

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.24 OF 2012

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|-----------------------------------|---|-------------------|
| 1. Amol Bhagwat Gaikwad, |] | |
| Age : 29 years, |] | |
| R/of Near Madhusheth Kata, |] | |
| Durganagar, Digha, Navi Mumbai |] | |
| |] | |
| 2. Ravi Philip Kasbe, |] | |
| Age : 28 years, |] | |
| R/of Durganagar, Digha, |] | |
| Navi Mumbai. |] | |
| |] | |
| 3. Gopi Vikram Waghe, |] | |
| Age : 28 years, |] | |
| R/of Sathenagar, Digha, |] | |
| Navi Mumbai. |] | |
| |] | |
| 4. Govind Tukaram Waghe @ Gosavi, |] | |
| Age : 29 years, |] | |
| R/of Room No.3, House of Yashoda |] | Appellants / |
| Bhoir, Behind Shankar Temple, |] | (Org. Accused |
| Ramnagar, Digha, Navi Mumbai. |] | Nos.1 to 4) |

Versus

The State of Maharashtra,	]	
Thru' Rabale Police Station,	]	
Navi Mumbai	]	 Respondent

ALONG WITH
CRIMINAL APPEAL NO.674 OF 2012

Sagar Dashrath Kamble,	]	
Age : 27 Years, Occ.: Nil,	]	 Appellant /
R/o. Ganesh Chawl, Near Stable,	]	(Org. Accused
Ramnagar, Digha, Navi Mumbai	]	No.6)

Versus

The State of Maharashtra,	]	 Respondent
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Mr. Satyavrat Joshi for the Appellant in
Cr. Appeal No.24 of 2012.

Mr. V.V. Purwant, a/w. Mr. Sachin Deokar, for
the Appellant in Cr. Appeal No.674 of 2012.

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

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

DATE : 4TH MARCH, 2015.

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

1. Both these Appeals take an exception to the Judgment of Extra Joint Ad-Hoc Additional Sessions Judge, Thane, dated 28th November, 2011 in Sessions Case Nos.243 of 2007 and 15 of 2008. By the said Judgment, the Appellants are convicted for the offence punishable under Section 396 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/-, each, in default to suffer S.I. for one year. They are further convicted for the offence punishable under Section 332 r/w. 34 of the IPC and sentenced to suffer R.I. for three years, with a further conviction for the offence punishable under Section 37 r/w. 135 of the Bombay Police Act and sentenced to suffer S.I. for one month and to pay fine of Rs.100/-, each, in default to suffer S.I. for eight days, with a direction that all the substantive sentences of imprisonment shall run concurrently.

2. Appellants in Criminal Appeal No.24 of 2012 are original Accused Nos.1 to 4, whereas, Appellant in Criminal Appeal No.674 of 2012 is original Accused No.6.

3. As both these Appeals are arising out of the one and same Judgment, they are being decided by this common Judgment. For the sake of convenience, the Appellants are referred to by their original nomenclature.

4. Facts, as are necessary, for deciding these Appeals can briefly be stated thus :-

On 26th February, 2007, PW-3 Subhash Patil was working as 'Security Guard' in third shift at M.S.E.B., Airoli. PW-4 Sadashiv Barate and PW-24 Sunil Katkar were also on duty along with him at the same campus. Deceased Police Constable Gopal Vasant Saindane was on duty at Gate No.4. At about 1:45 am, when PW-3 Subhash Patil and PW-4 Sadashiv Barate were patrolling, they noticed some suspicious movements of three persons. PW-3 Subhash Patil blew the whistle and tried to chase those three persons. Deceased Police Constable Saindane and PW-24 Sunil Katkar came to their help. They caught hold of two thieves from the spot. However, one of them ran away. The third thief tried to run away by jumping over the wall. Deceased Police Constable

Saindane caught hold of him and pulled him down. The said thief shouted for help. Thereupon, other persons, who were outside the wall, jumped inside and assaulted Police Constable Saindane with knife and other witnesses with stones. Then they succeeded in running away from the spot, committing the theft of scrap articles belonging to M.S.E.B. Police Constable was Saindane then shifted to Life Line Hospital and then to Indravati Hospital. In the incident, PW-3 Subhash and PW-24 Sunil also sustained injuries and were referred to the hospital for treatment.

