

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.481 OF 1996

The State of Maharashtra
through P.S.O., Bhusawal Police Station,
Taluka Bhusawal, District Jalgaon

... APPELLANT

VERSUS

- 1) Sk. Amir Sk. Abdulla,
Age 51 years, R/o Railway Station,
Bhusawal, District Jalgaon.
- 2) Sk. Iman Sk. Abdulla,
Age 47 years, R/o Near Grampanchayat
Office, Kandari, Taluka Bhusawal,
District Jalgaon.
- 3) Sk. Shakil Sk. Samir,
Age 30 years, R/o Bhangiwada,
Amalner, District Jalgaon.,
- 4) Sk. Khalil Sk. Iman,
Age 18 years, R/o Near Grampanchayat
Office, Kandari, Taluka Bhusawal,
District Jalgaon.
- 5) Sk. Rustam Sk. Amir,
Age 32 years, R/o Near Kustam House,
Nazhirabad, Taluka
and District Jalgaon.
- 6) Sk. Ajij Sk. Iman,
Age 26 years, R/o Near Grampanahcyat
Office, Kandari, Taluka Bhusawal,
District Jalgaon.
- 7) Rashidabai Sk. Iman,
Age 41 years, R/o Near Grampanchayat
Office, Kandari, Taluka Bhusawal,
District Jalgaon.

... RESPONDENTS

.....
Shri V.D. Godbharle, A.P.P. for appellant/ State
Shri H.I. Pathan, Advocate for respondents
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CORAM: S.S. SHINDE AND
 A.I.S. CHEEMA, JJ.

DATED: 6th August, 2015.

Date of reserving Judgment : 3/7/2015

Date of pronouncing Judgment : 6/8/2015

JUDGMENT (Per A.I.S. Cheema, J.)

1. This is appeal against acquittal of respondents No.1 to 7 (original accused No.1 to 7) in Sessions Case No.168/1995, passed by 3rd Additional Sessions Judge, Jalgaon on 22.4.1996. The case of the prosecution in short is as follows:

- (a) Deceased Shaikh Isub Shaikh Shiraj (hereinafter referred as victim) along with his wife Shafiyabi (P.W.5) was residing in the neighbourhood of the accused persons at Agakhan Wada at Bhusawal. On 13.3.1995, at about 8.15 p.m., he filed F.I.R. at Bazar Peth Police Station, Bhusawal, informing that on the same day in the evening at about 7.15

p.m., when he was in front of his house, his neighbour Shaikh Shakil Shaikh Abdulla came there and told his maternal uncle Jabbar Chandkhan that their waste water had been released in his compound. At that time, accused No.5 Shaikh Rustam Shaikh Amir and accused No.6 Shaikh Ajij Shaikh Iman came there running, and with the sticks which they had, started beating him and by such sticks, they hit him on his head, on his hand and he was injured to the head and blood was oozing. His uncle Jabbar Chandkhan had intervened, but he was also hit on his leg and hand.

- (b) The report was written by P.W.12 Head constable Pandit Patil and offence was registered by Head constable Uttam Sonawane (P.W.11) at Crime No.54/1995. The victim and Jabbar Chandkhan were sent to Municipal Dispensary at Bhusawal where they were examined by P.W.9 Prakash Mahajan. He referred the victim Isub to Civil Hospital at Jalgaon. On 14.3.1995 police prepared spot panchanama (Exh.36). Statements of witnesses were recorded. In the statements,

police found involvement of the other accused persons. There was house-search of accused No.1 Shaikh Amir Shaikh Abdulla and his blood stained clothes were seized (Exhibit 37). The blood stained clothes of accused No.6 Shaikh Ajij Shaikh Iman were also seized (vide Exh.38). The investigation showed that the incident had proceeded from spot on the road to the house of accused No.2 Shaikh Iman where also the victim was beaten and where P.W.4 Benubi had intervened and protected the victim. Even her clothes had blood stains. Consequently, they were seized (Vide Exh.39). Nasirkhan Gaffarkhan (P.W.6) had accompanied victim Isub to the Hospital at Jalgaon. He produced blood stained clothes of the complainant and they were seized vide Exch.40 on 15.3.1995.

