

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.985 OF 2006

The State of Maharashtra,
Through Turbhe Police Station.

] Appellant /
] (Org. Complainant)

Versus

1. Mohammad Mannan Aktar Shaikh,]
Age - 30 Yrs.,]
R/o. Turbhenaka, Fiazer Road,]
Adjacent to Sanjivini Valley,]
Zopadapatti, Navi Mumbai.]
]
2. Mohammad Aktar Mohammad]
Rafique Shaikh,]
Age - 56 Yrs.,]
R/o. Vikramplur Bande,]
Dist. Samastipur, Bihar.]
]
3. Mohammad Istiyak Mohammad]
Sahebjan Shaikh,]
Age - 39 Yrs.,]
R/o. Gahar Shripurgahar, Khanpur,]
Dist. Samastipur, Bihar.]
]
4. Akhilali Hasan Shaikh,]
Age - 22 Yrs.,]
R/o. Govidpur, Chapra,]
Muzaffarpur, Piya, Bihar.]
]
5. Mohammad Hanan Akhtar Shaikh,]
Age - 28 Yrs.,]
R/o. Vikrampur Bande,]
Dist. Samastipur, Bihar.]
]
6. Samshad Mahamud Mustafir Shaikh,]
Age - 20 Yrs.,]
R/o. Vikrampur Bande,]
Dist. Samastipur, Bihar.]

7. Mohammad Salauddin Mohammad	]	
Majibul Shaikh @ Pappu,	]	
Age - 22 Yrs.,	]	
R/o. Sambopadi Bande,	]	 Respondents /
Post - Angepati,	]	(Org. Accused
Dist. Samastipur, Bihar	]	Nos.1 to 7)

Mrs. A.S. Pai, A.P.P., for the Appellant/State.

Mr. Shirish Gupte, Sr. Advocate, a/w. Mr. Baba Shaikh, Ms. Supriya Kak, Mr. Prasanna Bhangale and Mr. Aamir Shaikh, i/by Mr. Niranjana Mundargi, for Respondent Nos.1, 2, 4, 5, 6 and 7.

Mr. Murtaza M. Najmi, Appointed Advocate, for Respondent No.3.

CORAM : SMT. V.K. TAHILRAMANI & DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 14TH JULY, 2015

PRONOUNCED ON : 21ST JULY, 2015

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

1. The State has preferred this Appeal challenging the Judgment and Order dated 31st March, 2006 of Ad-Hoc Additional Sessions Judge, Thane in Sessions Case No.84 of 2005, thereby acquitting the Respondents for the offences punishable under Sections 452, 364, 506(2), 302 and 120-B of the IPC.

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

PW-1 Mohd. Jafrulla is the First Informant and husband of PW-2 Sanwar and father of deceased child Mohd. Fazal. Accused No.1 Mannan is his brother's son. Accused No.2 Aktar is his brother. Accused No.5 Hanan is the son of Accused No.2 Aktar. Accused No.3 Istiyak is the husband of his sister. Accused No.6 Samshad and Accused No.7 Pappu are from his native place in Bihar.

3. According to PW-1 Jafrulla, as he has constructed a house in the land owned by his father at native place, there was quarrel and dispute between him and his brothers. When he was residing initially at Kopar Khairane, Accused Nos.1 to 7 had threatened his wife that they would kill him. Hence, he has lodged a complaint at Sanpada Police Station against them. He had left the room at Kopar Khairane and came to reside at Faizal Road since two months prior to the incident. At that time, he was informed by one Abbas that Accused were conspiring to commit his murder and he should be, therefore, careful.

4. The incident giving rise to this case took place on 31st July, 2004. On that night, at about 11:20 pm, when he was sleeping in the house along with his wife PW-2 Sanwar and his son Mohd. Fazal, a child of three and a half years, somebody knocked on the door. His wife opened the door. At that time, Accused No.1 Mannan and Accused No.5 Hanan entered in the house. Other Accused remained standing outside the house. Accused No.5 Hanan lifted the child. Accused No.1 Mannan snatched the child from his hand and went outside the house. PW-1 Jafrulla and his wife PW-2 Sanwar followed them. PW-1 Jafrulla tried to get hold of the child. However, Accused pushed him. Accused were also carrying iron bars in their hands. PW-1 Jafrulla and PW-2 Sanwar noticed that Accused No.1 Mannan banged the child on the platform of stone (ota) near his house. The child sustained bleeding injuries to his mouth, nose and ears. PW-1 Jafrulla then immediately rushed to Police Chowky and came back along with the Police. Police told him to take the child to M.G. Hospital, Vashi. There Doctor declared the child to be dead. Then PW-1 Jafrulla again came to the Police Station and lodged complaint vide Exhibit-20 against the Accused.

