

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.397 OF 2009

Santosh Bansilal Varma,	]	
Aged about years,	]	
R/at Room No.3,	]	
Ramnaresh Jaswanti Chawl,	]	
Khira Nagar, S.V. Road,	]	 Appellant /
Santacruz (West), Mumbai.	]	(Org. Accused No.2)

Versus

The State of Maharashtra,	]	
Thru' Senior Inspector of Police,	]	
Bandra Police Station, Mumbai	]	 Respondent

Mr. Niteen V. Pradhan, i/by Ms. Subhada Khot,
a/w. Ms. Ameeta Kutti Krishnan and Ms. Joel
Carlos, for the Appellant/Original Accused No.2.

Mr. H.J. Dedhia, A.P.P., for the Respondent-State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 3RD FEBRUARY, 2015.

ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. The Appellant, who is original Accused No.2, stands convicted for the offences punishable under Sections 302 and 392 r/w. 397 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/-, in default to suffer R.I. for six months, on first count, and R.I. for seven years and to pay fine of Rs.1,000/-, in default to suffer R.I. for six months, on second count, by the Judgment dated 31st March, 2009 in

Sessions Case No.955 of 2007, by the Additional Sessions Judge, Greater Bombay. By this Appeal, he challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

On 29th June, 2006, at about 9:50 pm, while PW-17 PSI Vitthal Suryavanshi was on PSO duty at Bandra Police Station, he received telephonic message that one person is stabbed by knife near seashore and, in injured condition the said person was admitted in Bhabha Hospital. PW-17 PSI Suryavanshi took entry of the said message in Station Diary and proceeded to Bhabha Hospital. There, injured Rohit Jadhav was under treatment and PW-10 Neelam Mohite, who was with injured at the time of incident, was present in the casualty room. PW-17 PSI Suryavanshi made enquiry with PW-10 Neelam and recorded her complaint, in which she stated that on that night, at about 8:30 pm, when she and injured Rohit were sitting on the rocks at seashore, behind Jogger's Park at Bandra (West), three persons arrived there and started demanding money as donation for the Dahi-Handi. On refusal by injured Rohit to pay the money, one of those three persons, who was armed with knife, stabbed injured Rohit on his chest and back, whereas, the other person snatched her gold chain. The third person pelted stone on them.

When she raised the alarm by shouting, the crowd gathered there and with the help of those people, she had brought injured Rohit to Bhabha Hospital.

3. PW-17 PSI Suryavanshi, on recording the complaint (Exhibit-47) of PW-10 Neelam, returned to Police Station and registered the offence bearing C.R. No.368 of 2007 for the offence punishable under Section 397 r/w. 34 of the IPC. Within five minutes thereafter, he went to Jogger's Park. However, as there was total darkness, he could not make Panchanama. He deputed one Police Guard at the place and returned to Bhabha Hospital.

4. At Bhabha Hospital, PW-17 PSI Suryavanshi learnt that injured Rohit has already succumbed to the injuries and was declared dead at around 11:45 pm. Hence, with the assistance of Panch PW-1 Sudhir Lokhande and one another Panch Salvi, he made Inquest Panchanama (Exhibit-14) and sent the dead body for postmortem. On the same night, Police Constable Patil produced the blood stained clothes of the deceased from Bhabha Hospital, which he seized in the presence of the Panch PW-2 Manish Kotiyan under Panchanama (Exhibit-16).

5. On the following morning, PW-17 PSI Suryavanshi went to the spot at the Jogger's Park, along with PW-10 Neelam and the Panchas. There,

in the presence of PW-13 Ajay Dhotre, he made Panchanama of the Scene of Offence (Exhibit-63) of the spot shown by PW-10 Neelam. The said spot was on rock surface, some what inside the sea. On minute scrutiny, PW-17 PSI Suryavanshi found the blood stains on the stones lying there. He collected some stones under the said Panchanama. Then he returned to the Police Station and made entry in Station Diary about the same and deposited the clothes in the Police Station.

6. Further investigation was taken over by PW-18 PI Sanjay Patil. On that day itself, he arrested original Accused No.1-Jiten. During police custody, at the behest of Accused No.1-Jiten, the gold chain came to be seized in the presence of Panch PW-3 Hasan Rizvi under Memorandum Panchanama (Exhibit-19) and the Seizure Panchanama (Exhibit-20).