5. PW-3 Subhash Patil then went to Rabale Police Station and lodged complaint against those accused persons. On his complaint (Exhibit-73), C.R. No.I-80 of 2007 came to be registered. During the course of investigation, PW-26 PI Dinkar Kane went to the spot and drew the Scene of Offence Panchanama (Exhibit-70) in the presence of the Panch PW-2 Vijay Deshmukh. Under the said Panchanama, he seized various articles lying on the spot, like, the pair of sleepers, blue coloured shirt, black half shirt, the blood stained stones and the simple mud.

6. Meanwhile, as PW-26 PI Kane received information that injured Police Constable Saindane has succumbed to the injuries, he collected the Inquest Panchanama (Exhibit-86), which was made by PSI Kadam in the presence of the Panch PW-7 Maruti Surose. He also seized the

clothes of deceased Saindane under Panchanama (Exhibit-100), which were produced by Police Head Constable. On the same night, he arrested the three accused viz. Accused No.2-Ravi, Accused No.3-Gopi and juvenile in conflict with law Ajay Sable. He seized the clothes on their person under Panchanama (Exhibit-82) in the presence of the Panch PW-6 Jagannath Patil. On 28th February, 2007, PW-26 PI Kane again went to the spot along with two Panchas and collected dust from the wall under Panchanama (Exhibit-104) in the presence of the Panch PW-11 Sadanand Naik. On the same day, he arrested Accused No.1-Amol under Panchanama (Exhibit-102) in the presence of Panch PW-10 Suresh Bhilare and seized clothes on his person. At the spot, PW-26 PI Kane verified whether there was sufficient light and in the presence of the Panch PW-11 Sadanand Naik, he made Panchanama of the mercury light available there.

7. During the course of further investigation, on 2nd March, 2007, PW-26 PI Kane traced the owner of the Nanak Tailor, whose label was appearing on the black shirt found at the spot. He recorded the statement of the said tailor, namely, PW-20 Nanakchand Jaiswal and seized the receipt issued in the name of customer Sagar Kamble vide Panchanama (Exhibit-89). On 3rd March, 2007, Accused No.3 Gopi gave a disclosure statement showing willingness to produce the chopper used in the

commission of the offence. Accordingly, Memorandum Panchanama (Exhibit-92) was prepared by PW-26 PI Kane in the presence of the Panch PW-8 Deepa Mhatre. Then, at the instance of Accused No.3-Gopi, the said chopper was seized under Panchanama (Exhibit-93) from the ditch in front of Nirankar Bhavan.

8. On 5th March, 2007, at the instance of Accused No.1-Amol, in pursuance of his Memorandum Panchanama (Exhibit-95), his clothes and one knife with blood stains thereon came to be seized under Panchanama (Exhibit-96) near Mulund Check Post in the presence of the Panch PW-9 Arvind Mane.

9. On the same day, at the instance of juvenile in conflict with law Ajay Sable, in pursuance of his Memorandum Panchanama (Exhibit-88), one bundle of scrap material of M.S.E.B. came to be seized under Panchanama (Exhibit-89) from the place near Digha lake. On 7th March, 2007, PW-26 PI Kane recorded the statements of some of the witnesses, including PW-24 Sunil Katkar. On the same day, he also sent letter (Exhibit-161) to the Executive Magistrate PW-17 Dinesh Paithankar for conducting Test Identification Parade of some of the Accused. On 15th March, 2007, he sent stones and other articles seized from the spot to the Chemical Analyzer vide his letter (Exhibit-159). On 15th April, 2007, at the

instance of Accused-Pradeep Angre, his clothes came to be seized, in pursuance of Memorandum Panchanama (Exhibit-165) and Seizure Panchanama (Exhibit-166). The said clothes were sent to Chemical Analyzer on 17th April, 2007 vide requisition letter (Exhibit-167). The letter was sent vide Exhibit-168 for conducting Test Identification Parade of this Accused also. On 21st April, 2007, PSI Abhale of Crime Branch, Ulhasnagar Unit, produced Accused Govind Waghe before PW-26 PI Kane and he came to be arrested under Panchanama (Exhibit-105). On 22nd April, 2007, in pursuance of the Memorandum Panchanama (Exhibit-126), the clothes of Govind Waghe came to be seized under Panchanama (Exhibit-127). On 24th April, 2007, while PW-25 PSI Prakash Sakpal was making interrogation with acquitted Accused No.5-Sainath Bhoir, he gave a disclosing statement that he is ready to produce his blood stained clothes and the knife, which were kept hidden in bushes, near the compound wall of Mukund Company. The Memorandum Panchanama of the said weapon was prepared vide Exhibit-128 and then the said articles were recovered vide Panchanama (Exhibit-129).