5. On his complaint, PW-6 PSI Avinash Kaldade registered C.R. No.306 of 2004 for the offences punishable under Sections 452, 364, 302, 506(2) and 120-B of the IPC. Then he went to the hospital and drew the Inquest Panchanama (Exhibit-17). He seized the clothes of the deceased child under Panchanama (Exhibit-26). On the next day, in the morning, he went to the spot of incident and drew the Scene of Offence Panchanama (Exhibit-43) in the presence of the Panch PW-5 Nagappa Talwar. Some blood stains were found present there. They were collected with the cotton swab.

6. Further investigation of the case was taken over by PW-7 Senior PI Parshuram Shinde. He arrested the Accused and recorded the statements of two witnesses. During custodial interrogation, on 8th August, 2004, Accused No.5 Hanan expressed his willingness to produce the iron bar. His statement was reduced to Memorandum Panchanama (Exhibit-39) in the presence of the Panch PW-4 Ramji Yadav. Thereafter, Accused No.5 Hanan guided the Police and Panch to his hut and from the roof of the hut, he produced the iron bar, which came to be seized under Panchanama (Exhibit-40). PW-7 Sr. PI Parshuram

Shinde has then sent seized muddemal articles to Chemical Analyzer along with requisition letter (Exhibit-48). The C.A. Reports are produced on record at Exhibits "49" and "50". Further to completion of investigation, he filed Charge-Sheet in the Court against the Accused. In due course, the case was committed to the Sessions Court.

7. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-8. Accused pleaded not guilty and claimed trial, raising the defence of false implication on account of the inimical relations.

8. In support of its case, Prosecution examined in all seven witnesses and on appreciation of their evidence, Trial Court was pleased to acquit the Accused of all the offences.

9. This Judgment of the Trial Court is challenged in this Appeal by learned A.P.P. by submitting that there is oral account of the incident, as given by PW-1 Jafrulla and PW-2 Sanwar, the parents of the deceased child, and it is also supported with the complaint lodged immediately on the same night and the medical evidence to the effect that child has sustained four incised wounds, which

ultimately resulted into his death. Hence, according to learned A.P.P., the evidence on record is more than sufficient to prove the guilt of the Accused, especially, when the Prosecution has also proved the motive and the earlier threats given by the Accused to PW-1 Jafrulla. Hence, according to learned A.P.P., the Judgment and Order of the Trial Court acquitting the Accused of all the charges levelled against them, is required to be quashed and set aside.

10. Per contra, learned Counsel for the Accused have supported the said Judgment and Order of the Trial Court by submitting that there are several omissions and inconsistencies in the evidence of PW-1 Jafrulla and PW-2 Sanwar. The all important probability factor also does not echo in the case put up by the Prosecution. There is every possibility of the child sustaining injuries due to fall, as the house of PW-1 Jafrulla is situate on the hill. According to them, only on account of the previous enmity, PW-1 Jafrulla and PW-2 Sanwar had implicated the Accused falsely.

11. It is further submitted by learned Counsels for the Accused that the view taken by the Trial Court is borne out from the evidence on record and it being a probable view, this Court

sitting in Appeal against the acquittal should be slow in interfering with the said view and ought not to interfere with such an order of acquittal merely because this Court may, after re-appreciation of evidence, arrive at a view which may be different from the view taken by the Trial Court.

12. To substantiate their submissions, learned Counsels for the Accused have relied upon the two Judgments of the Supreme Court; (i) ***Ram Swaroop & Ors. Vs. State of Rajasthan, AIR 2004 SC 2943***, and (ii) ***Ghurey Lal Vs. State of Uttar Pradesh, (2008) 10 SCC 450***.

13. The crux of both these authorities is to the effect that,

“Even if the power of the High Court in Appeal against acquittal is not in any way curtailed in appreciating the evidence on record, but having done so, the High Court ought not to interfere with an order of acquittal if the view taken by the Trial Court is also a reasonable view of the evidence on record and the findings recorded by the Trial Court are not manifestly erroneous, contrary to the evidence on record or perverse.”