The victim was taken from Civil Hospital, Jalgaon to the hospital of one Dr. Acharya and from there he was shifted to Dhule and admitted in the hospital of Dr. Nikhil Shah (P.W.7) from 14.3.1995 to 19.3.1995. The victim was unconscious. Police who had earlier registered

offence under Section 324 of the Indian Penal Code, added offence under Section 307 of the Indian Penal Code at Dhule, the victim was operated upon. On 19.3.1995, the victim was shifted against medical advise from the hospital at Dhule. The victim expired and post mortem was done on 20.3.1995. It was found that the victim died in coma due to head injury. P.W.13 Devidas Chaudhari completed the investigation. The accused No.3 Shakil gave discovery of stick (Exh.80 and 81). Police seized a pipe used in the incident at the instance of accused No.1 Shaikh Amir (Exh.82, 83). Another pipe was discovered at the instance of accused No.5 (Exh.84, 85). The seized articles and the blood samples were sent to Chemical Analyser. C.A. reports were obtained. After investigation charge sheet came to be filed under Sections 302, 323, 342, 147 and 148 of the Indian Penal Code against accused No.1 to 6 and under Section 114 read with Section 302 and 323 of the Indian Penal Code against accused No.7.

2. The Sessions Court at Jalgaon framed charge under

above sections against the accused persons. They pleaded not guilty. The defence is of total denial.

3. Prosecution brought on record evidence of 13 witnesses. The defence did not lead any evidence. Considering the material brought before it, the trial Court, by judgment dated 22.4.1996, acquitted the accused of all the offences. Thus, this appeal by the State.

4. We have heard learned A.P.P. for the State and learned counsel representing the respondents – accused.

5. The appeal claims, and the learned A.P.P. has argued that the trial Court wrongly held that culpable homicide was not established. It was wrongly held that there was missing link as to what happened with the patient at Jalgaon. The medical evidence and the post mortem report were not properly appreciated. The evidence of eye witnesses P.W.4 Benubi, P.W.5 Shafiyabi and P.W.10 Sabirkha was not properly appreciated. These witnesses gave details as to how the incident started from the road and continued in the house of Shaikh Iman (accused No.2). The F.I.R. which was filed by the victim himself has not been properly considered. The

same was in the nature of dying declaration and it was corroborated by P.Ws.4, 5 and 10. Minor contradictions were wrongly given undue importance. Thus, the A.P.P. submitted that the accused deserve to be convicted. According to him, at least regarding accused No.5 and 6, the F.I.R. and the oral evidence completely match and accused No.5 and 6 at least should have been convicted.

6. Against this, the learned counsel for the accused completely supported the reasonings recorded by the trial Court for acquittal of the accused persons. He submitted that, the F.I.R. did not refer to so many accused, but the witnesses involved other persons and the evidence is doubtful and on such evidence brought by prosecution conviction could not be awarded.

7. We have gone through the oral and documentary evidence available on record. We will first make reference to the F.I.R. which was filed by the victim himself. The F.I.R. referred to one Shaikh Shakil Shaikh Abdulla from the neighbourhood as going and making the complaint to the victim Shaikh Isub that their waste water had entered his compound and at such time, accused No.5 Rustam and

accused No.6 Ajij coming there running with sticks and hitting the complainant on his head. The F.I.R. shows that, his uncle Jabbar Chandkhan was present and even Jabbar Chandkhan was hit on his leg and hand. P.W.12 Head constable Pandit wrote down the F.I.R. and P.W.11 Head constable Uttam registered the offence. The evidence of both these Head constables shows that, before complainant reached the hospital, P.W.5 Shafiyabi had earlier rushed to the police station when the incident was still taking place to inform that the incident of assault was going on and so, P.W.12 Head Constable Pandit had sent police constables to go and bring the victim. Shafiyabi had left along with Constable. Subsequently, complainant reached the police station and his F.I.R. (Exh.75) was registered.

