

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.651 OF 1992
(By State against acquittal)**

The State of Maharashtra	]	... Appellant (Orig. Complainant)
Versus		
1. Raja Dayandeo Pawar.	]	
R/o. Lal-Dongar, Behind Shivdarshan Seva	]	
Mandal, Chembur, Bombay-71.	]	
2. Namdeo Vithal Gaikvad.	]	
R/o. Lal-Dongar, Zopda No.287, Behind	]	
Shivdarshan Seva Mandal, Chembur,	]	
Bombay-71.	]	
3. Gurunath Sudhakar Nivekar.	]	
R/o. Kasturba Hospital Compound,	]	
Bldg. No.1, Room No.60, Arthar Road,	]	... Abated on
Bombay-11.	]	18/02/2013
4. Ramesh Gangaram More.	]	
R/o. Rajaram Yadav Chawl, Room No.2,	]	
Utkarsh Nagar, Bhandup, Tembipada Road,	]	... Abated on
Bhandup (W), Bombay-78.	]	18/02/2013
5. Datta Dayandeo Pawar.	]	
R/o. Behind Shivdarshan Seva Mandal,	]	
Lal-Dongar, Chembur, Bombay-71.	]	
6. Navnath Mahadeo Dhumal.	]	
R/o. Samadhan Bldg., 4 th floor, Room No.	]	
111, Bakari Adda, N. M. Joshi Marg,	]	

Bhayculla, Bombay-11.	]	
7. Sanjay Atmaram Taraskar.	]	
R/o. Varli Naka, Prem Nagar Zopadpatti,	]	... Abated on
Varli, Bombay-18.	]	18/02/2013
8. Salauddin Gulab Shaikh.	]	
R/o. Varli Naka, Prem Nagar Zopadpatti,	]	... Appeal Dismissed
Varli, Bombay-18.	]	on 18/03/1998
9. Namdeo Tukaram Dinkar.	]	
R/o. Varli Naka, Prem Nagar Zopadpatti,	]	... Abated on
Varli, Bombay-18.	]	18/02/2013
10. Anant Maruti Kathe.	]	
R/o. Varli Naka, Prem Nagar Zopadpatti,	]	... Respondents/
Varli, Bombay-18.	]	(Original Accused)

Smt. V. R. Bhonsale, APP for Appellant/State.

Mr. D. S. Joshi i/b Mr. A. H. H. Ponda for Respondent Nos.1, 2, 5, 6 and 10.

CORAM :- **SMT. V. K. TAHILRAMANI AND**
SMT. I. K. JAIN, JJ.
DATE :- **JANUARY 08, 2015**

JUDGMENT (PER SMT. I. K. JAIN, J.) :-

. The Appellant/State of Maharashtra has preferred this Appeal against the Judgment and Order dated 20/07/1992 passed by the learned Additional Sessions Judge, Greater Bombay, in Sessions Case No.926 of 1989. By the said Judgment and Order, the learned Additional Sessions Judge acquitted the respondents for the offences as

under :-

- (i) Accused Nos.1 to 7 of the offences punishable under Sections 148 and 302 read with 149 and in the alternative Section 302 read with 34 of the Indian Penal Code.
- (ii) Accused Nos.1, 2 and 5 of the offence punishable under Section 452 read with 34 of the Indian Penal Code.
- (iii) Accused No.5 of the offence punishable under Section 324 of the Indian Penal Code.

2. Initially case proceeded against the ten accused. Vide Order dated 09/07/1992 at Exh.66 accused Nos.8 to 10 were acquitted under Section 232 of Cr.P.C.

3. By an Order dated 18.03.1998 the Appeal against respondent No.8 came to be dismissed. Appeal stood abated against respondent Nos.3, 4, 7 and 9 as per Order dated 18.02.2013. Thus, this Appeal is being heard only in respect of acquittal of respondent Nos.1, 2, 5, 6 and 10.

4. The prosecution case briefly stated is as under :-

Arun Pagare was residing with his parents, wife, son and elder brother's daughter in a hut having a loft in Lal Dongar (East) hutments at Chembur. On 31.05.1989, accused No.5 delivered a blow with Sword to Arun Pagare in the presence of accused Nos.1 and 2. Arun lodged a complaint against them. Thereafter, the three accused absconded.

5. According to the prosecution, on 26.06.1989, Arun returned home from work at around 09:00 p.m. He was working as driver with one Company. Arun and family members had meals. Then Arun went to sleep on a cot on the ground floor of the hut. His mother PW-1 Gandherabai and niece were also sleeping there. His father climbed the loft. The wife of Arun had been to Vikhroli with her son to her relatives few days before the incident. At around 11:30 p.m. PW-1 Gandherabai heard someone climbing the steps of the ladder. She saw in a burning match stick that somebody was opening the door of hut. In the light of match stick, she inquired who was there. A male person asked whether Arun was at home. Apprehending some mis-deed Gandherabai informed

the person that Arun was not at home. Thereafter, she heard sound of steps of three-four persons outside the door of hut. After some time she opened the entrance door and found no one outside in the passage. However, in the light of street lamp, she saw six-seven persons standing in a lane. Those six-seven persons rushed through the narrow lane and by pushing PW-1 Gandherabai three of them entered the hut. Those three started dragging Arun who was under the cot on the ground floor. Gandherabai attempted to obstruct them. That time accused No.5 dealt a blow with a Sword on her head and she fell down. The father of Arun was about to peep on hearing the sound of steps but he saw a person who climbed the ladder brandishing a Sword at him. Then, accused started assaulting Arun with Swords, Koytas, Guptis, iron pipes and iron rods. Mother of Arun again attempted to save him but accused No.5 dealt two more blows on her head and elbow with a Sword. She again fell down. After multiple blows were delivered on the body of Arun, those persons fled away through the narrow lane. PW-1 Gandherabai then got up. Father of Arun also climbed down. They shouted for help. Neighbourers assembled there. One of them informed police. Within a short time police reached the spot. An Auto Rickshaw was brought and Arun was shifted to Rajawadi Hospital. On examining, Doctor on duty

declared him dead. PW-1 Gandherabai lodged report. On her report, investigation was set into motion. On completion of investigation, charge sheet came to be filed. In due course, case was committed to the Court of Sessions.