14. It was further held that,

“If two views are reasonably possible on the basis of the evidence on record, the view which favours the Accused must be preferred. Similarly, if the view taken by the Trial Court while acquitting the Accused is a possible and reasonable view of the evidence on record, High Court ought not to interfere with such an order of acquittal, merely because it is possible to take the contrary view.”

15. In the landmark decision of **Ghurey Lala (supra)** referred above, it was further held that,

“Due or proper weight and consideration must be given to the Trial Court's decision and findings. This is especially true when a witness's credibility is at issue. Especially because the Trial Court has the advantage of watching the demeanour of the witnesses, who have given the evidence. The Appellate Court in such situation may only overrule or otherwise disturb the Trial Court's acquittal if it

has “very substantial and compelling reasons” for doing so. It would be justified in interfering in the Judgment of acquittal only when the Judgment of the Trial Court is palpably wrong, totally ill-founded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.”

16. It is also expressed by the Apex Court that the Appellate Court should attach due weight to the lower Court's acquittal because the presumption of innocence in favour of the Accused is further strengthened by the acquittal.

17. Bearing in mind this exposition of law, as elucidated by the Supreme Court and which has crystallized into the well recognized principles, when we enter into re-appreciation of evidence on record, we find that the Prosecution case stands on the evidence of two eye witnesses, namely, PW-1 Jafrulla and PW-2 Sanwar, who are the parents of the deceased child. Their evidence is again required to be appreciated in the background of the fact that there were admittedly inimical and strained relations between these two witnesses on one hand and the

Accused on the other hand. They belong to the same family, but on account of some property disputes, the relations were spoiled to such an extent that the threatening was given and the Police complaint was also lodged about the same.

18. As regards the incident, it is deposed by PW-1 Jafrulla and PW-2 Sanwar that while they were sleeping in the house, along with their child Mohd. Fazal, at about 11:20 pm, somebody knocked on the door. PW-2 Sanwar opened the door, whereas PW-1 Jafrulla, as stated by him, remained sleeping. As per their evidence, Accused No.1 Mannan and Accused No.5 Hanan entered in their house, whereas other Accused were standing outside. Accused No.5 Hanan lifted the child, as deposed by PW-1 Jafrulla. Accused No.1-Mannan snatched the child from the hands of Accused No.5 Hanan. Then Accused No.1 Mannan ran with the child in his hand. He and his wife also ran behind them. When he tried to save the child, Accused pushed him. They were having iron bars in their hands. Then he saw that Accused No.1 Mannan hurled his child on the ota outside his house. There was bleeding from mouth, nose and ears of the child. Then he went to Police Chowky and along with Police, he came back to the

spot. Then PW-2 Sanwar took the child to the M.G. Hospital, Vashi, where the child was declared dead. Thereafter PW-1 Jafrulla lodged the complaint vide Exhibit-20.

19. The evidence of PW-2 Sanwar is, more or less, same. According to her, Accused No.5 Hanan lifted her son. Her son shouted and Accused No.5 Hanan put his hand on the mouth of her son. She ran behind the Accused. Thereupon accused persons started pushing her. Her husband also came behind her. She requested the Accused to give her son, but Accused No.1 Mannan snatched her son from Accused No.5 Hanan and banged her son near on the ota of his house. She started crying loudly. By that time, her husband had also come there. Her son was bleeding from nose, ears and mouth. Hence, her husband went to Police Station and brought the Police. Thereafter, her son was taken to the M.G. Hospital, Vashi. According to her evidence, Accused No.4 Akhilali was having iron bar in his hand at the time of incident.

20. In cross-examination, PW-1 Jafrulla admitted that Accused No.1 Mannan is residing at a distance of about 400 mtrs. from his house. House of Accused No.1 Mannan is at about 50 mtrs.

height from his house. There are stair steps to climb. The area is thickly populated. There are about twenty houses in between his house and the house of Accused No.1 Mannan. Around his own house also, there are about ten to twelve houses. There is one chawl in front of his house.

21. PW-2 Sanwar has also admitted that house of Accused No.1 Mannan is on the top of the hill, whereas, her house is between the hill. There are small stone steps to go to the house of Accused No.1 Mannan from their house and there are several houses in that area. As per her further evidence, when Accused lifted the child and started running away, she shouted loudly for the help. Some people came out of the house from the locality. She even told those people that Accused were carrying her child. Some people followed her when she was running behind the Accused. There was also crowd of people near the house of Accused. It is worth noting that despite several persons, as per her evidence, been present and witnessed the incident, no independent witness is coming forward to depose in the Court about this incident, which creates some doubt about veracity of the Prosecution case. Things would have been different if she

has not admitted that some people were present there to witness the incident. Then one could have said that as the incident had happened at night, independent eye witnesses may not be available. That is not the case here.

