

- 1 -

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.20/1996

The State of Maharashtra.

...Appellant..

(Org.complainant)

Versus

- 1] Udhav Sitaram Yadav,
age 46 yrs., occu.service,
r/o Walwad Tq.Bhoom Dist.Osmanabad.
- 2] Digambar Sitaram Yadav,
age 50 yrs., occu. and r/o
as above.
- 3] Bharat Shankar Dedkar,
age 34 yrs., occu.labour,
r/o as above.

...Respondents...

(Org.accused)

.....

Smt.S.G. Chincholkar, APP for appellant.

Appeal is abated as against respondent no.1 as per Court's order dated 4.6.2003.

Appeal is abated as against respondent no.2 as per Court's order dated 21.11.2012.

Shri N.B. Narwade, Advocate appointed for respondent no.3
— Bharat Shankar Dedkar.

.....

**CORAM: S.S. SHINDE &
A.M. BADAR, JJ.**

JUDGMENT RESERVED ON : 16.01.2015

JUDGMENT PRONOUNCED ON: 20.01.2015

JUDGMENT (Per A.M. Badar, J.) :

- 2 -

1] This is an appeal u/s 378 of the Code of Criminal Procedure, 1973, on grant of leave by appellant – State whereby judgment and order dated 2.8.1995 passed by the learned Additional Sessions Judge, Osmanabad, in Sessions Case No.89/1992 thereby acquitting respondents / accused of the offence punishable u/s 302 r/w 34 of the Indian Penal Code is challenged. During pendency of the instant appeal, respondent / accused no.1 Udhav and respondent / accused no.2 Digambar died and as such appeal as against them stood abated.

2] Facts leading to the prosecution of respondents / accused can be summarized thus :

[a] Deceased Ashok Shantilal Salunke was working as Police Constable at Mumbai. He was having agricultural land at village Walwad in Taluka Bhoom of District Osmanabad. On 26.1.1992 accompanied by his wife PW7 Surekha Ashok Salunke, he visited village Walwad. When both of them alighted at Bus Stand, deceased respondent / accused no.2 Digambar and deceased respondent /

- 3 -

accused no.3 Bharat met him. They accompanied Ashok Salunke who took bath at the public washing room. Then they went to market and returned after purchasing some eggs. Thereafter deceased respondent / accused no.1 Udhav and deceased respondent / accused no.2 Digambar took informant PW7 Surekha and Ashok Salunke for *Hurda* party. They all returned at about 5-00 to 5-30 p.m. Then deceased respondent / accused no.2 and respondent / accused no.3 took Ashok Salunke with them.

[b] According to the prosecution case, thereafter all respondents / accused accompanied by Ashok Salunke had a booze session in evening at the public place at village Walwad. During that booze session, quarrel erupted and respondents / accused started beating Ashok Salunke. One Hira Chavan who was also accompanying them tried to intervene. After this first incident of quarrel, Ashok started returning to his house and then slept on the platform of the market.

- 4 -

[c] Thereafter, according to the prosecution case at about 10-30 p.m. of 26.1.1992, respondents / accused persons accompanied by Ashok Salunke went to a liquor shop and purchased two bottles of liquor. Sitting near a lamp-post, then they started consuming liquor. Again in that booze session, respondents / accused persons started quarreling with Ashok Salunke. Then they started proceeding towards Barshi-Bhoom road. At that road, respondents / accused persons started beating Ashok. Ashok started beating them in retaliation. He was assaulted by deceased respondent / accused no.2 Digambar Yadav by means of iron rod. Deceased respondent / accused no.1 Udhav and respondent / accused no.3 Bharat were hitting him by stones. After some time, Ashok fell down. Leaving him at that place, respondents / accused went away. This incident, according to the prosecution case, was witnessed by PW5 Birmal Pandurang Shinde and PW6 Hira Shiva Chavan.

