This is an apparent illegality committed in the present case.

16. It is a rule of writing judgment that the evidence as a whole available on the record shall be appreciated, and on the basis of the evidence, the Judge writing a judgment has to record the conclusions with reasons. The reasons are rational explanations for the conclusion. It is a process by which one reaches a conclusion. The reasons are the soul and heart of the judgment. The Judge writing a judgment has to examine the evidence minutely. The judgment should be confined to the facts of the case and the issues involved.

17. Considering the law as regards the appreciation of the evidence and rules of writing the judgment, and examining the

impugned judgment with abled assistance of both learned counsels for respective sides, the Court come to the conclusion that the impugned judgment and order of acquittal is without reasons, appreciating the evidence and ignoring the direct evidence. The soul and heart of the judgment are missing in the impugned judgment. The order impugned before this Court is bad in law and full of errors, illegalities and improprieties. Therefore, it is liable to be quashed and set aside.

18. Subsection 3 of Section 401 of Cr.P.C. provides that nothing under Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. In other words, exercising the powers under Section 401 of Cr.P.C. in case of a revision against acquittal, the High Court has no power to convert the findings of acquittal into conviction. In view of this provision of law, the sole remedy lies with the High Court is to remit the case back, directing the learned Magistrate to rewrite the judgment after giving an opportunity to the respective counsels. Hence, the following order:

ORDER

I) The revision application is allowed.

II) The impugned judgment and order of the learned Judicial Magistrate First Class, Tuljapur in R.C.C. No.153 of 2000 dated 06.07.2005, is quashed and set aside.

III) The learned Judicial Magistrate First Class, Tuljapur, is directed to rewrite the judgment appreciating the evidence and record its reasons as per law following the rule of writing the judgment after giving an opportunity of being heard to both sides.

IV) Respondent Nos.2 to 5/accused are directed to appear before the learned Judicial Magistrate First Class, Tuljapur, on 12.05.2023.

V) Bail orders, if any, granted to the accused stand restored.

VI) Record and proceedings be returned to the learned Judicial Magistrate First Class, Tuljapur.

VII) Rule is made absolute in the above terms.

(S.G. MEHARE, J.)

Mujaheed//