22. Absence of evidence of the independent eye witnesses, though available, makes it necessary to scrutinize the evidence of PW-1 Jafrulla and PW-2 Sanwar more cautiously and carefully before placing reliance on it. It rather becomes difficult to accept that though the knock on the door was at mid-night, at about 11:20 pm, PW-1 Jafrulla, who was sleeping in the house, did not open the door, but PW-2 Sanwar went there to open it. PW-1 Jafrulla has also not immediately followed the Accused when Accused took his child with them. Conversely, as admitted by him, he put on his clothes and then ran behind Accused No.1 Mannan. He has further stated that it took him 2 to 3 minutes to put on the clothes and when he came out of the house, after putting his clothes on, Accused had already gone from there. It took him about five minutes more to reach to the house of Accused No.1 Mannan.

23. It is pertinent to note that, as per his evidence, when he

went to the house of Accused No.1 Mannan, shouting loudly and calling for help, nobody came forward. When he reached to the top of the hill, nobody came to help him in spite of his cries. When he reached, his wife was at the door of Accused No.1 Mannan. Though he has deposed in his examination-in-chief that when he tried to get hold of his child, all the Accused pushed him and they had iron bars with them, in his cross-examination, he has admitted that neither his clothes were torn, nor there was any injury on his person. He has further admitted that he has not stated to the Police that all the Accused had iron bars with them and they pushed him when he tried to save his child. This evidence is, therefore, in the nature of omission. It is also significant to note that, as per evidence of PW-2 Sanwar, only Accused No.4 Akhilali had iron bar and only one iron bar is recovered in the course of investigation and, that too, at the instance of Accused No.5 Hanan.

24. Thus, there is serious inconsistency and omission in respect of material part of the incident. Further, the name of Accused No.4 Akhilali is not at all appearing in the complaint, but in his evidence PW-1 Jafrulla has stated that Accused No.4 Akhilali was

standing at the door of the house. Further, he has admitted that in the complaint, it is stated that Accused No.1 Mannan ran with the child, whereas in evidence before the Court, he has stated that Accused No.1 Mannan snatched the child from the hands of Accused No.5 Hanan, when they came outside the house. There is definitely overwriting in respect of the names of the Accused, as to which Accused snatched the child and which Accused ran with the child. This fact is admitted by PW-7 Sr. PI Parshuram Shinde. He has admitted that the said overwriting is made by Constable on the next day. He has also admitted that the evidence of PW-2 Sanwar that Accused No.5 Hanan lifted her child and thereafter her son shouted and Accused put hand on his mouth, is in the nature of omission. She has also not stated before the Police that while she was running, Accused No.1 Mannan, Accused No.3 Istiyak, Accused No.6 Samshad and Accused No.7 Pappu started pushing her. As regards the name of Accused No.3 Istiyak, it is not appearing in the evidence of any of the witnesses. They have taken some different name as Izarul, but not explained how he is connected with the offence.

25. Even as to the lodging of complaint and information given

to the Police, PW-6 PSI Avinash Kaldate has admitted that he did not make entry in the Police Diary about the same. He has also not taken entry in the Station Diary of PW-1 Jafrulla coming to the Police Station and giving information and thereafter he going to the spot along with him. It creates doubt as to whether such information was given or not.

26. As to the timing of lodging of the complaint, each witness has given different version. As per PW-1 Jafrulla, his complaint was recorded at 5 am, whereas the complaint (Exhibit-20) bears the endorsement that offence was registered at 1:45 am. Further, as per evidence of PW-2 Sanwar, her statement was recorded by Police at 7 am, whereas, as per evidence of PW-1 Jafrulla, Police recorded the statement of his wife on the same day at the same time i.e. at 5 am. As per evidence of PW-7 Sr. PI Parshuram Shinde, he has recorded the statement of PW-2 Sanwar between 10 to 12 noon. As per evidence of PW-6 PSI Avinash Kaldate, he has recorded the complaint of PW-1 Jafrulla at 1 am.