Thus, it is this version which was recorded as F.I.R. soon after the incident. What P.W.5 Shafiyabi told the police even before this F.I.R. was received was not recorded as an F.I.R. Even if the priority was to intervene in the incident which was taking place, the F.I.R. was not recorded from Shafiyabi although there was evidence of P.W.4 Benubi and P.W.5 Shafiyabi showing that when the victim went from the spot to the police station, they had also gone to the police

station. In fact, even the statement of Shafiyabi and Benubi was not recorded in the same evening of 13.3.1995 and their statements were recorded only on the next day of 14.3.1995. By the next day, P.W.4 and P.W.5 came up with different version of the incident. Although in the F.I.R. Exh.75 the victim claimed that it was only accused No.5 Rustam and accused No.6 Ajij who had assaulted him with stick and that too in front of his own house, the claim made by P.W.4 and P.W.5 on the next day was different. The evidence of P.W.4 and P.W.5 as well as P.W.10 Sabirkhan who claims that he got attracted to the spot due to the commotion is that, at the time of incident accused No.1 Shaikh Amir and accused No.5 Shaikh Rustam had come to the spot with iron pipes in the hand; accused No.3 Shaikh Shakil had stick and accused No.6 Shaikh Ajij had ballam (type of spear) in their hands and these people caused hurt to the victim by such instrument. Accused No.2 Shaikh Iman and accused No.4 Shaikh Khalil had beaten by kicks and blows. These witnesses have deposed that, at the time of incident, accused No.7 Rashidabi was instigating by shouting "*Maar Daalo Bhadweko Jaan Se.*" The evidence of these witnesses is that, from the spot which was on the road, the victim was dragged inside the house of accused No.2 Shaikh Iman by the accused persons and they

closed the door from inside and further beat him and when P.W.4 Benubi knocked, it was opened and she went in and lay on the victim to protect him from beating. The defence brought on record that there was omission in the evidence of witnesses with their police statements where even presence, leave aside instigation was not attributed to accused No.7 Rashidabi.

8. The above evidence, which is in two sets, has been thoroughly discussed by the trial Court. Trial Court referred to the evidence of P.W.4 Benubi, who deposed that her husband Jabbar at the time of incident was fitting cooler in their house and he did not come outside. P.W.5 also deposed that Jabbarkhan was fitting cooler in his house when the assault took place. These P.W.4 and P.W.5 did not attribute any presence or involvement to Jabbar Khan. Now this Jabbarkhan is said to have not only been present at the time of incident but also to have intervened and also to have suffered injury as per the F.I.R. Exh.75. This Jabbarkhan was also examined by P.W.9 Dr. Prakash and regarding whose injuries medical certificate Exh.71 was issued. The prosecution did not examine this important witness Jabbarkhan for reasons best known to it, although as per

F.I.R. he is injured witness.

9. Trial Court discussed the evidence that the F.I.R. referred to presence of only two accused. The third person Shaikh Shafi Shaikh Abdulla referred in the F.I.R. has not been linked to the accused. The evidence refers to Shaikh Shakil Shaikh Amir, but does not refer to Shaikh Shakil Shaikh Abdulla going to the victim and making complaint regarding the waste water. Although the F.I.R. Exh.75 claimed that accused No.5 and 6 beat the victim by sticks, the oral evidence claims that accused No.5 beat by iron pipe and accused No.6 by ballam. The F.I.R. did not refer to any part of incident taking place in the house of Shaikh Iman (accused No.2), something which the witnesses claimed. The trial Court discussed all this evidence and observed that P.W.4 Benubi was telling lie that her husband had not come to the spot looking to the fact that her husband Jabbar had even sustained injuries. The trial Court further found discrepancies from the fact that P.W.4 Benubi deposed that her husband Jabbarkhan had gone to Dhule with Shaikh Isub and returned only on 20.3.1995. This was against what the investigating officer claimed that he recorded statement of Jabbarkhan on 15.3.1995. Trial Court has further discussed that the dying

declaration alone also could have been relied on, but looking to the fact that there was contradictory evidence between the dying declaration Exh.75 and the oral evidence, the case of prosecution must be treated as doubtful. Trial Court observed that, genesis of the incident has not come on record.