7. On 10th September, 2007, PW-19 PSI Vijay Salunke, attached to DCB, CID, Unit-9, Bandra Office, arrested the present Appellant/original Accused No.2. At the behest of the Appellant, in pursuance of the Memorandum Panchanama (Exhibit-22) prepared in the presence of Panch PW-4 Kupuswami Harijan, the weapon of assault, i.e. the knife with blood stains thereon, came to be seized under Panchanama (Exhibit-23) from the shop named "Verma Perfect Tyres".

8. On the same day, PW-19 PSI Salunke handed over the custody of

Appellant, along with the seized knife and the Panchanamas (Exhibits “22” and “23”), to PW-18 PI Patil. On 11th September, 2007, PW-18 PI Patil recorded the further statement of PW-10 Neelam, in which she identified the knife and the gold chain. On 12th September, 2007, at the instance of the Appellant, in pursuance of his Memorandum Panchanama (Exhibit-65) made in the presence of Panch PW-14 Mohd. Ansari, his clothes with blood stains thereon came to be seized under Panchanama (Exhibit-66) from Room No.5 in Ram Naresh Jaswant Chawl, Khotwadi, Santacruz.

9. During the course of further investigation, original Accused No.3 Rajesh was arrested and in custodial interrogation on 13th September, 2007, at his behest, in pursuance of the Memorandum Panchanama (Exhibit-60), his clothes came to be seized under Panchanama (Exhibit-61) from the Room No.32 in the slum area, behind Buddha Graveyard, Khardanda.

10. On the same day, original Accused No.1-Jatin also made a disclosure statement and in pursuance of the Memorandum Panchanama (Exhibit-68), prepared in the presence of Panch PW-15 Mohd. Rashid Naushad, his clothes came to be seized under Panchanama (Exhibit-69) from Bhaiyawadi, Galli No.1, Juhu-Koliwada, Santacruz.

11. In pursuance of the requisition made by PW-18 PI Patil, on 18th

September, 2007, Special Executive Magistrate PW-9 Dattaram Kambli conducted Test Identification Parade of all the three arrested Accused, in which PW-10 Neelam identified all the three of them. He prepared the Memorandum Panchanama, accordingly, vide Exhibit-42. On the same day, PW-18 PI Patil recorded supplementary statement of PW-10 Neelam.

12. On 4th October, 2007, PW-18 PI Patil sent all the seized articles, including the clothes of the deceased, the Accused, the knife and the stones, to the Chemical Analyzer vide letter (Exhibit-71). The C.A. Reports (Exhibit-11 Colly.) were received on 22nd January, 2008. Meanwhile, on 4th October, 2007, PW-18 PI Patil had recorded the statement of PW-16 Head Constable Jaywant Sawant, who had carried these seized articles to the Chemical Analyzer. On the same day, he also recorded the statement of PW-8 Police Constable Sharad Parab, who has taken the photographs of the scene of offence and the dead body. He further recorded the statement of the Artist Kalgutkar, who has drawn the sketches of the assailants as per the description given by PW-10 Neelam. On 4th February, 2008, PW-18 PI Patil received the Postmortem Notes (Exhibit-13) from PW-6 Dr. Shivaji Kachare. Further to completion of investigation, he filed Charge-Sheet in the Court of Metropolitan Magistrate, Mumbai against the Accused.

13. On case being committed to the Sessions Court, the Trial Court

framed charge against the Accused vide Exhibit-3 for the offences punishable under Section 392 r/w. 397 of the IPC and Section 302 r/w. 34 of the IPC. All the Accused pleaded not guilty and claimed trial.

14. In support of its case, the Prosecution examined in all 19 witnesses, whereas, the Accused examined two witnesses; (i) DW-1 Raghunath Sachwani to prove that the chain recovered in the investigation was not a gold chain; and (ii) DW-2 Ketan Ranga, a Reporter from the Mid-Day Newspaper, to prove the news article (Exhibit-48) published in Mid-Day, wherein it was reported that, due to darkness, PW-10 Neelam has not seen the assailants and was, therefore, unable to identify them.