6. Charge came to be framed against the accused at Exh.2. They pleaded not guilty to the said charge and claimed to be tried. In respect to the commission of crime, defence of accused was of total denial and false implication. After going through the evidence adduced in the case, learned Additional Sessions Judge acquitted the respondents as stated above. Being aggrieved, the State has come up in this Appeal questioning the correctness of the Judgment and Order of acquittal.

7. We have heard learned Advocates for the parties. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties, the evidence on record and the Judgment delivered by the trial Court, for the below mentioned reasons we are of the opinion that there is no merit in the instant Appeal.

8. Learned APP submitted that PW-1 and PW-2 are the eye witnesses. Their evidence is not properly appreciated by the trial Court. Medical officer opined that the injuries found on the person of Arun were possible with the Sword. She submitted that conduct of the accused was relevant. They were absconding after the incident. There was recovery of Sword at the instance of accused. Spot panchanama was duly proved. She contended that there is sufficient evidence on record to bring home the guilt of the accused.

9. At the outset, it may be noted that it is a case of two fold evidence viz. (i) ocular version of PW-1 and PW-2 and (ii) identification parade as well as recovery of the several objects at the instance of accused which allegedly connected them with the commission of crime.

10. In order to appreciate the evidence in proper perspective, it would be necessary for us to scrutinize the evidence of PW-1 Gandherabai and PW-2 Narayan Pagare, mother and father of deceased Arun respectively. According to PW-1 Gandherabai, on 26.06.1989 at 11:30 p.m., she saw accused Nos.1, 2 and 5 assaulting Arun with Sword and deadly weapons. In FIR Exh.54, she named the assailants. It appears

from the testimony of Gandherabai that at the relevant time, it was dark at the place of occurrence of incident but she could see the assailants in the nearest street light. The prosecution evidence shows that street light was at the distance of 55 feet. It is stated by Gandherabai that during assault on Arun she intervened but accused No.5 Datta delivered a blow with a Sword on her head causing bleeding injury to her. After the blow was delivered, she fell down. She again attempted to save Arun and that time accused No.5 Datta dealt two more blows, one below right wrist and another on head of Gandherabai. She had fallen down after the blows were delivered to her. She stated that still she could see the entire incident.

11. It is pertinent to note that incident occurred in the midnight. It has consistently come on record that at the place of occurrence, it was dark and street light was away from the spot. Considering the manner of incident stated by PW-1 Gandherabai and particularly that she was also assaulted, it becomes doubtful that she could identify the assailants as stated by her. Moreover, in view of plan Exh.55 , street light was at the distance of 90 feet from the place of incident. The possibility of PW-1 having opportunity to identify the assailants in the light of match stick is

also remote as there were ten assailants. It was for the prosecution to prove that there was sufficient light to enable the witnesses to see the incident. Prosecution had failed for the same and therefore, trial Court disbelieved the evidence of PW-1 Gandherabai.

12. So far as PW-2 Narayan Pagare is concerned, he identified accused Nos.1, 2 and 5. On going through his evidence, it can be seen that it suffers from various contradictions and omissions and does not inspire confidence. The evidence of PW-2 Narayan also indicates that at the relevant time, it was dark. As prosecution has not adduced any evidence to show availability of sufficient light on the spot at the time of occurrence, evidence of PW-2 Narayan Pagare to the extent that he saw five-six persons rushing towards the passage and three persons dragging Arun cannot be believed.

13. The evidence of PW-8 Prabhakar Yashwantay, Special Executive Magistrate is on test identification parade. He conducted test identification parade on 06.07.1989. Incident took place on 26.06.1989. It is stated by Special Executive Magistrate that test identification parade was conducted in one of the rooms of Chembur Police Station. Thus, the

place wherein the identification parade was held was in the police station and possibility of showing the respondents to the witnesses before the parade could not be ruled out. This is a material infirmity relating to the evidence on identification parade. We are, thus, unable to put reliance thereon and we think it fit to discard the evidence of identification in toto.

14. Once we reach the conclusion that ocular evidence and the evidence relating to identification parade cannot be relied upon, there remains no merit in the case of prosecution. The evidence on recovery of weapon and clothes is also doubtful. Prosecution could not establish blood group of the deceased and C.A.Report too does not come to the help of prosecution.

15. In the result, we come to the conclusion that on the shaky and unreliable evidence, respondents could not be convicted. The view taken by the learned Additional Sessions Judge is found to be reasonable and possible view. No perversity is noticed hence we are not inclined to interfere in the Judgment and Order of acquittal.

16. In the result, Appeal against respondent Nos.1, 2, 5, 6 and 10 stands dismissed.

(SMT. I. K. JAIN, J.)

(SMT. V. K. TAHILRAMANI, J)