10. On 2nd May, 2007, PW-26 PI Kane issued letter to Special Executive Magistrate PW-14 Shriniwas Kshirsagar (Exhibit-170) for conducting Test Identification Parade of Accused Govind Waghe and Sainath Bhoir. After completion of investigation, PW-26 PI Kane filed Charge-Sheet against

seven accused persons, who were arrested till then. Further investigation was taken over by PW-27 PI Dnyanadev Bhong. He arrested absconding Accused No.6 Sagar Kamble under Panchanama (Exhibit-195). At his instance, knife and his clothes came to be seized as per Memorandum Panchanama (Exhibit-196) and Seizure Panchanama (Exhibit-197). He then filed Supplementary Charge-Sheet against Accused No.6-Sagar Kamble. On 22nd June, 2007, C.A. Reports are produced in the case at Exhibits "172" to "181".

11. On both the cases being committed to the Sessions Court, the Trial Court framed charge against the present Accused and co-accused No.5-Sainath Bhoir vide Exhibit-59. The Accused abjured the guilt and claimed trial, raising the defence of total denial.

12. In support of its case, the Prosecution examined in all 29 witnesses. The main reliance of the Prosecution, however, remained on the evidence of three eye witnesses, namely, PW-3 Subhash Patil, PW-4 Sadashiv Barate and PW-24 Sunil Katkar. The Prosecution also placed reliance on the evidence of Test Identification Parade, which was conducted by the Executive Magistrate PW-14 Shriniwas Kshirsagar, as regards Accused No.1-Amol, Accused No.2-Ravi and Accused No.3-Gopi on 23rd March, 2007 and the evidence of Test Identification Parade conducted by another

Executive Magistrate PW-17 Dinesh Paithankar in respect of Accused No.4-Govind and Accused No.6-Sagar on 25th May, 2006. The Prosecution also relied on the evidence of the Medical Officers to prove the death of Constable Saindane and the Injury Certificates of the witnesses. To prove various Panchnamas, Prosecution relied on the evidence of the Panchas and Investigating Officers.

13. On appreciation of this evidence, the Trial Court held the guilt of the Accused Nos.1 to 4 and Accused No.6 to be proved beyond reasonable doubt for the offences punishable under Sections 396 and 332 r/w. 34 of the IPC and under Section 37 r/w. 135 of Bombay Police Act and sentenced them, as stated above. The Trial Court, however, acquitted Accused No.5-Sainath Bhoir.

14. This Judgment of the Trial Court is being challenged in the present Appeals by learned Counsel for the Appellants, whereas, supported by learned A.P.P.

15. In our considered opinion, in order to effectively deal with their submissions, it would be useful to refer to the evidence on record.

16. The discussion in this case can be divided in two parts; first part pertains to the occurrence of the incident, and, second, the complicity of

the Appellants in the said incident. As regards the occurrence of the incident, there is ample evidence on record, that of three eye witnesses, namely, PW-3 Subhash Patil, PW-4 Sadashiv Barate and PW-24 Sunil Katkar. Their evidence is more or less of an identical nature, as all the three of them were working as 'Security Guards' in the M.S.E.B. Campus. On the date of incident, they were on duty in third shift. As deposed by PW-3 Subhash Patil, at about 1:45 am, he was on patrolling duty along with PW-4 Sadashiv Barate. When they went near store room, they noticed three thieves. Hence, PW-3 Subhash Patil deputed another Security Guard Randive from other side to prevent those thieves from running away. He called his remaining colleagues by blowing whistle. Constable Saindane came from Gate No.4 along with Security Guard PW-24 Sunil Katkar to help them. Seeing them, two thieves ran away from the spot. One thief was, however, caught hold of by Constable Saindane. He also tried to run away by jumping over the wall. Hence, Constable Saindane caught hold of his leg and pulled him down. All of them took him at Gate No.4. The said thief shouted for help. Upon hearing his shouts, some more thieves, who were outside the wall, jumped inside. Those persons were armed with the weapons, like, knife, gupti, sword etc. and one of those persons assaulted Constable Saindane, who sustained injuries. Some of those persons pelted stones. As a result, PW-3 Subhash

Patil sustained injury on his left eye and right hand. Some of those thieves beat PW-24 Sunil Katkar and he also got injured in the incident. Then, all of those assailants ran away from the spot, carrying with them the scrap material. Thereafter, Constable Saindane was taken to the Life Line Hospital and from there to Indravati Hospital. Then PW-3 Subhash Patil went to the Police Station and lodged the complaint (Exhibit-73).