15. On appreciation of the Prosecution and Defence evidence on record, the Trial Court held the guilt of the present Appellant/original Accused No.2 to be proved beyond reasonable doubt for the offences punishable under Sections 302 and 392 r/w. 397 of the IPC and convicted and sentenced him, as aforesaid.

16. As regards Accused No.1-Jatin and Accused No.3-Rajesh, they were convicted for the offence punishable under Section 392 of the IPC only, and sentenced to suffer R.I. for two years and to pay fine of Rs.2,000/- each, in default to suffer further R.I. for three months with a benefit of set off under Section 428 of the Cr.P.C. for the period which they

had already undergone in Jail. It is submitted at the Bar that Accused No.1-Jatin and Accused No.3-Rajesh had already undergone the sentence and released from Jail and they have not preferred any Appeal challenging their conviction.

17. It is Accused No.2-Santosh Varma, the present Appellant, who has challenged his conviction and sentence. We have heard the submissions advanced at the Bar by learned Counsel for the Appellant Mr. Niteen Pradhan and learned A.P.P. Mr. H.J. Dedhia. In our considered opinion, in order to effectively deal with their rival submissions, it would be useful to refer to the evidence on record.

18. As regards the occurrence of incident, there is more than sufficient evidence on record, including the testimony of the eye witness PW-10 Neelam, and other corroborating medical evidence. The evidence of PW-10 Neelam clearly goes to prove that on the date of incident, along with her friend deceased Rohit, at about 8:15 pm, she had gone at the back side of Jogger's Park at Bandra. Both of them were sitting on the rocks at the seashore. At that time, three persons came near them and one of them demanded money for Dahi-Handi. The said person was also having knife with him. As deceased Rohit refused to give the money, that person threatened that, if the money was not given, both of them would be killed by knife. Hence, both, PW-10 Neelam and Rohit started shouting. Then

one of those three persons picked up the stone and threatened them not to shout, otherwise he would assault them with stone. The third person from them, snatched the chain from PW-10 Neelam's neck. As per her further evidence, the first person, who has demanded the money and was having knife, then started assaulting Rohit with that knife on his chest and back. The other person then snatched her chain. When she and Rohit, both, raised alarm, the nearby couples started to approach them. Hence, all the three assailants fled away from the spot. Then she picked-up Rohit's cell phone and called his friend Mayur giving him information of the incident. Thereafter, Rohit was taken to the hospital, where he succumbed to the injuries and in the hospital itself, her complaint came to be recorded.

19. PW-10 Neelam is cross-examined at length as to the occurrence of the incident, but nothing of substance is elicited in her cross-examination to disbelieve her evidence as regards the occurrence of the incident, which is also corroborated with the F.I.R. (Exhibit-47) lodged immediately after the incident, within few hours.

20. Her evidence is also getting support and corroboration from the medical evidence. PW-7 Dr. Ajit Dhake, who was on duty on that day at Bhabha Hospital, has examined Rohit at about 9:45 pm, when he was brought there. At that time, Rohit was unconscious and gasping. His pulse

was feeble and B.P. was not recordable. On further examination, he found that there were three stab injuries about 2 x 1 x 1 cm. muscle deep, present over his right and left lower chest. The third injury was on back. Immediately Rohit was given emergency treatment and put on ventilator. Despite that, Rohit could not be revived and hence he was declared dead at 11:45 pm.

21. In his evidence before the Court, PW-7 Dr. Ajit Dhake has also produced the case papers of Rohit at Exhibit-35. He has further deposed that the injury found on the chest was penetrating injury and as a result thereof, Rohit went into the hypovolumic shock and had become unconscious. In his cross-examination, it is brought on record that the history given was of assault by unknown persons. He is cross-examined mostly on the point that the injuries sustained may not be possible due to the weapon of assault "the knife". According to him, the three injuries found on the dead body of Rohit are possible by a weapon which is sharp on both sides, whereas, the knife shown to him at the time of recording his evidence was blunt on one side, and with such knife, as deposed by him, there is likelihood of incised wound, rather than stab wound. His evidence, however, proves the incident of assault and Rohit sustaining the injuries in the said assault, which ultimately resulted into his death.