10. Trial Court further observed that, the motive was not established because if the flowing of waste water was the reason of the said quarrel, there was evidence of P.W.4 and P.W.5 that when grievance was made regarding the flow of water, on the direction of P.W.4, P.W.5 had cleaned that water and if this was so, there was no reason for the assault as the evidence of witnesses admittedly shows that between the parties there was no enmity and there was no earlier dispute although there may have been altercations due to the flow of waste water.

11. The trial Court found that in the present matter, culpable homicide has not been established. For this, the trial Court discussed in details the evidence of P.W.9 Prakash who was first to examine the victim, P.W.7 Dr. Nikhil Shah to whose hospital at Dhule the victim was admitted from 14.3.1995 to 19.3.1995 and the evidence of P.W.8 Dr.

Vishwas Zope who did post mortem on 20.3.1995.

P.W.9 had recorded the following injuries when he examined victim Isub on 13.3.1995, which are recorded in Exh.70:

- (1) RT parietal region-Oblique CLW, 1 x 1/4", skin deep, bleeding present. Margin-irregular.
- (2) RT frontal area Oblique CLW, 1-1/2" x 1/4", Bleeding and margine irregular, 1 skull RT frontal bone.
- (3) RT frontornaratory : Junctional area-lateral to RT eyebrow oblique CLW,margin irregular, 1" x 1/2"
- (4) RT forearm - Porterienty, continue-Reddroh in colour 3" x 1" x 1 elbow it.
- (5) LT Lubaregion : Contused abrasion, Hongantal, 3" x 1/2", Reddish in colour.

Evidence of P.W.9 Dr. Prakash is that the injuries of the victim were possible by hard and blunt object and they were within six hours when he examined. P.W.9 deposed that he sustained fracture and for further investigation referred the patient to Civil Hospital, Jalgaon. Now there is evidence of

P.W.6 Nasirkhan Gaffarkhan that he had accompanied the victim to Jalgaon Civil Hospital from Bhusawal on 13.3.1995. According to P.W.6, the Medical Officer at Civil Hospital asked him to take the patient to the hospital of Dr. Acharya and Dr. Acharya further asked him to take the victim to Dhule. At Dhule, P.W.7 Dr. Nikhil Shah had examined the victim. He found the following injuries and had issued certificate. The medical certificate issued by this doctor is as follows :

- "1. CLW 2 cm/ 1 cm. BD ® Temporal region.
2. Sutured CLW 3 cm ® Frontal region.
3. Sutured CLW 2 cm in the high parietal region.
4. CT shows a right frontal extra haematoma with severe oedema of the underlying brain with PCA Territory infarct. Massive shift of midline and sub-falcine herniation. The patient underwent surgery for the same. He remained UC throughout his stay in the hospital. The patient was taken away by the relatives AMA on 19/3/95."

12. After the death of the victim, P.W.8 who did post mortem, recorded the following injuries :

- "1] Stitched wound on right parieto-temporal region 7 ½" length.
- 2] Stitched wound on right frontal 1 ½" length.
- 3] Stitched wound on right parietal posteriorly 1 ½" length.

2. On internal examination, he found following injuries :

- [i] Injuries under the scalp : under scalp haematoma seen
their nature in right fronto parietal.
- [ii] Skull – Vault and base : fracture of right fronto parietal
- [iii] Brain : Blood clots seen in right fronto parietal weight 1245 grams."