17. This ocular account of the incident, as deposed by these three eye witnesses, who are injured in the incident, gets complete support and corroboration from the medical evidence. PW-16 Dr. Sandeep Mestri has treated Constable Saindane, when he was admitted in Life Line Hospital. According to him, Constable Saindane was in gasping condition. He had no pulse, no B.P., his pupils were dilated and fixed. He and other Doctor tried to revive the patient by giving him DC Shock, but it was of no use. They declared him dead at about 3:20 am. According to him, there were two major stab injuries on the back and abdomen of the patient. He has then referred the dead body to Vashi Municipal Hospital for postmortem. He has produced and proved on record the case papers of Constable Saindane at Exhibit-133.

18. Then there is evidence of the Medical Officer PW-1 Dr. Bhushan Jain to prove that the death of Constable Saindane was homicidal in

nature. He, at the relevant time, was attached to Vashi Municipal Hospital and has conducted the postmortem on the dead body of Constable Saindane, who has succumbed to the injuries sustained in the incident.

On external examination, he found following injuries :-

- (i) *A sutured wound seen over left forehead near midline of length 3 cm sutures intact, blood oozes out. On removing sutures, contused lacerated wound of size 3 x 1 cm bone deep, reddish in colour.*
- (ii) *Stab injury seen over right back near midline situated at distance of 25 cm from C7 spine and 1 cm lateral to midline, cavity deep, blood oozes out, reddish in colour directing obliquely and upwards.*
- (iii) *Stab injury over right back near midline situated at distance of 44 cm from C7 spine and 1 cm lateral to midline of size 5 x 2 cm, cavity deep, directing forwards, blood oozes out, reddish in colour.*
- (iv) *Stab injury over right thigh posteriorly below gluteal region of size 4 x 1 cm and 10 cm deep directing obliquely downwards and forwards, blood oozes out, reddish in colour.*
- (v) *Abrasion over left arm and forearm near elbow joint of size 4 x 1 cm and 2 x 1 cm respectively, reddish in colour.*
- (vi) *Abrasion over left forearm posteriorly near wrist joint, 3 x 1 cm reddish in colour.*
- (vii) *Multiple abrasion seen over left leg lower part posteriorly in an area of 6 x 4 cm reddish in colour.*
- (viii) *Evidence of treatment seen a] I V mark seen over dorsan of left hand and evidence seen of D.C. Shock given over left chest.*

19. PW-1 Dr. Bhushan Jain has opined that all the above injuries were antemortem in nature.

20. On internal examination, he noticed,

“haemorrhage under scalp over frontal region of size 4 x 3 cm., reddish in colour. He further noticed that Injury No.2 enters through 9th intercostal space on right side, right pleura cut on right side, cavity contains 500 cc blood, same injury is related with over right lung penetrating lower lobe, abdomen showed Injury No.3 corresponding with injury over right kidney, which showed penetrating injury over posterior surface”.

21. According to him, the cause of death was *“haemorrhage and shock due to multiple stab injuries”*. He has issued the Postmortem Report accordingly vide Exhibit-68. He has further opined that Injury Nos.2 to 4 are possible by sharp edged weapon, like, knife, which was shown to him in evidence before the Court. He has further opined that Injury Nos.2 and 3 were fatal one. He has denied that these injuries were possible due to fall.

22. There is also evidence of PW-12 Dr. Raju Murdukar, who has, on the same night, at about 2 am, examined PW-3 Subhash Patil and found one CLW on left xygoma of size 1" linear in shape. He also noticed abrasion on his right elbow, irregular in shape. According to him, both the injuries were caused within 6 hours and were simple. He has issued Injury Certificate (Exhibit-115).

23. Similarly, on the same night, he has also examined PW-24 Sunil Katkar and found one contusion on the right thigh of size 4 x 4", which injury was simple. He has issued the Injury Certificate accordingly vide Exhibit-114. There is no cross-examination of this witness at all.

24. Thus, from the ocular account and the medical evidence on record, the occurrence of the incident, as deposed by these three eye witnesses, can be positively held to be proved.