[d] According to the prosecution, on 27.1.1992

- 5 -

at about 10-00 a.m., informant PW7 Surekha Salunke was informed that her husband was lying in injured condition near the public washing room of village Walwad. She asked PW2 Prabhu Ram Mali to call PW3 Balbhim Gaikwad. They all then went to the spot of the incident and found Ashok Salunke lying in injured condition. PW3 Balbhim Gaikwad went to the house of PW1 Haridas Patil, Police Patil of village Walwad and called him on the spot. By hiring a tempo, PW1 Haridas Patil accompanied by PW3 Balbhim Gaikwad and PW7 Surekha Salunke, took injured Ashok Salunke to Police Station, Bhoom. PW12 Chandrakant Ware, Police Head Constable of Bhoom Police Station then accompanied all of them to Government hospital, Bhoom. However, the hospital authorities considering the nature of injuries suffered by Ashok Salunke referred him to Civil Hospital, Osmanabad. Accordingly, injured Ashok Salunke was taken to the Civil Hospital, Osmanabad. The injured was then admitted to that hospital. PW1 Pandit Sutar, Police Head

- 6 -

Constable of Osmanabad Police Station then recorded FIR (Exh.67) lodged by PW7 Surekha Ashok Salunke on 27.2.1992 and forwarded the same alongwith his report to Police Station, Bhoom. On the basis of this report, PW10 Ambadas Nana Khede, Police Head Constable of Police Station, Bhoom, registered Crime No.8/1992 for the offence punishable u/s 307 r/w 34 of the Indian Penal Code on 29.1.1992 at 6-00 p.m.

[e] While taking treatment at Civil Hospital at Osmanabad, on 30.1.1992, Ashok Shantilal Salunke succumbed to the injuries suffered by him. After his death, Section 302 of the Indian Penal Code was added to the case diary of crime. After death of Ashok Salunke, PW15 Ashok Patil, Night Officer of Police Station, Osmanabad, recorded inquest memorandum (Exh.58). He seized clothes from dead body while recording seizure panchanamas (Exhs.59 & 60) on 30.1.1992. Dead body was sent for autopsy to Civil Hospital, Osmanabad, where PW18 Dr.Rohidas Ambadas Chavan conducted *post-mortem* examination. He concluded

- 7 -

that death of Ashok Salunke was due to intracranial hemorrhage with fracture of right parietal bone due to head injury.

[f] During investigation, PW16 Chandrakant Kondure, PSI, visited spot and on inspection recorded spot panchanama Exh.65. He seized blood stained stones from the spot of the incident. Accused persons came to be arrested. They were sent for medical examination. Sample of their blood came to be seized. At the instance of accused no.2 Digambar, iron rod as well as clothes worn by him at the time of the incident in question came to be seized. During the course of investigation, statements of several witnesses came to be recorded. On completion of investigation, charge-sheet came to be filed in the Court of the learned Judicial Magistrate, First Class, Osmanabad. As the offence is punishable u/s 302 of the Indian Penal Code and exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, committed the case to the Court of Sessions,

Osmanabad.

3] Charge for the offence punishable u/s 302 r/w 34 of the Indian Penal Code came to be framed against accused persons. They pleaded not guilty and claimed trial. In order to bring home the guilt to the accused, prosecution has examined in all 18 witnesses. After hearing the parties, by the impugned judgment and order dated 2.8.1995, the learned Additional Sessions Judge, Osmanabad, after recording the finding that the prosecution has failed to prove the offence alleged against the respondents / accused, was pleased to acquit them all of the offence punishable u/s 302 r/w 34 of the Indian Penal Code.

4] As none appeared for respondent / accused no.3 Bharat Shankar Dedkar at the time of final hearing of the instant appeal, by an order dated 15.1.2015, we appointed Shri N.B. Narwade Advocate to represent him.

5] We heard the learned APP appearing for the appellant – State. According to the learned APP, the learned trial

- 9 -

Court erred in disbelieving eye witness account of the incident in question given by PW5 Birmal Pandurang Shinde as well as PW6 Hira Shiva Chavan. The learned APP contended that their evidence is cogent and trustworthy. As such the prosecution has established that with the requisite intention and knowledge, accused persons including sole surviving accused / respondent no.3 Bharat Shankar Dedkar committed murder of deceased Ashok Salunke in furtherance of their common intention.

6] Per contra, according to Shri Narwade, the learned defence counsel, the evidence adduced by the prosecution is infirm, scanty and discrepant. As such the impugned judgment and order of acquittal does not require any interference.

7] Now, let us examine whether the prosecution has proved that Ashok Shantilal Salunke, died homicidal death on 30.1.1992 and whether accused persons or any of them, in furtherance of their common intention committed his murder by intentionally and knowingly causing his death by assaulting him with stones and iron rod in the night

- 10 -

intervening 26.1.1992 and 27.1.1992 at Village Walwad, Taluka Bhoom, District Osmanabad.