13. The trial Court discussed the above evidence of these doctors and observed that the prosecution failed to bring on record material as to what happened when the patient was taken to the Civil Hospital at Jalgaon and the hospital of Dr. Acharya. Trial Court discussed the evidence of P.W.7 Dr. Shah that injury No.1 was not sutured and this injury was not treated by him. Dr. Shah did not mention age of injuries in his certificate. Trial Court observed that the injury No.1 referred to by doctor was not referred to by P.W.9 Dr. Mahajan. Trial Court observed that the evidence of Dr. Shah shows that he admitted in his cross-examination that

there was surgery and he found fracture on the frontal bone but the same was not mentioned in the certificate. The Trial Court has discussed in detail the medical evidence in para 8 and 9 of its judgment. It also discussed the evidence of P.W.8 Dr. Vishnu Zope, who, with reference to the injuries, deposed that in Column No.17 he had mentioned only three injuries and not width and depth because he did not de-stitch the injuries and as the injuries were already stitched, he drew inference that they might be ante-mortem. Discussing all this, the trial Court observed that the evidence did not give guarantee of homicidal death.

14. Although the trial Court painstakingly tried to say that homicidal death was not proved beyond reasonable doubt, we find that this is difficult to accept. It is nobody's case that the victim died of accidental injuries or that the injuries which he suffered were possible due to fall or accident. Only because trial Court found that the approach of P.W.7 Dr. Nikhil was not proper or that material as to what doctors at Jalgaon said or did is not brought, that does not mean that the injuries recorded by doctors P.W.9 and P.W.7 could be ignored. It is quite apparent that the victim died of head injury as he had suffered crack fracture.

15. Even if the link at Jalgaon is not established, one cannot forget that the victim appears to have been left to fend on his own as the police do not appear to have taken care of his movement from the Municipal Dispensary at Bhusawal in the evening of 13.3.1995 till 14.3.1995 when he had already reached the hospital of P.W.7 Dr. Nikhil at Dhule. In between for some time he appears to have been taken to Jalgaon. Even if those details are not forthcoming, that does not give room to doubt the injuries which the victim had which were already noted by P.W.9 Dr. Prakash at Bhusawal and further treated by P.W.7 Dr. Nikhil at Dhule. We find that homicidal death is proved.

16. Although homicidal death has been established, evidence regarding the incident, however, is not above doubts which has been rightly discussed by the trial Court. Even the further evidence regarding the discovery of pipe from accused No.5 Rustam (memorandum and panchanama Exhibits 84, 85) and discovery of stick from accused No.3 (vide Exhibits 80, 81) and discovery of pipe at the instance of accused No.1 (Exhibits 82, 83) is not much helpful. Although these instruments are said to have been seized at the instance of

these accused when these articles along with other articles were sent to Chemical Analyser, there is no interlinking of the victim with the accused persons. C.A. Report Exh.46 shows that the bamboo sticks and iron pipes did not have any blood on them. Even regarding the clothes, the clothes seized of accused No.1 and accused No.2 had blood group 'A' while the clothes of P.W.4 Benubi, who claims that she lay on the victim to save him and thus she had blood stains of the victim on her clothes, had blood group 'AB'. The clothes of the victim also had blood group 'AB'. This can be seen from C.A. report Exh.46, which mentions that the concerned Exhibits 7 to 10 had blood group 'AB'. As per Exh.47, the blood group of the deceased was 'AB'. Thus, Exh.46 shows that there were blood stains on the clothes of accused No.1 Shaikh Amir as well as accused No.2 Shaikh Iman, but that blood group was 'A'. If this is also kept in view, how exactly the incident took place becomes doubtful.

17. We have examined in details the various reasons recorded by the trial Court while appreciating the evidence. Although we disagree with the trial Court regarding homicidal death, we agree with the trial Court regarding the other appreciation of evidence regarding incident. The trial Court

has found the oral evidence of witnesses unreliable and has given benefit of doubt to the accused. The present appeal being against acquittal, when the view taken by the trial Court regarding the incident is a possible view, it would not be appropriate for this Court to interfere only because some other view could be taken.

18. For the above reasons, we do not find that there is any substance in this appeal.

19. The appeal is dismissed.

20. We quantify fees of Mr. H.I. Pathan, Advocate who was appointed for the respondents, at Rs.6000/- (Rupees Six thousand only).

(A.I.S. CHEEMA, J.)

(S.S. SHINDE, J.)