22. There is also evidence of PW-6 Dr. Shivaji Kachare, who has

conducted the postmortem on the dead body of Rohit and found following injuries :-

On external examination, following injuries were found :-

- (i) *Surgical sutured wound at left anterior of chest, 7.5 cm. below from left nipple, three stitches are seen 2 cm. long, reddish oblique.*
- (ii) *Surgical sutured wound at medial to Injury No.1, one stitch is seen reddish oblique and 1 cm. long.*
- (iii) *Surgical sutured wound at anterior of right thoracic region at the level of 11th and 12th intra coastal space, three sutured are seen 2.5 cm. long, reddish oblique.*
- (iv) *Abrasion with tapering end at left dorsum of forearm, three in number, reddish size of 3 cm. x 0.1 cm., 2 cm., 1 cm. oblique.*
- (v) *Incised stab wound at left renal region, post, both angle acute, reddish, 2.5 cm. x 0.5 cm. x 4 cm. deep, oblique.*
- (vi) *Abrasion at posterior lateral surface of right upper arm at shoulder joint 5 cm. reddish.*

All above injuries were antemortem in nature.

On internal examination, following injuries were found :-

On right side, anterior 10th and 11th ribs ruptured, on left 7th, 8th ribs and cartilages ruptured, pleura ruptured by laterally at base and lateral region.

Walls and Peritonium ruptured at left and right hypochondriac region and umbilical region.

Dupdenum anteriorly ruptured.

Liver - (i) Incised stab wound at interior lateral surface right lobe, oblique, reddish 2 cm x 0.5 cm x 4 cm deep; (ii) ISW at anterior lateral surface of left lobe, 2 cm x 0.5 cm x 3 cm, reddish and oblique.

23. According to him, Injury Nos.3 and 5 were of grave and serious nature, sufficient in the ordinary course of nature to cause the death. The final cause of death, in his opinion, was “*haemorrhage and shock due to incised wound, unnatural*”. He has issued the Postmortem Notes (Exhibit-30) accordingly. There is nothing in his cross-examination to disbelieve the cause of the death.

24. Thus, it has to be held that there is sufficient evidence on record to prove the occurrence of the incident, in which three unknown assailants threatened PW-10 Neelam and Rohit and one of them stabbed Rohit with knife, as a result of which he succumbed to death.

25. The real question for consideration is about the identity of those assailants. The entire Prosecution case as regards identification of those assailants hinges on the sole testimony of PW-10 Neelam, in whose presence the alleged incident had taken place. Admittedly, all the three assailants, including the present Appellant, were unknown to PW-10 Neelam. As admitted by her in her cross-examination, the entire incident took place within 7 to 8 minutes. She has further admitted that she saw

those three assailants for the first time when they came nearer to her and deceased; therefore, not prior to it, when they were approaching. Hence it goes without saying that she did not get sufficient opportunity and time to observe them so that their impressions remain imprinted on her mind and memory. In the incident, she was completely occupied, as one was pelting stone, the other was snatching her chain and the third one was stabbing deceased Rohit. Therefore, she was shouting.

26. The material aspect is that there is no evidence of sufficient illumination at the spot, when this incident occurred. It must be recalled that the incident had taken place at 8:30 pm and that too on the rocks inside the sea at some distance behind Jogger's Park. Neither PW-10 Neelam has stated that there was any illumination from the light, nor even the Scene of Offence Panchanama (Exhibit-63) reveals that any illumination was there from other sources of light. Needless to say, that as the couples were sitting on the rocks in the sea, they are bound to search for the privacy in the place of darkness and not the place illuminated with light.

27. This inference that at the spot of incident there was darkness, can further be strengthened from the evidence of PW-17 PSI Suryavanshi. In his examination-in-chief itself, he has stated that, after recording the complaint of PW-10 Neelam, he went to the Jogger's Park for drawing the

Scene of Offence Panchanama. However, as there was total darkness, he could not do so and, hence, after deputing the Police Guard at the place, he returned to the Police Station and, on the next day, in the early morning, the Spot Panchanama was prepared. In cross-examination, he has further admitted this fact by stating that, due to darkness and high tide, he was unable to see the place of incident and, therefore, he could not make the Spot Panchanama at night. He has to leave the said spot within five minutes after reaching there. Thus, it is more than apparent that due to darkness and in the absence of any illumination, there was no possibility for PW-10 Neelam to observe the assailants and thereafter to identify them in the Court.