8] At the outset, it needs to be put on record that with the trustworthy evidence of autopsy surgeon, PW18, Dr.Rohidas Chavan, Medical Officer of Civil Hospital, Osmanabad, the prosecution has established the fact that Ashok Shantilal Salunke died homicidal death. Evidence of PW7 Surekha Salunke (widow of the deceased), PW3 Balbhim Gaikwad and PW1 Haridas Purshottam Patil, Police Patil of village Walwad shows that in the morning on 27.1.1992, they had taken injured Ashok Salunke initially to Police Station, Bhoom, then, to Government Hospital Bhoom and on reference by the said Hospital to the Civil Hospital, Osmanabad. Ashok Salunke was admitted to that hospital. Evidence of PW7 Surekha Salunke makes it clear that while taking medical treatment at Civil Hospital, Osmanabad on 30.1.1992, Ashok Salunke succumbed to the injuries sustained by him. As seen from the evidence of PW1 Ashok Patil, Night Officer of Police Station, Osmanabad, after recording Inquest Memorandum Exhibit 58, dead body of Ashok Salunke was sent for autopsy. Evidence of PW18 Dr.Rohidas Chavan, who conducted post

- 11 -

mortem examination on dead body of Ashok Salunke, shows that Ashok Salunke died because of Intracranial Hemorrhage with fracture on right parietal bone due to head injury. Unchallenged evidence of PW18 Dr.Rohidas Chavan shows that dead body of Ashok Salunke was having, in all 11 injuries, no head, face, arms and other parts of the body. PW18 Dr.Rohidas Chavan, found Hematoma in left fronto parietal region and occipital temporal region of the head of the dead body apart from lineal fracture of right parietal bone. With this material evidence found while conducting autopsy, PW18 Dr.Rohidas Chavan concluded that death of deceased Ashok Salunke was due to intracranial hemorrhagic shock with fracture on left parietal bone due to head injury. This evidence as such goes to show that death of Ashok Salunke was not in normal course. There is no iota of evidence of record to infer that his death was accidental. This evidence is therefore sufficient to hold that, deceased Ashok Salunke died homicidal death on 30.1.1992.

9] Now let us examine whether accused persons, including the sole surviving respondent/accused no.3 —

- 12 -

Bharat has committed murder of deceased Ashok Salunke in furtherance of their common intention.

10] According to prosecution, PW5 Birmal Pandurang Shinde, Home Guard and PW6 Heera Shiva Chavan relatives of Ashok Salunke are star witnesses because they have seen happening of the incident in question and, therefore, their evidence is very material in the instant case. With the assistance of learned the APP and the learned defence counsel, we have carefully perused evidence of both these witnesses as well as that of PW7 Surekha Salunke – informant widow.

11] At the outset we will prefer to examine evidence of PW7 Surekha Salunke she being the informant in the instant case. Her evidence shows that she accompanied by her husband Ashok Salunke (since deceased) who was serving in Police department at Mumbai reached their native place – Walvad in Bhoom Taluka on 26.1.1992 at about 11:00 am. At the bus stand of the said village itself accused no.2 Digambar and accused no.3 Bharat met deceased Ashok Salunke. He then took bath at public wash

- 13 -

room. In the company of these accused, he went to market and purchased eggs. PW7 Surekha Salunke further stated that, in the afternoon accused no.1 Uddhav and accused no.2 Digambar took her as well as her husband Ashok Salunke for *Hurda* party. They returned at about 5:00-5:30 pm. As per the version of PW7 Surekha then accused no.2 Digambar and accused no.3 Bharat took her husband with them. Then as per her version at about 8:30 to 9:00 pm PW6 Heera Chavan came and told her that deceased respondent/accused no.2 Digambar, accused no.3 Bharat as well as deceased Ashok Salunke are behaving in disorderly manner. She then ask Heera Chavan (PW6) to bring back Ashok Salunke. PW6 Heera went but returned and told her that deceased Ashok Salunke as well as accused No.2 Digambar slapped him. In the night, it was told, that Ashok Salunke would sleep at the house of one Patil. Then, as per her version, on the next day morning, one boy came and told that Ashok Salunke is lying in injured condition. She then went to police outpost, but it was closed. Then, she took her injured husband to Police Station at Bhoom; thereafter, to Government Hospital, Bhoom and then to Civil Hospital Osmanabad, where her

- 14 -

husband died. PW7 Surekha Salunke lodged report of the incident on 27.1.1992 and same at Exhibit 67. Bare perusal of this evidence of PW7 Surekha Salunke goes to show that though she tried to stated that accused persons were in company of her deceased husband on 26.1.1992, she has not claimed that they have assaulted her deceased husband. On the contrary, she is stating that PW6 Heera Chavan had informed her that her deceased husband, as well as accused No.2 Digambar and accused No.3 Bharat were behaving in disorderly manner. In her report Exhibit 67, informant widow has stated that on 26.1.1992 at about 6.30 p.m., two persons took her deceased husband Ashok Salunke with them but she does not know who assaulted her husband Ashok Salunke. As such, even the FIR lodged her does not disclose that those were accused No.2 Digambar and Accused No.3 Bharat, who took her husband with them at about 6.30 p.m. of 26.1.1992.