25. The only issue for consideration is about the complicity of the Appellants in the said incident. In this respect, it is necessary to scrutinize the evidence of the three eye witnesses carefully. According to PW-3 Subhash, initially, they saw three thieves, two succeeded in running away, after he sounded the whistle. Deceased Saindane caught hold of the third thief, while the said thief was jumping over the wall. Then some more persons came inside. He has not stated how many more persons came

inside the wall. He has not specifically stated out of those several persons, who stabbed deceased Saindane with knife. Neither in the evidence before the Court, nor even in the Test Identification Parade, he has attributed specific role to any of the accused persons. He has also not specified which of the accused pelted stones or which were the accused they saw initially and which were the accused who came there subsequently. Admittedly, all the accused were unknown and, therefore, as admitted by him in his cross-examination, Police told him the names of those accused. Further, according to him, the incident had taken place at the distance of 60 to 70 feet from the campus in open space. It is not brought on record whether there was any illumination at that particular spot where the incident of assault took place or from where the assailants or accused entered inside the campus. It is his evidence that incident had taken place all of a sudden and it was over within 5 to 7 minutes. He has further admitted that he did not see the accused prior to the incident of assault. Further in his cross-examination, he has admitted that he cannot say which were the four persons, to whom he has identified in the first Test Identification Parade in the Jail.

26. Similarly, PW-4 Sadashiv Barate, another injured eye witness, has stated that when he blew the whistle, there were around 10 to 12 persons, who jumped inside the wall to rescue one of their persons, who was

caught hold by the deceased. According to him, all of them were having the knife and pen knife. They were also armed with stones. It is his evidence that one of them by name Amol, Accused No.1, stabbed Constable Saindane with knife. However, in his cross-examination, he has also admitted that he was not knowing the name of the said accused or any of the accused and accused were totally unknown to him. From Police, he came to know the names of all of those accused. Even then, their names are appearing in his statement recorded by Police. In his cross-examination, he has further stated that actually there were 8 to 9 persons only, though he has wrongly given the number 11 to 12 persons. It is his evidence also, that entire incident was complete within 4 to 5 minutes and it has happened all of a sudden. He has also not specified the roles of other accused persons as to whether out of the six accused, who are the three thieves who had come first and who are the other thieves who came subsequently. His entire evidence is vague and general.

27. As regards PW-24 Sunil Katkar, the last injured eye witness, in his examination-in-chief itself, he has admitted that he has not identified any of the accused persons in the Test Identification Parade dated 23rd March, 2007. Further he has admitted that he cannot say whether the other accused persons in the Court were involved in the incident. According to

him also, when he first saw the accused, there were 10 to 11 persons. Later on, he ascertained that they were 8 to 9 persons. Thus, his evidence again suffers from the same flaws and infirmities, as he is also unable to attribute the specific role to any of the accused. He is also unable to say exactly how many assailants came there; out of them, which assailants came first; who stabbed deceased Saindane etc. In such situation, on the basis of such vague, general and omnibus evidence about identification of the Appellants, the Prosecution case creates serious doubt about its credibility.

28. Though Prosecution has placed reliance on the evidence relating to the Test Identification Parade of the Accused proved through the Executive Magistrates PW-14 Shriniwas Kshirsagar and PW-17 Dinesh Paithankar, needless to state, that, this evidence is merely of a corroborative nature. Substantive evidence is of identification of the Accused by eye witnesses in the Court at the time of trial. In the present case, in view of the lacunae noted above in the evidence of eye witnesses, their substantive evidence about identification of the Accused does create confidence in the judicial mind.

29. Even as regards the recovery evidence of the weapons, the Prosecution has failed to prove that the weapons recovered at the

instance of the Accused were seized, sealed with wax and were in the same condition, when they were sent to Chemical Analyzer. There is also no evidence proving that the blood stains found on the knife were matching with the blood group of the deceased. The C.A. Report goes to prove that the results of the blood group of Accused No.1-Amol were inconclusive. In view thereof, there is no conclusive and unerring evidence proving complicity of the present Accused in the said incident beyond reasonable doubt.

30. In our considered opinion, therefore, the Judgment of the Trial Court convicting and sentencing the Appellants deserves to be quashed and set aside, extending the benefit of reasonable doubt to the Appellants. Consequently, both the Criminal Appeals are allowed and the conviction and sentence of the Appellants is hereby quashed and set aside and the Appellants are acquitted of the offence with which they were charged and convicted. Fine, if paid by the Appellants, be refunded to them. Since the Appellants are in Jail, they be released forthwith, if not required in any other case.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]