28. Though the Prosecution has relied upon the description of the assailants, as given by PW-10 Neelam in her complaint, in cross-examination of PW-10 Neelam, it is sufficiently proved that the said description is not tallying with the Accused, especially with the present Appellant. It is admitted by her, in her cross-examination, that the assailant, who was holding the knife, was in between 30 to 35 years of age. However, the said fact is not found mentioned in the F.I.R. Further, she has stated that the person holding the knife was tallest among the assailants and he was blackish in complexion, compared with other two assailants. At the time of recording evidence before the Court, when all

the Accused were made to stand bare feet, she has admitted that Accused No.3-Rajesh, and not the present Appellant, was tallest than others. She has further admitted that Accused No.3-Rajesh is blackish in colour amongst them. Further, while giving description of the assailants in the F.I.R., she has stated that the person holding the knife was hefty and well built among the three assailants, whereas, in evidence before the Court she has admitted that all the three Accused are having similar built. Thus, the description of the assailant, who stabbed Rohit, as given in the F.I.R. that of, he was tallest, hefty and dark in complexion, as per her own admission given in the cross-examination, is not tallying with the present Appellant. At more than one places in her cross-examination, she has admitted that Accused No.3-Rajesh is the tallest person and he was dark in complexion and all the three of them were not hefty and having same built.

29. Though the Investigating Officer PW-18 PI Patil has stated that the sketch of the assailants was got prepared on the basis of the description given by PW-10 Neelam, neither the said Sketch Artist was examined to prove it, nor it is brought on record that the description of the person in the said sketch is tallying with the description of the Appellant. In such situation, the evidence relating to sketch is hardly of any significance or importance to connect the Appellant with the offence.

30. Further, though the Prosecution and learned A.P.P. has relied upon the identification of the assailants in the Test Identification Parade held by Special Executive Magistrate PW-9 Dattaram Kambli, in our considered opinion, in the absence of any evidence proving on record that PW-10 Neelam had sufficient opportunity to observe the assailants and there was sufficient light for her to do so, in view of the above admissions given by her in cross-examination itself, the evidence relating to identification of the Appellant in the Test Identification Parade cannot be of much help. After all, evidence of Test Identification Parade is merely of a corroborative nature. The substantive evidence relating to the identification of the Accused is their identification in the Court by the eye witness. The evidence relating to identification of Accused can be relied upon, provided the eye witness had got the opportunity to observe the assailants and there was sufficient light for her to do so, which is conspicuously lacking in the present case. Therefore, in our opinion, the evidence of PW-10 Neelam, who is the only and single eye witness to the incident of assault, relating to identification of the present Appellant, cannot be accepted so as to place implicit reliance thereon.

31. The only corroborating evidence to her testimony, on which the Prosecution is relying, is that of the recovery of knife at the instance of the Appellant. In this respect, again there is no evidence that the said knife,

on its recovery, was sealed with wax. Conversely, the evidence of PW-18 PI Patil goes to prove that on the recovery of the knife, it was shown to PW-10 Neelam. She identified it and her further statement came to be recorded on 11th September, 2007. Therefore, there is no evidence to prove that the weapon of assault, which was seized at the instance of the Appellant, was sealed and in the sealed condition, it was sent to the Chemical Analyzer.

32. As regards the Seizure Panchanama of the clothes of the Appellant also, there is no evidence to prove that the clothes were sealed and the blood stains found thereon were that of the deceased. No C.A. Report is produced about the blood group of the Appellant. In the absence thereof, it also cannot be said that the blood stains found on the knife were of the blood group of the deceased alone.

33. The cross-examination of PW-7 Dr. Ajit Dhake, who has examined injured Rohit, also goes to create doubt whether the injuries found on the person of the deceased were possible by the knife, which is stated to be recovered at the behest of the Appellant.

34. To sum up, therefore, in our considered opinion, there are sufficient lacunae, infirmities and flaws in the Prosecution case as regards the identification of the Appellant to be the same assailant, who has stabbed

Rohit with knife. The benefit, therefore, of reasonable doubt cannot be withheld from the Appellant.

35. Hence, this Criminal Appeal is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the Appellant, be refunded to him. Since the Appellant is in Jail, he be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]