12] Now, let us examine, what PW5 Birmal Shinde, the alleged eye witness states about the incident. This witness was working as Home Guard at the relevant time and as such, he was well acquainted with the police

- 15 -

machinery. It is in his evidence that on 26.1.1992, at about 6.00 p.m. accused No.2 Digambar and accused No.3 Bharat, PW6 Heera Chavan and deceased Ashok Salunke consumed liquor. He further stated that accused No.2 Digambar was demanding liquor from deceased Ashok Salunke and on refusal by Ashok Salunke, accused No.2 Digambar started bearing him. Then, PW6 Heera Chavan intervened. Thereafter, deceased Ashok Salunke started returning and slept on platform of the market. PW5 Birmal further disclosed the second part of the alleged incident, wherein, according to prosecution, Ashok Salunke was assaulted by accused persons by inflicting fatal blows on him. As per the version of PW5 Birmal, at about 10.30 p.m., all accused persons alongwith deceased Ashok Chavan went to the liquor shop. Then, they started consuming liquor by sitting near the lamp post. Then quarrel started amongst them. While still quarreling they proceeded on Barshi-Bhoom Road. At that road as per version of PW5 Birmal, all accused persons and Ashok Salunke started beating each other. Deceased respondent/accused No.2-Digambar assaulted Ashok Salunke by means of iron rod, whereas, deceased

- 16 -

respondent/accused No.1-Udhav and respondent/accused No.3 Bharat started pelting stones on Ashok Salunke. Because of the assault, Ashok Salunke fell down. PW5 Birmal further stated that he returned to his home. On 27.1.1992, i.e. on the next day morning, he informed PW7 Surekha Salunke that her husband, Ashok Salunke is lying in injured condition. PW5 Birmal claimed that he has narrated the entire incident to PW7 Surekha.

13] The questions, which fall for consideration, whether this eye witness account given by PW5 Birmal is acceptable. It is seen from the cross-examination of this witness that except PW7 Surekha Salunke he has not disclosed the incident to anybody else, for a period of more than about two days. Thereafter, he disclosed the incident to police when the police approached him for recording his statement.

14] Though this witness was serving as Home Guard and was well acquainted with the investigating machinery, he preferred not to disclosed the incident to anybody else and not to lodge report about the commission of

- 17 -

serious offence which had taken place in his presence. If we peruse evidence PW7 Surekha Salunke then, she has nowhere stated that in the morning of 27.1.1992, this witness i.e. PW5 Birmal has narrated the incidence to her. If really PW5 Birmal had narrated the incident of murderous assault on her husband to PW7 Surekha Salunke, then she would have very well named accused persons in her FIR (Exhibit 67) lodged on the very same day. Unnatural conduct of PW5 Birmal makes his version doubtful. For all these reasons, we are of the considered opinion that the evidence of PW5 Birmal Shinde is not at all reliable and trustworthy.

15] Next alleged eye witness is PW6 Heera Chavan, who is relative of the deceased Ashok Salunke. As per his version, after return from the field on 26.1.1992, PW7 Surekha asked him to call Ashok Salunke for dinner. This witness stated that he went to Ashok Salunke and found that all accused persons were drinking liquor in the liquor shop in presence of Ashok Salunke. He further stated that when he attempted to take Ashok Salunke to his home, accused No.2 Digambar obstructed and beaten

- 18 -

him. He returned and disclosed the incidence to PW7 Surekha. Thus, PW6 Heera is not stating that in the evening time of 26.1.1992 he had seen Accused No.2 Digambar beating deceased Ashok Salunke, as claimed by PW5 Birmal Shinde. So far as the second incident of assault in the night hours is concerned, PW6 Heera Chavan stated that at about 11.00 a.m. he was informed by Vitthal Mali that deceased respondent/accused Nos.1 and 2 i.e. Udhav and Digambar were beating Ashok Salunke. Then, PW6 Heera, claims that he went to the spot and saw accused No.1/Udhav mounted on person of Ashok Salunke and accused No.2 Digambar assaulting him with iron rod. PW6 Heera further stated that Vitthal Mali asked him not to take injured Ashok Salunke with him.