27. This inconsistent version as to the timing of recording the complaint and registration of the offence becomes significant

and damaging to the Prosecution case in view of the fact that there is overwriting in the complaint as to the names of the two Accused; as to which Accused lifted the child and which Accused hurled the child. Hence, a suggestion was put to PW-7 Sr. P.I. Parshuram Shinde that after recording the statement of PW-2 Sanwar, on 1st August, 2004, overwriting is made in the complaint, changing the name of Hanan into Mannan and Mannan into Hanan.

28. The evidence of PW-3 Dr. Kushal Jain, who has conducted the postmortem, reveals that he found following external and internal injuries :-

- (1) Contusion over left forehead involving temporal region 8 x 5 cm reddish.*
- (2) Abrasion over left side of the face 6 x 5 cm reddish.*
- (3) Abraded contusion over left side of the chin 3 x 2 cm. reddish.*

(4) Contusion over left occipital region below left external ear 7 x 5 cm reddish.

(5) Haemorrhage under scalp over left fronto temporal and left occipital region of size 6 x 5 cm and 11 x 7 cm respectively reddish.

29. According to him, the cause of the death was “head injury”, and these injuries were sufficient to cause the death in ordinary course of nature. He has further deposed that these injuries are possible with hard and blunt object or with rough surface. In his cross-examination, he has, however, stated that the death of the child might have occurred 12 to 24 hours prior to conducting of the postmortem and it is possible that death of the child might have occurred between 6 to 7 pm on 31st July, 2004. He has further admitted that brain hemorrhage is possible in fall in case of a child, even if child falls from 5 to 6 ft. height. Further, he has admitted that the external and internal injuries found in this case are possible if the child falls from hill steps downwards on the stone. Thus, as per his evidence, the injuries which were found on the body of the child are possible even by fall while child was playing. Considering the hilly area where the steps were also of

the stones, the possibility of the child sustaining injuries due to fall and Accused being implicated on account of the previous rivalry cannot be ruled out, especially, having regard to the above infirmities, as noted by the Trial Court also.

30. As regards the Spot Panchanama (Exhibit-43), which, according to Prosecution, proved the presence of blood stains on the ota outside the house of the Accused, the only Panch Witness examined by Prosecution, namely, PW-5 Nagappa Talwar has admitted that the Panchanama was already prepared. He does not know what was written therein. He has only signed thereon. Similarly, as regards evidence of PW-4 Ramji Yadav, Panch to the recovery of iron bar at the instance of Accused No.5 Hanan, he has admitted in his cross-examination that Panchanama was already prepared and he has only signed on it.

31. In respect of charge of conspiracy, there is absolutely no iota of evidence brought on record by the Prosecution. Similarly, as regards Accused Nos.2, 3, 4, 6 and 7, except for attributing the role to them of being present along with Accused No.1 Mannan and Accused No.5 Hanan, no incriminating role is proved against them. The evidence of PW-1 Jafrulla that they were

carrying iron bars, is in the nature of improvement and there is no evidence to show that they either used the iron bars or pushed him, as stated by him. Though a role is attributed to Accused No.5 Hanan of lifting the child, Accused No.1 Manan snatching the child from his hand and Accused No.1 Mannan hurling the child, as stated above, there is overwriting in their names in the F.I.R., as admitted by PW-7 Sr. PI Parshuram Shinde also.

32. To sum up, therefore, these infirmities in the evidence of eye witnesses and the over all lacunae in Prosecution case have broken the grain of Prosecution case to such an extent that it becomes difficult to separate the chaff from grain. As a result, the view taken by the Trial Court, which has the advantage of observing the demeanour of the witnesses in order to decide their credibility and veracity, being the probable view and no manifest perversity being noticed or pointed out by learned A.P.P. in the said view, this Court cannot interfere in the said view. As per the well settled law, even if we have re-appreciated the entire evidence on record, we do not find *“very substantial and compelling reasons”* to discard the Trial Court's findings. We also

do not find that the Trial Court's conclusion with regard to the fact is palpably wrong or the entire approach of the Trial Court in dealing with the evidence was patently illegal and its Judgment is manifestly unjust and unreasonable. There is also nothing on record to show that the Trial Court has ignored the evidence or misread the material evidence. In such situation, legally we cannot interfere in the Judgment of the Trial Court even assuming that we may arrive at some different view.

33. Consequently, the Appeal holds no merit and, hence, stands dismissed, confirming acquittal of the Respondents for the offences punishable under Sections 452, 364, 506(2), 302 and 120-B of the IPC. Bail Bonds of the Accused stand cancelled.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]