16] Eye witness account given by PW6 Heera cannot be accepted for the reason that though this witness is relative of deceased Ashok Salunke, he had chosen to return to his home and not to disclose the incident to anybody. He had chosen to allow deceased Ashok Salunke to remain lying on the spot in injured condition rather than offering any medical help to him. PW6 Heera has

- 19 -

chosen not to report the incident to PW7 Surekha Salunke so as to enable her to take necessary steps for saving the life of her injured husband Ashok Salunke. In his cross-examination, PW6 Heera has candidly stated that he disclosed the incident firstly after 3-4 days and that too when Police came to record his statement. Till then, he preferred to keep mum. This witness was not under threat not to disclose the incident in question to anybody. Though he is a relative, he has chosen not to accompany PW7 Surekha Salunke to Bhoom for providing medical aid to injured Ashok Salunke. Thus, evidence of this witness is totally unnatural and he also appears to be a got up witness.

17] The crime in question came to be registered on 27.1.1992 itself on the basis of the report lodged by PW7 Surekha Salunke. The incident had happened in a small village Wadwal. The prosecution claims that there are atleast two eye witnesses to the incident in question. However, still, statements of these witnesses came to be recorded after a long gap of about 3 to 5 days. In the matter of *Ganesh Patel and another Vs. State of*

Maharashtra reported in **AIR 1989 SC 135** and *Ashraf Hussain Shah vs. State of Maharashtra* reported in **1996 Cr.L.J.3147**, the Hon'ble Apex Court, as well as, this Court has held that delay of few hours, simplicitor, in recording the statement of eye-witnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately making time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. The case in hand appears to be a perfect example of such concoction. Delay in recording statements of PW5 Birmal and PW6 Heera is not at all explained by the prosecution through the evidence of the Investigating Officer nor there appears to be any obvious reason for the delay. A reasonable doubt lurks that both these witnesses may be got up witnesses in order to give shape to the case and to frame accused persons. As such, neither evidence PW5 Birmal, nor evidence PW6 Heera appears to be trustworthy and reliable. It is seen that evidence adduced by the prosecution is insufficient to bring home the guilt to

- 21 -

accused persons. On that backdrop, non-examination of eye-witness Vitthal Mali gives a further dent to the prosecution case. As per version of PW6 Heera, it was Vitthal Mali who has informed him about the assault and thereafter asked him not to take injured Ashok Salunke to his house. Thus, according to the prosecution, Vitthal Mali has witnessed the incident of murderous assault on Ashok Salunke, but for the reasons best known to it, he was not examined.

18] Then comes the circumstantial evidence. The prosecution has claimed to have seized the weapon of the offence i.e. iron rod at the instance of deceased Accused No.2 Digambar on the basis of his voluntary disclosure statement. That iron rod was sent for chemical analysis. C.A. Report at Exhibit 85 shows that no blood was deducted thereon. As such, this piece of evidence is also not sufficient to connect the accused persons to the crime in question.

19] Evidence of PW1 Haridas Patil and PW3 Balbhim, who accompanied PW7 Surekha Salunke to deceased Ashok

- 22 -

Salunke to Bhoom and Osmanabad is also not useful for the prosecution to infer guilt of the accused persons. PW2 Prabhu Ram Mali had done job only to call PW3 Balbhim to the house of deceased. Rest of the witnesses who have either taken part in the investigation or aided investigation as panch witnesses. Injury certificates of accused do not lead to infer their guilt.

20] After careful perusal of the record and after re-appreciation of the entire prosecution evidence, we are of the considered view that the prosecution has failed to prove that accused persons, in furtherance of their common intention committed murder of deceased Ashok Salunke by assaulting him on 27.1.1992. As such, there are no reasons, much less, compelling and substantial reasons to interfere with the judgment of acquittal, as recorded by the learned trial court.

21] In the result, we proceed to pass the following order :-

The appeal is dismissed.

We appreciate the efforts taken by Advocate Shri Narwade appointed to represent respondent no.3 - Bharat for conducting present appeal and we quantify his fees at Rs.2100/- (rupees two thousand one hundred only).

(A.M. BADAR, J.)

(S.S. SHINDE, J.)